THE SUPER STATUTE'S KRYPTONITE: THE FAA AFTER EFASASHA

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INTRODUCTION

On August 29 and 30, 2018, Katherine Anderson stayed in a hotel for an Aflac work conference,[1] where a disturbing series of events would come to hinge on an unexpected technicality. After dinner and drinks, Katherine returned to her hotel room on the 30th. After midnight, Jeffrey Hansen, a Business Development Manager for Aflac, forcibly entered Anderson's hotel room and raped her.[2] Anderson and her husband filed suit against Hansen, asserting tort claims for battery, assault, false imprisonment, loss of consortium, and other related claims.[3]

As a third-party beneficiary to Aflac's arbitration agreement with Anderson, Hansen could enforce that agreement.[4] And because that agreement contained an arbitration clause compelling arbitration for claims "relating to" Anderson's employment, Hansen objected to Anderson bringing suit in court.[5] Although Eighth Circuit precedent held that the arbitration agreement's "relating to" language imposed the broadest possible scope of arbitration,[6] the Eighth Circuit nevertheless upheld the District Court's order refusing to compel arbitration.[7] Holding that Anderson's tort claims did not fall within the scope of Anderson's employment,[8] the Eighth Circuit seemed to buck decades of precedent requiring that arbitration be compelled if "the underlying factual allegations simply touch matters covered by the arbitration provision."[9]

Dissenting, Judge Grasz criticized the majority's ruling:

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1. Anderson v. Hansen, 47 F.4th 711, 713 (8th Cir. 2022).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. Parm v. Bluestem Brands, Inc., 898 F.3d 869, 874 (8th Cir. 2018); Fleet Tire Serv. of N. Little Rock v. Oliver Rubber Co., 118 F.3d 619, 621 (8th Cir. 1997).
7. *Anderson*, 47 F.4th at 719.
8. *Id.* at 718.
9. Unison Co. v. Juhl Energy Dev., Inc., 789 F.3d 816, 818 (8th Cir. 2015).

> This case illustrates the old adage that "bad facts make bad law." The facts here are indeed bad: the Andersons alleged Katherine was drugged and raped in her hotel room during a work conference and then suffered emotional and psychological symptoms that had a lasting impact on her career. Faced with these bad facts, the court sidesteps our precedent on arbitration and instead blazes a new trail by relying on caselaw from other circuits. While the court's outcome may be preferable as a matter of public policy, I believe it is at odds with our precedent.[10]

Conflicts such as these exemplify why the Federal Arbitration Act ("FAA") has been marked by controversy for more than a century. Initially passed in response to court anti-arbitration hostility, the FAA sought to place arbitration agreements on equal footing with other contracts by making such agreements "valid, irrevocable, and enforceable . . . ."[11] Rather than placing arbitration agreements on equal footing, however, judges have construed the Act with extraordinary breadth.

Such construction has caused commentators to remark that the FAA is a kind of "super statute," pulling other statutes into its ambit with gravitational force and altering the legal landscape entirely. William Eskridge, Jr. and John Ferejohn describe the concept of a super-statute as follows:

> A super-statute is a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does "stick" in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute.[12]

Eskridge and Ferejohn explain that super statutes are an extension of the concept of "fundamental law," in which certain statutes—such as the Statute of Frauds—took on an evolutive, common law character and came to constitute a backdrop against which ordinary law is interpreted.[13] The "super-statute" idea has gained great currency as applied to the FAA, and has been cited favorably by courts construing its scope.[14] The Supreme Court has not directly endorsed this idea as applied to the FAA, but it has come close, denying "rules that stand as an obstacle to the accomplishment of the FAA's objectives"[15] because the FAA reflects "a liberal federal policy favoring arbitration . . . "[16] and the "fundamental principle that arbitration is a matter of contract."[17] It is thus

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10. *Anderson*, 47 F.4th at 719 (Grasz, J., dissenting).

11. 9 U.S.C. § 2.

12. William Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001).

13. *Id.*

14. *See, e.g.*, Capua v. Air Europa Lineas Aereas S.A., Inc., No. 20-CV-61438-RAR, 2021 U.S. Dist. LEXIS 47759 (S.D. Fla. Mar. 15, 2021). ("[T]he FAA is a 'super-statute' and thus, as the Fifth and Eleventh Circuits have found, it can at times swallow *Chevron* deference.").

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

16. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

reasonable to identify the FAA as a super-statute in the court's treatment of it, as Eskridge and Ferejohn have,[18] even if it does not perfectly fit their typical super-statute criteria (such as "sticking" in the public culture).

Conducting a statistical analysis of the FAA's treatment in arbitration cases, preemption cases, arbitrability cases, and cases involving conflicts between the FAA and other federal law, Kristin Blankley concludes that "the Court treats the FAA as a super-statute, giving it gravitational pull over other statutes that might conflict with it."[19] As a result, courts—like the Eighth Circuit prior to *Anderson v. Hansen*—have aggressively ruled in favor of compelling arbitration in legally diverse contexts. Decades of pushback have mobilized states to usher in varying degrees of reform, but each time, the laboratory of democracy has been stifled by the federal courts' insistence on the FAA's "super statute" status, leading to a broad application of preemption doctrine, a broad interpretation of the contractual language in arbitration agreements, and a broad presumption in favor of the FAA where it seemingly conflicts with other statutes.[20] However, new legislation has finally altered the landscape of compelled arbitration.

In July of 2021, Congress's passage of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFASASHA") came into effect.[21] In response to the broad scope of the FAA, the EFASASHA's language is equally breathtaking. EFASASHA allows a person to unilaterally waive any predispute arbitration agreement which "relates to the sexual assault dispute or the sexual harassment dispute."[22] The act applies "with respect to any dispute or claim that arises or accrues on or after . . . " the date of enactment of the Act.[23] And it defines a "sexual harassment dispute" as "a dispute *relating to* conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."[24]

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17. *Id.*

18. Eskridge, Jr. & Ferejohn, *supra* note 12, at 1260.

19. Kristin M. Blankley, *The Future of Arbitration Law?*, 2022 J. DISP. RESOL. 51, 51 (2022).

20. Academic criticisms of the court's expansive interpretation of the Federal Arbitration Act are legion. *See, e.g.*, Salvatore U. Bonaccorso, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145 (2015); DIRECTV, Inc. v. Imburgia, 577 U.S. 47 (2015); Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. KAN. L. REV. 795 (2012); Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RESERVE L. REV. 91 (2012); Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived in the Workplace*, 35 BERKELEY J. EMP. & LAB. L. 5 (2014); Scott R. Swier, *The Tenuous Tale of the Terrible Termites: The Federal Arbitration Act and the Court's Decision to Interpret Section Two in the Broadest Possible Manner:* Allied-Bruce Terminix Companies, Inc. v. Dobson*,* 41 S.D. L. REV. 131 (1996).

21. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, 9 U.S.C. §§ 307, 401–402.

22. *Id.* § 402(a).

23. *Id.* § 307.

24. *Id.* § 401(4) (emphasis added).

In the arbitration agreement context generally, the Second Circuit has found that the language "relates to" creates the broadest possible scope.[25] Other circuits have come to similar conclusions.[26] But the breadth of the act creates more questions than answers. For example, if the employer retaliated against an employee for filing a sexual harassment lawsuit, does this "relate to" the sexual harassment? Do other workplace discrimination claims, such as racial discrimination or harassment, "relate to" the underlying sexual harassment claim if they are not a component of the sexual harassment itself? Does such discrimination "relate to" the underlying claim if it is perpetrated by a separate actor than the sexual harasser? In an article advocating for the broadest possible interpretation of EFASASHA, plaintiff-side employment discrimination practitioner David E. Gottlieb argues that all of these questions should be resolved against arbitration.[27]

However, the key attribute of "super-statutes" is that conflicts with their scope, or even conflicts with their general policy are resolved in their favor. As a result, the key puzzle created by EFASASHA impacts the resolution of all of these questions: If a super-statute derives its breadth from being premised on a normative consensus, how are we to interpret its dialectical antithesis–a statute premised on a rejection of the super-statute's normative consensus? In the context of the FAA—if the FAA has been given predominance over other statutes because courts believe it has been substantiated by a consensus of vindicating parties' rights to have their agreements to arbitrate enforced by the courts, how are we to interpret a statute passed explicitly as a result of public rejection of this narrative?

This Note will analyze these puzzles through the lens of EFASASHA and the FAA. I propose that an amendment to a super-statute should receive a construction that goes beyond the four corners of the amendment's text to ensure that its core policy is achieved within the context of the statute as a whole, so long as three conditions are met which rebut Eskridge and Ferejohn's super-statute criteria within its context:

> An anti-super statute is an amendment or series of amendments that (1) seeks to *displace* a preexisting normative or institutional framework within a super-statute and (2) emerges from a *rejection* that over time has "stuck" in the public culture such that (3) the amendment and its institutional or normative rebuttal of the super-statute's principle has a broad effect on the law—including an effect beyond the four corners of the amendment.

First, I will explore the history of the Arbitration Act, its "super status" as applied by the Supreme Court, and the Court's implementation of that status

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25. *See, e.g.*, Collins & Alkman Prods. Co. v. Bldg. Sys., Inc., 58 F.3d 16, 20 (2d Cir. 1995).

26. *See, e.g.*, Parm v. Bluestem Brands, Inc., 898 F.3d 869, 874 (8th Cir. 2018).

27. David E. Gottlieb, *The Expansive Scope of the New Anti-Arbitration Law*, N.Y. L.J. (April 8, 2022), https://www.law.com/newyorklawjournal/2022/04/08/the-expansive-scope-of-new-anti-arbitration-law/ (arguing that § 402(a)'s "relates to" language suggests an expansive scope of application, including retaliation and any portion of the "continuing violation" associated with a hostile work environment).

through a "Freedom of contract" norm underpinning the federal policy favoring arbitration. I will turn to failure of significant opposition to this freedom of contract approach to dislodge the Court's super-statute approach to demonstrate why it is most helpful to analyze the FAA as a super-statute, even if it does not neatly fit Eskridge's criteria. Next, I will turn to the unrest leading to its subsequent amendment in the Ending Forced Arbitration of Sexual Harassment and Sexual Assault Act, including EFASASHA's history and emergence from the #MeToo movement. I will parse Eskridge's example "super-statutes" which have been amended under various approaches to construction taken by the Court—a "narrowing construction" approach, a "broad remedial construction" approach, and a "status-weakening" approach—and compare this context with the EFASASHA's amendment of the FAA. Although none of these scenarios are sufficiently analogous, they demonstrate how the context leading to a super-statute amendment can shape the construction given to ambiguous terms. I will thus turn to the "anti-super-statute approach" as the best construction to give the EFASASHA. I will then use this framework to explore several areas of ambiguity, and compare this with what courts have said regarding those areas in this first year: retroactive application, claim-splitting, and retaliation and animus-based sex harassment claims. Although this does not exhaust the interpretive challenges posed by the EFASASHA in the context of the FAA, it is aimed at providing a practical solution to courts and commentators which can be theoretically squared with the court's prior treatment of the FAA as preempting competing regimes.

The battles over the Federal Arbitration Act demonstrate another possible justification for the Eighth Circuit's turn-of-face in *Anderson*. In dissent, Judge Grasz called attention to EFASASHA, explaining that its passage may provide a public policy rationale for the court to deviate from its established standard and criticizing the court for not explicitly grappling with this question.[28]

I. THE BECOMING OF THE SUPER STATUTE

In this section, I will briefly explore the FAA's history through Eskridge's super-statute lens. I will describe the pre-existing practice of judicial invalidation of arbitration agreements which led to the FAA, and the normative standpoint reflected in the court's interpretation of the FAA. I will then turn to the opposition to this viewpoint, and the social momentum leading to EFASASHA.

A. Accepting the "Freedom of Contract" Hypothesis

The Supreme Court has given the FAA's principles an expansive reach in recent years,[29] and a growing body of case law suggests that compelled

28. Anderson v. Hansen, 47 F.4th 711, 719 (8th Cir. 2022) (Grasz, J., dissenting).

29. *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 255–56 (2009).

arbitration does not forfeit any substantive right from the litigants.[30] The court has gone further to craft unique contract rules for the FAA in light of its character as foundational law in order to further goals of speed and informality,[31] enforcement,[32] and contractual liberty.[33] Although these developments have received ample criticisms,[34] they must be understood in the context of the FAA's remedial purposes. The FAA was enacted in 1925 in response to courts' hostility towards enforcing arbitration agreements. Before the FAA, courts would often invalidate arbitration agreements *sua sponte*, refusing to hold parties to their agreements. Courts would even set aside arbitration judgments after the dispute had already been resolved in an arbitral forum. This approach was demonstrated in *Rison v. Moon*, where the Supreme Court of Virginia held that it was "well settled" that either party could withdraw from an agreement to arbitrate before the award was rendered.[35]

In the Supreme Court's accounting of the Federal Arbitration Act's history, this hostility towards the enforcement of arbitration agreements was a judicial disposition inherited from English practice.[36] In the English courts, doctrines such as ouster and revocability permitted arbitration clauses to be rendered nearly useless.[37] The FAA sought to curb this practice of applying special antiarbitration rules by placing arbitration "upon the same footing as other contract[] . . . " provisions.[38]

In rejecting this practice, the Supreme Court has remarked that a sort of freedom of contract norm underlays its views. The FAA's most expansive application began after the litigation explosion of the 1980s,[39] when a series of decisions erased several crucial limitations on the FAA's scope. This new approach was most palpable in *Mitsubishi*, where the court—rejecting its earlier view that statutory claims are not appropriate for arbitration[40]—opined that parties should be held to their end of the bargain when they agree to arbitrate:

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30. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26, 28 (1991); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985); Green Tree Fin. Corp.-Ala. v. Randolph, 121 S. Ct. 513, 521 (2000).

31. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344–45 (2011).

32. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001).

33. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219 (1985).

34. *See supra* note 20.

35. Rison v. Moon, 91 Va. 384 (Va. 1895); *see also* Headley v. Ætna Ins. Co., 202 Ala. 384 (Ala. 1918).

36. *Circuit City Stores, Inc.*, 532 U.S. at 111.

37. *See* Kill v. Hollister (1746) 95 Eng. Rep. 532, 532 (KB); *see also* Vynior's Case (1609) 77 Eng. Rep. 597, 598–99 (KB).

38. H.R. REP. NO. 68-96, at 1 (1924).

39. David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J. F. 1, 5 (2022).

40. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 59–60 (1974) ("[T]he federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause . . . and his cause of action under Title VII.").

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute . . . . It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration . . . . Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.[41]

In an exercise of *Lochner*-esque individualism,[42] the Court thus endorses freedom of contract as an animating principle of the FAA Congress envisioned. Applying this background principle, the court has thus compelled arbitration in cases involving Federal statutes such as Title VII, the Fair Labor Standards Act, and the Sherman Antitrust Act; it has even applied it to override the laws passed by state legislatures and the judgments reached by state courts.[43] As scholars have noted, the court's post-1980 application of the FAA has impliedly accepted that even the arbitration agreements contained in standard form contracts of adhesion had the same status as those contained in contracts negotiated by sophisticated parties.[44] This application is an extreme demonstration of the "colonizing effect" that super statutes typically have on other statutes.[45]

B. Conflict Surrounding the "Freedom of Contract" Hypothesis

This freedom of contract approach to the FAA has survived both harsh criticism from opponents as well as judicial challenges grounded in other statutes with opposing principles.

The freedom of contract hypothesis has sparked great animosity among anti-arbitration proponents who reject the premise that parties always exercise a free choice to arbitration when agreeing to an arbitration clause. Many commentators have discussed objections to compelling litigants to arbitrate, even though they agreed to be bound by an agreement to arbitrate in the first place. In many contractual relationships, certain terms are "adhesive" or non-negotiable due to an imbalance of power between the parties.[46] While market forces may allow consumers to filter out objectionable contract terms by

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41. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 613, 628 (1985).

42. *See* Lochner v. New York, 198 U.S. 45, 60 (1905) ("[I]t follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power."), *overruled by* West Coast Hotel Co v. Parrish, 300 U.S. 379 (1937).

43. Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013); *Mitsubishi Motors Corp.*, 473 U.S. at 628; Southland Corp. v. Keating, 465 U.S. 1, 31 (1984).

44. David L. Noll, *Arbitration Conflicts*, 103 MINN. L. REV. 665, 679–680 n.76 (2018) (citing Carnival Cruise Lines, Inv. v. Shute, 499 U.S. 585 (1991); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 531 (2012); CompuCredit Corp. v. Greenwood, 565 U.S. 95, 97 (2012); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336–37 (2011)).

45. Eskridge, Jr. & Ferejohn, *supra* note 12, at 1235.

46. *See* J. W. Looney & Anita K. Poole, *Adhesion Contracts, Bad Faith, and Economically Faulty Contracts*, 4 DRAKE J. AGRIC. L. 177 (1996); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 n.21 (1983); Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919).

shopping around for other sellers, a seller's monopoly or oligopoly status erases this equalizing force.

An even greater source of controversy lies in employment contracts. The economic reliance of employees on their earned income, many have argued, gives rise to a power imbalance relegating most terms of employment to "adhesive" status for most employees.[47] Other factors contributing to inequality of bargaining power in the employee-employer relationship include employees' unequal access to information;[48] the transaction costs of moving;[49] the monopoly status of large corporate employers who are dominant within the employee's industry; or the monopsony status of local employers.[50]

Such concerns are heightened when negotiating over an offer of employment—even for those employees who actually bargain over their terms of employment in the first place, and who are aware of the difference between arbitration and court, the employer receives a first mover advantage by drafting

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47. *See* Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579 (2009); David D. Barnhizer, *Inequality of Bargaining* Power, 76 U. COLO. L. REV. 139 (2005) (describing the dynamics of inequality of bargaining power, including as applied to standard form employment contracts and employment negotiation); Daniel D. Barnhizer, *Power, Inequality and the Bargain: The Role of Bargaining Power in the Law of Contract—Symposium Introduction*, 2006 MICH. ST. L. REV. 841 (2006); *Unequal Power: How the Assumption of Equal Bargaining Power in the Workplace Undermines Freedom, Fairness, and Democracy*, ECONOMIC POLICY INSTITUTE, https://www.epi.org/unequalpower/home/ (last visited Mar. 25, 2023). These concerns have been recognized by state legislatures attempting to equalize power relations, for example by decreasing informational asymmetry. *See, e.g.*, New York City Local Law 32 (requiring New York City employers to publish pay minimum and maximum salary offered in job advertisements), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3713951&GUID=E7B03ABA-8F42-4341-A0D2-50E2F95320CD&Options=&Search=; *New York State Enacts Pay Transparency Law*, GIBSON DUNN (Jan. 17, 2023), https://www.gibsondunn.com/new-york-state-enacts-pay-transparency-law/.

48. *Id.*; Benjamin Harris, *Information Is Power: Fostering Labor Market Competition Through Transparent Wages*, BROOKINGS INSTITUTE: THE HAMILTON PROJECT 4, 9 (February 2018) ("In the U.S. labor market, information on wages and compensation is decidedly asymmetric . . . . [S]tagnant wage growth over the past several decades can be attributed to a host of factors, including lack of competition in the labor market. Diminished competition itself could be due to a variety of factors, but lack of wage transparency appears to play a role in shifting bargaining power towards employers.").

49. Broadly defined, transaction costs refer to the cost of making any economic trade while participating in a market; transaction costs provide bargaining leverage to employers, and thus impede perfect competition in the labor market, by making it more costly for employees to leverage the most competitive offers against employers. *See* R. H. COASE, THE NATURE OF THE FIRM (1937) (expounding upon John Commons' transaction cost theory); MICHAEL C. MUNGER, TOMORROW 3.0: TRANSACTION COSTS AND THE SHARING ECONOMY (2018) (identifying search, information, and bargaining costs as a category of transaction costs called "triangulation costs"); Sherwin Rosen, *Transaction Costs and Internal Labor Markets*, J. L., ECON. & ORG. 53 (1988) (if factors such as transport costs did not exist, it would be "difficult to imagine why complete decentralization of labor markets would fail to achieve efficient allocations").

50. *See* COUNCIL OF ECONOMIC ADVISERS ISSUE BRIEF, *Labor Market Monopsony: Trends, Consequences, and Policy Responses* (October 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf.

employment contracts. Employees may very rationally fear souring their relationship with their employer or receiving threats or reprisal by bringing up an arbitration clause since it demonstrates that the employees are contemplating asserting their legal rights in a court of law.

These tensions came to the forefront in the recent case of *Epic Systems Corp. v. Lewis*.[51] In *Epic Systems*, the Supreme Court confronted a conflict between the National Labor Relations Act (NLRA)[52] and the FAA. The NLRA radically reshaped American labor relations, and has been recognized as having great weight as against other statutes in its own regard.[53] The NLRA's core provision guarantees American workers the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," and this collective right has been interpreted broadly by courts.[54] The FAA and NLRB were placed in conflict when arbitration clauses in individual employees' employment contracts clashed with their union's attempt to bargain on their behalf.[55] The Supreme Court resolved this conflict in favor of the FAA in a narrow 5-4 decision, explaining that, although the NLRA does explicitly protect employees' ability to engage in concerted activity for mutual aid or protection, as it did not mention class or collection action procedures, it could not be read to displace the Arbitration act.[56] In Justice Ginsburg's dissent, joined by Justices Breyer, Sotomayor, and Kagan, she noted the extreme imbalance in power between employer and employee which Congress sought to remedy through the NLRA.[57] *Epic Systems* is thus another example of the animating norm behind the FAA vetoing the policies embodied by other legislative enactments. Despite the social momentum leading to the NLRA and the social opposition to the Supreme Court's version of freedom of contract norms in settings where an imbalance of power exists between parties, the FAA continued to win out against such objections.

The failure of opposition to the FAA's supposed animating principle in other statutes and throughout society demonstrates that the Court is unlikely to reverse this interpretation of the Act. Although there is widespread disagreement with the Supreme Court's interpretation of the FAA's history and goals,[58] or the FAA's status as a "super statute" generally,[59] the court has dug

51. 138 S. Ct. 1612 (2018).

52. National Labor Relations Act, 29 U.S.C. § 157 (2012); Norris-LaGuardia Act, 29 U.S.C. § 102 (2012).

53. *See, e.g.*, J.I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944).

54. *See, e.g.*, Eastex, Inc. v. NLRB, 437 U.S. 556, 563–66 (1978).

55. *Epic Sys. Corp.*, 138 S. Ct. at 1619.

56. *Id.* at 1628–29.

57. *Id.* at 1634 (Ginsburg, J., dissenting).

58. *See, e.g.*, Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115 (2016); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 125–30 (2001) (Stevens, J., dissenting).

59. *See, e.g.*, David L. Noll, *Arbitration Conflicts*, 103 MINN. L. REV. 665, 671–72 (2018) ("The FAA is not, on any accepted theory of statutory interpretation, a "super-statute" that occupies a special position in federal law.").

its heels in hard and seems unwilling to budge.[60] Moreover, if one accepts "super statutes" as evolutive, common law instruments, the court's exposition of the FAA's values in new and unanticipated contexts is no more objectionable than its similar application of the Sherman Act.[61] Given the approach that has been taken by the Supreme Court, it is unlikely that the extraordinary breadth of the FAA will change course absent legislative intervention.

It is for this reason that EFASASHA poses a unique interpretive challenge. If we take the FAA's ability to displace the policy embodied in *other* law as a given (which seems to be the most useful and realistic approach), the interpretation of a statute passed to curb the FAA itself leaves a variety of approaches open to the court.

II. SUPER STATUTE AND ANTITHESIS

In this section, I explore various approaches to amendments to super-statutes such as the FAA. First, I will discuss the history behind EFASASHA's passage to demonstrate the policies it vindicates. Next, I will explore various approaches to the interpretation of amendments to super statutes, including contexts in which they have been given narrowing and sweeping constructions, with the goal of shedding light on how EFASASHA should be construed. Because EFASASHA is the reaction of public outrage towards the normative foundations of the FAA, I argue that it garners a particularly broad scope as a public rejection of the normative consensus upon which the super-statute was originally premised.

A. The Passage of EFASASHA

The power imbalance between employer and employee which has caused public outcry to the FAA's application is most fraught in the context of sexual harassment.[62] It is not surprising that compelled arbitration has encountered its most aggressive opposition in the context of workplace sexual harassment. As already explained, the inherent imbalance of power between employers and employees, along with the adhesive nature of many employment contracts, creates little choice for the vast majority of employees but to sign binding arbitration agreements. And aside from studies showing that arbitration tends

60. *See, e.g.*, *Epic Sys. Corp.*, 138 S. Ct. 1612.

61. Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731-32 (1988). ("The term 'restraint of trade' in the statute, like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances. The changing content of the term "restraint of trade" was well recognized at the time the Sherman Act was enacted. . . . The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.").

62. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 2016); LAURIE COLLIER HILLSTROM, THE #METOO MOVEMENT 85, 115 (Bloomsbury Publishing USA, 2018).

to favor employers and result in lower damages for employees,[63] many litigants find value in the opportunity to air their grievances in court, rather than being forced to do so in a private arbitral forum subject to confidentiality requirements.[64] This practice has a broad impact, as over sixty million American workers are subject to mandatory arbitration procedures.[65]

The employer-employee power imbalance has been recognized by the Supreme Court in several cases as having importance in the area of sexual harassment, in which the court extended the text of Title VII to apply to workplace sexual harassment.[66] The public rallied around this issue at the height of the #MeToo movement, which gained steam in response to the public exposé of Harvey Weinstein's sexual abuse and resulted in a wave of reforms in industry and at the state level.[67] The #MeToo movement in 2017 prompted lawmakers to focus on legal reform related to sexual assault and sexual harassment in the workplace in the ensuing years.[68] One article describes the social crisis recognized through the #MeToo movement has served as an "inflection point" in our thinking about the law.[69]

An early reaction to this #MeToo movement was the Member and Employee Training and Oversight on Congress Act (ME TOO Congress Act) on November 15, 2017. This bipartisan bill amended the Congressional Accountability Act of 1995 by ensuring that sexual harassment complaints within the legislative branch, rather than being confidential and time-

63. Employees in mandatory arbitration win only about a fifth of the time (21.4 percent), whereas they win over one third (36.4%) of the time in federal courts. Ross Eisenbrey, *Mandatory Arbitration Unfairly Tilts the Legal System in Favor of Corporations and Employers*, ECON. POL'Y INST. (Jan. 28, 2016), https://www.epi.org/publication/mandatory-arbitration-unfairly-tilts-the-legal-system/ (citing Katherine V. W. Stone & Alexander J. S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECON. POL'Y INST. (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/.).

64. The confidentiality of arbitration has been touted as a core benefit of arbitration; however, compelled arbitration allows corporate entities to avoid publicity without litigants being afforded the opportunity to speak out. *See* Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth* 54 U. KAN. L. REV. 1255 (2006) (criticizing the supposed virtues of confidentiality in arbitration).

65. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Apr. 8, 2018), 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/.

66. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (Title VII "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women in employment'" (citation omitted); Harris v. ForkLift Sys., Inc., 510 U.S. 17, 21 (1993).

67. *See* Matthew DeLange, *Arbitration or Abrogation: Title VII Sexual Harassment Claims Should Not be Subjected to Arbitration Proceedings*, 23 J. GENDER, RACE & JUST. 227, 240–41 (2020); Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories.

68. *See* Terry Morehead Dworkin & Cindy A. Schipani, *The Times They Are A-Changin'?: #MeToo and Our Movement Forward*, 55 U. MICH. J. L. REFORM 365, 380, 400–02 (2022); HILLSTROM, *supra* note 62, at 1–5.

69. Dworkin & Schipani, *supra* note 68, at 397–401.

consuming, ensured that complaints could only take up to 180 days to be filed, would allow staffers to transfer to different departments without losing their jobs upon request, and would make settlements and settlement amounts public information rather than confidential. Although the bill was first introduced in 2017 by Senators Kirsten E. Gillibrand and Lindsey Graham, it would not pass for several years.

EFASASHA was introduced in the United States House of Representatives on July 7, 2021. It was passed on February 7, 2022, with an overwhelming vote of 335 to 97; although all 222 Democratic Representatives voted unanimously in its favor, a majority of Republicans still supported the bill (113 votes to 97). Similarly, the Amendment passed by voice vote in the Senate on February 10, 2022. The Bill was presented to President Biden on March 3, 2022, and signed on March 3, 2022.[70]

The legislative history of EFASASHA demonstrates its core purpose of allowing victims of workplace sexual assault to have a voice, but Senators scrapped over its scope. In his statement of support for the bill, Senator Ernst explained that the bill "provides survivors of sexual assault and sexual harassment with a choice between litigation and arbitration so their voices will not be silenced."[71] Still, Senator Ernst continued, the limited nature of the bill should be made "crystal clear:"

> [T]his bill should not be the catalyst for destroying predispute arbitration agreements in all employment matters . . . . Harassment and assault allegations are very serious and should stand on their own. The language of this bill should be narrowly interpreted . . . . If an employment agreement contains a predispute arbitration clause and a sexual assault or harassment claim is brought forward in conjunction with another employment claim and the assault or harassment claim is later dismissed, a court should remand the other claim back to the arbitration system under this bill.[72]

Likewise, although Senator Graham agreed with EFASASHA's purpose of preventing employers from hiding sexual harassment or assault allegations and explained that "[t]he light of day in a courtroom is what we are hoping for," he expressed reservations about the bill's scope: "I hope people won't game the system."[73]

Senator Durbin also focused on EFASASHA's role in preventing victims of sexual assault from "being forced into a secret arbitration proceeding where the deck is stacked against them."[74] Senator Durbin also drew attention to the story of Gretchen Carlson in her case against FOX News, as Carlson had been

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70. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, 9 U.S.C. § 401.

71. S. REP. NO. 118-624, at 624–25 (Feb. 10, 2022) (Statement of Sen. Ernst).

72. *Id.* at 625.

73. *Id.* at 625 (Statement of Sen. Graham).

74. *Id.* at 625–26 (Statement of Sen. Durbin).

one of the bill's most visible advocates in past years.[75] Although Senator Durbin agreed that "[t]he bill is clear on this point" of not voiding unrelated claims, "the bill should not be interpreted to require that if a sexual assault or harassment claim is brought forward in conjunction with another related claim and the assault or harassment claim is later dismissed, the court must remand the other claim back to forced arbitration. That is not what the bill requires."[76] Senator Durbin directly addressed other types of related claims: "[i]f there were such a requirement, it would have the undesirable effect of hiding corporate behavior such as retaliation and discrimination against women who report assaults and harassment."[77]

Senator Gillibrand echoed Senator Durbin's emphasis on the bill's "related to" language:

> The bill plainly reads, which is very relevant to Senator Ernst's concerns, that only disputes that relate to sexual assault or harassment conduct can escape the forced arbitration clauses. "That relate to" is in the text . . . . But . . . it is essential that all the claims related to the sexual assault or harassment can be adjudicated at one time for the specific purpose that Senator Ernst is well aware of. We don't want to have to make a sexual assault or harassment victim relive that experience in multiple jurisdictions.[78]

Senator Schumer hinted at the issue of retroactivity, explaining that "[t]he good news about this legislation is all the clauses that people already signed in their employment contracts, even when they didn't know about it, will no longer be valid."[79]

In her signing statement, Vice President Kamala Harris also emphasized the breadth of the bill: "The legislation the President will sign today will end forced arbitration in all cases of sexual abuse. (Applause.) And—and almost equally as important, *it will apply retroactively*—(applause)—invalidating every one of these agreements, no matter when they were entered into."[80] Harris further emphasized the broad consensus achieved in passing EFASASHA: "These leaders—they saw clearly: This is not a partisan issue. This is not about Republicans or Democrats. This is about right and wrong."[81]

In sum, the #MeToo Movement marshaled public consensus towards sexual harassment and assault in the workplace specifically. It was the view of

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75. *See Remarks by Vice President Harris at Signing of H.R. 4445, "Ending the Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021"*, THE WHITE HOUSE (Mar. 3, 2022, 5:42 P.M. EST), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/03/remarks-by-vice-president-harris-at-signing-of-h-r-4445-ending-the-forced-arbitration-of-sexual-assault-and-sexual-harassment-act-of-2021/ ("And now I will now welcome to the podium . . . .").

76. S. REP. NO. 118-624, at 626 (Feb. 10, 2022) (Statement of Sen. Durbin).

77. *Id.*

78. *Id.* at 627 (Statement of Sen. Gillibrand).

79. *Id.* at 628 (Statement of Sen. Schumer).

80. *Remarks by Vice President Harris at Signing of H.R. 4445*, *supra* note 75 (emphasis added).

81. *Id.*

the EFASASHA Congress, based on the lessons of #MeToo, that the freedom to air one's sexual assault or harassment grievances in open court is a crucial public policy goal in and of itself which should trump the "freedom of contract" idea. But beyond this core premise, the EFASASHA Congress seemed split as to how far the statute would reach.

Beyond posing simple interpretive challenges, the scope of EFASASHA also poses challenges because it exists against the backdrop of the FAA. While the Court's approach to other super statute amendments is illuminating, EFASASHA poses a somewhat unique issue.

B. Approaches to Interpreting Super Statute Amendments

This section further develops amendments to three "super-statutes" identified by Eskridge and Ferejohn in their seminal article: The Sherman Antitrust Act, Title VII, and the Endangered Species Act. While none of these statutes directly parallel EFASASHA, they each reveal how the Super-Statute concept can be applied to the statutory amendment context.

1. The Sherman Act and the Narrow Carve-Out Construction

The first super-statute amendment construction I identify is a "narrow carve-out construction." Where a super-statute is amended, but neither public sentiment nor the purpose of the amendment rejects the core value of the super-statute, the scope of that amendment should receive a narrowing construction. The Sherman Antitrust Act[82] is labeled as a paradigm super statute case study in Eskridge and Ferejohn's seminal article on the subject.[83] The Miller-Tydings Act of 1937[84] is a case in point. Passed after twenty-three years of struggle by interest groups, the Miller-Tydings Act authorized anticompetitive practices by authorizing states to permit resale price maintenance contracts.[85] In *Schwegmann Bros. v. Calvert Distillers Corp.*, the Supreme Court invalidated a Louisiana law passed in furtherance of the exemption because it "offends the statutory scheme" of the Sherman Act.[86] While the Miller-Tydings Act exempted only "contracts or agreements prescribing minimum prices for the resale," the Louisiana law permitted the fixing of maximum as well as minimum prices.[87] This difference was significant enough for the court to reject Louisiana's law because "[t]he contrary conclusion would have a vast and devastating effect on Sherman Act policies."[88] Thus, despite a series of ill-fated and swiftly overturned missteps by the Supreme Court,[89] cases like

82. 15 U.S.C. §§ 1–2 (1994).

83. Eskridge, Jr. & Ferejohn, *supra* note 12, at 1231.

84. 50 Stat. 693 (1937) (codified as amended at 15 U.S.C. § 1).

85. Harvard Law Review Association, *Resale Price Maintenance: The Miller-Tydings Enabling Act*, 51 HARV. L. REV. 336 (1937).

86. 341 U.S. 384, 388 (1951).

87. *Id.* at 387–88.

88. *Id.* at 389.

89. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895); Swift & Co. v. United States, 196 U.S. 375, 391–93 (1905).

Schwegmann Bros. demonstrate an approach which the Court has since clearly proclaimed: that "exemptions from the antitrust laws are to be narrowly construed."[90] The McCarran-Ferguson Act of 1945,[91] exempting insurance and leaving that industry to state regulation, and the McGuire Act,[92] have had similar fates.

The reasoning of *Schwegmann* and its ilk[93] seem to suggest that narrowing constructions should be given to amendments that conflict with the underlying normative consensus of super-statutes like the Sherman Act. Eskridge describes this episode by contending that the Court "interpreted the amendments to minimize rent-seeking and to fit possibly valid market-based reasons for alternative regulatory schemes," meaning that "firms that engage in predatory conduct have not usually been able to hide behind statutory exemptions."[94] Thus, textual canons such as *inclusio unius* would only apply where new items on a list would derogate from the principle or policy that is the baseline for that statute.[95] However, Sherman Act exceptions were not passed as a rejection of the Sherman Act's free trade aspirations, so it made sense to give them a narrowing construction. In other words, the surrounding context of the statute implies heavily that the statute's core tenet of promoting free trade remains intact, so one would assume that Congress has not altered this statutory backdrop. In this context, a "narrow carve-out construction" seems most appropriate.

The Sherman Antitrust Act at first appears to promise a parallel example of giving narrowing constructions to amendments like EFASASHA which strike at a statute's core. Just like the Sherman Act amendments undermined its core principle of competition and free trade, EFASASHA undermines the FAA's core principle of placing arbitration agreements on equal footing with other agreements by making them voidable at will. This argument would conclude that, in both cases, the amendments should be interpreted narrowly.

However, the Sherman Act amendments were not the result of public deliberation rejecting the Sherman Act's principles within certain areas. The Sherman Act amendments were widely criticized as being advanced by interest groups who merely sought to evade the Sherman Act, and it remained clear that they did not target or undermine its core values. In contrast, EFASASHA's legislative history demonstrates how it carries a broader message of public consensus against applying the FAA where it would compel sexual harassment.

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90. Grp. Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231–32 (1979).

91. 59 Stat. 33, 15 U.S.C. §§ 1011–1015 (1994); Grp. Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231–32 (1979).

92. United States v. McKesson & Robbins, Inc., 351 U.S. 305, 316 (1956).

93. For other examples of this approach to the Sherman Act, see *id.*; Fed. Mar. Comm'n v. Seatrain Lines, Inc., 411 U.S. 726 (1973); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Silver v. N.Y. Stock Exchange, 373 U.S. 341 (1963); United States v. Nat'l Ass'n of Secs. Dealers, Inc., 422 U.S. 694 (1975).

94. Eskridge, Jr. & Ferejohn, *supra* note 12, at 1233–34.

95. Case law demonstrates this phenomenon in the context of Title VII. *Compare, e.g.*, Hishon v. King & Spalding, 467 U.S. 69, 77–78 (1984), *with* United Steelworkers Am. v. Weber, 443 U.S. 193, 202–04 (1979).

As discussed earlier, in the context of workplace sexual harassment, where public rejection of the FAA's freedom of contract hypothesis is at its most palpable, public outrage has boiled over into legislation. The core "freedom of contract" rationale appended to the FAA by the Supreme Court has been utterly rejected through public debate and deliberation in this particular context. Like other remedial statutes, it would seem obvious that the Supreme Court should give this amendment a broad application.

2. Title VII and the Broad Remedial Construction

The second kind of interpretation I identify is a "broad remedial construction;" where Congress amends a super-statute because the Court misinterpreted or misapplied the fundamental value conveyed through the statute, that amendment should receive a broad construction and should be read as informing the statute's "correct" reading. The PDA represents an example of a broad interpretation given to a super statute amendment. After the Supreme Court's ruling that pregnancy-based classifications do not necessarily violate Title VII's prohibition on sex discrimination in *Geduldig v. Aiello*,[96] the Pregnancy Discrimination Act overrode this determination just four years later in 1978.[97] The Court then applied a very broad interpretation to the PDA in subsequent cases.[98]

Because the PDA is harmonious with the anti-discrimination norm embodied by Title VII, its broad application makes sense as guiding the development of the statute rather than grating against its normative aspirations. The Court took this interpretation in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, explaining that "[t]he Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex."[99] The *Newport* Court's description of the PDA demonstrates that it viewed the PDA as correcting what the meaning of Title VII had always been, rather than altering its fundamental character.

At the same time, EFASASHA's history does not resemble that of the PDA. The PDA's core function of correcting the Supreme Court's decisions to realign the law with the antidiscrimination statutes' core purpose is fundamentally different than the more adversarial approach taken by EFASASHA. But EFASASHA does not reject a particular interpretation of the FAA. Rather than reshaping or guiding the development of the FAA's norms, EFASASHA rejects them outright within a limited area of application.

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96. 417 U.S. 484, 496 n.20 (1974); Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

97. Pub. L. No. 95–555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (1994)).

98. United Auto. Workers v. Johnson Controls Inc., 499 U.S. 187, 191 (1991); Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987); Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 684 (1983).

99. 462 U.S. 669, 684 (1983).

3. The Endangered Species Act and the Status-Weakening Construction

The purpose of calling a super-statute a super-statute is that this designation signifies how the public policy behind the statute trumps other statutes. Where subsequent amendments or acts, undermine the very core premise of a super-statute, I call for a "status-weakening construction;" the statute carries less breadth with it as interpreted against the policies in other statutes. The Endangered Species Act[100] demonstrates a super-statute that was subsequently undermined by further Amendments. The Endangered Species Act's broad aspirational principle of biodiversity, proclaimed in section 7 of the Act,[101] was demonstrated in several cases by the Rehnquist Court.[102] Although the Court first interpreted the Act "to halt and reverse the trend toward species extinction—whatever the cost,"[103] various amendments have loosened its strict requirements,[104] and subsequent decisions by the court have interpreted the act more narrowly,[105] most recently in *National Association of Home Builders v. Defenders of Wildlife*,[106] in which a conflict between the ESA and the Clean Water Act was read to favor the Clean Water Act.

Yet, the FAA does not directly resemble the ESA's history. While the ESA as a whole received a slightly less broad application after its amendments, EFASASHA carries a purposefully narrow application. The public outrage and deliberation behind EFASASHA do not go so far as Justice Ginsburg's dissent in *Epic Systems v. Lewis*, and are instead idiosyncratic to the sexual assault context. As evidenced by the Legislative History of the Act, there seemed to be a murky consensus that the FAA's default policy should *not* be undermined by EFASASHA. Although amendments were introduced contemporaneously with EFASASHA which would apply it to all employment contracts, this amendment failed to garner the wide bipartisan support accomplished by EFASASHA.

Thus, EFASASHA by no means provides us with a basis to argue that the FAA is no longer deeply embedded and adhered to, nor does it fully undermine precedents privileging the FAA above other statutes.[107] Although it may

100. Pub L. No. 93-205, 87 Stat. 884 (codified as amended in 16 U.S.C. (1994)).

101. 16 U.S.C. §§ 1533(a)(2) ("Each Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical.").

102. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995); Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978).

103. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978).

104. Endangered Species Act Amendments of 1978, Pub. L. No. 95–632, § 3; CIVIL & ENVIRONMENTAL CONSULTANTS, USFWS AND NMFS APPROVE CHANGES TO IMPLEMENTATION OF ENDANGERED SPECIES ACT (Oct. 16, 2019), https://www.cecinc.com/blog/2019/10/16/usfws-and-nmfs-approve-changes-to-implementation-of-endangered-species-act/ (describing Trump Administration's changes to the ESA).

105. Lujan v. Def's. of Wildlife, 504 U.S. 555 (1992); Bennett v. Spear, 520 U.S. 154 (1997).

106. 551 U.S. 644 (2007).

107. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 619–20 (1985).

suggest that the Court should not privilege the FAA over Title VII, and return to its approach in *Alexander v. Gardner-Denver Co*,[108] given how strongly embedded the federal policy favoring arbitration is, this approach is unlikely to garner support of the lower courts absent an amendment or Supreme Court intervention.

C. Analyzing EFASASHA: The "Anti-Super Statute"

These case studies provide three examples to build off of for our approach to analyzing EFASASHA. However, neither fully captures the dynamics leading to EFASASHA. Because I conclude that EFASASHA meets Eskridge and Ferejohn's criteria to qualify as a super-statute *in and of itself*, I conclude that the EFASASHA should have a broad construction as against the FAA—an unprecedented move in the realm of arbitration.

Although each of these frameworks fails to describe EFASASHA, each bears enough similarity to inform how it should be applied. First, although the Narrow Carve-Out Constructions embodied within the Sherman Act are not analogous to EFASASHA, they do teach us that the norms embedded within a super-statute should impact how it is construed. Relatedly, the Broad Remedial Construction given to the PDA does not apply to EFASASHA because EFASASHA is fundamentally opposed to the overriding freedom of contract norm underlying the FAA; still, it teaches us that when Congress lashes out against the application of norms within a super-statute, it should have a corresponding impact on the scope of the law. And, although the legislative history of EFASASHA clearly shows that it is not meant to be given a Status-Weakening Construction as applied to all FAA applications, the idea of "status-weakening" does carry weight within the realm of sexual harassment leading to the #MeToo movement. Combined, this context suggests that the public's outrage at compelled arbitration for sexual harassment—and its rejection of the freedom of contract hypothesis as applied to sexual harassment—means that this aim should override the freedom of contract norm where the two conflict. There is no more authentic way to account for the fact that the normative premise of EFASASHA is fundamentally irreconcilable with that of the FAA.

I deem this last approach the "Anti-Super Statute Construction." Unlike the Status-Weakening Construction, this Construction only rejects the premise of the Statute in limited contexts—but where it does so, it does so resoundingly. This approach to construction should apply to any statutory amendment which falls short of a repeal, but meets Eskridge and Ferejohn's super-statute criteria:

> A super-statute is a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2)

108. 415 U.S. 36 (1974) ("[T]he federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause . . . and his cause of action under Title VII."), *overruled by* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23, 35 (1991); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2007) (interpreting the savings clause of the FAA narrowly to exclude only transportation workers such as seamen, railroad workers, and other transportation workers).

> over time does "stick" in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute.[109]

Tweaking this framework slightly, we have criteria for establishing when an amendment should receive an Anti-Super Statute Construction:

> An anti-super statute is an amendment or series of amendments that (1) seeks to *displace* a preexisting normative or institutional framework within a super-statute and (2) emerges from a *rejection* that over time has "stuck" in the public culture such that (3) the amendment and its institutional or normative rebuttal of the super-statute's principle has a broad effect on the law—including an effect beyond the four corners of the amendment.

EFASASHA bears this out point-by-point. First, by voiding the freedom of contract idea entirely, EFASASHA seeks to displace the normative and institutional freedom of contract framework within the sexual harassment context. By its literal terms, it allows the victims of sexual harassment to void a contract at will. This is a recognition that—at least within the limited area of sexual harassment—the freedom of contract hypothesis is an utter fiction that does not apply to adhesive contracts formed in the context of an inequality of bargaining power. As such, EFASASHA's policy is a clear rejection of the Supreme Court's hypothesis for the FAA's animating principles.

Second, the values of the #MeToo Movement have indisputably stuck in the public culture over time. The core value that has stuck is simple—the public should commit to opposing the opportunity for sexual abuse that arises from the power imbalance inherent in the employer-employee relationship; the idea that these parties contract and work on equal footing is simply wrong. EFASASHA only resulted after several years of public reckoning with the issue of workplace sexual harassment, beginning in 2017 and spreading across diverse industries and fields.[110] The broad bipartisan support of EFASASHA shows how overwhelmingly this public consensus has been accepted.

Third, Eskridge and Ferejohn note that super-statutes carry weight beyond the four corners of the statute where the policy they embody is threatened by other statutes. EFASASHA should receive a similar construction—where other parts of the FAA threaten the ability of sexual harassment victims to access the justice system, those parts should be interpreted in a way that avoids denigrating this core principle, even if they are not commanded by the literal terms of the amendment.

III. APPLYING ANTI-SUPER STATUTE THEORY

Under an Anti-Super Statute reading of EFASASHA, a construction should be given to the FAA as a whole which does not contravene EFASASHA's core goals, even if that construction reaches beyond the four

109. Eskridge, Jr. & Ferejohn, *supra* note 12, at 1216.

110. LAURIE COLLIER HILLSTROM, THE #METOO MOVEMENT 1–5 (2019).

corners of the amendment itself. This groundwork promises to be instructive for courts and practitioners given the number of theoretical issues to untangle before construing the EFASASHA's scope. As Eskridge notes, the already complex phenomenon of super statutes becomes even more complex when conflicts among them must be resolved.[111] Adapting EFASASHA to the FAA—against the backdrop of conflict between the FAA and Title VII—presents an especially complex challenge. This approach may begin to answer those questions.

In this section, I will analyze how the EFASASHA's Anti-Super Statute status should govern its construction in several problem areas. In each section, I will compare this theoretical application with the approaches taken by courts. First, I will focus on the issue of retroactive application. Second, I will focus on the issue of claim-splitting. Third, I will focus on two issues within the "relating to" area: retaliation, and animus-based sexual harassment.[112]

A. Retroactive Application

Because EFASASHA has been in effect for just over a year as of the writing of this article, the issue of retroactive application makes up the majority of commentary by courts.[113] EFASASHA's text directly instructs that it applies to a "dispute or claim that arises or accrues on or after the date of enactment of this act," March 3, 2022.[114] Although the issue of retroactive application will only be useful to courts and practitioners for the coming years, the approaches courts have taken on the issue of retroactivity may provide a limited window into courts' approaches to construing the EFASASHA in years to come.

An Anti-Super Statute approach to EFASASHA leads one to support a reading that defines a dispute or claim as the filing of a lawsuit rather than the injuries leading to a claim. As discussed earlier, one of the key rejections to the freedom of contract hypothesis as applied to sexual harassment was the fact that arbitration could prevent sexual assault and harassment victims from telling their stories in open court. The #MeToo Movement prompting EFASASHA was a movement defined by the public coming together to support sexual assault and harassment victims when they came forward with their stories of harassment, and the outrage at victims being forced into silence or prevented from telling their stories was mentioned multiple times in the legislative history of EFASASHA. Reading EFASASHA to bar compelled arbitration so long as a *claim* has been filed after its passage would encourage victims who would otherwise be discouraged from coming forward due to compelled arbitration

111. Eskridge, Jr. & Ferejohn, *supra* note 12, at 1256–57.

112. This case survey is current as of April 2023.

113. *See* Yost v. Everyrealm, 2023 U.S. Dist. LEXIS 31246 (S.D.N.Y. Feb. 24, 2023) ("Yost, via her amici, argues that even an implausibly pled such [sexual harassment] claim brings a case within the EFAA, so long as the claim was not sanctionably frivolous . . . . This question appears to be one of first impression. The case law to address the EFAA has overwhelmingly addressed a different question: whether the plaintiffs' claims had accrued before the EFAA's effective date.").

114. 9 U.S.C. § 401(4).

provisions to share their stories. However, the majority of courts have applied ordinary principles of retroactivity to find that sexual assault or harassment must occur after EFASASHA's enactment for EFASASHA to prohibit compelled arbitration; likewise, only a minority of courts have found that EFASASHA represents public policy which renders compelled arbitration of sexual assault and harassment claims unenforceable.

Courts are unanimous in applying this text to claims filed before the act's passage.[115] Courts have also rejected plaintiffs' claims that the retroactivity provision bars any motions to compel arbitration filed after March 3, 2022, even if the suit was filed before March 3, 2022.[116] However, there remains some ambiguity as to whether the underlying acts giving rise to the injury (i.e., the sexual assault or harassment) must take place after March 3, 2022, or whether the plaintiff's suit must be filed after March 3, 2022, for EFASASHA to prevent compelled arbitration. Because EFASASHA refers to sexual assault or harassment "as defined by Federal and state law," every Federal and state court to have explicitly held on the issue has found that the phrase "dispute or claim" refers to the underlying injury as determined by the cause of action substantiating the sexual assault or harassment action; for EFASASHA to apply, that claim must have "accrued" after March 3, 2022.[117] Notably, before addressing the issue of retroactivity, some of these courts refers to the FAA's Federal policy favoring arbitration which prompts courts to construe limitations to the FAA strictly.[118] Although no court has explicitly applied this rationale to

115. *See, e.g.*, Gibson v. Giles Chem. Corp., No. 1:20-cv-394-MOC-WCM, 2022 U.S. Dist. LEXIS 82182 (W.D.N.C. May 6, 2022); Tantaros v. Fox News Network, LLC, No. 1:19-cv-7131 (ALC), 2022 U.S. Dist. LEXIS 179393 n.1 (S.D.N.Y. Sep. 30, 2022); Cholakian v. Hospice, 2022 Cal. Super. LEXIS 77415.

116. Rivas v. International Coffee & Tea, 2022 Cal. Super. LEXIS 36735 ("The accrual date of a dispute does not depend on the hearing dates of specific motions within the lawsuit"); Samano v. So-Cal Dominoids, 2022 Cal. Super. LEXIS 53830; Steinberg v. Capgemini Am., Inc., No. 22-489, 2022 U.S. Dist. LEXIS 146014 (E.D. Pa. Aug. 15, 2022).

117. Simmons v. Alpha Grp. Mktg., 2022 Cal. Super. LEXIS 63773, at *7–8 (Los Angeles Cnty. Super. Ct. Oct. 14, 2022); Marshall v. Hum. Servs. of Se. Tex., No. 1:21-CV-529, 2023 U.S. Dist. LEXIS 20910, at *5–6 (E.D. Tex. Feb. 7, 2023); Avitia v. Heerdt, 2022 Cal. Super. LEXIS 48194, at *5–8 (Los Angeles Cnty Super. Ct. Aug. 26, 2022); Saidwal v. Flagship, No. 19-cv-08211-JSW, 2022 U.S. Dist. LEXIS 219884, at *2–3 (N.D. Cal. Dec. 6, 2022); Zinsky v. Russin, No. 2:22-cv-547, at *8–12, 2022 U.S. Dist. LEXIS 130115 (W.D. Pa. July 22, 2022); Dixon v. Dollar Tree Stores, Inc., No. 22-CV-131S, 2023 U.S. Dist. LEXIS 37974, at *16–17 (W.D.N.Y. Mar. 7, 2023); Walters v. Starbucks Corp., No. 22cv1907 (DLC), 2022 U.S. Dist. LEXIS 153228, at *6–9 (S.D.N.Y. Aug. 25, 2022) (Each of Walters' claims accrued at the time she experienced discrimination, harassment, or retaliation, and at the latest by December of 2021, when she left her job.); Torres v. Invitae Corp., 2022 Cal. Super. LEXIS 71876, at *3–4 (Orange Cnty. Super. Ct. Oct. 31, 2022) (citing Walters v. Starbucks (citation omitted)); Gomez v. Beauty Sys. Grp. LLC, 2022 Cal. Super. LEXIS 77052, at *5–6 (Los Angeles Super. Ct. Dec. 19, 2022); Newcombe-Dierl v. Amgen, No. CV 22-2155-DMG (MRWx), 2022 U.S. Dist. LEXIS 140079, at *12–14 (C.D. Cal. May 26, 2022); Zuluaga v. Altice United States, No. A-2265-21, 2022 N.J. Super. Unpub. LEXIS 2356, at *14–16 (N.J. Super. Ct. App. Div. Nov. 29, 2022).

118. Marshall, 2023 U.S. Dist. LEXIS 20910, at *3; Dixon, 2023 U.S. Dist. LEXIS 37974, at *7; Walters, 2022 U.S. Dist. LEXIS 37974, at *5.

the EFASASHA's retroactivity, these citations demonstrate that the impact of the FAA's super-status on the EFASASHA's scope is by no means obvious to these courts.

Several courts denying that the EFASASHA prohibits compelled arbitration for suits filed after March 3 have also explicitly refused to consider countervailing legislative history evidence from the statements of Senators Gillibrand and Schumer and the signing statement of Kamala Harris.[119] One court considering Harris' statement on retroactivity notes that it refers to arbitration agreements signed before the law went into effect, *not* assault and harassment occurring before March 3, 2022.[120]

Still, there is some reason to believe that the issue of whether retroactivity is limited to filing is still in flux. Some courts have explicitly pointed to this issue of whether EFASASHA bars compelled arbitration of claims filed after March 3, 2022, but have declined to reach this issue where plaintiffs' claims would be barred even under the more generous date.[121] In its discussion of this issue, the California Court of Appeals notes one treatise claiming that the act's note "merely clarif[ies] that the Act is inapplicable to claims already filed in arbitration."[122] In contrast, no cases have been decided on the issue of retroactive application to contracts signed before the act was passed for sexual assault or harassment occurring after the act, dicta strongly supports that the act is retroactive in this sense.[123]

Courts have also considered the issue raised by Judge Grasz in Anderson: whether EFASASHA creates a public policy rationale for declining to compel arbitration as a matter of contract law. All courts have declined this

119. Zinsky v. Russin, No. 2:22-cv-547, 2022 U.S. Dist. LEXIS 130115 (W.D. Pa. July 22, 2022); Marshall v. Human Servs. of Se. Tex., No. 1:21-CV-529, 2023 U.S. Dist. LEXIS 20910 (E.D. Tex. Feb. 7, 2023).

120. Walters v. Starbucks Corp., No. 22cv1907 (DLC), 2022 U.S. Dist. LEXIS 153228 (S.D.N.Y. Aug. 25, 2022).

121. Steinberg v. Capgemini Am., Inc., No. 22-489, 2022 U.S. Dist. LEXIS 146014 n.2 (E.D. Pa. Aug. 15, 2022); Murrey v. Superior Court, 87 Cal. App. 5th 1223 (2023); Rourke v. Herr Foods Inc., No. A-2567-21, 2022 N.J. Super. Unpub. LEXIS 1970 (Super. Ct. App. Div. Oct. 26, 2022) ("[P]laintiff's sexual harassment claim arose no later than December 9, 2021, the date he filed his complaint"); Ellis v. Prime Healthcare Ltd. Liab. Co., 2022 Cal. Super. LEXIS 41081 ("Since Plaintiff filed her Complaint before March 03, 2022, the Act does not apply to Plaintiff's claims."); Woodruff v. Dollar Gen. Corp., No. 21-1705-GBW, 2022 U.S. Dist. LEXIS 227578 (D. Del. Dec. 19, 2022); Silverman v. DiscGenics, Inc., No. 2:22-cv-00354-JNP-DAO, 2023 U.S. Dist. LEXIS 42753 (D. Utah Mar. 13, 2023).

122. Murrey v. Superior Court, 87 Cal. App. 5th 1223 (2023). *See also* Farley, *Ending Forced Arbitration: Understanding the New Federal Law That Prohibits Mandatory Arbitration in Matters of Sexual Assault or Harassment*, 79 BENCH & BAR MINN. 26, 29 (2022); *Remarks by Vice President Harris at Signing of H.R. 4445*, supra note 75.

123. Walters v. Starbucks Corp., No. 22cv1907 (DLC), 2022 U.S. Dist. LEXIS 153228 (S.D.N.Y. Aug. 25, 2022).

invitation,[124] except for one appellate court in California.[125] In addition, one appellate Judge in Ohio cites EFASASHA as initiating a "shift in removing forced arbitration provisions in contracts," and thus suggests revisiting earlier concerns that compelled arbitration policies for nursing home patients are contrary to public policy.[126], although EFASASHA could be seen as a broader rejection of compelled arbitration, and thus as initiating a status-weakening shift for the FAA, few Judges have interpreted it in this way.

This lukewarm reception to the EFASASHA's fundamental policy, including rejection of its legislative history and a refusal to give it a more charitable reading regarding retroactivity, is telling about the conflict to come in the next few years. Although few court decisions have had to directly address the EFASASHA's scope where retroactivity was not in play, such issues require the courts to more directly reckon with the FAA's broad preemptive power and its effect on EFASASHA.

B. Claim Splitting

EFASASHA's core provision states that "at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute . . . no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which . . . relates to the sexual assault dispute or the sexual harassment dispute."[127] An Anti-Super Statute reading of EFASASHA weighs strongly in favor of allowing all discrimination claims to be heard in one suit, rather than granting a motion for compelled arbitration with respect to all claims but the sexual assault and harassment claims. Aside from this being the most natural reading of the phrase "a *case* which . . . relates to the . . . dispute," this reading also encourages plaintiffs to hear their case in court without fear that claim-splitting would lead to prohibitively expensive litigation. Only two District Courts have considered the issue of claim splitting, and they diverge in their approaches.

In *Silverman v. DiscGenics*,[128] Judge Parrish in the District of Utah gave this section of the EFASASHA the same kind of "narrowing construction" given to the Sherman Act amendments described in Part II. The *Silverman*

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124. *See, e.g.*, Donofrio v. Peninsula Healthcare Servs., Ltd. Liab. Co., No. N21C-07-122 MAA, 2022 Del. Super. LEXIS 141, at n.11 (Super. Ct. Apr. 8, 2022) ("Plaintiff argued that the new law conflicts with the federal presumption in favor of arbitration. The new law, however, is irrelevant to the case at bar because the case does not involve allegations of sexual assault or harassment. The federal law also does not impact Delaware's history of public policy favoring arbitration."); Matthews v. Gucci, No. 21-434-KSM, 2022 U.S. Dist. LEXIS 26668 (E.D. Pa. Feb. 15, 2022); Hamidi v. King's Seafood Co., 2022 Cal. Super. LEXIS 44384; Doe v. Unruly Agency LLC, 2022 Cal. Super. LEXIS 6099.

125. Murrey v. Superior Court, 87 Cal. Ct. App. 5th 1223 (2023).

126. Lee v. Bath Manor Ltd. P'ship, 2023 Ohio Ct. App. LEXIS 792 (Ct. App.) (Keough, J., concurring).

127. 9 U.S.C. § 402(a).

128. Silverman v. DiscGenics, Inc., No. 2:22-cv-00354-JNP-DAO, 2023 U.S. Dist. LEXIS 42753 (D. Utah Mar. 13, 2023).

plaintiff pleaded both sexual harassment and retaliation claims.[129] Although only the plaintiff's retaliation claims (including failing to provide shareholder updates, spreading rumors, and threatening to file baseless counterclaims) fell within EFASASHA's timeframe, the plaintiffs urged the court to hear the claims in one suit.[130] The *Silverman* court ultimately refused to do so, explaining that the FAA's normal policy favoring arbitration governed the dispute and quoting from decisions regarding the ordinary claim-splitting regime under the FAA:

> [B]y its terms, the FAA leaves no place for the exercise of discretion by a district court . . . . [C]ourts must enforce an arbitration agreement even if doing so requires some claims to be resolved in arbitration while other closely related claims are litigated in court. . . . Relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement."[131]

The court thus ordered that the parties proceed to arbitration as to all claims except for the plaintiff's post-termination retaliation claims.[132] The *Silverman* decision demonstrates how one's resolution of the conflicting policies of the FAA and EFASASHA can directly shape doctrine; by opining that the FAA's policy favoring arbitration was left intact even against EFASASHA, the *Silverman* court applied a relatively strained reading of EFASASHA to resolve this dispute by pulling from pre-existing doctrine regarding claim-splitting.

The other cases decided on EFASASHA take the opposite approach. Judge Engelmayer in the Southern District of New York decided two twin disputes against the same employer in *Johnson v. Everyrealm*[133] and *Yost v. Everyrealm*,[134] which demonstrate a practical implementation of an anti-super statute approach to EFASASHA. After finding that the plaintiff had pleaded a valid sexual harassment claim in *Johnson*, Engelmayer found that "EFAA blocks arbitration as to the entire case."[135] Judge Engelmayer opined that although the FAA requires claim-splitting even if it results in piecemeal litigation, "the FAA's mandates in support of its 'liberal federal policy favoring arbitration agreements' may be 'overridden by a contrary congressional command.'"[136] Engelmayer found that the statutory text of EFASASHA was "clear, unambiguous, and decisive as to the issue here" because it "keys the scope of the invalidation of the arbitration clause to the entire 'case' relating to the sexual harassment dispute."[137]

Further, Engelmayer tied his analysis to the EFASASHA's goal of overriding the FAA's policy within the realm of sexual harassment:

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129. *Id.* at *1–2.

130. *Id.* at *7–8.

131. *Id.* at *8–9.

132. *Id.* at *9.

133. Johnson v. Everyrealm, Inc., 2023 U.S. Dist. LEXIS 31242 (S.D.N.Y. Feb. 24, 2023).

134. Yost v. Everyrealm, Inc., 2023 U.S. Dist. LEXIS 31246 (S.D.N.Y. Feb. 24, 2023).

135. Johnson, 2023 U.S. Dist. LEXIS 31242 at *39.

136. *Id.* at *40.

137. *Id.* at *41.

> [I]t is significant, too, that the EFAA amended the FAA directly . . . . That reinforced Congress's intent to override—in the sexual harassment context—the FAA's background principle that, in cases involving both arbitrable and non-arbitrable claims, "the former must be sent to arbitration even if this will lead to piecemeal litigation."[138]

Although Engelmayer stated that it was not necessary to consider legislative history, he noted that EFASASHA's history decisively favored this construction of the statute as barring arbitration for the entire case:

> To the extent any legislative history is futile here, it is as to the statute's purpose. The House Judiciary Committee's Report identifies the EFAA's purpose in broad terms: to prohibit "forced arbitration" in "cases involving sexual assault or harassment" because "the arbitration system lacks transparency and precedential guidance of the justice system" and is "shielded from public scrutiny," and "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." H.R. Rep. No. 117-234, at 3 (2022).[139]

Engelmayer thus held that "where a claim in a case alleges 'conduct constituting a sexual harassment dispute' as defined, the EFAA, at the election of the party making such an allegation, makes pre-dispute arbitration agreements unenforceable with respect to the entire case relating to that dispute."[140]

In contrast, in the companion case of *Yost*, the plaintiff's sexual harassment claim was implausible and thus did not survive a Motion to Dismiss.[141] Engelmayer held that "where a party seeks to invoke the EFAA based on a claim of sexual harassment, such a claim must have been plausibly pled. Accordingly, the Court holds, the EFAA does not present any barrier to arbitration in this case."[142] Explaining that "the EFAA's text does not definitively decide this point," the *Yost* court found that "the term 'alleged' as used in [EFASASHA] is best read to implicitly incorporate the plausibility standard."[143] Along with noting that the 2022 Congress legislated against the backdrop of Twombly and Iqbal's plausibility standard and similar constructions of the term "allege,"[144] Engelmayer determined that it was not necessary that the EFASASHA reach non-plausible sexual harassment claims to achieve its core purpose:

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138. *Id.* at *45.

139. *Id.* at *47 n.22.

140. *Id.* at *47.

141. Yost v. Everyrealm, Inc., 2023 U.S. Dist. LEXIS 31246, at *28 (S.D.N.Y. Feb. 24, 2023).

142. *Id.* at *4.

143. *Id.* at *44.

144. *Id.* at *44, *47–48.

> [R]equiring a sexual harassment claim to be capable of surviving dismissal at the threshold of a litigation fully vindicates the purposes of the EFAA. The stated purpose of the EFAA is to empower sexual harassment claimants to pursue their claims in a judicial, rather than arbitral, forum. *See* H.R. Rep. No. 117-234, at 3–4 (2022). That important purpose is achieved by enabling such a claimant, notwithstanding an otherwise valid arbitration agreement, to bring her claims of sexual harassment in court and to litigate them there through the point of their durable dismissal. And, as the Court holds today in the companion case, as long as a claim of sexual harassment pends in a case, the EFAA, by its terms, blocks arbitration of the entire "case" containing that claim. After the dismissal of all sexual harassment claim(s) for failure to meet the plausibility standard, however, that purpose is not served by requiring the remaining (that is, non-sexual harassment) claims in the case to be litigated in court, in the face of a binding arbitration agreement . . . . The FAA's mandate may be "overridden by a contrary congressional command" . . . as, in fact, the EFAA unequivocally does in explicitly removing cases sounding in sexual harassment (or sexual assault) from arbitration.[145]

Engelmayer went on to construe the FAA as one statutory regime, finding that EFASASHA should not be read to topple its purposes:

> But to read the EFAA tacitly to void arbitration agreements after the point at which plaintiffs have proven themselves unable to plead claims of sexual harassment consistent with Iqbal (Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation"), could destabilize the FAA's statutory scheme. It would enable a plaintiff to evade a binding arbitration agreement—as to wholly distinct claims, and for the life of a litigation—by the expedient of adding facially unsustainable and quickly dismissed claims of sexual harassment. Because the EFAA does not contain a clear command to that effect, the Court declines to so construe it.[146]

As opposed to the District of Utah's *Silverman* decision, the *Everyrealm* cases demonstrate how to construe the EFASASHA as an anti-super statute. First, EFASASHA should be construed to accomplish its core purposes of allowing sexual assault and harassment victims to have their day in court; where this conflicts with the FAA's normative freedom of contract policy, the EFASASHA should win. EFASASHA thus adds gloss to the FAA's regime as a whole. However, the FAA's ordinary presumption in favor of a liberal federal policy favoring arbitration can and should come into play where the EFASASHA's policy is not implemented. By avoiding claim-splitting so long as sexual assault and harassment claims are plausibly pled, *Johnson* allows sexual harassment and assault victims to bring their cases to court without fear that claim-splitting will force them into duplicative litigation if they ultimately

145. *Id.* at *45 (citation omitted).

146. *Id.* at *46–47 (citations omitted).

fail in pleading their sexual harassment or assault claim: for that plaintiff to tell her story, the entire *case* must be pled together. However, an implausibly pled sexual harassment or assault claim should not topple the FAA's regime: ultimately, EFASASHA only rejects the FAA's freedom of contract ideal within a limited set of circumstances, and the 2022 Congress clearly evidenced that it had no intent to invalidate the FAA's ordinary status as a super-statute.

C. "Relating to" Sexual Harassment or Assault

EFASASHA's core ambiguity is the one with the least case law: what is required for a claim to "relate to" sexual harassment or assault? The *Johnson v. Everyrealm* court highlighted these sources of ambiguity in a footnote:

> Under the EFAA, the term "sexual harassment dispute" includes one "relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." Under this definition, the EFAA might be implicated by lawsuits other than the ones containing sexual harassment causes of action—for example, a lawsuit that brought a claim against an employer for retaliating against a plaintiff who had made a protected report of sexual harassment. *See* Amici Br. at 9. This case, however, does not contain claims of this nature, and the Court thus does not have occasion to consider how the EFAA would apply in such a context.[147]

D. Retaliation

Under a narrowing construction, the FAA's policy favoring arbitration should win out unless a plaintiff specifically invokes a cause of action involving sexual assault or harassment under EFASASHA. This was the approach of one District Court in *Pepe v. New York Life Ins. Co.*, which involved a pro se plaintiff's "laundry list of grievances" including that his supervisor "harassing" employees by going "'out of his way to try and set up an employee to commit adult[e]ry with two female employees,' which he attempted to record via 'ring door bell [*sic*] cameras.'"[148] The court compelled arbitration, explaining that "[t]hough plaintiff's complaints mention 'harassment,' he does not bring a claim for sexual harassment under any state or federal statute. Nor does he allege facts that suggest he was a victim of sexual harassment."[149] Although the *Pepe* court was right to compel arbitration under the *Yost* standard because the plaintiff's claims were implausibly pled, its suggestion that plaintiff must "bring a claim for sexual harassment under [a] state or federal statute" is quite narrow. The strictest reading of this approach would result in the exclusion of any case failing to include one of a list of sexual harassment-related statutes, which does not seem to vindicate EFASASHA's purposes.

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147. Johnson v. Everyrealm, Inc., 2023 U.S. Dist. LEXIS 31242, at *39 n.14 (S.D.N.Y. Feb. 24, 2023).

148. Pepe v. New York Life Ins. Co., No. 22-4005, 2023 U.S. Dist. LEXIS 20992, at *3–4 (E.D. La. Feb. 7, 2023).

149. *Id.* at *10 n.19.

In contrast, the *Silverman* court—while it took a narrow view with respect to retroactivity—nevertheless found that retaliation was sufficient to preclude compelled arbitration, although it did not engage in any explicit analysis as to whether this was covered under the statute.[150] The core standard of retaliation demonstrates why this construction was necessary. Any conduct which "well might have dissuaded a reasonable worker" from making or supporting a discrimination claim is unlawful retaliation;[151] if such conduct were to nevertheless be resolved through arbitration, employers would be able to subvert EFASASHA's purposes so long as they only retaliated against an employee for reporting perceived sexual harassment, but the employee was actually mistaken. One of EFASASHA's core purposes was to promote transparency in the area of sexual assault and harassment,[152] and failing to include retaliation claims would defeat this value.

E. Animus-Based Sex Harassment

Sexual harassment and assault claims do not capture the class of cases in which an employee is subjected to animus or bias due to his or her sex. The Yost court suggests that such claims are *not* included by explaining that Yost only alleged retaliation for "employment policies [that] were gender-discriminatory . . . Yost's case does not allege sexual assault."[153] Although case law is quite limited on this point, the *Pepe* decision suggests similarly.[154] Applying the anti-super-statute approach developed throughout this article, I contend that animus-based claims should be included within EFASASHA's scope, but disparate impact claims should not.

The core canon of super-statutes, as applied to the EFASASHA as an Anti-Super Statute, should still guide this inquiry. It may be true that treating women or men less favorably on the virtue of their sex does not fall within the scope of the 2022 Congress' contemplation. However, this interpretation is necessary to achieve EFASASHA's core policy goals. The infamous harassment experienced by Fox News Anchor Gretchen Carlson played a key role in the passage of EFASASHA; Carlson was one of the law's key proponents, and her experience was mentioned in the Senate debates. [155] Carlson's story is not only

150. Silverman v. DiscGenics, Inc., No. 2:22-cv-00354-JNP-DAO, 2023 U.S. Dist. LEXIS 42753, at *7 (D. Utah Mar. 13, 2023).

151. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

152. The House Judiciary Committee's report describes EFASASHA's purpose broadly as prohibiting "forced arbitration" in "cases involving sexual assault or harassment" because "the arbitration system lacks transparency and precedential guidance of the justice system," and 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." H.R. Rep. No. 117–34, at 3 (2022).

153. Yost v. Everyrealm, Inc., 2023 U.S. Dist. LEXIS 31246, at *40 n.14 (S.D.N.Y. Feb. 24, 2023).

154. Pepe v. New York Life Ins. Co., No. 22-4005, 2023 U.S. Dist. LEXIS 20992, at *3–4 (E.D. La. Feb. 7, 2023).

155. S. Rep. No. 118-624, at 626–37; *Remarks by Vice President Harris at Signing of H.R. 4445*, supra note 75 ("And now I will now welcome to the podium a woman who was instrumental in the passage of this law: Gretchen Carlson.").

one of being propositioned by Roger Ailes, the chairman of Fox News, but also one infamously one tinged with sexism and belittlement because of her sex—"a boys' club environment at the network."[156] The #MeToo Movement also supports this reading, as it was concerned with sexual harassment and assault in part because harassment and assault were a core barrier to women's workplace achievements.[157] Indeed, the inclusion of sexual harassment within Title VII sprung initially from Title VII's prohibition of "discrimination based on . . . sex."[158] The *Meritor* court reached this result by holding that including sexual harassment and assault was necessary to achieve a workplace free from discrimination for women,[159] and the *Oncale* court explained that this prohibition on sexual assault and harassment applied to men as well as women, and same-sex sexual harassment as well as opposite-sex.[160] Just as the 2022 Congress legislated against the backdrop of the plausibility standard, the 2022 Congress also legislated against this backdrop in which sexual harassment was considered inseparable from the issue of sex discrimination. Because sexual harassment and assault are linked with sexism and gender-based workplace barriers, future courts should consider allowing litigants to void arbitration agreements under EFASASHA where, despite the lack of a formally pled sexual assault or harassment claim, the litigant has faced harassment because of his or her sex.

At the same time, the statute does not contemplate "sex-based" harassment as the result of policies where no discriminatory animus is pled. Such a reading would sweep beyond the legislative history of EFASASHA and its debates, beyond the core impetus animating the #MeToo Movement, and beyond the purpose of allowing victims of sexual assault and harassment to share their stories without the silencing force of arbitration. Disparate impact-based concerns are certainly a barrier to achieving equal workplaces for men and women, but they do not implicate the same policy concerns to which EFASASHA was oriented.

CONCLUSION

The FAA's "freedom of contract hypothesis" as interpreted through post-1980 case law has been fiercely rejected by courts and commentators alike, but the Supreme Court has demonstrated that it is unlikely to budge. For better or for worse, the FAA has been treated as a "super-statute" whose basic policy validating the legitimacy of all manner of arbitration agreements trumps nearly any statute with which it comes into conflict—even the NLRA. Because this policy is so deeply embedded within the court's jurisprudence, the most useful approach for commentators is to proceed from the assumption that the FAA is

156. Michael M. Grynbaum & John Koblin, *Gretchen Carlson of Fox News Files Harassment Suit Against Roger Ailes*, N.Y. TIMES (July 6, 2016), https://www.nytimes.com/2016/07/07/business/media/gretchen-carlson-fox-news-roger-ailes-sexual-harassment-lawsuit.html.

157. *See* Dworkin & Schipani, *supra* note 68, at 380.

158. 42 U.S.C. § 2000e-2(a)(1).

159. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

160. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

a super statute, even if there are very legitimate objections that the FAA did not emerge from a broad public normative consensus like other super statutes.

This is precisely why a statute like the EFASASHA poses such a unique challenge. Emergent from the shared public outrage of the #MeToo Movement, EFASASHA is a firm rejection of the value the FAA proposes. However, the context of the EFASASHA and its history—as evidenced by the #MeToo Movement and its legislative history—does not reject the freedom of contract hypothesis in its entirety. Instead, it reaches only a limited class of disputes relating to sexual assault and harassment which Americans have deemed a pernicious and unacceptable issue.

The various approaches to super statute amendments do not clearly resolve EFASASHA, but they each teach us something about how to approach such amendments. Although the Sherman Act Amendments have received a "narrow carve-out construction," the circumstances leading up to those amendments were not analogous to the public outcry resulting in EFASASHA. Similarly, the PDA's broad remedial construction approach is not precisely analogous to EFASASHA because Congress is not clarifying how the statute's aims are to be realized, but is instead refuting them entirely within a limited area. Finally, both legislative history and the scope of the statute strongly counsel against applying a status-weakening construction to the EFASASHA as with the ESA; outside of a limited realm, the FAA's general policy favoring arbitration remains intact.

As a statute (1) seeking to establish a new normative or institutional framework for policy as compared with the freedom of contract approach to sexual harassment and assault arbitration which (2) has resulted from a rejection of compelled arbitration which has stuck in the public culture, (3) EFASASHA should be interpreted to vindicate its basic policy beyond the four corners of the amendment's text itself. This approach can guide the courts within several ambiguous areas. First, although retroactive application cases may not be as illustrative as one would hope, one would still expect a broad construction pertaining to the filing of a sexual harassment or assault-related suit after EFASASHA's passage. However, the existing case law seems to demonstrate that courts have not taken this approach. Nor have courts interpreted EFASASHA as setting forward a broad policy which should impact unconscionability and public policy analysis. The more useful analysis of the meager EFASASHA case law comes through claim-splitting. While the *Silverman* court gives EFASASHA a narrowing construction against the FAA's usual claim-splitting regime, the *Everyrealm* companion cases demonstrate a feasible approach which can allow the court to achieve the goals of EFASASHA where they conflict with the FAA, without resulting in total repeal of the FAA's policy favoring arbitration. Finally, while there is almost no caselaw concerning EFASASHA's "relating to" provision, an anti-super statute approach as well as existing dicta supports reading the "relating to" provisions to include retaliation and animus-based sex harassment.

This article seeks to offer an analytical framework with which to reconcile the FAA—which has a broad "super-statute" presumption favoring constructions furthering its policy—and the EFASASHA—which carries a broad public rejection of the FAA's core policy through an amendment applying to a limited context. It does not, however, resolve every ambiguity prompted

by EFASASHA's text, and in just over a year, courts around the country have barely scratched the surface. However, this theoretical "anti-super statute" foundation should provide a baseline lens through which courts can view, analyze and interpret EFASASHA. When construed against the FAA and its policy, the EFASASHA should similarly receive a construction which goes beyond the four corners of its text to further its core policy. So long as that construction does not reach too far, this approach is the best way to reconcile Congress's balancing of goals in maintaining the current arbitration regime, while ensuring that victims of sexual harassment and assault are entitled to tell their stories in a court of law.