

ENDING FORCED ARBITRATION OF SEXUAL ASSAULT  
AND SEXUAL HARASSMENT ACT OF 2021

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JANUARY 28, 2022.—Committed to the Committee of the Whole House on the State  
of the Union and ordered to be printed

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Mr. NADLER, from the Committee on the Judiciary,  
submitted the following

R E P O R T

together with

SUPPLEMENTAL VIEWS

[To accompany H.R. 4445]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4445) to amend title 9 of the United States Code with respect to arbitration of disputes involving sexual assault and sexual harassment, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:  
Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021”.

**SEC. 2. PREDISPUTE ARBITRATION OF DISPUTES INVOLVING SEXUAL ASSAULT AND SEXUAL HARASSMENT.**

(a) IN GENERAL.—Title 9 of the United States Code is amended by adding at the end the following:

**“CHAPTER 4—ARBITRATION OF DISPUTES INVOLVING SEXUAL ASSAULT AND SEXUAL HARASSMENT**

“Sec.

“401. Definitions.

“402. No validity or enforceability.

**“§ 401. Definitions**

“In this chapter:

“(1) PREDISPUTE ARBITRATION AGREEMENT.—The term ‘predispute arbitration agreement’ means any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.

“(2) PREDISPUTE JOINT-ACTION WAIVER.—The term ‘predispute joint-action waiver’ means an agreement, whether or not part of a predispute arbitration agreement, that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.

“(3) SEXUAL ASSAULT DISPUTE.—The term ‘sexual assault dispute’ means a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 or similar applicable Tribal or State law, including when the victim lacks capacity to consent.

“(4) SEXUAL HARASSMENT DISPUTE.—The term ‘sexual harassment dispute’ means a dispute relating to the any of the following conduct directed at an individual or a group of individuals:

“(A) Unwelcome sexual advances.

“(B) Unwanted physical contact that is sexual in nature, including assault.

“(C) Unwanted sexual attention, including unwanted sexual comments and propositions for sexual activity.

“(D) Conditioning professional, educational, consumer, health care or long-term care benefits on sexual activity.

“(E) Retaliation for rejecting unwanted sexual attention.

**“§ 402. No validity or enforceability**

“(a) IN GENERAL.—Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

“(b) DETERMINATION OF APPLICABILITY.—An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.”.

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) IN GENERAL.—Title 9 of the United States Code is amended—

(A) in section 2, by inserting “or as otherwise provided in chapter 4” before the period at the end;

(B) in section 208—

(i) in the section heading, by striking “**Chapter 1; residual application**” and inserting “**Application**”; and

(ii) by adding at the end the following: “This chapter applies to the extent that this chapter is not in conflict with chapter 4.”; and

(C) in section 307—

(i) in the section heading, by striking “**Chapter 1; residual application**” and inserting “**Application**”; and

- (ii) by adding at the end the following: “This chapter applies to the extent that this chapter is not in conflict with chapter 4.”.

(2) TABLE OF SECTIONS.—

(A) CHAPTER 2.—The table of sections for chapter 2 of title 9, United States Code, is amended by striking the item relating to section 208 and inserting the following:

“208. Application.”.

(B) CHAPTER 3.—The table of sections for chapter 3 of title 9, United States Code, is amended by striking the item relating to section 307 and inserting the following:

“307. Application.”.

(3) TABLE OF CHAPTERS.—The table of chapters for title 9, United States Code, is amended by adding at the end the following:

“4. Arbitration of disputes involving sexual assault and sexual harassment ..... 401”.

SEC. 3. APPLICABILITY.

This Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act.

### Purpose and Summary

H.R. 4445, the “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021,” would prohibit the enforcement of mandatory, pre-dispute arbitration (“forced arbitration”) provisions in cases involving sexual assault or sexual harassment. Over the past several decades, forced arbitration clauses have become virtually ubiquitous in everyday contracts.<sup>1</sup> Often buried deep within the fine print of employment and consumer contracts, forced arbitration deprives millions of Americans of their day in court to enforce state and federal rights.<sup>2</sup> Because arbitration lacks the transparency and precedential guidance of the justice system, there is no guarantee that the relevant law will be applied to these disputes or that fundamental notions of fairness and equity will be upheld in the process.<sup>3</sup> Furthermore, due to the secretive nature of this system, these disputes are often shielded from public scrutiny.<sup>4</sup>

Due to the prevalence of these clauses in employment and consumer disputes, victims of sexual violence and harassment are often unable to seek justice in a court of law, enforce their rights under state and federal legal protections, or even simply share their experiences. When an employee who is subject to a forced arbitration clause sues after being raped, assaulted, or harassed at work, the company is entitled, under the Federal Arbitration Act (FAA), to force the suit into arbitration. Similarly, a consumer who signs an arbitration clause and is assaulted at a business can be forced into an arbitration proceeding.

<sup>1</sup>See *Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights: Hearing Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm. on the Judiciary*, 117th Cong. (2021); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking Deck of Justice*, N.Y. TIMES (Nov. 1, 2015), <https://nyti.ms/2k6cZ1z> (“By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies . . . devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices.”).

<sup>2</sup>CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY REP. TO CONG., PURSUANT TO DODD—FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT §1028(a) (2015), [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf).

<sup>3</sup>See, e.g., Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371 (2016).

<sup>4</sup>Letter from Nat’l Ass’n of Att’y’s Gen. to Cong. Leadership (Feb. 12, 2018), [http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/\\$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf](http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf).

In many forced arbitration cases, the company is entitled to choose the arbitrator who decides the case, as well as the rules of procedure and evidence that apply, and the distribution of costs of the arbitration. The rules also protect the company by keeping the records of an arbitration secret. Because the records in arbitration are protected, employers that use arbitration clauses in their employment contracts can retaliate against a victim—rather than confront the harasser or the attacker—without fear of their actions becoming public through the courts. The secretive nature of arbitration also prevents victims from sharing their stories. This allows for the growth of office cultures that ignore harassment and retaliate against those who report it, prevent future victims from being warned about dangerous companies and individuals, and create incentives for the corporate protection of rapists and other serial harassers.

H.R. 4445 would restore access to justice for millions of victims of sexual assault or harassment who are currently locked out of the court system and are forced to settle their disputes against companies in a private system of arbitration that often favors the company over the individual. This critical legislation is supported by a coalition of survivors of sexual harassment or assault and their allies, including the National Center on Domestic and Sexual Violence, the National Coalition Against Domestic Violence, the National Domestic Violence Hotline, the National Network to End Domestic Violence, RAINN, and the Sexual Violence Prevention Association, among others. It is also supported by numerous public interest and advocacy organizations, such as Public Citizen and the American Association of Justice.<sup>5</sup>

### Background and Need for the Legislation

Unlike the judicial system—in which courts’ decisions are generally public and, by building on precedent, cumulatively create a body of law—the results of arbitration disputes are often kept secret.<sup>6</sup> For example, the arbitration protocols for the American Arbitration Association state that arbitrators of consumer disputes must “maintain the privacy of the hearing to the extent permitted by applicable law.”<sup>7</sup> Further, a coalition of state attorneys general—representing all 50 states, the District of Columbia, and several U.S. territories—have similarly noted that arbitration’s required “veil of secrecy” applies to workplace sexual harassment claims, which may prevent similarly situated persons from learning of illegal conduct and seeking relief.<sup>8</sup> The coalition referred to this phenomenon as a “culture of silence that protects perpetrators at

<sup>5</sup>Letter from Public Citizen & American Association for Justice et al., Advocacy Coalition, to U.S. Rep. Nancy Pelosi (D-CA), Speaker, House of Representatives (Jan. 31, 2022) (on file with staff of H. Comm. on the Judiciary).

<sup>6</sup>*Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 963, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 3–4, 10 (2019) (statement of Gretchen Carlson, advocate and former Fox News commentator; statement of Professor Myriam Gilles, Paul R. Verkuil Chair in Pub. L., Benjamin N. Cardozo Sch. of L.).

<sup>7</sup>Nat’l Consumer Disp. Advisory Comm., *Consumer Due Process Protocol*, Principle 12.2, AM. ARBITRATION ASS’N, [https://www.adr.org/sites/default/files/document\\_repository/Consumer%20Due%20Process%20Protocol%20\(1\).pdf](https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20(1).pdf).

<sup>8</sup>Letter from Nat’l Ass’n of Att’ys Gen. to Cong. Leadership (Feb. 12, 2018), [http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWWMYN/\\$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf](http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWWMYN/$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf).

the cost of their victims.”<sup>9</sup> This opacity often prevents others from learning of widespread misconduct. As Terri Gerstein, the Director of the State and Local Enforcement Project at the Harvard Law School Labor and Worklife Program, noted, the secretive nature of arbitration “has allowed outrageous violations, in some cases years of sexual harassment and predation, to remain hidden from view and therefore to continue.”<sup>10</sup>

Forced arbitration also lacks many of the procedural safeguards of the justice system.<sup>11</sup> For example, in forced arbitration, a company may increase the expense of bringing a claim,<sup>12</sup> limit discovery,<sup>13</sup> or eliminate protections related to the geographic proximity of the resolution forum,<sup>14</sup> formal civil procedure rules, access to counsel,<sup>15</sup> and the right to bring similar claims jointly.<sup>16</sup> Additionally, the company imposing arbitration often selects the presiding arbitrator or arbitration provider,<sup>17</sup> creating a conflict of interest in which the purportedly neutral arbitrator may be motivated by the prospect of obtaining repeat business from the company rather than the desire to fairly assess the claim.<sup>18</sup>

As a result of the decline of enforcement of state and federal statutory protections, forced arbitration makes it more likely that corporate harms and abuse will go unchallenged. As Professor Myriam Gilles testified last Congress, many companies’ arbitration clauses specifically identify federal protections that arbitration makes unenforceable in court, such as rights under the Civil Rights Act of 1964 and the Family Medical Leave Act.<sup>19</sup> In this respect, as Professor Gilles observes, “forced arbitration is not an alternative regime for resolving claims, it is a means of suppressing legal claims altogether.”<sup>20</sup> Judge William G. Young, who was appointed by President Ronald Reagan, likewise stated that the proliferation of

<sup>9</sup>*Id.*

<sup>10</sup>Terri Gerstein, *Forced Arbitration is Unjust and Deeply Unpopular. Can Congress End It?*, SLATE (Mar. 1, 2019), <https://slate.com/news-and-politics/2019/03/congress-forced-arbitration-fair-act.html>.

<sup>11</sup>*Id.*

<sup>12</sup>Arbitration clauses may impose high costs on consumers, such as requiring travel to a distant forum or selection of a high-fee arbitrator—possible expenses which a plaintiff filing in a local court would not have to incur. See Lisa B. Bingham, *Control over Dispute-System Design and Mandatory Commercial Arbitration*, 67 L. & CONTEMP. PROBS. 221, 234–35 (2004).

<sup>13</sup>See Katherine Palm, Note, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 ELDER L.J. 453, 478 n.172 (2006).

<sup>14</sup>See Ziva Branstetter, *Nursing Home Policy Challenged*, TULSA WORLD (Mar. 4, 2002), [https://www.tulsaworld.com/archives/nursing-home-policy-challenged/article\\_6131212f-481c-59c4-af51-7c2a188e37f9.html](https://www.tulsaworld.com/archives/nursing-home-policy-challenged/article_6131212f-481c-59c4-af51-7c2a188e37f9.html) (Oklahoma nursing home’s arbitration clause requires residents to travel to New Mexico at their own expense for arbitration proceeding).

<sup>15</sup>The lower probability of victory and legal fees may discourage some attorneys from representing individuals in arbitration proceedings. See Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 783–84 (2002).

<sup>16</sup>See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 6 (2000).

<sup>17</sup>The major arbitration providers include the American Arbitration Association and JAMS, which set their own procedures, contract with agencies and companies to arbitrate future disputes, and provide arbitrators and panels to hear disputes. KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POLICY INST., *THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS* 17 (2015), <https://www.epi.org/publication/the-arbitration-epidemic/>.

<sup>18</sup>See Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 35–37 (1999).

<sup>19</sup>*Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 963, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. 7 (2019) (statement of Myriam Gilles, Paul R. Verkuil Chair in Pub. L., Benjamin N. Cardozo Sch. of L.).

<sup>20</sup>*Arbitration in America: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 1 (2019) (Responses to Questions for the Record of Professor Myriam Gilles, Paul R. Verkuil Chair in Pub. L., Benjamin N. Cardozo Sch. of L.).

forced arbitration clauses means that “business has a good chance of opting out of the legal system altogether and misbehaving without reproach.”<sup>21</sup> Deepak Gupta, a leading public interest attorney, similarly testified that forced arbitration has undermined the enforcement of statutory rights.<sup>22</sup> He explained:

As the U.S. Supreme Court has itself acknowledged, the presence of a forced arbitration clause often means that Americans will have no effective method of asserting their rights or getting justice under federal laws that could otherwise have been enforced in a court—consumer protection or antitrust laws, for example, or prohibitions on sex or race discrimination. If Congress passes laws that can’t be enforced in the real world, what good are those laws?<sup>23</sup>

Although proponents claim that arbitration decreases litigation costs for consumers, consumers often do not receive any benefit of reduced costs through forced arbitration.<sup>24</sup> Instead, arbitration clauses appear to dissuade consumers from adjudicating disputes altogether.<sup>25</sup> Moreover, the lower probability of victory, the lack of class representation, and meager legal fees may also discourage attorneys from representing individuals in arbitration proceedings.<sup>26</sup> As Justice Stephen G. Breyer explained:

What rational lawyer would have signed on to represent the [plaintiffs] in litigation for the possibility of fees stemming from a \$30.22 claim? The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.<sup>27</sup>

In sum, forced arbitration has transferred the rights of workers and consumers to a secretive, closed, and private system designed by corporate interests to evade oversight and accountability.<sup>28</sup> Unsurprisingly, 84% of Americans across the political spectrum support ending forced arbitration in employment and consumer disputes.<sup>29</sup>

<sup>21</sup> Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://nyti.ms/2k6cZ1z> (“By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies . . . devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices.”).

<sup>22</sup> *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 963, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. 2 (2019) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC).

<sup>23</sup> *Id.*

<sup>24</sup> CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REP. TO CONG., PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), at § 10 (2015), [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf) (“Using two measures of credit offered, we did not find any statistically significant evidence that companies that eliminated arbitration provisions reduced the credit they offered.”).

<sup>25</sup> *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 963, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. 3–4 (2019) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC).

<sup>26</sup> See Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 783–84 (2002).

<sup>27</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 365 (2011) (Breyer, J. dissenting) citing *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (CA7 2004).

<sup>28</sup> Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, A Privatization of the Justice System*, N.Y. TIMES (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

<sup>29</sup> See Guy Molyneux & Geoff Garin, *National Survey on Required Arbitration*, HART RESEARCH ASSOCS. (Feb. 28, 2019) (on file with staff).

## I. Recent Case Law Ignores the Legislative Intent of the Federal Arbitration Act

On February 12, 1925, Congress codified the use of arbitration through the FAA.<sup>30</sup> The FAA was adopted to put arbitration agreements on equal footing with other contracts in certain disputes.<sup>31</sup> The legislative history of the FAA suggests that the law was intended to narrowly apply to disputes between merchants, not between a business and its consumers or workers.<sup>32</sup> In 1967, the Supreme Court characterized the FAA as “plainly designed” to include protections against “captive customers or employees.”<sup>33</sup> The Court noted that it was clear from congressional debate on the Act that Congress did not intend for parties with unequal bargaining power to be forced to arbitrate claims on a “take-it-or-leave-it basis”:

On several occasions [Members of Congress] expressed opposition to a law which would enforce even a valid arbitration provision contained in a contract between parties of unequal bargaining power. Senator Walsh cited insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take-it-or-leave-it basis to captive customers or employees. He noted that such contracts “are really not voluntarily (sic) things at all” because “there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court.” He was emphatically assured by the supporters of the bill that it was not their intention to cover such cases.<sup>34</sup>

Indeed, the drafters of the FAA had made clear that arbitration was not appropriate for substantive questions of law. Julius Henry Cohen, the law’s architect, emphasized that it was “not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes.”<sup>35</sup> Arbitration was also rarely invoked in state courts because it was widely considered not to preempt state law.<sup>36</sup> This consensus was supported by the FAA’s legislative history. During hearings on the measure, Cohen testified that “[t]here is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement.”<sup>37</sup>

<sup>30</sup> Pub. L. No. 68–401, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1–16 (2019)).

<sup>31</sup> H.R. REP. NO. 68–96, at 1 (1924) (“The purpose of this bill is to make valid and enforceable [sic] agreements for arbitration . . . in the Federal courts.”).

<sup>32</sup> See, e.g., H.R. REP. NO. 68–96, at 1 (1924); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 305 (2015) (“The most important fact about the testimony, hearings, and reports leading up to congressional enactment of the FAA is that every witness, every Senator, and every Representative discussed one issue and one issue only: arbitration of contract disputes between merchants.”).

<sup>33</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967).

<sup>34</sup> *Id.* (quoting *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary, 67th Cong. 9–11 (1923)* [hereinafter *1923 Hearing on S. 4213 and S. 4214*] (statement of Senator Walsh)).

<sup>35</sup> Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CAL. L. REV. 1, 11 n.67 (2019) (quoting Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926)).

<sup>36</sup> David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1039 (2012).

<sup>37</sup> *Id.* at 1039 n.55 (citing *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary, 68th Cong. 40 (1924)*).

In a series of decisions beginning in the 1980s,<sup>38</sup> however, the Supreme Court drastically expanded the applicability of the FAA to arbitration clauses in everyday contracts, “push[ing] arbitration into the mainstream.”<sup>39</sup> The Court has upheld the enforcement of arbitration clauses even when doing so prevents an individual from vindicating a state or federal statutory right.<sup>40</sup> Furthermore, by imposing arbitration on a “take-it-or-leave-it” basis, large companies have largely eviscerated the congressional intent of arbitration as a voluntary process agreed to between parties of equal bargaining power.<sup>41</sup>

## II. The Effect of Forced Arbitration on Statutory Rights of Sexual Assault and Sexual Harassment Victims

Forced arbitration is now widespread in consumer contracts.<sup>42</sup> In many cases, consumers are unaware of forced arbitration clauses in the contracts of commonly used goods and services.<sup>43</sup> These clauses are sometimes hidden inside of envelopes,<sup>44</sup> delivery boxes,<sup>45</sup> and privacy policies.<sup>46</sup>

Forced arbitration provisions imposed on consumers for using everyday goods and services often prevent victims of civil rights violations from pursuing their claims in court.<sup>47</sup> For example, Massage Envy, the country’s largest massage chain, forced hundreds of women’s allegations of sexual assault into arbitration.<sup>48</sup> In one case, a customer who has alleged that she was sexually assaulted by one of the company’s therapists attempted to cancel her monthly membership to Massage Envy for over a year, but was refused unless she agreed to forced arbitration.<sup>49</sup> Another sexual assault sur-

<sup>38</sup> See, e.g., *Moses H. Cone Mem’l Hosp. v. Mercury Constr.*, 460 U.S. 1 (1983); *Justice Denied: Forced Arbitration and the Erosion of Our Legal System: Hearing on H.R. 963, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. 25–29 (2019) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC).

<sup>39</sup> Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CAL. L. REV. 1, 12 (2019).

<sup>40</sup> See, e.g., *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) (“[W]hen parties agree to arbitrate all questions arising under a contract,” the Federal Arbitration Act supersedes state laws.); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

<sup>41</sup> During the passage of the Federal Arbitration Act, Congress did not even intend to allow binding arbitration agreements on individuals if the contracts were between parties of unequal bargaining power. *Prima Paint Corp.*, 388 U.S. at 414 (1967) (Black, J., dissenting) (citing *1923 Hearing on S. 4213 and S. 4214*).

<sup>42</sup> *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 963, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. 1–2 (2019) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC).

<sup>43</sup> See *Wash. Mut. Fin. Grp. v. Bailey*, 364 F.3d 260, 264–66 (5th Cir. 2004) (holding that an arbitration agreement was enforceable against illiterate consumers, even though they had no knowledge of the arbitration requirement); *Am. Gen. Fin. Servs., Inc. v. Griffin*, 327 F. Supp. 2d 678, 683 (N.D. Miss. 2004) (upholding arbitration agreement even though blind consumer had no knowledge of agreement); *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 916–18 (N.D. Tex. 2000) (finding that inserting an arbitration clause in monthly billing statements constituted sufficient notice).

<sup>44</sup> See *Ting v. AT&T*, 319 F.3d 1126, 1134 (9th Cir. 2003).

<sup>45</sup> See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997).

<sup>46</sup> See Stephanie Strom, *When ‘Liking’ a Brand Online Voids the Right to Sue*, N.Y. TIMES (Apr. 16, 2014), <https://www.nytimes.com/2014/04/17/business/when-liking-a-brand-online-voids-the-right-to-sue.html>.

<sup>47</sup> HEIDI SHIERHOLZ, ECON. POLICY INST., FORCED ARBITRATION IS BAD FOR CONSUMERS (2017), <https://www.epi.org/publication/forced-arbitration-is-bad-for-consumers/>.

<sup>48</sup> See Brooks Jarosz, *Fears Loom that Sexual Assault Cases Involving Massage Envy Will Remain Private*, FOX KVTU (Dec. 21, 2018), <http://www.kvtu.com/news/fears-loom-sexual-assault-cases-involving-massage-envy-will-remain-private>.

<sup>49</sup> Terri Gerstein, *Forced Arbitration is Unjust and Deeply Unpopular. Can Congress End It?*, SLATE (Mar. 1, 2019), <https://slate.com/news-and-politics/2019/03/congress-forced-arbitration-fair-act.html>.



vivor said, “I was mortified. . . . It’s just horrifying that they would allow this to happen and then take steps to cover up what is happening” through forced arbitration.<sup>50</sup>

As Gretchen Carlson, an advocate and former Fox News commentator, noted in her testimony during the Antitrust, Commercial, and Administrative Law (ACAL) Subcommittee’s hearing on forced arbitration:

These women put their trust into a company and its employees, only to suffer the trauma of being sexually assaulted and then continue to suffer as the company did little to help them and instead tried to silence them. Now that these women are seeking public accountability in court, the company is trying to force them into arbitration, because hidden in the fine print of the terms and conditions of the company’s app and iPads (used to check in for services) was a forced arbitration clause.<sup>51</sup>

In 2015, the Consumer Financial Protection Bureau (CFPB) found that arbitration has undermined the ability of consumers to seek redress for abusive, anti-consumer practices.<sup>52</sup> Richard Cordray, then-Director of the CFPB, explained that based on this research, the CFPB had concluded that “any prospect of meaningful relief for groups of consumers is effectively extinguished by forcing them to fight their legal disputes as lone individuals.”<sup>53</sup> Cordray also warned that “many businesses have sought to use arbitration clauses not simply as an alternative means of resolving disputes, but effectively to insulate themselves from accountability by blocking group claims.”<sup>54</sup> Nowhere is this more evident than in sexual violence and harassment cases, where survivors are unaware or will not have access to a repeat offender’s history of sexual violence or harassment.

According to a 2017 report by the Economic Policy Institute, 60.1 million workers—the majority of non-union employees in the private sector—have signed away their rights through forced arbitration clauses.<sup>55</sup> As this report notes, this trend has “weakened the position of workers whose rights are violated, barring access to the courts for all types of legal claims, including those based on Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Fair Labor Standards Act.”<sup>56</sup> When employees work under forced arbitration clauses, they are less likely to win in disputes with their employers,<sup>57</sup> or

<sup>50</sup> Brooks Jarosz, *Fears Loom that Sexual Assault Cases Involving Massage Envy Will Remain Private*, FOX KVTU (Dec. 21, 2018), <http://www.ktvu.com/news/fears-loom-sexual-assault-cases-involving-massage-envy-will-remain-private>.

<sup>51</sup> *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 963, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. 2–3 (2019) (statement of Gretchen Carlson, advocate and former Fox News commentator).

<sup>52</sup> Richard Cordray, Dir., Consumer Fin. Prot. Bureau, Remarks at Field Hearing on Arbitration Clauses (May 5, 2016), <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-field-hearing-arbitration-clauses/>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> ALEXANDER J.S. COLVIN, ECON. POLICY INST., *THE GROWING USE OF MANDATORY ARBITRATION* 2 (2017), <https://www.epi.org/files/pdf/135056.pdf>.

<sup>56</sup> *Id.* at 1.

<sup>57</sup> *Id.* at 3.

even to bring them at all.<sup>58</sup> Workers that do enforce their rights in the workplace receive less in damages in arbitration than would have been available in court.<sup>59</sup>

Worse still, forced arbitration clauses in employment contracts are often coupled with non-disclosure agreements,<sup>60</sup> ensuring minimal scrutiny of corporate misconduct. For example, the claims of hundreds of workers at Sterling Jewelers—the parent company of Jared Jewelers and Kay Jewelers—who were victims of “groping and sexual coercion and sexual degradation and rape” in the workplace over a period of years were forced into arbitration.<sup>61</sup> More than 200 women filed statements describing “an atmosphere in which female employees endured unwanted sexual advances from male superiors at the company.”<sup>62</sup> These statements from women across the country alleged, among other egregious forms of abuse and harassment, that male supervisors coerced their female subordinates into performing sexual favors for them in order to receive better jobs or higher pay.<sup>63</sup>

The claims of these women, and nearly 70,000 others who were part of a class action lawsuit against Sterling, were subject to forced arbitration,<sup>64</sup> denying their access to justice. Sterling, like many other American companies, subjects its employees to forced arbitration, requiring them to waive their rights to pursue their claims in court, including claims of discrimination and sexual harassment.<sup>65</sup> According to a New York Times investigation, this secretive process minimized the company’s exposure to additional claims or public scrutiny.<sup>66</sup> As the report explains:

Arbitration meant that instead of being heard in a public court, [the victims] had to proceed privately in Sterling’s in-house system, called Resolve. The first step of Resolve was an internal investigation. If the employee wasn’t satisfied by the results of that investigation, he or she could ask to be heard by a panel of the employee’s peers and an employment lawyer, all selected by Sterling. If the employee was still dissatisfied, the case was sent to arbitration. Sterling paid the arbitrator. The hearing’s proceedings were carried out with judicial oversight, but they were done in private, and their outcome was sealed. After-

<sup>58</sup> *Id.* at 5–6.

<sup>59</sup> *Id.*

<sup>60</sup> Laura Lawless, *Sexual Harassment Claims Put Non-Disclosure and Arbitration Agreements Under Scrutiny, Resulting in a Flurry of Legislative Action*, NAT’L L. REV. (Dec. 7, 2017), <https://www.natlawreview.com/article/sexual-harassment-claims-put-non-disclosure-and-arbitration-agreements-under> (“Many employers require employees to sign [non-disclosure agreements] as a condition of employment in order to prevent the dissemination and misuse of companies’ confidential and proprietary information.”).

<sup>61</sup> Taffy Brodesser-Akner, *The Company that Sells Love to America Had a Dark Secret*, N.Y. TIMES MAG. (Apr. 23, 2019), <https://www.nytimes.com/2019/04/23/magazine/kay-jewelery-sexual-harassment.html>.

<sup>62</sup> Rebecca Hersher, *Parent Company of Kay Jewelers Accused of Wage Discrimination Against Women*, NPR: THE TWO-WAY (Mar. 1, 2017), <https://www.npr.org/sections/thetwo-way/2017/03/01/517684117/thousands-allege-wage-and-promotion-discrimination-by-sterling-jewelers>.

<sup>63</sup> Drew Harwell, *Hundreds Allege Sex Harassment, Discrimination at Kay and Jared Jewelry Company*, WASH. POST (Feb. 27, 2017), <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>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Taffy Brodesser-Akner, *The Company that Sells Love to America Had a Dark Secret*, N.Y. TIMES MAG. (Apr. 23, 2019), <https://www.nytimes.com/2019/04/23/magazine/kay-jewelery-sexual-harassment.html>.

ward, if there was a settlement, the employee often had to sign a nondisclosure agreement that prohibited the employee from speaking about the case again. The benefit of arbitration to the employee was that the claim was usually resolved more speedily. The benefit to the company was that it was resolved in secret. *The secrecy was the point . . . [I]n arbitration, the proceedings are so secretive that the lawyers weren't allowed to tell other women in the suit what had happened to them.*<sup>67</sup>

In light of these concerns, a coalition of state attorneys general—from all 50 states, the District of Columbia, and several U.S. territories—have written Congress in support of ending forced arbitration in workplace disputes involving claims of sexual harassment.<sup>68</sup> As this bipartisan coalition notes, “[e]nding 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.”<sup>69</sup>

Following a series of high-profile disputes involving sexual and racial harassment, some companies have chosen to voluntarily limit the use of forced arbitration in employment contracts. For example, Google announced that it would no longer include forced arbitration clauses in its employment contracts, following a worldwide walkout to protest the company’s handling of sexual harassment claims.<sup>70</sup>

### Hearings

For the purposes of clause 3(c)(6)(A) of House Rule XIII, the following hearings were used to develop H.R. 4445:

On February 11, 2021, the ACAL Subcommittee held an oversight hearing entitled “Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights.” The Majority witnesses at the hearing were: Myriam Gilles, Professor of Law, Paul R. Verkuil Chair in Public Law, Benjamin N. Cardozo School of Law; Gretchen Carlson, Journalist and Advocate; and Jacob Weiss, Founder and President, OJ Commerce. The Minority witness at the hearing was G. Roger King, Senior Labor and Employment Counsel, HR Policy Association. There, Ms. Carlson testified about the use of forced arbitration to silence victims of systemic sexual harassment.<sup>71</sup> In her testimony, Professor Gilles similarly explained how forced arbitration “perpetuates the exploitation of women in the workplace by shunting victims into a private system where each is unaware of the other and where the arbitration provider (who is

<sup>67</sup> *Id.* (emphasis added).

<sup>68</sup> Letter from Nat’l Ass’n of Att’ys Gen. to Cong. Leadership (Feb. 12, 2018), [http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/\\$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf](http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf).

<sup>69</sup> *Id.*

<sup>70</sup> Alexia Fernández Campbell, *Why Thousands of Google Employees Are Protesting Across the World*, Vox (Nov. 1, 2018), <https://www.vox.com/2018/11/1/18051884/google-employee-walkouts-explained>; Nitasha Tiku, *Google Ends Forced Arbitration After Employee Protest*, Wired (Feb. 21, 2019), <https://www.wired.com/story/google-ends-forced-arbitration-after-employee-protest/>.

<sup>71</sup> *Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm. on the Judiciary*, 117th Cong. 1 (2021) (statement of Gretchen Carlson).

chosen and paid by the employer) lacks authority to remedy systemic and recurring workplace abuse.”<sup>72</sup>

On November 16, 2021, the Committee on the Judiciary held a hearing entitled “Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment in the Shadows.” The Majority witnesses at the hearing were: Eliza Dushku, Actor, Producer, and Graduate Student; Tatiana Spottiswoode, Law Student, Columbia Law School; Andowah Newton of New York, NY; Lora Henry of Canton, OH; and Professor Myriam Gilles, Professor of Law, Paul R. Verkuil Chair in Public Law, Cardozo School of Law. The Minority witnesses at the hearing were: Anna St. John, President and General Counsel, Hamilton Lincoln Law Institute; and Sarah Parshall Perry, Legal Fellow, Edwin Meese III Center for Legal and Judicial Studies, The Heritage Foundation. During the hearing, survivors of sexual harassment or sexual assault testified about how forced arbitration clauses blocked their ability to seek justice and hold wrongdoers accountable, and shielded this misconduct from public scrutiny.<sup>73</sup>

### **Committee Consideration**

On November 17, 2021, the Committee met in open session and ordered the bill, H.R. 4445, favorably reported with an amendment, by a rollcall vote of 27 to 14, a quorum being present.

### **Committee Votes**

In compliance with clause 3(b) of House Rule XIII, the following rollcall votes occurred during the Committee’s consideration of H.R. 4445:

1. An amendment by Mr. Buck of Colorado to amend the bill’s definition of sexual harassment was defeated by a rollcall vote of 15 to 20. The vote was as follows:

<sup>72</sup>*Id.* at 9 (statement of Professor Myriam Gilles, Paul R. Verkuil Chair in Pub. L., Benjamin N. Cardozo Sch. of L.), <https://docs.house.gov/meetings/JU/JU05/20190516/109484/HHRG-116-JU05-Wstate-GillesM-20190516.pdf>.

<sup>73</sup>*Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment in the Shadows Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm. on the Judiciary*, 117th Cong. 1 (2021) (statement of Professor Myriam Gilles, Paul R. Verkuil Chair in Pub. L., Benjamin N. Cardozo Sch. of L.).

Roll Call No. |

Date: 11/17/21

COMMITTEE ON THE JUDICIARY

House of Representatives

117<sup>th</sup> Congress

Amendment # 2 (Am) to H.R. 4445 offered by Rep. Buck

PASSED  
 FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)		✓	
Zoe Lofgren (CA-19)		✓	
Sheila Jackson Lee (TX-18)		✓	
Steve Cohen (TN-09)		✓	
Hank Johnson (GA-04)		✓	
Ted Deutch (FL-22)			
Karen Bass (CA-37)		✓	
Hakeem Jeffries (NY-08)			
David Cicilline (RI-01)		✓	
Eric Swalwell (CA-15)			
Ted Lieu (CA-33)		✓	
Jamie Raskin (MD-08)			
Pramila Jayapal (WA-07)		✓	
Val Demings (FL-10)		✓	
Lou Correa (CA-46)		✓	
Mary Gay Scanlon (PA-05)		✓	
Sylvia Garcia (TX-29)		✓	
Joseph Neguse (CO-02)		✓	
Lucy McBath (GA-06)		✓	
Greg Stanton (AZ-09)		✓	
Madeleine Dean (PA-04)		✓	
Veronica Escobar (TX-16)		✓	
Mondaire Jones (NY-17)			
Deborah Ross (NC-02)		✓	
Cori Bush (MO-01)		✓	
	AYES	NOS	PRES.
Jim Jordan (OH-04)			
Steve Chabot (OH-01)	✓		
Louie Gohmert (TX-01)			
Darrell Issa (CA-50)	✓		
Ken Buck (CO-04)	✓		
Matt Gaetz (FL-01)	✓		
Mike Johnson (LA-04)			
Andy Biggs (AZ-05)			
Tom McClintock (CA-04)	✓		
Greg Steube (FL-17)	✓		
Tom Tiffany (WI-07)	✓		
Thomas Massie (KY-04)	✓		
Chip Roy (TX-21)	✓		
Dan Bishop (NC-09)	✓		
Michelle Fischbach (MN-07)	✓		
Victoria Spartz (IN-05)	✓		
Scott Fitzgerald (WI-05)	✓		
Cliff Bentz (OR-02)	✓		
Burgess Owens (UT-04)	✓		
	AYES	NOS	PRES.
TOTAL	15	20	

2. An amendment by Mr. Bishop of North Carolina to amend the Federal Arbitration Act to exempt claims related to sexual assault or harassment disputes failed by a rollcall vote of 13 to 24. The vote was as follows:

Roll Call No. 2

Date: 11/17/21

COMMITTEE ON THE JUDICIARY

House of Representatives

117<sup>th</sup> Congress

Amendment # 3 (ANJ) to HR 4445 offered by Rep. Bishop

PASSED  
 FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)		✓	
Zoe Lofgren (CA-19)		✓	
Sheila Jackson Lee (TX-18)		✓	
Steve Cohen (TN-09)		✓	
Hank Johnson (GA-04)		✓	
Ted Deutch (FL-22)			
Karen Bass (CA-37)		✓	
Hakeem Jeffries (NY-08)			
David Cicilline (RI-01)		✓	
Eric Swalwell (CA-15)			
Ted Lieu (CA-33)		✓	
Jamie Raskin (MD-08)		✓	
Pramila Jayapal (WA-07)		✓	
Val Demings (FL-10)		✓	
Lou Correa (CA-46)		✓	
Mary Gay Scanlon (PA-05)		✓	
Sylvia Garcia (TX-29)		✓	
Joseph Neguse (CO-02)		✓	
Lucy McBath (GA-06)		✓	
Greg Stanton (AZ-09)		✓	
Madeleine Dean (PA-04)		✓	
Veronica Escobar (TX-16)		✓	
Mondaire Jones (NY-17)		✓	
Deborah Ross (NC-02)		✓	
Cori Bush (MO-01)		✓	
	AYES	NOS	PRES.
Jim Jordan (OH-04)	✓		
Steve Chabot (OH-01)	✓		
Louie Gohmert (TX-01)			
Darrell Issa (CA-50)	✓		
Ken Buck (CO-04)		✓	
Matt Gaetz (FL-01)		✓	
Mike Johnson (LA-04)			
Andy Biggs (AZ-05)	✓		
Tom McClintock (CA-04)	✓		
Greg Steube (FL-17)			
Tom Tiffany (WI-07)	✓		
Thomas Massie (KY-04)	✓		
Chip Roy (TX-21)	✓		
Dan Bishop (NC-09)	✓		
Michelle Fischbach (MN-07)	✓		
Victoria Spartz (IN-05)	✓		
Scott Fitzgerald (WI-05)			
Cliff Bentz (OR-02)	✓		
Burgess Owens (UT-04)	✓		
	AYES	NOS	PRES.
TOTAL	13	24	

3. The motion to report H.R. 4445, as amended, favorably was agreed to by a rollcall vote of 27 to 14. The vote was as follows:



Roll Call No. 3

Date: 11/17/21

COMMITTEE ON THE JUDICIARY

House of Representatives

117<sup>th</sup> Congress

Final Passage on: HR 4445

PASSED  
 FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)	✓		
Zoe Lofgren (CA-19)	✓		
Sheila Jackson Lee (TX-18)	✓		
Steve Cohen (TN-09)	✓		
Hank Johnson (GA-04)	✓		
Ted Deutch (FL-22)	✓		
Karen Bass (CA-37)	✓		
Hakeem Jeffries (NY-08)			
David Cicilline (RI-01)	✓		
Eric Swalwell (CA-15)			
Ted Lieu (CA-33)	✓		
Jamie Raskin (MD-08)	✓		
Pramila Jayapal (WA-07)	✓		
Val Demings (FL-10)	✓		
Lou Correa (CA-46)	✓		
Mary Gay Scanlon (PA-05)	✓		
Sylvia Garcia (TX-29)	✓		
Joseph Neguse (CO-02)	✓		
Lucy McBath (GA-06)	✓		
Greg Stanton (AZ-09)	✓		
Madeleine Dean (PA-04)	✓		
Veronica Escobar (TX-16)	✓		
Mondaire Jones (NY-17)	✓		
Deborah Ross (NC-02)	✓		
Cori Bush (MO-01)	✓		
	AYES	NOS	PRES.
Jim Jordan (OH-04)		✓	
Steve Chabot (OH-01)	✓		
Louie Gohmert (TX-01)	✓		
Darrell Issa (CA-50)		✓	
Ken Buck (CO-04)	✓		
Matt Gaetz (FL-01)	✓		
Mike Johnson (LA-04)			
Andy Biggs (AZ-05)		✓	
Tom McClintock (CA-04)		✓	
Greg Steube (FL-17)		✓	
Tom Tiffany (WI-07)		✓	
Thomas Massie (KY-04)		✓	
Chip Roy (TX-21)		✓	
Dan Bishop (NC-09)		✓	
Michelle Fischbach (MN-07)		✓	
Victoria Spartz (IN-05)		✓	
Scott Fitzgerald (WI-05)		✓	
Cliff Bentz (OR-02)		✓	
Burgess Owens (UT-04)		✓	
	AYES	NOS	PRES.
TOTAL	27	14	

### **Committee Oversight Findings**

In compliance with clause 3(c)(1) of House Rule XIII, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of House Rule X, are incorporated in the descriptive portions of this report.

### **Committee Estimate of Budgetary Effects**

Pursuant to clause 3(d)(1) of House Rule XIII, the Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

### **New Budget Authority and Congressional Budget Office Cost Estimate**

Pursuant to clause 3(c)(2) of House Rule XIII and section 308(a) of the Congressional Budget Act of 1974, and pursuant to clause (3)(c)(3) of House Rule XIII and section 402 of the Congressional Budget Act of 1974, the Committee has requested but not received from the Director of Congressional Budget Office a budgetary analysis and a cost estimate of this bill.

### **Duplication of Federal Programs**

Pursuant to clause 3(c)(5) of House Rule XIII, no provision of H.R. 4445 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program.

### **Performance Goals and Objectives**

The Committee states that pursuant to clause 3(c)(4) of House Rule XIII, H.R. 4445 improves access to justice for survivors of sexual assault and harassment by allowing these parties to elect arbitration after a dispute has arisen.

### **Advisory on Earmarks**

In accordance with clause 9 of House Rule XXI, H.R. 4445 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of House Rule XXI.

### **Section-by-Section Analysis**

The following discussion describes the bill as reported by the Committee.

*Sec. 1. Short Title.* Section 1 sets forth the short title of the bill as the “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021.”

*Sec. 2. Pre-dispute Arbitration of Disputes Involving Sexual Assault and Sexual Harassment.* Sec. 2(a) amends Title 9 of the United States Code by adding at the end “Chapter 4—Arbitration of Disputes Involving Sexual Assault and Sexual Harassment.”

New section 401 defines various terms used under new chapter 4. For example, it defines “sexual assault dispute” as “a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 or similar applicable Tribal

or State law, including when the victim lacks capacity to consent.” The term “sexual harassment dispute” means a “dispute relating to any of the following conduct directed at an individual or a group of individuals: (A) Unwelcome sexual advances; (B) Unwanted physical contact that is sexual in nature, including assault; (C) Unwanted sexual attention, including unwanted sexual comments and propositions for sexual activity; (D) Conditioning professional, educational, consumer, health care or long-term care benefits on sexual activity; or (E) Retaliation for rejecting unwanted sexual attention.”

New section 402 first provides that at the election of a person alleging conduct that constitutes a sexual harassment or sexual assault claim, no pre-dispute arbitration agreement or pre-dispute joint-action waiver shall be valid or enforceable relating to disputes described within the chapter. It further provides that a court, and not an arbitrator, shall determine whether this chapter applies to an agreement to arbitrate, and the enforceability of that agreement.

Section 2(b) makes a series of technical and conforming amendments.

*Sec. 3. Effective Date.* Section 3 provides that the legislation applies to any dispute or claim that arises or accrues on or after the date of enactment of the legislation.

**Changes in Existing Law Made by the Bill, as Reported**

In compliance with clause 3(e) of House Rule XIII, changes in existing law made by the bill, H.R. 4445, as reported, are shown as follows:

**Changes in Existing Law Made by the Bill, as Reported**

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

**TITLE 9, UNITED STATES CODE**

Chap.		Sec.
	<b>1. General provisions .....</b>	<b>1</b>
	* * * * *	
	<b>4. Arbitration of disputes involving sexual assault and sexual harassment .....</b>	<b>401</b>

**CHAPTER 1—GENERAL PROVISIONS**

\* \* \* \* \*

**§2. Validity, irrevocability, and enforcement of agreements to arbitrate**

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 con-

troverly 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 or as otherwise provided in chapter 4.

\* \* \* \* \*

**CHAPTER 2—CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS**

Sec.  
201. Enforcement of Convention.

\* \* \* \* \*

**[208. Chapter 1; residual application.]**  
208. *Application.*

\* \* \* \* \*

**§ 208. [Chapter 1; residual application] Application**

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States. *This chapter applies to the extent that this chapter is not in conflict with chapter 4.*

\* \* \* \* \*

**CHAPTER 3—INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION**

Sec.  
301. Enforcement of Convention.

\* \* \* \* \*

**[307. Chapter 1; residual application.]**  
307. *Application.*

\* \* \* \* \*

**§ 307. [Chapter 1; residual application] Application**

Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States. *This chapter applies to the extent that this chapter is not in conflict with chapter 4.*

**CHAPTER 4—ARBITRATION OF DISPUTES INVOLVING SEXUAL ASSAULT AND SEXUAL HARASSMENT**

Sec.  
401. *Definitions.*  
402. *No validity or enforceability.*

**§ 401. Definitions**

*In this chapter:*

- (1) *PREDISPUTE ARBITRATION AGREEMENT.*—The term “predispute arbitration agreement” means any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.
- (2) *PREDISPUTE JOINT-ACTION WAIVER.*—The term “predispute joint-action waiver” means an agreement, whether or not part

of a predispute arbitration agreement, that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.

(3) *SEXUAL ASSAULT DISPUTE*.—The term “sexual assault dispute” means a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 or similar applicable Tribal or State law, including when the victim lacks capacity to consent.

(4) *SEXUAL HARASSMENT DISPUTE*.—The term “sexual harassment dispute” means a dispute relating to the any of the following conduct directed at an individual or a group of individuals:

(A) Unwelcome sexual advances.

(B) Unwanted physical contact that is sexual in nature, including assault.

(C) Unwanted sexual attention, including unwanted sexual comments and propositions for sexual activity.

(D) Conditioning professional, educational, consumer, health care or long-term care benefits on sexual activity.

(E) Retaliation for rejecting unwanted sexual attention.

#### **§ 402. No validity or enforceability**

(a) *IN GENERAL*.—Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

(b) *DETERMINATION OF APPLICABILITY*.—An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.

### **Supplemental Views**

Although I am recorded as a No on final passage of H.R. 4445, the “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021,” I intended to vote Yes.

BURGESS OWENS,  
*Member of Congress.*

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