BREAKING THE SILENT TREATMENT: THE CONTRACTUAL ENFORCEABILITY OF NON-DISCLOSURE AGREEMENTS FOR WORKPLACE SEXUAL HARASSMENT SETTLEMENTS

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The dramatic revelations of the #MeToo movement have exposed the extent to which workplace sexual harassment is endemic and concealed across different industries. #MeToo has also shed light on the use of non-disclosure agreements ("NDAs") by harassers to conceal their pattern of repeated misconduct. While there has been strong public condemnation of NDAs in the wake of the #MeToo movement, there is limited case law on the question of whether contracts such as NDAs are legally enforceable when used to settle claims of sexual harassment that do not amount to criminal conduct.

While federal and state legislatures continue to debate the benefits of legislating against such agreements, this Note analyzes the viability of the common law public policy analysis to hold such NDAs unenforceable. Given that most states do not have specific statutes directly addressing sexual harassment NDAs, courts should look to a broad range of state legislation as relevant in considering the public policy interests counseling toward finding such NDAs unenforceable. Accordingly, this Note analyzes public policy considerations derived from three types of state law: restrictions on the use of NDAs in instances of sexual harassment, prohibitions of workplace harassment, and limitations on the concealment of public hazards.

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Even in states without any such legislation, this Note urges state courts, when determining whether to enforce sexual harassment NDAs, to more actively weigh the benefits of enforcing the contractual will of private parties against potential harms to the public welfare. Workplace sexual harassment is a public policy issue that is worsened by the continued use of NDAs. In concealing workplace sexual misconduct, NDAs prevent society, through private and state actors, from addressing the problem itself and threaten public safety and welfare by allowing offenders to potentially harm future workers. Without NDAs as protection, companies will be exposed to reputational damage and potential shareholder litigation when sexual harassment news becomes public knowledge. Indeed, this threat of future reputational harm could be an effective way to encourage corporations to change their internal policies relating to workplace misconduct.

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I. INTRODUCTION

The phrase "secret settlement" refers to a settlement agreement between disputing parties on terms not subject to

public scrutiny.[1] In the case of sexual harassment accusations, in return for the settlement payout the accusing party must not publicly disclose any information covered by the confidentiality provisions in the settlement agreement.[2]

The viability of these "secret settlements" for sexual harassment cases rests on the enforceability of non-disclosure agreements ("NDAs")[3]—defined in this Note as any contractual term or agreement used to protect and preserve confidential information, such as claims of sexual harassment, from public exposure.[4] With the rise of women's empowerment

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[1] Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 U. KAN. L. REV. 1457, 1458 (2006).

[2] *See* MAYA RAGHU & JOANNA SURIANI, NAT'L WOMEN'S LAW CTR., #METOOWHATNEXT: STRENGTHENING WORKPLACE SEXUAL HARASSMENT PROTECTIONS AND ACCOUNTABILITY 5 (2017).

[3] Throughout this Note, the term "NDA" is used to encompass all types of confidentiality or non-disclosure contract provisions, though other authors have referred to these arrangements as non-disclosure provisions, non-disparagement provisions, confidentiality agreements, confidentiality provisions, hush contracts, and contracts of silence. *See* Elizabeth Tippett, *Non-Disclosure Agreements and the #MeToo Movement*, ABA DISP. RESOL. MAG. (Jan. 1, 2019), https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/non-disclosure-agreements-and-the-metoo-movement/ [https://perma.cc/U2LU-TPBU] (describing the term "non-disclosure provisions" to refer to several different contractual provisions that might restrict a party's ability to speak, and the term "non-disparagement provisions" to relate to negative statements one party might make about another); Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 627 (1999) (defining confidentiality agreements as agreements employees sign promising not to disclose confidential information about their employer); David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 167 (2019) (defining "hush contracts" as nondisclosure agreements covering incidents of sexual misconduct); Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 268 (1998) (defining a "contract of silence" as a contract in which a party has made an enforceable promise to keep quiet about something).

[4] *See* Terry Morehead Dworkin & Elletta Sangrey Callahan, *Buying Silence*, 36 AM. BUS. L.J. 151, 155 (1998). The term "NDA," as referred to in this Note, only includes NDAs used in relation to claims of sexual harassment. And while NDAs have been used to conceal criminal sexual

movements such as #MeToo[5] and Time's Up,[6] NDAs have come to the forefront of public discussion, with commentators

misconduct, such agreements are not the subject of this Note. The terms "sexual misconduct" and "sexual harassment," as used in this Note, refer only to sexual harassment that does not amount to criminal conduct. In other contexts, however, the term sexual misconduct can be considered to be a crime. For example, in New York, "sexual misconduct" is defined statutorily as a Class A misdemeanor. N.Y. PENAL LAW § 130.20 (McKinney 2016).

[5] The purpose of the anti-sexual assault movement #MeToo is to give "people a voice" and bring about a cultural transformation by "encouraging millions to speak out about sexual violence and harassment." Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements — And How They're Alike*, TIME (Mar. 22, 2018), https://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/ [https://perma.cc/R7S3-PGST]. The #MeToo movement was originally founded in 2006 to help survivors of sexual violence but was popularized on October 15, 2017, after actress Alyssa Milano asked Twitter users to write "me too" as a reply to her tweet if they had been sexually harassed or assaulted. *See History & Vision*, ME TOO MOVEMENT, https://metoomvmt.org/about/ [https://perma.cc/S4AU-MP3U] (last visited Mar. 16, 2020); *see also* Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), https://twitter.com/alyssa_milano/status/919659438700670976?lang=en [https://perma.cc/MEM2-UWCZ]. In the first twenty-four hours after Milano's tweet more than twelve million posts were shared on various social media platforms using the "me too" hashtag. Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html [https://perma.cc/UF5H-Q5RW]. The movement has led to the public exposure of allegations against numerous high-profile men, starting with Hollywood producer Harvey Weinstein. *See* 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 [https://perma.cc/K76U-KKLG]. At the end of 2018, a year after Milano's tweet, at least 200 prominent men had lost their jobs after public allegations of sexual harassment from at least 920 people. Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.*, N.Y. TIMES (Oct. 29, 2018), https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html [https://perma.cc/7C23-AXFS].

[6] The Time's Up movement was started by a group of over 300 women in Hollywood and is described as a solution-based, action-oriented next step in the #MeToo movement. *See* Langone, *supra* note 5. The group's focus is

debating whether they ought to be permitted to exist.[7] Many individuals accused in numerous instances of sexual misconduct have used NDAs to prevent victims from disclosing details about their misconduct.[8]

As more people break their silence about workplace sexual harassment, questions have arisen as to whether those who have publicly spoken their accusations could be subject to legal and monetary penalties for breaching the confidentiality provisions in their settlement agreements.[9] Although

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getting legislation passed and policies changed. *Id.* To fund this goal, they created the Time's Up Legal Defense Fund, which is a source of legal and financial support for women and men who want to fight sexual misconduct through the justice system. *See id.*

[7] *See, e.g.,* Debra S. Katz & Lisa J. Banks, *The Call to Ban NDAs is Well-Intentioned. But it Puts the Burden on Victims*, WASH. POST (Dec. 10, 2019), https://www.washingtonpost.com/opinions/banning-confidentiality-agreements-wont-solve-sexual-harassment/2019/12/10/13edbeba-1b74-11ea-8d58-5ac3600967a1_story.html [https://perma.cc/V6ET-GYJV]; Scott Altman, *Do Non-disclosure Agreements Hurt or Help Women?*, HILL (Nov. 12, 2019), https://thehill.com/opinion/judiciary/470013-do-non-disclosure-agreements-hurt-or-help-women [https://perma.cc/5EHK-2KFM].

[8] *See*, *e.g.,* Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 21, 2017), https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements [https://perma.cc/5XR6-DVY2] (detailing a series of settlements spanning two decades involving claims against film producer Harvey Weinstein); Christie Smythe, *Stormy Daniels Offers to Pay Back Trump Settlement to End Silence*, BLOOMBERG (Mar. 12, 2018), https://www.bloomberg.com/news/articles/2018-03-12/porn-actress-offers-to-pay-back-trump-settlement-to-end-silence [https://perma.cc/R4MD-TLSR]; Emily Steel & Michael S. Schmidt, *Bill O'Reilly Thrives at Fox News, Even as Harassment Settlements Add Up*, N.Y. TIMES (Apr. 1, 2017), https://www.nytimes.com/2017/04/01/business/media/bill-oreilly-sexual-harassment-fox-news.html [https://perma.cc/HRQ6-HB4T] (describing confidentiality provisions used in five payouts by Fox News to secretly settle sexual misconduct allegations against Bill O'Reilly); Matt Carroll et al., *Scores of Priests Involved in Sex Abuse Cases; Settlements Kept Scope of Issue Out of Public Eye*, BOS. GLOBE (Jan. 31, 2002), https://www.bostonglobe.com/news/special-reports/2002/01/31/scores-priests-involved-sex-abuse-cases/kmRm7JtqBdEZ8UF0ucR16L/story.html [https://perma.cc/29A4-NTH9] (describing how the Archdiocese of Boston had quietly settled child molestation claims against at least seventy priests).

[9] *See, e.g.*, Victor Mather, *McKayla Maroney Says USA Gymnastics Forced Confidentiality in Sexual Abuse Settlement*, N.Y. TIMES (Dec. 20,

historically sexual harassment accusers have entered into settlement agreements with confidentiality provisions,[10] now victims increasingly do not want to contract away the ability to share their story.[11] For victims that have or will enter into a settlement agreement, the enforceability of the agreement's confidentiality provisions and the potential penalties imposed for its breach are largely untested legal issues.

As mentioned above, this Note limits its discussion of NDAs to those agreements covering sexual harassment that does not involve criminal conduct such as assault, false imprisonment, rape, or battery.[12] In such cases of non-criminal sexual harassment workers, who generally enter into NDAs

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2017), https://www.nytimes.com/2017/12/20/sports/olympics/mckayla-maroney-usa-gymnastics-confidentiality-agreement.html [https://perma.cc/G9PX-LDPH] (describing a $100,000 penalty if Olympic gymnast McKayla Maroney breached the NDA she entered into with USA Gymnastics as part of a settlement related to Maroney's sexual assault allegations against the former team doctor); Farrow, *supra* note 5 (quoting an anonymous female employee at the Weinstein Company claiming that "her lawyer advised her that she could be exposed to hundreds of thousands of dollars in lawsuits for violating the nondisclosure agreement attached to her employment contract").

[10] *See supra* note 8 and accompanying text.

[11] *See, e.g.*, Jessica Bennett, *Ellen Pao Is Not Done Fighting*, N.Y. TIMES (Sept. 8, 2017), https://www.nytimes.com/2017/09/08/style/ellen-pao-gender-discrimination-silicon-valley-reset.html [https://perma.cc/7PHK-WLDZ] (describing Ellen Pao, the plaintiff in an employment discrimination suit that included sexual harassment allegations, turning down a seven-figure settlement in order to continue her suit against her venture firm employer); Gretchen Carlson, *Gretchen Carlson: Fox News, I Want My Voice Back*, N.Y. TIMES (Dec. 12, 2019), https://www.nytimes.com/2019/12/12/opinion/gretchen-carlson-bombshell-movie.html [https://perma.cc/VKZ2-PKVT] (detailing how Gretchen Carlson, after settling her sexual harassment complaint against Fox News, regretted signing a NDA because it prohibited her from telling her story).

[12] As discussed in this Note, sexual harassment that does not involve criminal conduct includes non-physical conduct such as sexual remarks or behaviors—for example, addressing women in crude or objectifying terms, posting pornographic images in the office, or making derogatory statements about women (such as telling anti-female jokes). NAT'L ACADS. OF SCI., ENG'G, & MED., SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE, AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, AND MEDICINE 24 (Paula A. Johnson et al. eds., 2018).

without legal representation, often do not know what facts or details, if any, they can disclose pursuant to the confidentiality provisions in their settlement agreements. This uncertainty, along with the fear of being sued or fired, may discourage victims from disclosing the abuse they have suffered.[13] Given the current state of federal and state law,[14] workers who want to disclose confidential information protected by settlement agreements end up with little clarity on whether they can disclose at all.

While more legislative clarity is essential, common law contract doctrine is another legal avenue courts could pursue to evaluate the enforceability of NDAs. That is, sexual harassment victims could attempt to void their NDAs by arguing for the application of the public policy exception to the enforcement of contracts. Ordinarily, there is a presumption of enforcement of a contract between two consenting and informed parties.[15] But contracts still remain subject to society's public policy interests. In some circumstances where social justice or third-party interests are relevant to a significant extent, courts are willing to intervene and deny contract enforcement under the public policy exception.[16] Such public policy interests can be derived from state legislation.[17] The issue lies in whether state law has adequately signaled the circumstances

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[13] *See* RAGHU & SURIANI, *supra* note 2, at 5; *see also* HISCOX, 2018 HISCOX WORKPLACE HARASSMENT STUDY 6 (2018), https://www.hiscox.com/documents/2018-Hiscox-Workplace-Harassment-Study.pdf [https://perma.cc/E4Q7-EEDK].

[14] *See infra* Section II.D; *see also infra* Section IV.B.2.

[15] *See* 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 5.1 (3d ed. 2004).

[16] *See* ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 480 (5th ed. 2013) (stating how significant limitations on the freedom of contract are permitted if the effects of a contract's enforcement are not confined to the contractual parties themselves).

[17] RESTATEMENT (SECOND) OF CONTRACTS § 178(3)(a) (AM. LAW INST. 1981). Contractual choice of law principles permit parties to choose the law that will govern the interpretation and enforcement of their contract through drafting choice of law clauses. Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 247 (1993).

in which social justice and third-party interests can override an individual party's interest in enforcing a contract.

Over the past few years, state legislatures have increasingly attempted to shape public policy in this area by proposing or passing legislation aimed at combatting workplace sexual harassment.[18] Despite this increase, a majority of states do not have statutes directly addressing the enforceability of sexual harassment NDAs.[19] As a result of this statutory gap, this Note suggests that the public policy exception to the enforcement of contracts has a broader reach than previously suggested. This means it is applicable even in states that do not have specific statutes that directly address the enforceability of NDAs.

Further, this Note argues a broader range of state legislation ought to be considered by courts in determining whether a sexual harassment NDA violates the public policy interests of a state. That is, public policies articulated by state law in different but relevant subject matters should be referenced in considering whether to deny the enforcement of NDAs under the public policy exception. Aggregating public policy concerns from a group of relevant legislation allows courts to look

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[18] *See* ANDREA JOHNSON ET AL., PROGRESS IN ADVANCING ME TOO WORKPLACE REFORMS IN #20STATESBY2020 2 (2019), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/07/final_2020States_Report-9.4.19-v.pdf [https://perma.cc/U4JU-A8QY]; *see also #MeToo Inspires Legislative Changes Across the United States*, SEYFARTH (Mar. 28, 2019), https://www.seyfarth.com/publications/MA032819-LE [https://perma.cc/JB22-22PJ]; Elizabeth A. Harris, *Despite #MeToo Glare, Efforts to Ban Secret Settlements Stop Short*, N.Y. TIMES (June 14, 2019), https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html [https://perma.cc/8RJX-EABN] (stating that since 2018, at least twenty-six states have introduced bills to restrict NDAs in instances of sexual harassment but only twelve states have actually passed new laws).

[19] *Legislation on Sexual Harassment in the Legislature*, NAT'L CONF. OF ST. LEGISLATURES (Feb. 11, 2019), http://www.ncsl.org/research/about-state-legislatures/2018-legislative-sexual-harassment-legislation.aspx [https://perma.cc/MVM4-3NE5] (noting that in 2018, thirty-two states introduced over 125 pieces of legislation on sexual harassment and within the first two months of 2019, twenty-nine states had introduced over 100 pieces of legislation related to sexual harassment).

beyond any particular law to the entire state statutory scheme.[20] Relevant legislative subject areas may articulate policy goals that affect the problem of workplace sexual harassment, such as combatting discrimination, protecting whistleblowers, and empowering workers.[21]

To determine the public policy interests of states relevant to the enforcement of sexual harassment NDAs, the types of state legislation analyzed in this Note include: (1) legislation restricting or banning sexual harassment NDAs, (2) anti-discrimination statutes protecting victims of harassment and prohibiting workplace harassment, and (3) laws prohibiting the concealment of public hazards. While certain types of legislation are more relevant than others, courts should consider any and all relevant pieces of state legislation in determining whether the state has articulated a public interest that outweighs its interests in enforcing the will of contracting parties. The commonality in the laws listed above lies in their legislative purpose—to reduce the prevalence of workplace sexual harassment and prohibit the concealment of its occurrence. Such a legislative intent can serve as evidence of a state's public policy interest in reducing sexual harassment and protecting victims of sexual harassment.[22]

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[20] FARNSWORTH, *supra* note 15, § 5.5.

[21] The consideration as to whether NDAs may be deemed unenforceable based on the whistleblowing public policy exception is not a novel idea. *See* Dworkin & Callahan, *supra* note 4, at 153. Legislation protecting whistleblowing is widespread at both the federal and state level. Indeed, at least forty-one states have enacted whistleblower protection statutes. *See* Bast, *supra* note 3, at 668. However, it is unclear how much protection a whistleblower who reported non-criminal misconduct, or reported criminal misconduct to a non-governmental authority, would obtain under whistleblower statutes. For example, several state courts have held that instances of whistleblowing were not protected because they affected private rather than public interests. *See id.* at 670. Nonetheless, the fact that many courts continue to protect whistleblowers, even those under NDAs, shows that courts are capable of limiting private contractual guarantees in light of a clear, countervailing public policy. *See* Ryan M. Philip, Comment, *Silence at Our Expense: Balancing Safety and Secrecy in Non-Disclosure Agreements*, 33 SETON HALL L. REV. 845, 873 (2003).

[22] *See* FARNSWORTH, *supra* note 15, § 5.1 (noting that legislation commonly serves to signal that the legislature regards a policy area as

Finally, this Note argues that, even in the total absence of any authoritative legislative declaration, the public policy balancing test[23] gives courts broad discretion to recognize public policy interests that counsel against the enforcement of sexual harassment NDAs. Courts can then determine whether a judicially developed public policy, such as protecting the public from sexual harassment, outweighs private parties' interest in enforcing their NDA.

In arms-length business transactions, there are mutually beneficial reasons for parties with relatively equal bargaining power to enter into an NDA. The sale of a victim's silence in sexual harassment settlements, however, is an inherently different type of transaction. While NDAs provide benefits to both contracting parties in the form of mutually agreed upon consideration, such agreements are contrary to the general public interest in that they fail to remedy the underlying issue of workplace sexual harassment. Past scandals where NDAs have been used to conceal sexual misconduct, such as the pattern of sexual harassment of female employees by Harvey Weinstein,[24] demonstrate how the enforcement of such NDAs harms the general public welfare by enabling offenders to repeat their misconduct and harm new victims. In balancing the public interests of eliminating workplace sexual harassment and protecting future victims with the private interests of contracting parties, courts should be more active in holding sexual harassment NDAs unenforceable. Removing the availability of NDAs in sexual harassment settlements will impose an effective deterrent on companies, as the potential future

significant); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 179 cmt. b (AM. LAW INST. 1981). *See, e.g.,* S.B. 820, 2017-2018 Legislative Sess., Legislative Counsel's Digest (Cal. 2018), at 4 ("[California] must again stand with victims of sexual harassment and assault by ending this unjust practice of secret settlements that keep these aggressors unaccountable and able to prey on other victims.").

[23] RESTATEMENT (SECOND) OF CONTRACTS § 178 (stating that a contract term is unenforceable on grounds of public policy if the interest in its enforcement is "clearly outweighed in the circumstances by a public policy against the enforcement of such terms").

[24] *See* Farrow, *supra* note 8.

disclosure of workplace sexual harassment exposes companies to significant reputational harm. [25]

Part II of this Note describes the prevalence of NDAs in sexual harassment settlements and how such agreements provide incentives for businesses to continue concealing workplace sexual harassment. Part III discusses the public policy exception to contract enforcement and how it applies to sexual harassment NDAs specifically. Part IV begins the analysis of the public policy exception by analyzing three types of relevant state laws that suggest certain states have demonstrated a public interest in protecting sexual harassment victims and/or eliminating workplace sexual harassment. Finally, Part V lays out several non-legislative public policies that counsel against NDA enforcement that courts should consider. Specifically, Part V discusses how, if courts refused to enforce corporate sexual harassment NDAs, reputational harm could function as an effective market force to incentivize companies to address workplace sexual harassment instead of hiding behind a veil of silence.

II. THE PROBLEM WITH USING NDAS TO SETTLE WORKPLACE SEXUAL HARASSMENT

A. Defining Sexual Harassment: Sexual Harassment as a Form of Sex Discrimination

Federal law, through Title VII of the Civil Rights Act of 1964 ("Title VII"),[26] recognizes sexual harassment as a form of employment discrimination based on sex.[27] The Equal

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[25] *See* David A. Hoffman and Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 174 (2019) (noting the potential reputational harm to companies employing abusers).

[26] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2018)).

[27] While the statutory language of Title VII does not expressly prohibit sexual harassment, the Supreme Court has interpreted Title VII's prohibition against discrimination to include a ban on workplace harassment based on sex. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986) (holding that sexual harassment constituted a violation of Title VII and that such

Employment Opportunity Commission (the "EEOC"), the federal agency responsible for enforcing Title VII,[28] defines sexual harassment as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment.[29]

For the conduct to be unlawful and thus legally actionable under Title VII, it must either be endured as a condition of continued employment or involve conduct that is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.[30] Courts have also found verbal sexual harassment constitutes an actionable Title VII claim when it is daily or regular.[31]

Despite these definitions, courts have had difficulty in assessing when sexual harassment is sufficiently severe or pervasive to amount to a Title VII violation.[32] That is, there have

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claims are actionable under Title VII "without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex").

[28] *Laws Enforced by EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/statutes/laws-enforced-eeoc [https://perma.cc/5N8E-MY9N].

[29] *Facts About Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/publications/fs-sex.cfm [https://perma.cc/BEU8-YTG3]; *see also* 29 C.F.R. § 1604.11(a) (2009).

[30] *Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/types/harassment.cfm [https://perma.cc/6PBZ-GVTW].

[31] *See, e.g.*, Farpella-Crosby v. Horizon Health Care, 97 F.3d 803, 806 (5th Cir. 1996) (finding that plaintiff's supervisor's questions about plaintiff's sexual activity or similarly offensive comments, made two or three times a week, sometimes in front of co-workers, were sufficiently severe and pervasive to create a hostile working environment).

[32] *See* CHRISTINE J. BACK & WILSON C. FREEMAN, CONG. RESEARCH SERV., R45155, SEXUAL HARASSMENT AND TITLE VII: SELECTED LEGAL ISSUES 3 (2018); *see also* Jolynn Childers, *Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment*

been inconsistent determinations by courts as to whether actionable sexual harassment has occurred in cases with very similar facts.[33] Given the inconsistency in applying this fact-intensive inquiry and the high bar for showing actionable harassment,[34] most employee lawsuits for sexual harassment under Title VII fail.[35]

B. The Enforceability and Rise of NDAs

As used in the commercial context, NDAs typically protect confidential information from public exposure by preventing the promisor from disclosing or using the protected information without authorization from the promisee.[36] Because NDAs are contracts, their enforceability is mainly governed by state law, which naturally varies by state. Generally, courts have found NDAs to be enforceable if the restrictions imposed are "reasonable in scope and tailored to protect legitimate business interests."[37]

Sexual Harassment, 42 DUKE L.J. 854, 879–80 (1993) (stating that in evaluating whether conduct is sufficiently severe or persuasive to constitute a hostile work environment individual judges have an immense amount of interpretive freedom, and that lower courts have "illiberally" used this freedom).

[33] *See* BACK & FREEMAN, *supra* note 32, at 4–5.

[34] *See, e.g.*, Duncan v. Cty. of Dakota, 687 F.3d 955, 960 (8th Cir. 2012) (noting the Eighth Circuit and other recent circuit cases "requir[e] hostile work environment claims to satisfy the demanding standards established by the Supreme Court in order to clear the high threshold for actionable harm").

[35] *See* CARLY MCCANN ET AL., CTR. FOR EMP. EQUITY, EMPLOYER'S RESPONSES TO SEXUAL HARASSMENT, 18 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3407960 [https://perma.cc/P8UB-3YKE] (finding that between 2012 and 2016, only 27% of sexual harassment charges filed with the EEOC resulted in any benefit to the filer despite EEOC categorizing 88% as potentially legally actionable).

[36] 2 MELVIN F. JAGER, TRADE SECRETS LAW § 13:3 (2019).

[37] Norman D. Bishara et al., *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 21 (2015). *See also* Tom James of Dall., Inc. v. Cobb, 109 S.W.3d 877, 888 (Tex. App. 2003) (citing an employee's common law duty not to use confidential or proprietary information acquired during employment adversely against his employer in holding that a NDA may be enforceable).

Historically, NDAs were used mainly by employers to prevent employees from disclosing any knowledge they had of company trade secrets.[38] Since the 1970s, the use of NDAs has expanded greatly.[39] Today, in the commercial world, employees routinely sign NDAs as part of employment contracts or settlement agreements, and thus promise not to disclose a broad range of confidential information.[40]

C. Use of NDAs in Sexual Harassment Context Hinders Efforts to Address the Problem

In many settings, the use of NDAs is largely unproblematic. They provide a vital safeguard for the protection of trade secrets and preservation of other confidential information.[41] But in the context of sexual harassment, NDAs undermine the public interest in knowing about and combatting workplace sexual harassment. In workplace harassment cases, companies use NDAs to keep the alleged misconduct from becoming public knowledge.[42]

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[38] Hiba Hafiz, *How Legal Agreements Can Silence Victims of Workplace Sexual Assault*, ATLANTIC (Oct. 18, 2017) https://www.theatlantic.com/business/archive/2017/10/legal-agreements-sexual-assault-ndas/543252/ [https://perma.cc/Z245-3GZ5]; *see also* Hoffman & Lampmann, *supra* note 25, at 191 (noting that most of the case law on NDAs is related to trade secrets).

[39] *See* Michelle Dean, *Contracts of Silence*, COLUM. JOURNALISM REV. (Winter 2018), https://www.cjr.org/special_report/nda-agreement.php/ [https://perma.cc/UN8A-FTAX].

[40] Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 627 (1999).

[41] *See* Dworkin & Callahan, *supra* note 4, at 157–58.

[42] *See, e.g.*, Katie Benner, *Abuses Hide in the Silence of Nondisparagement Agreements*, N.Y. TIMES (July 21, 2017), https://www.nytimes.com/2017/07/21/technology/silicon-valley-sexual-harassment-non-disparagement-agreements.html [https://perma.cc/K6XE-QP7Y] (discussing how nondisparagement agreements in employment contracts have played a significant role in keeping workplace sexual harassment accusations secret in the tech start-up world); Maura Judkis & Tim Carman, *Mike Isabella's Restaurants Used Nondisclosure Agreements to Silence Sexual Harassment Accounts, Lawsuit Alleges*, WASH. POST (Apr. 3, 2018), https://www.washingtonpost.com/lifestyle/food/mike-isabellas-restaurants-used-nondisclosure-agreements-to-silence-sexual-harassment-accounts-

1. How NDAs are Used in the Context of Workplace Sexual Harassment

Generally, sexual harassment NDAs are observed in two contractual contexts. First, NDAs often take the form of confidentiality provisions included in employment agreements that are entered into upon hiring at a new job. Second, sexual harassment NDAs are observed in the settlement context, as settlement terms included in settlement agreements that serve to resolve sexual harassment complaints.

This Note focuses on NDAs contained in settlement agreements. Unlike pre-dispute employment agreements,[43] settlement agreements are entered into after the alleged incident has occurred and thus are more specifically tailored as to what cannot be disclosed.[44] Another key distinction is that while employment agreements are contracts between employees and employers, settlement agreements are contracts between alleged harassers and victims. Additionally, any legal entities associated with alleged harassers, such as their corporate

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new-lawsuit-alleges/2018/04/03/aaf6f766-373e-11e8-9c0a-85d477d9a226_story.html?utm_term=.0cbfcd8f7352 [https://perma.cc/C7A5-GZUG].

[43] NDAs are included regularly in employment agreements between companies and their new employees. Generally such NDAs do not explicitly prevent employees from disclosing information related to sexual harassment they may have experienced, but instead broadly forbid employees from disclosing information that could harm the company's "business reputation" or "any employee's personal reputation." Daniel Hemel, *How Nondisclosure Agreements Protect Sexual Predators*, VOX (Oct. 13, 2017), https://www.vox.com/the-big-idea/2017/10/9/16447118/confidentiality-agreement-weinstein-sexual-harassment-nda [https://perma.cc/TC2J-R5RP]. While the main purpose of such NDAs is to protect company trade secrets and other intellectual property, these NDAs are drafted broadly to cover a wide range of business information such that they could potentially ban workers from speaking out about sexual harassment they have experienced in the workplace. *See* Jeff John Roberts, *Why You Should Be Worried About Tech's Love Affair with NDAs*, FORTUNE (Apr. 29, 2019), https://fortune.com/2019/04/29/silicon-valley-nda/ [https://perma.cc/A63Y-RMQK] (stating that the main stated objective of NDAs is to protect trade secrets). *See also* Hemel, *supra* note 43.

[44] Such settlement agreements are generally private contracts entered into by the parties out of court. *See* Drahozal & Hines, *supra* note 1, at 1458.

employers, can also be a party to settlement agreements.[45] Through the confidentiality provisions of these settlement agreements, victims promise to keep quiet about the settlement's terms and all details of the circumstances giving rise to the settlement.[46] In addition, these types of confidentiality provisions generally require victims to agree not to pursue civil litigation relating to the events at issue. In exchange, victims usually receive a monetary payoff and other benefits, such as maintaining their personal privacy.[47]

NDAs, and the silence they mandate, are critical to ending litigious disputes through settlements. After a 1991 amendment to Title VII that allowed for increased money damage awards to plaintiffs claiming employment discrimination,[48] the number of sexual harassment charges filed with the EEOC has proliferated.[49] Still, victims and their harassers, including companies associated with or employing the harasser, have legitimate interests in seeking settlements to avoid litigation that is invasive, exhausting, and expensive.

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[45] *See* L. Camille Hébert*, Is "MeToo" Only a Social Movement or a Legal Movement Too?,* 22 EMP. RTS. & EMP. POL'Y J. 321, 333–34 (2018).

[46] *See, e.g.,* Matthew Garrahan, *Harvey Weinstein: How Lawyers Kept a Lid on Sexual Harassment Claims*, FIN. TIMES (Oct. 23, 2017) https://www.ft.com/content/1dc8a8ae-b7e0-11e7-8c12-5661783e5589 [https://perma.cc/HC5M-4Q7Y] (describing the terms of the sexual harassment NDA entered into by Zelda Perkins and Harvey Weinstein to settle claims of sexual harassment).

[47] *See* S.M., *How Non-Disclosure Agreements Can Protect Workplace Abusers*, ECONOMIST (Oct. 20, 2017), https://www.economist.com/democracy-in-america/2017/10/20/how-non-disclosure-agreements-can-protect-workplace-abusers [https://perma.cc/US9R-KDFK].

[48] Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072 (codified as amended at 42 U.S.C. § 1981a (2012)). *See also* Hafiz, *supra* note 38.

[49] U.S. EQUAL EMP. OPPORTUNITY COMM'N, VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS 1 (2010), https://www.eeoc.gov/policy/docs/harassment.pdf [https://perma.cc/QQ68-SSVB] ("For example, the number of sexual harassment charges has increased from 6,883 in fiscal year 1991 to 15,618 in fiscal year 1998.").

Additionally, courts themselves seem to favor and encourage settlements in lieu of prolonged litigation.[50]

Secret settlement agreements for sexual harassment, however, can enable persistent sexual misconduct by harassers and prevent the general public from learning about their wrongdoing. Many harassers exhibit a "pattern potential" that is enabled by their persistent use of NDAs.[51] This pattern potential also puts victims at a bargaining disadvantage in negotiating sexual harassment settlement agreements.[52] Often, potential plaintiffs do not know whether their harasser has engaged in a pattern of sexual misbehavior or how many other potential complainants exist.[53] While it can be assumed that both victims and harassers value their privacy, it is hard for victims to evaluate how much their harassers value their own privacy due to information asymmetries.[54] Additionally, many victims are unwilling to take their harasser to trial because trials require them to relive the sexual harassment they suffered in a public setting.[55] This makes the cost of litigation, in non-monetary terms, higher for sexual harassment plaintiffs as compared to commercial plaintiffs.

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[50] *See* Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 257–58 (1999).

[51] Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 322 (2018).

[52] *Id.*

[53] *Id.* at 322. Without knowing how many other potential plaintiffs there are, victims will be unlikely to benefit from the use of collective negotiation. Two commonly recognized benefits of collective negotiation are (1) economies of scale and (2) the ability to make a joint bargaining decision. *See* Yeon-Koo Che, *The Economics of Collective Negotiation in Pretrial Bargaining*, 43 INT'L ECON. REV. 549, 550 (2002).

[54] Levmore & Fagan *supra* note 51, at 319.

[55] S.M., *supra* note 47.

2. The Prevalence of Workplace Sexual Harassment

While hard to estimate due to widespread underreporting,[56] workplace sexual harassment affects millions of employees each year.[57] The EEOC has estimated that anywhere from 25% to 85% of women experience sexual harassment in the workplace.[58] In 2018, out of 26,699 claims of workplace harassment filed with the EEOC, 28.5% included allegations of sexual harassment.[59] Recent self-reporting surveys have estimated the percentage of female employees that have been sexually harassed at work to be between 41–50%.[60]

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[56] Carly McCann & Donald T. Tomaskovic-Devey, *Nearly All Sexual Harassment at Work Goes Unreported – and Those Who Do Report Often See Zero Benefit*, CONVERSATION (Dec. 14, 2018), https://theconversation.com/nearly-all-sexual-harassment-at-work-goes-unreported-and-those-who-do-report-often-see-zero-benefit-108378 [https://perma.cc/BF7W-P83Z].

[57] MCCANN ET AL., *supra* note 35, at 5 (estimating that about 5.1 million employees are sexually harassed at work every year).

[58] CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 8 (2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace [https://perma.cc/73CZ-Y4A4].

[59] *All Charges Alleging Harassment (Charges Filed with EEOC) FY 2010 – FY 2019*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm [https://perma.cc/VQM8-94MZ]; *Charges Alleging Sexual Harassment (Charges Filed with EEOC) FY 2010 – FY 2019*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm [https://perma.cc/RJ8L-ZPLH].

[60] HISCOX, 2018 HISCOX WORKPLACE HARASSMENT STUDY 6 (2018), https://www.hiscox.com/documents/2018-Hiscox-Workplace-Harassment-Study.pdf [https://perma.cc/E4Q7-EEDK] (finding that amongst 500 full-time employees, thirty-five percent of workers felt they had been harassed at work and amongst just female survey respondents, the figure was forty-one percent); IPSOS, IPSOS/NPR EXAMINE HOW VIEWS ON SEXUAL HARASSMENT HAVE CHANGED IN THE PAST YEAR 9 (2018), https://www.ipsos.com/sites/default/files/ct/news/documents/2018-10/ipsos_npr_sexual_harassment_topline_103118_final.pdf [https://perma.cc/US24-VE7V] (finding through a 2018 Ipsos/NPR poll that about half of all women said they had "personally experienced" sexual harassment).

Such workplace sexual harassment often goes unreported and, for those who do report it, seeking formal action, either internally within their organization or legally through filing a legal complaint, is the least common response.[61] According to a 2016 EEOC report, approximately 90% of individuals who experience harassment never take formal action.[62] Additionally, the study found that approximately 75% of individuals who experience sexual harassment never discuss it with a supervisor, manager, or union representative.[63]

Data suggests that employees' failure to report workplace harassment stems from fear.[64] For example, a recent study found that 53% of those surveyed who experienced workplace harassment did not report it because they feared reporting the allegations would create a hostile work environment.[65] Forty-six percent feared retaliation and being fired from their job.[66] Thirty-seven percent of those that did report their harassment noted that their complaints were not properly handled by their employer.[67]

3. Incentives for Companies to Conceal Workplace Sexual Harassment

Because confidentiality is often an essential condition for both parties to settle a sexual harassment claim, NDAs can create negative externalities in contributing to a culture of silence around workplace sexual harassment. The issue of underreported workplace sexual harassment has only worsened with the rise of "different contractual methods [used by employers] to keep workplace discrimination claims, including sexual harassment claims, confidential and non-public."[68]

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[61] *See* FELDBLUM & LIPNIC, *supra* note 58, at v, 16.

[62] *See id.* at 8.

[63] *See id.* at v.

[64] HISCOX, *supra* note 60, at 6.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] PRACTICAL LAW LABOR & EMPLOY'T, SEXUAL HARASSMENT CLAIMS IN SETTLEMENT, ARBITRATION, AND OTHER EMPLOYMENT AGREEMENTS STATE LAWS CHART: OVERVIEW, Westlaw W-017-3754 (2020).

It is easy to see what incentivizes businesses to use sexual harassment NDAs. That is, in furtherance of their ultimate goal of preventing news of sexual harassment claims from leaking, NDAs have a strong deterrent effect on victims. Most centrally this is because NDAs, especially those contained in employment agreements, are often drafted broadly, leaving victims confused and afraid as to what they are permitted to say.[69] Fear of breaching their NDA and incurring legal consequences leads victims not to speak up about their experiences.[70] Companies also use NDAs to settle claims brought by sexual harassment victims against their alleged harasser.[71] Through their employment of or association with an alleged harasser, companies are often named defendants in litigations commenced by sexual harassment victims.[72] Using NDAs to deter and later conceal misconduct protects companies from the negative ramifications that result from the public's knowledge of employee sexual misconduct, such as bad publicity or reputational harm.[73]

D. The Limitations of Federal Law Protections for Victims Subject to NDAs

The current legislative landscape provides unclear guidance as to the enforceability of sexual harassment NDAs. While Title VII prohibits sexual harassment in the workplace, its protections are limited to situations relating to employment, which significantly cabins its scope.

First, Title VII does not apply to every type of employer; it only applies to employers with fifteen or more employees and

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[69] *See infra* Section V.A.1.

[70] *See* Judkis & Carman, *supra* note 42 (finding that employees said they were "afraid to talk" publicly about anything related to their place of employment because they had signed NDAs as a condition of accepting their jobs and feared being sued).

[71] *See* Hébert, *supra* note 45, at 333–34.

[72] *See* JoAnna Suriani, Note, *"Reasonable Care to Prevent and Correct": Examining the Role of Training in Workplace Harassment Law*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 801, 808–12 (2019).

[73] *See* Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1612 (2018).

to any agent of such employers.[74] Additionally, many courts have determined that Title VII does not allow for individual liability because individuals are not employers as defined under the statute.[75] Other courts have found individuals liable under Title VII only if they are considered agents of the employer.[76] This means that individuals who commit sexual harassment who are not employers of the victim and are not agents of the employer may not be liable for their actions under Title VII.[77] But without Supreme Court guidance on individual liability, it is unclear whether victims who directly sue their harassers under Title VII will recover damages.[78]

Second, although entities may be sued for the sexual harassment committed by their employees, this type of liability, too, is limited. That is because any worker not classified as an

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[74] 42 U.S.C. § 2000e(b) (2018) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person . . . .").

[75] Elizabeth R. Koller Whittenbury, *Individual Liability for Sexual Harassment Under Federal Law,* 14 LAB. LAW. 357, 357 (1998). Most circuit courts have rejected individual liability for supervisors that are sued under Title VII. *See, e.g.*, Fantini v. Salem State Coll., 557 F.3d 22, 28–31 (1st Cir. 2009); Tomka v. Seiler Corp., 66 F.3d 1295, 1314 (2d Cir. 1995); Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1077–78 (3d Cir. 1996) (en banc); Lissau v. S. Food Serv., Inc., 159 F.3d 177, 180–81 (4th Cir. 1998); Smith v. Amedisys Inc., 298 F.3d 434, 448 (5th Cir. 2002) (finding that Congress meant only "to import *respondeat superior* liability into Title VII" and not individual liability); Wathen v. Gen. Elec. Co., 115 F.3d 400, 405–06 (6th Cir. 1997); Williams v. Banning, 72 F.3d 552, 552–55 (7th Cir. 1995); Smith v. St. Bernards Reg'l Med. Ctr., 19 F.3d 1254, 1255 (8th Cir. 1994); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993); Haynes v. Williams, 88 F.3d 898, 901 (10th Cir. 1996); Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991); Gary v. Long, 59 F.3d 1391, 1399 (D.C. Cir. 1995).

[76] *See* Whittenbury, *supra* note 75, at 257-58.

[77] While there appears to be a trend in federal discrimination cases to ban personal liability, federal courts have found individuals liable for their own harassment in sexual harassment cases. *See, e.g.,* Harvey v. Blake, 913 F.2d 226, 227 (5th Cir. 1990); Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989), *rev'd in part, aff'd in part en banc*, 900 F.2d 27 (4th Cir. 1990); Vance v. S. Bell Tel. & Tel. Co., 863 F.2d 1503, 1515 (11th Cir. 1989).

[78] *See* Whittenbury, *supra* note 75, at 358.

employee is not protected under Title VII.[79] For example, federal courts have interpreted Title VII not to cover workers classified as independent contractors.[80] Due to this distinction, within the gig economy[81] on-demand workers are not protected by Title VII.[82] Companies that employ these on-demand workers, such as ride-sharing companies, assert that their drivers are considered independent contractors, not employees.[83] As another example, many individuals working on films,

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[79] *See* 42 U.S.C. § 2000e(f) (2018) (defining workers protected under Title VII as "individual[s] employed by an employer").

[80] *See, e.g.,* Shah v. Deaconess Hosp., 355 F.3d 496, 499 (6th Cir. 2004); Spirides v. Reinhardt, 613 F.2d 826, 829 (D.C. Cir. 1979).

[81] The gig economy can be broken down into three main components: the consumers who want a specific service, the independent workers paid by performing those services (the "gigs"), and the companies that connect the consumers to the workers, generally through app-based technology platforms. *See* EMILIA ISTRATE & JONATHAN HARRIS, NAT'L ASS'N. CTYS. FUTURES LAB, THE FUTURE OF WORK: THE RISE OF THE GIG ECONOMY 3 (2017), https://www.naco.org/sites/default/files/documents/Gig-Economy.pdf [https://perma.cc/3LL7-XQE3]. The gig economy differs from traditional labor markets consisting of employees who receive a steady wage. One of the main differences between a gig and traditional work arrangement is that each gig is a temporary work engagement, and the worker is paid only for completing each specific gig. *Id.*

[82] *See* NAYANTARA MEHTA, NAT'L EMP'T L. PROJECT, THE ON-DEMAND ECONOMY & ANTI-DISCRIMINATION PROTECTIONS (2017), https://www.nelp.org/publication/on-demand-economy-anti-discrimination-protections [https://perma.cc/WC9S-NMKE]; *see also* Jacquie Lee, *Gig Workers Have Scant Protection From Job Bias,* BLOOMBERG (Feb. 9, 2018), https://news.bloomberglaw.com/business-and-practice/gig-workers-have-scant-protection-from-job-bias/ [https://perma.cc/6AML-HTNE].

[83] *See, e.g.,* Razak v. Uber Technologies, Inc., 951 F.3d 137, 141 (3d Cir. 2020) (stating Uber's assertion that its drivers should be classified as independent contractors and not employees). The federal government, through an advice memorandum by the Department of Labor, has also classified drivers as independent contractors under federal law. *See* Uber Techs., Inc., NLRB Advice Memorandum, No. 13-CA-163062 (Apr. 16, 2019). But this classification may change in the future and may vary state by state. *See, e.g.,* Matthew Haag & Patrick McGeehan, *Uber Fined $649 Million for Saying Drivers Aren't Employees*, N.Y. TIMES (Nov. 14, 2019), https://www.nytimes.com/2019/11/14/nyregion/uber-new-jersey-drivers.html [https://perma.cc/5HUZ-4C5D] (reporting that New Jersey is claiming Uber misclassified its workers as independent contractors and not as employees).

theater shows, or commercials in the entertainment industry work as independent contractors and thus would not be classified traditional employees who fall under Title VII's protections.[84] It follows that, as the definition of the workplace is changing, millions of non-traditional employees may potentially be unable to bring claims under Title VII.[85] Without Title VII protection, non-traditional employees are inarguably more vulnerable to workplace sexual harassment. Additionally, non-traditional employees generally have limited institutional support and few or no supervisors to whom they can report misconduct.[86] While there is limited data on such

[84] *See* Bryce Covert, *Actresses—and Millions of Other Workers—Have No Federal Sexual-Harassment Protections*, NATION (Oct. 19, 2017), https://www.thenation.com/article/actresses-and-millions-of-other-workers-have-no-federal-sexual-harassment-protections/ [https://perma.cc/5UML-5N5H]; *see also* Nicole Einbinder, *What Happens if Someone Breaks a Non-Disclosure Agreement?*, PBS: FRONTLINE (Mar. 2, 2018), https://www.pbs.org/wgbh/frontline/article/what-happens-if-someone-breaks-a-non-disclosure-agreement/ [https://perma.cc/K7FR-8YM3] ("Some in Hollywood don't have the option of going to the EEOC: independent contractors, including many actors and actresses, aren't considered employees and therefore aren't protected under Title VII, the main federal protection against sexual harassment in the workplace.").

[85] A 2019 study estimated that fifty-seven million Americans were freelancers (defined as individuals who have engaged in supplemental, temporary, project, or contract-based work within the past twelve months). *Sixth Annual "Freelancing in America" Study Finds That More People Than Ever See Freelancing as a Long-Term Career Path*, UPWORK (Oct. 3, 2019), https://www.upwork.com/press/2019/10/03/freelancing-in-america-2019/ [https://perma.cc/X737-5MH8]. Additionally, the Bureau of Labor Statistics estimated that 5.9 million people held temporary jobs or jobs they did not expect to last in May 2017. *See 3.8 Percent of Workers Were Contingent in May 2017*, U.S. BUREAU LAB. STAT.: ECON. DAILY (June 14, 2018), https://www.bls.gov/opub/ted/2018/mobile/3-point-8-percent-of-workers-were-contingent-in-may-2017.htm [https://perma.cc/EGL4-359C].

[86] *See* Nathan Heller, *The Gig Economy Is Especially Susceptible to Sexual Harassment*, NEW YORKER (Jan. 25, 2018), https://www.newyorker.com/culture/cultural-comment/the-gig-economy-is-especially-susceptible-to-sexual-harassment [https://perma.cc/VFV9-QDJW].

workers, a recent study revealed that 54% of self-employed women reported being sexually harassed.[87]

Federal law does place certain restrictions on sexual harassment NDAs for those employees that do fall under Title VII's protections. For example, the First Circuit has held that settlement agreement provisions that prohibit an employee from communicating with or assisting the EEOC in its investigation of a sexual harassment charge are "void as against public policy."[88] This ruling was expanded by EEOC guidance, which prohibits employers from interfering with their employees' ability to file charges or participate in any manner in an investigation, hearing, or proceeding under the laws enforced by the EEOC, regardless of whether a settlement agreement has been entered into.[89] This federal protection of victims' right to pursue a governmental investigation of their claims is limited, however, as victims of sexual harassment must file charges with the EEOC within 180 days of the alleged harm, or, in the case of a state or local agency, within 300 days of the alleged harm.[90]

III. THE USE OF CONTRACT LAW DOCTRINE IN ANALYZING ENFORCEABILITY OF NDAS FOR SEXUAL HARASSMENT SETTLEMENTS

Until comprehensive legislation addressing the enforceability of sexual harassment NDAs is passed, traditional principles of contract law can provide an alternative route for

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[87] *Sexual Harassment Is Pervasive Among Self-Employed Creatives*, HONEYBOOK (Jan. 25, 2018), https://www.honeybook.com/risingtide/sexual-harassment-report [https://perma.cc/U37U-T9E8].

[88] EEOC v. Astra USA, Inc., 94 F.3d 738, 744–45 (1st Cir. 1996). The First Circuit reached its finding that the contractual provision was against public policy by balancing "the impact of [the] settlement provisions that effectively bar cooperation with the EEOC on the enforcement of Title VII against the impact that outlawing such provisions would have on private dispute resolution." *Id.*

[89] U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC NOTICE NO. 915.002, ENFORCEMENT GUIDANCE ON NON-WAIVABLE EMPLOYEE RIGHTS UNDER EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) ENFORCED STATUTES (1997).

[90] *See* 42 U.S.C. § 2000e-5(e)(1) (2018).

finding such NDAs unenforceable. Specifically, this Note discusses the public policy exception to the enforcement of contracts in contract law doctrine that can potentially be used by courts to hold NDAs related to sexual harassment unenforceable.

A. The Freedom to Contract

Contract law is based on the principle of freedom of contract—sometimes described as "the power of the contracting parties to control the rights and duties they create."[91] This principle manifests in the general reluctance of courts to interfere with contracts entered into willingly and voluntarily by two private parties.[92] Under a freedom of contract regime, a person is generally free to make a promise of silence in return for consideration.[93] If a contract is formed, then it is legally binding and enforceable such that the law will provide a remedy in the event of a contractual breach.[94]

B. The Public Policy Exception

1. The Restatement Test and Pattern of Judicial Deference to the Legislature for Determining Relevant Public Policy

Even if all elements of a valid contract are present, courts may deem such agreements "void as against public policy."[95] The public policies that courts recognize in this way generally involve matters that "strike at the heart of a citizen's social

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[91] Robert Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598, 598 (1969).

[92] *See* Addison E. Dewey, *Freedom of Contract: Is It Still Relevant?*, 31 OHIO ST. L.J. 724, 725 (1970).

[93] Garfield, *supra* note 3, at 268.

[94] *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.").

[95] ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 480 (5th ed. 2013).

rights, duties, and responsibilities."[96] Historically, courts themselves determined which public policies could serve as the basis "on which they [could] den[y] enforcement of agreements."[97] In the current regime, however, it is legislation, not case law, that indicates what the bounds of the public policies exception are.[98] Courts often express care and deference to the judgment of the legislature when reviewing contracts that are allegedly contrary to public policy.[99]

Under the Restatement (Second) of Contracts, there are two bases which may render a contract or contract term unenforceable as against public policy: (1) if existing legislation dictates that such an agreement is unenforceable; or (2) if the parties' interest in the contract's enforcement is plainly dwarfed by a public policy interest against enforcement.[100] In many close cases where courts must balance public interests against private parties' interests in enforcement, courts rely on a fact-intensive "in light of all the circumstances" inquiry.[101]

Under the first basis, it is the legislature that determines what public policies ought to trump the will of contracting parties, making the court's function essentially one of statutory

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[96] Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878–79 (Ill. 1981).

[97] FARNSWORTH, *supra* note 15, § 5.2; s*ee also* Walter Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 679, 679 (1935); RESTATEMENT (SECOND) OF CONTRACTS § 179 cmts. a–b.

[98] The legislature has largely replaced the judiciary in dictating public policy because it is usually more responsive to the public than judges, and it has superior tools at its disposal to assist in factual investigations. *See* RESTATEMENT (SECOND) OF CONTRACTS § 179 cmt. b.

[99] *See, e.g.*, Sanchez v. Cty. of San Bernardino, 98 Cal. Rptr. 3d 96, 104 (Cal. Ct. App. 2009). Courts, in deferring to the legislature, have reasoned that the legislature is ultimately in a better position to make a significant change in law. *See, e.g.*, Murphy v. Am. Home Prods. Corp., 448 N.E.2d 86, 89–90 (N.Y. 1983).

[100] RESTATEMENT (SECOND) OF CONTRACTS § 178 cmts. a–b.

[101] RESTATEMENT (SECOND) OF CONTRACTS § 178 cmt. b ("In doubtful cases, however, a decision as to enforceability is reached only after a careful balancing, in the light of all the circumstances, of the interest in the enforcement of the particular promise against the policy against the enforcement of such terms.").

interpretation.[102] But unless the legislation explicitly states that agreements or portions of agreements that violate it are unenforceable, it is often unclear whether such agreements would be held to be contrary to public policy.[103] Without such explicit statutes, courts must determine whether their refusal to enforce agreements will further or frustrate the policy that underlies the statute itself.[104] Also, legislators may fail to adequately consider the legal ramifications their legislation may have on contracts.[105] Given the ambiguity surrounding state legislatures' intent, Walter Gellhorn advocates that statutes must only be "the starting point of [] judges' excursion" into defining what specific public policies ought to be recognized by the state.[106] In approaching the decision of whether to enforce a contract, courts should "study the public policy involved," and determine whether enforcing the contract will "disserve the general interest as it has been indicated by the legislature."[107] This ties in to the balancing analysis of the Restatement's second basis. By leaving the rule for deriving a state's public policies open-ended, the Restatement empowers courts to determine themselves what public policies they should consider in the balancing analysis.[108]

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[102] FARNSWORTH, *supra* note 15, § 5.1. *See also Murphy*, 448 N.E.2d at 90 (stating that it is the duty of the legislature to resolve public policy issues in declining to recognize a claim for wrongful discharge of at-will employees without legislative action).

[103] FARNSWORTH, *supra* note 15, § 5.1.

[104] *Id.*

[105] *See* RESTATEMENT (SECOND) OF CONTRACTS § 179 cmt. b ("When proscribing conduct, however, legislators seldom address themselves explicitly to the problems of contract law that may arise in connection with such conduct."); *see also* FARNSWORTH, *supra* note 15, § 5.5 (noting that when legislators make a certain conduct a crime, they seldom deal explicitly with the enforceability of contracts involving that conduct).

[106] Gellhorn, *supra* note 97, at 685.

[107] *Id*. at 686.

[108] RESTATEMENT (SECOND) OF CONTRACTS § 179 cmt. a. The Restatement does not provide any specifications as to what public policy considerations courts may weigh against the private interests in favor of enforcement.

2. The Balancing Test Analysis to be used for Evaluating Sexual Harassment NDAs

Under the second basis for finding a contract contrary to public policy, courts can consider relevant legislation, case law, and the court's own perception of what societal interests need protection.[109] In the case where no explicit legislation on point exists, courts may look to the legislative history and purpose of peripherally relevant statutes.[110] Ultimately, in evaluating whether a public policy ought to override the enforcement of a contract or term, courts are likely to consider the following factors:

> (a) the relative strength of that policy as evidenced by legislation or judicial decisions, (b) the likelihood that non-enforcement of the term will further that policy, (c) the seriousness of any wrongdoing and whether it was deliberate and (d) the directness of the connection between the wrongdoing and the term.[111]

Enforcement, however, will only be denied if these abovementioned factors "clearly outweigh the law's traditional interest to protect the expectations of the parties, [the court's] abhorrence of any unjust enrichment, and any public interest in the enforcement of the particular term."[112] In *Equal Employment Opportunity Commission v. Astra U.S.A*, *Inc.*, for example, the court balanced all relevant public and private interests in determining whether to enforce a waiver of the right to file charges with the EEOC. [113] The *Astra* court reinforced the public policy principle that a "promise is unenforceable if

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[109] Garfield, *supra* note 3, at 297. Historically, judges themselves developed the public policies that counseled against enforcement, based on their own perception of what aspects of the public welfare needed protection. *See* RESTATEMENT (SECOND) OF CONTRACTS § 179 cmt. a.

[110] FARNSWORTH, *supra* note 15, § 5.5.

[111] RESTATEMENT (SECOND) OF CONTRACTS § 178(2) (listing factors to be taken into account in weighing a public policy against the enforcement of a contractual term).

[112] RESTATEMENT (SECOND) OF CONTRACTS § 178 cmt. b.

[113] EEOC v. Astra USA, Inc., 929 F. Supp. 512, 518 (D. Mass. 1996), *aff'd in part, vacated in part*, 94 F.3d 738 (1st Cir. 1996).

the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."[114] There, however, the court identified a conflict between two public policy interests: encouraging voluntary settlements through restrictive contractual provisions, and preventing employment discrimination through EEOC enforcement of Title VII.[115] Ultimately, the First Circuit concluded that the public interest in encouraging communication with the EEOC outweighed the interests of private parties in enforcing their mutually agreed upon settlement agreements.[116] Employees and employers "cannot agree to deny to the EEOC the information it needs to advance the public interest."[117]

In determining the enforceability of sexual harassment NDAs, courts have to consider the competing policy interests of preventing future harassment from happening and allowing existing victims to bargain for compensation in exchange for their silence. The underlying public interest in enforcement is, again, an echo of the principle of freedom of contract. That is, under that principle, individuals ought to be granted broad powers to enter into legally enforceable agreements.[118] Further, enforcing such NDAs protects the justified expectations of parties, and allows them to continue to extract private benefits from their freely-chosen bargains.[119] Specifically, victims have an interest in enforcing NDAs to keep their bargained for compensation and to maintain their privacy.[120]

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[114] *Id.*

[115] *Id.* at 744 (citing Gen. Tel. Co. of the Nw., Inc., v. EEOC, 446 U.S. 318, 326 (1980)).

[116] *Id.* at 744–45.

[117] *Id.* at 518–19 (quoting EEOC v. Cosmair, Inc., 821 F.2d 1085, 1090 (5th Cir. 1987)).

[118] *See, e.g.*, Ryan v. Weiner, 610 A.2d 1377, 1380 (Del. Ch. 1992) (holding that the right of persons to contract is a basic part of their general liberty).

[119] FARNSWORTH, *supra* note 15, § 5.1.

[120] *See* Debra S. Katz, Partner, & Hannah Alejandro, Senior Counsel, Katz, Marshall & Banks LLP, Remarks at the Meeting of the Equal Employment Opportunity Commission's Select Task Force on the Study of Sexual Harassment in the Workplace (June 11, 2018),

Often, a victim's promise of silence is the only leverage they have to bargain with to obtain compensation for their experiences.[121] From a societal perspective, prohibiting sexual harassment NDAs outright could have a chilling effect and may deter victims from coming forward at all.[122]

When sexual harassment NDAs are enforced, however, the public loses valuable health and safety information, given that such NDAs allow harassers to continue their behavior and victimize more people.[123] The public also has an interest in holding harassers accountable for their wrongdoing and in reducing future public harm. Given the number of harassers that have continued their pattern of sexual misconduct after settling multiple claims, this fear of continued misconduct is legitimate.[124]

IV. APPLYING THE PUBLIC POLICY ANALYSIS: USING STATE LEGISLATURE PUBLIC POLICY TO ARGUE SEXUAL HARASSMENT NDAS ARE UNENFORCEABLE

While current case law suggests that courts are hesitant to declare contracts invalid on public policy grounds,[125] judges

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https://www.eeoc.gov/written-testimony-debra-s-katz-partner-and-hannah-alejandro-senior-counsel-katz-marshall-banks-llp [https://perma.cc/HVP5-2RMY].

[121] *See* Jeannie Suk Gersen, *Trump's Affairs and the Future of the Non-disclosure Agreement,* NEW YORKER (Mar. 30, 2018), https://www.newyorker.com/news/news-desk/trumps-affairs-and-the-future-of-the-nondisclosure-agreement [https://perma.cc/EC6A-T5Z2] (stating that sometimes the only bargaining chip that sexual harassment victims have in a dispute is their silence); *see also* Drahozal & Hines, *supra* note 1, at 1471 (noting how claimants can use secrecy as a negotiating chip to obtain higher payouts).

[122] *See* RAGHU & SURIANI, *supra* note 2, at 5.

[123] *See* Levmore & Fagan, *supra* note 51, at 322.

[124] *See id.* (describing how confidential settlements conceal patterns of sexual misbehavior because other potential complainants may not come forward).

[125] *See, e.g.,* Phx. Ins. Co. v. Rosen, 949 N.E.2d 639, 645 (Ill. 2011) (noting that the "power to declare a private contract invalid on public policy grounds is exercised sparingly").

should adopt a more active role in shaping public policy in this space, particularly when the potential for future public danger is evident. But even with a more active role, judges can and should still look to relevant state legislation for guidance. Thus, plaintiffs seeking to break the terms of their sexual harassment NDAs should argue that the agreements are void on public policy grounds, and they should look to relevant state legislation as evidence of a state's public policy interest in reducing the occurrence and protecting victims of sexual harassment.

This Section argues that a broad range of legislation should be considered as evidence of a state's public policy interest in this area. In addition to legislation that restrict NDAs in instances of sexual harassment, consideration should be given to other types of legislation directed at state law issues such as workplace harassment and the concealment of public hazards. These state statutes, taken as a whole, could demonstrate that a state has articulated sufficiently strong public policy concerns to render a sexual harassment NDA unenforceable.

A. Sources of Public Policy: Types of Relevant State Legislation to Consider

Because contract law is dictated by state law, public policy concerns vary by state. In connection with the #MeToo movement, several states have enacted statutes which restrict or prohibit sexual harassment NDAs.[126] Such states, however, remain in the minority.[127] Therefore, in assessing whether a state has demonstrate a public policy interest in reducing sexual harassment and protecting victims of sexual harassment courts should look to a "multitude of laws in which lawmakers have wrestled with the dilemma of balancing confidentiality

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[126] *See, e.g.*, CAL. CIV. PROC. CODE § 1001 (West 2019); N.J. STAT. ANN. § 10:5–12.8 (West 2019); N.Y. C.P.L.R. 5003-b (McKinney 2019).

[127] Since 2018, at least twelve states have passed new laws restricting NDAs in instances of sexual harassment or sexual assault. *See* Harris, *supra* note 18. Of those twelve states, only New Jersey has banned their enforcement when victims break their NDAs. *Id.*

and disclosure interests."[128] For one example, almost every state has laws prohibiting workplace sexual harassment.[129] In addition, state legislatures have regulated NDAs in other comparable contexts in the form of laws prohibiting the concealment of public hazards.[130] In sum, courts should look to state legislation across a broad range of subject matters in considering whether a state has demonstrated a public policy interest against enforcing sexual harassment NDAs. Relevant types of state legislation can and should include: (1) legislation restricting or banning sexual harassment NDAs, (2) anti-discrimination statutes prohibiting workplace sexual harassment, and (3) laws prohibiting the concealment of public hazards.[131]

B. Legislation Prohibiting Sexual Harassment or Protecting Victims of Sexual Harassment

In states that do not expressly prohibit sexual harassment NDAs, other forms of state legislation could serve as evidence of a state's public policy interest in finding such NDAs unenforceable. As noted above, relevant state legislation should include anti-sexual harassment legislation and laws prohibiting the concealment of public hazards.

1. States with Anti-Sexual Harassment Legislation

As it relates to sexual harassment legislation, states can be sorted into three broad categories: (1) those with anti-sexual harassment statutes more protective than Title VII, (2) those with anti-sexual harassment statutes mirroring federal

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[128] Garfield, *supra* note 93, at 316.

[129] *See* Rachel Farkas et al., *State Regulation of Sexual Harassment*, 20 GEO. J. GENDER & L. 421, 424 (2019) (noting that forty-seven states and the District of Columbia have enacted legislation prohibiting workplace sexual harassment).

[130] *See infra* notes 170–71 and accompanying text.

[131] Garfield, *supra* note 93, at 318 (discussing how "fact-intensive inquiries are common when courts police contracts for public policy violations").

law protections, and (3) those without any anti-sexual harassment laws.[132]

Currently, forty-seven states and the District of Columbia have adopted their own anti-discrimination laws that prohibit workplace sexual harassment.[133] This overwhelming number represents an affirmation by state legislatures across the country that this type of behavior is a general "matter of public concern that involves inequitable and potentially coercive uses of power."[134] Thus, in any state that has enacted an anti-sexual harassment statute, plaintiffs can make a strong public policy argument to hold their NDA unenforceable, given the state's explicit demonstration of their interest in preventing sexual harassment.

Several states have gone even further by enacting workplace protections that are more robust than Title VII.[135] For example, while Title VII only provides sexual harassment protection to employees working for employers with at least fifteen employees, thirty-eight states have passed sexual harassment legislation that covers employers with fewer than

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[132] This Note limits its discussion to states that, at a minimum, have enacted their own anti-sexual harassment laws. In a minority of states, such as Alabama and Georgia, there are no state laws expressly prohibiting sexual harassment, and instead sexual harassment cases are brought in those jurisdictions pursuant to federal law. *See* Cynthia S. Ross & Robert E. England, *State Governments' Sexual Harassment Policy Initiatives*, 47 PUB. ADMIN. REV. 259, 260 (1987). In such states without clear legislative intent to prohibit workplace sexual harassment, it would be difficult to mount the type of public policy argument advocated for in this Section.

[133] Farkas, *supra* note 129, at 424.

[134] Louise Marie Roth, *The Right to Privacy Is Political: Power, the Boundary Between Public and Private, and Sexual Harassment*, 24 LAW & SOC. INQUIRY 45, 67 (1999).

[135] *See, e.g.,* ALASKA STAT. ANN. § 18.80.300 (5) (West 2019) (using a broader definition of "employer"); ARIZ. REV. STAT. ANN. § 12-720 (2019); COLO. REV. STAT. ANN. § 24-34-402 (West 2019); CONN. GEN. STAT. ANN. § 46a-60 (West 2019); DEL. CODE ANN. tit. 19, § 711A (West 2019); D.C. Code Ann. § 2-1401.02 (West 2019); HAW. REV. STAT. ANN. § 378-2 (West 2019); Illinois Workplace Transparency Act, 2020 Ill. Legis. Serv. P.A. 101–221 (West) (codified at 820 ILL. COMP. STAT. ANN. 96/1-1–1-50); IND. CODE §§ 22-9-1-2–3 (2019); IOWA CODE § 216.6 (2018); N.J. STAT. ANN. § 10:5-12.8 (West 2019); N.Y. C.P.L.R. 5003-b (McKinney 2019).

fifteen employees.[136] Additionally, some states prohibit workplace discrimination against workers not covered by Title VII, such as contractors or unpaid interns.[137] And at least seven states require employers to provide sexual harassment training to their supervising employees and/or other workers.[138] While implementation of these laws and the requirements they impose differ, their commonality lies in their legislative purpose—to reduce the prevalence of workplace harassment.[139]

Public policies are not fixed, they vary over time.[140] Given the continued momentum of the #MeToo and Time's Up movements and the number of states that have reacted to public sentiment by passing additional laws against workplace sexual harassment, we can conclude that both the general public and state legislatures are very interested in eliminating workplace sexual harassment.[141] This indicates a shift in societal

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[136] Farkas, *supra* note 129, at 436.

[137] *See, e.g.,* D.C. Code Ann. § 2-1401.02 (West 2019) (defining the term "employee" to include an unpaid intern); IDAHO CODE § 67-5902 (2019) (defining the term "employer" to include a person who is a contractor for the state).

[138] CAL. CIV. PROC. CODE § 1001 (West 2019); CONN. GEN. STAT. ANN. § 46a-60 (West 2019); DEL. CODE ANN. tit. 19, § 711A(g) (West 2019); 775 ILL. COMP. STAT ANN. 5/2–109 (West 2019); ME. REV. STAT. ANN. tit. 7, § 807 (2019); MASS. GEN. LAWS. Ch. 151B § 3A(e) (West 2019); N.Y. LAB. § 201-g (McKinney 2019).

[139] *See, e.g.,* DEL. CODE ANN. tit. 19, § 711A (West 2019) (stating that the purpose of the law is to combat sexual harassment in the workplace and to ensure the safety and dignity of all employees in Delaware).

[140] Pope Mfg. Co. v. Gormully, 144 U.S. 224, 233–34 (1892) (stating that public policy "is not absolutely invariable or fixed, since contracts which at one stage of our civilization may seem to conflict with public interest, at a more advanced stage are treated as legal and binding").

[141] For example, New York State Senator Brad Hoylman, in introducing legislation voiding certain NDAs concealing harassment, emphasized the need to eliminate "shady confidentiality clauses" to prevent workplace misconduct and protect employee rights. *See* Brad Hoylman, *Stop Letting Powerful Men Silence Victims with Confidentiality Agreements*, GUARDIAN (Oct. 30, 2017), https://www.theguardian.com/commentisfree/2017/oct/30/powerful-men-silence-victims-confidentiality-agreements-harvey-weinstein [https://perma.cc/MLR9-9MD6]. Hoylman also stated that settlement agreements including confidentiality clauses solely serve the interests of

interests that courts should recognize as a new, generally accepted public policy that weighs in favor of protecting the rights of sexual harassment victims.[142] Such a public policy concern would be thwarted by the blind enforcement of sexual harassment NDAs. Thus, in states who have passed reactive #MeToo legislation, courts should use a reasonableness approach in balancing the public interest in preventing secrecy around sexual harassment against private parties' interest in enforcing their bargained for agreements.[143]

2. States with Legislation Restricting Contracting as it Relates to Sexual Harassment

While most states have their own anti-sexual harassment legislation in place, many states have not passed specific statutes addressing sexual harassment NDAs. In recent years, however, in response to public sentiment during the #MeToo movement, some state legislatures have chosen to adopt and enact legislation that specifically limits or prohibits NDAs used to conceal workplace sexual harassment.[144]

In addition to California, Oregon, New Jersey, and New York, where state legislatures have expressly prohibited or severely restricted the use of NDAs in sexual harassment settlements, several other states have placed restrictions on contractual arrangements that require secrecy from sexual harassment victims.[145] While these states have recognized the

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predators and facilitators that demonstrate the "power imbalance that fuels sexual harassment in the workplace." *Id.*

[142] FARNSWORTH, *supra* note 15, § 5.2 ("As the interests of society change, courts are called upon to recognize new policies, while established policies become obsolete or are comprehensively dealt with by legislation.").

[143] Town of Newton v. Rumery, 480 U.S. 386, 394 (1987) (using a balancing test to reject a per se rule for release-dismissal agreements because a "promise is unenforceable [only] if the interest in its enforcement is outweighed . . . by a public policy harmed by the agreement").

[144] *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-720(D) (2019) (prohibiting the use of taxpayer money as consideration for settling a sexual misconduct claims); WASH. REV. CODE § 49.44.210(1) (2019) (barring all sexual harassment NDAs used in employment agreements as a condition of employment).

[145] *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-720(A) (2019) (prohibiting the use of NDAs when used to restrict a victim from responding to a peace

need to reduce contractual barriers that prevent employees from disclosing workplace sexual harassment, none of these states' laws explicitly prohibit NDAs used in private party settlement agreements.[146] For instance, legislation passed in Washington and Vermont specifically carves out NDAs related to settlement agreements from their prohibitions.[147]

The statutory scheme in Vermont, first enacted in 2018, provides a useful test case. Pursuant to Vermont Act No. 183 (the "Vermont Act"),[148] Vermont employers are required to protect all individuals in the workplace from sexual harassment—including volunteers, interns, and independent

officer's or prosecutor's inquiry or making a statement in a criminal proceeding); MD. CODE ANN., LAB. & EMPL. § 3-715 (West 2019) (prohibiting the use of mandatory arbitration provisions for sexual harassment claims in employment agreements); TENN. CODE ANN. § 50-1-108 (2019) (prohibiting employers from requiring employees to enter into an NDA regarding sexual harassment in the workplace as a condition of their employment); VA. CODE ANN. § 40.1-28.01 (2019) (making NDAs void and unenforceable if they require employees, as a condition of their employment, to conceal details related to certain sexual assault claims); VT. STAT. ANN. tit. 21, § 495h(h) (2019) (requiring that sexual harassment settlement agreements (1) do not prohibit an individual from working for the employer and (2) expressly state that the agreement does not restrict the individual from pursuing various actions or waiving any rights or claims); VT. STAT. ANN. tit. 21, § 495h(g) (2019) (making NDAs void and unenforceable if used by an employer to prevent an employee from disclosing or otherwise participating in a sexual harassment investigation); WASH. REV. CODE § 49.44.085 (2019) (making employment contracts unenforceable if they require employees to waive any rights to publicly pursue a cause of action for discrimination).

146 *See* JOHNSON ET AL., *supra* note 18, at 6–8 (summarizing recently passed state legislation that limits or restricts sexual harassment NDAs in settlement agreements).

147 *See* WASH. REV. CODE § 49.44.210 (2019) ("This section does not prohibit a settlement agreement between an employee or former employee alleging sexual harassment and an employer from containing confidentiality provisions."); 2018 Vt. Acts & Resolves 183 ("[I]nformation related to the claim of sexual harassment" does not include the specific terms of the settlement agreement).

148 2018 Vt. Acts & Resolves 183 (codified at VT. STAT. ANN. tit. 21, § 495h(c) (2019)).

contractors, as well as employees.[149] The Vermont Act was intended to better protect victims and improve the preventative measures taken by employers.[150] To accomplish these public policy goals, the Vermont Act, among other things,[151] required all employers to adopt sexual harassment policies, added protections for victims who file complaints of workplace harassment and discrimination with state agencies, created a telephone and online portal for victims to file complaints, and gave state agencies broader powers to investigate employers in response to complaints.[152] The Act also voided settlement NDAs that do not include express language specifying what actions claimants may still take under the NDA.[153]

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[149] *See* VT. STAT. ANN. tit. 21, § 495h(a)(l) (2019) (imposing the obligation that all employers have "to ensure a workplace free of sexual harassment").

[150] *See* Press Release, Mitzi Johnson, Vt. Speaker of the House, House Gives Final Approval to Sexual Harassment Prevention Legislation (May 10, 2018), https://speaker.vermont.gov/2018-sexual-harassment-prevention-bill [https://perma.cc/X6GT-VA38] (stating that the Sexual Harassment Prevention Bill "improves preventative measures and addresses incidents of sexual harassment for all work environments in the State of Vermont. The legislation creates a common standard for all work environments to prevent sexual harassment and discrimination").

[151] The Act encourages, but does not require, employers to conduct sexual harassment training for all employees and for new employees within one year of their start date. *See* tit. 21, § 495h(f).

[152] In adopting new or updating old policies against sexual harassment, employers must provide written copies to all employees. *See* tit. 21, § 495h(c). The Act directs the state attorney general's office to create an online portal and telephone hotline to allow individuals to file complaints of sexual harassment. The law gives the Attorney General and the Human Rights Commission the ability to inspect a workplace, question supervisory employees, and examine employer records relating to sexual harassment, upon giving 48 hours' notice. *See* tit. 21, § 495h(i). Following an investigation, the Vermont Attorney General's Office and the Human Rights Commission have the power to require employers to conduct annual sexual harassment training for their employees. *See* tit. 21, § 495h(i)(4).

[153] *See* tit. 21, § 495h(h). If an employer enters into a sexual harassment settlement agreement the agreement is subject to the following conditions: (1) the agreement shall not prevent, prohibit or otherwise restrict the employee from working for the employer or any of its affiliated companies in the future; (2) the agreement cannot restrict the employee from filing a complaint with, or participating in, any investigation conducted by an

While the Vermont Act does not expressly prohibit the use of NDAs in sexual harassment settlements, it did direct the state attorney general's office to prepare a report discussing two potential amendments to the Act that would further restrict settlement NDAs.[154] While the enacted legislation ends there, several Vermont legislators have expressed their clear intention to pursue additional legislation to reduce instances of sexual harassment in the workplace.[155]

The statutory scheme as a whole demonstrates the Vermont legislature's commitment to public policies that weigh strongly against enforcing certain sexual harassment NDAs. Again, the Vermont legislature's main goals in passing the Vermont Act were to "better protect victims" and to ensure all working environments in Vermont are free of sexual harassment.[156] A court considering the enforceability of a sexual harassment NDA in Vermont should determine whether these public policy concerns of the legislature would be undermined by the enforcement of the NDA at issue. For example, enforcement could undermine the Vermont legislature's policy of ensuring work environments are free from sexual harassment if the NDA prevents the victim from warning other workers about their harasser.

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appropriate state or federal agency; (3) the agreement cannot restrict the employee from complying with any discovery requests or from participating in any litigation or arbitration proceeding; and (4) the agreement cannot waive any rights that may arise after the date the settlement agreement is executed, but it may include a waiver or release of any rights existing before the date the agreement is executed. *See* tit. 21, § 495h(h).

154 *See* 2018 Vt. Acts & Resolves 183 (codified at VT. STAT. ANN. tit. 21, § 495h(c) (2019)).

155 *See* April McCullum, *How Vermont's New Sexual Harassment Law Will Change the Workplace*, BURLINGTON FREE PRESS (June 5, 2018), https://www.burlingtonfreepress.com/story/news/local/vermont/2018/06/05/how-vts-new-sexual-harassment-law-work/669706002/ [https://perma.cc/X433-ZCET] (quoting Representative Sarah Copeland-Hanzas, a lawmaker who led work on the bill, "I don't doubt that there will be more that we need to come back and do").

156 *See* Johnson, *supra* note 147; *see also* VT. GEN. ASSEMBLY, POLICY FOR THE PREVENTION OF SEXUAL HARASSMENT 1–2 (2018).

C. Legislation Concealing Public Hazards

Outside of legislation directly discussing sexual harassment, states' legislative purpose in enacting statutes that restrict the concealment of public hazards can be analogized to also apply to sexual harassment NDAs. That is, since NDAs are effective at keeping important information about sexual harassers out of the public domain, such NDAs can be framed as covering up a public hazard.[157]

Current anti-secrecy laws vary by state. Some states prohibit the enforcement of agreements that prevent the disclosure of "public hazards."[158] Other states restrict or prohibit courts' from sealing court records, including settlement agreements, when such orders would suppress information that impacts public health and safety.[159] While anti-secrecy statutes

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[157] *See* Garfield, *supra* note 93, at, 264.

[158] *See, e.g.*, ARK. CODE ANN. § 16-55-122(a) (2019) (providing that provisions of settlement agreements entered into that prohibit the disclosure of environmental hazards violate public policy and are not enforceable); FLA. STAT. § 69.081(4) (2019) (providing that portions of contracts or agreements that prohibit the disclosure of public hazards violate public policy and are not enforceable); LA. CODE CIV. PROC. ANN. art. 1426(D) (2019) (providing that portions of contracts or agreements that prohibit the disclosure of public hazards violate public policy and are not enforceable); WASH. REV. CODE § 4.24.611(4)(b) (2019) (providing that confidentiality provisions are subject to a balancing test that must consider the potential risk of public hazards).

[159] *See, e.g.*, CAL. R. CT. 2.550 (prohibiting sealing court records unless the court finds a substantial probability exists that the interest against openness would be prejudiced if the record is not sealed); DEL. SUPER. CT. CIV. R. 5(g)(2) (providing that court records are only sealed upon a showing of good cause and are subject to discretionary in camera review); FLA. STAT. § 69.081(3) (2019) (prohibiting courts from entering orders or judgments that conceal public hazards); GA. UNIF. SUPER. CT. R. 21.2 (requiring that, to limit access to court files, courts must find the harm to privacy outweighs the public interest in the order); N.C. GEN. STAT. § 132-1.3(b) (2019) (creating the presumption that all settlement documents are open for public inspection in any suit, administrative proceeding, or arbitration against a state government agency); NEV. REV. STAT. ANN. § 41.0375 (West 2019) (prohibiting settlements with state government employees or legislators that require confidentiality); N.Y. CT. R. 216.1(a) (requiring courts to consider the interests of the public and the parties when deciding whether to seal court records); OR. REV. STAT. § 17.095 (2019) (prohibiting settlements with public bodies, agents, or officers that are conditioned on confidentiality); TEX. R.

could in theory be construed as prohibiting sexual harassment NDAs, it has yet to be determined whether non-criminal sexual harassment constitutes a "public hazard" as defined by those state laws.[160] In many states courts have not clearly defined the scope of what harms or dangers fall under the definition of "public hazard."[161] Nonetheless, the public policy interest animating these laws is in protecting the public from concealed public hazards.[162]

Building upon this, a public policy theory invalidating NDAs used in private sexual harassment settlements should successfully argue two prongs. First, that sexual harassers are public hazards because they have caused and are likely to cause injury to members of the public. Second, that public access to information concealed by such NDAs could mitigate the harm caused by sexual harassers. To analyze this two-prong argument, we apply it to Florida's Sunshine in Litigation Act (the "Florida Act") which voided, as a matter of public policy, all agreements—including purely private settlement agreements—that hide a "public hazard."[163]

CIV. P. 76a (creating a rebuttable "presumption of openness" that affirms public access to all court records unless a party seeking to seal court records demonstrates, after a public hearing, a specific, serious, and substantial privacy interest in sealing the record in question).

[160] *See, e.g.,* FLA. STAT. § 69.081(2) (2019) (defining "public hazard" to mean "an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury").

[161] *See, e.g.,* Elizabeth E. Spainhour, *Unsealing Settlements: Recent Efforts to Expose Settlement Agreements That Conceal Public Hazards,* 82 N.C. L. REV. 2155, 2158 (2004) (noting scant case law interpreting the definition of "public hazard" as defined in Florida).

[162] *See id.* at 2160. *See also* Richard A. Zitrin, *The Laudable South Carolina Rules Must Be Broadened*, 55 S.C. L. REV. 883, 889 (2004) ("Without court rules that provide for open settlements, open discovery fights, and stricter rules on obtaining protective orders, these private agreements will remain off trial courts' radar screens, posing a danger to public health and safety.").

[163] *See* FLA. STAT. § 69.081(4) (2019) ("Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy, and

As noted above, the key issue this Note means to address is whether specific harassers individually could be considered a "public hazard." Looking first to the statutory language, the Florida Act defines a public hazard as "an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury."[164] In other contexts Florida courts have found that the phrase public hazard refers to a "tangible danger to public health or safety."[165] Beyond this, judicial interpretation of the Florida Act is limited.[166] Asbestos and defective car tires have been deemed public hazards by Florida courts.[167] But a financing practice that caused only economic loss was found not to constitute a "public hazard" because economic loss does not implicate health or safety issues.[168]

Admittedly, it may be difficult to argue that the dangers of non-criminal sexual harassment are akin to the dangers arising from asbestos exposure or exploding tires if there is no physical injury. Factors to emphasize in arguing that sexual harassers constitute public hazards are the severity of the harassment and the repetitive pattern of a harasser's

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may not be enforced."). The Florida Act prohibits courts from entering any order that intentionally or incidentally conceals a "public hazard," which includes orders that seal documents, evidence, or settlement agreements. *See* § 69.081(3). While the Florida Act does apply to private settlements, such applications are rare. FLA. COMM. ON JUDICIARY, REVIEW OF THE SUNSHINE IN LITIGATION ACT, S. 2012-227, at 4 (2011).

164 FLA. STAT. § 69.081(2).

165 Stivers v. Ford Motor Credit Co., 777 So. 2d 1023, 1026 (Fla. Dist. Ct. App. 2000).

166 *See* Ray Shaw, *Sunshine in Litigation,* 74 FLA. B.J. 63 (2000).

167 *See* ACandS, Inc. v. Askew, 597 So. 2d 895, 896–99 (Fla. Dist. Ct. App. 1992) (finding that asbestos was a public hazard); *see also* Jones v. Goodyear Tire & Rubber Co., 871 So. 2d 899, 906 (Fla. Dist. Ct. App. 2003) (holding that a defective exploding tire was a "public hazard" and thus no future court order could be entered which would conceal information regarding the tire).

168 *See* Stivers, 777 So. 2d. at 1026–27 (finding that because there was no "public hazard," the underlying settlement agreement that prevented expert witnesses from testifying against the financing company did not violate the Act and was thus enforceable).

behavior. The severity of the harassment should be highlighted by emphasizing the non-economic damages suffered by the harasser's victims. Studies have shown that sexual harassment causes significant psychological, health, and job-related injuries to victims.[169] Besides the injuries to immediate sexual harassment victims, it is possible that, without detection, harassers could escalate their activity, resulting in more serious and violent misconduct that would further threaten the safety of the public. Evidence of a pattern of harassment could demonstrate that additional members of the public could be similarly harmed by the harasser.

After establishing the existence of a public hazard, the second prong must prove the need for public information about the public hazard. Returning to the statute's policy focus of protecting the public, courts need to determine whether information concealed by the NDA is necessary to further this policy.[170] Arguably, NDAs conceal information that is needed to mitigate the harm caused by sexual harassers. For example, the identity of the harasser and the circumstances surrounding the harassment could help potential victims avoid the same type of harm. If courts find a sexual harassers' misconduct to be serious enough or persistent enough to constitute a public hazard, it should follow that they would also allow for the disclosure of information regarding the misconduct.[171]

Thus, in states such as Florida, courts should consider the underlying public policy concerns of state legislatures in

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[169] *See, e.g.*, Rebecca C. Thurston, et al., *Association of Sexual Harassment and Sexual Assault with Midlife Women's Mental and Physical Health*, 179 JAMA INTERNAL MED. 48, 48–53 (2019) (finding that, from a sample of roughly 300 middle-aged women, (1) an experience of sexual assault was associated with anxiety, depression, and poor sleep and (2) a history of workplace sexual harassment was associated with poor sleep and an increased risk of developing high blood pressure).

[170] *See* Spainhour, *supra* note 161, at 2169.

[171] *See* FLA. COMM. ON JUDICIARY, *supra* note 163, at 8 (noting that, through the enactment of the Florida Act, "the Florida legislature has signaled that the right to contract [in Florida] is outweighed by the policy of disclosure of otherwise non-public information when a public hazard exists").

passing anti-secrecy legislation when determining whether sexual harassers ought to be considered public hazards.

V. APPLYING THE PUBLIC POLICY BALANCING TEST: NDAS ALLOW PRIVATE PARTIES TO THWART PUBLIC POLICY GOALS AND HARM PUBLIC WELFARE

Even in the absence of a clear legislative declaration, courts should consider states' public policy interest in protecting the public from sexual harassment.[172] This Section focuses on the Restatement's second pathway for making a public policy argument, where courts themselves determine whether a significant public policy exists that tips the balance against enforcement of a NDA.[173]

Instead of relying on state public policy interests in eliminating workplace sexual harassment, courts should recognize their broad discretion to protect the public by *creating* public policy. Such judicially developed public policy should recognize the significant public interest in preventing sexual harassment. Given that NDAs have historically allowed repeat sexual harassers to continue their misconduct,[174] this public policy is subverted by their use. Specifically, sexual harassment NDAs as used by corporations allow companies to protect repeat offenders and conceal cultures of sexual harassment. Without such NDAs, there is a higher chance that initial incidences of sexual harassment will be exposed, thus warning the public as to the potential future danger of harassers.[175] Thus, the public interest in protecting members of the public from the harm sexual harassment NDAs inflict

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[172] Bast, *supra* note 40, at 707.

[173] RESTATEMENT (SECOND) OF CONTRACTS § 179(b) (AM. LAW INST. 1981).

[174] *See, e.g., supra* note 8 and accompanying text.

[175] For example, a psychology study found that men who perceived strong sanctions against sexual harassment within their organization self-reported engaging in less frequent sexualized harassment behavior. *See* Inez Dekker & Julian Barling, *Personal and Organizational Predictors of Workplace Sexual Harassment of Women by Men*, 3 J. OCCUPATIONAL HEALTH PSYCHOL. 7, 14 (1998).

strongly outweighs private parties' interests in enforcing their private agreements. Thus, even in states without legislation directly addressing the use of sexual harassment NDAs, victims have a viable public policy argument to find their NDAs unenforceable.

Considering the factors articulated in the second prong of the Restatement balancing test, courts should find that the public interest in preventing sexual harassment overrides the enforcement of sexual harassment NDAs.[176] This Section looks specifically at corporate sexual harassment NDAs that are entered into between entities affiliated with individual harassers and victims. Because corporations have strong private incentives to continue to use NDAs for sexual harassment claims, courts should give greater weight to the second factor of the Restatement's balancing test, the likelihood that non-enforcement will further public policy.[177] Non-enforcement of these NDAs could motivate corporations to take preventative measures to avoid the reputational harms associated with employee sexual harassment.

A. Public Policy Considerations for Protecting Future Victims from Repeat Offenders and Ending Workplace Sexual Harassment Outweigh Interests of Contracting Parties

Preserving the justified expectations of private parties is a long-standing judicially developed public policy that courts must consider under the second part of the Restatement balancing test.[178] The freedom of sexual harassment victims to enter into contracts with their harassers, or with any corporate entity affiliated with their harassers, provides benefits to private parties. It is also in the public's best interest to have a legal framework in which individuals have broad powers to

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[176] RESTATEMENT (SECOND) OF CONTRACTS § 178(2). The first factor, the relative strength of the state policy addressing sexual harassment, can be analyzed through relevant state legislation, as discussed above. *See infra* Part IV.

[177] RESTATEMENT (SECOND) OF CONTRACTS § 178(2).

[178] FARNSWORTH, *supra* note 15, § 5.1.

order their own affairs by making legally enforceable promises. Specifically in the sexual harassment context, the freedom of victims to choose the terms and price at which they value their own silence serves the public interest in facilitating quicker resolutions to sexual harassment disputes, which, as previously noted, can be particularly difficult to pursue to trial.[179] However, given the tendency of sexual predators to engage in "patterned" misconduct,[180] it is clear that enforcing sexual misconduct NDAs presents a clear danger to the public that outweighs the public interest in preserving private parties' freedom to contract.

In the case of Hollywood producer Harvey Weinstein, due to the sheer number of allegations against him it is easy to understand how his patterned misconduct endangered public welfare.[181] By the accounts of his alleged victims, Weinstein's behavior appeared to have a consistent pattern: first luring women into his hotel room under the guise of holding a work-related meeting, and then offering to advance their careers in exchange for sexual favors.[182] While Weinstein's sexual harassment often amounted to criminal misconduct, his behavior continued partially as a result of the settlement agreement NDAs he entered into which silenced his victims.[183] Since 1990, Weinstein allegedly entered into at least eight settlement agreements with women to conceal their allegations of sexual harassment.[184] With the help of these NDAs, Weinstein

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[179] *See* S.M., *supra* note 47.

[180] *See* Levmore & Fagan, *supra* note 51; *see also* Farrow, *supra* note 8.

[181] *See id.*

[182] *See* Megan Twohey et al., *Weinstein's Complicity Machine*, N.Y. TIMES (Dec. 5, 2017), https://www.nytimes.com/interactive/2017/12/05/us/harvey-weinstein-complicity.html [https://perma.cc/NY8X-DB53] (stating how agents and managers sent actresses to meet Weinstein alone at hotels in order to obtain roles in his films).

[183] *See* Farrow, *supra* note 8.

[184] *See* Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinsteinharassment-allegations.html [https://perma.cc/AXB2-YXPU].

was allegedly able to sexually harass dozens of women over the next two decades.[185] With the benefit of hindsight, it is easy to argue that the public interest in stopping his sexual misconduct far outweighed the public interest in preserving the involved parties' freedom to contract.

Still, the challenge remains for judges in accurately assessing whether enforcing a specific NDA would cause actual harm to the public welfare. Judges may be unable to predict what will come next. There may be insufficient information as to whether misconduct will persist. But in the context of sexual harassment, history has demonstrated the severity and extent of the harm harassers can inflict on their victims. Because, in the case of sexual harassment NDAs, one contracting party has already harmed the public welfare by engaging in misconduct, in such cases courts should more seriously consider the public policy exception.

B. Eliminating NDAs Creates Market Incentives for Companies to Address Workplace Sexual Harassment

As long as NDAs continue to be pervasively used in order to settle workplace sexual harassment claims, state public policies will be subverted. Instead, holding such NDAs to be unenforceable would increase incentives for corporations to more efficiently deter workplace sexual harassment. Indeed, if sexual harassment NDAs are deemed unenforceable, reputational sanctions, losses of human capital, and threats of shareholder litigation may emerge and effectively discipline those companies that fail to adequately address sexual misconduct within their ranks.

1. Reputational Harm and Human Capital

Sexual harassment NDAs eliminate the possibility that reputational sanctions will result from employee sexual misconduct—that is, no reputational sanctions can occur if the misconduct is never revealed to anyone. However, the absence

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185 *See id.*

of this reputational threat negatively effects the public welfare. That is, if sexual harassment NDAs were rendered unenforceable, corporations would be more incentivized to address sexual misconduct within their ranks.

A corporation's reputation is an asset that can generate positive financial results and create a "sustainable competitive advantage" in the commercial context.[186] From an investor's perspective, a company with a positive reputation can generate more revenue and its stock can yield a higher value.[187] Additionally, customers tend to be more loyal to companies with positive brand reputations, and companies that are perceived as having good reputations tend also to have less difficulty in attracting and retaining valuable employees.[188] Retaining high quality human capital in this way has been shown to contribute to firms' financial performance.[189]

Naturally, if sexual harassment NDAs are deemed unenforceable, information relating to incidents of workplace sexual harassment will become more widely known. As information about such incidents, and more broadly, about company cultures, becomes public, it will likely affect companies' bottom lines in four ways. First, such disclosures will increase the amount of litigation companies face, and will thereby also increase companies' litigation and settlement

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[186] Karen S. Cravens & Elizabeth Goad Oliver, *Employees: The Key Link to Corporate Reputation Management*, 49 BUS. HORIZONS 293, 293, 300 (2006).

[187] *See* Robert G. Eccles et al., *Reputation and Its Risks*, HARV. BUS. REV. (Feb. 2007), https://hbr.org/2007/02/reputation-and-its-risks [https://perma.cc/2H9Q-6WFM] ("Because the market believes that such companies will deliver sustained earnings and future growth, they have higher price-earnings multiples and market values and lower costs of capital.").

[188] *See* Lisa Kent, *Why Great Customer Service is Key to a Positive Brand Reputation*, FORBES (Sept. 20, 2018), https://www.forbes.com/sites/forbesagencycouncil/2018/09/20/why-great-customer-service-is-key-to-a-positive-brand-reputation/#13aa143d5c63 [https://perma.cc/LNM2-9VTG]. *See also* Cravens & Oliver, *supra* note 186, at 295–96.

[189] Abraham Carmeli & Ashler Tishler, *The Relationships Between Intangible Organizational Elements and Organizational Performance*, 25 STRATEGIC MGMT. J. 1257, 1271 (2004).

related expenses.[190] Second, the negative publicity associated with the dissemination of such information may affect companies' public image and brand reputation.[191] Third, revelations of repeated instances of sexual harassment in a workplace may create a hostile and toxic work culture for other employees, which in turn might reduce company morale and decrease overall productivity.[192] Fourth, companies' ability to hire and retain talented employees may be negatively impacted by the disclosure of past incidents of workplace sexual harassment.[193]

For one example of a company who has been negatively impacted by such a disclosure, consider Uber. Uber is a corporation that depends on its ability to maintain "its brand and reputation."[194] In 2016, after a former Uber employee publicly alleged that her report of workplace sexual harassment was ignored internally, additional allegations of widespread workplace sexual harassment, gender discrimination, and a toxic work culture were made by current and former Uber employees.[195] The fallout that resulted from these allegations included a since settled gender discrimination class action lawsuit filed by former employees[196] and a wave of customers

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190 *See* Hemel & Lund, *supra* note 73, at 1612.

191 *See id.*

192 *See id.*

193 *See id.*

194 Uber Techs., Inc., Registration Statement (Form S-1), at 31 (Apr. 17, 2019) (stating that "[m]aintaining and enhancing our brand and reputation is critical to our business prospects").

195 *See* Mike Isaac, *Uber Investigating Sexual Harassment Claims by Ex-Employee*, N.Y. TIMES (Feb. 19, 2017), https://www.nytimes.com/2017/02/19/business/uber-sexual-harassment-investigation.html?module=inline [https://perma.cc/TL5M-QYW6]; *see also* Mike Isaac, *Inside Uber's Aggressive, Unrestrained Workplace Culture*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/technology/uber-workplace-culture.html [https://perma.cc/L89G-VXLD] (describing specific allegations of sexual harassment through interviews with more than thirty current and former Uber employees).

196 *See* Merrit Kennedy, *Details of Uber Harassment Settlement Released*, NPR (Aug. 22, 2018), https://www.npr.org/2018/08/22/640900988/dozens-sued-uber-for-harassment-heres-what-they-re-set-to-receive [https://perma.cc/78UN-52RU].

deleting the app in protest.[197] Since these events Uber has actively taken steps to improve its culture, but its brand reputation has still undoubtedly suffered damage.[198]

2. Eliminating NDAs Would Increase Company Accountability Due to Threat of Shareholder Lawsuits

In recent years, shareholder derivative suits stemming from corporate sexual misconduct have become increasingly common.[199] Such lawsuits are brought by shareholders on behalf of a corporation.[200] Shareholders may allege that a company, in failing to address workplace sexual harassment within its ranks, has damaged its reputation, operations and long-term value.[201] Given that they offer a forum for the public disclosure of workplace sexual harassment allegations,

(detailing the class action lawsuit filed against Uber by female and minority engineers alleging systematic discrimination and harassment).

197 *See* Johana Bhuiyan, *A Former Uber Employee's Disturbing Claims of Workplace Sexism Reignite Calls to #deleteUber*, VOX (Feb. 20, 2017), https://www.vox.com/2017/2/20/14666572/uber-sexism-susan-fowler-delete-uber [https://perma.cc/84QK-VLUD] (discussing how sexual harassment and sexism allegations against Uber resulted in customers deleting the app and documenting their actions through the #deleteUber campaign on Twitter).

198 *See* Yuki Noguchi, *Uber Fires 20 Employees After Sexual Harassment Claim Investigation*, NPR (June 6, 2017), https://www.npr.org/sections/thetwo-way/2017/06/06/531806891/uber-fires-20-employees-after-sexual-harassment-claim-investigation [https://perma.cc/WG2T-K5W8] (reporting that Uber fired about twenty employees after the completion of an independent investigation into 200 sexual harassment and other workplace misconduct claims).

199 *See* Robert Armstrong, *Rising Tide of Lawsuits Against Company Directors Hits Insurers*, FIN. TIMES (Apr. 1, 2019), https://www.ft.com/content/1c26e600-4c27-11e9-8b7f-d49067e0f50d [https://perma.cc/ZKE3-35UX].

200 *See* 3 AMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 15:2 (3d ed. 2010).

201 *See* Emily Steel, *Fox Establishes Workplace Culture Panel After Harassment Scandal,* N.Y. TIMES (Nov. 20, 2017), https://www.nytimes.com/2017/11/20/business/media/fox-news-sexual-harassment.html [https://perma.cc/D2X2-5BFU].

derivative lawsuits will likely continue to incentivize companies to address workplace sexual harassment issues preemptively.

As one prominent example of such a derivative suit, I turn to the case of Twenty-First Century Fox, Inc. ("Fox"). There, shareholders filed a lawsuit against the company and its directors and officers in response to very public allegations of workplace sexual misconduct at one of its subdivisions, Fox News.[202] Fox, in over six separate settlements, paid out at least sixty million dollars to victims of the misconduct.[203] In their complaint, Fox's shareholders claimed that company leaders "failed to act against harassing conduct in their midst by treating it as isolated incidents."[204] The complaint further alleged that Fox's management team breached their fiduciary duties by allowing a toxic culture of workplace sexual harassment to fester.[205] The lawsuit ultimately settled for a ninety million dollar payment and a requirement that Fox create an oversight panel tasked with improving its internal culture and increasing corporate transparency. [206] The Fox lawsuit and its resolution demonstrates the consequences that companies might face if they fail to curb workplace sexual harassment within their ranks.

If companies are restricted from using sexual harassment NDAs, allegations of sexual harassment will be more likely to become public and prompt shareholder litigation. In such a world, without access to sexual harassment NDAs, management teams will be forced to address incidents of workplace sexual harassment. That is, if company management ignores allegations of sexual harassment within their ranks, they will

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[202] *See* Verified Derivative Complaint at 2, City of Monroe Emps.' Ret. Sys. v. Murdoch, No. 2017-0833 (Del. Ch. Nov. 20, 2017).

[203] *Id.*

[204] *Id.*

[205] *Id.* at 7.

[206] Jonathan Stempel, *21st Century Fox in $90 Million Settlement Tied to Sexual Harassment Scandal*, REUTERS (Nov. 20, 2017), https://www.reuters.com/article/us-fox-settlement/21st-century-fox-in-90-million-settlement-tied-to-sexual-harassment-scandal-idUSKBN1DK2NI [https://perma.cc/P2TY-BVSY].

be exposed to damaging consequences—litigation costs, reputational harm, and potentially even individual termination.[207] The threat of facing some or all of these consequences is likely significant enough to push company management teams to take swift action against harassers and prevent cultures of sexual harassment from forming within their offices.[208] As long as such a threat continues to be credible, it serves as a helpful incentive in pressuring company management teams to discover effective ways to detect, address, and resolve any issues of sexual misconduct within their workplace.

VI. CONCLUSION

The use of NDAs in sexual harassment settlement agreements allows society to pay lip service to solving the issue of workspace sexual harassment; that is why such agreements are so pervasive. However, as long as these types of NDAs are used, state public policies are being subverted. In other words, these types of NDAs necessarily encourage harassers to continue their misconduct and silence their victims, which directly contravenes the demonstrated public policy interests of most states—to protect the public and eliminate workplace sexual harassment. In order to align states' interests with those of individual sexual harassment victims, courts should deem sexual harassment NDAs void as a matter of public policy. By voiding these agreements, courts will allow reputational sanctions to discipline companies that fail to adequately remedy sexual harassment issues within their workplaces.

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[207] *See* Hemel & Lund, *supra* note 73, at 1666.

[208] *See id.*