ARBITRATION SECRECY

E. Gary Spitko[†]

Parties to an arbitration contract may agree to a secrecy clause that will govern their arbitration process to protect the confidentiality of their proprietary or personal information. Of great concern, however, is that they also may use such an arbitration secrecy clause to hide their improper or discriminatory practices or defects in their products, and to silence the victims of their wrongdoing. This silence, in turn, may enable perpetrators to continue to engage in harmful behavior, that is like the conduct that the secrecy clause has covered up. This Article explores the relationship between the Federal Arbitration Act (FAA), which generally requires that courts enforce arbitration agreements as written, and various state and federal limitations on the enforcement of nondisclosure agreements (NDAs), which might be used to safeguard against the harmful effects of arbitration secrecy clauses.

Courts have divided sharply in considering the extent to which the FAA preempts or displaces, respectively, various state and federal limitations on the enforcement of NDAs as they relate to arbitration secrecy. The established broad framework is clear enough: Pursuant to the U.S. Supreme Court's FAA jurisprudence, the FAA will preempt or displace a regulation that undermines a fundamental attribute of arbitration. A neutral regulation will not conflict with the FAA, however, when it impacts only an incidental aspect of arbitration. Lower courts have not reached a consensus as to whether arbitration secrecy is a fundamental attribute or merely an incidental aspect of arbitration. The U.S. Supreme Court has never explicitly addressed the issue.

The Article's analysis begins by considering the nature of arbitration and the place of secrecy in the hierarchy of arbitral values. After reviewing the FAA's structure and

† Presidential Professor of Ethics and the Common Good and Professor of Law, Santa Clara University. For their thoughtful comments on earlier drafts of this Article, I am grateful to Hiro Aragaki, Sarah Rudolph Cole, Christopher Drahozal, Clark Freshman, David Horton, Lisa A. Kloppenberg, Kerry L. Macintosh, Janet Martinez, Stephen J. Ware, Maureen Weston, and participants in a faculty workshop sponsored by the Center for Negotiation and Dispute Resolution at the University of California College of the Law, San Francisco.

legislative history, the folklore of arbitration, and the case law addressing encroachments upon arbitration secrecy, the Article concludes that secrecy is neither a fundamental attribute of arbitration nor a mere incidental aspect of arbitration. Rather, secrecy should be regarded as a secondary or intermediate attribute of arbitration. This Article's novel conclusion that arbitration has intermediate attributes, suggests the need for an expanded framework for resolution of challenges to neutral arbitration regulation that allows for a more nuanced intermediate scrutiny. This Article proposes and defends such a framework. In the context of government infringements of arbitration secrecy, the framework would require the government to demonstrate that its infringement upon arbitration secrecy is reasonable in its inception and reasonable in its scope when measured against the parties' interest in arbitration secrecy. This balancing approach would allow for consideration of context that the Supreme Court's current all-or-nothing approach ignores and, thus, is better suited to harmonizing the competing concerns grounding the FAA and any potentially conflicting state or federal effort that does not target arbitration specifically but nonetheless impacts a secondary attribute of arbitration.

INTRODUCTION: INFRINGEMENTS ON ARBITRATION SECRECY

Constance Ramos was a much sought-after and highly experienced litigator and patent attorney when she joined the Silicon Valley office of Winston & Strawn, LLP as an "income

partner" in May 2014.[1] Three years later, Ramos resigned from the firm "under protest" and simultaneously filed a complaint with the California Department of Fair Employment and Housing, alleging that Winston had illegally discriminated against her because of her sex.[2] When Ramos subsequently filed a sex discrimination lawsuit against Winston in California superior court, the firm moved to compel arbitration of the dispute, citing the arbitration clause in the Winston partnership agreement that Ramos had signed shortly after she joined the firm.[3]

After the trial court granted Winston's motion to compel arbitration, the court of appeals reversed.[4] The appellate court grounded its refusal to compel Ramos to arbitrate her case, in part, on its conclusion that the arbitration clause's confidentiality provision was substantively unconscionable.[5] That confidentiality provision required that, "[e]xcept to the extent necessary to enter judgment on any arbitral award, all aspects of the arbitration shall be maintained by the parties and the arbitrators in strict confidence."[6] The court reasoned that this clause would prevent Ramos from gathering evidence to present her case. The court explained, "[i]t is hard to see how she could engage in informal discovery or contact witnesses without violating the prohibition against revealing an 'aspect of the arbitration.'"[7]

The case of *Constance Ramos v. Winston & Strawn* is emblematic of the tension between the strong desire of many parties to an arbitration contract to maintain the confidentiality of

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1 Ramos v. Superior Court, 239 Cal. Rptr. 3d 679, 685 (Cal. Ct. App. 2018).

2 *Id.* at 687.

3 *Id.*

4 *Id.* at 685. An order denying a motion to compel arbitration is immediately appealable but an order granting a motion to compel arbitration generally is not. In Ramos's case, however, the court of appeals took the unusual step of granting a writ of mandate to hear her immediate appeal of the trial court's order granting Winston & Strawn's motion to compel arbitration. *Id.* at 687–88.

5 *Id.* at 700–02. The appeals court also held that several provisions of the arbitration clause at issue violated public policy as set forth in California's *Armendariz* doctrine. *Id.* at 696–98; *see also* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 682–89 (Cal. 2000). The *Armendariz* doctrine is grounded in the state effective-vindication exception to FAA preemption, which itself is of dubious validity. E. Gary Spitko, *Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 HARV. NEGOT. L. REV. 1, 14–25 (2015) (discussing the state effective-vindication exception and the *Armendariz* doctrine and arguing that the FAA largely preempts the doctrine).

6 *Ramos*, 239 Cal. Rptr. 3d at 700.

7 *Id.* at 701.

their arbitration proceedings and the application of federal and state doctrines hostile to confidentiality provisions in arbitration agreements or to a party's claims of arbitration confidentiality.[8] Parties to a dispute may value arbitration secrecy as a means to protect the confidentiality of their valuable proprietary information or their sensitive personal information.[9] For example, an employee asserting any claim against her current or previous employer may prefer secrecy to safeguard her reputation with potential future employers.[10] More generally, a claimant alleging harassment, defamation, or other abuse may prefer that the details of her alleged victimization not become public knowledge.[11] Arbitration also may protect against public disclosure of sensitive information relating to non-disputants, such as salary data and performance evaluations relating to an employment discrimination claimant's coworkers.[12] Arbitration secrecy may

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8 With respect to the widespread desire among parties to arbitration for arbitral secrecy, see, e.g., Llewellyn Joseph Gibbons, *Private Law, Public "Justice": Another Look at Privacy, Arbitration, and Global E-Commerce*, 15 OHIO ST. J. ON DISP. RESOL. 769, 771 (2000) ("Frequently, institutions and individuals choose arbitration solely in the hope of keeping some facts private."); Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 849–50 (1961) (listing a desire for privacy among several reasons that chiefly motivate parties to choose arbitration); Randall Thomas, Erin O'Hara & Kenneth Martin, *Arbitration Clauses in CEO Employment Contracts: An Empirical and Theoretical Analysis*, 63 VAND. L. REV. 959, 965, 970–71, 983, 985 (2010) (explaining how the structure of arbitration promotes secrecy and discussing various reasons why disputants might value arbitral secrecy).

9 Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 170 F.3d 1, 7 n.4 (1st Cir. 1999); Alexandria Real Est. Equities, Inc. v. Fair, No. 11 Civ. 3694 (LTS), 2011 WL 6015646, at *3 (S.D.N.Y. Nov. 30, 2011); Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 KAN. L. REV. 1211, 1212, 1248–49 (2006).

10 *Alexandria Real Est. Equities*, 2011 WL 6015646 at *3 (describing arbitral party seeking to seal an arbitration award and supporting documents arguing that "they may be read by future [potential] employers who may be less likely to hire him as a result of knowing the details of his employment history"); Orna Rabinovich-Einy, *Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age*, 7 VA. J.L. & TECH. 1, 51 (2002).

11 Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2684 (1995) ("In fact, plaintiffs in sexual harassment, defamation, and employment cases, as well as some tort cases, have strong interests in not publicizing the underlying facts of their cases, even if they win, and most certainly if their alleged facts are not 'sustained.'"); *id.* at 2695; Schmitz, *supra* note 9, at 1239 (arguing that "some sexual harassment claimants, and others with sensitive claims, would not assert those claims without ensured arbitral secrecy"); Meagan Glynn, Note, *#TimesUp for Confidential Employment Arbitration of Sexual Harassment Claims*, 88 GEO. WASH. L. REV. 1042, 1063 (2020) ("[C]onfidentiality can be a valuable feature of arbitration, especially for certain victims.").

12 E. Gary Spitko, *Exempting High-Level Employees and Small Employers from Legislation Invalidating Predispute Employment Arbitration Agreements*, 43 U.C. DAVIS L. REV. 591, 608 (2009).

also promote a conflict resolution atmosphere relatively more conducive to reconciliation among the parties.[13]

On the other hand, arbitration secrecy may aid parties in hiding from the public their improper or discriminatory practices or defects in their products that otherwise would have been exposed in public litigation.[14] Thus, commentators have argued that arbitration secrecy may negatively impact public welfare in several ways.[15] For example, arbitration secrecy may lessen the likelihood that potential victims of a particular harasser who previously had created a hostile environment in the workplace will learn of the harasser's prior behavior and, in this way, may enable the offender's harassment of new and unsuspecting victims.[16] Arbitration secrecy similarly may impede victims from gathering evidence of a pattern of illegal or tortious conduct that may be useful in prosecuting litigation.[17] More generally, arbitration secrecy may make it more difficult for potential claimants to cooperate with one another.[18] Finally, because arbitration secrecy makes it less likely that the public will learn of an arbitration award that rebukes a party, such secrecy also detracts from the ability of arbitration to have a punitive and specific

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13 *See* Cal. Com. Club, Inc., 369 N.L.R.B. No. 106, at 6 (June 19, 2020) ("[P]rotecting parties' agreement to arbitrate disputes on a confidential basis saves resources, protects all parties from reputational injury, and facilitates the cooperative exchange of discovery."); Mentschikoff, *supra* note 8, at 864 ("The physical format of the hearing room is designed to create an atmosphere of relative coziness."); Schmitz, *supra* note 9, at 1215 ("Many have defended arbitration's private process as necessary to foster open communications, relax tensions that often exist in the courtroom, and allow for flexible and efficient dispute resolution."); *id.* at 1245 (stating arbitration privacy "may promote candor and non-adversarial relational mending").

14 Laurie Kratky Dore, *Public Courts versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 487 (2006); Schmitz, *supra* note 9, at 1212, 1222, 1240.

15 *See, e.g.*, Schmitz, *supra* note 9, at 1229–31 (discussing ways in which the lack of a published opinion in arbitration impedes public access to information and, thus, may negatively impact public health or safety); *id.* at 1232–34 (discussing how arbitration secrecy may augment some repeat player advantages of arbitration).

16 Glynn, *supra* note 11, at 1046-47, 1056.

17 Schmitz, *supra* note 9, at 1232; Glynn, *supra* note 11, at 1054, 1056.

18 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 246 (2013) (Kagan, J., dissenting) (discussing how arbitration contract's "confidentiality provision prevents [one merchant] from informally arranging with other merchants to produce a common expert report."); Christopher R. Drahozal, *Confidentiality in Consumer and Employment Arbitration*, 7 Y.B. ON ARB. & MEDIATION 28, 30 n. 9 (2015).

deterrent effect on the wrongdoer and to serve general deterrence and norm development functions.[19]

The policy debate focused on arbitration secrecy has played out against a backdrop of various state and federal doctrines that limit arbitration secrecy. In fact, while arbitration in the United States almost always is private, arbitration confidentiality is often infringed.[20] Arbitration privacy refers to the closed nature of the arbitration proceedings themselves.[21] The public has no right to attend arbitration proceedings including the arbitration evidentiary hearing.[22] Rather, through their arbitration contract, the parties control access to the arbitration proceedings in their case.[23] Where the parties have not come to an agreement on third-party access, the arbitrator generally has the power to determine who, aside from the parties, their counsel, and the presently testifying witness, may attend the arbitration proceedings.[24]

Arbitration confidentiality refers to the right of the parties to an arbitration, by means of an arbitration confidentiality agreement, to prevent nonparties to the arbitration from learning of or obtaining access to materials produced in arbitration discovery, testimony presented in the arbitration hearing, and

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19 Spitko, *supra* note 12, at 614–16; *see also* Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 400 (1999) (arguing that, in part because of arbitration secrecy, arbitration does not serve general deterrence and norm development functions); Stephen Plass, *Private Dispute Resolution and the Future of Institutional Workplace Discrimination*, 54 HOW. L.J. 45, 79 (2010) ("Privatization of employment disputes will greatly reduce these public condemnation and monitoring efforts that instigate company-wide reforms.").

20 Drahozal, *supra* note 18, at 30 (discussing how "under U.S. law, arbitration is a private process, not a confidential one"); Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 KAN. L. REV. 1255, 1260 (2006) (discussing the distinction between arbitration privacy and arbitration confidentiality); Schmitz, *supra* note 9, at 1211 ("Arbitration is private but not confidential.").

21 Drahozal, *supra* note 18, at 40; Reuben, *supra* note 20, at 1259–60; Schmitz, *supra* note 9, at 1211.

22 Drahozal, *supra* note 18, at 30–31; Schmitz, *supra* note 9, at 1214; Maureen A. Weston, *Buying Secrecy: Non-Disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era*, 2021 U. ILL. L. REV. 101, 110.

23 Weston, *supra* note 22, at 111.

24 *See, e.g.*, AM. ARB. ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, RULE 26 (2022), https://www.adr.org/sites/default/files/Commercial_Rules_Web.pdf [https://perma.cc/5TX6-XBV7]; AM. ARB. ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES, RULE 22 (2009), https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf [https://perma.cc/8BPP-HCEE]; JAMS, COMPREHENSIVE ARBITRATION RULES & PROCEDURES, RULE 26(c) (2021), https://www.jamsadr.com/rules-comprehensive-arbitration/ [https://perma.cc/LB48-YVBJ].

the arbitration award itself.[25] Several states have statutes that protect arbitral communications from discovery by third parties and render such communications inadmissible in subsequent judicial or administrative proceedings.[26] Absent statutory protection, however, nonparties to the arbitration may gain access to arbitral materials, testimony, and awards in a variety of ways. For example, absent a confidentiality agreement or protective order, an arbitration party may voluntarily disclose information or documents obtained in the course of the arbitration to third parties.[27] Similarly, a nonparty participant in the arbitration is under no obligation to maintain the confidentiality of the arbitration proceedings absent her consent to a confidentiality agreement.[28] A party to separate litigation may use a subpoena or discovery requests to obtain documents produced in an arbitration or transcripts of arbitration testimony.[29] And

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25 Schmitz, *supra* note 9, at 1214, 1218.

26 ARK. CODE. ANN. § 16-7-206 (2023); CAL. EVID. CODE § 703.5 (West 2023); MO. ANN. STAT. § 435.014 (West 2023); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (West 2021).

27 A.T. v. State Farm Mut. Auto. Ins. Co., 989 P.2d 219, 220–21 (Colo. App. 1999); STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION § 2.1 (4th ed. 2023); Drahozal, *supra* note 18, at 31, 38; *see also* Am. Cent. E. Tex. Gas Co. v. United Pac. Res. Grp., Inc., No. 2:98CV0239-TJW, 2000 WL 33176064, at *1–2 (E.D. Tex. Jul. 27, 2000) (declining an arbitral party's request to order that an arbitration award be sealed and noting that the parties had not entered into a confidentiality agreement).

28 Schmitz, *supra* note 9, at 1211, 1221, 1235.

29 *See, e.g.*, Gotham Holdings, LP v. Health Grades, Inc., 580 F.3d 664, 665–66 (7th Cir. 2009) (holding that a nonparty to an arbitration may obtain documents related to the arbitration by serving a subpoena on a party to the arbitration); Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc, No. 04-N-1228, 2004 WL 1821968, at *4 (D. Colo. Aug. 13, 2004); United States v. Panhandle E. Corp., 118 F.R.D. 346, 351 (D. Del. 1988) (denying a motion for a protective order from discovery requests seeking documents related to an earlier arbitration); Industrotech Constructors, Inc. v. Duke Univ., 314 S.E.2d 272, 274 (N.C. Ct. App. 1984) (holding that a nonparty to an arbitration suing a party to the arbitration is entitled to production in discovery of a transcript of the arbitration); *see also* Reuben, *supra* note 20, at 1261–73 (discussing federal and state regulation and case law addressing the discoverability of arbitral communications and concluding that "at both the state and the federal level, present law provides little reliable support for arbitration confidentiality when arbitration communications are sought for purposes of discovery or admission at trial"); Matthew Gierse, Note, *You Promised You Wouldn't Tell: Modifying Arbitration Confidentiality Agreements to Allow Third-Party Access to Prior Arbitration Documents*, 2010 J. DISP. RESOL. 463, 468-72 (discussing case law concerning the right of a nonparty to an arbitration to subpoena documents relating to the arbitration).

Professor Richard Reuben has considered at length the normative question of whether a communication made in an arbitration or a document introduced in an arbitration should be discoverable and admissible in another formal legal proceeding. See generally Reuben, supra note 20. He argues for a heightened

the public may gain access to the arbitration award itself when a party to the arbitration seeks to confirm or vacate the award in state or federal court.[30]

These deviations from arbitration confidentiality make clear that without an enforceable confidentiality agreement the value of arbitration privacy is greatly diminished.[31] For example, the right to exclude a third party from the arbitration hearing is less valuable when limitations on arbitration confidentiality allow that third party to subpoena a transcript of the hearing.[32] Indeed, arbitration confidentiality would seem to be the whole point of arbitration privacy: the principal reason that arbitral parties highly value arbitration privacy is that it prevents nonparties to the arbitration from accessing documents and testimony presented in the arbitration. Thus, this Article considers arbitration privacy and arbitration confidentiality together and subsumes the two into the concept of arbitration secrecy.

This Article explores the relationship between the FAA and various infringements on arbitration secrecy. The FAA does not contain an express preemption clause.[33] With respect to

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standard for discoverability and admissibility of evidence sought from arbitration proceedings whereby the party seeking to discover or introduce such information must demonstrate that the information is otherwise not obtainable and is necessary for resolution of the movant's case. Id. at 1294–99. Reuben's justification for such an exclusionary rule is grounded in his understanding of congressional intent and the nature of arbitration as an alternative to the public court system:

> In enacting the FAA, Congress intended to authorize a private adjudicatory alternative to public trial. A general rule freely permitting the discovery and admissibility of arbitration communications, would frustrate this unambiguous congressional intent, upset party expectations of arbitration, create pragmatic problems, undermine public confidence in the arbitration process, and inhibit the democratic legitimacy of arbitration as an alternative dispute resolution process.

Id. at 1281.

30 Global Reinsurance Corp.-U.S. Branch v. Argonaut Ins. Co., No. 07 CIV. 8196 (PKC), 2008 WL 1805459, at *1 (S.D.N.Y. Apr. 21, 2008); Chartis Specialty Ins. Co. v. LaSalle Bank, Nat'l Ass'n, No. CIV.A. 6103-VCN, 2011 WL 3276369, at *3 (Del. Ch. July 29, 2011); Drahozal, *supra* note 18, at 38–39.

31 *See* Judith Resnik, Stephen Garlock & Annie J. Wang, *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge*, 24 LEWIS & CLARK L. REV. 365, 375 (2020) (asserting that, with respect to dispute resolution, "[c]onfidentiality is often a method of protecting privacy").

32 Hassneh Ins. Co. of Israel v. Mew [1993] 2 Lloyd's Rep. 243 (Q.B.) 247 (concluding that "the requirement [under English law] of privacy [in arbitration] must in principle extend to documents which are created for the purpose of that hearing" and reasoning that, "[t]he disclosure to a third party of such documents would be almost equivalent to opening the door of the arbitration room to that third party").

33 Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989).

implied preemption, the Supreme Court has held that Congress did not intend to occupy the entire field of arbitration law.[34] Thus, the FAA will preempt a state law only where the state law actually conflicts with the FAA by "stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in passing the FAA.[35]

The FAA's primary purpose and objective is set forth in Section 2 of the Act. Section 2 of the FAA provides in part that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[36] The Supreme Court, applying an obstacle preemption analysis, has held repeatedly that this provision requires that "courts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms."[37] Thus, a state may not invalidate an arbitration contract on grounds that do not apply to contracts generally.[38]

Moreover, even a state rule that is neutral on its face with respect to arbitration agreements may not stand as an obstacle

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34 *Id.*

35 *Id.* (quotation omitted).

36 9 U.S.C. § 2.

37 AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011); *see also* Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. 246, 248 (2017) ("The Federal Arbitration Act . . . requires courts to place arbitration agreements 'on equal footing with all other contracts.'" (quoting DIRECTTV, Inc. v. Imburgia, 577 U.S. 47, 58 (2015))); *Volt*, 489 U.S. at 476 ("[T]he federal policy [of the FAA] is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."); Scherk v. Alberto-Culver Co., 417 U.S. 506, 510–11 (1974).

38 *Kindred Nursing Ctrs.*, 581 U.S. at 248 (holding that the FAA preempts a rule that the Kentucky Supreme Court derived from the Kentucky Constitution, "[b]ecause that rule singles out arbitration agreements for disfavored treatment"); Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

For a discussion of whether a state law that applies to arbitration clauses as well as some but not all other contracts is sufficiently "general" to avoid FAA preemption, see Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 408–10 (2004); see also Hiro N. Aragaki, AT&T Mobility v. Concepcion *and the Antidiscrimination Theory of FAA Preemption*, 4 Y.B. ON ARB. & MEDIATION 39, 56 (2013) (arguing that no state law can apply "in any meaningful sense" to every contract and, therefore, a requirement that state law must put arbitration contracts on an equal footing with all other contracts is "hopelessly incoherent"); David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1252 (2013) (concluding that "if a rule must govern 'all types of contracts' to satisfy the savings clause, then section 2 preempts contract law in its entirety" because in "the sprawling universe of private agreement, *no* rule reaches so far").

to the accomplishment of the FAA's objectives.[39] Thus, "the saving clause [of Section 2] does not save defenses that target arbitration either by name or by more subtle methods, such as by interfering with fundamental attributes of arbitration."[40] The same limitations necessarily hold when a state seeks to regulate arbitration by statute as opposed to through a general contract law defense.[41]

In sum, the Supreme Court's FAA jurisprudence has developed an all-or-nothing preemption analysis for any state rule that does not target arbitration for special treatment but nonetheless impacts an aspect of arbitration.[42] If the state statute, regulation, or doctrine interferes with a fundamental attribute of arbitration, the FAA will preempt the state effort.[43] For example, as the Supreme Court has instructed, a state may not "find[] unconscionable or unenforceable as against public policy consumer arbitration agreements" that "disallow an ultimate disposition by a jury (perhaps termed 'a panel of twelve lay arbitrators' to help avoid preemption)" because such a rule would undermine expert decision-making, which unquestionably is a fundamental attribute of arbitration.[44] On the other

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39 *Concepcion*, 563 U.S. at 343; *Volt*, 489 U.S. at 477–78.

40 Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018) (internal quotation omitted); *see also Kindred Nursing Ctrs.*, 581 U.S. at 251 (explaining that the FAA "preempts any state rule discriminating on its face against arbitration" and "any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements"); *Concepcion*, 563 U.S. at 344 (holding that the FAA preempts a state rule requiring the availability of class arbitration because that rule "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA").

41 *See* Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987) (stating in a pre-*Concepcion* case that "state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally"); Christopher R. Drahozal, *FAA Preemption After* Concepcion, 35 BERKELEY J. EMP. & LAB. L. 153, 169 (2014) ("It would seem to follow that if application of a general contract law defense is preempted despite the savings clause, a state statute invalidating an arbitration clause for the same reason would also be preempted.").

42 *See* Sarah Rudolph Cole, *Blurred Lines: Are Non-Attorneys Who Represent Parties in Arbitrations Involving Statutory Claims Practicing Law?*, 48 U.C. DAVIS L. REV. 921, 968 (2015) (concluding that the FAA preemption analysis as to whether states may preclude a non-lawyer from representing a party in an arbitration "depends on whether non-lawyer representation is a fundamental attribute of arbitration").

43 *Concepcion*, 563 U.S. at 352 (holding that the FAA preempted a California rule that conditioned the enforceability of a consumer arbitration agreement on the availability of class arbitration because such a rule interfered with fundamental attributes of arbitration).

44 *Id.* at 341–42; *see also infra* notes 48–55, 58, 65–66 and accompanying text (arguing that expert decision-making is a fundamental attribute of arbitration).

hand, a state statute, regulation, or doctrine that impacts only an incidental aspect of arbitration should survive FAA preemption analysis. For example, a state court finding that an arbitration agreement was unconscionable on the grounds that it specified a hearing location that would unreasonably burden an employee or consumer party should avoid FAA preemption because hearing locale is merely an incidental aspect of arbitration, particularly when holding the arbitration hearing at the specified location would not result in savings of time or money.[45] The Supreme Court has applied a similar displacement analysis when a federal statute impacts an aspect of arbitration.[46]

Thus, the contours of any FAA preemption or displacement analysis of regulation impacting arbitration secrecy will differ depending upon whether secrecy is a "fundamental attribute of arbitration."[47] Therefore, this Article turns next in Part I to an exploration of the place that secrecy holds in the hierarchy of arbitration values. This Part concludes that arbitration secrecy is neither a fundamental attribute of arbitration nor a mere incidental attribute of arbitration. Rather, secrecy is a secondary attribute of arbitration. As such, arbitration secrecy does not fit neatly into the current all-or-nothing FAA preemption and displacement framework of the Supreme Court's jurisprudence. Part I argues, therefore, for a novel framework that would apply an intermediate review to intrusions into arbitration secrecy,

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45 Drahozal, *supra* note 41, at 166 (concluding that application of unconscionability doctrine to the arbitral hearing location should survive FAA preemption analysis because hearing locale is not a fundamental attribute of arbitration); *but see* Arpan A. Sura & Robert A. DeRise, *Conceptualizing* Concepcion*: The Continuing Viability of Arbitration Regulations*, 62 KAN. L. REV. 403, 471–75 (2013) (discussing the split in the cases considering whether the FAA preempts state efforts to limit arbitral forum selection clauses and arguing that cases invalidating an arbitral forum selection clause "are likely not on firm footing after *Concepcion* because they do not acknowledge that forum selection clauses serve many pro-arbitration ends").

46 Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018) (assuming for the sake of argument that the FAA's saving clause applies to defenses arising from federal statutes and reiterating that "the saving clause does not save defenses that target arbitration by name or by more subtle methods, such as by interfering with fundamental attributes of arbitration" (internal quotation omitted)).

47 *See Concepcion*, 563 U.S. at 344 (holding that a state may not regulate arbitration under the FAA's saving clause where that regulation "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA"); Drahozal, *supra* note 41, at 167 (reasoning that although privacy is a fundamental attribute of arbitration, confidentiality is not, and, therefore, "there is a good argument that [intrusions into arbitration confidentiality] are not preempted under *Concepcion*").

as well as to infringements of other secondary attributes of arbitration. The framework for this intermediate review is informed by the balancing approach that courts have long used to evaluate a public employee's claim that the government has impermissibly infringed upon her right to privacy. As applied in the context of government infringements of arbitration secrecy, the framework would require the government to demonstrate that the infringement upon arbitration secrecy is reasonable in its inception and reasonable in its scope.

Applying this intermediate review framework and established arbitration doctrine, Part II then more fully considers the relationship between the FAA and several doctrines that otherwise would limit the extent to which the parties to an arbitration contract may agree to maintain arbitration secrecy: (1) the unconscionability and public policy doctrines, (2) state statutes rendering non-disclosure agreements (NDAs) unenforceable against employees, (3) the common law and statutory right of access to documents filed in litigation, and (4) the right to concerted activity arising under Section 7 of the National Labor Relations Act. Using this set of state and federal intrusions into arbitration secrecy allows for application and evaluation of the new intermediate review framework in diverse contexts in which the primary focus is on, respectively, the relationship between the parties to an arbitration contract, state public policy, and displacement of one federal statute by another.

I
SECRECY AND THE HIERARCHY OF ARBITRATION VALUES

Julius Henry Cohen, the FAA's principal architect, has written of the three evils that arbitration and the FAA are intended to overcome[48]: (1) congestion and complexity in the courts and the attendant delays of litigation; (2) the high costs of litigation; and (3) "[t]he failure, through litigation, to reach a decision regarded as just when measured by the standard

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48 For the proposition that Julius Henry Cohen was the principal drafter of the FAA, see *Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 10 (1924) [hereinafter *1924 Joint Hearings*] (statement of W.H.H. Piatt, Chairman, ABA Comm. on Commerce, Trade, and Commercial Law) (stating that Cohen "has had charge of the actual drafting of the work"); *id.* at 15 (testimony of Julius Henry Cohen) (stating that "it is true I made the first draft"); *id.* at 19 (statement of Francis B. James, Westory Building) (stating that "the burden fell of drafting the bill" upon Cohen).

of the business world" resulting from the application of legal standards that are inappropriate for the dispute at hand or "because, in the ordinary jury trial, the parties do not have the benefit of the judgment of persons familiar with the peculiarities of the given controversy."[49] Thus, the FAA seeks primarily to enable speedy, economical, and expert resolution of disputes through arbitration.[50]

Indeed, the drafter's concerns with these three fundamental attributes of arbitration are evident in the FAA's structure.[51] Sections 3, 4 and 6 of the FAA provide a procedure for the enforcement of contracts to arbitrate on a motion, rather than through initiation of a separate cause of action for breach of contract, that was designed specifically to minimize delay and expense.[52] Similarly, FAA Sections 9 through 12 were designed to ensure a prompt hearing on a motion to confirm, vacate, modify, or correct an arbitration award.[53] Also, FAA Section 16 allows for an interlocutory appeal of an order denying a motion to compel arbitration while generally disallowing interlocutory appeal of an order compelling arbitration.[54] Finally, Section 5 of the FAA makes enforceable the parties' chosen means for selecting an arbitrator, allowing the parties to choose a

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49 Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 269 (1926); *see also 1924 Joint Hearings*, *supra* note 48, at 34–35 (brief of Julius Henry Cohen) (same).

50 *See, e.g.*, S. REP. NO. 68-536, at 3 (1924) ("It has been said that 'arrangements for avoiding the delay and expense of litigation and referring a dispute to friends or neutral persons are a natural practice of which traces may be found in any state of society.'"); Weston, *supra* note 22, at 109–10 ("Arbitration historically has been, and continues to be, a preferred and private forum for many commercial [disputes] because the process is considered faster, less expensive, [and] allows the parties to select decision-maker(s) . . . .").

51 *1924 Joint Hearings*, *supra* note 48, at 35–36 (brief of Julius Henry Cohen) (discussing how the FAA's structure minimizes delay and expense).

52 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22 (1983) (discussing how the structure of Sections 3 and 4 of the FAA reflect "Congress's clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible"); H.R. REP. NO. 68-96, at 2 (1924) (describing the FAA's procedure for enforcement of an arbitration contract as "following the lines of ordinary motion procedure, reducing technicality, delay, and expense to a minimum and at the same time safeguarding the rights of the parties"); S. REP. NO. 68-536, at 3 ("Section 6 provides for expedition in the matter of the hearing of arbitration matters by the court."); *see also* 9 U.S.C. §§ 3, 4, 6.

53 *1924 Joint Hearings*, *supra* note 48, at 34 (brief of Julius Henry Cohen) ("The proceedings for vacating, modifying, correcting or enforcing an award follow the ordinary motion practice of the court, so that a prompt hearing is assured."); *see also* 9 U.S.C. §§ 9, 10, 11, 12.

54 9 U.S.C. § 16.

decisionmaker with relevant expertise.[55] In contrast, the FAA's structure itself does not suggest a concern with arbitration secrecy. In fact, its structure expressly compromises arbitration secrecy in requiring an arbitration party that seeks to confirm, modify, or correct an arbitration award to attach the award to the relevant motion.[56]

The FAA's legislative history strongly suggests that Congress passed the FAA principally to empower parties to arbitration to avoid the costs and delays of litigation.[57] The legislative

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55 9 U.S.C. § 5 ("If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed . . . .").

56 9 U.S.C. § 13(b); *see also* Dish Network, LLC, 370 N.L.R.B. No. 97, at 15 (Mar. 18, 2021) (McFerran, concurring in part and dissenting in part) (asserting that "several sections of the FAA expressly provide for public filings that would violate the plain language of many broad confidentiality agreements"); Resnik, Garlock & Wang, *supra* note 31, at 429 (arguing that considering the FAA's provisions regarding motions to confirm, vacate, or modify an arbitration award, "the FAA should not be interpreted to preclude disclosure of information about the pendency or outcomes of arbitration").

57 *See 1924 Joint Hearings*, *supra* note 48, at 34 (brief of Julius Henry Cohen) (listing the long delay and expense of litigation among the evils "at which arbitration agreements in general are directed"); *id.* at 7 (testimony of Charles L. Bernheimer) (asserting that "arbitration saves time, saves trouble, saves money"); *id.* at 21 (letter dated January 31, 1923, from Herbert Hoover, Sec'y of Commerce, to Sen. Thomas Sterling) (arguing that the FAA is needed because "[t]he clogging of our courts is such that the delays amount to a virtual denial of justice"); *id.* at 22 (letter dated January 8, 1924, from M.L. Toulme, Sec'y of the Nat'l Wholesale Grocers' Ass'n, to Sen. Thomas Sterling) (supporting the FAA in the interest of "economical adjustment of trade disputes and elimination of expensive litigation"); *id.* at 24 (letter dated January 7, 1924, from Samuel M. Forbes, Sec'y of the Converters' Ass'n, to Sen. Thomas Sterling) ("Our members have found arbitration to be expeditious, economical, and equitable, conserving business friendships and energy."); *id.* (letter dated January 8, 1924, from Arthur S. Somers, Brooklyn Chamber of Commerce, to Rep. William E. Cleary) ("The Brooklyn Chamber of Commerce . . . believes that it is often possible by arbitration to save time, trouble, and money."); *id.* at 27 (statement of Alexander Rose, Arb. Soc'y of America) (discussing delay in the courts as a reason to support the FAA and asserting that "the people . . . want speedy justice"); *id.* at 31 (resolution of the American Bankers' Association, adopted January 26, 1923) ("[A]rbitration offers the best means yet devised for an efficient, expeditious, and inexpensive adjustment of such disputes."); *A Bill Relating to Sales and Contracts to Sell in Interstate and Foreign Commerce; and A Bill to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising Out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 2 (1923) [hereinafter *1923 Hearing*] (statement of Charles L. Bernheimer) (asserting that the FAA "will enable business men to settle their disputes expeditiously and economically"); *id.* at 11 (testimony of W.H.H. Piatt) (suggesting that expeditious arbitration "would offer . . . opportunities for saving perishable products"); *id.* at 14 (excerpt from the Report of the ABA Comm. on Commerce, Trade, and Commercial Law) (stating the FAA "will reduce litigation [and] will enable business men to settle their disputes expeditiously and economically and will reduce the

history also contains several references to the desire of disputants to obtain expert decision-making through arbitration.[58] The legislative history is silent, however, with respect to arbitration secrecy.[59]

The Congress that passed the FAA may well have assumed, however, that arbitrations within the purview of the Act would be private. At the time of the FAA's enactment in 1925, privacy was part of the folklore of arbitration.[60] Thus, the custom

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congestion in the Federal and State courts"); S. REP. NO. 68-536, at 3 (1924) (noting the appeal of arbitration "to big business and little business alike, to corporate interests as well as to individuals" in light of the persistent and growing "desire to avoid the delay and expense of litigation"); H.R. REP. NO. 68-96, at 2 (1924) ("It is practically appropriate that the action [of enacting the FAA] should be taken at this time when there is so much agitation against the costliness and delays of litigation."); *id.* (suggesting that the costliness and delays of litigation "can be largely eliminated by agreements for arbitration"); 66 CONG. REC. S984 (daily ed. Dec. 30,1924) (statement of Sen. Walsh) ("The business interests of the country find so much delay attending the trial of lawsuits in courts that there is a very general demand for a revision of the law in this regard."); 65 CONG. REC. H11081 (daily ed. June 6,1924) (statement of Rep. Dyer) (commenting that "[t]he result of such a bill [the proposed FAA] will be to do away with a lot of expensive litigation").

58 *1924 Joint Hearings*, *supra* note 48, at 14 (statement of Julius Henry Cohen) (discussing the value of having a dispute resolved by one in whom the disputants "have confidence in his ability to understand complex commercial situations and in his sense of right and justice"); *id.* at 27 (statement of Alexander Rose, Arb. Soc'y of America) (noting that arbitration allows for selection of a decisionmaker "who is familiar with the subject of the controversy . . . so that no time will be lost in educating a man in the jury who is unfamiliar with the subject" and later discussing the "tremendous advantage" of arbitration in that "we may select judges satisfactory to the parties"); *id.* at 35, 40–41 (brief of Julius Henry Cohen) (asserting that arbitration contracts seek to address the fact that "in the ordinary jury trial, the parties do not have the benefit of the judgment of persons familiar with the peculiarities of the given controversy" and twice later mentioning the desire of disputants for "expert" decision-making); *1923 Hearing*, *supra* note 57, at 3 (statement of Charles L. Bernheimer) (discussing the will of President George Washington "which stipulated that the disputants [with respect to any dispute concerning the will] were each to select a man 'known for probity and good understanding' and these two to select a third" to serve as arbitrators).

59 The FAA's text also is silent with respect to arbitration secrecy. 9 U.S.C. §§ 1–16; *see also* Drahozal, *supra* note 18, at 32 ("Neither the Federal Arbitration Act (FAA) nor the Uniform Arbitration Act (UAA) imposes any obligation of confidentiality on the parties to an arbitration agreement, the arbitrator or the arbitration administrator. Nor do they address the privacy of the arbitration process."); Weston, *supra* note 22, at 111 ("While federal and state laws provide for the enforcement of arbitration agreements and awards, these laws do not address arbitration's procedural aspects or confer specific confidentiality privileges to arbitral proceedings or awards.").

60 Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 30 TEX. INT'L L.J. 121, 122 (1995) (noting that, under English law, "it has for centuries been recognized that arbitrations take place in private" and "[o]ther common law jurisdictions appear to share that view"); Resnik, Garlock & Wang, *supra* note 31, at 376 ("[B]y the time of the enactment of the FAA in 1925, the model of

of privacy in arbitration may well have been part of the law merchant that Congress intended the FAA to codify. For example, when the New York Chamber of Commerce set out in 1911 to reestablish commercial arbitration facilities at the organization, the first significant decision made by the committee tasked with adopting rules to govern the new arbitration system was that the arbitration proceedings would be private.[61] The twelve simple rules later approved by the committee to govern arbitrations included the principle that arbitrations would be private unless the parties agreed otherwise.[62] Soon thereafter, the Chamber promoted its new arbitration system as being "conducted on plain, common sense, business-like methods, with guaranteed privacy."[63] Privacy and, to a lesser extent, confidentiality, maintain a central place in the custom of arbitration to the present day.[64]

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business-to-business and labor-management arbitrations shaped assumptions that arbitrations were to be closed to third parties.").

61 IMRE STEPHEN SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA 43 (2013).

62 *Id.* at 45.

63 *Id.* at 57 (quoting Chamber of Commerce of the State of New York, Monthly Bulletin (Feb. 1914)).

64 *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1648 (2018) (Ginsburg, J., dissenting) ("Arbitration agreements often include provisions requiring that outcomes be kept confidential."); AM. ARB. ASS'N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, CANON VI(B) (2004), https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf [https://perma.cc/4WNQ-ALGA] ("The Arbitrator should keep confidential all matters relating to the arbitration proceedings and decision."); AM. ARB. ASS'N., COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, *supra* note 24, at Rule 45 (requiring the American Arbitration Association (AAA) and the arbitrator to "keep confidential all matters relating to the arbitration or the award" and empowering the arbitrator to protect "the confidentiality of the arbitration proceeding or of any other matters in connection with the arbitration and [to] take measures for protecting trade secrets and confidential information"); JAMS, COMPREHENSIVE ARBITRATION RULES & PROCEDURES, *supra* note 24, at Rule 26 (providing that "JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award" and empowering the arbitrator to "issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information" and to "exclude any non-Party from any part of a Hearing"); Resnik, Garlock & Wang, *supra* note 31, at 376 ("Since the American Arbitration Association's (AAA) founding in 1926, the AAA has described privacy as a central feature of arbitrations."); Sura & DeRise, *supra* note 45, at 466 ("It is well recognized that confidentiality is a principal advantage of arbitration."); Laura A. Kaster, *Confidentiality in U.S. Arbitration*, 5 N.Y. DISP. RESOL. LAW., Spring 2012, at 23, 23 (commenting that "[p]rivacy is the dominant feature of arbitration" and noting that "[i]t is almost universally the case that the arbitral organization's administrative personnel and arbitrators have an obligation to protect information about the proceeding").

The Supreme Court has several times discussed speed, economic efficiency, and expert decision-making together as three fundamental attributes of "the nature of arbitration."[65] For example, the Court has remarked, "[i]n bilateral arbitration, parties forego the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."[66] More frequently, the Court has focused on speed and economy alone when speaking of the essence of arbitration.[67]

The Court has only twice suggested that arbitration secrecy also may be among arbitration's fundamental attributes.[68] In *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation*, the Court held that an arbitrator may not imply an agreement to authorize class-action arbitration solely from the fact that the parties agreed to arbitrate their dispute.[69] "This is so," the court explained, "because class-arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."[70] The Court then listed the loss of "the presumption of privacy and confidentiality" among "the fundamental changes" arising from the shift away from bilateral arbitration to class arbitration under the American Arbitration

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65 Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416 (2019); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344–45 (2011); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010); Alexander v. Gardner-Denver Co., 415 U.S. 36, 56–58 (1974) (commenting with respect to labor arbitration, which is outside the FAA's purview, that "[p]arties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations" and "it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution").

66 *Stolt-Nielsen*, 559 U.S. at 685.

67 *See, e.g.*, *Epic Sys. Corp.*, 138 S. Ct. at 1621 (The FAA reflects that in "Congress's judgment arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved"); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 277–78 (1995) (rejecting an interpretation of the words "evidencing a transaction involving commerce" in Section 2 of the FAA that would "risk[] the very kind of costs and delay through litigation (about the circumstances of contract formation) that Congress wrote the Act to help the parties avoid"); *id.* at 280 (listing among the advantages of arbitration that "it is usually cheaper and faster than litigation"); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (speaking of the "expedition of arbitration").

68 *See Concepcion*, 563 U.S. at 347–48; *Stolt-Nielsen*, 559 U.S. at 685–87.

69 *Stolt-Nielsen*, 559 U.S. at 685.

70 *Id.*

Association's rules for class-action arbitration.[71] The Court set forth a similar analysis in *AT&T Mobility LLC v. Concepcion*.[72] After quoting its earlier opinion in *Stolt-Nielsen* for the proposition that "the 'changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'fundamental,'" the Court included among several examples the assertion that "[c]onfidentiality becomes more difficult" in class arbitration.[73]

Two U.S. courts of appeals have found confidentiality to be, if not a "fundamental attribute" of arbitration, part of the "character of arbitration."[74] In *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, the U.S. Court of Appeals for the Fifth Circuit rejected the argument by cellular-telephone service customers that a clause in their arbitration agreement requiring the parties to keep the existence and result of any arbitration under the contract confidential was unconscionable because it would give an informational advantage to "repeat-player" arbitration parties who would have first-hand knowledge of how arbitrations to which they were a party were decided.[75] The court characterized the argument against the confidentiality provision as "an attack on the character of arbitration itself."[76] In its reasoning, the court focused on the role that confidentiality plays in promoting "the simplicity, informality, and expedition of arbitration"[77]:

> If every arbitration were required to produce a publicly available, "precedential" decision on par with a judicial decision, one would expect that parties contemplating arbitration would demand discovery similar to that permitted [in court], adherence to formal rules of evidence, more extensive appellate review, and so forth—in short, all of the procedural accoutrements that accompany a judicial proceeding.[78]

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71 *Id.* at 686.

72 *Concepcion*, 563 U.S. at 347–48.

73 *Id.* (quoting *Stolt-Nielsen*, 559 U.S. at 686); *but see* Dish Network, LLC, 370 N.L.R.B. No. 97, at 19 (Mar. 18, 2021) (arguing that "the Supreme Court has never so much as suggested that strict party confidentiality is a fundamental attribute of arbitration" and suggesting that the Court in *Concepcion* was concerned with arbitration confidentiality only as a means to protect trade secrets).

74 Guyden v. Aetna, Inc., 544 F.3d 376, 385 (2d Cir. 2008); Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 175 (5th Cir. 2004); *but see* Seibert v. Precision Contracting Sols., LP, No. CV 18-818 (RMC), 2019 WL 935637, at *8 (D.D.C. Feb. 26, 2019) (finding that "the broad confidentiality condition in the contract under review is [not] 'fundamental' to arbitration").

75 *Iberia Credit Bureau*, 379 F.3d at 175.

76 *Id.*

77 *Id.* at 176.

78 *Id.* at 175–76.

In *Guyden v. Aetna, Inc.*, the U.S. Court of Appeals for the Second Circuit reasoned similarly in rejecting a former employee's argument that a confidentiality clause in her arbitration agreement would prevent her from vindicating her federal statutory rights arising under the whistleblower protection provisions of the Sarbanes-Oxley Act.[79] The confidentiality clause at issue provided that "[a]ll proceedings, including the arbitration hearing and decision, are private and confidential, unless otherwise required by law."[80] The *Guyden* court expressed sympathy with the former employee's argument that arbitration secrecy "conflicts with one of the purposes of the SOX whistleblower provision—to communicate to other employees that their rights will be protected if they report wrongdoing."[81] Further, the court assumed for the sake of argument that "the public litigation of SOX whistleblower claims would create a positive incentive for potential whistleblowers to come forward."[82] Nonetheless, the court rejected the federal effective vindication claim. The court found that "confidentiality clauses are so common in the arbitration context," and that "confidentiality is a paradigmatic aspect of arbitration."[83] Thus, quoting the Fifth Circuit, the court concluded that the challenge to the confidentiality provision was "an attack on the character of arbitration itself" and, consequently, was inconsistent with a body of Supreme Court case law endorsing arbitration.[84]

Despite this caselaw suggesting that secrecy is part of the character of arbitration, the better conclusion is that secrecy is not a fundamental attribute of arbitration. As detailed above, the FAA's structure does not evidence a concern with arbitration secrecy and even, in parts, impairs arbitration secrecy.[85] Moreover, the legislative history of the FAA does not contain a single reference to arbitration secrecy.[86] Finally, the Supreme Court's FAA jurisprudence strongly suggests that arbitration secrecy is of lesser importance in contrast to the three attributes

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79 *Guyden*, 544 F.3d at 385.

80 *Id.* at 384.

81 *Id.* at 384–85.

82 *Id.* at 385 n.2.

83 *Id.* at 385.

84 *Id.* (quoting Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 175 (5th Cir. 2004)).

85 *See supra* notes 51–56 and accompanying text.

86 *See supra* notes 57–59 and accompanying text.

of arbitration that the Court has repeatedly recognized as fundamental: speed, economy, and expert decision-making.[87]

This is not to say, however, that arbitration secrecy is a mere incidental aspect of arbitration. Arbitration secrecy has for centuries been a widely accepted custom of arbitration.[88] And privacy is ubiquitous in arbitration in the United States today.[89]

Of critical importance also, as the U.S. Court of Appeals for the Fifth Circuit explained in *Iberia Credit Bureau*, arbitration secrecy promotes arbitration's fundamental attributes of speed and economy by lessening the incentives that parties to arbitration would otherwise have to adopt a litigate-to-the-hilt strategy.[90] For example, an enforceable arbitration secrecy provision should lessen a party's fear that the discovery material it produces in arbitration will become public and, consequently, also should reduce the party's incentive to contest discovery requests.[91] Indeed, arbitration secrecy may also facilitate a faster

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87 *See supra* notes 65–73 and accompanying text.

88 *See supra* notes 61–64 and accompanying text.

89 *See supra* notes 20–24 and accompanying text.

The limited empirical data on point suggests that relatively few parties to an arbitration contract provide for confidentiality in the arbitration process. *See, e.g.*, CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), at § 2.5.8 (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/8UEL-WUWB] (reporting that 7.3 percent of arbitration-subject credit card loans outstanding, 28 percent of checking account arbitration-subject insured deposits, 33 percent of private student loan arbitration clauses, 5.9 percent of payday loan storefronts with arbitration clauses, and no mobile wireless arbitration clauses included an arbitral secrecy provision); John F. Coyle & Christopher R. Drahozal, *An Empirical Study of Dispute Resolution Clauses in International Supply Contracts*, 52 VAND. J. TRANSNAT'L L. 323, 367–68 (2019) (reporting that 29.1 percent of arbitration clauses in international supply contracts studied required at least some degree of confidentiality in the arbitral process); Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 69 (2004) (reporting that 13.5 percent of the consumer arbitration contracts studied provided for some degree of arbitral confidentiality). In the context of employment arbitration, a study of pre-dispute arbitration contracts alone almost certainly would significantly underreport the extent to which the parties had contracted for confidentiality. In the more than 50 employment arbitrations for which I served as the arbitrator between 2011 and 2022, the parties in a significant number of cases stipulated to a confidentiality agreement or asked the arbitrator to enter a protective order only after the demand for arbitration had been filed.

90 Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 175–76 (5th Cir. 2004) (explaining the role that arbitration secrecy plays in promoting "the simplicity, informality, and expedition of arbitration").

91 *See* Chi. Trib. Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1312 n.10 (11th Cir. 2001) ("The prospect of all discovery material being presumptively

and less expensive conflict resolution by removing an incentive for the arbitrator to "judicialize" the arbitration process and her arbitration award so as to protect her public reputation.[92] Thus, while arbitration secrecy is neither a fundamental attribute of arbitration nor an incidental attribute of arbitration, arbitration secrecy is a significant secondary attribute of arbitration.

An important implication of the conclusion that arbitration secrecy is a secondary attribute of arbitration, rather than a fundamental or incidental attribute of arbitration, is that the Supreme Court's framework for considering challenges to arbitration regulation is ill-suited to resolving challenges to state and federal limitations on arbitration secrecy. As explained above, that framework is rigidly dichotomous.[93] The FAA will preempt any state arbitration regulation that undermines a fundamental attribute of arbitration.[94] In contrast, arbitration regulation that infringes only an incidental attribute of arbitration will survive FAA preemption analysis provided that the regulation applies to contracts generally.[95] The conclusion that there are intermediate attributes of arbitration suggests that the current framework is rigid to the point of dysfunction and reveals the need for an expanded framework for resolution of challenges to arbitration regulation that allows for a more nuanced intermediate scrutiny.

The intermediate scrutiny analysis should not merely add an additional all-or-nothing prong to the existing fundamental attribute/incidental attribute framework. Rather, the revised framework should allow for a case-by-case balancing of the state's interests in restricting arbitration secrecy on the one hand against the interests of the parties to the arbitration contract in the enforcement of their arbitration secrecy provisions as written on the other. Such a balancing approach would allow for consideration of context that the Supreme Court's

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subject to the right of access would likely lead to an increased resistance to discovery requests."); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 483 (1991) ("If litigants know that compliance with a discovery request could lead to uncontrolled dissemination of private or commercially valuable information, many can be expected to contest discovery requests with increasing frequency and tenacity to prevent disclosure."); *id.* at 446, 500.

92 *See* Amy J. Schmitz, *Assuming Silence in Arbitration*, N.J.L. MAG., Apr. 2011, at 13, 14 (arguing that "privacy may help minimize 'judicialization' of arbitration proceedings").

93 *See supra* notes 42–45 and accompanying text.

94 *See supra* notes 39–41, 43–44 and accompanying text.

95 *See supra* note 45 and accompanying text.

all-or-nothing approach ignores. For example, the state may have a significantly greater interest in infringing an arbitration secrecy provision in the context of an employment arbitration that concerns a nonwaivable statutory right than the state would have in infringing the same arbitration secrecy provision in the context of an arbitration of a breach-of-contract claim.[96]

Admittedly, it would be unusual to employ a balancing test in a federal preemption analysis. The Supremacy Clause of the U.S. Constitution provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[97] Thus, state law must bow to federal law whenever Congress so intends.[98]

The FAA's saving clause, however, as the Supreme Court has interpreted it, can be seen as a Congressional mandate to balance state interests against the federal interests that ground the FAA when a neutral state law interferes with an element of arbitration.[99] On its face, the saving clause suggests that a state's interests in its arbitration regulation law shall outweigh federal interests whenever the state regulates arbitration "upon such grounds as exist at law or in equity for the revocation of any contract."[100] As the Supreme Court has interpreted the saving clause, however, whether state interests outweigh federal interests depends upon the nature of the element of arbitration that the neutral state regulation impacts. A state's interests in its neutral arbitration regulation outweigh federal interests if the regulation impacts only an incidental aspect of arbitration. On the other hand, federal interests outweigh a state's interests in any neutral arbitration regulation that impacts a fundamental attribute of arbitration.[101]

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96 *See* Gibbons, *supra* note 8, at 771–72 (arguing that the public has no interest in the arbitration of a contract dispute, but when an arbitration involves statutory rights, "then privacy interests in the arbitration must be weighed against the public's interests in the arbitration").

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

98 Kansas v. Garcia, 140 S. Ct. 791, 801 (2020).

99 *Cf.* Southland Corp. v. Keating, 465 U.S. 1, 17–21 (1984) (Stevens, J., concurring in part and dissenting in part) (arguing that the federal courts should develop a federal common law setting forth the scope of the FAA's saving clause and expressing the belief that the saving clause "leaves room for the implementation of certain substantive state policies that would be undermined by enforcing certain categories of arbitration clauses").

100 9 U.S.C. § 2.

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

Thus, the Supreme Court's current all-or-nothing approach to FAA preemption under the saving clause can be seen as a balancing approach where the Court has pre-balanced the respective state and federal interests. My proposed reform is in accord, but it eschews pre-balancing. Where a neutral state regulation impacts a secondary attribute of arbitration, one cannot say that the state's interests will always outweigh the interests that ground the FAA, or vice versa. Rather, one must consider a broader context in balancing the respective state and federal interests to determine whether the state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[102]

In addition to focusing on the state's interest in infringing arbitration secrecy in a specific context, my proposed framework would focus on the state's specific means of infringing arbitration secrecy. Essentially, pursuant to my proposed framework, the state must enforce the parties' agreement with respect to arbitration secrecy unless the state can demonstrate that its interest in disregarding that agreement is reasonable in its inception and reasonable in its scope when measured against the parties' interest in arbitration secrecy. This proposed balancing test borrows from the Supreme Court's case-by-case approach to evaluating a government worker's claim for privacy protection when the government seeks to invade that privacy as employer rather than as sovereign.[103]

In *O'Connor v. Ortega*, a four-justice plurality of the Supreme Court announced a framework for evaluating a government employer's intrusion into a public employee's privacy.[104] The first part of the *O'Connor* framework evaluates whether the public employee had a reasonable expectation of privacy in the area or thing into which the government employer intruded.[105] The plurality reasoned with respect to this first inquiry that, in light of great variations in public sector work environments, the inquiry must be made on a case-by-case basis and must focus on whether the public employee's expectation of privacy is one

102 Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

103 *See generally* O'Connor v. Ortega, 480 U.S. 709 (1987) (plurality opinion).

104 *Id.* at 714–26. The plurality limited its inquiry to only two types of government employer intrusions: non-investigatory work-related searches and investigatory searches for evidence of suspected work-related employee misconduct. *Id.* at 723.

105 *Id.* at 715.

that society is prepared to consider reasonable in light of the operational realities of her particular work environment.[106]

If the public employee did have such a reasonable expectation of privacy, the second part of the *O'Connor* framework considers whether the government employer's intrusion into the public employee's privacy was reasonable both in its inception and in its scope.[107] Subsequent to *O'Connor*, a majority of the Court endorsed this second part of the *O'Connor* framework in a case in which the Court assumed for the purposes of its analysis that the public employee had a reasonable expectation of privacy and, thus, found it unnecessary to decide whether the *O'Connor* plurality's approach to determining whether a public employee had a reasonable expectation of privacy controlled.[108] This second inquiry seeks to "balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and efficient operation of the workplace."[109]

The inception inquiry focuses on the government's objectives in intruding.[110] The *O'Connor* plurality suggested that a government employer's intrusion into a worker's privacy will be reasonable in its inception "when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose."[111] Necessity, however, is not the standard. Rather, the Court has clarified that an intrusion will be reasonable in its inception where the government has a "legitimate interest," "legitimate purpose," or "legitimate reason" it seeks to further by intruding.[112]

The scope inquiry focuses on the government's means of intruding in relation to its reasonable purposes for intruding. The intrusion "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the [harm to be addressed]."[113] Importantly, the Court has held

106 *Id.* at 717–18.

107 *Id.* at 725–26.

108 City of Ontario v. Quon, 560 U.S. 746, 757, 760–61 (2010).

109 *O'Connor*, 480 U.S. at 719–20 (plurality opinion).

110 *Id.* at 726.

111 *Id.*

112 *See Quon*, 560 U.S. at 761, 764.

113 *O'Connor*, 480 U.S. at 726 (plurality opinion) (quotation omitted).

that a government search is not "excessively intrusive" under the *O'Connor* framework merely because the means chosen is not the least intrusive means practicable.[114]

In a concurring opinion in *O'Connor*, Justice Scalia disapproved of the plurality's framework.[115] In particular, he criticized the plurality's call for a case-by-case inquiry into whether the public employee had a reasonable expectation of privacy as "a standard so devoid of content that it produces rather than eliminates uncertainty in this field."[116] Justice Scalia argued instead for a fixed approach under which a public employee would, "as a general matter," have a reasonable expectation of privacy in her office and the drawers and files within that office—the physical spaces at issue in *O'Connor*.[117]

Justice Scalia's concern about the uncertainty arising from a case-by-case inquiry into the reasonableness of a claimant's expectation of privacy should be taken seriously in formulating a standard for evaluating intrusions into arbitration secrecy. Parties often desire arbitration precisely because it can be a speedy and economical means of dispute resolution.[118] Thus, the extent to which an arbitration-related standard is likely to breed litigation is highly relevant.[119]

In the context of an arbitration secrecy clause within the FAA's purview, the FAA itself weighs against a case-by-case approach to consideration of whether a party had a reasonable expectation of secrecy. Where a party to an arbitration agreement has contracted for arbitration secrecy, the FAA protects that party's interest in enforcement of the contract as written.[120]

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114 *Quon*, 560 U.S. at 763–64.

115 *O'Connor*, 480 U.S. at 729–32 (Scalia, J., concurring).

116 *Id.* at 730.

117 *Id.* at 731; *see also Quon*, 560 U.S. at 767 (Scalia, J., concurring) ("In this case, the proper threshold inquiry should be not whether the Fourth Amendment applies to messages on *public* employees' employer-issued pages, but whether it applies *in general* to such messages on employer-issued pagers.").

118 *See* Preston v. Ferrer, 552 U.S. 346, 357 (2008) ("A prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results.") (internal quotation omitted); *supra* note 57.

119 *See* Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 266, 275 (1995) (rejecting an interpretation of the FAA that would conflict with the purpose of the Act by "unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it").

120 9 U.S.C. § 2 ("A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . . ."); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489

Thus, my proposed framework for evaluating intrusions into arbitration secrecy would assume, as a general matter, that the contracting party has a reasonable expectation of secrecy. My proposed framework, therefore, would focus primarily on whether the state's intrusion into arbitration secrecy was reasonable in its inception and reasonable in its scope in relation to the party's generally given reasonable interest in arbitration secrecy.

Although my proposed standard borrows from the law governing privacy claims against the government as employer, its justification as a preemption standard for infringements on arbitration secrecy does not rely upon a connection to privacy law. Rather, justification for the proposed inception and scope test can be found in both of the principal existing strands of FAA preemption theory—the antidiscrimination strand and the essence of arbitration strand.[121] Thus, application of the inception and scope test should not be limited to government infringements of arbitration secrecy. Indeed, the inception and scope test should be applied widely to any government infringement of a secondary attribute of arbitration.[122]

The antidiscrimination strand of FAA preemption theory reflects Congressional intent that that FAA target government efforts that suggest a hostility to arbitration.[123] Most obviously, Section 2 of the FAA, in combination with Section 4 of the FAA,

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U.S. 468, 476 (1989) ("The federal policy [grounding the FAA] is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.").

121 *See infra* notes 123–132 and accompanying text.

122 A thorough analysis of which attributes should be classified as secondary attributes of arbitration is beyond the scope of this Article. Because of their likely impact on fundamental attributes of arbitration, candidates for classification as secondary attributes might include the ability to contract for limited judicial review in state court of an arbitration award, foregoing a reasoned opinion in support of the arbitrator's award, allowance of motions to dispose of the case without a full evidentiary hearing, and acceptance of remote or documentary testimony.

123 *See, e.g.*, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006) ("To overcome judicial resistance to arbitration, Congress enacted the Federal Arbitration Act."); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) ("[The FAA's] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) ("The [Federal Arbitration] Act was intended to reverse centuries of judicial hostility to arbitration agreements . . . .") (internal quotation omitted); Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1194, 1197, 1220, 1224 (2011) (distilling from the FAA preemption jurisprudence an antidiscrimination principle aimed at "ensur[ing] that arbitration agreements were not denied enforcement because of unjustified considerations such as the historic 'mistrust' or 'suspicion' of the arbitral process" and arguing that the purpose of

was meant to end the refusal of courts to specifically enforce predispute arbitration agreements.[124] Thus, the FAA will preempt any state effort that fails to put arbitration contracts on an equal footing with all other contracts.[125]

My proposed inception and scope test is designed to apply to cases in which a neutral, non-discriminatory statute or doctrine impacts a secondary attribute of arbitration. Thus, at one level, the antidiscrimination principle would seem inapposite. Still, my proposal finds support in the antidiscrimination strand of FAA preemption theory in that when the state infringes upon a secondary attribute of arbitration without a legitimate reason or in a way that is only loosely connected with a legitimate reason, one should suspect that hostility to arbitration motivated the infringement, at least in part.[126] Thus, one justification of my proposed inception and scope test is similar to the "pretext" justification of adverse impact law in the employment context: requiring an employer to demonstrate that its neutral practice that has an adverse impact upon women or minorities is job related and consistent with business necessity is a means to limit intentional discrimination that workers cannot prove is intentional discrimination.[127]

The essence of arbitration strand of FAA preemption theory reflects Congressional intent that parties who seek to avoid litigation in the public courts be allowed to contract for a binding

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the FAA was to "put[] the arbitration process on par with its main public sector competitor: litigation").

124 9 U.S.C. § 2 (making certain arbitration contracts "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"); 9 U.S.C. § 4 (providing for specific performance for a breach of an arbitration contract).

125 *See, e.g.*, Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996); Allied-Bruce Terminix Cos., Inc., v. Dobson, 513 U.S. 265, 281 (1995); *Volt*, 489 U.S. at 478; H.R. REP. NO. 68-96, at 1 (1924) (discussing the effect of the proposed FAA and asserting that "[a]n arbitration agreement is placed upon the same footing as other contracts, where it belongs").

126 *See* Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1285–88 (2011) (discussing "the problem of pretext: the possibility that courts may be concealing lingering anti-arbitration bias behind the mask of 'general' contract defenses" and arguing that "[p]reemption concerns are just as salient here as they were in the case of statutes that single out arbitration").

127 *See* George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1299, 1309–10 (1987) ("Because of the difficulty of proving the defendant's intent directly and because Congress attempted to prevent pretextual discrimination in several central provisions of title VII, the theory of disparate impact constitutes a justifiable extension of the statute's prohibitions against discrimination.").

adjudication that will differ significantly from litigation.[128] Specifically, the FAA seeks to protect the rights of disputants to enjoy a resolution of their dispute that, by design, is faster, less expensive, and more informed than public litigation.[129] In short, this strand of FAA preemption theory requires that states allow arbitration to be arbitration.[130]

My proposed inception and scope test can be seen as grounded in the essence of arbitration strand of FAA preemption theory in two ways. First, infringement of a secondary attribute of arbitration carries a significant risk of impairing the fundamental attributes of arbitration. For example, as argued above, infringement of arbitration secrecy may incentivize the parties and the arbitrator to judicialize arbitration, ultimately resulting in a slower and more expensive dispute resolution process.[131]

Second, infringement of a secondary attribute of arbitration itself may interfere with the right of the parties to an arbitration contract to design a process that differs significantly from litigation in the public courts. For example, as argued below, infringement of a secondary attribute of arbitration so that arbitration may better promote the public policy purposes of public litigation will cause arbitration to be less useful to and less utilized by potential arbitration parties.[132]

For these reasons, a more stringent FAA preemption standard should apply in the case of a neutral government infringement of a secondary attribute of arbitration than in a case of a neutral government infringement of a merely incidental attribute of arbitration. In sum, the FAA should preempt or displace a neutral government infringement upon a secondary attribute of arbitration unless the state can demonstrate that the infringement is reasonable in its inception and reasonable

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128 *See* Stephen J. Ware, *The Centrist Case Against Current (Conservative) Arbitration Law*, 68 FLA. L. REV. 1227, 1276–78 (2016) (arguing that the Supreme Court has interpreted the word "arbitration" in the FAA to mean "a streamlined form of binding adjudication" and concluding that the FAA requires states to allow "[a] form of binding adjudication that significantly differs from litigation by having (1) less discovery, (2) fewer evidentiary rules, and (3) no jury," as well as no class actions).

129 AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) ("The point of [the FAA] affording parties discretion in designing arbitration processes is to allow efficient, streamlined procedures tailored to the type of dispute.").

130 *Id.* at 351 (asserting that arbitration "pursuant to a discovery process rivaling that in litigation" is "not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law").

131 *See supra* notes 90–92 and accompanying text.

132 *See infra* notes 170–182 and accompanying text.

in its scope. This standard finds support in both the antidiscrimination strand of FAA preemption theory and the essence of arbitration strand of FAA preemption theory. The next Part illustrates how this standard should be applied.

II
The Federal Arbitration Act's Relationship to Anti-Secrecy Efforts

This Part explores how the proposed reasonableness inquiries would impact FAA preemption and displacement analysis across a sample of state and federal limitations on arbitration secrecy. First, Part II reviews case law applying the unconscionability and public policy doctrines to arbitration secrecy contracts and, in turn, applies the inception and scope tests to the reasoning of those cases. Second, this Part focuses on state statutes that preclude enforcement of nondisclosure agreements against employees and considers whether such statutes can survive FAA preemption analysis under the reasonableness inquiries. Third, this Part examines the relationship between the common law and statutory right of access to documents filed in litigation and FAA preemption or displacement under the inception and scope tests. Finally, Part II considers the extent to which the FAA would displace Section 7 of the National Labor Relations Act under the inception and scope tests when Section 7 would otherwise apply to preclude a workplace arbitration secrecy contract.

A. Unconscionability and Public Policy

As noted above, Section 2 of the FAA allows a state to invalidate an arbitration contract, in whole or in part, on grounds that would apply to any contract, so long as application of the neutral contract doctrine does not undermine a fundamental attribute of arbitration.[133] Such generally applicable contract doctrines that may be used to invalidate an arbitration provision include fraud, duress, and unconscionability.[134] Of these, unconscionability has most frequently been used to deny enforcement of arbitration secrecy provisions.[135]

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133 *See supra* notes 36–41 and accompanying text.

134 Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

135 *See, e.g.*, Narayan v. Ritz-Carlton Dev. Co., Inc., 400 P.3d 544, 556 (Haw. 2017); Schnuerle v. Insight Commc'ns Co., 376 S.W.3d 561, 579 (Ky. 2012); Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753, 765 (Wash. 2004).

A contract may be procedurally unconscionable, substantively unconscionable, or both.[136] Procedural unconscionability relates to unfairness in contract formation and focuses on inequality of the parties with respect to bargaining power and surprise to a party arising from hidden or complex terms.[137] Substantive unconscionability refers to unfairness with respect to the terms of the contract and focuses on whether the contract terms are one-sided or overly harsh to one party.[138]

In some states, a court may hold a contract to be unenforceable if the court finds either that the contract is procedurally unconscionable or that the contract is substantively unconscionable.[139] In most states, however, a court must find a contract to be both procedurally unconscionable and substantively unconscionable before the court will hold the contract to be invalid on grounds of unconscionability.[140] In some of those states, as the degree of procedural unconscionability present increases, the amount of substantive unconscionability needed to find a contract unenforceable decreases.[141] Conversely, in these states, as the degree of substantive unconscionability present increases, the amount of procedural unconscionability needed to invalidate the contract on grounds of unconscionability decreases.[142]

Despite these variations across the states in the law of unconscionability and even though unconscionability analysis, by its very nature, is case specific, patterns and themes have emerged in the caselaw adjudicating unconscionability challenges to arbitration secrecy provisions. First, a significant number of courts have focused on the effect of the arbitration secrecy provisions at issue on nonparties to the contract, in

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136 *See, e.g.*, *Schnuerle*, 376 S.W.3d at 575–76.

137 Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000).

138 Ting v. AT&T, 319 F.3d 1126, 1149 (9th Cir. 2003); Schroeder v. Fageol Motors, Inc., 544 P.2d 20, 23 (Wash. 1975).

139 *See, e.g.*, *Schnuerle*, 376 S.W.3d at 576 n.12; Gandee v. LDL Freedom Enters., Inc., 293 P.3d 1197, 1199 (Wash. 2013).

140 *See, e.g.*, *Armendariz*, 6 P.3d at 690; *Narayan*, 400 P.3d at 551; Hayes v. Oakridge Home, 908 N.E.2d 408, 412 (Ohio 2009); *see also* Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 767 (2014) ("Most states' unconscionability doctrines require both procedural unconscionability and substantive unconscionability before a court will refuse to enforce a contract.").

141 *See, e.g.*, *Armendariz*, 6 P.3d 669 at 690.

142 *Id.*

particular on potential future litigants.[143] Second, courts have routinely failed to distinguish between arbitration secrecy provisions and broader nondisclosure agreements separable from the arbitration contract.[144] The former pattern raises principally an inception issue. The latter pattern implicates principally a scope issue.

1. *Concern for Nonparties to the Arbitration Agreement*

In a significant number of cases, courts have found an arbitration secrecy clause to be substantively unconscionable because the clause would impede nonparties to the agreement in building a case against a party to the clause.[145] The reasoning of the U.S. Court of Appeals for the Eleventh Circuit in *Larsen v. Citibank FSB* is illustrative: "[W]ithout the guidance of prior arbitral decisions, future claimants are less able to assess the viability of their claims. In turn, they cannot accurately measure the costs of dispute resolution against its benefits."[146] The court reasoned further that when arbitral outcomes remain concealed, "prospective claimants have little context in which to assess the value of discovered documents or work product from prior disputes. . . . [Moreover,] they cannot avoid repeating past claimants' mistakes—nor can they leverage prior successes—if they have no insight into dispute outcomes."[147] The *Larsen* court found that the informational advantage that a party would gain from routinely using arbitration secrecy clauses in its contract might discourage potential claimants

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143 *See infra* notes 145–158 and accompanying text.

144 *See infra* notes 184–205 and accompanying text.

145 *See, e.g.*, Davis v. O'Melveny & Myers, 485 F.3d 1066, 1078 (9th Cir. 2007); Ting v. AT&T, 319 F.3d 1126, 1152 (9th Cir. 2003); *Narayan*, 400 P.3d at 556; Schnuerle v. Insight Commc'ns Co., 376 S.W.3d 561, 579 (Ky. 2012); *but see* Sanchez v. Carmax Auto Superstores Cal., LLC, 168 Cal. Rptr. 3d 473, 481–82 (Cal. Ct. App. 2014) (rejecting the trial court's conclusion that an arbitration secrecy provision which required that the arbitration be confidential was unconscionable because it "inhibit[ed] employees from discovering evidence from each other") (internal quotations omitted).

After the California Court of Appeal decided *Sanchez*, the U.S. Court of Appeals for the Ninth Circuit held that the holding in *Sanchez* bound the Ninth Circuit in cases arising under California law. *See* Poublon v. C.H. Robinson Co., 846 F.3d 1251, 1266 (9th Cir. 2017). This holding calls into question the outcomes in *Ting* and *Davis*, which had purported to apply California's law of unconscionability in holding arbitration secrecy clauses to be substantively unconscionable. *Id.* at 1267.

146 Larsen v. Citibank FSB, 871 F.3d 1295, 1319 (11th Cir. 2017).

147 *Id.*

from pursuing even valid claims.[148] Thus, the court held that the arbitration secrecy clause at issue was substantively unconscionable under the relevant state law.[149] Numerous other courts have reasoned more specifically that the unavailability of information relating to an arbitration arising from the contract at issue will prevent nonparties to the contract from gathering evidence of intentional misconduct or a pattern of discrimination by a party to the contract.[150]

A common concern expressed by courts in this line of cases is that an arbitration secrecy provision will compound the advantages that a repeat player in arbitration enjoys in arbitrating a case against a one-shot player.[151] As the label suggests, a repeat player is an entity that uses arbitration for multiple cases.[152] A prototypical example is an employer that requires its employees to arbitrate any employment law claims brought against the employer and, therefore, finds itself arbitrating numerous cases.[153] Any single employee, on the other hand, is unlikely to arbitrate more than once in her lifetime.[154] Thus, an employee is a prototypical one-shot player.[155]

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148 *Id.*

149 *Id.*

150 *See, e.g.*, *Ting*, 319 F.3d at 1152 ("[T]he unavailability of arbitral decisions may prevent potential plaintiffs from obtaining the information needed to build a case of intentional misconduct or unlawful discrimination against AT&T."); Plaskett v. Bechtel Int'l, Inc., 243 F. Supp. 2d 334, 343 (D.V.I. 2003) ("[T]he ability of a party to unilaterally prevent the inclusion of its name in the award favors the repeat participant and makes it difficult for a potential plaintiff to build a case of intentional misconduct or to establish a pattern or practice of discrimination by a particular company."); Luna v. Household Fin. Corp. III, 236 F. Supp. 2d 1166, 1180–81 (W.D. Wash. 2002) (same); *Narayan*, 400 P.3d at 556 (finding that an arbitration secrecy clause "insulates the Defendants from potential liability" by precluding potential disputants from accessing arbitral precedent and, in turn, hampering the ability of those parties to build a case of intentional misconduct or unlawful discrimination); *Schnuerle*, 376 S.W.3d at 579 (adopting the reasoning of the U.S. Court of Appeals for the Ninth Circuit along this line); Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753, 765 (Wash. 2004) ("As written, the provision hampers an employee's ability to prove a pattern of discrimination or take advantage of findings in past arbitrations.").

151 *See, e.g.*, *Plaskett*, 243 F. Supp. 2d at 343; ACORN v. Household Int'l, Inc., 211 F. Supp. 2d 1160, 1172 (N.D. Cal. 2002); *Luna*, 236 F. Supp. 2d at 1180–81; *Schnuerle*, 376 S.W.3d at 578–79.

152 *See, e.g.*, Lisa B. Bingam, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP POL'Y J. 189, 190 (1997).

153 *Id.*

154 *Id.*

155 *See, e.g.*, Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974) (discussing "one-shotters" in the context of litigation).

The specific "repeat player effect" concern with arbitration secrecy clauses in this line of cases is that the repeat player has access to information from prior arbitrations involving claims under similar contracts or concerning similar alleged misbehavior while, because of the widespread use of arbitration secrecy provisions, the one-shot player will not have access to this same information.[156] Thus, the repeat player will be able to accumulate a body of knowledge over time about how best to defend itself from these types of claims.[157] At the same time, the repeat player will be able to hide relevant arbitration "precedent" from potential one-shot players.[158]

Concern that an arbitration secrecy clause will enhance the repeat player effect is principally, if not entirely, a concern for nonparties to the arbitration contract that is being challenged as unconscionable. The contract at issue requires the parties to maintain the secrecy of the instant arbitration but does not preclude those parties from accessing information relating to earlier arbitrations—what some courts have called arbitration "precedent."[159] Rather, other arbitration secrecy clauses in other arbitration contracts aside from the arbitration contract that is being challenged prevent the parties to the challenged arbitration contract from accessing that arbitration precedent. The arbitration secrecy provision that is the focus of the instant unconscionability challenge will preclude only nonparties to the agreement from accessing arbitration precedent relating to the arbitration arising from the contract that is being challenged.

Thus, courts across this line of cases have confused unconscionability with public policy. Unconscionability doctrine is concerned with unfairness between the parties to a contract.[160] Where the concern with a contract is its impact on nonparties to the contract, unconscionability is not the issue.[161] Rather,

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156 *See, e.g.*, Davis v. O'Melveny & Myers, 485 F.3d 1066, 1078 (9th Cir. 2007); Fox v. Vision Serv. Plan, No. 2:16-CV-2456-JAM-DB, 2017 WL 735735, at *8 (E.D. Cal. Feb. 24, 2017); Sprague v. Household Int'l, 473 F. Supp. 2d 966, 974–75 (W.D. Mo. 2005); Narayan v. Ritz-Carlton Dev. Co., Inc., 400 P.3d 544, 556 (Haw. 2017).

157 *See, e.g.*, Ting v. AT&T, 319 F.3d 1126, 1151–52 (9th Cir. 2003); Schnuerle v. Insight Commc'ns Co., 376 S.W.3d 561, 579 (Ky. 2012).

158 *See, e.g.*, *Ting*, 319 F.3d at 1151–52; *Fox*, 2017 WL 735735, at *8; *Schnuerle*, 376 S.W.3d at 579.

159 *See, e.g.*, *Ting*, 319 F.3d at 1152.

160 Parilla v. IAP Worldwide Servs. VI, Inc., 368 F.3d 269, 279 (3rd Cir. 2004).

161 Eagle v. Fred Martin Motor Co., 809 N.E.2d 1161, 1180 (Ohio Ct. App. 2004) (distinguishing between unconscionability analysis and public policy analysis).

the issue is one of public policy.[162] The U.S. Court of Appeals for the Third Circuit has noted the distinction in a case involving an arbitration secrecy clause:

> The District Court's concern was not about any potential unfairness between two contracting parties vis-à-vis each other. Rather, that concern related to whether allowing an employer the right to prevent its name from appearing in an award in one proceeding would make it more difficult for claimants in subsequent proceedings to prove their cases. This concern has to do, not with unfairness between contracting parties, but with public policy and, more specifically, with whether confidentiality in arbitration proceedings of this kind is consistent with the public policy reflected in [antidiscrimination law].[163]

This Article's proposed inception and scope test should apply to a public policy challenge in the same way that the test would apply to an unconscionability challenge.[164] Indeed, the Supreme Court has made clear that its all-or-nothing approach to neutral state regulation of arbitration applies with equal effect to rules grounded in state public policy.[165] In *Lamps Plus, Inc. v. Varela*, the Supreme Court considered California's application of the generally applicable contract rule known as *contra proferentum* to an arbitration contract.[166] The *contra proferentum* doctrine, which provides that an ambiguity in a contract should be resolved against the contract's drafter, is grounded in public policy considerations, including equitable concerns relating to the likelihood that the contract's drafter enjoyed

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162 *Parilla*, 368 F.3d at 280; Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 175 n.20 (5th Cir. 2004) (noting that the plaintiffs' unconscionability arguments "relate more to broader considerations of public policy" given that "[t]he vice (if any) of the [arbitration] confidentiality clause lies mostly in its systematic effect, not in its oppressiveness as regards the particular plaintiffs before us"); *Eagle*, 809 N.E.2d at 1180 ("Rather than focus on the relationship between the parties and the effect of the agreement upon them, public policy analysis requires the court to consider the impact of such arrangements upon society as a whole."); David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH U. L. REV. 165, 199 (2019).

163 *Parilla*, 368 F.3d at 280.

164 *See generally* Horton, *supra* note 38, at 1245 (arguing "that a purposivist account of FAA preemption allows courts to nullify arbitration clauses under some strands of the contract defense of violation of public policy").

165 *See* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1418 (2019) (applying "the same reasoning" that Supreme Court case law has developed in the context of unconscionability to a state rule grounded in public policy).

166 *See id.* at 1417–19.

greater bargaining power.[167] In *Lamps Plus*, the Court held that even though the rule of *contra proferentum* applied to arbitration contracts and other contracts equally, the doctrine could not be applied to impose class arbitration upon the parties to an arbitration contract because such an application would interfere with fundamental attributes of arbitration.[168]

Thus, the questions one should ask with respect to a public policy challenge to an arbitration secrecy provision are the same questions one should ask with respect to an unconscionability challenge to such a provision: Is the state's limitation on arbitration secrecy reasonable in its inception? If so, is the state's limitation reasonable in its scope?

A regulation that would invalidate an arbitration secrecy provision because of that provision's effect on nonparties to the arbitration contract fails the reasonable inception test. This is so principally because, unlike public litigation, arbitration is neither intended to serve the public interest nor well-situated to do so.[169] Rather, arbitration at its essence is a private alternative to public litigation.[170] In fact, arbitration is the principal means for disputants to reject and withdraw from the public court system.[171] The greatest utility of arbitration is that it allows the contracting parties to tailor their own dispute resolution

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167 *Id.* at 1411, 1417 (citing several treatises discussing these points).

168 *Id.* at 1418.

169 *See* Union Oil Co. of Cal. v. Leavell, 220 F.3d 562, 568 (7th Cir. 2000) ("People who want secrecy should opt for arbitration. When [litigants] call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials.").

For a discussion of how arbitration and mediation processes differ from public court litigation with respect to party autonomy and how this difference presents challenges when courts adopt mediation and arbitration techniques given that courts are designed to serve a public function, see Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199 (2000).

170 Ware, *supra* note 128, at 1277 ("'Arbitration' is widely understood to mean a form of binding adjudication that is not litigation.").

171 *See generally* E. Gary Spitko, *Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interests of the Family*, 57 WASH. & LEE L. REV. 1139, 1142–1154 (2000) (discussing "the potential utility of arbitration for those who wish to avoid or dismantle subordinating law that they feel does not well serve them"); E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RSRV. L. REV. 275, 275, 294–97 (1999) (arguing that minority-culture litigants "have cause to fear adjudication of their legal rights and responsibilities in a legal system dominated by majority-culture personnel" and that arbitration provides a means for cultural majorities to escape from majoritarian bias).

process to best serve *their* own needs unrestrained by the rules of the public court system.[172]

Indeed, the parties to arbitration pay for the privilege of avoiding the public civil justice system.[173] Public tax dollars almost entirely fund the civil justice system's facilities, administrators, and judges.[174] In contrast, the parties to an arbitration typically pay for their hearing room, an arbitral organization's administrative fees, and their arbitrator's fees and expenses.[175]

At a practical level, arbitration is poorly situated to promote the public interest. The contrast with the public civil justice system is informative.[176] The public has input into the composition of the judiciary, either directly by means of a judicial election or indirectly through their elected representatives.[177] Those judges create judicial precedent that guides and binds the public.[178] Unlike with the appointment of a judge, the public has no say in the arbitrator's appointment; they have no reason to place confidence in her.[179] Moreover, the arbitrator is

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172 *See* Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 FLA. L. REV. 711, 764 (2015) ("Parties choose arbitration, in part, . . . to custom design a process to best meet the needs of all of the participants."); E. Gary Spitko, *Judge Not: In Defense of Minority-Culture Arbitration*, 77 WASH. U. L.Q. 1065, 1066 (1999) (arguing that arbitration "can serve as . . . a laboratory for developing procedural and substantive reforms"); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 746–47 (1999) (arguing that the parties to an arbitration contract might create "sophisticated, comprehensive, legal system[s]" tailored to their specific industry).

173 Stephen J. Ware, *Is Adjudication a Public Good? "Overcrowded Courts" and the Private Sector Alternative of Arbitration*, 14 CARDOZO J. CONFLICT RESOL. 899, 907–08 (2013) ("[T]he public-sector court system provides legally binding adjudication virtually free of charge to the disputing parties, while the private sector arbitration system generally charges them market rates for it.").

174 Erin S. Knutsen, *Keeping Settlements Secret*, 37 FLA. ST. U. L. REV. 945, 946, 963 (2010); Ware, *supra* note 173, at 905–06.

175 Sura & DeRise, *supra* note 45, at 468 ("[T]he funding required to resolve disputes with a private third-party neutral, instead of a judge, will almost invariably come from the parties themselves."); Ware, *supra* note 173, at 906.

176 *See* Dore, *supra* note 14, at 465 ("A judge represents a broader public interest, even when adjudicating a seemingly private dispute, and must carefully balance any legitimate need for secrecy against any countervailing public interest in disclosure.").

177 *See* Broughton v. Cigna Healthplans of Cal., 988 P.2d 67, 78 (Cal. 1999) (noting that superior court judges in California are elected and may be recalled).

178 Cole, *supra* note 169, at 1202, 1215; Knutsen, *supra* note 174, at 946.

179 *Broughton*, 988 P.2d at 77–78 (stating that "it hardly requires elaboration that superior court judges are accountable to the public in ways arbitrators are not" and elaborating on those differences, including that superior court judges "are locally elected" and "[v]irtually all of their proceedings take place in public view").

not accountable to the public, nor is she obligated to value or even consider their interests.[180] The arbitrator's decision in any case will not create precedent that will develop the law or bind the public.[181]

Requiring that arbitration serve as a public resource or public good is antithetical to this nature of arbitration. The more that regulation requires that arbitration serve the public policy purposes of public litigation, the less of a private alternative to public litigation arbitration will become. The result will almost certainly be a more expensive, slower, less informed, and less flexible dispute resolution method that remains arbitration in name only. This public-interest-serving arbitration will be less useful to potential arbitration parties and, ultimately, less utilized by them.[182] Thus, regulation that demands that arbitration serve the interests of entities that are not parties to the arbitration contract is not reasonable in its inception.

Assuming for the sake of argument that a certain set of disputes should be adjudicated in a process that is required to serve the public interest, society has one obvious option other than coopting and mutating private arbitration: Congress might amend the FAA to place that set of disputes outside the statute's scope.[183] Amending the FAA to keep such disputes in the public court system would better protect the relevant public interest while allowing arbitration to remain arbitration.

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180 *Id.* at 78 (noting that "arbitrators are not public officers and are in no way publicly accountable").

181 *But see* Menkel-Meadow, *supra* note 11, at 2681 (suggesting that arbitrators who sit in a series of similar cases "write opinions requiring both legal conclusions and fact-findings that must be elaborated and over time necessarily become affected and 'constrained' by the equity of decisions in other, similar cases"); W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1899–1906 (2010) (reviewing arguments that support the conclusion that arbitration does not produce precedent, conceding that past arbitral awards do not determine the outcome of future disputes, yet arguing that "each system of arbitration represents a unique institutional context, the particulars of which undoubtedly will influence how (and whether) arbitral precedent evolves").

182 *Cf.* Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 117 (1981) (rejecting a call for a non-neutral mediator in environmental disputes and arguing that "[t]he way to insure [sic] the continued integrity and usefulness of mediation as a dispute settlement procedure, however, is to be certain that we do not demand that it perform functions beyond the scope of its institutional and conceptual capacity").

183 *See* 9 U.S.C. § 402 (amending the FAA to provide that a predispute arbitration agreement is not enforceable with respect to claims of sexual harassment or sexual assault).

2. *Conflation of a Broad Nondisclosure Agreement with an Arbitration Secrecy Clause*

A second pattern emerging from the caselaw adjudicating unconscionability challenges to arbitration contracts containing secrecy clauses is the failure of courts to distinguish between arbitration secrecy provisions and broader nondisclosure agreements separable from the arbitration contract.[184] To fully appreciate the implications of this failure for the purposes of FAA preemption analysis, one must first understand two related preliminary points: First, the FAA's purview is quite limited. Second, the separability doctrine requires that the arbitration secrecy provision at issue be considered apart from any non-arbitration contract that contains it or relates to it.[185]

As to the first point, the FAA governs the enforcement only of arbitration contracts.[186] It has nothing to say about the enforcement of broader nondisclosure agreements as they relate to matters arising outside of arbitration.[187] This remains true even if the NDA is contained in a contract that also contains an arbitration clause or, indeed, even if the NDA is wrapped in an arbitration clause.[188] The latter would include any arbitration secrecy provision that purports to require confidentiality with

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184 *See, e.g.*, Davis v. O'Melveny & Myers, 485 F.3d 1066, 1071 (9th Cir. 2007) (failing to distinguish between secrecy provisions of an arbitration contract and secrecy provisions of an NDA that are separable from the arbitration contract where the relevant clause provided that "all claims, defenses and proceedings (including . . . the existence of a controversy and the fact that there is a mediation or arbitration proceeding) shall be treated in a confidential manner" and that "no one shall divulge . . . the content of the pleadings, papers, orders, hearings, trials, or awards in the arbitration"); Ramos v. Superior Court, 239 Cal. Rptr. 3d 679, 701 (Cal. Ct. App. 2018); Narayan v. Ritz-Carlton Dev. Co., Inc., 400 P.3d 544, 555 (Haw. 2017).

185 For a broad discussion of the separability doctrine, see E. Gary Spitko, *The Will as an Implied Unilateral Arbitration Contract,* 68 FLA. L. REV. 49, 92–97 (2016) (discussing the separability doctrine and applying the doctrine to various challenges to the validity of a will or trust).

186 *See* 9 U.S.C. § 2 (providing that an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

187 *See* 65 CONG. REC. 1931 (1924) (statement of Rep. Graham commenting that the proposed FAA "does not affect any contract that has not the agreement in it to arbitrate"); Drahozal, *supra* note 41, at 172 ("If the parties agree to a process that is not 'arbitration,' the FAA does not apply and state law rather than federal law will determine the enforceability of the agreement.").

188 Dish Network, LLC, 370 N.L.R.B. No. 97, at 5 (Mar. 18, 2021) (stating that "the FAA does not speak to settlements," given that "settlements are effectively an *alternative* to arbitration" and holding that an arbitration confidentiality provision that read "all arbitration proceedings, including but not limited to hearings, discovery, settlements, and awards shall be confidential" was outside the purview of

respect to matters beyond the scope of the arbitration proceedings.[189] State law or federal law aside from the FAA governs the enforceability of such extra-arbitral secrecy provisions.[190]

Consider once again, for example, the confidentiality provision in *Ramos v. Superior Court*.[191] The court interpreted the provision requiring the parties to maintain the confidentiality of "all aspects of the arbitration" such that Ramos "would be in violation if she attempted to informally contact or interview any witnesses outside the formal discovery process."[192] Accepting for the sake of argument that the confidentiality clause means what the court says it means, the clause must be understood to contain two separable contracts—a provision respecting secrecy in arbitration (its pleadings, discovery, testimony, and award) and an NDA governing Ramos's conversations with persons who may have information relevant to Ramos's sex discrimination claims against her former employer. The FAA governs the former contract, while the latter contract is outside of the FAA's scope.

A contract not to speak to persons outside of an arbitration concerning matters that arose independent of the arbitration is not an arbitration contract.[193] Thus, such an NDA does not fall within the purview of the FAA even if a court implies the NDA's existence from the arbitration confidentiality provision. Given the FAA's limited scope, the concern that *arbitration* secrecy will broadly prevent the parties to an arbitration contract from discussing the events giving rise to their dispute is misplaced.

It may seem odd that the FAA would govern a clause at it relates to arbitration but not govern the very same clause as it relates to matters outside of arbitration. Nonetheless, the arbitral doctrine of separability dictates this result. Even when

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the FAA with respect to settlements); Cal. Com. Club, Inc., 369 N.L.R.B. No. 106, at 1 (June 19, 2020).

189 *Cal. Com. Club*, 369 N.L.R.B. at 1 ("Provisions [in an arbitration contract] that impose confidentiality requirements beyond the scope of the arbitration proceeding and 'the rules under which the arbitration will be conducted' receive no protection from the FAA.").

190 *Id.* at 1 (commenting that secrecy provisions in an arbitration contract that purport to govern in a context outside of the arbitration proceeding "must be assessed under the same standards that apply to confidentiality rules generally").

191 Ramos v. Superior Court, 239 Cal. Rptr. 3d 679, 701 (Cal. Ct. App. 2018).

192 *Id.*

193 *See Cal. Com. Club*, 369 N.L.R.B. at 1 ("Provisions [in an arbitration contract] that impose confidentiality requirements beyond the scope of the arbitration proceeding and 'the rules under which the arbitration will be conducted' receive no protection from the FAA.").

an arbitral secrecy provision and a broader NDA arise from the same contract or the same clause of a contract, the arbitral doctrine of separability requires that a court treat the arbitration secrecy provision and the broader NDA as two separate contracts.[194]

In short, the separability doctrine provides that a court must treat a contract's arbitration provisions as a separate contract apart from the contract that contains the arbitration provisions.[195] Thus, where a party to a contract challenges the validity of the container contract, a court will not view that challenge as a challenge to the container contract's arbitration provisions.[196] For example, where a party to a contract containing an arbitration provision alleges that the contract as a whole was procured by fraud and, therefore, is voidable, the court will not treat that allegation as a challenge to the validity of the arbitration provision contained in the allegedly voidable contract.[197] The Supreme Court has held that the FAA provides for separability in cases to which the FAA applies.[198] Moreover, the Revised Uniform Arbitration Act expressly adopts a separability scheme.[199]

A court that conflates a contract's arbitral secrecy clause with a broader NDA in the same container contract violates both the letter and the spirit of this separability principle.[200] The court's reasoning in *Narayan v. Ritz-Carlton Development*

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194 *See* ITT Educ. Servs., Inc. v. Arce, 533 F.3d 342, 344 (5th Cir. 2008) (holding that even if the arbitrator found fraud in the inducement with respect to a container contract, "the district court nonetheless properly found that the confidentiality provision [which stated that 'all aspects of the arbitration proceeding, and any ruling, decision or award by the arbitrator, will be strictly confidential'] is part of the arbitration clause and, thereby, severable and enforceable under *Prima Paint* and its progeny").

195 *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006) (explaining that "as a matter of substantive federal law [under the FAA], an arbitration provision is severable from the remainder of the contract").

196 *Id.* at 445–46.

197 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402–04 (1967) (holding that "a claim of fraud in the inducement of the entire contract" is one that the arbitrator, not the court, must decide).

198 *Id.*

199 REVISED UNIFORM ARBITRATION ACT § 6(c) (2000) ("An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.").

200 *See, e.g.*, Davis v. O'Melveny & Myers, 485 F.3d 1066, 1078 (9th Cir. 2007) (holding an arbitration secrecy clause that was intertwined with a broader NDA to be substantively unconscionable and reasoning that "[a]n inability to mention even the existence of a claim to current or former O'Melveny employees would handicap if not stifle an employee's ability to investigate and engage in discovery").

Company, Inc. illustrates the point.[201] The clause at issue in *Narayan* included an arbitral secrecy provision intertwined with a broader NDA: "Neither a party, witness, or the arbitrator may disclose the facts of the underlying dispute or the contents or results of any negotiations, mediation, or arbitration hereunder without prior written consent of all parties."[202] The court held that what it labeled the "confidentiality provision of the arbitration clause" was substantively unconscionable because it would impede the plaintiffs' ability to investigate and prosecute their claims against the defendant.[203]

More specifically, the *Narayan* court found that if the contract's secrecy provisions and discovery limitations were enforced, "the [plaintiffs] would only be able to obtain discovery by consent and would be prevented from discussing their claims with other potential plaintiffs because the confidentiality provision would make them unable to disclose the facts of the underlying dispute."[204] The court may well be correct that the contract's confidentiality provisions as a whole would have this effect. That, however, would be the effect of the broader NDA rather than of the arbitral secrecy provision. The arbitration secrecy clause would preclude the plaintiffs only from disclosing "the contents or results of any . . . arbitration."[205]

To avoid FAA preemption under the inception and scope test, a court may have to eschew the type of conflated unconscionability analysis seen in *Narayan*. One may assume for the sake of argument that an unconscionability analysis that seeks to ensure that a claimant would have a reasonable opportunity to investigate and prosecute her claims against a respondent would be found reasonable in its inception. Still, the conflated unconscionability analysis is not reasonable in its scope where it invalidates an arbitration secrecy provision if that purpose can be achieved by invalidating only the NDA or other nonarbitral confidentiality provisions. In such a case, the regulation of arbitration through unconscionability doctrine is excessively intrusive when weighed against the contract party's interest in arbitration secrecy and the lack of the state's need for such intrusion.

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201 *See* Narayan v. Ritz-Carlton Dev. Co., Inc., 400 P.3d 544, 548–49 (Haw. 2017).

202 *Id.* at 548–49.

203 *Id.* at 556.

204 *Id.* (internal quotations omitted).

205 *See id.* at 548–49.

An unconscionability analysis is not reasonable in its scope when it misattributes to an arbitration secrecy provision the effects of a broader NDA, as was the case in *Narayan*. Nor is such an analysis reasonable in its scope when it invalidates an arbitration secrecy clause because of the combined effect of the arbitration secrecy provision and the broader NDA. Rather, to be reasonable in scope, the court's analysis may invalidate an arbitration secrecy provision only if that provision alone would have an impermissible effect. Thus, in considering an unconscionability challenge to an arbitration secrecy provision, a court should assume that any non-arbitral confidentiality restrictions, which the FAA does not protect, have been found unconscionable and unenforceable. In sum, in accordance with the separability principle, the court must ensure that its unconscionability analysis relates specifically to the arbitration clause and not a broader NDA.[206]

B. State Statutory Limitations on Nondisclosure Agreements

A nondisclosure agreement obligates a party to the agreement to maintain the confidentiality of information specified by the agreement.[207] As with arbitration secrecy agreements, parties enter into NDAs that are not specific to arbitration to protect their proprietary information and reputational interests.[208] For example, an employee may value an NDA agreed to as part of the settlement of her claims against her employer as a means to minimize publicity and the likelihood of retaliation from her co-workers and potential future employers.[209]

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206 Indeed, where the arbitration clause assigns to the arbitrator the power to rule on the enforceability of the container contract that contains the NDA, the separability principle dictates that the arbitrator and not the court must decide whether the broader NDA is enforceable. *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445–46 (2006) (explaining that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance"); REVISED UNIFORM ARBITRATION ACT § 6(c) (2000) ("An arbitrator shall decide whether . . . a contract containing a valid agreement to arbitrate is enforceable.").

207 *See, e.g.*, Weston, *supra* note 22, at 108.

208 *See, e.g.*, *id.* at 108–09.

209 *See, e.g.*, Weston, *supra* note 22, at 130; Gloria Allred, *Opinion: Assault Victims Have Every Right to Keep Their Trauma and Their Settlements Private*, L.A. TIMES (Sept. 24, 2019), https://www.latimes.com/opinion/story/2019-09-23/metoo-sexual-abuse-victims-confidential-settlements-lawsuits [https://perma.cc/4MZ6-NW4U] ("Many victims want the opportunity to enter a confidential settlement because they are unwilling to have what happened to them made known to their family members, their co-workers, their future employers or the general public.").

There is widespread concern, however, that NDAs may be used by wrongdoers to hide their malfeasance and silence their victims.[210] A broader concern is that this silence, in turn, enables perpetrators to continue to engage in harmful behavior that is like the behavior that the NDA has covered up.[211] Thus, an NDA may put nonparties to the agreement at risk of harm.[212]

In response to such concerns, in the past few years, the federal government and a significant number of states have enacted meaningful restrictions on the enforcement of NDAs as they relate to workplace behavior.[213] For example, in December 2022, President Biden signed into law the Speak Out Act, which limits enforcement of predispute NDAs as they relate to sexual assault and sexual harassment claims.[214] More specifically, the Speak Out Act provides, "[w]ith respect to a sexual assault dispute or sexual harassment dispute, no nondisclosure clause or nondisparagement clause agreed to before the dispute arises shall be judicially enforceable in instances in which conduct is alleged to have violated Federal, Tribal, or State law."[215] While this legislation will ensure that victims of workplace sexual assault and sexual harassment remain free to discuss their claims publicly, the Speak Out Act is unlikely to have a significant effect on arbitration secrecy. This is because only nine months before enactment of the Speak Out Act, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, which gives claimants the option of invalidating any predispute agreement within the purview of the FAA to arbitrate sexual assault and

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210 *See, e.g.*, Weston, *supra* note 22, at 109 ("NDAs have also been invoked to silence reports of misconduct, negligence, sexual harassment, and even sexual assault.").

211 *See, e.g.*, *id.* at 121.

212 *See, e.g.*, *id.* at 131 ("NDAs can deprive the public of knowledge about misconduct and impede individuals at risk of similar harm from obtaining proof necessary to their cases as well as impair regulatory agencies from investigating and enforcing statutory rights.").

213 *See* CAL. CIV. PROC. CODE § 1001 (West 2023); 820 ILL. COMP. STAT. 96/1-30 (2019); MD. CODE ANN., LAB. & EMPL. § 3-715 (West 2018); NEV. REV. STAT. ANN. § 10.195 (West 2019); N.J. REV. STAT. § 10:5-12.8 (2019); N.M. STAT. ANN. § 50-4-36 (West 2020); N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2019); OR. REV. STAT. § 659A.370 (2023); TENN. CODE ANN. § 50-1-108 (West 2018); VT. STAT. ANN. tit. 21, § 495h(g), (h) (West 2018); VA. CODE ANN. § 40.1-28.01(A) (West 2023); WASH. REV. CODE ANN. § 49.44.211 (West 2022).

214 Speak Out Act, Pub. L. No. 117-224, 136 Stat. 2290 (2022).

215 *Id.* § (4)(a).

sexual harassment claims.[216] Thus, such claims are unlikely to end up in arbitration and, therefore, a statute limiting NDAs with respect to such claims is likely to have minimal impact on arbitration secrecy.

Importantly, the Speak Out Act expressly does not preempt state limitations on the enforcement of NDAs that are "at least as protective of the right of an individual to speak freely, as provided by" the Speak Out Act.[217] In fact, several states have enacted bans on NDAs that are similar to but broader in scope than the Speak Out Act. Most of these statutes are concerned principally with NDAs that would have the effect of silencing complaints of invidious discrimination, discriminatory harassment with respect to any protected trait, or noncompliance with worker protections.[218] Thus, several of the statutes and their limitations expressly do not apply to the protection of proprietary information.[219]

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216 Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26, 27 (2022) ("[A]t the election of the person alleging conduct constituting a sexual harassment dispute or a sexual assault dispute . . . no predispute arbitration agreement . . . shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.").

217 Speak Out Act § 4(b).

218 *See, e.g.*, CAL. CIV. PROC. CODE § 1001(a) (declaring void certain NDAs focusing on workplace harassment and discrimination); 820 ILL. COMP. STAT. 96/1-30(a) (a settlement or termination agreement that contains a confidentiality provision "related to alleged unlawful employment practices" must meet certain specified conditions to be enforceable); N.J. REV. STAT. § 10:5-12.8(a) (an NDA is unenforceable against an employee to the extent that the agreement "has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment"); N.M. STAT. ANN. § 50-4-36 (regulating nondisclosure provisions relating to an employee's "claim of sexual harassment, discrimination or retaliation"); N.Y. GEN. OBLIG. LAW § 5-336 (regulating NDAs "which involve[] discrimination, in violation of laws prohibiting discrimination"); OR. REV. STAT. § 659A.370(a) (limiting certain NDAs by referring to various Oregon statutes that prohibit specified types of invidious employment discrimination); WASH. REV. CODE ANN. § 49.44.211(1) (prohibiting an NDA limiting an employee's right to discuss "conduct . . . that the employee reasonably believed . . . to be illegal discrimination, illegal harassment, illegal retaliation, a wage and hour violation, or sexual assault, or that is recognized as against a clear mandate of public policy, is void and unenforceable.").

219 *See, e.g.*, CAL. GOV'T CODE § 12964.5(f) (West 2022) ("This section does not prohibit an employer from protecting the employer's trade secrets, proprietary information, or confidential information that does not involve unlawful acts in the workplace."); N.J. REV. STAT. § 10:5-12.8(c)(2) ("[T]his section shall not be construed to prohibit an employer from requiring an employee to sign an agreement . . . in which the employee agrees not to disclose proprietary information."); WASH. REV. CODE ANN. § 49.44.211(6) ("This section does not prohibit an employer and an employee from protecting trade secrets, proprietary information, or confidential information that does not involve illegal acts.").

Washington state is unusual in that it has enacted legislation that specifically targets employment arbitration secrecy.[220] Although the relevant statute does not mention the word "arbitration," it is evident that arbitration that is subject to a confidentiality agreement is a target[221]: "A provision of an employment contract or agreement is against public policy and is void and unenforceable if it requires . . . an employee to resolve claims of discrimination in a dispute resolution process that is confidential."[222]

To the contrary, most of the recent statutes that limit the enforceability of NDAs as they relate to workplace behavior do not expressly target arbitration.[223] Nonetheless, some of these non-arbitration-specific statutes are broad enough to apply to arbitration secrecy agreements. This is so because although the separability doctrine, discussed above,[224] dictates that a challenge to a container contract is not a challenge to the arbitration clause within the container contract, the principle does not apply in the context of a regulation of a container contract: a statute that regulates the container contract may very well regulate an arbitration clause within the container contract. Thus, a statute that applies to "an agreement" between an employer and an employee, or even more specifically "a nondisclosure or confidentiality agreement" between an employer and an employee, should be seen as regulating an arbitration secrecy provision entered into between an employer and an employee whether that arbitration contract stands alone or is contained within a more general contract.[225]

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220 WASH. REV. CODE ANN. § 49.44.085 (West 2018). Washington state also has a separate statute that targets NDAs as they relate to workplace behavior. *Id.* at § 49.44.211.

221 *See* Chamber of Com. v. Bonta, 62 F.4th 473, 486 (9th Cir. 2023) ("[A] state rule discriminates against arbitration even if it does not expressly refer to arbitration, but instead targets its defining characteristics."); Saturn Distrib. Corp. v. Williams, 905 F.2d 719, 725 (4th Cir. 1990) ("[T]he mere fact that a statute or regulation does not expressly refer to arbitration is not determinative on the question of whether it impermissibly singles out arbitration provisions.").

222 WASH. REV. CODE ANN. § 49.44.085.

223 *See, e.g.*, N.Y. GEN. OBLIG. LAW § 5-336; N.J. STAT. ANN. § 10:5-12.8; 820 ILL. COMP. STAT. 96/1-30.

224 *See supra* notes 195-199 and accompanying text.

225 *See* OR. REV. STAT. § 659A.370 (2023) (making it an unlawful employment practice for an employer and an employee "to enter into an agreement" under certain circumstances that contains certain nondisclosure provisions); VA. CODE ANN. § 40.1-28.01(A) (West 2023) ("No employer shall require an employee or a prospective employee to execute or renew any provision in a nondisclosure or confidentiality agreement, including any provision relating to nondisparagement,

Given a state statute limiting the enforceability of an NDA that is broad enough to apply to an arbitration secrecy clause, the question becomes whether the FAA preempts this statute as it relates to arbitration secrecy. A statute that invalidates an NDA to the extent that the agreement prevents a person having knowledge of discrimination, harassment, or noncompliance with worker protections from sharing that knowledge should be found to be reasonable in its inception. The government unquestionably has a legitimate interest in preventing workplace discrimination and harassment and in promoting compliance with worker protections. Thus, the government also has a legitimate interest in limiting the tools that perpetrators of invidious discrimination and those who fail to comply with worker protections use to silence those who would raise awareness of their wrongdoing.

Anti-NDA statutes that carve out exceptions for trade secrets and other proprietary information or that limit their application to agreements that obligate parties to keep their knowledge of illegal acts secret avoid an overbreadth problem. The state does not further its legitimate interests in preventing workplace discrimination and promoting compliance with worker protections by abrogating contractual protections for trade secret or proprietary information. Thus, such carveouts and limitations ensure that the anti-NDA statute is not excessively intrusive.

An anti-NDA statute may still be unreasonable in scope, however, where its focus is too narrow. Specifically, a prohibition that applies to arbitration secrecy agreements but does not apply to documents or disclosures relating to or arising from settlement negotiations or mediations may unreasonably discriminate against arbitration.[226] Information precluded from disclosure by negotiation secrecy or mediation secrecy is no less likely to enable further wrongdoing or impede potential claimants in building their case than is information precluded from disclosure by arbitration secrecy.[227] Thus, arbitration

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that has the purpose or effect of concealing the details relating to a claim of sexual assault . . . or a claim of sexual harassment . . . as a condition of employment.").

226 *See* MD. CODE ANN., LAB. & EMPL. § 3-715 (West 2018); OR. REV. STAT. § 659A.370; TENN. CODE ANN. § 50-1-108 (West 2018); VA. CODE ANN. § 40.1-28.01(A).

227 *See* Iberia Credit Bureau, Inc. v. Cingular Wireless, LLC, 379 F.3d 159, 176 (5th Cir. 2004) (rejecting an unconscionability challenge to an arbitration secrecy clause and pointing out that "a corporate repeat-player can use confidential *settlements* to prevent a court from making adverse findings. . . ."); LISA A. KLOPPENBERG, THE BEST BELOVED THING IS JUSTICE: THE LIFE OF DOROTHY WRIGHT NELSON 153 (2022) ("[M]ediation is entirely confidential and if people cannot air grievances

secrecy is but one piece of the broader problem of secrecy in conflict resolution.[228]

Moreover, even under existing FAA jurisprudence, states are not free to address this problem piecemeal—targeting only the arbitration secrecy piece. In *Doctor's Associates, Inc. v. Casarotto*, the Supreme Court held that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions."[229] The Court found that when Congress enacted the FAA, "Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts."[230]

One might meaningfully distinguish between the need to protect and promote secrecy in the context of a settlement negotiation or mediation on the one hand versus arbitration on the other.[231] Most importantly, abrogating confidentiality in settlement negotiations and mediations would likely discourage the candor that is essential to the negotiation and mediation processes given that a party might then reasonably fear that information it discloses during a negotiation or mediation session could later be used against it if the case proceeds to

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publicly and officially in other ways, the confidentiality agreements in mediation can be used to hide information and prevent redress of grievances (e.g., with a sexual predator)."); Dore, *supra* note 14, at 506 ("Confidential settlements can deprive existing and potential claimants of information necessary to build their case or prevent disclosure of information relevant to public welfare, health, and safety."); Knutsen, *supra* note 174, at 962, 966 (noting the view that "secret settlements also deny future litigants information about the dispute" that settled and "allow information pertaining to safety to remain undisclosed"); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 220 (2004) ("Institutions which enter confidential settlements, like institutions which resolve disputes through confidential arbitration, are able to minimize information available to potential claimants.").

228 Hoffman & Lampmann, *supra* note 162, at 174–82 (detailing harms that arise from confidential settlements of sexual harassment claims); Sarah Rudolph Cole, *The End of 'Forced' Arbitration Isn't the Beginning of Corporate Transparency*, THE HILL (Feb. 17, 2022), https://thehill.com/opinion/judiciary/594533-the-end-of-forced-arbitration-isnt-the-beginning-of-corporate-transparency/ [https://perma.cc/Z9AE-JSHZ] (noting that "NDAs are typically part of settlement agreements between employers and employees in litigated matters, as well [as arbitrated matters]" and arguing that "[a]rbitration is not the problem—settlement with nondisclosure is").

229 Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (emphasis omitted).

230 *Id.* (internal quotations omitted).

231 *See* Randall, *supra* note 227, at 220 (discussing differences between arbitration and settlement negotiation that "may provide additional justifications for confidentiality in settlements, not applicable to arbitration.").

trial.[232] As arbitration is itself a replacement for trial, no similar concern would arise from a statute abrogating confidentiality in the arbitration process. Nonetheless, the FAA may not allow for such well-reasoned and well-meaning differentiation. In sum, a statute that abrogates arbitration secrecy while respecting secrecy in the context of a settlement negotiation or mediation may be found unreasonable in scope in that it fails to put arbitration contracts "upon the same footing as other contracts."[233]

C. The Presumption of Public Access to Judicial Records

Federal and state courts recognize a common law presumption of public access to criminal and civil judicial proceedings and records.[234] Moreover, a significant number of state legislatures have codified this common law right.[235] This right of access protects not only the right to attend open court proceedings but also the right to inspect and copy judicial records.[236] Pursuant to the broadest of several approaches, a document will qualify as a "judicial record" and, thus, fall within the purview of the presumption of public access if the document has been filed with the court or otherwise integrated into the court's proceedings.[237] "While filing clearly establishes such

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232 *See id.* (listing among the reasons to differentiate between arbitration and negotiation that "[a]dmissibility of information from failed negotiations would create a significant disincentive to settlement efforts.").

233 *See id.* (arguing that "[t]he fact that judges find confidentiality requirements to be harsh, oppressive, and ultimately unenforceable in the context of arbitration agreements but perfectly acceptable in the context of settlement agreements once again suggests a bias against arbitration").

234 *See, e.g.*, Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) (citing federal and state cases); *In re* Avandia Mktg., Sales Pracs. & Prods. Liab. Litig., 924 F.3d 662, 672 (3d Cir. 2019); Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003); *In re* Atlanta J.-Const., 519 S.E.2d 909, 910–11 (Ga. 1999).

235 *See, e.g.*, COLO. REV. STAT. § 24-72-203(1)(a) (2016) ("All public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise specifically provided by law."); S.D. CODIFIED LAWS § 15-15A-5 (2005) ("Information in the court record is accessible to the public except and as prohibited by statute or rule and [this statute]."); TEX. R. CIV. P. 76(a)1) (providing that "court records. . . are presumed to be open to the general public and may be sealed only upon a showing of all of [certain factors]").

236 *See, e.g.*, *In re Avandia Mktg.*, 924 F.3d at 672; Chi. Trib. Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1311 (11th Cir. 2001); Rosado v. Bridgeport Roman Cath. Diocesan Corp., 970 A.2d 656, 676 (Conn. 2009).

237 *See, e.g.*, *In re Avandia Mktg.*, 924 F.3d at 672; *Rosado*, 970 A.2d at 678–79 (discussing several approaches that courts have taken to determining what constitutes a judicial record). Pursuant to the narrowest approach, a document

status, a document may still be construed as a judicial record, absent filing, if a court interprets or enforces the terms of that document, or requires that it be submitted to the court under seal."[238]

Several related rationales ground the presumption of public access. The public subsidizes the judicial system and, for that reason, has a right to know how that judicial system is functioning.[239] Giving the public access to the documents that bear on the merits of litigation allows the public to assess the judge's disposition of the case.[240] Thus, the right of access helps to ensure that judges perform their judicial duties honestly and competently.[241] Relatedly, the presumption of public access promotes public confidence in the judicial system and, thus, the legitimacy of the judicial process by exposing the bases for the court's reasoning and decisions.[242]

The right of access may compromise arbitration secrecy when private arbitration intersects with the public courts.[243]

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becomes a judicial record only if the court relies upon the document to determine a litigant's substantive rights. Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986). A middle approach requires that a filed document "be relevant to the performance of the judicial function and useful in the judicial process" to be classified as a judicial record. Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 119 (2d Cir. 2006) (quoting United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995)).

238 *In re* Cendant Corp., 260 F.3d 183, 192 (3d Cir. 2001).

239 Union Oil Co. of Cal. v. Leavell, 220 F.3d 562, 568 (7th Cir. 2000) ("When [litigants] call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials.").

240 Romero v. Drummond Co., Inc., 480 F.3d 1234, 1245 (11th Cir. 2007) (stating that the presumption of public access "is instrumental in securing the integrity of the [judicial] process"); Baxter Int'l, Inc. v. Abbott Lab'ys, 297 F.3d 544, 546 (7th Cir. 2002); *see also* Dore, *supra* note 14, at 476 ("Public monitoring and understanding of the judicial process require disclosure of documents relevant and useful to a court's determination of the litigants' substantive rights.").

241 *In re Cendant Corp.*, 260 F.3d at 192; A.A. v. Glicken, 237 A.3d 1165, 1170 (Pa. Super. Ct. 2020) ("[P]ublic access to civil trials enhances the quality of justice . . . .").

242 *Leavell*, 220 F.3d at 568 (noting that judges claim legitimacy by virtue of their reasoning and arguing that "[a]ny step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification"); United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995); Littlejohn v. BIC Corp., 851 F.2d 673, 678 (3rd Cir. 1988); Doe v. Bellmore-Merrick Cent. High Sch. Dist., 770 N.Y.S.2d 847, 848 (N.Y. Sup. Ct. 2003) ("There is an overwhelming presumption that the public has the right of access to the courts to ensure the actual and perceived fairness of the judicial system."); *Glicken*, 237 A.3d at 1170 (public access "promotes confidence in and respect for our judicial system").

243 Global Reinsurance Corp.-U.S. Branch v. Argonaut Ins. Co., No. 07 CIV. 8169 (PKC), 2008 WL 1805459, at *1 (S.D.N.Y. Apr. 21, 2008) (explaining that

Private arbitration involves the public court system in several common scenarios. When a party to an arbitration contract refuses to arbitrate and seeks instead to litigate in court, for example, the other party or parties to the arbitration contract may file a motion in federal or state court to stay the pending litigation and to compel arbitration.[244] In such cases, the arbitration contract necessarily will be filed with the court in connection with either type of motion.[245]

Private arbitration also intersects with the public court system when a party to an arbitration asks a federal or state court to confirm, vacate, modify, or correct an arbitration award.[246] The party that prevailed in arbitration may wish to have a court confirm the arbitrator's award so that the award becomes a ruling of the court. Upon confirmation, the prevailing party may enforce the arbitration award just as a party to public litigation would enforce any judgment of the court.[247] A confirmed award also may give rise to claim preclusion and issue preclusion, respectively, under the judicial doctrines of res judicata and collateral estoppel.[248] For these very reasons, the party that lost in arbitration may decide to move a court to

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while parties to an arbitration contract are entitled to privacy, "[t]he circumstance changes when a party seeks to enforce in federal court the fruits of their private agreement to arbitrate, *i.e.* the arbitration award"); Dore, *supra* note 14, at 507 ("Once arbitration documents are filed with the court with a request for judicial action, they become judicial records subject to the right of public access.").

244 *See* 9 U.S.C. §§ 3–4 (governing in federal court, respectively, a motion to stay litigation and a motion to compel arbitration); REVISED UNIFORM ARBITRATION ACT § 7(a), (g) (2000) (governing in state court, respectively, a motion to compel arbitration and a motion to stay litigation).

245 Dish Network, LLC, 370 N.L.R.B. No. 97, at 17 (Mar. 18, 2021) (McFerran, concurring in part and dissenting in part) (noting that "a party seeking to stay judicial action or to compel arbitration under Section 3 or 4 of the FAA must necessarily disclose the existence and content of such a demand").

246 *See* 9 U.S.C. §§ 9–11 (governing in federal court, respectively, a motion to confirm an arbitration award, a motion to vacate an arbitration award, and a motion to modify or correct an arbitration award); REVISED UNIFORM ARBITRATION ACT §§ 22, 24 (governing in state court, respectively, a motion to confirm, vacate, and modify or correct an arbitration award). *See, e.g.*, *Global Reinsurance Corp.*, 2008 WL 18005459 at *1 (unsealing submissions relating to petitions to confirm several arbitration awards in light of the common law right of access); Zurich Am. Ins. Co. v. Rite Aid Corp, 345 F. Supp. 2d 497, 506 (E.D. Pa. 2004) (ordering that the record be unsealed with respect to a petition to vacate, modify, or correct an arbitration award where the party seeking continuation of the sealing order failed to demonstrate that disclosure would lead to sufficient harm).

247 *See* 9 U.S.C. § 13(c); REVISED UNIFORM ARBITRATION ACT § 25(a); Ware, *supra* note 172, at 708 ("Through confirmation, the court adopts the arbitrator's decision as its own, and that decision is enforced like any other ruling of the court.").

248 *See* Postlewaite v. McGraw-Hill, Inc., 333 F.3d 42, 48 (2d Cir. 2003) ("[C]ollateral estoppel may also be applied . . . to an issue resolved in arbitration.").

vacate the arbitrator's award. Finally, either a prevailing party or a losing party in arbitration may seek to have a court direct the arbitrator to complete, correct, or clarify her arbitration award in cases where the arbitrator failed to rule on an issue properly before her in the arbitration, made a computation error in her award, or issued an award that is unclear.[249]

When a party to an arbitration seeks to confirm, modify, or correct the award arising from the arbitration, the FAA itself requires that the movant file the award with the court.[250] A party seeking to vacate such an award must necessarily attach the award to the motion to vacate.[251] Upon a party's filing an arbitration award with the court in connection with a motion to confirm, vacate, modify, or correct the arbitration award, the award is deemed a judicial record to which the presumption of public access attaches.[252] Thus, the presumption of public access routinely threatens to infringe upon arbitration secrecy.[253]

The right of access "begins with a presumption in favor of public access."[254] The right of access, however, is not absolute.[255] Thus, a party seeking to maintain or prolong arbitral secrecy despite the need to involve the public courts in a motion relating to an arbitration proceeding or award may seek leave with the court at issue to file the arbitration contract, award or other documents relating to an arbitration under

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249 9 U.S.C. § 11 (providing grounds for a court to order modification or correction of an arbitration award "so as to effect the intent [of the award] and promote justice between the parties"); *see also* REVISED UNIFORM ARBITRATION ACT § 24.

250 9 U.S.C. § 13.

251 Dish Network, LLC, 370 N.L.R.B. No. 97, at 17 (Mar. 18, 2021) (McFerran, concurring in part and dissenting in part).

252 Pa. Nat'l Mut. Cas. Ins. Grp. v. New England Reinsurance Corp., 840 Fed. App'x 688, 691 (3d Cir. 2020); *Dish Network, LLC*, 370 N.L.R.B. at 17 (McFerran, concurring in part and dissenting in part); McAfee, Inc. v. Weiss, 336 S.W.3d 840, 843–44 (Tex. App. 2011) (concluding that an arbitration award filed with a motion to confirm "plainly comes within the definition of 'court records' found in [the Texas Rules of Civil Procedure]").

253 *See, e.g.*, Century Indem. Co. v. AXA Belgium, No. 11 CIV. 7263(JMF), 2012 WL 4354816, at *13–14 (S.D.N.Y. Sept. 24, 2012) (rejecting an arbitral party's motion to seal an arbitration award and other documents filed in connection with a motion to confirm the arbitration award); Alexandria Real Est. Equities, Inc. v. Fair, No. 11 Civ. 3694(LTS), 2011 WL 6015646, at *3 (S.D.N.Y. Nov. 30, 2011) (same).

254 *In re* Avandia Mktg., Sales Pracs. & Prods. Liab. Litig., 924 F.3d 662, 677 (3d Cir. 2019).

255 Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978); *In re Avandia Mktg.*, 924 F.3d at 672; Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003).

seal.[256] Such a motion is, in essence, a request that the court maintain the confidentiality of the arbitral contract, award, or other documents.

A significant number of states have enacted legislation or adopted court rules specifying the findings that a court must make before sealing a judicial record.[257] In general, to overcome the presumption in favor of public access, the movant must demonstrate that disclosure of the judicial record will result in a clearly defined and serious injury to the movant.[258] Further, the movant must demonstrate that the movant's interest in avoiding the harm from disclosure outweighs the public's interest in access to the judicial record.[259]

In ruling on a motion to seal an arbitration award, courts generally do not find themselves to be bound by a confidentiality agreement that the arbitration parties have entered into or by a protective order that an arbitrator has issued.[260] Rather, courts have applied to a motion to seal an arbitration award the same standards that they would apply to any other motion

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256 *See, e.g.*, Decapolis Group, LLC v. Mangesh Energy, Ltd., No. 3:13-CV-1547-M, 2014 WL 702000, at *2 (N.D. Tex. Feb. 24, 2014) (ruling on a motion to seal the court's record in connection with a petition to confirm an arbitration award); *Fair*, 2011 WL 6015646 at *3 (same).

257 *See, e.g.*, IND. CODE ANN. § 5-14-3-5.5 (West 2023) (specifying required findings); CAL. R. CT. 2.550(d) (setting out the factual findings that a court must make before it may order that a record be filed under seal); GA. UNIF. SUPER. CT. R. 21.2 ("An order limiting access shall not be granted except upon a finding that the harm otherwise resulting to the privacy of a person in interest clearly outweighs the public interest.").

258 *In re Avandia Mktg.*, 924 F.3d at 672; A.A. v. Glicken, 237 A.3d 1165, 1170 (Pa. Super. Ct. 2020).

259 *In re Avandia Mktg.*, 924 F.3d at 672; Rushford v. New Yorker Mag., Inc., 846 F.2d 249, 253 (4th Cir. 1988); Anderson v. Home Ins. Co., 924 P.2d 1123, 1126–27 (Colo. App. 1996); *In re* Atlanta J.-Const., 519 S.E.2d 909, 911 (Ga. 1999).

260 *See, e.g.*, Bristol-Meyers Squibb Co. v. Novartis Pharma AG, No. 22 Misc. 124, 2022 WL 1443319, at *1 (S.D.N.Y. May 6, 2022) (denying a motion to file a petition to confirm an arbitration award under seal despite the parties' agreement to file any documents connected with the arbitration under seal); Chartis Specialty Ins. Co. v. LaSalle Bank Nat'l Ass'n, No. CIV.A. 6103-VCN, 2011 WL 3276369, at *1 (Del. Ch. July 29, 2011) ("The Court concludes that the existence of a confidentiality order does not necessarily require . . . the sealing of the award."); McAfee, Inc. v. Weiss, 336 S.W.3d 840, 845 (Tex. App. 2011) ("We have found no cases recognizing a party's general interest in a confidentiality agreement—even an agreement reinforced by an arbitrator's rules and orders—as a specific, serious, and substantial interest within the meaning of [the Texas Rule of Civil Procedure governing the sealing of judicial records]."); Steven C. Bennett, *Confidentiality Issues in Arbitration*, 68 DISP. RESOL. J. 1, 3 (2013) ("Where a party seeks to confirm or vacate an award, . . . an arbitration confidentiality agreement may not compel the court to seal the award as part of the review proceedings.").

to seal.[261] Pursuant to those standards, courts commonly decline to seal an arbitration award.[262]

Even when a court grants a motion to seal, the protection of arbitral secrecy may well be only temporary. Under a balancing of the interests test, a court will maintain the secrecy only for as long as the circumstances that supported its granting of the motion to seal persist.[263] Pursuant to this approach, when, because of changed circumstances, the interest of the parties in arbitral secrecy no longer outweighs the public's interest in its right of access, the court will unseal the judicial records at issue and arbitral secrecy will be lost.[264]

This approach to granting the public access to judicial records arising from or relating to an arbitration is reasonable in its inception. The parties to an arbitration contract or arbitral proceeding who file a motion with a court to stay litigation, compel arbitration, or confirm, vacate, modify, or correct an arbitration award, in their motion process, utilize facilities, administrative personnel, and judges that the public funds.[265] Moreover, the court's ruling on any such motion will guide and perhaps bind members of the public that consider entering into an arbitration contract or who do become subject to an arbitration agreement. Thus, the public has a significant interest in gaining access to judicial records that the court utilizes in ruling on any such motion. Such access assists the public in

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261 *See, e.g.*, Scott D. Boras, Inc. v. Sheffield, No. 09 CIV. 8369 (SAS), 2009 WL 3444937, at *1 (S.D.N.Y. Oct. 26, 2009); *Chartis Specialty Ins. Co.*, 2011 WL 3276369 at *1; *McAfee, Inc.*, 336 S.W.3d at 844–45.

262 *See, e.g.*, Mission Wellness Pharmacy LLC v. Caremark LLC, No. CV-22-00967-PHX-GMS, 2022 WL 2488817, at *1 (D. Ariz. Mar. 4, 2022); Am. Cent. E. Texas Gas Co. v. United Pac. Res. Grp., Inc., No. 2:98CV0239-TJW, 2000 WL 33176064, at *1–2 (E.D. Tex. Jul. 27, 2000); *Chartis Specialty Ins. Co.*, 2011 WL 3276369 at *4 (concluding that "sealing the award [at issue] *in toto* is not necessary and would improperly encroach upon the public's right of access"); *McAfee, Inc.*, 336 S.W.3d at 845 (concluding that the trial court did not abuse its discretion in declining to seal an arbitration award filed along with a motion to confirm the award).

263 Rosado v. Bridgeport Roman Cath. Diocesan Corp., 970 A.2d 656, 692–93 (Conn. 2009). Some jurisdictions apply a stricter "extraordinary circumstances" test, pursuant to which a court will modify or vacate an order to seal upon which a party has reasonably relied only where the party seeking modification or vacatur demonstrates that the order to seal was improvidently granted or an extraordinary circumstance or compelling need supports modification or vacatur. *See, e.g.*, Martindell v. Int'l Tel. & Tel. Corp., 594 F.2d 291, 296 (2d Cir. 1979).

264 Pansy v. Stroudsburg, 23 F.3d 772, 790 (3d Cir. 1994); *Rosado*, 970 A.2d at 693.

265 *See* Knutsen, *supra* note 174, at 946, 963 ("The public purse provides the administrative framework for the dispute resolution process: the judge, the rules of civil procedure, and the courthouse forum.").

monitoring judicial behavior that may have a significant impact on members of the public.

As applied, however, the presumption of public access often is not reasonable in its scope. Specifically, the right of access is not reasonable in its scope when the right grants the public access to documents or portions of documents that are not relevant to what the court is deciding.[266] For example, a motion to compel arbitration may center on an arbitration clause contained in an employment contract that also contains provisions relating to an employee/party's stock options. Where the contract provisions governing incentive compensation are irrelevant to the question of whether a valid contract to arbitrate exists between the parties, the incentive compensation provisions are not a focus of what the court is deciding, and the right of access should not extend to the incentive compensation provisions.

Counterintuitively, often the reasoning of an arbitration award will be largely or totally irrelevant to what a court adjudicating a motion to confirm or vacate the arbitration award is considering. This is so because the grounds for vacating an arbitration award, which are few and narrow, mostly relate to the arbitration process but not to the reasoning of the arbitration award. The FAA provides four grounds for challenging an arbitration award: the award "was procured by corruption, fraud, or undue means"; there was "evident partiality or corruption in the arbitrators"; the arbitrators inappropriately refused to postpone the hearing or refused to hear material evidence; and "the arbitrators exceeded their powers."[267] Of the four grounds for judicial review of an arbitration award, only the "exceeded their powers" ground necessarily would require the court to consider the reasoning of the arbitration award. The Uniform Arbitration Act and the Revised Uniform Arbitration Act, one or the other of which has been adopted in nearly every state, have judicial review standards that are substantially identical to those of the FAA.[268] Importantly, that an arbitrator misapplied the facts or misunderstood the law is not a proper basis for

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266 *See* Miller, *supra* note 91, at 440 (arguing that "[d]iscovery material is not considered by a court, and no court decision is based upon it[, therefore,] allowing access [to discovery material] neither promotes fair and open decisionmaking by the court nor educates the public about the justice system").

267 9 U.S.C. § 10.

268 *See* REVISED UNIFORM ARBITRATION ACT § 23(a) (2000); UNIFORM ARBITRATION ACT § 12(a) (1956).

challenging an arbitration award under the FAA, the Uniform Arbitration Act, or the Revised Uniform Arbitration Act.[269]

When a court adjudicating a motion to confirm or vacate an arbitration award is not concerned with the reasoning of the arbitration award, the presumption of public access is not reasonable in scope where it enables the public to review the entirety of the arbitration award. Rather, to be reasonable in scope, the presumption of public access should apply only to those portions of the arbitration award that the court has evaluated in vacating an award or evaluated or turned into a judgment in confirming the award. Indeed, the presumption should be in favor of sealing all parts of the award except those that the court has evaluated or turned into a judgment.

Even absent application of an intermediate scrutiny to infringements of arbitration secrecy, the parties to an arbitration contract themselves can mitigate the threat that the presumption of public access poses to their interest in arbitration secrecy.[270] First, the parties can draft their arbitration contract as a stand-alone document free of any contractual terms unrelated to arbitration. Doing so will minimize the likelihood that information unrelated to the arbitration provisions at issue in a motion to compel arbitration will be disclosed to the public pursuant to the right of access. Second, the parties can specify in their arbitration contract that any arbitration award arising from the contract will state only which party prevails and the amount of damages, if any, that are due.[271] If the parties wish for an explanation of the arbitrator's reasoning, the contract can call for the arbitrator to set forth that reasoning in

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269 AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350–51 (2011) ("[R]eview under [FAA] § 10 focuses on misconduct rather than mistake."); *cf.* Global Reinsurance Corp.-U.S. Branch v. Argonaut Ins. Co., No. 07 CIV. 8169 (PKC), 2008 WL 1805459, at *1 (S.D.N.Y. Apr. 21, 2008) ("In the ordinary course, a petition to confirm or vacate an arbitration award ought not to require a court to review all testimony and documentary evidence before the arbitration panel.").

270 Baxter Int'l, Inc. v. Abbott Labs, 297 F.3d 544, 548 (7th Cir. 2002) (opining that arbitral parties might preserve arbitration secrecy by "par[ing] down the appellate record" given that "[t]he strong presumption of public disclosure applies only to the materials that formed the basis of the parties' dispute and the district court's resolution").

271 Precluding the arbitrator from issuing a reasoned award may also have the effect of limiting the application of collateral estoppel arising from the arbitration award. *See* Postlewaite v. McGraw-Hill, Inc., 333 F.3d 42, 48–49 (2d Cir. 2003) (commenting that "[a]pplication of the estoppel following arbitration . . . may be problematic because arbitrators are not required to provide an explanation for their decision" and declining to apply collateral estoppel in the case at hand given that the arbitration award at issue did not state the grounds for the arbitrator's decision).

a separate confidential memorandum that is not a part of the award.[272] Such provisions will minimize the likelihood that an eventual motion to confirm or vacate the arbitration award will result in disclosure of the facts surrounding the parties' dispute pursuant to the right of access.

D. The National Labor Relations Act Right to Concerted Activity

Section 7 of the NLRA guarantees to certain employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[273] A concern with employment arbitration contracts that provide for arbitration secrecy is that the secrecy provision may infringe upon an employee's Section 7 right to engage in concerted activities. Specifically, the arbitration secrecy clause may preclude the employee from speaking with coworkers about an arbitration award finding the employer liable for violating the employee's workplace rights as well as information or materials disclosed in the arbitration that speak to the employer's workplace practices. That concern itself raises the related issue of how Section 7 of the NLRA and Section 2 of the FAA relate to each other with respect to arbitration secrecy.

In 2018, in *Epic Systems Corporation v. Lewis*, the Supreme Court considered the extent to which Section 7 of the NLRA displaces the FAA's general command that courts must enforce arbitration agreements as written.[274] The precise issue in *Epic Systems* was whether Section 7 nullifies an arbitration contract that contains a class and collective action waiver and purports to require an employee to bring any claims against her employer arising from her employment in an individual arbitration.[275] The Court began its analysis by reiterating its holding in *Concepcion*: the FAA commands that "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without

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272 Kaster, *supra* note 64, at 24 (arguing that "the greater the information disclosed in an [arbitration] award, the more confidentiality may be threatened, so that the desire for a reasoned award may have to be tempered or satisfied in a form that is separate from the award itself if there is a great desire or need for privacy").

273 29 U.S.C. § 157.

274 *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

275 *Id.* at 1622.

the parties' consent."[276] The Court then turned to the novel argument at hand—that Section 7 of the NLRA "overrides" the FAA with respect to an employment arbitration agreement containing a class and collective action waiver.[277]

In its displacement analysis, the Court first recognized its "duty to interpret Congress's statutes as a harmonious whole rather than at war with one another."[278] Moreover, the Court emphasized that the party arguing in favor of displacement bore the "heavy burden of showing a clearly expressed congressional intention that such a result should follow."[279] Finally, the Court cited the strong presumption against repeal by implication.[280]

Applying these principles, the Court held that Section 7 of the NLRA does not displace the FAA, at least with respect to the FAA's mandate that a court may not condition the enforceability of an arbitration agreement on the availability of class or collective arbitration procedures.[281] The Court noted that Section 7 does not expressly disapprove of arbitration, says nothing of class or collective actions, and "does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand."[282] Importantly, the Court rejected the employees' argument that the phrase "other concerted activities for the purpose of . . . other mutual aid or protection" should be interpreted to encompass class and collective legal actions.[283] Citing the *ejusdem generis* canon of statutory interpretation, the Court reasoned that "the term "other concerted activities" should, like the terms that precede it [all relating to unionization and collective bargaining], serve to protect things employees just do for themselves in the course of exercising their right to free association in the

276 *Id.* at 1623.

277 *Id.* at 1623–24.

278 *Id.* at 1619, 1624 ("When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both.") (internal quotations omitted).

279 *Id.* at 1624 (internal quotations omitted).

280 *Id.*

281 *Id.* at 1632.

282 *Id.* at 1624.

283 *Id.* at 1625.

workplace, rather than the highly regulated, courtroom-bound activities of class and joint litigation."[284]

With respect to arbitration secrecy, it is highly plausible that "other concerted activities" should be read to encompass workplace communications about information or materials disclosed in an employment arbitration or the arbitration award itself. These types of communications seem much more closely connected with free association in the workplace as contrasted with class and joint litigation.[285] Thus, arbitration secrecy arguably presents a more challenging context in which to attempt to harmonize Section 7 of the NLRA and Section 2 of the FAA. Subsequent to *Epic Systems*, the National Labor Relations Board ("NLRB" or "Board") has considered this issue at length.[286]

In 2020, in *California Commerce Club, Inc.*, the NLRB considered whether an arbitration clause that provided that "[t]he arbitration shall be conducted on a confidential basis and there shall be no disclosure of evidence or award/decision beyond the arbitration proceeding" violated an employee's Section 7 right to engage in concerted activities.[287] The Board interpreted this arbitration secrecy provision as allowing a party to discuss information that the party came to possess independent of the arbitration proceeding including "the existence of the arbitration, their claims against the employer, the legal issues involved, or the events, facts, and circumstances that gave rise to the arbitration proceeding."[288] Nevertheless, the Board found that the secrecy provision did restrict an employee's freedom to discuss some terms and conditions of employment with coworkers and, thus, did curtail the employee's Section 7 rights.[289] Moreover, the Board assumed for the sake of argument that the negative impact of these restrictions outweighed any interest that the

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284 *Id.* (internal quotations omitted). The *ejusdem generis* canon of statutory interpretation counsels that when "a more general term follows more specific terms in a list, the general term is usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Id.* (internal quotations omitted).

285 *See* St. Margaret Mercy Healthcare Ctrs., 350 N.L.R.B. 203, 205 (2007) ("It is axiomatic that discussing terms and conditions of employment with coworkers lies at the heart of protected Section 7 activity.").

286 *See* Dish Network, LLC, 370 N.L.R.B. No. 97 (Mar. 18, 2021); Covenant Care Cal., LLC, 369 N.L.R.B. No. 112 (June 29, 2020); Cal. Com. Club, Inc., 369 N.L.R.B. No. 106 (June 19, 2020).

287 *Cal. Com. Club*, 369 N.L.R.B. at 2.

288 *Id.* at 6.

289 *Id.*

employer had in enforcement of the secrecy provision and "that this provision would therefore violate the [NLRA] if maintained as an employer-promulgated work rule" outside of an arbitration contract within the purview of the FAA.[290] The Board, held, however, that the FAA shielded the arbitration secrecy provision from invalidation by the NLRA.[291] The Board noted that "the FAA gives parties the discretion to design their own dispute-resolution procedures, tailored to the type of dispute, including that arbitral proceedings be kept confidential" and concluded that the NLRA did not express a contrary congressional command that would displace the FAA.[292]

The Board also specifically rejected the argument that the NLRA invalidated the arbitral confidentiality provision by means of the FAA's saving clause.[293] Whether the saving clause applies to defenses arising from federal law is an open question.[294] Putting aside that question, the Board noted the Supreme Court's holding that the saving clause does not save defenses that "interfere with fundamental attributes of arbitration."[295] In rejecting the saving clause argument, the Board found, without elaboration, that "a prohibition on arbitral confidentiality provisions would interfere with a fundamental attribute of arbitration" and, thus, "[t]he FAA's saving clause provides no basis for refusing to enforce such provisions."[296]

Less than a year after deciding *California Commerce Club*, a divided NLRB reaffirmed its basic holding that the NLRA does not displace the FAA with respect to an arbitration secrecy clause requiring that arbitration proceedings remain confidential.[297] In *Dish Network, LLC*, the Board also split on whether arbitration secrecy was a fundamental attribute of arbitration.[298] The majority concluded that "confidentiality" is indeed a

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290 *Id.*

291 *Id.* at 7–9.

292 *Id.* at 7–8.

293 *Id.* at 8 n.6.

294 *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018) (declining to decide whether "the saving clause was designed to save not only state law defenses but also defenses allegedly arising from federal statutes").

295 *Cal. Com. Club*, 369 N.L.R.B. at 8 n.6 (quoting *Epic Sys. Corp.*, 138 S. Ct. at 1622).

296 *Id.*

297 Dish Network, LLC, 370 N.L.R.B. No. 97 (Mar. 18, 2021).

298 *Compare id.* at 8–9 (concluding that confidentiality is a fundamental attribute of arbitration), *with id.* at 16–17 (McFerran, concurring in part and dissenting in part) (concluding that confidentiality is not a fundamental attribute of arbitration).

fundamental attribute, reasoning that an infringement on arbitration confidentiality would simultaneously interfere with other attributes of arbitration that the Supreme Court has clearly identified as fundamental—namely, arbitration's informal nature and streamlined proceedings.[299] Quoting the U.S. Court of Appeals for the Fifth Circuit in *Iberia Credit Bureau*, the majority found that "[p]rohibiting arbitration confidentiality provisions would interfere with these fundamental attributes of arbitration because, absent confidentiality, discovery disputes are more likely, and parties will demand "all of the procedural accoutrements that accompany a judicial proceeding."'"[300]

In her opinion concurring in part and dissenting in part, newly-confirmed NLRB Chairperson Lauren McFerran argued that the Board had wrongly decided *California Commerce Club*.[301] More specifically, she argued that a confidentiality provision in an employment arbitration contract undeniably interferes with the employee-disputant's core Section 7 right to discuss the terms and conditions of her employment with her co-workers and that invalidation of such a confidentiality provision would not interfere with a fundamental attribute of arbitration.[302] In concluding that arbitration confidentiality is not a fundamental attribute of arbitration, the dissent reasoned that although arbitration historically has been private in that the proceedings have been closed to the public, arbitration historically has not been confidential in that the parties have been free to disclose information concerning the arbitration proceedings as well as the arbitration award.[303] Indeed, the dissent noted that a party seeking to stay litigation pursuant to FAA Section 3, compel arbitration pursuant to Section 4, or confirm, vacate, or modify an arbitration award pursuant respectively to Sections 9, 10, or 11 necessarily will have to disclose information relating to the arbitral proceedings and that, absent a court protective order, this information will become part of the public record.[304]

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299 *Id.* at 8–9 (majority opinion).

300 *Id.* at 9 (quoting Iberia Credit Bureau, Inc. v. Cingular Wireless, LLC, 379 F.3d 159, 175–76 (5th Cir. 2004)).

301 *Id.* at 13–18 (McFerran, concurring in part and dissenting in part). Chairperson McFerran's first term as a member on the National Labor Relations Board expired prior to the Board deciding *California Commerce Club*. President Biden reappointed her to the Board after the Board decided *California Commerce Club*. *See id.* at 10 n.10.

302 *Id.* at 15–17.

303 *Id.* at 17.

304 *Id.* ("Given that accessing enforcement mechanisms expressly provided by the FAA itself would require violating the plain terms of many broad confidentiality

Having concluded that arbitration confidentiality is not a fundamental attribute of arbitration, the dissent further reasoned that the FAA's saving clause supplied a means for the NLRA to displace the FAA with respect to an arbitration confidentiality provision.[305] Recall that the saving clause, as the Supreme Court has interpreted it, allows for the invalidation of an arbitration contract "upon such grounds as exist at law or in equity for the revocation of any contract," provided that application of the neutral principle does not interfere with a fundamental attribute of arbitration.[306] Applying this all-or-nothing framework, the dissent began with the proposition that the NLRA generally invalidates an employer's restriction on an employee's right to discuss the terms and conditions of her employment.[307] Thus, the dissent argued, the NLRA's invalidation of an arbitration confidentiality clause would be, in the words of the saving clause, "upon such grounds as exist at law or in equity for the revocation of any contract."[308] The dissent concluded, therefore, that "invalidating arbitration-confidentiality provisions, because of their demonstrable impact on Section 7 rights, is the proper accommodation between the NLRA and the FAA."[309]

The majority and dissenting opinions in *Dish Network*, taken together, demonstrate the inadequacy of the Supreme Court's all-or-nothing framework when one seeks to harmonize the FAA and a conflicting federal statute. The *Dish Network*

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agreements, it makes no sense to claim that the FAA actually mandates enforcing such terms as written.").

305 *Id.*

306 9 U.S.C. § 2; Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018).

307 *Dish Network, LLC*, 370 N.L.R.B. at 17 (McFerran, concurring in part and dissenting in part).

308 *Id.* at 17–18 (quoting 9 U.S.C. § 2.).

309 *Id.* at 16; *see also id.* at 18 ("[H]olding [confidentiality restrictions] unlawful where they conflict with the core protections of the NLRA—in mandatory arbitration agreements, just as in any other contract—properly accommodates the FAA and the NLRA with no harm to either statute.").

Less than a year after the NLRB decided *Dish Network*, the Board, with a newly appointed Democratic majority, invited briefing to address (1) whether it had erred in *California Commerce Club* in holding that confidentiality is a fundamental attribute of arbitration and, consequently, the FAA precludes the NLRB from invalidating an arbitral nondisclosure provision even if that provision infringes an employee's right to engage in concerted activity under the National Labor Relations Act, and (2) if so, what standard the NLRB should use to determine whether arbitration confidentiality provisions are lawful. Ralphs Grocery Company, Notice and Invitation to File Briefs, Case 21-CA-073942, 370 N.L.R.B. No. 50 (Jan. 18, 2022). As of September 2023, the Board had taken no further action with respect to the matter.

majority, having concluded that arbitration secrecy is a fundamental attribute of arbitration, saw no need to consider the negative effects of an arbitration secrecy provision on the public policy goals that ground the NLRA's concerted activities provision or on the right of specific employees to discuss the workplace practices and conditions that their employer maintains. Conversely, the dissent, after finding that arbitration secrecy is not a fundamental attribute of arbitration, failed to give special weight to the FAA's concern with overcoming hostility to arbitration contracts as well as the interest of a specific employer in the enforcement of the arbitration secrecy provision agreed to by the employer and its employee.[310]

In contrast, my proposed inception and scope analysis is better suited to harmonizing the competing concerns of the FAA and a potentially conflicting federal statute. Where a secondary attribute of arbitration is implicated, this analysis requires a court to consider the legitimate purposes that the competing statute seeks to achieve in infringing upon a secondary attribute of arbitration as well as how the statute's means for intruding relate to those purposes. Moreover, this analysis compels a court to balance the statute's need to intrude upon a secondary attribute of arbitration in the manner selected against the interests of the FAA and the contracting parties in the enforcement of the arbitration contract at issue as written.[311]

Whether Section 7 of the NLRA may infringe upon a particular arbitration secrecy provision should depend upon the scope of the provision and the purpose of the employee's intended disclosure. An arbitration secrecy provision that precludes an employee from discussing information that the employee learned in arbitration that relates directly to the employee's workplace conditions strikes at the heart of the NLRA's Section 7

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310 Under the standard in effect at the time the Board decided *Dish Network*, if the NLRB determined that an employer's policy potentially interferes with an employee's Section 7 right to concerted activity, the Board then determined whether the policy violates the NLRA by weighing the policy's impact on the employee's section 7 rights against the employer's legitimate justifications for the policy. The Boeing Co., 365 N.L.R.B. No. 154, at 3–4 (Dec. 14, 2017). Having concluded that confidentiality is not a fundamental attribute of arbitration, Chairperson McFerran reasoned that an arbitration secrecy clause that interferes with the right to concerted activity "is just as unlawful as the same provision in any other type of contract would be." *Dish Network LLC*, 370 N.L.R.B. at 17 (McFerran, concurring in part and dissenting in part).

311 *See* City of Ontario v. Quon, 560 U.S. 746, 762 (2010) ("[T]he extent of an expectation [of privacy] is relevant to assessing whether the search was too intrusive.").

protections. The central premise grounding Section 7's right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" is that the typical employee will not be able to match her employer's bargaining power unless she acts in concert with her fellow employees.[312] Thus, abrogation of an arbitration secrecy provision pursuant to Section 7 should be found reasonable in both its inception and its scope to the extent that the abrogation is necessary to prevent the arbitration secrecy provision from frustrating the employee's ability to effectively vindicate her statutory right to act in concert with her fellow employees.[313]

CONCLUSION

The U.S. Supreme Court has interpreted the FAA so that it preempts any otherwise neutral state regulation that interferes with a fundamental attribute of arbitration. In contrast, a neutral regulation that interferes with only an incidental attribute of arbitration will avoid FAA preemption. This all-or-nothing framework is ill-suited to resolving a challenge to any state infringement of arbitration secrecy, however, because secrecy is neither a fundamental attribute of arbitration nor a mere incidental attribute of arbitration. An examination of the FAA's structure, its legisl[a]tive history, and the Supreme Court's arbitration jurisprudence reveals that arbitration secrecy ranks lower on the hierarchy of values than the three attributes of arbitration that the Court has repeatedly recognized as fundamental, namely speed, economy, and expert decisionmaking. Still, secrecy is more than an incidental attribute of arbitration. Privacy has long been and is today ubiquitous in arbitration. Moreover, parties to an arbitration contract commonly include provisions to maintain the confidentiality of documents and testimony relating to their arbitration. Finally, arbitration secrecy promotes arbitration's fundamental attributes of speed and economy by removing an incentive for parties to an arbitration contract as well as the arbitrator to judicialize the

312 Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1634 (2018) (Ginsburg, J. dissenting) (asserting that the "NLRA operate[s] on a different premise, that employees must have the capacity to act collectively in order to match their employers' clout in setting the terms and conditions of employment."); *id.* at 1640.

313 *Cf.* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013) (commenting that the federal effective vindication exception to FAA enforcement "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights").

arbitration process. Thus, secrecy is best characterized as a secondary attribute of arbitration.

This Article's conclusion that arbitration has intermediate attributes suggests the need for an expanded framework for resolution of challenges to neutral arbitration regulation that allows for a more nuanced intermediate scrutiny. This Article proposes such a framework. In the context of government infringements of arbitration secrecy, the framework would require the government to demonstrate that its infringement upon arbitration secrecy is reasonable in its inception and reasonable in its scope when measured against the parties' interest in arbitration secrecy. This balancing approach would allow for consideration of context that the Supreme Court's current all-or-nothing approach ignores.

The Article has demonstrated the utility of the inception and scope analysis by applying the proposed framework to several state and federal intrusions upon arbitration secrecy. The analysis would compel a court to focus on the legitimate purposes that the government seeks to achieve in infringing upon arbitration secrecy as well as how the government's means for intruding relate to those purposes. In addition, the analysis would require a court to balance the government's need to intrude upon arbitration secrecy in the manner selected against the interests of the FAA and the contracting parties in the enforcement of the arbitration contract at issue as written. Thus, in the context of a neutral government limitation on arbitration that affects a secondary attribute of arbitration, the proposed framework is better suited to harmonizing the competing concerns grounding the FAA and any potentially conflicting state or federal limitation on arbitration than is the Supreme Court's current all-or-nothing approach to resolving challenges to a government effort that does not target arbitration specifically but nonetheless impacts an attribute of arbitration.