Shedding Light on Secret Settlements: An Empirical Study of California's STAND Act

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Catalyzed by the #MeToo movement, states have adopted a spate of laws restricting secret settlements—controversial contracts that shield misconduct from public scrutiny. In 2018, California led the charge with the Stand Together Against Non-Disclosure (STAND) Act, which targets secrecy in the resolution of sex discrimination, harassment, and abuse cases. In the intervening years, more than a dozen states followed suit with restrictions of their own.

Reigniting a decades-old debate, transparency advocates hail these reforms as a major win for victims. They celebrate STAND and its legislative progeny as a way to promote accountability, facilitate accuracy in case adjudication, and publicize (and thus deter) abuse. Critics, meanwhile, warn that the reforms will hurt those they intend to help. By reducing defendants' incentive to settle, confidentiality bans will undercut victims' negotiating leverage, depress settlement sums, clog courts, and, perhaps worst of all, discourage victims from coming forward in the first place.

Nested within this debate sits a raft of confident, conflicting—and also eminently testable—claims about what exactly happens in the wake of reform. Will defendants still settle, even if secrecy isn't on offer? How do anti-secrecy reforms actually alter the litigation landscape? Will case filings disappear? Or will they spike and drag on, as litigation turns scorched-earth? Debate over these questions has raged since the 1980s; the #MeToo movement only unleashed its modern incarnation. And, over these decades, the debate has always centered on fervent predictions regarding each. Yet no one has meaningfully tested them.

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We do. Analyzing more than a quarter-million case filings from the Los Angeles County Superior Court and deploying a mix of quantitative and qualitative empirical methods, including advanced machine-learning techniques and in-depth interviews with two dozen practitioners, we explore litigation patterns before and after STAND took effect.

Our findings tell a clear and consequential story. Contrary to critics' fears, the STAND Act did not yield a sharp increase or decrease in case filings. Nor did the Act appear to significantly prolong cases or amplify their intensity. The upshot: cases still settle even when secrecy isn't on offer. Further, and though our evidence is more tentative, interviews with employment attorneys indicate that STAND does not even seem to have depressed settlement sums. Finally, and perhaps most importantly, it appears that positive effects did come to pass. Unlocking what we call a "liberation effect," it appears that the STAND Act has improved the lives of many assault and harassment survivors, freeing them from the long shadow of an oppressive nondisclosure agreement. Taken together, these findings ought to reboot and recast the long-simmering debate about secret settlements, in California and beyond.

INTRODUCTION

In 2015, on a chilly April morning in midtown Manhattan, 22-year-old Ambra Battilana Gutierrez made a decision she would later regret. Sitting across the table was Daniel Connolly, an attorney for media mogul Harvey Weinstein.[1] Hands trembling, Connolly passed Gutierrez an inscrutable eighteen-page document.[2] Gutierrez recalled: "My English was very bad. All of the words in that agreement were super-difficult to understand."[3] Despite her uncertainty, she affixed her signature. She signed because her lawyer told her it was the best thing for her and her family. By doing so, Gutierrez, who had been sexually assaulted by Weinstein weeks earlier, agreed to pocket a $1 million payment in exchange for her silence.[4] While Gutierrez was, in her words, "completely destroyed,"[5] Weinstein went on to assault many more women.[6] Many of them, like Gutierrez, signed nondisclosure agreements (NDAs).[7]

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1 RONAN FARROW, CATCH AND KILL 62 (2019) [hereinafter FARROW, CATCH AND KILL].

2 *Id.*; Ronan Farrow, *Harvey Weinstein's Secret Settlements*, THE NEW YORKER (Nov. 21, 2017), https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements [hereinafter Farrow, *Secret Settlements*].

3 FARROW, CATCH AND KILL, *supra* note 1, at 62.

4 *Report: Weinstein Paid $1M to Accuser After 2015 Case Died*, AP NEWS (Nov. 21, 2017), https://perma.cc/D5R2-5Q4E.

5 FARROW, CATCH AND KILL, *supra* note 1, at 62.

6 Amelia Schonbek, *The Complete List of Allegations Against Harvey Weinstein*, THE CUT (Jan. 6, 2020), https://perma.cc/FP5T-UM3X.

7 Farrow, *Secret Settlements*, *supra* note 2; *see also Read: Two Settlements that Harvey Weinstein Reached with His Accusers*, THE NEW YORKER (Nov. 21, 2017), https://www.newyorker.com/sections/news/read-the-settlements-that-harvey-weinstein-used-to-silence-accusers. Note that some employers also (or alternatively) require employees to sign NDAs in the course of employment or at hiring, creating some confusion in terminology. We do not discuss those contracts, which typically exist when the employee, as part of her job, has access to trade secrets, sensitive client information, or the like. We discuss only NDAs inked to resolve a dispute between parties. For a discussion of general

In his insistence on secrecy, Weinstein wasn't alone. For decades, perpetrators of sexual assault and sexual harassment have used secret settlements, sometimes called NDAs, "hushing contracts,"[8] or "invisible settlements,"[9] to conceal their conduct. Think: Bill Cosby,[10] Bill O'Reilly,[11] R. Kelly,[12] Jeffrey Epstein,[13] Matt Lauer,[14] Larry Nasser,[15] Roger Ailes,[16] Michael Jackson,[17] and disgraced priests of the Catholic Church.[18] Each reportedly paid hefty sums to muzzle their victims.[19]

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employment NDAs, see Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), https://perma.cc/8F7U-M2V2.

8 David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 167 (2019).

9 Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 927 (2006) [hereinafter Kotkin, *Invisible Settlements*].

10 Manuel Roig-Franzia, *Bill Cosby Paid $3.38 Million to Settle Previous Sexual Assault Claim by Woman Now Accusing Him*, WASH. POST (Apr. 9, 2018), https://www.washingtonpost.com/lifestyle/style/bill-cosby-paid-338-million-to-settle-previous-sexual-assault-claim-by-woman-now-accusing-him/2018/04/09/302fa704-3c38-11e8-974f-aacd97698cef_story.html.

11 Chris Dolmetsch, *O'Reilly's Secret Harassment Settlements Become Public*, BLOOMBERG (Apr. 4, 2018), https://www.bloomberg.com/news/articles/2018-04-04/o-reilly-accusers-urge-judge-to-reject-blackout-request-on-suit.

12 Mark Savage, *R. Kelly: The History of His Crimes and Allegations Against Him*, BBC NEWS (Feb. 24, 2023), https://perma.cc/HM87-4L9S.

13 Jane Musgrave, *Epstein Paid Three Women $5.5 Million to End Underage-Sex Lawsuits*, PALM BEACH POST (Oct. 3, 2017), https://perma.cc/5YAL-HPXN.

14 Igor Derysh, *Ronan Farrow: NBC Tried to Cover Up Matt Lauer Allegations with "Multiple" Settlements Before Firing*, SALON (Oct. 11, 2019), https://perma.cc/Z3V4-YVL4.

15 Tom Schad, *McKayla Maroney's Lawyer: USA Gymnastics Relented Only When Others Offered to Pay Fine*, USA TODAY (Jan. 17, 2018), https://perma.cc/Z5A9-2M2U.

16 Kim Elsesser, *Five Years After #MeToo, NDAs Are Still Silencing Victims*, FORBES (Mar. 21, 2022), https://www.forbes.com/sites/kimelsesser/2022/03/21/five-years-after-metoo-ndas-are-still-silencing-victims; Gabriel Sherman, *The Revenge of Roger's Angels*, INTELLIGENCER (Sept. 2, 2016), https://perma.cc/SCJ7-PSU8; Emily Jane Fox, *Report: Fox News Allegedly Paid $3.15 Million Settlement to Woman Claiming Roger Ailes Sexually Harassed Her*, VANITY FAIR (July 29, 2016), https://perma.cc/GLX4-UWQP.

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

18 Laurie Goodstein, *Albany Diocese Settled Abuse Case for Almost $1 Million*, N.Y. TIMES (June 27, 2002), at B1. Between 1994 and 2002, the Roman Catholic Archdiocese of Boston reportedly paid so much in secret settlements that it exhausted its liability insurance and was forced to sell off real estate. *See* Stephen Kurkjian & Walter V. Robinson, *Sex Cases May Cost Church $100m*, BOS. GLOBE (Mar. 3, 2002), https://perma.cc/NXL7-QEZK.

19 We realize that there is disagreement as to whether those who have endured sexual violence are more respectfully referred to as "survivors" or as "victims." In keeping with the views of the Rape, Abuse & Incest National Network (RAINN), we use both terms interchangeably. *See Key Terms and Phrases*, RAINN, https://perma.cc/2BF8-SRTE (explaining that "[s]ome people identify as a victim, while others prefer the term survivor," and so neither term is, in fact, preferred).

In 2017, the #MeToo movement—and startling accounts of NDAs' outsized role in the perpetuation of abuse—upended this uneasy status quo and ignited a thunderous debate over secret settlements' use and effect.[20] One by one, states began regulating NDAs in settlement agreements in sexual harassment and sexual assault cases.[21] California was among the first, enacting in September 2018 the Stand Together Against Non-Disclosure (STAND) Act,[22] which prohibited the use of NDAs when resolving civil claims involving sexual harassment, sexual assault, or sex discrimination.[23] Three years later, the state doubled down, enacting the Silenced No More Act,[24] which expanded STAND's scope to cases involving discrimination or harassment based on characteristics such as race, religion, age, disability, and military status.[25]

Federal lawmakers soon joined in. In 2017, in what's now known as the "Weinstein Provision," Congress amended the tax laws to establish that defendants cannot deduct payments incurred to settle sexual harassment cases where an NDA shields the settlement from scrutiny.[26] In 2022, Congress enacted the

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[20] The #MeToo movement was a social movement that gained widespread attention through social media, where people—especially women—used the hashtag #MeToo to share their experiences as victims of sexual misconduct. *See generally* Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RSCH. CTR. (Oct. 11, 2018), https://perma.cc/N4CC-QAQM. Journalist Ronan Farrow's blockbuster article, *Secret Settlements, supra* note 2, helped ignite this reckoning, as did journalists Jodi Kantor and Megan Twohey's article, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html, which was published just prior.

[21] *See infra* Part I.B; *see also Our State-by-State Guide on NDA Laws*, LIFT OUR VOICES (last updated Oct. 1, 2023), https://perma.cc/KTY5-LXJW.

[22] 2018 Cal. Stat. 6262 (codified as amended at CAL. CIV. PROC. CODE § 1001).

[23] *See* CAL. CIV. PROC. CODE § 1001(a) (West 2024).

[24] 2021 Cal. Stat. 8238 (codified at CAL. GOV'T CODE § 12964.5 and CAL CIV. PROC. CODE § 1001).

[25] *See* CAL. CIV. PROC. CODE § 1001(a)(3)–(4).

[26] *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 13307, 131 Stat. 2054, 2129 (codified at 26 U.S.C. § 162(q)). For discussion, see Shane Rader, *The Weinstein Tax: Congress' Attempt to Curb Non-Disclosure Agreements in Sexual Harassment Settlements*, 3 BUS. ENTREPRENEURSHIP & TAX L. REV. 329, 330–31 (2019); Robert Wood, *Tax Write-Offs in Sexual Harassment Cases After Harvey Weinstein*, N.Y. STATE BAR ASS'N J., Feb. 2018, at 11, 12. Some believe, however, that this tax restriction is quite easily circumvented and unlikely to have much bite. *See* Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J.F. 121, 135 n.69 (2018) (expressing doubt that the 2017 enactment "will make a large dent in the prevalence of nondisclosure agreements given that the parties may be able to" circumvent the law's requirements); Wood, *supra*, at 15 (explaining that the parties might attempt to sidestep the

Speak Out Act,[27] which voids nondisclosure and nondisparagement clauses related to allegations of sexual harassment or sexual assault, but only in agreements entered into "before the dispute arises."[28] And in 2023, the National Labor Relations Board held in *McLaren Macomb*[29] that employers violate the National Labor Relations Act[30] when they offer even nonunion employees severance agreements with broad confidentiality provisions.[31]

Even though this round of reform is new, the broader debate isn't. Questions concerning secret settlements have, in fact, swirled since the 1980s. And though the #MeToo movement has shifted the policy landscape and altered the prospects for reform, the core arguments on both sides of the issue remain strikingly familiar, even stale.

On one side of the ledger, many have long championed reform. Citing stories like Gutierrez's, reformers highlight the danger of NDAs: these provisions, in reformers' telling, not only silence and isolate victims but also enable wrongdoers to continue their behavior without accountability.[32] If the Weinstein settlements hadn't been confidential, some victims would have been spared.[33] Furthermore, reformers reason that, because testimony about similar acts—which NDAs bury[34]—can be key to a jury's determination of liability, secrecy provisions impair the truth-seeking function of courts. As one scholar put it: "[N]ondisclosure agreements not only protect an accused harasser from public

law's requirements simply by stating that "no portion of the settlement amount is allocable to sexual harassment").

27 Pub. L. No. 117-224, 136 Stat. 2290 (2022) (codified at 42 U.S.C. §§ 19401–19404).

28 *Id.* § 4, 136 Stat. at 2291.

29 372 N.L.R.B. No. 58, 2023 L.R.R.M. (BNA) 54078 (Feb. 21, 2023).

30 29 U.S.C. §§ 151–169.

31 *McLaren Macomb*, 372 N.L.R.B. No. 58, at 8. Supervisory employees are partially exempted. *Id.* at 20.

32 *See, e.g.*, Stephanie Russell-Kraft, *How to End the Silence Around Sexual-Harassment Settlements*, THE NATION (Jan. 12, 2018), https://perma.cc/6H27-57C2 ("[Secrecy] leaves other employees vulnerable to harassment by repeat perpetrators, and deprives the public of information about how widespread the problem of workplace harassment is."). For further discussion, see *infra* notes 130–31 and accompanying text.

33 Or, in the chilling words of Boston attorney Jeffrey Newman, who acquiesced to secrecy provisions as part of a settlement with an abusive Catholic priest: "The consequence of confidentiality was that further harm was done to children. There is no escaping that fact." Eileen McNamara, *Courts Must End Secrecy*, BOS. GLOBE, Feb. 27, 2002, at B1.

34 For discussion of the evidentiary issues sometimes at play in the admission of this other-acts evidence, see *infra* note 141.

censure in one instance but also undermine the likelihood that future cases of harassment will succeed."[35]

Critics are doubtful. For starters, critics insist that most plaintiffs *want* secrecy. Uncomfortable in the spotlight, some plaintiffs are understandably eager to put an agonizing episode behind them.[36] Through this lens, STAND and its progeny deprive abuse victims of not only their privacy but also their agency.[37] Prominent plaintiffs' lawyer Gloria Allred put the point succinctly in the wake of the Weinstein scandal: "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 coworkers, their future employers or the general public."[38]

Critics further reason that defendants desire secrecy, and this desire gives plaintiffs a powerful, perhaps indispensable, bargaining chip. "Without this leverage," critics argue, "victims are dramatically less likely to secure settlements and receive any compensation for their injuries."[39] Reforms like STAND, critics contend, deprive plaintiffs of this valuable consideration, meaning that a change intended to promote victim welfare and autonomy "has the paradoxical effect of singling victims out for *less* negotiating power than a typical civil litigant."[40]

Finally, many critics worry that, by taking NDAs off the table, reforms will complicate—and prolong—litigation. Reasoning that confidentiality facilitates dispute resolution, critics worry that nobody would settle in a world with these reforms, and that litigation would be prolonged and intensified to the detriment of victims, defendants, and courts.[41] Offering this perspective, defense lawyer Mike Delikat, former Chair of Orrick's employment

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35 Mizrahi, *supra* note 26, at 134.

36 As one plaintiffs' attorney observed, some victims "don't want a word breathed" of their experiences. Danielle Paquette, *How Confidentiality Agreements Hurt—and Help—Victims of Sexual Harassment*, WASH. POST (Nov. 2, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/11/02/how-confidentiality-agreements-hurt-and-help-victims-of-sexual-harassment. For further discussion, see *infra* notes 165–67 and accompanying text.

37 *See supra* note 36.

38 Gloria Allred, Opinion, *Assault Victims Have Every Right to Keep Their Trauma and Their Settlements Private*, L.A. TIMES (Sept. 24, 2019), https://perma.cc/7WBK-ASV8.

39 *Written Testimony of Debra S. Katz, Partner and Hannah Alejandro, Senior Counsel Katz, Marshall & Banks LLP*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 11, 2019) [hereinafter *Katz & Alejandro Testimony*], https://perma.cc/PD2D-PS3Y.

40 *Id.* (emphasis in original).

41 *E.g.*, Richard A. Epstein, *The Disclosure Dilemma*, BOS. GLOBE, Nov. 3, 2002, at D1 (explaining that, if defendants cannot obtain secret settlements, defendants, fearing

division, explained: "There's really no middle ground. Either I'm not going to give you this money or you're not going to talk about it."[42] Allred, whose firm has reportedly represented "thousands" of plaintiffs who inked NDAs, concurred: "[D]efendants often refuse to enter into any settlement unless it is confidential."[43] And plaintiffs' attorney Debra Katz, dubbed "the consummate lawyer for the #MeToo movement,"[44] observed that "[n]early all settlements of civil claims—including other kinds of harassment, personal injury, and contract disputes—include non-disclosure provisions, and the term is often an essential condition for the parties' agreement."[45] If Delikat, Allred, and Katz are right, when a secret settlement isn't possible, there won't be a settlement, period. We'll instead face protracted, scorched-earth, court-clogging litigation, as defendants fight tooth and nail.

In short: secret settlements have recently roared back onto legislative agendas, and what happens next will have profound implications for litigant autonomy, court transparency, adjudicative accuracy, judicial efficiency, and public policy. Yet, states are passing—or refusing to pass—reforms without any real information concerning a key question: What *actually happens* in the wake of reform? To this point, convincing empirical evidence is virtually nonexistent, so policymakers have had to make hugely consequential judgments based on hunches and heated rhetoric but very few facts.

This Article offers overdue clarity. We leverage state-of-the-art machine-learning and natural-language processing tools to construct and analyze a novel dataset of more than a quarter-million cases filed in the Los Angeles (L.A.) Superior Court, from both before and after the STAND Act took effect. In doing so, we shed new light on how restrictions on secret settlements affect litigation dynamics. Our evidence suggests that STAND may

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copycat litigation, "will likely seek to postpone settlement" and will also "resist[ ] the discovery process for as long as they can").

42 Nitasha Tiku, *How to Pierce the Secrecy Around Sexual Harassment Cases*, WIRED (Dec. 4, 2017), https://www.wired.com/story/how-to-pierce-the-secrecy-around-sexual-harassment-cases (quoting Delikat).

43 Allred, *supra* note 38.

44 Isaac Stanley-Becker, *Christine Blasey Ford's Lawyer Debra Katz: The Feared Attorney of the #MeToo Moment*, WASH. POST (Sept. 24, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/09/24/meet-christine-blasey-fords-lawyer-debra-katz-nerves-of-steel-and-proud-to-be-among-the-top-10-plantiffs-attorneys-to-fear-most. Among other things, Katz represented Dr. Christine Blasey Ford before the Senate Judiciary Committee during Justice Brett Kavanaugh's confirmation hearings.

45 *Katz & Alejandro Testimony*, *supra* note 39.

have caused filings of covered cases to tick downward slightly, while STAND's companion legislation, the Silenced No More Act (which, recall, extended STAND's scope beyond gender), appears to have had no substantial effect on filings. Meanwhile, after STAND was enacted, it appears that at most only a modest share of covered cases took longer to resolve. Similarly, we do not find convincing evidence that STAND caused an increase in litigation intensity. In sum: When secret settlements were banned in L.A. Superior Court—a massive court system that adjudicates more cases each year than all U.S. federal district courts *combined*[46]—critics' dire predictions did not materialize. There were no sharp swings in case filings, and also no clear spikes in litigation duration or intensity.

We supplemented our quantitative study with insights from nearly two dozen in-depth interviews with experienced, repeat-play counsel on both sides of the litigation "v." Those we interviewed strongly believed that, after STAND, cases still settled; in fact, settlement amounts either went up or held steady. Perhaps more importantly, these interviews also surfaced an underexplored advantage of transparency mechanisms that cannot be captured by even mountains of data: the STAND Act, according to practitioners, has conferred on victims rich psychic benefits, removing the suffocating shadow cast by oppressive NDAs.

The remainder of this Article proceeds in four Parts. Part I offers a primer on secret settlements and canvasses past and current efforts to restrict their use. Part II surveys the surrounding debate, including critics' persistent and consequential prediction that "[s]exual harassers [will] never make payments to victims without getting silence in return."[47] It also catalogs the scant empirical evidence testing competing claims—and notes that, in this virtual empirical desert, competing hunches and warring rhetoric have understandably reigned.

With that foundation laid, Part III uses a novel dataset built with sophisticated machine-learning tools to test what actually happened in the wake of reform. Deploying difference-in-differences methods, we find evidence that STAND may have

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[46] *See infra* note 205 (comparing the entire annual throughput of the L.A. court system, including criminal cases, against the entire annual throughput of all federal district courts).

[47] JODI KANTOR & MEGAN TWOHEY, SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT 78 (2019) [hereinafter KANTOR & TWOHEY, SHE SAID] (paraphrasing Gloria Allred); *see also infra* notes 165–67 (offering similar predictions).

modestly reduced covered case filings and somewhat weaker evidence that STAND did not significantly increase the duration of covered cases or the intensity with which cases were litigated. Accordingly, although "[a]mongst the most fervent arguments in favor of confidential settlements is that, without confidentiality, most defendants would not want to settle at all," when we actually tested whether defendants will still settle without confidentiality, we found that they will.[48] Further, our interview evidence tends to rebut the idea that, without NDAs, defendants will settle for markedly less. Although our evidence on this point is admittedly tentative, our interviewees suggested that, not only did defendants still settle in the shadow of STAND, they settled for *similar sums*.[49]

Finally, Part IV further unpacks our evidence. It first asks why our findings differ so sharply from so many experts' predictions and, ultimately, observes that one reason for STAND's seeming success may be that it takes something of a Goldilocks approach. Settling for what Professors Saul Levmore and Frank Fagan call "translucency," rather than total transparency, STAND goes far, but not too far, in its approach.[50]

Part IV then shifts gears and notes that, while our empirical inquiry indicates that claims about STAND's effect on dockets and court congestion were likely exaggerated, our qualitative interviews indicate STAND has had another effect that has, to this point, been underappreciated.[51] According to many lawyers, that is, STAND has had a significant "liberation effect," conferring on victims significant emotional benefits by freeing them from oppressive NDAs that many saw as a persistent perpetuation of their abuse.

In sum, this Article seeks to offer overdue clarity as to what *actually* happens in the wake of secret settlement reform. What

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48 *Rethinking the Silent Treatment: Discovering Confidential Settlements in a Post-#MeToo World*, 74 VAND. L. REV. EN BANC 289, 320 (2021) [hereinafter *Rethinking the Silent Treatment*].

49 Several, in fact, suggested that settlement amounts have ticked upward, although they doubted—and we also doubt—that this perceived upward trend is traceable to STAND and not to other legal, cultural, and societal factors. *See infra* notes 255–59.

50 Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 314, 341 (2018).

51 Over the past three decades, lawmakers have held dozens of hearings to debate secret settlements, and scholars have penned dozens of articles debating nearly every facet of their use. Yet, this effect has seemingly fallen beneath most lawmakers' and scholars' radars. For a rare and welcome exception, see Hoffman & Lampmann, *supra* note 8, at 179–81. Many victims themselves have discussed this benefit. *See infra* notes 292–93.

we find debunks certain claims that, in reform's wake, the sky inevitably falls. And it shows that certain real advantages that *actually* accompany reform have, to this point, received insufficient attention.

I. SECRET SETTLEMENTS AND NDAS

This Part proceeds in two steps. Part I.A offers a primer on secret settlements, while Part I.B canvasses past legislative efforts to restrict their use.

A. Secret Settlements 101

Secret settlements litter the U.S. legal landscape.[52] They figure prominently in the resolution of all manner of claims, including employment discrimination,[53] personal injury,[54] and commercial contracts.[55] And the disputes where secrecy provisions have played a prominent role read like a catalog of ignominy: Firestone tires,[56] the Boston Archdiocese,[57] General Motors ignition

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[52] Interestingly, no one quite knows the origin story of secret settlements, though many believe that these provisions first appeared in the 1940s and were initially used to resolve disputes arising under maritime law. For a discussion, see Michelle Dean, *Contracts of Silence*, COLUM. JOURNALISM REV. (Feb. 14, 2018), https://perma.cc/DEL6-WKUB. It also appears that secret settlements became more prevalent in the mid-1980s, although evidence is anecdotal. *See* Am. Judicature Soc'y, *"Confidential Settlements and Sealed Court Records: Necessary Safeguards or Unwanted Secrecy?", as reprinted in* 78 JUDICATURE 304, 304 (1995) (statement of then-Professor Erwin Chemerinsky) ("Since 1986 there has been a dramatic increase in the number of cases with agreements to keep settlements confidential.").

[53] Joseph A. Golden, *Secrecy Clauses, A Negotiated Restraint on Free Speech*, 73 MICH. BAR J. 550, 550 (1994) ("In the past ten years, at least 90% of my settlements in employment cases have contained a secrecy clause as part of the final written document.").

[54] *See infra* notes 53–63.

[55] *See, e.g.*, Wells Fargo Bank, NA v. MPC Invs., LLC, 2012 WL 1205685, at *1 (E.D. Mich. Mar. 5, 2012).

[56] *See* Davan Maharaj, *Tire Recall Fuels Drive to Bar Secret Settlements*, L.A. TIMES (Sept. 10, 2000), https://perma.cc/4RLN-MNSY; Alicia C. Shepard, *Local Heroes*, AM. JOURNALISM REV. (Dec. 2000), https://perma.cc/XN3L-GCCP.

[57] *See* Walter V. Robinson, *Scores of Priests Involved in Sex Abuse Cases; Settlements Kept Scope of Issue Out of Public Eye*, BOS. GLOBE (Jan. 31, 2002), at A1, https://www.bostonglobe.com/news/special-reports/2002/01/31/scores-priests-involved-sex-abuse-cases/kmRm7JtqBdEZ8UF0ucR16L/story.html.

switches[58] and side-saddle fuel tanks,[59] Pfizer heart valves,[60] the Dalkon Shield,[61] Zomax,[62] and asbestos.[63]

Secret settlements have long taken a variety of forms. All or nearly all require that at least one party refrain from disclosing the settlement amount relating to the claim—and, on this point, some settlements are bilateral (limiting the speech of both parties), while others are unilateral (binding only the plaintiff).[64] Many also prohibit the plaintiff from discussing the underlying facts of the dispute, typically backed up with hefty liquidated damages provisions in the event of a breach.[65] And, while some settlements create a carve-out when disclosure is compelled by a subpoena or court order, others omit even this safeguard.[66]

Some secret settlements are more draconian. As part of the settlement Ambra Battilana Gutierrez inked with Weinstein, she was required to relinquish her phone and "surrender the passwords to her email accounts and other forms of digital communication."[67] Likewise, the settlement agreements between former Fox News host Bill O'Reilly and two of his accusers, Andrea Mackris and Rebecca Gomez Diamond, not only contained oppressive liquidated damages provisions, but they also required

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58 *See* Editorial Board, *Secrecy That Kills*, N.Y. TIMES (May 31, 2014), https://www.nytimes.com/2014/06/01/opinion/sunday/secrecy-that-kills.html.

59 *See* S. REP. NO. 112-45, at 6 (2011).

60 *See id.* at 4.

61 *See* Daniel J. Givelber & Anthony Robbins, *Public Health Versus Court-Sponsored Secrecy*, 69 LAW & CONTEMP. PROBS. 131, 134 (2006).

62 *See* Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know* Can *Hurt You)*, 2 J. INST. FOR STUDY LEGAL ETHICS 115, 119 (1999) [hereinafter Zitrin, *Against Secret Settlements*].

63 *See* Bill Richards, *New Data on Asbestos Indicate Cover-Up of Effects on Workers*, WASH. POST (Nov. 11, 1978), https://www.washingtonpost.com/archive/politics/1978/11/12/new-data-on-asbestos-indicate-cover-up-of-effects-on-workers/028209a4-fac9-4e8b-a24c-50a93985a35d/.

64 *See* Ann Fromholz & Jeanette Laba, *#MeToo Challenges Confidentiality and Nondisclosure Agreements*, 41 L.A. LAW. 12, 12 (2018) ("It is not uncommon for these provisions to be one-sided—in other words, only the complainant is prohibited from disclosure.").

65 *See, e.g.,* Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481, 483–84 (2008) (detailing such a provision); Dean, *supra* note 52, at 13 (discussing a case where the NDA subjected the plaintiff to liquidated damages of $750,000 for "each single violation of the confidentiality clause").

66 Bauer, *supra* note 65, at 492 n.21 ("Confidentiality clauses in settlements frequently contain an exception for disclosures required by subpoena or court order. Sometimes even this is lacking."); Fromholz & Laba, *supra* note 64, at 12 (similar).

67 FARROW, CATCH AND KILL, *supra* note 1, at 63. Appended to the agreement was a sworn statement, presigned by Gutierrez. In the sworn statement, which was to be released in the event Gutierrez ever breached, she (falsely) disclaimed the truth of her underlying claims. *Id.* at 64.

Mackris and Diamond to turn over all evidence, including audio recordings and diaries, to O'Reilly and required that, if the material somehow ever came to light, Mackris would disclaim the materials "as counterfeit and forgeries."[68]

Underscoring just how outlandish the terms can be, consider the 1998 agreement between Weinstein and producer Zelda Perkins.[69] The agreement went so far as to mandate that, "in the event that [Perkins] require[s] treatment from an appropriate medical practitioner in connection with the conduct alleged," Perkins had to first obtain the Weinstein Company's consent.[70] Under the terms of the agreement, Perkins was also duty bound to ensure that any prospective doctor *also* sign an NDA—even though the agreement already required Perkins "to use all reasonable endeavors not to disclose the name" of Weinstein during any treatment.[71] And, in a truly Orwellian twist, the agreement even prevented Perkins from retaining a copy of the agreement—the contract that would, thenceforth, restrict her discussion of her own experience.[72]

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68 Emily Steel, *How Bill O'Reilly Silenced His Accusers*, N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/business/media/how-bill-oreilly-silenced-his-accusers.html.

69 When she was in her early twenties, Perkins worked as "Weinstein's right-hand woman" until Perkins's colleague revealed that Weinstein had attempted to rape her. Julianne McShane, *She Broke Her NDA with Harvey Weinstein in 2017. Here's How She Wants to Change the System for Others*, WASH. POST (Nov. 15, 2021), https://www.washingtonpost.com/gender-identity/she-broke-her-nda-with-harvey-weinstein-in-2017-heres-how-she-wants-to-change-the-system-for-others/. Under the terms of a £125,000 settlement, Perkins remained quiet for decades until, in 2017, she violated her NDA and became an advocate for reform. Alexandra Topping, *Harvey Weinstein PA Says Abusers Still Have the Legal Power to Silence Victims*, THE GUARDIAN (Oct. 10, 2021), https://perma.cc/5ZHV-RU9S. In the course of her advocacy, she submitted an excerpt of her settlement agreement to the U.K. Parliament. *See Written Submission from Zelda Perkins SHW0058*, U.K. PARLIAMENT (Mar. 2018) [hereinafter *Perkins Agreement*], https://www.parliament.uk/globalassets/documents/commons-committees/women-and-equalities/Correspondence/Zelda-Perkins-SHW0058.pdf.

70 *Perkins Agreement*, *supra* note 69, at 4.

71 *Id.*

72 *Id.* at 2.

While secret settlements are, by all accounts, prevalent,[73] they are notoriously hard to study.[74] Secret settlements are slippery in part because it's their very nature to be secret,[75] and also because courts' routine involvement in secret settlements is essentially nil.[76] Technically, parties *can* file secret settlements with the court and ask the court to issue a confidentiality order protecting its content. That way, in the event of a breach, the nonbreaching party can invoke the court's enforcement power without filing another lawsuit. However, such filings are, by all accounts, vanishingly rare.[77] Most secret settlements are reached

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73 Anecdotal evidence suggests that most civil settlements—perhaps the overwhelming majority—are accompanied by an NDA. *See* Blanca Fromm, *Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 675–76 (2001) (finding, based on interviews with attorneys for corporate defendants and insurance companies, that most attorneys insist on secrecy provisions in settlement agreements); Fromholz & Laba, *supra* note 64, at 12 ("Confidentiality provisions are a common and material component of nearly every settlement agreement."); Erik S. Knutsen, *Keeping Settlements Secret*, 37 FLA. STATE U. L. REV. 945, 946 n.1 (2010) ("Most cases in the civil litigation system settle. Most also settle in secrecy."); Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 113 n.4 (2007) (citing an estimate given by a federal magistrate judge that 85–90% of employment discrimination settlements are governed by confidentiality agreements); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 511 (1994) (noting, based on attorneys' reports and Judge Jack Weinstein's "own experience in helping to settle thousands of cases," that "it is almost impossible to settle many mass tort cases without a secrecy agreement").

74 Consequently, there remains "a lack of meaningful data on the pervasiveness of confidential settlements." Am. Judicature Soc'y, *supra* note 52, at 304 (statement of Kathleen Sampson).

75 David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217, 1218 & n.3 [hereinafter Dana & Koniak, *Lawyer Cartels*] (explaining that no one knows exactly how prevalent secret settlements are, in part because "[t]he definitional quality of secret settlements—their secrecy—makes . . . statistical analysis impossible").

76 There are a handful of exceptions—when judges are actively involved. These include the settlement of Rule 23 class actions, antitrust actions (but only where the United States has initiated the action and there is a consent judgment), shareholder derivative actions, and actions initiated on behalf of children or others who are legally unable to make their own legal decisions. *See* FED. JUD. CTR., MANUAL FOR COMPLEX LITIGATION 172 (4th ed. 2004). *See generally* Howard M. Erichson, *The Role of the Judge in Non-Class Settlements*, 90 WASH. U. L. REV. 1015 (2013).

77 *See* ROBERT TIMOTHY REAGAN, SHANNON R. WHEATMAN, MARIE LEARY, NATACHA BLAIN, STEVEN S. GENSLER, GEORGE CORT & DEAN MILETICH, SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT 1 (2004) (finding that "a sealed settlement agreement is filed in less than one-half of one percent of civil cases").

privately through out-of-court bargaining, and, even when a settlement is reached after a lawsuit is filed, the public docket contains no mention of that fact.[78]

B. Legislative Efforts to Promote Transparency

Given the weighty policy considerations at play, it is unsurprising that secret settlements have long spurred contentious debate. Indeed, over the past three-plus decades, we have seen two distinct waves of reform, which we call Transparency Effort 1.0 and Transparency Effort 2.0, respectively.

Transparency Effort 1.0 dates back to the late 1980s, when the public learned that secret settlements had allowed various public health hazards—including asbestos, which has claimed tens of thousands of American lives—to fester. Yet, the resulting state reforms were limited and piecemeal—and, at the federal level, transparency efforts encountered staunch resistance and ultimately went down to defeat.[79]

Catalyzed by the #MeToo movement, Transparency Effort 2.0 has resulted in actual change at the federal level and in sixteen states. As we explain below, these reforms come in different flavors, and many are admittedly weak. Yet, all seek, however subtly, to shift the balance of power in sexual harassment and discrimination suits.

1. Transparency Effort 1.0.

As noted, over the past thirty-plus years, lawmakers have bandied about efforts to restrict secret settlements, often with an eye toward promoting public safety.[80]

At the federal level, over the past twenty-odd years, Congress has repeatedly introduced but failed to enact versions of a

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[78] *See* Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 555 (2006) (explaining that parties typically file "notices of dismissal" with courts but then "separately" specify "the relevant terms in contracts," and that "confidential settlement agreements" are likely "commonplace").

[79] For discussion, see Michelle Conlin, Dan Levine & Lisa Girion, *Why Big Business Can Count on Courts to Keep Its Deadly Secrets*, REUTERS (Dec. 19, 2019), https://www.reuters.com/investigates/special-report/usa-courts-secrecy-lobbyist.

[80] For a discussion of these efforts, see Drahozal & Hines, *supra* note 17, at 1476–79; Amie Sloane, *Secret Settlements and Protecting Public Health and Safety: How Can We Disclose with Our Mouths Shut?*, 3 APPALACHIAN J.L. 61, 70–76 (2004).

Sunshine in Litigation Act.[81] The Sunshine in Litigation Act's particulars have varied, although all versions have sought to ensure that incrementally more information concerning public health and safety comes to light through litigation. Consider, for instance, the 2011 version of the Sunshine in Litigation Act.[82] Declaring that settlements often conceal "smoking gun" documents that would otherwise "adequately inform the public and regulators about a health or safety danger,"[83] the Sunshine Act sought to prohibit federal courts from approving or enforcing settlement provisions that restrict a party from disclosing information related to public health or safety.[84] Yet, like its predecessors,[85] the bill never came to a floor vote.[86] Similar legislation proposed in more recent years also stalled.[87]

Meanwhile, Transparency Effort 1.0 made some progress in the states—although that, too, was limited.[88] The first successes

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[81] *See* Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI-KENT L. REV. 439, 441 (2006) (cataloging unsuccessful federal legislative efforts in 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2003, and 2005); *see also* David A. Dana & Susan P. Koniak, Opinion, *Secret Court Settlements Are a Scourge on Society*, WASH. POST (Dec. 14, 2017) [hereinafter Dana & Koniak, *Scourge on Society*], https://www.washingtonpost.com/opinions/secret-court-settlements-are-a-scourge-on-society/2017/12/14/7b9cb97e-e022-11e7-89e8-edec16379010_story.html ("In every Congress since 1995, lawmakers have introduced legislation that would put serious limits on secrecy in cases involving substantial hazards to the public at large. Year after year, those bills remain unnoticed and die.").

[82] S. 623, 112th Cong. (2011).

[83] S. REP. NO. 112-45, at 3 (2011).

[84] S. 623.

[85] *See, e.g.*, *H.R.5884—Sunshine in Litigation Act of 2008*, CONGRESS.GOV (last updated June 3, 2008), https://www.congress.gov/bill/110th-congress/house-bill/5884/all-actions.

[86] *S.623—Sunshine in Litigation Act of 2011*, CONGRESS.GOV (last updated Aug. 2, 2011), https://www.congress.gov/bill/112th-congress/senate-bill/623/all-actions.

[87] *See H.R.1053—Sunshine in Litigation Act of 2017*, CONGRESS.GOV (last updated Mar. 2, 2017), https://www.congress.gov/bill/115th-congress/house-bill/1053/all-actions. In 2019, Representative Jerrold Nadler indicated he planned to introduce the Sunshine in Litigation Act, although it does not appear that such an Act was introduced. *See* Jan Wolfe, *U.S. House Leader to Back Bill Limiting Court Secrecy*, REUTERS (Oct. 3, 2019), https://www.reuters.com/article/world/us-politics/us-house-leader-to-back-bill-limiting-court-secrecy-idUSKBN1WB32O/; *see also The Federal Judiciary in the 21st Century: Ideas for Promoting Ethics, Accountability, and Transparency: Hearing Before the Subcomm. on Cts., Intell. Prop. & the Internet of the H. Comm. on the Judiciary*, 116th Cong. 6–7 (2019) (statement of Rep. Jerrold Nadler, Chair, H. Comm. on the Judiciary).

[88] For a helpful rundown of various state enactments, see Richard A. Zitrin, *The Laudable South Carolina Court Rules Must Be Broadened*, 55 S.C. L. REV. 883, 890–96 (2004) [hereinafter Zitrin, *South Carolina Court Rules*], and see also Nora Freeman Engstrom, David Freeman Engstrom, Jonah B. Gelbach, Austin Peters & Aaron Schaffer-Neitz, *Secrecy by Stipulation*, 74 DUKE L.J. 99, 120–22 (2024) (discussing state enactments).

came in 1990, in Texas and Florida, respectively. First, by a four-to-three vote in 1990, the Texas Supreme Court created Texas Rule of Civil Procedure 76a, which presumptively allows public access to filed and unfiled settlements that have a "probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government."[89]

That same year, Florida enacted a Sunshine in Litigation Act,[90] which provides:

> Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard is void, contrary to public policy, and may not be enforced.[91]

Applicable in cases litigated in state court and (we believe) also in federal court with some limitations,[92] the law targets mainly product liability cases; indeed, it's not clear whether sexual harassment or abuse would fall under the "public hazard" umbrella.[93] Nor is it clear that the law has much bite. In 2012, the Florida Senate Committee on the Judiciary reviewed the Sunshine in Litigation Act and found that the law "is not frequently invoked in general."[94] The review also revealed that, "even though the Act applies to private settlement agreements in addition to documents associated with litigation, the former application is rare."[95]

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89 TEX. R. CIV. P. 76a(1), (2)(b)–(c). For the fact the vote was closely divided, see Zitrin, *Against Secret Settlements*, *supra* note 62, at 122.

90 1990 Fla. Laws 49 (codified as amended at FLA. STAT. § 69.081(4)).

91 FLA. STAT. § 69.081(4) (2024).

92 In *Ronque v. Ford Motor Co.*, 1992 WL 415427 (M.D. Fla. May 19, 1992), a case involving the lawfulness of a protective order under Federal Rule of Civil Procedure 26(c), a federal court held that Florida's Sunshine in Litigation Act "may apply if this case were in state court" but "does not apply here because F.S. § 69.081 is a procedural rule inapplicable in this federal proceeding." *Id.* at *1 (citing Erie R.R. v. Tompkins, 304 U.S. 64 (1938)). While the court may have cited the wrong precedent—the state procedure must give way under *Hanna v. Plumer*, 380 U.S. 460 (1965), not *Erie*—we do not read this decision, or any decisions like it, as determinative. In fact, we believe state laws prohibiting secrecy terms generally apply to settlement contracts in federal courts. *See infra* note 268 (offering our analysis of this question).

93 *See* Vasundhara Prasad, Note, *If Anyone Is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2531–32 (2018) (discussing this ambiguity).

94 FLA. SENATE, REVIEW OF THE SUNSHINE IN LITIGATION ACT 4 (2011).

95 *Id.*; *see also* Wendy F. Lumish & Cristina Alonso, *Time for a Legislative Overhaul of the Sunshine in Litigation Act*, FLA. BAR (May 2011), https://perma.cc/7WA8-7YML

Even so, several other states soon joined the fledgling movement. In 1991, Arkansas enacted legislation voiding secret settlements that conceal environmental hazards.[96] Like the Florida statute, the Arkansas law's real-world effect is unclear.[97] Two years later, Washington enacted a set of "right-to-know" statutes, providing a right to know if a bona fide public hazard is at play.[98] Finally, Louisiana followed with its Sunshine in the Courtroom Bill,[99] which declared any settlement agreement made with the purpose of concealing information about a public hazard void for public policy reasons, subject to various exceptions.[100]

Then, after a long hiatus, in 2002, the South Carolina federal district court "created a sensation" when it unanimously adopted Local Civil Rule 5.03(c).[101] Upon its initial adoption, the Rule read: "No settlement agreement filed with the court shall be sealed pursuant to the terms of this rule."[102] As the Rule—expressly designed to put "an end to court orders . . . to seal settlement agreements"—was inked, the reform was widely heralded.[103] Professor Richard Epstein pithily summarized: "To its defenders," South Carolina's Rule 5.03(c) was "motherhood and apple pie all rolled into one."[104]

(explaining that, although Florida's reform is well-intentioned, it "suffers from several problems that rob it of its effectiveness and limit its ability to accomplish its purpose").

96 1991 Ark. Acts 1210 (codified at ARK. CODE ANN. § 16-55-122).

97 Roma Perez, *Two Steps Forward, Two Steps Back: Lessons to Be Learned from How Florida's Initiatives to Curtail Confidentiality in Litigation Have Missed Their Mark*, 10 FLA. COASTAL L. REV. 163, 219 (2009) ("No reported opinions exist interpreting or applying this statute. Similarly, no legal or scholarly commentary discusses the statute's impact on confidential settlements in Arkansas.").

98 15A WASH. PRAC., HANDBOOK ON CIVIL PROCEDURE § 38.26 (2024 ed.); WASH. REV. CODE ANN. § 4.24.601 (2024).

99 1995 La. Acts 313 (codified at LA. CODE CIV. PROC. ANN. Art. 1426(D)).

100 LA. CODE CIV. PROC. ANN. ART. 1426(D); *see also* Ashley A. Kutz, *Rethinking the "Good Cause" Requirement: A New Federal Approach to Granting Protective Orders Under F.R.C.P. 26(c)*, 42 VALPARAISO U. L. REV. 291, 322–23 (2007).

101 Epstein, *supra* note 41, at D1.

102 D.S.C. CIV. R. 5.03; *see also* Eli A. Poliakoff, Kris Hines & Matthew T. Richardson, *Secret Settlements: Reports of Their Demise Are Premature*, 15 S.C. LAW. 28, 29–30 (2004).

103 Eric Frazier, *Judges Veto Sealed Deals; U.S. Bench in S.C. Won't OK Them*, NAT'L L.J., Aug. 12, 2002, at A1. The *New York Times* proclaimed that it represented the "strictest ban on secrecy in settlements in the federal courts." Adam Liptak, *Judges Seek to Ban Secret Settlements in South Carolina*, N.Y. TIMES (Sept. 2, 2002), https://www.nytimes.com/2002/09/02/us/judges-seek-to-ban-secret-settlements-in-south-carolina.html.

104 Epstein, *supra* note 41, at D1. Some, of course, offered a chillier reception. Said Professor Arthur Miller, then at Harvard: "The judges of South Carolina, God bless them, have not evaluated the costs of what they are proposing." Like so many others, Miller went

Yet, over time, it became clear that that rule, too, lacked teeth: it applies only to settlements filed with the court, and as explained, nearly all settlement agreements aren't.[105] Worse, when South Carolina's Rule 5.03(c) was enacted, many also hailed it as "start[ing] a trend" and a sign of "momentum nationally to limit secret settlements."[106] But, in fact, the Rule was less an opening salvo than a closing bell. After the Rule took effect, little happened on the secret settlement front for more than a decade.

2. Transparency Effort 2.0.

The #MeToo movement upset the stagnation and kicked off Transparency Effort 2.0.[107] Started by a tweet from actress Alyssa Milano, and amplified by community activists, including Tarana Burke, the #MeToo movement ignited public awareness of sexual misconduct in the workplace.[108] It also, consequentially, set off clamorous criticism of seemingly ubiquitous settlement provisions that concealed egregious, repeated misconduct.[109]

Since 2017, the federal government has made various changes to curb secret settlements,[110] and sixteen states have

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on to predict that, deprived of secrecy, all manner of trouble would come for South Carolina's courts. Liptak, *supra* note 103, at A1.

105 For the fact that filed settlements are anomalous, see *supra* note 76 and accompanying text, and see also RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 766 (8th ed. 2010) ("When a case is settled for money, the settlement agreement ordinarily is not filed in court."); Zitrin, *South Carolina Court Rules*, *supra* note 88, at 884 (observing that Rule 5.03(c) "excludes the vast majority of settlements—all those not filed with the court").

106 Frazier, *supra* note 103, at A1.

107 A burst of scholarly activity has complemented this legislative activity, with numerous scholars advancing new arguments that certain NDAs are unenforceable even absent any statutory change. *See, e.g.*, D. Andrew Rondeau, Comment, *Opening Closed Doors: How the Current Law Surrounding Nondisclosure Agreements Serves the Interests of Victims of Sexual Harassment, and the Best Avenues for Its Reform*, 2019 U. CHI. LEGAL F. 583, 589 (exploring arguments sounding in unconscionability and public policy); Jingxi Zhai, Note, *Breaking the Silent Treatment: The Contractual Enforceability of Non-Disclosure Agreements for Workplace Sexual Harassment Settlements*, 2020 COLUM. BUS. L. REV. 396, 398–99 (similar).

108 Amy Brittain, *Me Too Movement*, BRITANNICA (Oct. 1, 2023), https://perma.cc/VK9W-T8ML.

109 *See* Blair Druhan Bullock & Joni Hersch, *The Impact of Banning Confidential Settlements on Discrimination Dispute Resolution*, 77 VAND. L. REV. 51, 55–56 (2024).

110 *See supra* notes 26–31 and accompanying text (describing these federal efforts).

enacted laws that restrict their use.[111] First came Arizona, California, Maryland, Vermont, and New York.[112] Then, New Jersey, Oregon, Illinois, and Nevada.[113] Most recently, in July 2022, Hawaii joined the effort, enacting legislation that significantly expanded the state's restrictions on NDAs relating to workplace sexual harassment and sexual assault—including as part of settlement agreements.[114] We present a visual summary of state activity in Figure 1 below.

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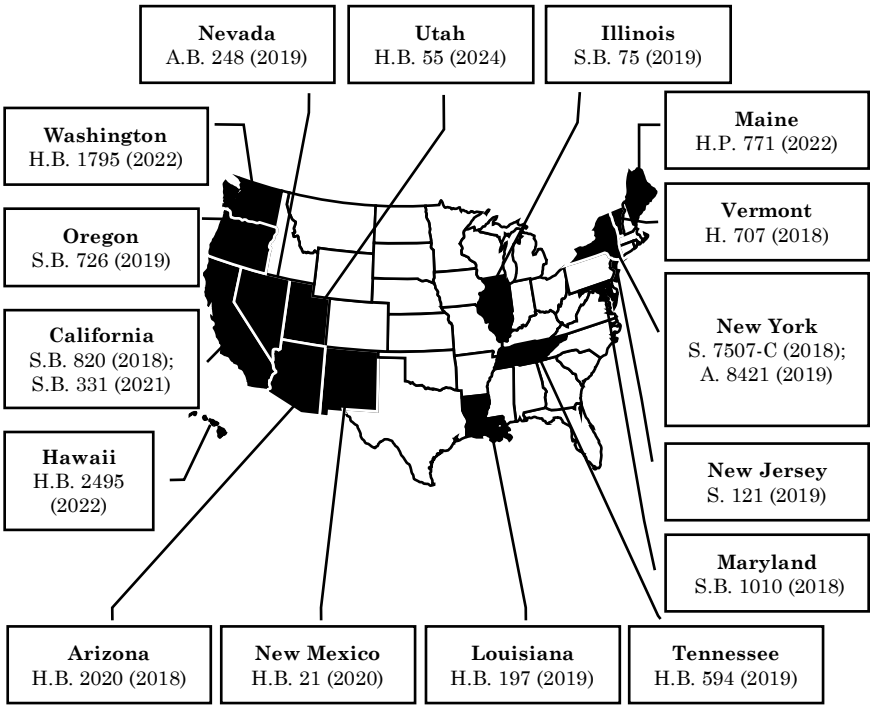
[111] Note that, in this state tally, we include reforms relating only to settlements. Thus, for instance, we exclude Virginia even though the state enacted a law that prohibits employment agreements that have the "purpose or effect of concealing the details relating to a claim of sexual assault." VA. CODE ANN. § 40.1-28.01 (2024).

[112] *See infra* Figure 1.

[113] *See infra* Figure 1.

[114] Chris Marr, *Hawaii Joins Expansion of Nondisclosure Bans, Covers Settlements*, BLOOMBERG L. (July 13, 2022), https://news.bloomberglaw.com/daily-labor-report/hawaii-joins-expansion-of-nondisclosure-bans-covers-settlements.

FIGURE 1: STATE LEGISLATIVE ACTIVITY TO RESTRICT SECRET SETTLEMENTS AS OF AUGUST 2024



Reforms vary in numerous ways but chiefly along two dimensions: (i) the types of claims covered and (ii) the exact approach taken to restrict the use of secret settlements.

As to *claim type*, most reforms cover the use of secret settlements in sexual misconduct and employment discrimination cases writ large. In these states, then, a settlement agreement that resolves a case alleging religious, racial, or age discrimination would also be covered. But some reforms—including those enacted in Hawaii,[115] Louisiana,[116] and Tennessee[117]—cover only sexual harassment, the case type most closely associated with the #MeToo movement.[118]

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115 *See* HAW. REV. STAT. § 378-2.2 (2024).

116 *See* LA. STAT. ANN. § 13:5109.1 (2024).

117 *See* TENN. CODE ANN. § 29-34-106 (2024).

118 Nevada's reform is something of a straddler, as it covers sexual harassment and sex discrimination, but it does not cover other forms of discrimination such as that based on race or age. NEV. REV. STAT. § 10.195 (2023).

As to *reform approach*, state efforts fall into one of three buckets, which we dub real reforms, phantom reforms, and government-centric reforms.

Opting for real reforms, four states—California, Hawaii, New Jersey, and Nevada—deem nondisclosure agreements unenforceable when used in covered cases. New Jersey's reform is illustrative. The New Jersey Law Against Discrimination was amended in 2019[119] to state:

> A provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment . . . shall be deemed against public policy and unenforceable against a current or former employee . . . who is a party to the contract or settlement.[120]

If an employer attempts to enforce an unenforceable settlement provision, the employee (or former employee) can sue the employer (or former employer) and can recover attorneys' fees and expenses.[121] Legislators in Connecticut sought to emulate this type of reform, but the bill died in the Senate in 2024.[122]

Next, five states—Illinois, Maine, New Mexico, New York, and Utah—have enacted what we call phantom reforms. These states deem covered NDAs unenforceable, but they water down the reform by tying the prohibition to the complainant's preference. Taking this tack, § 5-336 of New York General Obligations Law states:

> Notwithstanding any other law to the contrary, no employer, its officers or employees shall have the authority to include or agree to include in any settlement, agreement or other resolution of any claim, the factual foundation for which involves . . . any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action *unless the condition of confidentiality is the complainant's preference*.[123]

In a similar vein, § 34A-5-114(2)(c) of the Utah Code allows the employee to "withdraw from the settlement agreement" that

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[119] 2019 N.J. Laws 246 (codified at N.J. STAT. ANN. § 10:5-12.7–11).

[120] N.J. STAT. ANN. § 10:5-12.8 (West 2024).

[121] *Id.*

[122] *See Connecticut Senate Bill 361*, LEGISCAN (last updated Mar. 15, 2024), https://perma.cc/Q39Z-JSRR.

[123] N.Y. GEN. OBLIG. L. § 5-336 (McKinney 2023) (emphasis added).

contains an NDA, but only if the employee does so "within three business days" after the agreement was signed.[124]

This approach might seem to give victims a salutary choice. But it's hard to see how this "reform" differs much from prior law, where victims (including Ambra Battilana Gutierrez) also exercised a "choice."[125] Commentators have thus pointed out that New York's so-called preference exception renders the law "entirely superficial and meaningless in practice,"[126] since "[a]s a practical matter [ ] it will almost always be the employee's 'preference' to actually get paid."[127]

Third, adopting the government-centric approach, Arizona, Louisiana, and Tennessee void covered nondisclosure agreements only if the government is one of the parties. The Tennessee statute, for instance, states:

> Notwithstanding any law to the contrary, any provision of a settlement agreement entered into by a governmental entity that has the effect of prohibiting the disclosure of the identities of persons relating to a claim by any of the parties is void and unenforceable as contrary to the public policy of this state.[128]

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[124] UTAH CODE § 34A-5-114(2)(c) (LexisNexis 2024); *see also* H.B. 55, 2024 Leg., Gen. Sess. (Utah 2024).

[125] Of course, the reform could have an effect that we do not foresee; the effects of these provisions have not been explored either empirically or qualitatively, although it's also worth noting that we are not the first to doubt the law's efficacy. *See, e.g.*, Hoffman & Lampmann, *supra* note 8, at 168 (dismissing New York's effort as a "virtual husk").

[126] Gretchen Carlson & Julie Roginsky, *N.Y. Must Ban Work Harassment NDAs*, N.Y. DAILY NEWS (Mar. 2, 2022), https://www.nydailynews.com/2022/03/02/gretchen-carlson-and-julie-roginsky-ny-must-ban-work-harassment-ndas. Journalists Gretchen Carlson and Julie Roginsky further explained: "In exchange for a settlement, employees will always be pressured to 'prefer' a non-disclosure agreement." *Id.*

[127] Alice K. Jump & Ethan Krasnoo, *A Practical Guide to New York's Confidentiality Waiver Requirements for Employment Discrimination Settlement Agreements*, LAW.COM (June 22, 2011), https://www.law.com/newyorklawjournal/2021/06/22/a-practical-guide-to-new-yorks-confidentiality-waiver-requirements-for-employment-discrimination-settlement-agreements. There is, importantly, "nothing in the statute that prevents an employer from asserting that it will not settle the matter unless confidentiality is the employee's preference." Minna J. Kotkin, *Reconsidering Confidential Settlements in the #MeToo Era*, 54 U.S.F. L. REV. 517, 532 (2020) [hereinafter Kotkin, *Reconsidering Confidential Settlements*]. More broadly, because a settlement agreement is a contract between multiple parties, it's a conceptual muddle to try to discern which of multiple terms were the choice of which parties.

[128] TENN. CODE § 29-34-106(a) (2023).

Needless to say, limiting coverage to government defendants drastically reduces the scope of these reforms, since only a tiny sliver of the workforce can be expected to see any effect.[129]

Two other key limitations apply to all three types of reform. First, in an effort to address concerns about victim privacy and possible backlash, all state-level reforms (including California's STAND Act) include provisions to protect the victim's identity. Second, all the reforms allow parties to conceal the settlement amount.[130] Both safeguards, we discuss in Part IV.A.4., may influence the reform's impact on litigation. Below, Table 1 summarizes the current legislative landscape.

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[129] For context: As of 2022, Arizona had 251,599 full-time state and local government employees—a mere 3% of the state's population. U.S. CENSUS BUREAU, 2022 CENSUS OF GOVERNMENTS, SURVEY OF PUBLIC EMPLOYMENT & PAYROLL DATASETS & TABLES: STATE AND LOCAL GOVERNMENT EMPLOYMENT DATA (2023); *QuickFacts: Arizona*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/AZ/PST045223.

[130] Many have long argued that settlement amounts can and should be shielded from scrutiny. *See, e.g.*, Levmore & Fagan, *supra* note 50, at 313, 341 (advocating settlement reforms that bar litigants from keeping the subject matter of the dispute confidential but permit the parties to keep the settlement amount confidential and arguing that these reforms "are likely superior" to those that take a harder-edged approach because, when the settlement sum is revealed, "news of a settlement amount sets a floor for later settlements with other plaintiffs"); Jack B. Weinstein & Catherine Wimberly, *Secrecy in Law and Science*, 23 CARDOZO L. REV. 1, 25 (2001) ("There is no strong reason to oppose some form of secrecy as to settlement amount."); Zitrin, *South Carolina Court Rules*, *supra* note 88, at 887 ("I do not object to keeping the amount of the settlement secret; there are valid reasons for doing this.").

TABLE 1: CONTENT OF STATE ENACTMENTS RESTRICTING SECRET SETTLEMENTS

State	Law(s)	Type(s) of Claims Covered			Approach to Voiding NDA Terms		
		Sexual Assault & Harassment Claims	Sex Discrimination Claims	Other Job Discrimination Claims	Fully Voided	Voided Unless Claimant Wants Secrecy	Voided Only Where Govt Is a Party
Arizona	H.B. 2020 (2018)	✓					✓
California	S.B. 820 (2018)	✓	✓		✓		
	S.B. 331 (2021)			✓	✓		
Hawaii	H.B. 2495 (2022)	✓			✓		
Illinois	S.B. 0075 (2019)	✓	✓	✓		✓	
Louisiana	H.B. 197 (2019)	✓					✓
Maine	H.P. 771 (2022)	✓	✓	✓		✓	
Maryland[131]	S.B. 1010 (2018)	✓			—	—	—

[131] Maryland provides a fourth approach to restrict the use of secret settlements. Under the state's reform, employers with fifty or more employees must electronically submit to the state's Commission on Civil Rights answers to a survey on (i) the number of settlements made by or on behalf of the employer after an allegation of sexual harassment by an employee, (ii) the number of times the employer has paid a settlement to resolve a sexual harassment allegation against the same employee over the past ten years of employment, and (iii) the number of settlements made after an allegation of sexual harassment that included a nondisclosure provision. *See generally* MD. CODE ANN., LAB. & EMPL. § 3-715 (West 2024).

State	Law(s)	Type(s) of Claims Covered			Approach to Voiding NDA Terms		
		Sexual Assault & Harass-ment Claims	Sex Discrimi-nation Claims	Other Job Discrimi-nation Claims	Fully Voided	Voided Unless Claimant Wants Secrecy	Voided Only Where Govt Is a Party
New Jersey	S. 121 (2019)	✓	✓	✓	✓		
Nevada	A.B. 248 (2019)	✓	✓		✓		
New Mexico	H.B. 21 (2020)	✓	✓	✓		✓	
New York	S. 7507-C (2018)	✓	✓			✓	
	A. 8421 (2019)			✓		✓	
Oregon	S.B. 726 (2019)	✓	✓	✓		✓	
Tennessee	H.B. 594 (2019)	✓					✓
Texas	H.B. 55 (2024)	✓				✓	
Vermont[132]	H.707 (2018)	✓			✓		
Washington	H.B. 1795 (2022)	✓	✓	✓	✓		

[132] Vermont's approach is somewhat limited in that the complainant may "lodg[e] a complaint of sexual harassment committed by any person with [the government]," but could be prohibited from disclosing information to private parties. VT. STAT. ANN. tit. 21, § 495h(h)(2) (2024).

II. THE TIRED TRANSPARENCY DEBATE

To this point, we have shown that debates concerning secret settlements are not new. Even though the #MeToo movement has energized a new, nationwide effort to crack down on secret settlements, Transparency Effort 2.0 is just the latest chapter in a long-running saga.

In this Part, we dive into the decades-old debate that has pervaded both efforts and consider the most common arguments that are—and that have long been—made in favor of, and against, transparency reforms. Along the way, we catalog an array of positive (Part II.A) and negative (Part II.B) predictions of how restricting confidential settlements may affect the civil litigation landscape. We then show that, even though these predictions have loomed large for more than three decades, none have, so far, been subject to meaningful empirical scrutiny (Part II.C).

A. Reformers' Arguments

Those who favor transparency reforms advance six principal arguments. First, reformers contend that restricting secret settlements makes the world a safer place by revealing serious misdeeds sooner, whether pollution, manufacturing defects, or, as is our focus here, sexual assault and abuse.[133] In particular, laws like the STAND Act deter misconduct. They "prevent repeat offenses" and "deter people in positions of power from committing the misconduct in the first place" when those people know that publicity is a likely consequence.[134] A jurisdiction that outlaws secret settlements, the argument goes, is likely to be safer than a jurisdiction that permits their entry.

Second, advocates offer two distinct but overlapping reasons why reforms help victims access justice. To begin, advocates point out that abuse is frequently isolating, and secret settlements can "entrench victims' feelings of shame" and isolation.[135] Conversely,

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[133] *See* Drahozal & Hines, *supra* note 17, at 1472 ("The principal argument against secret settlements . . . [is that they] harm the public by suppressing information about health and other hazards.").

[134] Mallory Perazzo, *Silenced No More: Preventing Workplace Discrimination Through Nonenforcement of Confidentiality Agreements*, U. CIN. L. REV. BLOG (Feb. 28, 2022), https://perma.cc/2DCD-E9V4; *see also* Scott Altman, *Selling Silence: The Morality of Sexual Harassment NDAs*, 39 J. APPLIED PHIL. 698, 707 (2022) (arguing that NDAs allow wrongdoers to "hide their wrongdoing and avoid social punishment" and "contribute[ ] to the prevalence of sexual harassment").

[135] Altman, *supra* note 134, at 698. Similarly, Professor David Hoffman and attorney Erik Lampmann have argued that NDAs keep survivors from "openly and honestly

when settlements are disclosed, those disclosures can show victims that they are not alone, and this knowledge can fortify them with the courage necessary to confront their abusers, including by taking legal action.[136] Advocates then explain that NDAs often muzzle not only victims, but also their lawyers. That means NDAs can preclude plaintiffs' lawyers from touting their past experience—and this compelled silence makes it harder for victims to identify and retain counsel with relevant expertise.[137]

Third, and relatedly, reformers argue that secret settlements distort public perceptions of both workplaces and courts. As to workplaces: by shielding abusive conduct from scrutiny, secret settlements skew public perceptions of employment discrimination and equal opportunity, leading some to believe that the sexual harassment problem has been fixed—when, in fact, it endures.[138] As STAND and Silenced No More sponsor California Senator Connie Leyva explained: "[W]orkers must be able to speak about their own experiences if we are going to have meaningful and public conversations about effectuating real change."[139] As to courts: secret settlements skew—and sour—public views concerning contemporary litigation. With clearly meritorious cases (such as those involving Weinstein's predations) resolved confidentially, the media might see only cases with shakier facts and less obvious merit. "This situation," reformers insist, "leads to unfounded claims that the 'American civil justice system is broken.'"[140]

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talk[ing] about their experiences and [ ] form[ing] coalitions with other survivors." Hoffman & Lampmann, *supra* note 8, at 179.

136 Ellen J. Zucker, *NDAs: Is There Anything Worth Keeping?*, 66 BOS. BAR J. 22, 22 (2022) (explaining that NDAs can "leave victims with feelings of isolation and self-doubt, as many believe—incorrectly—that what they experienced happened to them alone").

137 *See Secret Settlements—Our Stand*, PATRICK MALONE & ASSOCS., https://perma.cc/PGZ5-GG7H (discussing this dynamic). One caveat is that, pursuant to some states' laws, some NDA provisions that limit attorneys' discussion of past experience may be unlawful, even absent particularized reform. *See* Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1959–62 (2017) (discussing American Bar Association Model Rule 5.6(b)).

138 Kotkin, *Invisible Settlements*, *supra* note 9, at 931 (explaining that "the discourse about employment discrimination is skewed against workers by virtue of secrecy"); *see also* Russell-Kraft, *supra* note 32, at 1 ("[Secrecy] . . . deprives the public of information about how widespread the problem of workplace harassment is.").

139 Connie M. Leyva, *Senate Bill 331: Silenced No More Act*, COMM'N ON THE STATUS OF WOMEN & GIRLS (Feb. 8, 2021), https://perma.cc/D8QA-JZCV.

140 Martin J. Healy, Jr. & David P. Huber, *Sunshine Is Vital to Public Safety*, 92 ILL. BAR J. 138, 141 (2004).

Fourth, reformers argue that transparency measures promote the accuracy of adjudication. In particular, evidence that a defendant has harassed or abused others may be admissible at trial—and, if admitted, can play a powerful role in the trajectory of a case, especially because, in the absence of corroborating evidence, sexual harassment and abuse claims tend to "merely pit[ ] the plaintiff's word against the defendant's."[141] But certain NDAs keep this crucial evidence under wraps—out of reach of both plaintiffs' counsel and the ultimate factfinder. Furthermore, when judge and jury hear that a defendant's abuse of a particular plaintiff is part of a larger pattern of malicious conduct, that fact can, very often, subject the abuser—and, sometimes, even the abuser's employer—to punitive damages.[142] Again, NDAs can hide or shield that critical fact.

Fifth, in what is perhaps less an argument than an anti-argument, reformers express doubt that, if NDAs are outlawed, critics' dire predictions will, in fact, materialize.[143] So, for example, while critics (as explained below) argue that, without secrecy, cases simply won't settle, reformers are skeptical. As one plaintiffs' lawyer put it, "a nonconfidential out-of-court settlement would likely still look more attractive to most defendants than a

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[141] *Rethinking the Silent Treatment*, *supra* note 48, at 292. In federal court, Federal Rule of Evidence 404(b)(1) excludes evidence of a person's "crimes, wrongs, or acts" used to prove that the person acted "in conformity" with the character of one who would commit such acts, and thus is more likely to have committed alleged acts in the instant case. However, this propensity-based exclusion was abrogated by statute in 1994 with respect to a party's other sexual assaults or child molestations. *See* Pub. L. No. 103-322, § 320935(a), 108 Stat. 1796, 2137 (1994); FED. R. EVID. 415 (civil cases); FED. R. EVID. 413–414 (criminal cases); *see also Rethinking the Silent Treatment*, *supra* note 48, at 292. A court must still find that the evidence is not substantially more prejudicial than probative per Rule 403. Some scholars suggest that, in practice, this hurdle is frequently overcome. *See* Bauer, *supra* note 65, at 492; Fromholz & Laba, *supra* note 64, at 13. Finally, not all facts covered by an NDA are covered by Rule 415; for example, acts of sexual harassment that do not involve sexual assault are uncovered by this Rule, and therefore Rule 404(b)(1) excludes use of them for propensity-based reasons.

[142] Mizrahi, *supra* note 26, at 134–35 (explaining that "evidence that an employer repeatedly shielded a serial harasser, or condoned harassment in general, serves as a basis for punitive damages," and conversely, "[w]hen this conduct is covered up . . . it limits a plaintiff's ability to prove that punitive damages are warranted").

[143] Some reformers also push back against some of opponents' other claims. Thus, for instance, whereas opponents claim that many survivors *want* NDAs, *see infra* notes 165–67 and accompanying text, some reformers are dubious, *see, e.g.*, Russell-Kraft, *supra* note 32 (quoting Boston civil rights attorney Rebecca G. Pontikes, who explained that in her two decades of legal practice: "'Never in my experience has a plaintiff said to me, "Rebecca, I want to have a really broad confidentiality agreement so neither of us can say anything about this"'").

public trial."[144] Or, as Professor Richard Zitrin, another transparency advocate, has observed: "[T]here are no empirical studies or even 'anecdotal' evidence indicating that it is actually harder to attain a settlement when secrecy is not permitted."[145]

Sixth and finally, certain reformers contend that expansive NDAs inflict serious psychological injury on survivors of abuse.[146] NDAs, reformers insist, doom victims to a life that's less than authentic, aware that a casual slip of the tongue could lead to a lawsuit and massive financial loss. This, some say, constitutes a perpetual revictimization at the hands of an abuser. As Professor David Hoffman has explained: "There's a psychological harm that results from agreeing to not tell the story of your own life. And that psychological harm is not one that you'd appreciate, probably, when you first sign that contract."[147]

Illustrating this dynamic, media specialist Rowena Chiu, another of Weinstein's victims, left her home, family, and friends to avoid the challenges of keeping silent:

> I moved to Central America, lived in Guatemala for five years. So I was away from family and friends. I couldn't really work in the industry anymore. I was afraid, because I couldn't explain to anybody what had happened.

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144 Frazier, *supra* note 103, at A1 (quoting Chicago plaintiffs' lawyer Robert Clifford); *see also* Chuck Noteboom, *Courts Get Wise to Harmful Secret Settlements*, 18 TEX. LAW. 664 (Oct. 7, 2002) ("Defendants have said that without the protection a confidentiality agreement affords, they will be less likely to settle cases at all. Their objection rings hollow because if they are trying to avoid publicity, a settlement is still preferable to a public trial."); Jack H. Friedenthal, *Secrecy in Civil Litigation: Discovery and Party Agreements*, 9 J.L. & POL'Y 67, 95–96 (2000):

> [I]t seems unlikely that even a total ban on confidentiality provisions would be a major deterrent to settlement. Plaintiffs would still want their money as soon as they could get it and without risk of a loss at trial. Defendants would still want to avoid trial in order to limit dissemination of bad publicity as much as possible.

145 Zitrin, *Against Secret Settlements*, *supra* note 62, at 119; *see also* Dana & Koniak, *Scourge on Society*, *supra* note 81 (explaining that, although reform has long been resisted on the basis that, without NDAs, cases won't settle and courts will become "backlog[ged]," in fact, "[t]here is virtually no evidence to support those claims").

146 As noted, while victims have discussed this dynamic at some length, academics have—curiously—mostly ignored it. *See supra* note 51.

147 *Gretchen Carlson and the Complicated Truth About NDAs*, CBS NEWS (Mar. 1, 2020), https://perma.cc/K4K7-CVBL; *see also* Gretchen Carlson & Julie Roginsky, *Door Opens for Justice for Victims of Workplace Assault, Harassment*, STAR TRIB. (Apr. 3, 2022), https://perma.cc/Y4JJ-MAZX (describing the "psychological and professional toll of these concealment clauses"); Russell-Kraft, *supra* note 32 (explaining reformers' view that NDAs can be "isolating and impede healing").

> . . .
> It was not something I was ever able to get away from. I found it an impossible burden to bear, really. And it came to a point where I tried to kill myself a couple of times. And I really felt I was never going to get away from the secret.[148]

Guitierrez fared only modestly better. She recalled that, "[t]he moment" after she signed the NDA that committed her to a lifetime of silence: "I really felt it was wrong."[149] In short order, she developed an eating disorder and battled depression.[150] "I was completely destroyed."[151] With two decades to reflect on her ordeal, Perkins felt similarly. What Weinstein did, Perkins said, was of course horrendous, "but what broke my heart is what happened when I went to the lawyers."[152]

B. Opponents' Arguments and Dire Predictions

Opponents, not surprisingly, see the world differently. They insist that transparency reforms will unleash a parade of horribles: disarming victims who have the courage to sue, spurring frivolous copycat lawsuits, and drowning courts in a sea of protracted litigation.[153] Opponents' arguments fit into four distinct buckets.

First, some reform opponents predict that, if NDAs aren't available, the courts will be hit with a sharp increase in filings as

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148 Carmen Merrifield, *What's Changed to Protect Women Since Harvey Weinstein's Accusers Went Public?: 'Everything . . . and Nothing'*, CBC NEWS (Jan. 7, 2020), https://perma.cc/7ZCD-87DB.

149 FARROW, CATCH AND KILL, *supra* note 1, at 62.

150 *Id.*

151 *Id.*

152 KANTOR & TWOHEY, SHE SAID, *supra* note 47, at 68.

153 At one time, opponents also insisted that secret settlements did not actually shield public health hazards from scrutiny—that "the argument that . . . settlement agreements conceal information critical to public safety is contrived." Robert N. Weiner, *Protective Orders and Nest Feathering*, LEGAL TIMES, Sept. 23, 1991, at 29, 30; *see also* Arthur R. Miller, *Private Lives or Public Access?*, 77 A.B.A. J. 65, 66–67 (1991) [hereinafter Miller, *Private Lives*]:

> [I]t is alarming to think . . . confidentiality agreements are being used to conceal information regarding hazardous consumer products, toxic waste dumps, or other potentially harmful activities. The allegations that courts are concealing such information apparently stem[ ] from news media reports about a handful of cases. . . . These reports, however, do not withstand scrutiny.

However, as evidence putting the lie to that assertion has piled up, it seems that opponents have, perhaps wisely, pivoted. For the numerous secret settlements that have concealed information critical to public safety, see *supra* notes 56–63.

defendants refuse to settle (including in the all-important period between when counsel is retained but before a lawsuit is filed).[154] Some add that news of claims will amplify this effect: as word spreads that a defendant's checkbook is open, ever more plaintiffs will come out of the woodwork, perhaps even those with no genuine claim to relief.[155] Public settlements, on this latter view, will send "unintended signals" to the world that the defendant is willing and able to pay or is otherwise an "easy target[ ]."[156] This signaling, in Richard Epstein's words, will unleash a "litigation explosion."[157] It will also make certain companies "targets" of baseless litigation.[158]

Second, some predict not just more litigation, but also more protracted litigation because defendants will lose the incentive to settle.[159] This prediction turns on defendants highly valuing secrecy as a litigation outcome. If a defendant can't gain secrecy,

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[154] Professor Scott Moss has called this the "conventional economic wisdom," and it is supported by illustrious scholars. Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 882 (2007); *see also, e.g.*, POSNER, *supra* note 105, at 766:

> When a case is settled for money . . . the parties can if they wish agree to keep its terms secret. This becomes an inducement to defendants to settle large cases rather than try them; they avoid a public judgment that would encourage further suits by persons situated similarly to the victorious plaintiff. Ordinarily the plaintiff will be happy to agree to such a confidentiality provision because it will enable a quicker and larger settlement.

[155] *E.g.*, Kotkin, *Reconsidering Confidential Settlements*, *supra* note 127, at 529 ("Employers insist on the importance of keeping settlements secret, believing that [if there are disclosures] they will be deluged with similar actions from disgruntled employees."); Dana & Koniak, *Lawyer Cartels*, *supra* note 75, at 1225 ("One rationale for the use of secret settlements is that secrecy is necessary because the disclosure of a large settlement in a frivolous case will encourage other baseless suits."); Knutsen, *supra* note 73, at 964 (explaining that, if secret settlements are limited, "there is a real possibility that lawsuits that would not have otherwise been brought will suddenly appear"); Epstein, *supra* note 41, at D4 (predicting that, if secret settlements are limited, the disclosure of settlements will "spur[ ] additional lawsuits" and, in fact, will "increase[ ] dubious as well as sound litigation").

[156] Dawn Shawger McCord, *The Secret to Keeping Settlements Secret*, 33 LITIG. 45, 47 (2007). Scholars have echoed this argument. *See, e.g.*, POSNER, *supra* note 105, at 766–67; ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 66 (2003); Andrew F. Daughety & Jennifer Reinganum, *Hush Money*, 30 RAND. J. ECON. 661, 663 (1999) ("[B]y engaging in a confidential settlement (as compared to, e.g., either trial or an open settlement), the early plaintiff and the defendant are able to reduce the likelihood that the later plaintiff files suit.").

[157] Epstein, *supra* note 41, at D4.

[158] McCord, *supra* note 156, at 47.

[159] *See, e.g.*, Gilat Juli Bachar, *A Duty to Disclose Social Injustice Torts*, 55 ARIZ. STATE L.J. 41, 51 (2023) ("[L]imiting confidential settlements entails a price, including potentially . . . discouraging defendants from settling."); Stephen E. Darling, *Confidential*

the argument goes, the benefit of settling decreases, so the defendant may as well litigate to the hilt.[160] Needlessly higher litigation costs will result—a social-welfare loss that may not be recouped via other welfare gains.[161] Indeed, some even argued that South Carolina's comparatively toothless Rule 5.03(c) would have this effect and that even that rule would "deter many settlements, which is contrary to the interests of the parties, the courts, and the public."[162]

Taking the argument a step further, many also predict that, as settlements stall, there will be negative downstream effects. Courts will be clogged, scarce judicial resources will be diverted, and society's interest in the expeditious resolution of disputes will be compromised.[163] Putting these various arguments together, the California Chamber of Commerce and seven other business-interest organizations explained when opposing the state's

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Settlements: The Defense Perspective, 55 S.C. L. REV. 785, 787 (2004) (predicting that reforms will "chill[ ]" voluntary settlements); Kotkin, *Invisible Settlements*, *supra* note 9, at 947 ("The proponents widely claim that without confidentiality, defendants would simply refuse to settle cases."); Elizabeth E. Spainhour, *Unsealing Settlements: Recent Efforts to Expose Settlement Agreements That Conceal Public Hazards*, 82 N.C. L. REV. 2155, 2162 (2004) ("Public policy favors encouraging settlement, and opponents of Sunshine laws argue that the laws would undermine this policy, overburdening the already strained judicial system with cases that might have settled but for Sunshine laws.").

160 As Harvard Law Professor Jeannie Suk Gersen has put it: "Absent a legally enforceable promise to keep the matter wholly out of the public eye, many powerful people would prefer to take their chances at defending themselves in court or in the press." Jeannie Suk Gersen, *Trump's Affairs and the Future of the Nondisclosure Agreement*, THE NEW YORKER (Mar. 30, 2018), https://www.newyorker.com/news/news-desk/trumps-affairs-and-the-future-of-the-nondisclosure-agreement.

161 *See, e.g.*, Altman, *supra* note 134, at 701 (explaining that, "[w]ithout enforceable NDAs . . . cases might settle less often, which would require some victims either to litigate—suffering trauma, expense, and loss of privacy—or to abandon their claims").

162 Letter from Gregory LaCost, Couns., Nat'l Ass'n of Indep. Insurers, to Larry W. Propes, Clerk of Ct., D.S.C. (Sept. 30, 2002) (on file with authors). We note that these predictions could be right, in principle, but nothing says they must be. We lack the space to present a detailed model here, but it is not hard to show that the duration and intensity of litigation might either rise or fall as a result of secrecy reform. Whether it does depends on the details of the reforms and the parties' valuation of secrecy.

163 *See, e.g.*, Givelber & Robbins, *supra* note 61, at 137 ("[P]rohibiting secret settlements would likely increase the number of trials."); Drahozal & Hines, *supra* note 17, at 1466–67 ("[E]liminating secrecy would reduce the likelihood of settlement, resulting in a growing backlog in the courts."); Heather Waldbeser & Heather DeGrave, Current Developments, *A Plaintiff's Lawyer's Dilemma: The Ethics of Entering a Confidential Settlement*, 16 GEO. J. LEGAL ETHICS 815, 816–17 (2003) ("[I]f confidentiality is not a condition of settlement, some defendants may be inclined to continue litigation . . . contribut[ing] to the backlog in the civil court system."); Frazier, *supra* note 103, at A1 (stating that "defense lawyers" argue that "banning secret settlements will clog courts because the incentive for a defendant to settle is greatly reduced if they fear plaintiffs won't keep the terms confidential").

STAND Act that, by chilling settlements, the STAND Act would "crowd the judicial dockets, delaying [the] timely resolution of such claims."[164]

A third argument stands in sharp tension with the flood-of-litigation argument just noted: Some critics argue that restricting the use of secret settlements will *stifle* lawsuits by deterring victims from confronting their abusers in the first instance. According to prominent plaintiffs' lawyer Gloria Allred, victims of sexual assault or harassment often choose to settle privately with their abusers because public disclosure only compounds their suffering, whether in the form of shame, fear, or backlash.[165] Yet, banning secret settlements deprives victims of that desirable option. As a result, victims might feel compelled to "opt out of the public justice system and into private arbitration or alternative dispute resolution, where the ban may not apply."[166] Likewise, prominent plaintiffs' lawyer Debra Katz has argued that efforts to force transparency aren't actually salutary: "The victim's interest in privacy, particularly after an experience of sexual harassment, should be respected and prohibiting settlement non-disclosure agreements would almost certainly deter many people from coming forward at all."[167]

Fourth, others are less sure that a defendant's willingness to settle will be affected, but they argue that settlement *sums* will surely decline[168] and that, more generally, the reform will deprive plaintiffs of critical bargaining leverage. On this point, plaintiffs' lawyer Ellen Zucker cautions:

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164 Letter from Cal. Chamber of Com. et al. to Cal. Assemb. Comm. on Judiciary (June 26, 2018) (on file with authors). Richard Epstein sounded a similar warning, predicting that, if NDAs were limited, defendants would predictably respond by resisting settlement and even discovery. Epstein, *supra* note 41.

165 *See* Allred, *supra* note 38. Some also argue that victims of harassment might fear that the knowledge of a settlement will harm their future job prospects because the settlements can taint them as litigious. *See* Prasad, *supra* note 93, at 2516.

166 Knutsen, *supra* note 73, at 977. Supporting this point, Areva Martin, who has reportedly "represented dozens of women who have experienced workplace sexual harassment not unlike the claims shared by Weinstein's victims," has written: "Many of my clients would never have come forward if they knew the only option was full public disclosure of their experiences." Areva Martin, *How NDAs Help Some Victims Come Forward Against Abuse*, TIME (Nov. 28, 2017), https://perma.cc/MB8G-6WV9.

167 *Katz & Alejandro Testimony*, *supra* note 39, at 7.

168 *See, e.g.*, Drahozal & Hines, *supra* note 17, at 1471 ("If secret settlements were to be eliminated, plaintiffs who otherwise would settle secretly presumably would receive less in settlement.").

> [A]bolishing NDAs only in cases of sexual harassment, as many of the current bills propose, would eliminate critical bargaining power and leverage for victims of sexual harassment while leaving such leverage in place where claimants have raised concerns about other forms of misconduct. However well-meaning, this would leave victims of sexual harassment with fewer tools to resolve disputes, thereby cementing the very power imbalance that lies at the core of sexual harassment itself.[169]

Harvard's Jeannie Suk Gersen concurred: "Sometimes the *only* bargaining chip the less powerful party has is the possibility of silence."[170] Putting an even finer point on it, plaintiffs' lawyer Areva Martin asked: "Bill O'Reilly allegedly paid $32 million dollars to settle a sexual harassment claim made by a Fox News Analyst. Would he have settled at all, not to mention for that amount, without the promise that the story would remain confidential?"[171]

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So goes the debate over secret settlements, trading in a range of theories about what victims want, how perpetrators will respond, and the resulting effects on settlement rates, settlement amounts, deterrence, victims' mental health, litigation costs, and court congestion. Confident predictions abound, with warring forecasts about direct and net effects.

Yet, after clearing away the underbrush, many of the predictions, really, backstop on the following three questions:

1. *What is the effect of confidentiality bans on plaintiffs' willingness to file suit?* Opponents actually offer conflicting predictions. Some say there will be a dearth of claims, while others say a deluge of filings will result.
2. *Will defendants still be willing to settle before trial?* Opponents confidently assert that settlements will stall; without

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169 Zucker, *supra* note 136, at 23.

170 Gersen, *supra* note 160; *see also* Debra S. Katz & Lisa J. Banks, *The Call to Ban NDAs is Well-Intentioned. But It Puts the Burden on Victims*, WASH. POST (Dec. 10, 2019), https://www.washingtonpost.com/opinions/banning-confidentiality-agreements-wont-solve-sexual-harassment/2019/12/10/13edbeba-1b74-11ea-8d58-5ac3600967a1_story.html ("In nearly all settlements, from personal injury claims to contractual disputes, confidentiality provisions are an important bargaining chip for plaintiffs.").

171 Martin, *supra* note 166.

secrecy, opponents insist, there won't be settlements. Reformers are skeptical.

3. *Are policymakers condemning judges and litigants to more protracted, intense, and costly litigation, with attendant costs in the form of delayed justice and congested courts?* Opponents say yes. Reformers, again, doubt it's so simple.

To this point, these key questions have defied resolution, which has not only stunted reform but also undermined the substance and credibility of the surrounding debate.

C. The Limits of Existing Empiricism

The above suggests that the debate has long traded in a few core questions. However, empirical inquiry into these theoretically testable claims has been virtually absent. Indeed, collecting data on secret settlements is like searching for the dog that doesn't bark: settlement agreements by and large are private contracts inaccessible to the public, not to mention that *secret* settlements are, by design, meant to stay secret.[172] As one commentator has forthrightly put it: "[N]either advocates nor opponents of Sunshine laws can offer empirical evidence in support of their positions."[173] And from another: "Much of the discussion of secret settlements is based on anecdotes rather than systematic data collection."[174]

Testing of transparency reforms began in the early 2000s, when a pair of papers examined the impact of Florida's Sunshine in Litigation Act—which, as noted, barred secrecy in any documents relating to a "public hazard"—on general tort litigation in that state.[175] The studies found no evidence that Florida's reform

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[172] *See supra* notes 74–77 and accompanying text; *see also* Dana & Koniak, *Lawyer Cartels*, *supra* note 75, at 1218:

> Discerning the incidence of secret settlements and settlements that restrict future practice is difficult because the former are by definition secret and the latter are by definition in settlements, many of which are secret and all of which are private contracts not easily accessible to the press or public. Empirical data on the frequency of these practices is therefore unreliable . . . .

[173] Spainhour, *supra* note 159, at 2165; *see also* Am. Judicature Soc'y, *supra* note 52, at 304 (statement of Kathleen Sampson) ("Unfortunately, there is a lack of meaningful data . . . on the impact of 'sunshine litigation.'"); Kotkin, *Invisible Settlements*, *supra* note 9, at 947 ("No studies have been done in those states with sunshine legislation.").

[174] Drahozal & Hines, *supra* note 17, at 1460.

[175] *See* James E. Rooks, Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 55 S.C. L. REV. 859, 867–71 (2004) (finding no evidence that Florida's Sunshine in Litigation Act worked to chill settlements); Diana Digges, *Confidential Settlements Under Fire in 13 States*, 2 ANN. ATLA-CLE 2769 (2001) (noting that, according to a recent study by

chilled settlements.[176] However, these papers simply examined trends in tort filings before and after the reform, without any rigorous comparison to other case types or effort to control for wider litigation or other trends, sharply limiting their value.[177]

Next, in 2004, came a study from the Federal Judicial Center.[178] That study is sometimes erroneously cited as evidence of the paucity of secret settlements.[179] But the study's focus was much narrower: sealed settlement agreements that happened to be filed in federal district court. Not surprisingly, the study found that *those* settlements were extremely rare—not even one in two hundred cases had one.[180] The study said little about secret settlements more generally (other than suggesting that they are common), and the study said not a word about their impact on litigation patterns in courts.[181] As one scholar observed, given that "most settlement agreements are not filed with the court, any data from this study are incomplete at best."[182]

The latest entrant is a study by Professors Blair Bullock and Joni Hersch.[183] They focused on New Mexico's 2019 legislation banning secret settlements for workplace discrimination and harassment claims, pointing out that New Mexico is the only state that enacted transparency provisions without making other changes to governing law, thus limiting potential confounding

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Association of Trial Lawyers of America (not an unbiased source), per capita litigation rates fell in Florida following enactment of a state statute restricting secret settlements).

176 Rooks, *supra* note 175.

177 *See* Dana & Koniak, *Lawyer Cartels*, *supra* note 75, at 1225.

178 REAGAN ET AL., *supra* note 77.

179 *E.g.*, Molly McDonough, *Not Keeping a Secret: Study Finds Sealed Settlements Are Rare in Federal Courts*, 3 A.B.A. J. EREPORT 14 (2004) (quoting defense-side lobbyists seizing on the study to question the necessity of transparency reform activity); *Sunshine in Litigation Act of 2009: Hearing on H.R. 1508 Before the Subcomm. on Com. and Admin. L. of the H. Comm. on the Judiciary*, 111th Cong. 66 (2009) (statement of Hon. Mark R. Kravitz, Judge, D. Conn., for the Rules Comm. of the Jud. Conf. of the U.S.) (drawing on the Federal Judicial Center study to argue that any concern about secret settlements is overstated because secret settlements are rare).

180 REAGAN ET AL., *supra* note 77, at 1. For an overview of the unusual cases (such as those involving injured children or Rule 23 class actions) that tend to file settlement agreements with the court, see *supra* note 76.

181 REAGAN ET AL., *supra* note 77 (stating that "the practice of *confidential* settlement agreements is common" (emphasis in original)).

182 Mary Elizabeth Keaney, Note, *Don't Steal My Sunshine: Deconstructing the Flawed Presumption of Privacy for Unfiled Documents Exchanged During Discovery*, 62 HASTINGS L.J. 795, 803 (2010).

183 Bullock & Hersch, *supra* note 109.

variables.[184] Bullock and Hersch examined data from three sources: completed arbitrations at the American Arbitration Association (AAA); the Integrated Database, which reports certain data about the full set of employment-related cases in federal district courts; and a database from Lex Machina that purports to identify harassment cases in particular. Analyzing these data, the authors reported, inter alia, that the New Mexico transparency reforms increased filings of workplace discrimination and harassment claims but decreased settlement rates.[185]

Bullock and Hersch's study, however, is limited in several respects. First and foremost, it is limited by New Mexico's very small population. Starting with the AAA data, it is notable that, for all of 2019, the dataset contains just *four* employment-related arbitration disputes in the entire state prior to the secret settlement law's operative date,[186] and just *seventeen* in total from October 2017 to December 2021.[187] Another data limitation, as the authors acknowledged, is that the AAA data and the Integrated Database (i.e., court) data describe the substance of cases at only a coarse level, making it impossible to tell *what kind* of employment dispute is involved. It is thus possible, and even likely, that few of the small number of cases in their study—perhaps as few as one filed case per month, depending on the data source—were covered by New Mexico's secret settlement reform in the first place.[188] These are serious data problems that make credible inferences difficult at best.

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184 As we discuss in Part III.A, *infra*, unlike New Mexico, California enacted the STAND Act alongside a number of other reforms.

185 Bullock & Hersch, *supra* note 109, at 88–89.

186 *See id*. at 91 tbl.2, col.AAA.

187 *See Provider Organization Report Q4 2023*, AM. ARB. ASS'N, https://perma.cc/WXC8-JMAH. Of the seventeen arbitration disputes reflected there, presumably four of them are those listed in Table 2 of Bullock and Hersch's piece, meaning four disputes prior to the secret settlement law and thirteen after. Further, we were able to determine that, because New Mexico had arbitration filings involving any type of employment claim in *only eleven of the months of the entire study period*, there were *zero* arbitration claims in Bullock and Hersch's lone treatment state for a startling *forty of the fifty-one months*. Finally, we note that Table 2's "IDB" (Integrated Database) column lists fifty-one federal district court cases filed in New Mexico in 2019—an average of only 4.25 per month (the twelve per month they describe in their text refers to the total for New Mexico and Colorado considered together). Bullock & Hersh, *supra* note 109, at 91 tbl.2, col.IDB.

188 Bullock and Hersch's Table 2 does not report the number of 2019-filed cases in their Lex Machina dataset that came from each state. However, their Lex Machina data appear to have included 392 cases that were filed in either New Mexico or Colorado. Bullock & Hersh, *supra* note 109, at 106 tbl.1A, cols.2 & 3. If we assume that New Mexico accounted for the same share of these cases as it did of the overall set of IDB cases (51 / 304, or roughly 17%), then the Lex Machina data set would contain sixty-six New

Our study, to which we now turn, avoids these issues. We focus on a wide set of claims brought both before and after California's STAND Act took effect, and we use a suite of machine-learning techniques to develop and deploy richer measures of key litigation dynamics that have been the subject of legislative and policy debates, including the length and intensity of litigated cases. We also use a mixed-methods approach, supplementing our quantitative findings with interviews with experienced defense- and plaintiff-side counsel. These interviews help to interpret our empirical results and offer a fuller basis for drawing reliable conclusions about the effect of the STAND Act and, indeed, what we describe as its overall success.

III. METHODOLOGY AND FINDINGS

As noted, the debate about secret settlements thus far has been protracted and messy. But three questions really hang over—and, indeed, have preoccupied—reformers and those who oppose reform. First, if transparency reforms are enacted, what is the effect on case filings? Second, will defendants still be willing to settle sans secrecy, or, as many claim, will even modest transparency reform "deter many settlements, which is contrary to the interests of the parties, the courts, and the public"?[189] Third, in curbing secret settlements, are policymakers inevitably condemning judges and litigants to more protracted, intense, and wasteful litigation with attendant costs in the form of delayed justice and congested courts?

This Part, the core of our analysis, tackles those questions. Part III.A discusses California's twin reforms. Part III.B discusses our dataset and outlines how we used machine-learning and natural-language processing to identify cases that would be covered by the STAND and Silenced No More Acts. Having explained *what* our data are, Part III.C then explains *how* we deploy those data to study the STAND and Silenced No More Acts' impact. In Part III.D, we report our detailed estimates of the effects of the two laws on the volume of case filings, as well as STAND's effect on case duration and litigation intensity. Readers who are not interested in the gory definitional and statistical details offered by Parts III.B, III.C, and (especially) III.D can safely skip to

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Mexico cases for the entire Lex Machina analysis period of October 2017 through May 2023, *see id.* at 106, which is an average of roughly one filed case per month.

[189] Letter from Gregory LaCost to Larry Propes, *supra* note 162.

Part III.E. There, we summarize our quantitative findings and situate them in the debate over secret settlement policy. Finally, in Part III.F, we discuss qualitative evidence from our interviews with twenty-two plaintiff- and defense-side practitioners concerning settlement amounts.

A. Our Case Study: California's Reforms

We zero in on California, one of the first states to implement a transparency reform. Enacted in direct response to the Weinstein scandal, California's STAND Act outlaws any provision in a settlement agreement that prevents the disclosure of factual information related to a claim filed in civil court or complaint filed with an administrative agency regarding sexual assault, sexual harassment, or workplace discrimination.[190] For the remainder of the study, we refer to these as "covered actions." Per the STAND Act, such a provision in a settlement agreement, if entered into on or after January 1, 2019, is void as a matter of law. In 2021, California enacted the STAND Act's companion legislation known as the Silenced No More Act; it extends STAND's reach to a broader range of harassment or discrimination cases, such as those involving race, religion, gender, sexual orientation, disability, age, and military status.[191]

The STAND Act (particularly as fortified by the Silenced No More Act) is broad. But like other transparency mechanisms, California's reforms have three key exceptions. First, the reforms apply only to "claim[s] filed in a civil action or a complaint filed in an administrative action."[192] Thus, neither the STAND Act nor the Silenced No More Act prohibits the use of NDAs in the prelitigation phase of the dispute (such as where a lawyer has been retained and a demand letter has been sent to the defendant, but

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[190] *See* Paquette, *supra* note 36 (reporting that California State Senator Connie Leyva, who introduced the STAND Act, was "inspired" to write the bill based on the "Weinstein revelations"). Prior to STAND, California prohibited secret settlements when the plaintiff advanced a claim involving childhood sexual abuse or any act that could be prosecuted as a felony sex offense. CAL. CIV. PROC. CODE § 1002(a). Our analysis accounts for that wrinkle, as explained *infra* note 209.

[191] Silenced No More Act, 2021 Cal. Stat. at 8239 (cross-referencing CAL. GOV'T CODE § 12940(a), (h)–(k), which prohibits workplace discrimination based on "race, religious creed, color, national origin, ancestry, physical disability, mental disability, reproductive health decisionmaking, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status").

[192] CAL. CIV. PROC. CODE § 1001(a).

no claim has been filed with an administrative agency or in court). Second, California's reforms permit settlements to shield the identity of the claimant and all facts that could lead to the discovery of the claimant's identity, at the claimant's request.[193] Third, the enactments allow parties to conceal the dollar amount of the settlement.[194]

On the same day it enacted the STAND Act, California also enacted a law, SB 1300,[195] that altered various aspects of the state's sex harassment and antidiscrimination landscape. First, the law stated that harassment claimants need not show a decline in productivity to make out a claim.[196] Second, the law clarified that a claimant could create a "triable issue" based on only a "single incident," addressing a previously undecided question in state law.[197] Third, the law clarified that "[h]arassment cases are rarely appropriate for disposition on summary judgment,"[198] aligning the legislature with an existing state appellate court's holding that "hostile working environment" cases involve issues "not determinable on paper."[199]

Although it would be better for our purposes if the STAND Act had not been accompanied by any other statutory changes, we believe none of these provisions significantly altered California's litigation landscape. First, none of the three provisions of SB 1300 required reversing any statutory or case law. Second, only one of the three—blessing a "single incident" as a "triable issue"—was more than a legislative statement.[200] This combination of facts

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193 *Id.* § 1001(c). This carve-out "does not apply if a government agency or public official is a party to the settlement agreement." *Id.*

194 *Id.* § 1001(e).

195 Unlawful Employment Practices: Discrimination and Harassment, 2018 Cal. Stat. 6267 (codified at CAL. GOV'T CODE §§ 12923, 12940, 12950.2, 12964.5, 12965).

196 CAL. GOV'T CODE § 12923(a). In so establishing, the California legislature essentially sided with Justice Ruth Bader Ginsburg in her concurrence in *Harris v. Forklift System, Inc.*, 510 U.S. 17, 25 (1993).

197 CAL. GOV'T CODE § 12923(b). The statute addressed a case, *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000), that touched on this issue with respect to both federal and California law.

198 CAL. GOV'T CODE § 12923(e).

199 Nazir v. United Airlines, Inc., 100 Cal. Rptr. 3d 296, 331 (2009); *see also* Hayes v. Temecula Valley Unified Sch. Dist., 2018 WL 6177938, at *16 (Cal. Ct. App. 2018).

200 *See* CAL. GOV'T CODE § 12923. As to this argument, "[t]here is a presumption that the Legislature intended a statutory amendment to change the meaning of the statute only when there is a material change contained in the language of the amended act." Chris Micheli & Ashley Hoffman, *How California Lawmakers Responded Legislatively to the #MeToo Movement*, 53 U. PAC. L. REV. 724, 733 (2022). And as to the summary judgment question, the bill's author "removed from her bill all the statutory amendments that would have actually changed the legal standard for actionable harassment cases." *Id.* at 734.

satisfies us that our estimates can be regarded as driven by the secrecy reforms that are our focus.[201]

A final wild card—and a potentially significant limitation of our study's setting—is the COVID-19 pandemic, which struck roughly midway through the study period. Below we discuss some ways in which COVID-19 might explain or complicate our results, with particular attention to how court closures may have altered litigant incentives. In particular, COVID-19 worked a fundamental change in the nature of employment nationwide, changing work patterns and moving a significant amount of workplace interaction online, particularly for workers who perform professional service, desk, managerial, or administrative work. Such a shift could well change what an economist might call the extensive margin of sexual harassment lawsuits, either decreasing them (for instance, if declining in-person interaction reduced opportunities for harassment) or increasing them (for instance, if increased online interaction, or COVID-19-related social pathologies, unleashed higher amounts of harassment). In what follows, we remain attentive to the many interpretive challenges posed by COVID-19's presence in our case study, offering explanations and additional analyses where relevant. We also repeatedly note the greater reliability of those of our conclusions reached through analyses that do not depend on data from after COVID-19's onset.

B. Data and Methods: The L.A. Court Docket Dataset and Supplemental Qualitative Interviews

To test the impact of California's secret settlement reforms, we zero in on state trial courts in Los Angeles County—collectively referred to as the L.A. Superior Court. We focus on California for three reasons. First, the types of claims the California reforms cover—sexual harassment, sexual assault, and employment discrimination—are representative of those covered by the majority of reform states. Second, California's approach to restricting secret settlements (voiding NDAs

Further, the Assembly Judiciary Committee report on the bill referred to the provisions in question as "non-binding findings and declarations." *Id.* (emphasis omitted).

[201] An additional argument is that all the aspects of the legislative findings, if they *did* alter the law, would make litigation more attractive to plaintiffs and improve their chances of surviving summary judgment—tending to bias our findings in *favor* of predictions made by secrecy reforms' critics (more cases, litigated longer and more intensively). But there could also be complex effects on settlement patterns, which might work in the other direction, so we do not press this point.

altogether) has more bite than New York–style phantom reforms which allow the plaintiff to opt into a secret settlement she could sign in any event, and they have far broader coverage than Arizona-style government-only reforms, which apply very narrowly. Third, because California is the most populous state in the country and home to 12% of Americans, it provides a sizable sample despite the recent vintage of its reforms.[202]

Within California, we zero in on L.A. County in particular, again for three reasons. First, Los Angeles is a large metropolitan area and is diverse both in racial and socioeconomic terms.[203] Second, L.A. hosts the media production industry, which has been a hotbed of high-profile sexual harassment cases.[204] Accordingly, if reforms like the STAND and Silenced No More Acts have the negative consequences predicted by opponents, we should expect them to happen in L.A. Finally, the L.A. court system is massive—the nation's single largest trial court.[205] Given its size, it is large enough to provide a sizeable sample of cases covered by the STAND and Silenced No More Acts.

We compiled our case data set by applying web-scraping techniques to the L.A. Superior Court's website.[206] We collected all "unlimited civil cases"—cases with claims above $25,000[207]—filed in L.A. County trial courts between January 1, 2018, and July 1, 2022, which covers the period of time between one year before the date the STAND Act took effect and six months after the effective

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[202] For population information, see *QuickFacts: California*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/CA/PST045223.

[203] For demographic information, see *QuickFacts: Los Angeles City, California*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/losangelescitycalifornia,CA/PST045223.

[204] *See* Brooks Barnes, *After #MeToo Reckoning, a Fear Hollywood Is Regressing*, N.Y. TIMES (Oct. 24, 2022), https://www.nytimes.com/2022/10/24/business/media/hollywood-metoo.html (discussing the prevalence of sexual harassment in Hollywood's entertainment industry).

[205] Including all types of cases (i.e., the "unlimited"-claim-value civil cases as well as all other types of civil and criminal cases), L.A. courts dispose of several times as many cases each year as *all* federal district courts. In Fiscal Year 2019–2020, the L.A. County courts disposed of nearly 1.3 million cases. JUD. COUNCIL OF CAL., 2021 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 90 tbl.1 (2021). Combined, every federal district court terminated less than a third as many cases. *Federal Judicial Caseload Statistics 2020*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020 (reporting 300,372 civil case terminations and 88,730 criminal case terminations).

[206] The court's website is: https://www.lacourt.org/casesummary/ui/index.aspx?casetype=civil.

[207] CAL. CIV. PROC. CODE § 85 (West 2022).

date of the Silenced No More Act.[208] We downloaded a total of 262,553 cases with enough information to be useful in the rest of the process we now describe.

Analyzing the impact of the STAND and Silenced No More Acts requires identifying which cases were covered by each. For the STAND Act, that means identifying cases alleging an act of sexual harassment, workplace harassment or discrimination based on sex, failure to prevent workplace harassment or discrimination, or retaliation against a person reporting an act of harassment or discrimination.[209] For the Silenced No More Act, it means identifying cases alleging similar harms for a larger group of protected classes.

Unfortunately, no summary variable on the docket report identifies whether a case involved claims covered by these Acts, so we had to do so ourselves. We did so by downloading the first page of the complaints filed in each case[210] and then using natural language processing tools to determine whether cases were covered by STAND or Silenced No More.[211] We identified 4,483 cases as having claims that would cause the STAND Act to apply to them if the cases were filed at a time when it was in effect ("STAND-covered cases"); we identified another 11,600 cases that had claims that would trigger the Silenced No More Act if it were in effect ("Silenced No More–covered cases").[212] An additional 14,265 cases involved other employment claims (other employment cases).

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[208] Given the limited period for which we observed data after the Silenced No More Act took effect, our conclusions about that Act are more tentative than our conclusions about the STAND Act.

[209] Sexual assault–related claims are also covered by the STAND Act. However, a 2016 California law had already extended STAND-like protections to sexual assault cases that "may be prosecuted as a felony sex offense." *See* 2016 Cal. Stat. 5929 (codified as amended at CAL. CIV. PROC. CODE § 1002(a)). We cannot identify which sexual assault claims in a case are covered by § 1002(a), so we do not count sexual assault cases as covered by the STAND Act.

[210] We did not need to download the full complaints because the first page, which provides substantial information, is free to download (while additional pages are not).

[211] As we explain in detail in the Data Construction Appendix, this process was time consuming and cumbersome. *See* David Freeman Engstrom, Nora Freeman Engstrom, Jonah B. Gelbach, Austin Peters & Garrett M. Wen, Appendix to Shedding Light on Secret Settlements: An Empirical Study of California's STAND Act, https://perma.cc/U7L8-QLHW.

[212] The Data Construction Appendix provides more discussion about how we constructed the data we used in our analysis, including some imputation. The Summary Statistics Appendix provides some details about the resulting data on monthly case filings, the share of cases that continue at least eighteen months after they are filed, and the intensity of litigation as measured by docketed events. *See* Appendix, *supra* note 211.

A last note on methodology: to enrich and contextualize our empirical results, we also conducted interviews with twenty-two lawyers who have extensive experience in the relevant fields. Seventeen of these lawyers are L.A.-based employment attorneys, and five have a national practice. Among the L.A. interviewees, ten primarily represent plaintiffs, and seven predominantly represent employers. These semistructured interviews, which lasted approximately twenty minutes, were conducted by a senior member of our research team over Zoom, recorded, and then professionally transcribed. All interviewees were offered confidentiality; eight accepted that offer.[213]

C. Study Objectives and Approach

In analyzing the L.A. court filings, we sought to answer the three questions that, as already noted, have animated debates over secret settlement reforms:

1) *Filings*: Did the two reforms affect the volume of case filings?
2) *Duration*: Did the STAND Act affect the litigation duration of covered cases?
3) *Intensity*: Did the STAND Act affect litigation intensity in covered cases?

To study case filings, we focused on the monthly number of covered cases that are filed (for reasons we explain in the Summary Statistics Appendix,[214] our estimates are actually based on this variable's natural logarithm). To study case duration, we created a binary variable that equals one if a case lasted at least eighteen months.[215] To measure litigation intensity, we counted the number of docketed events in the 548 days following the case's

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[213] We identified potential interviewees first by combing through L.A. court dockets. Specifically, we identified the sixty most frequently hired lawyers in cases covered by the STAND and the Silenced No More Acts; these attorneys, we reasoned, likely specialize in sexual assault and harassment cases. We then supplemented this list by adding lawyers referred to us in initial interviews and by reviewing attorney advertisements on Google. In total, we contacted eighty-seven potential interviewees via email and interviewed all who responded and accepted our invitation, resulting in an approximately 25% acceptance rate. This sample is not necessarily representative. But it provides a mosaic of perspectives from experts who have witnessed the implementation of the STAND and Silenced No More Acts firsthand.

[214] *See* Appendix, *supra* note 211.

[215] Because month lengths vary, we used a cutoff of 548 days, regardless of the month in which cases were filed.

filing.[216] We fixed the term of days since case filing to ensure apples-to-apples comparisons when we analyze litigation duration and intensity.[217] We selected the eighteen-month term because it balanced two competing concerns: it's a long enough period after case filing to capture important case-duration effects,[218] and also a short enough window to make reasonable comparisons before and after the STAND Act took effect.

To study whether the STAND and Silenced No More Acts affected these variables, we exploit two sources of variation in our data: (a) time and (b) case type. Let's start with time. Given that we study two different Acts passed at different times, it's helpful to place our data into three critical time periods:

1) *Pre-STAND implementation*: January 1, 2018, through December 31, 2018.
2) *Intermediate period*: January 1, 2019, through December 31, 2021 (between the implementation of STAND and Silenced No More).

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[216] Docketed events include motions and other filings by parties, court orders, notations from the clerk of the court, and certain events related to nonparties' actions (e.g., intervenors).

[217] To understand why we limit the postfiling period we consider when analyzing case duration and litigation intensity, consider that (1) we observe the full history of case duration and docketed activity only for those cases that terminate within the time period we are able to observe, and (2) we have a longer observation period for cases filed before the STAND Act takes effect than for those filed after. Take, for example, two cases that ultimately will last forty-eight months and have three hundred docketed events. Assume that one is filed on January 1, 2018 (the beginning of the pre-STAND period), and one is filed on December 31, 2019 (the end of the post-STAND period). Because our observation period ends on July 1, 2022, we can observe the entire litigation history for the first case, but only thirty months of activity for the latter case. Comparing docketed events for these two cases will mechanically lead to the conclusion that the first-filed case had more docketed events, simply because we cannot see past month thirty for the second case. Comparing months of duration would have a similar effect, for the same reason.

Statisticians call this problem right-censoring (data are censored to the right of the time when observation stops), and one way to solve it is to ignore data after a small enough observation period so that the same amount of information is available for cases filed both pre- and post-STAND. *See* Jonah B. Gelbach, *Beyond Transsubstantivity*, 26 N.Y.U. J. LEGIS. & PUB. POL'Y 909, 973–74 (2024). We achieve that result by considering only the first eighteen months following case filing. Our reasoning in choosing an eighteen-month term was to balance two competing concerns: that's a long enough period after case filing to capture important case-duration effects, and also a short enough window to make reasonable comparisons before and after the STAND Act took effect. On the first point, 50% of STAND-covered cases filed in 2018 were terminated within eighteen months. On the second point, a chief concern is that the COVID-19 pandemic struck in March 2020, approximately three months after STAND took effect.

[218] Among STAND-covered cases, 40% of cases filed in 2018, the year before STAND took effect, were terminated within eighteen months. *See infra* Part III.C.1.a.

3) *Post–Silenced No More implementation*: January 1, 2022, through June 30, 2022.

Now consider three types of cases: (1) cases to which STAND would apply if it were in effect (STAND-covered cases), such as sexual harassment cases; (2) cases to which Silenced No More, but *not* STAND would apply if each were in effect (Silenced No More–covered cases), such as racial discrimination cases; and (3) employment cases that aren't in either of the first two categories (e.g., wage disputes). Combining the three time periods and three case types, we get the three-by-three matrix presented in Table 2.

TABLE 2: CASE TYPES, TIME PERIODS, AND THE EFFECTS OF THE STAND AND SILENCED NO MORE ACTS[219]

	Time Period		
Case Type	**Pre-STAND**	**Intermediate**	**Post–Silenced No More**
STAND-Covered Cases	Unaffected by Law	Affected by STAND	Zero or Small Effect of Silenced No More
Silenced No More–Covered Cases	Unaffected by Law	Unaffected by Law	Affected by Silenced No More
Other Cases	Unaffected by Law	Unaffected by Law	Unaffected by Law

Our research approach proceeds directly from Table 2's mix of treatment and control groups over time. To study the STAND Act's effects, we first compare how our variables changed between the pre-STAND and Intermediate periods. We call the result of this comparison the *STAND-covered cases difference*. If we knew that the STAND Act was the *only* change that would have affected our outcome variables over this time period, then we could stop there. To address the possibility that other changes we can't observe might have happened concurrently, we also calculate the difference in each outcome variable for Silenced No More–covered cases; we

[219] Color reproductions of the tables and figures in this Article are available at https://perma.cc/A52B-WAX2.

call this the *Silenced No More–covered cases difference*. The difference-in-differences estimate equals the STAND-covered cases difference minus the Silenced No More–covered cases difference.

Table 3 offers a way to visualize how the difference-in-differences calculations work. Two of its cells represent the numbers of STAND-covered cases filed in 2018 (cell labeled *W*) and 2019 (cell labeled *Y*); another two cells represent the numbers of comparison group cases filed in 2018 and 2019 (cells labeled *X* and *Z*). The yellow-shaded cells in this table involve only cases that were not affected by the STAND Act—either because their case type is a comparison group that is unaffected by the STAND Act (*W*, *X*, and *Z*), or because the time period predates the STAND Act's effective date (*Y*). The dark blue cell labeled *Y* corresponds to the one cell with cases that are (i) covered by the STAND Act's terms and also (ii) filed late enough that the STAND Act's terms are in effect no later than the date the cases were filed.

TABLE 3: HOW THE DIFFERENCE IN DIFFERENCES FOR THE NUMBER OF CASES FILED RELATES TO CASE TYPES, TIME PERIODS, AND THE STAND ACT

	Time Period		
Case Type	2018	2019	***Differences***
STAND-Covered Cases	**W**	**Y**	$Y - W$
Comparison Group	**X**	**Z**	$Z - X$
Differences	$W - X$	$Y - Z$	$(Y - W) - (Z - X)$

- In yellow cells, the cases in question were not affected by the STAND Act—either because their case type is a comparison group that is unaffected by the STAND Act, or because the time period predates the STAND Act's effective date.
- The dark blue cell corresponds to cells that involve the STAND-covered cases that are covered by the STAND Act.
- The orange cells contain differences that involve the treatment group of STAND-covered cases.
- The light blue cell contains the difference in differences.

The yellow cells of Table 3, not yet discussed, involve differences between numbers of cases that aren't affected by the STAND Act. For example, the bottom-left yellow cell, labeled $W - X$, represents the pre-STAND difference between the number of STAND-covered cases and the number of comparison group cases. The orange cells contain differences that involve the treatment group of STAND-covered cases. For example, the STAND-covered cases difference is $Y - W$ and is shaded orange; the post-STAND difference is $Y - Z$ and is also shaded orange. Finally, the light-blue cell contains the difference in differences. This figure can be obtained by subtracting the comparison group difference ($Z - X$) from the STAND-covered cases difference ($Y - W$).[220]

This widely used difference-in-differences strategy relies on the similarity of cases in the three case-type buckets. STAND-covered cases are similar to Silenced No More–covered cases in many respects, because both types of cases include many cases with allegations of discrimination or harassment based on a protected class. Of course, sex- and non-sex-based discrimination may stem from different motivations and take different forms. But we think the similarities between Silenced No More– and STAND-covered cases warrant using the former as a comparison group in our difference-in-differences analysis.

Our second comparison group is other employment cases—employment cases that are neither STAND-covered cases nor Silenced No More–covered cases, such as wage disputes. We chose employment cases because the majority of STAND-covered cases and Silenced No More–covered cases arise from that context. Hence, if other changes—say, other shifts in employment law or the labor market—are actually driving the trends in STAND Act outcomes we observe, these could be accounted for in non-STAND and non-Silenced No More–covered cases.

We study the effects of the Silenced No More Act using a similar strategy. STAND-covered cases were already subjected to secrecy limitations when the STAND Act was implemented on January 1, 2019. So, nothing related to the legal treatment of secret settlements changed for other employment cases between the Intermediate and Silenced No More Act periods. Therefore, we would not expect the Silenced No More Act to *cause* changes to

[220] It can also be obtained by subtracting the 2018 difference ($W - X$) from the 2019 difference ($Y - Z$).

STAND-covered cases.[221] We can thus use STAND-covered cases as a comparison group. As with our evaluation of the STAND Act's effects, we also use other employment cases as a second comparison group. Our rationale is similar. Even though these cases were not subject to either Act, they share an important similarity with Silenced No More–covered cases: both involve employment-related disputes.

D. Difference-in-Differences Estimates

Part III.D presents our core empirical analysis of the effects of the STAND Act (Part III.D.1) and the Silenced No More Act (Part III.D.2). This analysis and discussion unavoidably include aspects that some readers will find technical and quantitative. We encourage any reader who is uninterested in the statistical details to skip ahead to Part III.E, where we offer an accessible summary of our key findings.

1. Estimates for the STAND Act.

We analyze three outcome variables for the STAND Act: monthly filings of STAND-covered cases, the share of STAND-covered cases that last at least eighteen months, and litigation intensity, measured as the number of docketed events that occur within a case's first eighteen months.

a) Case filings. Table 4 reports the statistics used to estimate the effects of the STAND Act on monthly case filings. As noted above, we use the natural logarithm of case filings (log case filings) as our measure of this variable.[222] The top row of Panel A reports the average value for STAND-covered cases, with the second row containing estimated standard errors in parentheses. The numbers in the Table's left-most column represent the pre-STAND period of 2018, and those in the middle column are for 2019, the first year after the STAND Act. The final column reports the difference—the post-STAND number minus the pre-STAND number. In the year after STAND was implemented, filings of STAND-covered cases fell slightly. The change in average

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[221] As noted, Silenced No More principally extended the subject matter to which the STAND Act applied.

[222] See the Summary Statistics Appendix, *supra* note 211, for why the multiplicative nature of variation in monthly case filings makes this a better approach than using the level of monthly case filings.

log monthly filings was −0.04;[223] this cell's value corresponds to the orange $Y - W$ cell of Table 3. Following typical practice, we describe this difference as "4 log points." A difference of 4 log points corresponds to a drop of roughly 4% in the level of monthly filings.[224] Thus, Table 4's top row shows that monthly case filings among STAND-covered cases actually fell by about 4% after the STAND Act took effect.

[223] This number differs from $4.46 - 4.49$ (which is -0.03) due to rounding.

[224] Viewing X_2 as the number of cases filed per month post-STAND and X_1 as the pre-STAND number, we have $\ln X_2 - \ln X_1 = -0.04$. Using properties of logs, this implies that $X_2 = \exp(-0.04)\, X_1 = 0.9608 X_1$, which means that there was a 3.92%—approximately a 4%—reduction in monthly case filings between the two periods.

TABLE 4: DIFFERENCE-IN-DIFFERENCES ESTIMATES OF ONE-YEAR POST-IMPLEMENTATION EFFECT OF STAND FOR THE LOG OF THE NUMBER OF MONTHLY CASE FILINGS

		Pre-STAND 1/1/18 – 12/31/18	**Post-STAND 1/1/19 – 12/31/19**	**Post−Pre**
	Case Type	**Mean (S.E.)**	**Mean (S.E.)**	**Difference (S.E.)**
Panel A	STAND-Covered Cases	4.49	4.46	−0.04
		(0.05)	(0.04)	(0.06)
Panel B	Silenced No More–Covered Cases (*Not* Covered by STAND Act)	5.33	5.38	0.05
		(0.05)	(0.03)	(0.05)
	Difference	−0.84	−0.93	**−0.08**
		(0.07)	(0.05)	**(0.08)**
Panel C	Other Employment	5.49	5.58	0.09
		(0.03)	(0.04)	(0.05)
	Difference	−1.00	−1.13	**−0.13**
		(0.06)	(0.05)	**(0.08)**

The top pair of rows of Panel B reports the same information for Silenced No More–covered cases. The right-most column (which corresponds to the yellow $Z - X$ cell of Table 3) shows that filings of these cases rose by 5 log points in the year after STAND was implemented. The bottom pair of rows in Panel B reports information about the difference in log filings between the STAND and Silenced No More–covered cases for the pre-STAND period, the year following the implementation of STAND. The rightmost value in this row, presented in bold font in the table for ease of discovery, is the difference between the differences for the two types of cases, i.e., the *difference in differences*, which is a commonly used measure of the impact of a new law. Because log filings of STAND-

covered cases fell and Silenced No More case log filings rose, the difference-in-differences estimate is negative, at −0.08; this corresponds to the light blue $(Y - X) - (Z - W)$ of Table 3. This tells us that the change in STAND case filings was 8 log points—about 8%—lower than it would have been if filings of these cases had changed exactly on par with Silenced No More–covered cases.

If Silenced No More–covered cases are a good comparison group for STAND-covered cases—meaning that their change over time provides a good picture of what changes in STAND-covered cases would have looked like had the STAND Act not been enacted—then the difference-in-differences estimate of about an 8% reduction represents an estimate of the causal effect of the STAND Act on log filings of STAND-covered cases. We note, though, that the estimated standard error for the difference-in-differences estimate is as large as the estimate itself. This means that the difference-in-differences estimate is not statistically significantly different from zero.[225] Panel C of Table 4 repeats this exercise for employment cases that are not covered by either STAND or Silenced No More. It shows a difference-in-differences estimate of a 13 log-point drop, which is statistically significant at the 10% level.[226]

In sum, the two difference-in-differences estimates for the post-STAND impact were both negative. The estimate that uses Silenced No More–covered cases as a comparison group was statistically insignificant, and the one that uses other employment cases was statistically significant. This evidence provides some reason to think the STAND Act reduced case filings among STAND-covered cases, although the high standard errors for the difference-in-differences estimates mean that the evidence in favor of a negative causal effect is relatively weak.

In principle, we could construct additional estimates of STAND's effects for later post-STAND periods, as we have data for cases filed in 2020 and 2021. The problem with doing this is

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[225] The absolute value of the ratio of the point estimate to its estimated standard error is the *t-statistic*. Thus, the *t*-statistic is roughly one in this case. Because STAND might be expected to cause either an increase or a decrease in the number of filings of covered cases, the appropriate way to test the null hypothesis of zero change is to use a two-sided test. The critical value for rejecting the null hypothesis using such a test is 1.65 for a test with 10% significance level, and 1.96 for a test with 5% significance level (this latter significance level is the one most commonly used in quantitative academic scholarship). When the *t*-statistic is less than the critical value for tests at conventionally used significance levels such as 5% or 10%, the test does not reject at these levels, and we colloquially say that "the estimate is not statistically significant."

[226] The *t*-statistic is 1.71, exceeding the critical value of 1.65. *See supra* note 225.

that the COVID-19 pandemic began in March 2020, convulsing society in general and courts in particular.[227] The pandemic and its many dislocations might have affected our three case groups differently in ways that we cannot observe. Such differential effects would cause bias in difference-in-differences estimates, reducing confidence in estimates of STAND's post-2019 effects. On the other hand, it is possible that COVID-19 affected our comparison and treatment groups similarly, so that they are removed when we calculate our difference-in-differences estimates. We, ourselves, are generally agnostic about the extent to which differential COVID-19 effects occurred. Our approach is to focus primarily on outcome measures that are unaffected by COVID-19 (as with case counts in 2019) or are plausibly only partially affected (as with case duration and intensity measures). Readers, of course, can make their own choices about how much concern they think differential COVID-19 effects warrant.

With these caveats, we present Figure 2, which plots the log of monthly case filings for our three case types over the period from January 2018 to December 2021—before the STAND Act to after the Silenced No More Act. The figure's vertical lines indicate the time at which STAND and Silenced No More were implemented (January 1, 2019, and January 1, 2022).[228] The blue circles are log filings for STAND-covered cases, the orange squares are for Silenced No More–covered cases, and the black triangles are for other employment cases. The solid lines are estimates of the trend in log filings for the case type with the same color markers as the lines.[229] We estimate these trends separately for 2018, for

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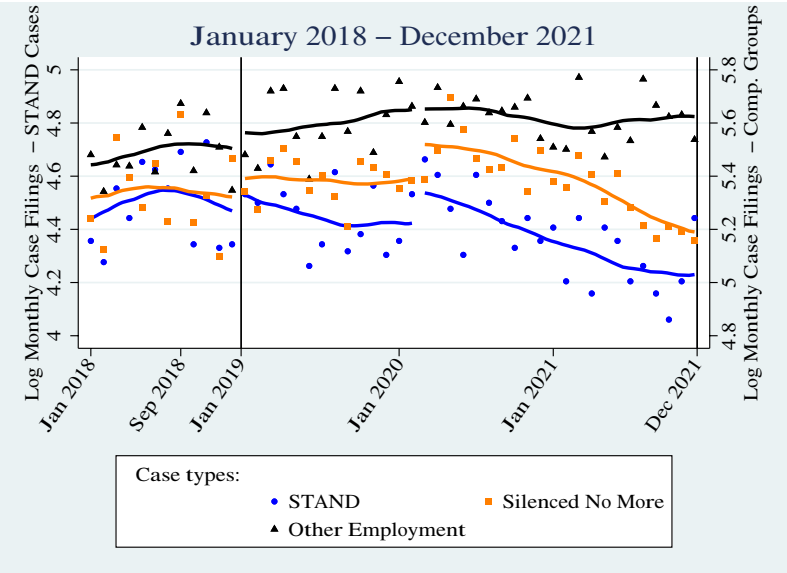
[227] On March 23, 2020, the L.A. County court shut down; on April 2, 2020, Presiding Judge Kevin Brazile issued General Order 007, which allowed judges to "extend statutory deadlines and implement, where possible, the use of technology." *COVID-19 Timeline of Events*, SUPER. CT. OF CAL., CNTY. OF L.A. 2–3 (Apr. 22, 2021), https://www.lacourt.org/newsmedia/uploads/142021422173519COVID19TimelineofEvents4.22.21(Final).pdf. On February 14, 2022, the courts "full[y] resum[ed]" in-person hearings, as well as criminal and civil trials. *Presiding Judge Eric C. Taylor: Face Masks Remain Mandatory in All Los Angeles County Courthouses*, SUPER. CT. OF CAL., CNTY. OF L.A. 2 (Feb. 24, 2022), https://perma.cc/4B8D-7TK3.

[228] The left scale is for STAND-covered cases, and the right scale is for the other two groups. The left scale is shifted down by 80 log points compared to the right scale, reflecting the fact that STAND-covered cases have substantially lower filings than the other two case types. Even so, the range of the two scales is the same, and the degree of variability is quite similar; this reflects the role of the log transformation in eliminating multiplicative variance.

[229] We estimate these trends using Stata's lpoly smoother, which calculates local regression fits for each observation; essentially, this smoother uses nearby data to calculate

the period between January 2019 and February 2020, and for the period from March 2020 through December 2021. We chose the latter two periods to focus on pandemic-period changes.

FIGURE 2: LOG OF MONTHLY CASE FILINGS FOR CASES COVERED BY: STAND ACT, SILENCED NO MORE ACT, AND NEITHER ACT, BUT INVOLVING EMPLOYMENT CLAIMS



a weighted average for each type of case for each month. This approach avoids parameterizing the trends, e.g., with a linear or quadratic fit, in order to allow the data to tell us the shape of trends rather than assuming its functional form.

Figure 2 reveals that log case filings were trending upward for STAND-covered cases in early 2018, before leveling off roughly halfway through the year, and then declining over the second half of 2018. Figure 2 thus provides an opportunity to describe and partially assess a key assumption necessary for the difference-in-differences approach to identify policy effects—the *parallel trends* assumption.[230] This assumption essentially requires that, in the absence of the STAND Act, trends in the number of cases filed would be the same for cases affected by the STAND Act as for those not affected. If this assumption were violated, then our difference-in-differences estimates would pick up both (1) the STAND Act–related effects on case counts that we want to measure, and (2) changes in case counts that occur due to trends that are unrelated to the STAND Act.

The parallel trends assumption can be partially tested using data on case filings that occurred before the STAND Act took effect. To do this, we calculate the average log number of cases filed over each of the four calendar quarters of 2018, for each of the three types of cases represented in Figure 2, i.e., (1) cases affected by the STAND Act (our STAND cases), (2) cases that are *not* affected by the STAND Act but *are* affected by the Silenced No More Act (our Silenced No More cases), and (3) employment cases not affected by either Act (our other employment cases). We then subtract each quarter's average log case counts for Silenced No More cases from that for STAND cases, and we plot these quarterly differences in part (a) of Figure 3. Similarly, we subtract each quarter's average log case counts for other employment cases from the STAND Act log case count, and we plot these quarterly differences in part (b) of the figure. Finally, we adjust the quarterly differences so that the first-quarter difference in each plot equals zero.[231]

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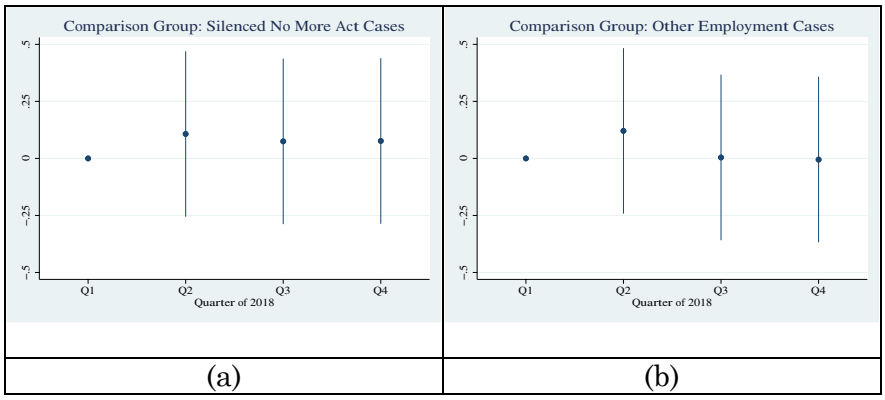
[230] *See, e.g.*, Clément de Chaisemartin & Xavier D'Haultfoeuille, Credible Answers to Hard Questions: Differences-in-Differences for Natural Experiments 19–20 (July 12, 2024) (unpublished manuscript) (available at https://perma.cc/LXM6-XG4M).

[231] To understand this alignment, observe that for STAND Act cases, the average monthly log case count was 4.40 for the first quarter, whereas this average was 5.30 for Silenced No More Act cases. Thus, the raw first-quarter difference is $4.40 - 5.30 = -0.90$. We thus add 0.90 to the quarterly difference in plot (a) for each quarter. That has the effect of ensuring that the plotted number for the first quarter is exactly zero. It also ensures that the differences for the other quarters are measured relative to the first-quarter difference; a negative value in plot (a) implies a quarterly difference that is greater than 0.90, whereas a positive value in plot (a) implies a quarterly difference that is less than 0.90. We use the same approach for plot (b); because the first-quarter average log case count for other employment cases is 5.42, plot (b)'s adjustment has to account for the first-quarter

If the parallel trends assumption held exactly, the circles in plot (a) would all lie on the horizontal axis, and similarly for plot (b). Although that is not the case, such a result would occur only by accident in the real world, in which quarter-to-quarter sampling variation occurs. Eyeballing plots (a) and (b) yields the heartening conclusion that neither plot seems to exhibit a systematic increase or decrease over the four-quarter period. Further, although statistical tests indicate that the quarterly differences in plot (a) are not all the same, (likewise for those in plot (b)),[232] tests also do not reject the null hypothesis that the first- and fourth-quarter differences in plot (a) are the same (likewise for plot (b)).[233] We conclude that the pre-STAND Act trends in the log of case counts provide little reason to doubt the appropriateness of a difference-in-differences approach to measuring the effect of the STAND Act on log case counts.

FIGURE 3: DIFFERENCE IN AVERAGE QUARTERLY VALUES OF LOG CASE COUNTS, STAND ACT CASES VERSUS SILENCED NO MORE ACT CASES (A), AND STAND ACT CASES VERSUS OTHER EMPLOYMENT CASES (B)



difference of $4.40 - 5.42 = -1.02$ between the log case count value for STAND Act and other employment cases.

232 The p-value for a test that all four quarterly differences are the same in plot (a) was zero to four digits, and similarly for plot (b).

233 That the differences are statistically insignificant can be most easily seen using the vertical lines running through the Q4 difference. These vertical lines are 95% confidence intervals; when the confidence interval includes the value zero, as happens in both plot (a) and plot (b), the null hypothesis of zero difference cannot be rejected. In quantitative terms, we note that the p-values for the tests of the null hypothesis corresponding to plots (a) and (b) are 0.68 and 0.97, respectively—in each case, miles above conventional significance levels.

One additional concern involves the possibility that the STAND Act's passage might have affected behavior before it took effect. For example, one might have thought that parties who wanted to litigate under pre-STAND rules would shift the filing of cases forward in time, filing between September 2018 and the end of the year to avoid having the law apply to their cases. But the trend depicted in the second half of 2018 is inconsistent with that story.

Turning to the period after the STAND Act took effect, we see that the second blue line in Figure 2 shows that STAND-covered cases declined over the first half of 2019, after the STAND Act was implemented, before leveling off in the second half. The figure's third blue line begins in March 2020, when the COVID-19 pandemic hit in earnest, forcing the closure of courts and a turn to remote management of cases. The shift up in the third line relative to the second may be due to an uptick in STAND case filings that occurred in March and April of 2020.[234] But after that, STAND-covered cases trended down throughout the remainder of 2020 and 2021.

Now consider Silenced No More–covered cases. These cases exhibited a slight upward trend and downward turn at the end of 2018 and then stayed roughly flat in 2019. Like STAND-covered cases, they saw an uptick around the beginning of the pandemic and then trended down throughout the rest of 2020 and then 2021. As for other employment cases, they had a somewhat similar profile to STAND and Silenced No More–covered cases during 2018 but then increased throughout 2019, stayed relatively level at the beginning of the pandemic, dipped over the latter half of 2020, and then increased slightly throughout 2021.[235]

Looking at the picture in Figure 2 leaves little doubt that filings of STAND-covered cases declined substantially during the postimplementation period. However, we are dubious that STAND would have had its greatest effects in the *third* year

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[234] One possibility is that, once it became clear (sometime in the spring of 2020) that the pandemic would be severe and of an uncertain duration, some plaintiffs, perhaps concerned that courts would close altogether, accelerated filings to avoid statute of limitations problems.

[235] Although it is not evident in the full post-March 2020 trend line for other employment cases, their filings were elevated between June 2021 and November 2021. One possibility—though not one we have investigated—is that this phenomenon reflected litigation related to vaccine or mask mandates during a time when COVID-19 mitigation policies became more controversial. The possibility of such disputes makes other employment cases a more problematic comparison group in 2021 than in 2019 or 2020.

following its implementation, which is what difference-in-differences estimates would tend to show. In addition to the confounding effects of the pandemic, we observe that the STAND Act isn't especially complicated in its content or application, there was robust discussion about its potential effects even before its adoption, and it seems to have been well understood. Thus, there's no good reason why STAND would have required more than a year to have effects.

Accordingly, we think the best reading of the evidence we have presented so far has two basic components. First, although the evidence is mixed, the STAND Act may have depressed case filings in the first year after its implementation. Second, the fact that STAND-covered cases declined so substantially in the later period—especially when compared to at least one of the comparison groups, other employment cases—suggests that something else besides the STAND Act complicated the litigation terrain. (A possible explanation is that the COVID-19 pandemic might have affected STAND Act cases and comparison group cases differently.) In addition, we recognize the possibility that the publicity and energy behind the #MeToo movement might have induced unusually high filings of sexual harassment and discrimination cases in 2018, essentially acting like a magnet to draw some filings forward in time.[236] The net impact of these effects could be to cause observed filings of STAND-covered cases to decline in 2019—for reasons unrelated to the STAND Act itself. We lack a method that would allow us to assess this possibility empirically.

In sum, we draw three conclusions about case filings. First, we think there is good reason to conclude that case filings may have fallen modestly in the year after STAND's implementation. Second, we recognize the possibility that this drop might have been associated with dynamics related to #MeToo. And third, although we also find that STAND-covered cases dropped more after 2019, we suspect that this later change was unrelated to the law itself.

b) Case duration. We next consider how case duration changed following STAND's implementation. Table 5 is similar to Table 4 but asks if the case lasted at least eighteen months. The

[236] That is, perhaps some women who would have waited to file suit until 2019 or 2020, had #MeToo not occurred, instead filed suit sooner, in 2018. One explanation for such a pattern would be that #MeToo simply emboldened some women. A second explanation would be that strategically inclined plaintiffs wanted to file and take advantage of a sudden but perhaps not durable change in the zeitgeist related to #MeToo.

rightmost column shows that the proportion of STAND-covered cases lasting at least eighteen months increased by 7.6 points (from 40.4% to 48.0%). But this proportion grew almost the identical amount among comparison group (Silenced No More) cases—7.2 percentage points. The net impact, about a half-point increase, is roughly zero, and it is statistically insignificant as well.

TABLE 5: DIFFERENCE-IN-DIFFERENCES ESTIMATES OF ONE-YEAR POSTIMPLEMENTATION EFFECT OF STAND FOR THE SHARE OF CASES THAT LAST AT LEAST EIGHTEEN MONTHS

		Pre-STAND 1/1/18 – 12/31/18	**One Year After STAND 1/1/19 – 12/31/19**	**Post−Pre**
	Case Type	**Mean (S.E.)**	**Mean (S.E.)**	**Difference (S.E.)**
Panel A	STAND-Covered Cases	0.404	0.480	0.076
		(0.015)	(0.015)	(0.022)
Panel B	Silenced No More–Covered Cases (Not STAND)	0.351	0.423	0.072
		(0.010)	(0.010)	(0.014)
	Difference	0.053	0.058	**0.005**
		(0.018)	(0.018)	**(0.025)**
Panel C	Other Employment	0.454	0.477	0.023
		(0.009)	(0.009)	(0.013)
	Difference	−0.050	0.004	**0.054**
		(0.018)	(0.018)	**(0.025)**

Table 5's Panel C shows that the case duration results are different for other employment cases. Case duration grew less among those cases than among Silenced No More–covered cases, with an increase of just 2.3 log points in the share lasting at least eighteen months. The implied difference-in-differences estimate

is 5.4 points and is statistically significant at conventional levels.[237]

A potentially important difference between the case filing measure and the case duration measure is that the measurement of case duration necessarily extends forward in time after the moment at which the case is filed. Eighteen months after STAND took effect on January 1, 2019, was July 2020—smack in the middle of the pandemic's first few months. In measuring case duration, then, overlap with the pandemic is unavoidable for cases filed in 2019.[238] Unfortunately, this also occurs for a sizable fraction of cases filed in 2018: eighteen months before March 1, 2019, was September 1, 2018, so nearly a third of cases filed in the pre-STAND period had some exposure to the pandemic. Accordingly, there is no way to measure case duration effects without assuming that any effects of COVID-19 (e.g., because of courthouse closure) were similar for treatment and comparison group cases. Although we have no way to assess that assumption empirically, we don't find it wildly implausible to think that varieties of employment lawsuits would be similarly affected by the effects of COVID-19 dislocations on the civil justice system.

We next consider the question of parallel trends for the case duration measure. Figure 4 repeats the analysis from Figure 3, except with each circle representing the quarterly difference across STAND Act and comparison group cases in the share of cases that last at least eighteen months. Once again, if the parallel trends assumption held exactly, the circles in plot (a) would all lie on a single horizontal line, and similarly for plot (b). Unfortunately, that is not the case in either of these plots; instead, the quarterly difference estimates increase discernibly over the

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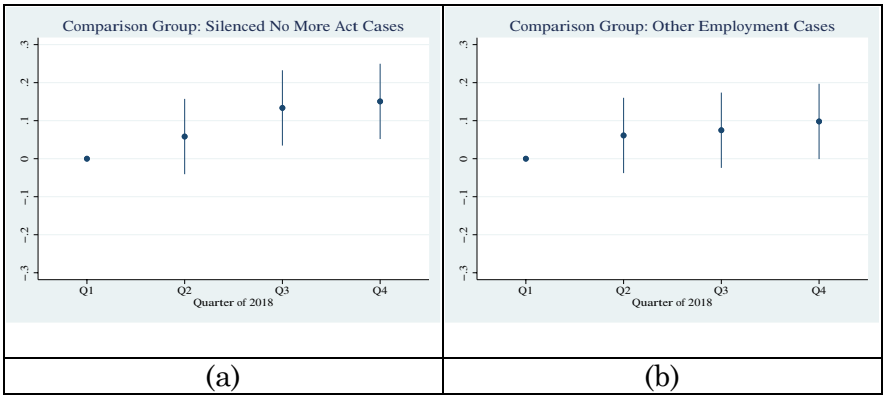
[237] The *t*-statistic for this estimate exceeds two, so we can reject the null hypothesis of zero change at the 5% significance level.

[238] Even if we chose a shorter window than eighteen months to measure duration, any reasonable measure would wind up overlapping the pandemic for cases filed in late 2019. More broadly, there is tension between (1) defining the case duration window for a long enough period such that the effects of the STAND Act on duration might show up in the data, and (2) minimizing contamination of the data with the pandemic. We chose eighteen months as a compromise between these desiderata, but reasonable people could disagree.

four-quarter period in both plots (a) and (b).[239] Statistical tests confirm this visually apparent pattern.[240]

FIGURE 4: DIFFERENCE IN AVERAGE QUARTERLY VALUES OF THE SHARE OF CASES THAT LAST AT LEAST EIGHTEEN MONTHS, STAND ACT CASES VERSUS SILENCED NO MORE ACT CASES (A), AND STAND ACT CASES VERSUS OTHER EMPLOYMENT CASES (B)



(a) (b)

One might decide that the evidence against the parallel trends assumption that we've just discussed simply invalidates any conclusions about the effects of the STAND Act on case duration. But there is also an alternative view, which goes as follows: Before the STAND Act, the treatment group/comparison group difference in the share of long-duration cases was growing even before the STAND Act took effect. If we assume that that trend actually continued into 2019, after the STAND Act took effect,

239 Here is a quick explanation of what's happening: For cases filed in the first quarter of 2018, Silenced No More Act cases have a similar share of cases that last at least eighteen months by comparison to STAND Act cases, with both types of cases having long-duration shares of between 30% and 35%. For Silenced No More Act cases, this share rose slightly in the next couple quarters before dropping back down, in the fourth quarter of 2018, to roughly where it began. Meanwhile, for STAND Act cases, the long-duration share increased over the next two quarters (reaching 47% in the third quarter), before dipping back a bit (to 44%) in the fourth quarter. The effect of this pattern was to cause the Silenced No More case–STAND Act case quarterly difference to fall from roughly 0 to about −12%. Meanwhile, other employment cases had a pattern similar to STAND Act cases, in that the long-duration share increased between quarter one and quarters two and three, and then dropped a bit in quarter four; however, the magnitudes of these drops were different from the magnitudes for STAND Act cases, with the end result being that STAND Act cases had a substantially lower long-duration share than other employment cases at the outset of 2018, but wound up with a similar one by the year's final quarter.

240 For example, the *p*-value for a test of the null hypothesis that the quarter-one and quarter-four differences in plot (a) are the same is less than 0.01; for plot (b), this *p*-value is 0.06.

then the long-duration share would have continued to increase among STAND Act cases relative to its value among comparison cases. In other words, at least some of the observed increase in case duration we observed in Table 5 would be attributable to this underlying trend, rather than to the STAND Act itself. In fact, it is possible that if we could remove this trend amount, case duration might even have *fallen* due to the STAND Act.

Our findings with respect to case duration are admittedly complicated. For some, nonparallel trends across the different case groupings before the STAND Act make it impossible to draw clear conclusions about the STAND Act's effect on case duration. But *if* one is willing to assume that nonparallel trends would have continued, then our results lend further support over and above Table 5's face value evidence, bolstering our skepticism that the STAND Act increased case duration.

c) Litigation intensity. To measure litigation intensity, we counted the number of docketed events—whether they were caused by the parties, the court, or (more rarely) other actors such as intervenors—that hit a case's docket in the first eighteen months after the case was initiated.[241]

Table 6 reports our results. It shows that docketed, within-case events were lower by about ten per case for cases filed in the year after STAND, compared to cases filed the year before. Docketed, within-case events also dropped substantially for both Silenced No More–covered cases and other employment cases. The difference-in-differences estimates are −1.8 and −1.9; both

[241] For example, the filing of a plaintiff's complaint counts as one filing, as does a motion or court order. All such events are listed on the case docket and can be counted. We encountered one hitch: many docket entries had empty values for the "filed-by" field that lists the identity of whoever caused the filing of the docket entry. We determined that these "blank-filer" entities likely were "child entries," in the following sense: Suppose Paula Plaintiff files a motion electronically and uploads an attached appendix. A docket entry will be created indicating that a complaint was filed, with Paula Plaintiff listed as the filer. Another docket entry might be created, listing the complaint as having been docketed—and also a *third* entry corresponding to the complaint. What is really *one event*—a complaint's filing—will have generated *three docket entries*. And more attachments might cause even more entries to be created. We devised an algorithm to identify child entries, and we excluded them from our litigation intensity measure. We note that our fix could be over-inclusive, as it's possible that more attachments might proxy for more intense litigation—for example, if multiple expert reports are separately attached to a summary judgment motion. But it's also possible that multiple documents will be compiled and submitted into a single, long document. For robustness, we also calculated intensity with child entries included; we obtained the same qualitative results.

are statistically insignificant.[242] In sum, the evidence related to litigation intensity suggests little change due to implementation of the STAND Act—and certainly not the substantial increase in litigation intensity that many critics of transparency reforms have long predicted.

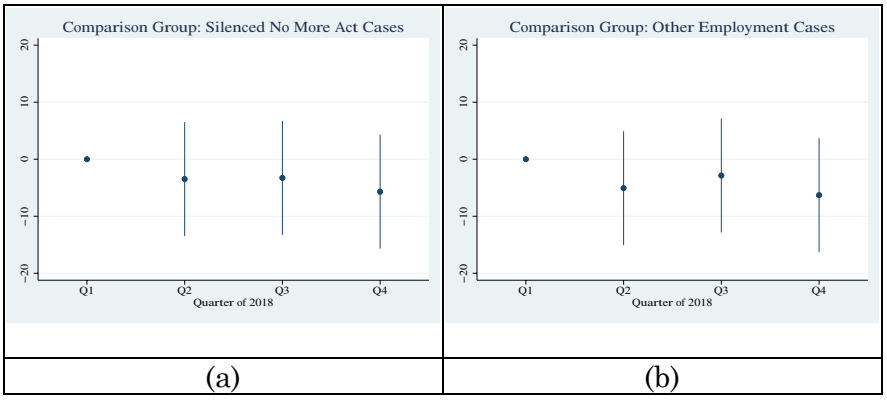
TABLE 6: DIFFERENCE-IN-DIFFERENCES ESTIMATES OF ONE-YEAR POSTIMPLEMENTATION EFFECT OF STAND FOR AVERAGE NUMBER OF DOCKETED FILINGS (WITHIN EIGHTEEN MONTHS OF CASE FILING)

	Case Type	Pre-STAND 1/1/18 – 12/31/18 Mean (S.E.)	One Year After STAND 1/1/19 – 12/31/19 Mean (S.E.)	Post−Pre Difference (S.E.)
Panel A	STAND-Covered Cases	43.5	33.5	−10.0
		(1.2)	(1.0)	(1.6)
Panel B	Silenced No More–Covered Cases (Not STAND)	36.8	28.6	−8.1
		(0.5)	(0.5)	(0.7)
	Difference	6.7	4.9	**−1.8**
		(1.3)	(1.1)	**(1.7)**
Panel C	Other Employment	37.0	29.0	−8.0
		(0.5)	(0.3)	(0.6)
	Difference	6.5	4.6	**−1.9**
		(1.3)	(1.0)	**(1.6)**

[242] To get a sense of the relative magnitude of the point estimates of a roughly two-event drop in the docket length, consider the pre-STAND mean of 43.5 docketed events. A two-event drop from this baseline is a bit less than 5%, which seems small to us.

We next consider the question of parallel trends for the litigation intensity measure. Figure 5 repeats the analysis from Figure 3 and Figure 4, except with each circle representing the quarterly difference across STAND Act and comparison group cases in the number of docketed filings. Once again, if the parallel trends assumption held exactly, the circles in plot (a) would all lie on a single horizontal line, and similarly for plot (b). Unfortunately, that is not the case in either of these plots; instead, the quarterly difference estimates decrease discernibly over the four-quarter period in plot (a) and, we think, also in plot (b). That said, statistical tests between the first- and fourth-quarter differences within each plot are less compelling than those for the case duration measure;[243] still, the pattern in both plots (a) and (b) provides some reason to doubt the parallel trends assumption.

FIGURE 5: DIFFERENCE IN AVERAGE QUARTERLY VALUES OF THE NUMBER OF DOCKETED FILINGS, STAND ACT CASES VERSUS SILENCED NO MORE ACT CASES (A) AND STAND ACT CASES VERSUS OTHER EMPLOYMENT CASES (B)



(a) (b)

As with the case duration measure, one might interpret Figure 5's evidence against the parallel trends assumption to invalidate conclusions about the effects of the STAND Act on litigation intensity (although this evidence is statistically less compelling). But once again there is also an alternative view that tracks our discussion above of parallel trends regarding case

[243] The *p*-value for a test of the null hypothesis that the quarter one and quarter four differences in plot (a) are the same is 0.28; for plot (b), this *p*-value is 0.23. Both these *p*-values are substantially above the levels usually used in scholarly work as critical values for rejecting the null hypothesis of equal values. Accordingly, one might decide that the evidence in Figure 5 is not enough to reject the parallel trend assumption.

duration, as follows: Before the STAND Act, there was a trend that was causing litigation intensity to fall among STAND Act cases relative to comparison cases. If that trend actually continued into 2019, after the STAND Act took effect, then litigation intensity would have continued to fall among STAND Act cases relative to its value among comparison cases. In other words, at least some of the observed decrease in litigation intensity we observed in Table 6 would be attributable to this underlying trend, rather than to the STAND Act itself. In fact, it is possible that if we could remove this trend amount, litigation intensity might have *risen* due to the STAND Act, in keeping with some critics' claims.

As with case duration, we draw two conclusions. First, the available evidence can be interpreted in different ways with respect to litigation intensity—including that the presence of nonparallel trends before the STAND Act makes it impossible to draw any clear conclusion about the STAND Act's effect on this variable. Second, *if* one is willing to assume that nonparallel trends would have continued, that provides reason to be skeptical that the STAND Act actually reduced litigation intensity, and it might even yield a conclusion that the STAND Act increased it.

2. Difference-in-differences estimates for case filing: effects of the Silenced No More Act.

We analyze only the number of monthly case filings for the Silenced No More Act, due to the short period of time for which we have data after the law took effect on January 1, 2022. Table 7 repeats the exercise from Table 4's study of the STAND Act, except that now the pretreatment period is calendar year 2021, and the posttreatment period is the first six months of 2022.[244] An additional wrinkle is that, for this part of our study, Silenced No More–covered cases become the treatment group, and STAND-covered cases become the closest comparison group. Because, as discussed above, the latter cases were already "treated" by the implementation of the STAND Act, we would not expect Silenced No More to have much, or maybe even any, effect.

[244] We ended our data collection process in July 2022.

TABLE 7: DIFFERENCE-IN-DIFFERENCES ESTIMATES OF IMPLEMENTATION EFFECT OF SILENCED NO MORE USING ONE YEAR OF PRE–SILENCED NO MORE DATA FOR THE LOG OF THE NUMBER OF MONTHLY CASE FILINGS

	Case Type	**Pre–Silenced No More 1/1/21 – 12/31/21** **Mean (S.E.)**	**Six Months Post–Silenced No More 1/1/22 – 6/30/22** **Mean (S.E.)**	**Post–Pre Difference (S.E.)**
Panel A	Silenced No More–Covered Cases	5.30	5.28	−0.02
		(0.03)	(0.06)	(0.07)
Panel B	STAND-Covered Cases	4.28	4.28	0.00
		(0.04)	(0.04)	(0.06)
	Difference	1.02	1.00	**−0.02**
		(0.05)	(0.08)	**(0.09)**
Panel C	Other Employment	5.60	5.49	−0.11
		(0.03)	(0.02)	(0.04)
	Difference	−0.30	−0.21	**0.09**
		(0.04)	(0.07)	**(0.08)**

Table 7 tells a simple story. There was little change in case filings for Silenced No More–covered cases, which dropped by 2 log points following Silenced No More's implementation. Both difference-in-differences estimates are statistically insignificant, with those using STAND-covered cases also being negative and quite small in magnitude.[245] The 9 log-point difference-in-differences estimate for other employment cases is perhaps substantial in magnitude, but it is imprecisely estimated and so

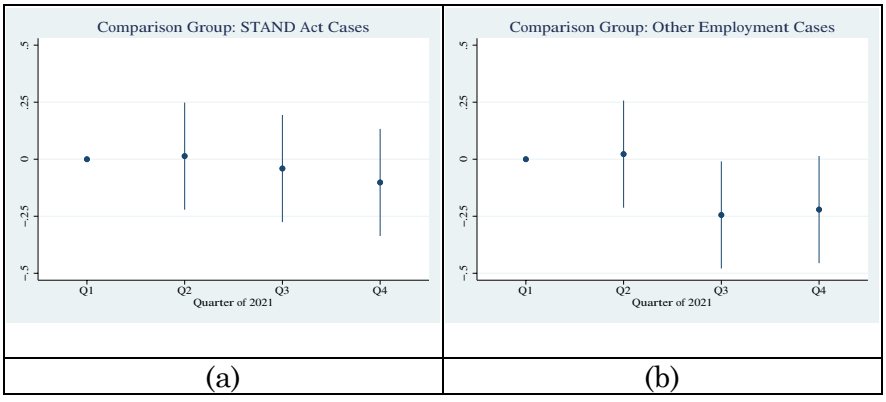
[245] The standard errors are quite large, reflecting the imprecision of estimating the impact of a program when one has only a short postimplementation observation period.

is statistically insignificant at conventional levels. In sum, although the estimates are concededly noisy, Table 7 offers little basis to believe that Silenced No More had a sizable effect, in either direction, on case filings in its first six months.

We next consider the question of parallel trends for measuring the effect of the Silenced No More Act on log case counts. Figure 6 repeats the analysis from Figures 3 through 5, with several changes: quarters one through four of 2021, rather than 2018, are plotted; Silenced No More Act cases are now the treatment group; and STAND Act cases are now one of the comparison groups. The point estimates in plot (a) show some limited evidence of a nonparallel trend in pre–Silenced No More Act filings between quarters two and four of 2021, although the differences are not statistically significant from zero at conventional levels. The evidence of nonparallel trends is stronger for the other employment cases, graphed in plot (b).

As discussed above, one might choose to disregard our difference-in-differences estimates where there is evidence of nonparallel trends. But for those willing to simply assume that filings of Silenced No More Act cases would have followed their pretreatment trend and kept declining in the absence of the Silenced No More Act's passage, our Table 7 estimate that the Silenced No More Act increased log filings by 0.09 would be an underestimate. This estimate would then be the clearest example we have of potentially substantial effects of the Silenced No More Act.

FIGURE 6: DIFFERENCE IN AVERAGE QUARTERLY VALUES OF LOG CASE COUNTS FOR THE SILENCED NO MORE ACT EVALUATION, COMPARING SILENCED NO MORE ACT CASES TO STAND ACT CASES (A) AND TO OTHER EMPLOYMENT CASES (B)



(a) (b)

E. Much Ado About Not Very Much: The Effects of the STAND and Silenced No More Acts

This Section collects the difference-in-differences results from Part III.C so that all readers, including those without quantitative training, can see them in one place without methodological details. We will not repeat here the details of our assessment of the validity of the parallel trends assumption; for purposes of the discussion in this Section, we simply take our difference-in-differences estimates from Part III.D as correct. We emphasize, though, that readers' views of these estimates might depend on the pretrend evidence discussed there. Most notable is that our results consist largely of what we find we *don't* find. Many critics of the STAND and Silenced No More Acts, and of transparency reforms more generally, have long predicted that reforms would unleash a tsunami of case filings and, further, that ensuing cases would be greatly protracted and more hard-fought. Our analysis finds little support for these claims.

1. Monthly case filing.

Critics of transparency reform have long predicted that restrictions on secret settlements will cause sharp swings in case filings. These reforms, in some critics' telling, are the tinder that will ignite a "litigation explosion."[246] In other critics' telling, the reforms will have the opposite effect, causing would-be plaintiffs to turn away from courts altogether.[247]

Our results, captured in Figure 7, support neither set of doomsday predictions. In particular, the top of Figure 7 shows our estimates of how the number of cases filed per month changed in the year after the STAND Act took effect. The bar on the left shows that monthly filings fell by about seven cases when we use Silenced No More–covered cases as the comparison group for STAND-covered cases.[248] The bar on the right shows an alternative estimate, that filings fell a bit more—by eleven cases per month—when we use other employment cases as the comparison group. Of the two estimates, the one for the Silenced No More–covered cases is statistically insignificant, and

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[246] Epstein, *supra* note 41, at D4.

[247] *See supra* notes 165–67 (collecting these predictions).

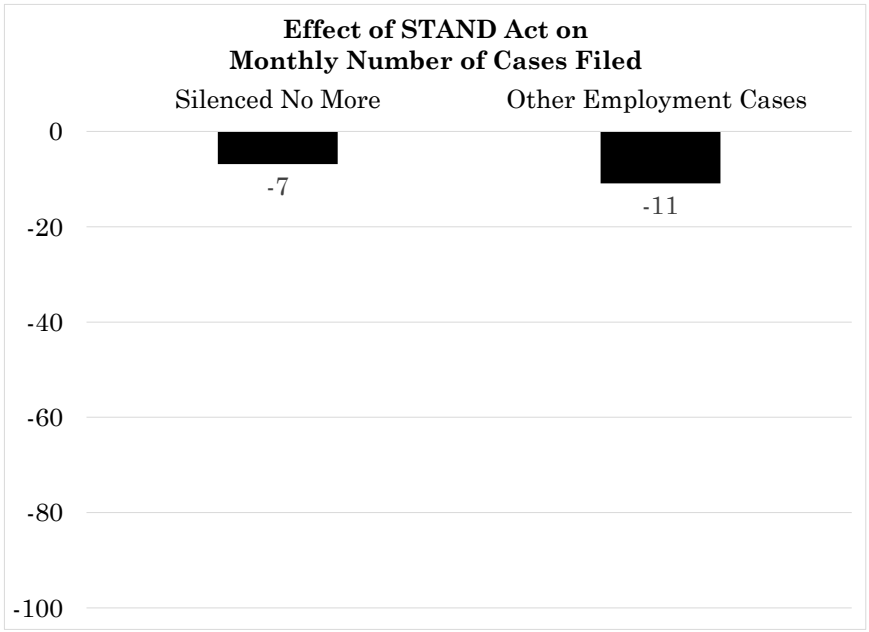
[248] Unlike the discussion in Part III.C, our reference to case filings throughout this Section involves numbers of filings, rather than their logarithms.

the one for the other employment cases is statistically significant.[249]

Leaving aside statistical significance, how big are those numbers relative to the typical volume of cases that involve STAND-covered subject matter? On average in 2018, the year before the STAND Act was enacted, there were about ninety STAND-covered cases filed each month. The bottom picture in Figure 7 shows that the drop in case filings amounts to 8% when we use Silenced No More–covered cases as the comparison group, and about 12% when we use other employment cases—roughly eight or nine total cases each month.

[249] This is true at the 10% significance level.

FIGURE 7: ONE-YEAR EFFECT OF STAND ACT ON MONTHLY CASE FILING



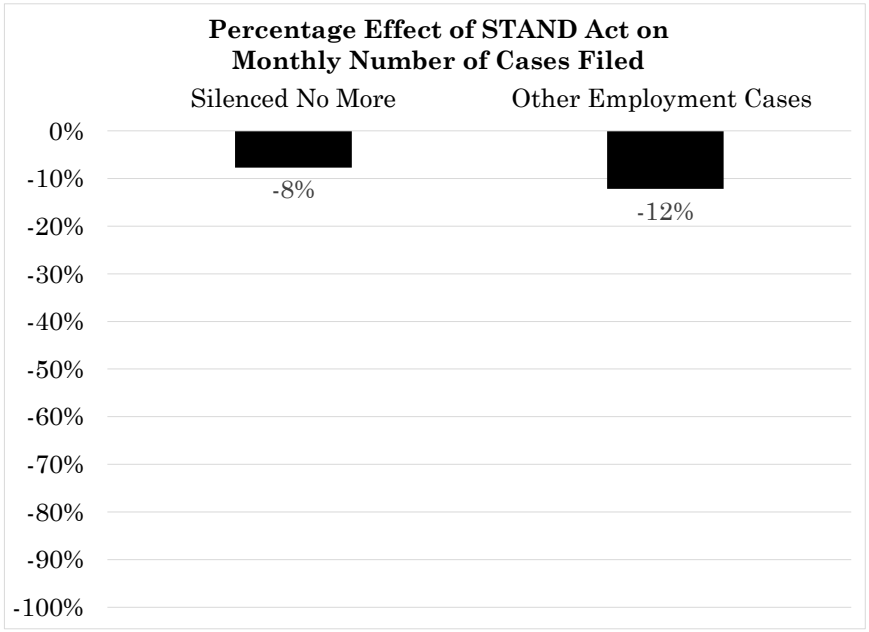
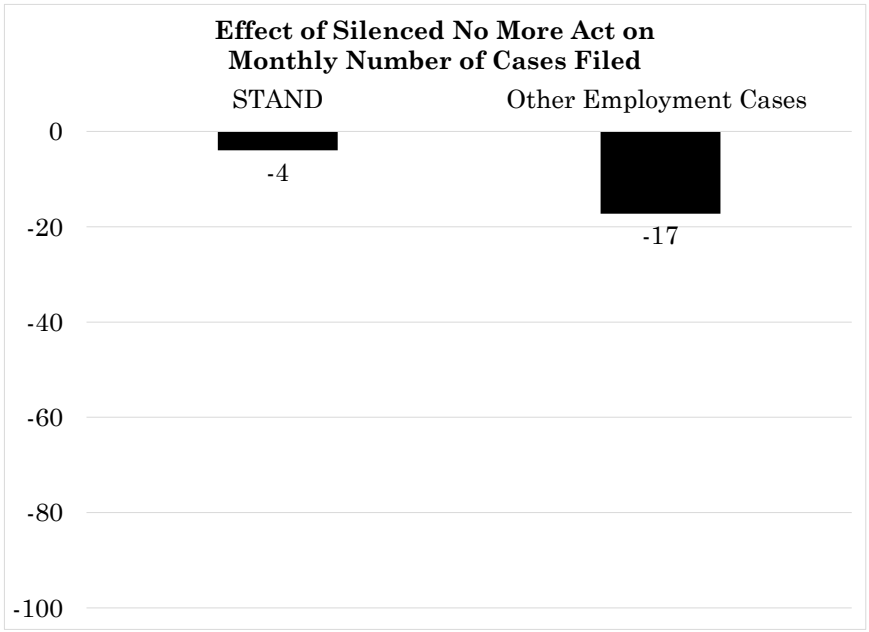
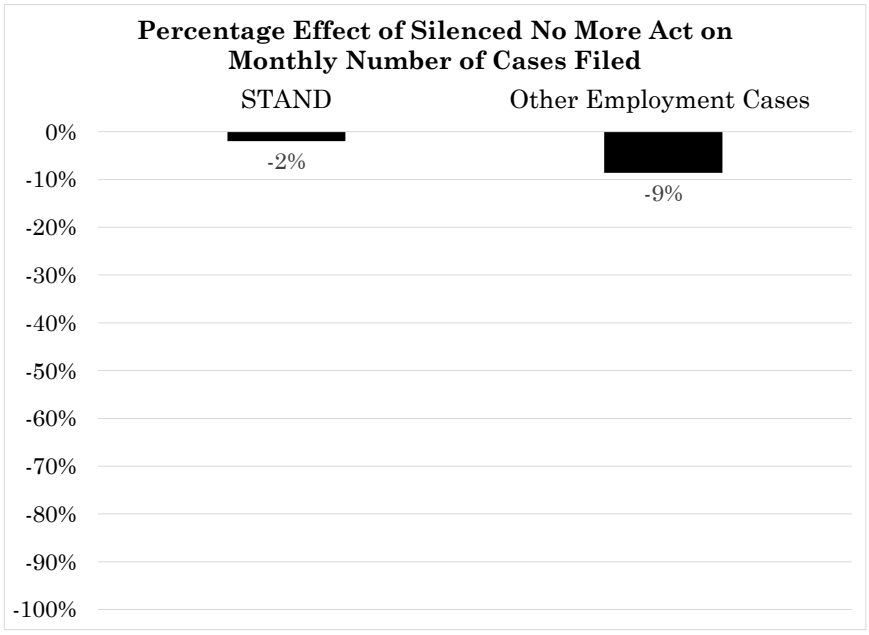


Figure 8 shows our estimates of the impact of the Silenced No More Act on monthly case filings over the first six months of 2022. It is worth noting that monthly filings of Silenced No More–covered cases are generally about twice as great as those of STAND-covered cases, with about two hundred Silenced No More–covered cases filed per month. The top picture in Figure 8 shows that we find drops of four and seventeen filed cases per month, depending on which comparison group we use for Silenced No More–covered cases (the estimate on the left corresponds to using STAND-covered cases as the comparison group, and the one on the right corresponds to using other employment cases).

FIGURE 8: ONE-YEAR EFFECT OF SILENCED NO MORE ACT ON MONTHLY CASE FILING





Both of these estimates are statistically insignificant and are also small in substantive terms. As just noted, roughly two hundred Silenced No More–covered cases were filed per month in the year before the Silenced No More Act took effect. As shown in the bottom picture in Figure 8, the drop in case filings amounts to under 10% with either choice of comparison group. The upshot: even ignoring the fact that these estimates are statistically insignificantly different from zero, the estimates would constitute only a modest drop in case filings, rather than the sharp swing many had feared.

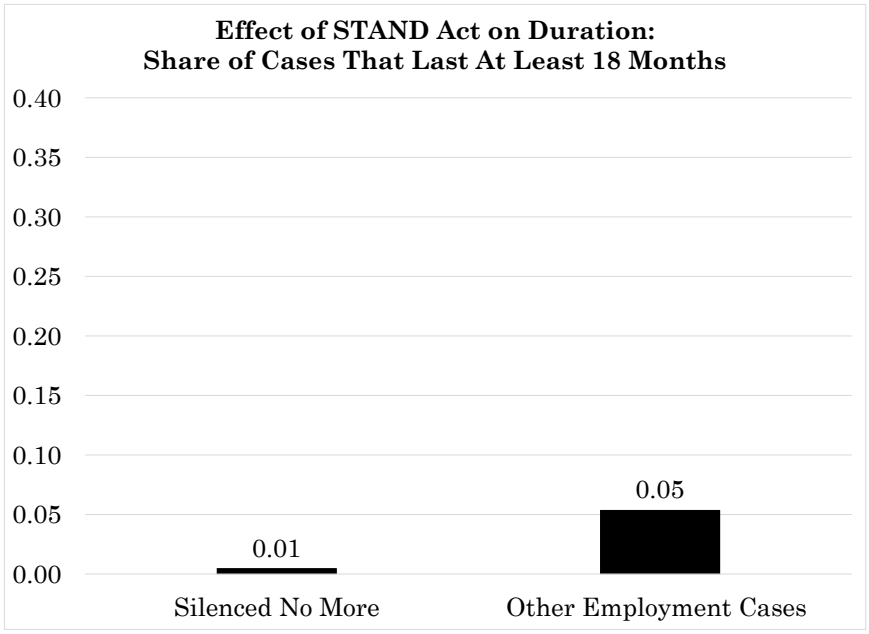
2. Case duration.

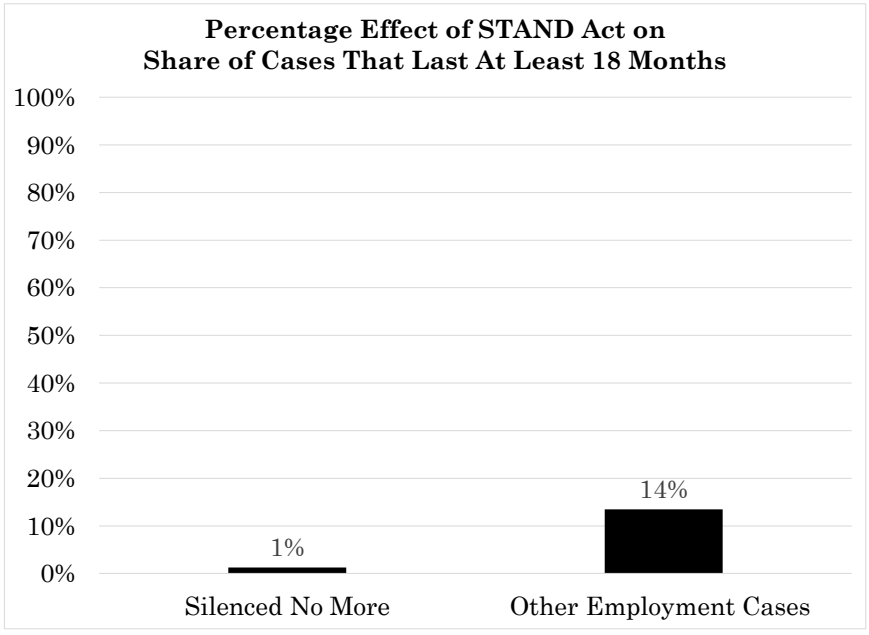
Without secret settlements, will cases drag out forever? Recall, critics say they will.[250] Our results say otherwise.

Consider Figure 9. Its top picture shows our estimates of how the STAND Act affected the share of filed cases that last at least eighteen months. As with the earlier Figures, the bar on the left shows the estimate when we use Silenced No More–covered cases as the comparison group for STAND-covered cases; the bar on the right is what we get when we use other employment cases instead. It is helpful to know that among cases filed in 2018, the year before the STAND Act took effect, 40% of STAND-covered cases lasted at least eighteen months.

[250] *E.g.*, Letter from H. Mills Gallivan, President, S.C. Def. Trial Att'ys' Ass'n, to Larry W. Propes, Clerk of the Ct., D.S.C. (Sept. 26, 2002) (on file with authors) (predicting that even South Carolina's comparatively toothless Rule 5.03(c) would "undoubtedly" exert a powerful "chilling effect on voluntary settlements"); *see also supra* notes 159–64 and accompanying text (compiling similarly dire predictions).

FIGURE 9: ONE-YEAR EFFECT OF STAND ACT ON CASE DURATION





The Figure shows that, if we use Silenced No More–covered cases as the comparison group, the STAND Act caused essentially no change in the share of STAND-covered cases that lasted more than eighteen months. When we instead use other employment cases, we estimate that the STAND Act increased the share of cases that lasted at least eighteen months by about five points, i.e., from 40% to 45%. Of the two estimates, the one for the Silenced No More–covered cases is statistically insignificant, and the one for the other employment cases is statistically significant.[251]

Leaving aside statistical significance (and also the complexities of the parallel trend assumption, as discussed above), how big are those numbers relative to the 40% of STAND-covered cases filed in 2018 that lasted at least eighteen months? The bottom picture in Figure 9 shows that the rise in the share of cases that reach eighteen months is 1% when we use Silenced No More–covered cases as the comparison group, and about 14% when we use other employment cases. Although 14% is not nothing, it hardly indicates that the STAND Act has caused a sharp slowdown in litigation speed. In sum, many have long insisted that, if transparency measures are enacted, settlement activity will screech to a halt, "burden[ing] already overcrowded court dockets."[252] Once again, our data say otherwise; the results are modest, not grave.

3. Litigation intensity.

What about litigation *intensity*? Did the STAND Act set off a massive increase in docket activity? Figure 10 tells us it did not.

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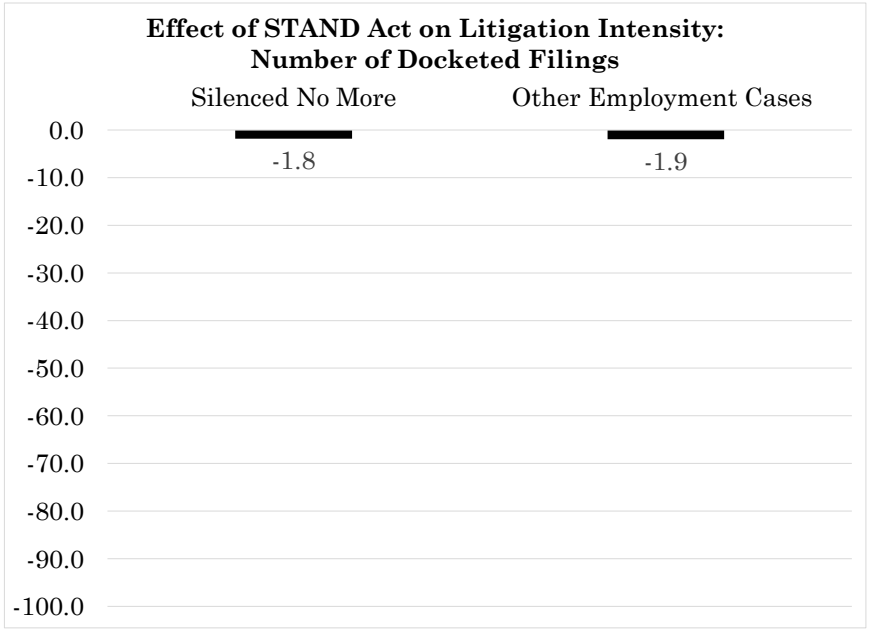
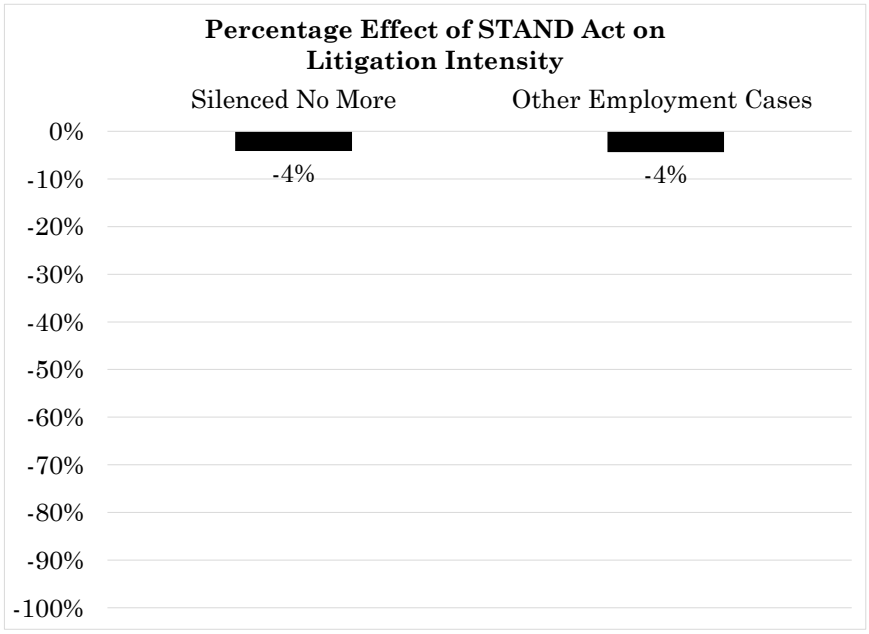
[251] This is true at the 5% level.

[252] Rooks, *supra* note 175, at 867 (quotation marks omitted) (quoting from a letter by Joyce E. Kraeger, writing for the Alliance for American Insurers); *see also* Letter from H. Mills Gallivan to Larry Propes, *supra* note 250 (predicting that even the modest South Carolina Rule would have this substantial effect). For other dark predictions, see *supra* notes 159–64 and accompanying text.

FIGURE 10: ONE-YEAR EFFECT OF STAND ACT ON LITIGATION INTENSITY





The Figure's top picture shows that, regardless of which comparison group we use—Silenced No More–covered cases or other employment cases—we estimate that the STAND Act caused a *drop* of about two docketed events. Both these estimates were statistically insignificant at conventional levels. Leaving statistical significance aside (and also, once again, the complexities of the parallel trend assumption, as discussed above), how substantial is a reduction of two docketed events? The pre-STAND average was 43.5 docketed events within the first eighteen months after case filing. As the Figure's bottom picture shows, these estimates correspond to only a 4% drop in docketed events. And recall here that critics of the STAND Act fretted that it would *increase*, not reduce, litigation intensity.

Put differently, while many have predicted that transparency reforms would needlessly complicate litigation, thereby "impos[ing] an additional burden on the judicial system," we found no such evidence.[253]

4. Summary.

In sum, we fail to find evidence that either the STAND Act or the Silenced No More Act generated a substantial shift in filings; there was neither a flood of additional filings nor a sharp downturn in the initiation of claims. Nor do we uncover convincing evidence that the STAND Act caused cases to last substantially longer or be more intensely litigated. While our evidence is perhaps not as strong as our case-filing analysis, observed case duration rose only modestly, and, for observed litigation intensity, our results are statistically insignificant at conventional levels.

We acknowledge that our quantitative evidence is limited in space (to California) and time (to the periods shortly after recent reforms). And it's true that the timing of the pandemic overlaps our study period for the duration and intensity variables we consider. Yet in what we think is the most credible approach to testing the critics' fears—and is unquestionably the largest data set ever assembled to do so—we find only the slightest evidence in support of critics' predictions, as well as plenty of evidence pointing in the opposite direction.

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[253] Antone Melton-Meaux, *Sex Harassment Settlements: A New Scarlet Letter for Employers*, 75 BENCH & BAR MINN. 18, 19 (2018); *see also supra* notes 159–64 and accompanying text (collecting additional dire predictions).

F. Settlement Sums: What We Learned from Lawyer Interviews

Finally, to address persistent claims that confidentiality is plaintiffs' primary source of negotiating leverage and that settlement sums would plummet without it, we conducted interviews to assess whether the STAND Act's passage has, in fact, been associated with a drop in the sums obtained by plaintiffs in negotiated settlements.[254] Because we lack quantitative settlement data, this assessment is qualitative, and our assessments are tentative, rather than firm. Nevertheless, with that caveat: our interviews suggest the STAND Act has not exerted negative pressure on settlement amounts.

More specifically, among fifteen interviewees who offered a definitive response, only one indicated that taking secrecy off the bargaining table has reduced claimants' leverage in settlement negotiations.[255] And even that defense attorney disclaimed seeing "a depression overall," estimating that settlements were reduced in "maybe 10%" of cases.[256] The six other defense attorneys we interviewed all reported that, in their experience, the STAND Act had not reduced settlement amounts.[257] Nine plaintiffs' attorneys unanimously—and emphatically—agreed. As one put it, when asked whether settlement amounts had, in fact, dropped in the wake of the transparency reforms: "I know that [they have] not because I keep the information and the data."[258] Indeed, several plaintiffs' attorneys reported that settlements had *increased* in value since the STAND Act's passage, though they attributed this

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[254] This prediction is taken nearly as gospel. *See, e.g.*, Samantha Bergeson, *Attorney Unpacks the 'Bizarre' Johnny Depp v. Amber Heard Verdict and What It Means for #MeToo*, INDIEWIRE (June 3, 2022), https://perma.cc/F4PJ-J74B (quoting plaintiffs' lawyer Lee Feldman as stating that women "want to settle for the maximum amount of money that they can get for the damages that they've suffered" and that transparency mechanisms make that "much more difficult"); Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFFALO L. REV. 757, 780 (2004) (explaining that one of the "strongest" arguments against transparency reform is that such a reform might "lower the settlement value for plaintiffs"). For further experts echoing this view, see *supra* notes 167–71 and accompanying text.

[255] Video Interview with Anonymous Attorney 2 (May 25, 2023). Two interviewees, one plaintiffs' attorney and one defense attorney, did not offer a definitive response.

[256] *Id.*

[257] *E.g.*, Video Interview with Anonymous Attorney 5 (June 16, 2023) ("No. Exact same. No effect at all. Case's value is what a case's value is.").

[258] Video Interview with Genie Harrison, Att'y, Genie Harrison L. Firm (May 25, 2023).

effect primarily to other influences, including the broader impact of the #MeToo movement.[259]

IV. UNPACKING THE EVIDENCE: FROM FALLING SKIES TO STRIKING SUCCESS

In this final Part, we step back and use our collected empirical findings to reset the terms of the debate about litigation transparency reforms. In Part III, we showed that, despite critics' dire warnings, the STAND Act didn't cause the California sky to fall. To the contrary, in the shadow of STAND, we found limited evidence of decreased filings, at most a modest uptick in case duration, and no change in litigation intensity. Meanwhile, those well-positioned to know—the experienced counsel we interviewed—maintain that, after these reforms, settlement sums didn't decline. As one put it: after STAND, "cases are settling for more and more and more."[260]

Further, as we discuss below, our interviews reveal something else—and something we found startling: the STAND and Silenced No More Acts appear to benefit at least some survivors in unanticipated, harder-to-capture, but vitally important ways. These Acts, our interviewees explained, unlocked what we dub a "liberation effect," freeing a generation of survivors from oppressive silencing mechanisms that many, previously, had seen as a perpetuation of their abuse.

Taken together, our mix of quantitative and qualitative evidence ought to reorient—and reboot—debate over transparency reforms in California and beyond. In what follows, we unpack our evidence, and seek to recast the debate, in two steps. First, Part IV.A offers four different interpretations of *why* we might have uncovered what we uncovered when we rigorously analyzed California dockets. Why did STAND buck so many predictions? Second, Part IV.B plumbs our qualitative evidence and adds the liberation effect to the "pro" side of the transparency ledger.

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[259] Video Interview with Anonymous Attorney 10 (May 2, 2023) ("Cases are settling for more money than ever before. I think mainly because the verdicts have tended to be increasing."); Video Interview with Anonymous Attorney 9 (Apr. 17, 2023) (attributing the increase to "the #MeToo movement").

[260] Video Interview with Anonymous Attorney 9, *supra* note 259.

A. Contextualizing Our Empirical Findings

Transparency, Part III suggests, does not inevitably come with many of the negative side effects that so many have long associated with even modest reforms.[261] Why might that be? To answer that question, we knit together our quantitative findings, our qualitative data, and the broader literature concerning secret settlements, yielding four possibilities. First, perhaps STAND's effect on filings, litigation intensity, and duration has been small because there is significant noncompliance and circumvention. Essentially, folks behave much as before. Second, perhaps the modest effects we observe actually reflect heterogeneous treatment effects—with a netting out of competing results. Third, perhaps we shouldn't be surprised that there hasn't been much visible change in settlement activity, as many have long suspected that critics' sky-will-fall claims were grossly exaggerated. Fourth and finally, maybe STAND's apparent success is that it achieves something like a golden mean—translucency, as past scholars have put it,[262] rather than transparency—and so it has changed some things, but not everything, in the resolution of claims in California. We discuss each possibility in turn.

1. Noncompliance and circumvention.

The first possible reason why so little seems to have changed in California as a result of the STAND Act is that the law is perhaps being flouted or ignored. Although the STAND Act's sponsors may have intended to limit the use of NDAs, in reality, it could be that NDAs' usage remains largely unchecked. And here, it is noteworthy that several interviewees observed that some parties continued to include NDAs in settlement agreements. One plaintiffs' attorney candidly expressed: "Honestly, I don't think anything that has been passed has changed at all. Defense counsel generally finds a way to get around and force whatever issues they want [in the settlement]."[263]

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[261] *See, e.g.*, Miller, *Private Lives*, *supra* note 153, at 66 (explaining that "the settlement process would be impaired if the parties could not rely on the assurances of confidentiality reached voluntarily in the settlement agreement," and that "our civil justice system simply could not bear the increased burden if the settlement rate were to decline, or if settlements were delayed to any significant degree, or if the dissemination of settlement details encouraged the bringing of suits that otherwise would not have been brought"); *see also supra* Part II.B (compiling similar predictions).

[262] *See* Levmore & Fagan, *supra* note 50, at 314.

[263] Video Interview with Anonymous Attorney 6 (Apr. 19, 2023).

Based on our interviews, it appears that noncompliance takes one of two forms. First, while many interviewees said they had not seen such a thing,[264] in seven of our interviews, we caught a sense that there's some nontrivial statutory noncompliance, fortified by a view that, now, the NDA would not be enforceable in the event of a breach. Thus, the NDA's execution at the time of case resolution would have more of a psychological than a practical effect. As one plaintiffs' lawyer recalled: "Even if . . . the defendant [ ] come[s] forward with, you know, a secrecy provision, . . . you can just sign the thing, because, you know, if it were to come to something, then it would be void anyway."[265] Second, in an effort at circumvention, some lawyers, we think erroneously, posit that the laws of another state govern. One recalled: "I've heard one lawyer [ ], a plaintiffs' lawyer . . . , who has told me that the [the STAND Act doesn't] apply because all you need to do is say that you're applying another state's laws."[266] Another shared similar experiences, recalling opposing counsels' attempts to "circumvent" the law, including by "stipulat[ing] another law applies."[267] Both forms of noncompliance could conceivably sit behind the modest effects we find in our data.[268]

As with virtually any reform, compliance with the STAND Act is surely incomplete, and so our empirical results may be picking up some of that slippage. However, we did not surface evidence of *widespread* disobedience.

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[264] *See, e.g.*, Video Interview with Anonymous Attorney 9, *supra* note 259 (responding that they had not seen evidence of statutory noncompliance).

[265] Video Interview with Anonymous Attorney 6, *supra* note 263.

[266] Video Interview with Anonymous Attorney 3 (May 2, 2023).

[267] Video Interview with Toni Jaramilla, Att'y, Toni Jaramilla: A Pro. L. Corp. (May 25, 2023).

[268] It is also conceivable that parties are attempting to circumvent STAND by filing more employment claims in federal court, hoping to evade the operation of state law. Yet, we heard nothing of this in our interviews, and such a strategy would rely on a plain misapplication of law. A settlement agreement that terminates litigation is simply a contract, whether the original litigation that led to it occurred in federal or state court, and federal courts cannot disregard state statutes that regulate contract law merely because the contract's subject matter involves the resolution of litigation initiated in federal court. Of course, if Congress enacted a (constitutional) statute preempting state transparency laws, that statute would displace contrary state law. Barring such a statute—and as of this writing there is none—state laws like the STAND Act apply to settlement contracts regardless of the forum where the case they settle is brought.

2. Cancellation: treatment effect heterogeneity.

A second possible explanation of our results harks back to Part II's tangle of predictions and forecasts. Recall that, in anticipating the effect of transparency measures, opponents actually offered two conflicting predictions. These were: (1) that transparency would *promote* the initiation of claims, including ones with dubious merit, which would increase case filings, and (2) that transparency would scare victims from coming forward, which would, in turn, *reduce* case filings.[269] Given these clashing predictions, it could be that eliminating secret settlements encourages some case initiation, even as it discourages other case initiation, and these two opposing trends cancel each other out. This would be a classic example of what applied economists call treatment effect heterogeneity.[270]

One might be tempted to conclude that treatment effect heterogeneity can explain only our case filing results—but says nothing about our results regarding case duration or litigation intensity. Yet, it could be that transparency reforms are, in fact, a magnet that pulls a different *kind* of case—perhaps easy-to-adjudicate ones, or ones where the plaintiff has only a fleeting interest in litigation—into the system. If so, that would tend to reduce measured litigation intensity following the STAND Act's implementation. Yet also suppose that, in addition, cases that would be litigated with or without secrecy reform are, as a result of STAND, litigated more intensely. We would then have intensity effects in both directions, once again leaving the sign of the net effect ambiguous—and possibly zero.[271]

Whether one or more of our possible interpretations can be proven right, or close to it, our quantitative results uniformly suggest that the STAND Act has had only modest effects on key litigation measures in a barrage of critical predictions and forecasts.

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[269] *Compare supra* notes 154–58 and accompanying text, *with* notes 165–67 and accompanying text.

[270] *See, e.g.*, Guido W. Imbens & Joshua D. Angrist, *Identification and Estimation of Local Average Treatment Effects*, 62 ECONOMETRICA 467, 468–69 (1994); Marianne P. Bitler, Jonah B. Gelbach & Hilary W. Hoynes, *What Mean Impacts Miss: Distributional Effects of Welfare Reform Experiments*, 96 AM. ECON. REV. 988, 988–89 (2006).

[271] For more on such effects, see Jonah B. Gelbach, *Can the Dark Arts of the Dismal Science Shed Light on the Empirical Reality of Civil Procedure?*, 2 STAN. J. COMPLEX LITIG. 223, 250–51 (2014); and Jonah B. Gelbach, *Rethinking Summary Judgment Empirics: The Life of the Parties*, 162 U. PA. L. REV. 1663, 1670–71 (2014).

3. Settlement will always be superior to trial.

A third way to make sense of our core findings that little in California's L.A. courts has demonstrably changed in the shadow of STAND is that the value of secrecy has *always* been overstated by those who oppose transparency reforms. The basic intuition would be: while defendants would prefer a secret settlement to a nonsecret settlement, when push comes to shove, they would prefer a nonsecret settlement to a costly and visible trial, and, given that, even in the shadow of the STAND Act, litigation in California is proceeding much as before.

Such an insight would not be new. One court explained nearly two decades ago:

> [S]ettlements will be entered into in most cases whether or not confidentiality can be maintained. The parties might prefer to have confidentiality, but this does not mean that they would not settle otherwise. For one thing, if the case goes to trial, even more is likely to be disclosed than if the public has access to pretrial matters.[272]

And of course, many supporters of reform, including many experienced trial lawyers, have long said as much.[273]

4. Translucency, not transparency: the Golden State's golden mean.

A final explanation for our finding that the STAND Act has had a limited effect on litigation dynamics relates to the explanation just above. Our results could indicate the STAND Act takes a Goldilocks approach. It goes far, but not too far, in its reform.

As noted above, the STAND Act contains three key carveouts. First, it allows parties to maintain the confidentiality of settlement amounts. Second, it does not apply to claims unless and until either a lawsuit is filed or the plaintiff files an administrative complaint with the relevant state agency. Third, it allows parties to maintain the confidentiality of the victim's identity.[274]

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[272] United States v. Ky. Utils. Co., 124 F.R.D. 146, 153 (E.D. Ky. 1989), *rev'd on other grounds*, 927 F.2d 252 (6th Cir. 1991).

[273] *E.g.*, Zitrin, *South Carolina Court Rules*, *supra* note 88, at 900 (stating that the "possibility" that transparency reforms would "chill[ ] settlements" was always "remote"). For additional claims, see *supra* notes 143–45 and accompanying text.

[274] *See supra* notes 192–94 and accompanying text. At the claimant's request, the STAND Act allows secrecy with respect to the claimant's identity and to all facts that could lead to its discovery. CAL. CIV. PROC. CODE § 1001(c).

These exclusions surely blunt the STAND Act's impacts. But we think they may help the STAND Act thread the needle to achieve a salutary middle ground.

Consider first the possibility that the STAND Act's settlement-amount carve-out avoids some of critics' worst fears. It may be that, notwithstanding the hue and cry over the importance of securing broad confidentiality provisions, at the end of the day, defendants *really* just want to keep settlement amounts secret, worried that such disclosures could have an anchoring effect and, in so doing, disrupt the litigation marketplace. As one defense attorney explained: "The main reason to have a confidentiality provision is just . . . , once there's a number, it starts to set a market and then people always want to get more than the last person."[275] By the same token, it could be that, from plaintiffs' perspective, as long as plaintiffs can reveal the facts of the dispute, they will be pretty well satisfied.[276] Under this explanation, for all defendants' talk about ensuring the confidentiality of facts—and notwithstanding *some* reformers' push to mandate the disclosure of figures—there is, in fact, a broad and mutually acceptable middle ground.[277]

Similarly, as noted, under the STAND Act, settlements that resolve claims prior to the initiation of litigation or the filing of a lawsuit or administrative charge can be subject to an NDA—and, once again, this built-in limit could have a moderating effect. After all, once a complaint is publicly filed with at least some factual allegations, the cat is partially out of the bag—and the value of NDAs to defendants diminishes drastically. As one defense attorney explained: "[T]he fact of the matter is [ ] when someone files a complaint in state court or federal court, that's public record."[278] Another attorney echoed this sentiment: "I don't see [post-complaint disclosure] as giving a huge amount more publicity

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[275] Video Interview with Bill Sailer, Senior Vice President & Legal Couns., Qualcomm Inc. (May 30, 2023). Interestingly, plaintiffs might be aligned with defendants on this point. *See, e.g.*, Video Interview with Anonymous Attorney 10, *supra* note 259 ("In most cases, my clients [ ] from the plaintiff's side, didn't really want to disclose it, especially the amount of money they got.").

[276] *See supra* note 130 (collecting citations).

[277] This middle ground doesn't appear to impede the public interest, either. As Professor Arthur Miller explained, "[i]t is difficult to imagine why the general public would have anything more than idle curiosity in the dollar value of a settlement of a court dispute or its terms of payment." Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 484 (1991).

[278] Video Interview with Anonymous Attorney 6, *supra* note 263.

than the complaint itself."[279] In this way, while the STAND Act aimed to address the overuse and potential abuse of NDAs, its actual impact on litigation dynamics, especially once a complaint is filed, could be minimal. Perhaps, consistent with Professor Scott Moss's 2007 prediction, the STAND Act is simply channeling some cases to prelitigation resolution, as the adverse parties join in a "settlement push" to unlock the value of secrecy before it's too late.[280]

The third carve-out—that claimants can conceal their identities and identifying information—also helps situate the STAND Act in the golden middle. As noted, one of critics' chief concerns has always been that, given many victims' desire for privacy, and given many victims' understandable fear that disclosure would be accompanied by a brutal backlash, banning NDAs puts victims in an impossible bind.[281] As attorneys Debra Katz and Lisa Banks put it: "Banning NDAs would often leave harassment victims with only two options—pursuing litigation or remaining silent—placing women in a worse position, not a better one, and potentially giving employers and harassers a pass."[282] Cognizant of this concern, the STAND Act gives victims an out, and it is perhaps owing to this protection that any observed effect on case filings has been modest, rather than sharp.

Accordingly, the STAND Act did not "transform the halls of justice into walls of glass."[283] What it did was strike a balance between transparency and privacy. It ushered in a framework that, while not radically altering the landscape of litigation, addresses the concerns of both plaintiffs and defendants.

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[279] Video Interview with Charles Boylston, Att'y, The L. Offs. of Charles P. Boylston (June 8, 2023).

[280] Moss, *supra* note 154, at 887. In his influential 2007 article, Scott Moss predicted: "With only postfiling confidentiality banned, the parties would make a serious settlement push immediately prefiling, because that would be their last chance to settle before losing part of the settlement value, plaintiff's ability to 'sell confidentiality' to the defendant." *Id.* To be sure, there is bitter with the sweet, and, in its moderate posture and with its toleration for prefiling NDAs, the STAND Act, no doubt, continues to shield some abusive conduct from scrutiny. It also inescapably deprives some, and perhaps many, victims of the "liberation effect" we describe in Part IV.B.

[281] *See supra* Part II.B.

[282] Katz & Banks, *supra* note 170.

[283] Miller, *Private Lives*, *supra* note 153, at 65 (describing the views of those who seek "increased public access" to secret settlements and protective orders).

B. The Liberation Effect

None of the above interpretations changes our core finding that the STAND Act did not have the dramatic effects many critics predicted. They only seek to explain it. However, while the STAND Act's effect on dockets and court congestion was likely exaggerated, our evidence suggests that the law has had another and very different effect that has, to this point, been underappreciated. Generating what we call the "liberation effect," the STAND Act has empowered at least some survivors by ensuring that they are not consigned to live their lives under the dark shadow of an oppressive NDA.[284]

1. Liberation and the long shadow of NDAs.

"Liberation" typically refers to the process of freeing oneself or others from social, political, economic, or psychological constraints by overcoming conditions of oppression, exploitation, or domination. Though it encompasses a broad spectrum of efforts aimed at dismantling structures, assumptions, understandings, and cultural practices, we focus on a theory of liberation that is perhaps most closely associated with modern psychology, which considers psychological self-reflection and the capacity of individuals to free themselves from internal constraints, fears, and limiting beliefs. A key insight that emerges from that narrower literature is that oppressive NDAs hang over victims and can even act as a form of ongoing revictimization, imposing a range of psychic harms.

Sometimes, of course, the long shadow of an NDA has concrete, material consequences. The NDA that bound Zelda Perkins—as noted previously, another one of Harvey Weinstein's

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[284] We recognize that there is an irony in arguing that a law that renders some contracts illegal has a liberating effect. Generally, of course, laws that invalidate contracts between competent, consenting adults are thought to be deeply paternalistic. *See generally, e.g.*, Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983). Cognizant of this tension, note: Our argument is modest. We do not argue that STAND is, on balance, liberty-enhancing. Such a conclusion would entail complex tradeoffs we do not make. Instead, our argument is only that, along one important dimension, STAND is liberty-enhancing, for at least some plaintiffs.

We also acknowledge that the liberation effect's benefits are difficult to quantify. Indeed, these benefits, ironically, represent one more place where the pervasiveness of secret settlements poses deep challenges for rigorous research. Many victims who might talk about their experience are contractually bound not to. Beyond that, many victims may also withhold their voices because they suffer from isolating feelings of shame based, at least in part, on the mistaken view that others don't share their experience.

many victims—restricted her interactions with medical professionals, accountants, and the media.[285] Another notable example is NDAs' restrictions on speaking about prior employment. As one attorney shared, NDAs can be so restrictive that "when someone was, you know, looking for a job even ten years later" and was asked about the employer with an NDA, "[t]hey couldn't even respond in any meaningful way to protect their job search efforts."[286] Perkins, too, shared that "[h]er search for a new job was uncomfortable because she couldn't explain to prospective employers why she had left a top company so abruptly."[287] This silence can plant seeds of doubt as to the circumstances of an employee's departure, putting their "professional reputation at risk."[288]

Harder to glimpse but potentially more powerful is an oppressive NDA's psychic impact. Although attorneys explained that, even prior to STAND, defendants rarely sued plaintiffs for breaching an NDA,[289] we also heard that fear and uncertainty nonetheless, for plaintiffs, loomed large.[290] The mere possibility of enforcement forced plaintiffs into a "constant state of fear, that if they say anything, the company will track them down, force them to hire an attorney, and demand thousands of dollars for the breach."[291]

More broadly but less obviously, NDAs' "legal boundaries restricting speech" harm plaintiffs by creating "a mental solitary

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[285] *See supra* notes 69–72 and accompanying text.

[286] Video Interview with Beth Mora, Att'y, Mora Emp. L.: A Pro. Corp. (May 25, 2023).

[287] KANTOR & TWOHEY, SHE SAID, *supra* note 47, at 67.

[288] Michele Simon, *How Being Legally Silenced Prolongs Workplace Trauma and PTSD*, MICHELE SIMON (Apr. 21, 2022), https://perma.cc/8BNS-USNT; *see also Story 6*, CAN'T BUY MY SILENCE, https://perma.cc/3BG4-NW3L ("I feel shame that I lost my career at 44; I have been blackballed in my industry. I can't explain why I left at the top of my game.").

[289] *See, e.g.*, Video Interview with Traci Hinden, Att'y, The L. Offs. of Traci M. Hinden (May 25, 2023); Video Interview with Charles Boylston, *supra* note 279; Video Interview with Genie Harrison, *supra* note 258; Video Interview with Nancy Smith, Att'y, Smith Mullin, P.C.: Counsellors at L. (May 3, 2023); Video Interview with Beth Mora, *supra* note 286 (describing a handful of threat letters that did not escalate).

[290] *E.g.*, Video Interview with Anonymous Attorney 5, *supra* note 255 (expressing this perspective).

[291] Diana Falzone, *After* Catch and Kill *Fallout, Former Fox News Staffers Demand to Be Released from Their NDAs*, VANITY FAIR (Oct. 28, 2019), https://perma.cc/T7K6-C7BS (quoting women's rights attorney Tamara Holder). Interestingly, some plaintiffs' attorneys also report experiencing mental anguish—this time, from helping their clients enter into NDAs. *See, e.g.*, Adam Liptak, *A Case That Grew in Shadows*, N.Y. TIMES (Mar. 24, 2002), https://www.nytimes.com/2002/03/24/weekinreview/the-nation-a-case-that-grew-in-shadows.html (quoting plaintiffs' lawyer Newman) ("I feel strongly . . . that I was complicit in not recognizing the significance and extent of the problem. I, among other lawyers, was part of the problem. It was probably one of the poorest decisions I made in my career.").

confinement. With no access to social or political space for validation, outrage, or action, all responses are compressed into the intrapsychic domain where they are felt as anxiety, fear, shame, worthlessness, and self-doubt."[292] Mandalena Lewis, an activist and former WestJet flight attendant who was sexually assaulted by a pilot during a layover, refused to sign an NDA when it was offered to her. As she recalled:

> I just remember it being on the table, and it being sort of pushed towards me. It was something that was sold to me, as good for me, beneficial to me. When you sign away something that says you cannot speak or you can't find other women, those women are in a really bad place, are in a terrible place, actually—like the worst, darkest, [ ] loneliest, most isolating place you can imagine. That's where they are.[293]

A potentially illuminating—though far from perfect—analogy might be the "epistemology of the closet."[294] An important part of gay liberation theory has been working out the implications of a metaphorical "closet" space of concealment and disclosure that shapes the lives of many LBGTQ+ individuals.[295] Professor Eve Kosofsky Sedgwick's seminal work on the topic is a blizzard of insights about how sexual orientation has been understood, represented, and silenced, but one of its most powerful is the simple observation that, in a society pervaded by continuing homophobia, the constant tension between silence and disclosure hangs over virtually all social interactions and experiences, including for individuals who are fully "out."[296] Another potential analogy—though, again, an imperfect one—is the vast literature measuring the chronic stress of African Americans in the face of pervasive discrimination and stigma, and the resulting cognitive, psychoemotional, and health tax paid by African Americans in a

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[292] Leah Lipton, *Cutting Out Her Tongue: The Impact of Silencing Trauma Through a Nondisclosure Agreement*, 55 CONTEMP. PSYCHOANALYSIS 373, 386 (2019); *see also infra* text accompanying notes 312–17 (discussing the importance of speaking out in the healing process).

[293] CBC News: The National, *How Sexual Assault Accusers Can Be Silenced by NDAs*, YOUTUBE (Jan. 6, 2020), https://www.youtube.com/watch?v=Vz3djcbkStE.

[294] We are grateful to David Hoffman, whose excellent article on "hushing contracts," *see* Hoffman & Lampmann, *supra* note 8, at 180 & n.83, and gracious correspondence helped surface this analogy.

[295] *See* MICHAEL WARNER, FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 145 (1993) (cataloging early works on the dynamics of "coming out").

[296] *See* EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 68 (1990) (noting that the "gay closet" is "the fundamental feature of social life" for many gay people).

society that remains afflicted by substantial explicit and implicit bias.[297] While no doubt doing violence to the richness of these distinct literatures and the many differences in the experiences of victims of sexual violence, LGBTQ+ individuals, and persons of color, one can read in them a common concern about the cognitively and psychoemotionally draining nature of their status and position in society.

Post-STAND, many NDAs have been voided, lifting the legal and psychological burdens NDAs previously posed. As one plaintiffs' lawyer observed:

> The effect [of the STAND Act] is that women aren't retraumatized . . . for the rest of their lives by having their abusers follow them around in their lives, looking over their shoulder to see if they can be either sued—or even worse, brought into a secret arbitration because somebody agreed to an arbitration clause in their settlement agreement.[298]

As such, NDAs are "not silencing victims anymore" nor "allowing their revictimization by the same abusers."[299] STAND thus comes as "a tremendous relief" to at least some plaintiffs and their lawyers.[300]

2. Victim voice and "hermeneutical injustice."

A liberation lens offers a second account of confidentiality's costs, this one rooted in the subtly different harms that can result from the loss of voice that attends the execution of an NDA. Through this lens, one can see that Gutierrez, Chiu, and

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[297] For an early treatment of what some call the "Black Tax," see generally JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA (1997). For an example of a related empirical literature, see, for example, Karen D. Lincoln, Linda M. Chatters & Robert Joseph Taylor, *Psychological Distress Among Black and White Americans: Differential Effects of Social Support, Negative Interaction and Personal Control*, 44 J. HEALTH & SOC. BEHAV. 390, 390 (2003). A cognate concept is stereotype threat, as first elaborated by psychologists Claude Steele and Joshua Aaronson. *See* Claude M. Steele, *A Threat in the Air*, 6 AM. PSYCH. 613, 616 (1997) (defining "stereotype threat" as "the event of a negative stereotype about a group to which one belongs becoming self-relevant, usually as a plausible interpretation for something one is doing, for an experience one is having, or for a situation one is in, that has relevance to one's self-definition"); Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCH. 797, 797 (1995).

[298] Video Interview with Nancy Smith, *supra* note 289.

[299] *Id.*

[300] *Id.*

Perkins—and surely many others—suffered a form of what political theorist Miranda Fricker has called "hermeneutical injustice," which captures the wrongs done to someone when "some significant area of [their] social experience [is] obscured from collective understanding."[301]

One clear aspect of confidentiality's voice-related harms is—as alluded to in Part II.A—that NDAs prevent victims from contributing to collective efforts to change the conditions that harmed them by reshaping and correcting deficiencies in shared understandings.[302] Put in broader epistemic terms, NDAs limit certain individuals' capacity to contribute to collective resources—high theorist Fricker called them "collective hermeneutical resource[s],"[303] but a prior generation of feminists considered them part of "consciousness-raising"[304]—that are necessary to build and sustain movements for social, cultural, and political change. Indeed, articulating this very point, California State Senator Connie Leyva, who sponsored the STAND and Silenced No More Acts, once explained she sought to "empower survivors to speak out—if they so wish—so they can hold perpetrators accountable and hopefully prevent abusers from continuing to torment and abuse other workers."[305]

But loss of voice also visits distinctively individual harms on victims. In some, it stirs a sense of powerlessness to know of a social problem and yet to be unable to communicate about it and thus mitigate it. In others, it breeds feelings of guilt, particularly among victims who may have signed the NDA in return for a larger payout.[306] And, for still others, NDAs inflict harm by constraining victims' ability to make their experiences fully intelligible both to themselves and also to others with whom they consult or commiserate.[307] The result is a kind of hermeneutical isolation, as Fricker might have put it, in which victims of sexual

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[301] *See* MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 154 (2007). Put even more concretely, hermeneutical injustice arises from there being "blanks where there should be a name for an experience." *Id.* at 160.

[302] *See supra* notes 135–37 and accompanying text.

[303] *See* FRICKER, *supra* note 301, at 151.

[304] CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 84 (1989).

[305] *California Lawmaker Seeks to Ban NDAs That Prevent Workers from Speaking Up About Discrimination and Abuse*, CBS NEWS (Feb. 10, 2021), https://perma.cc/SLR7-ZX9L (quoting Leyva).

[306] *See infra* note 323 (offering a particularly wrenching example).

[307] FRICKER, *supra* note 301, at 157 (describing hermeneutical injustice as, at least in part, an impairment of a subject's ability to "render[ ] [her] experience communicatively intelligible").

assault and harassment are left to make sense of traumatic experiences alone.

These ideas, though framed in high theory, surface repeatedly in victims' and lawyers' on-the-ground accounts. Prior to the STAND Act, plaintiffs often shared with their attorneys that "they felt like it really harmed them" that "they . . . couldn't talk about the facts" of their case.[308] Talking about the facts of a case, however, can be central to some plaintiffs' recovery. As one anonymous survivor who once signed an NDA explained:

> [N]ow I had processed what had happened, and I was ready to talk about it with my family and friends. It was depressing that I couldn't. I wondered if there was something wrong with me, and if other people who have been silenced are able to fully heal and move on with their lives? I realised I had been put in a position where I would always have to withhold a part of myself from the people closest to me, and I felt very isolated. . . . [I]t's been years since I made my complaint. I'm still on medication and managing depression and anxiety. I think back a lot to the beginning. I never would have agreed to be silenced if I knew the long-term impact it would have on my health, my personal relationships, and the safety of others.[309]

In a similar vein, one attorney shared: "You're not the same person" after a traumatic encounter.[310] "But you have to become the best of who you can be by integrating, metabolizing and integrating the experience, right?"[311] The way to do so, the attorney elaborated, is

> by actually being able to talk about it, when they want to talk about it, in the ways they need to talk about it, and share about it, and write about it, and explore it in the most public or the most private of ways, whatever their choice is. And that's where the healing comes through.[312]

NDAs interfered with some of these basic aspects of recovery. Another attorney stated, if someone told her client "I was sexually

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308 Video Interview with Genie Harrison, *supra* note 258.

309 *Story 90*, CAN'T BUY MY SILENCE, https://perma.cc/KL8U-RFPK.

310 Video Interview with Genie Harrison, *supra* note 258.

311 *Id.*

312 *Id.*

harassed," her client "can't say, 'oh my God, I was sexually harassed too. I understand how you feel, this is what happened to me.'"[313]

The STAND Act—and its legislative progeny—allows plaintiffs to "say something more publicly," and "feel safe to do it without fear of retaliation."[314] STAND emboldened plaintiffs to publicly assert: "[T]his was wrong and I need to, you know, do something about it and I don't want to be silenced about it."[315] It let more women not "be another cog in the wheel of silencing victims."[316] As such, they have "given thousands, tens of thousands of people, and maybe many more than that, the tools that they actually do truly need as human beings to do their best job of healing."[317]

At least as important, the STAND Act has, in a significant sense, given plaintiffs the *choice* to speak. This *itself* may be cathartic. "I wanted the power to decide whether or not I get to talk about it," said an anonymous survivor of sexual harassment.[318] "I didn't want that to be by the hand of someone who harmed me."[319] And as one attorney shared, "[B]y virtue of the type of conduct [my clients] have been subjected to . . . , their choice has been taken away from them."[320] Indeed, regaining agency is a critical part of many survivors' recovery.[321]

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313 Video Interview with Nancy Smith, *supra* note 289; *see also* Paquette, *supra* note 36 (quoting plaintiffs' lawyer John Manly as explaining that "[h]ealing . . . comes from talking about what happened, rather than burying it inside" (quotation marks omitted)); *The Experience of Speaking Out*, SHALVA, https://perma.cc/4BQK-QZ6X ("Speaking out lets other survivors know they are not alone, raises awareness of the impact of abuse on survivors, and educates about the many nuanced aspects of the abuse and aftermath issues.").

314 Video Interview with Beth Mora, *supra* note 286.

315 Video Interview with Toni Jaramilla, *supra* note 267.

316 August Brown & Stacy Perman, *Recording Academy Faces Claims of Past Use of NDAs to Silence Women About Sexual Abuse Allegations*, L.A. TIMES (Feb. 2, 2024), https://perma.cc/BLB9-YBSE (quoting Terri McIntyre, who was offered, but refused to sign, an NDA).

317 Video Interview with Genie Harrison, *supra* note 258.

318 Katie DeRosa, *'I Have to Have My Voice': Victims Push to Restrict Non-Disclosure Agreements in Workplace Sexual Harassment*, VANCOUVER SUN (Sept. 26, 2022) (quotation marks omitted), https://perma.cc/Q74F-YEBR.

319 *Id.* (quotation marks omitted).

320 Video Interview with Genie Harrison, *supra* note 258; *see also* Video Interview with Beth Mora, *supra* note 286 ("It doesn't force you to speak. It just allows you to if you want to. It's just the difference."); *see also* Jennifer Huemmer, Bryan McLaughlin & Lindsey E. Blumell, *Leaving the Past (Self) Behind*, 53 SOCIO. 435, 440 (2019) (discussing the loss of agency after experiencing sexual violence).

321 Video Interview with Genie Harrison, *supra* note 258; *see also* Robert T. Muller, *How to Talk or Listen to a Rape Survivor*, PSYCH. TODAY (June 17, 2021), https://www.psychologytoday.com/us/blog/talking-about-trauma/202106/how-to-talk-or-listen-to-a-rape-survivor (discussing the importance of choice and agency).

3. The liberation effect in the equation.

Our empirical findings disproving the dramatic predictions that have dominated decades of debates over secret settlements should recast those debates with a much greater emphasis on the *full range* of ways that transparency reforms affect victims, including psychoemotional effects on victims. Yet, none of this is to suggest that what we have called the "liberation effect" should be the only consideration going forward. When transparency reforms are debated, the liberation effect should be a card in the deck worthy of consideration; it should not necessarily trump.

Put more broadly, debates about regulation of secret settlements inevitably occupy a complex topography. As with the design of transparency mechanisms more generally, they implicate a host of complex questions spanning philosophy, economics, and psychology, among other disciplines.[322] And, as Part II's rehearsal of the debate made clear, they mix and match considerations of the incentives and interests of individual litigants, current and hypothetical victims, courts, and society as a whole. The result is a classic set of policy trade-offs between individual and social interests, and between private and public benefits. Complicating matters, these trade-offs are also context dependent. The liberation effect, for example, may not have the same purchase or force when applied to personal injury victims as compared to victims of sexual harassment and assault, or we might, as a society, decide we value deterrence more in one context, less in another.[323]

Still, we hope the foregoing helps policymakers make those difficult trade-offs. We hope our effort helps to debunk certain persistent claims that cases will no longer settle if secrecy is no longer on offer. We hope it helps to discipline critics' preoccupation with court congestion or strict economic instrumentalism, expressed through settlement sums and transaction costs. And we

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[322] Robert J. MacCoun, *Psychological Constraints on Transparency in Legal and Government Decision Making*, 12 SWISS POL. SCI. REV. 112, 113 (2006); *see also* David Pozen, *Seeing Transparency More Clearly*, 80 PUB. ADMIN. REV. 326, 327 (2020) (arguing that transparency is not a good in itself, but rather a procedural device that might help achieve or hinder substantive aims, depending on social context).

[323] That said, it would be wrong simply to assume that NDAs inevitably take a lesser psychoemotional toll in other areas. *See, e.g.*, *Hush Money?*, CBS NEWS (Oct. 10, 2000), https://perma.cc/P8ZX-CVVC (quoting Kim Van Etten, who accepted a secret settlement to resolve a wrongful death case involving her dead son and then learned that, in the aftermath, more victims had died owing to the defendant's negligence: "I literally, I'm telling you, I felt like I killed those people. And in all honesty, I do have a hand in it, and I'll have to answer to it for some time in my life or after my life").

hope it helps policymakers, judges, and scholars think more clearly about how legal institutions and legal processes can or should attach weight to victims' emotional agency and recovery[324] and, in so doing, make policy choices more "emotionally intelligent."[325]

CONCLUSION

Efforts to restrict oppressive NDAs have long been thought to put lawmakers to an impossible choice—to decide between "stopping tomorrow's harassment from happening" and "giving today's victims as much leverage as possible."[326] Scholars' assumption was that the settlement landscape was zero sum, and the question was not *whether* to hurt certain innocent individuals, but rather *which* innocents to hurt.

Our research puts the lie to those ways of thinking. After analyzing more than a quarter-million case filings, we find that, contrary to critics' dire predictions, the STAND Act did not lead to a sharp increase or decrease in case filings; nor did it appear to yield significantly more protracted litigation or more intense legal battles. These findings imply that defendants still settle, even when full secrecy is not on offer. Indeed, though the evidence is tentative, it doesn't appear that defendants even settle for less.

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[324] *See generally* WILLIAM J. LONG & PETER BRECKE, WAR AND RECONCILIATION: REASON AND EMOTION IN CONFLICT RESOLUTION (2003) (centering this question); LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1998) (noting how legal processes can act as social agents that shape psychological well-being).

[325] Jonathan Doak, *The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions*, 11 INT'L CRIM. L. REV. 263, 290 (2011). In so doing, the literature on procedural justice may be instructive, if imperfect, as the most sustained legal-academic effort to consider the subjective experience of those who interface with courts or court processes. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171 (2005) (offering an extensive literature review).

[326] Elizabeth A. Harris, *Despite #MeToo Glare, Efforts to Ban Secret Settlements Stop Short*, N.Y. TIMES (June 14, 2019), https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html. (suggesting that the choice lawmakers face is "between" these "two competing goals"); *see also* Russell-Kraft, *supra* note 32, at 3 (explaining that some women's rights advocates believe that transparency reforms advance the public interest but do so at the expense of "individual victims"). For an example of women's rights advocates who appear to view the debate in these "either-or" terms, see Katz & Banks, *supra* note 170 ("While well-intentioned, the call to ban NDAs improperly places the burden on victims to protect other workers.").

With profound implications, these findings show that meaningful transparency measures can be implemented without significant detrimental effects on the litigation system—and with possible salutary effects, when it comes to restoring the very agency victims once lost. Together, these insights ought to recast the longstanding debate about secret settlements in California and beyond.