

Procedural Apartheid? How Racial Harassment Cases and Their Proponents are Subject to Separate and Unequal Due Process

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INTRODUCTION

This is a story of two broken human beings. A Black male factory worker goes to work every day where his environment is “saturated with racism.”¹ Several white employees regularly call him the “N word,” along with other racial slurs, such as “coon,” “boy,” and “mayate.”² When he goes to the bathroom, he is met with swastikas, and “death to all [N-word]s” scratched on the stalls.³ Near his workstation, a “racist effigy” and sketches of a “picaninny,” with large lips and a bone in his hair, await him.⁴ A coworker has spread feces on the cart the Black worker drives around the factory.⁵ He is told to “go back to Africa,”⁶ that he is hated,⁷ and that “[N-word]s are lazy” and “are shit.”⁸ Coworkers threaten to beat him up, making him feel unsafe.⁹ When he complains to his employer, he is told “you people can’t

¹ See *Diaz v. Tesla, Inc.*, 598 F. Supp. 3d 809, 816 (N.D. Cal. 2022).

² *Id.* at 819-22. “Mayate” is “the Spanish equivalent of the N-word.” *Id.* at 819.

³ *Id.* at 818.

⁴ *Id.* at 820-22.

⁵ *Id.* at 819.

⁶ *Id.* at 820.

⁷ *Id.*

⁸ *Id.* at 820, 822.

⁹ *Id.* at 820, 836-37.

take a joke.”¹⁰ Not only do his coworkers harass him, but his “supervisors even join[] in on the abuse.”¹¹

After years of enduring such cruelty, this experience made him “lose . . . faith in [his] . . . fellow humans.”¹² He struggled to eat and sleep, lost his joyful personality, and conceded that “[s]ome days [he] would just sit on [his] stairs and cry.”¹³ The worker initially applied for the job because he liked the idea that he “was going to be a part of something that was bigger than” himself and would “be able to make the [E]arth a little bit better for the next generation” at this environment-friendly company.¹⁴

The factory worker sued his employer for creating a racially hostile work environment, in violation of 42 U.S.C. § 1981— “a Reconstruction-era civil rights statute that prohibits discrimination in the making and enforcement of contracts.”¹⁵ This story is not a fictional one from the 1890s post-Reconstruction era. It is a real-life story of a Tesla worker in Fremont, California as described in a 2022 case.

Consider a similar workplace. A white female electrical line worker goes to work every day where, as the only woman working with the crews,¹⁶ she is “subjected routinely to sexual harassment.”¹⁷ Several of her male coworkers constantly call her demeaning and derogatory sex-specific insults, such as “bitch,” “cunt,” and “wench.”¹⁸ “[H]er coworkers would ‘just hammer [her] all day long,’ never referring to her by her real name.”¹⁹ When she goes to the work trucks, she is met with sexually explicit playing cards, calendars, and magazines.²⁰ When she works with the guys in rural areas, they urinate outside and refuse to allow her to use a company truck to travel to a bathroom, taunting her that if she wants to “work in a man’s world, pee like a guy.”²¹ Her coworkers lock her in a trailer, where they demand she clean up their tobacco-chew spit.²² On another occasion, they duct tape shut a porta-potty, trapping her inside until she frees herself with a pocket knife.²³ They throw her purse out of a truck window into the dirt, taunting her for

¹⁰ *Id.* at 821.

¹¹ *Id.* at 816.

¹² *Id.* at 823.

¹³ *Id.*

¹⁴ *Id.* at 818.

¹⁵ *Id.* at 816. *See also* 42 U.S.C. § 1981. A hostile work environment claim may also be brought pursuant to Title VII of the Civil Rights Act of 1964.

¹⁶ *Waldo v. Consumers Energy Co.*, 726 F.3d 802, 815 (6th Cir. 2013).

¹⁷ *Id.* at 810.

¹⁸ *Id.* at 810, 815-16.

¹⁹ *Id.* at 810.

²⁰ *Id.* at 811, 815, 819.

²¹ *Id.* at 810, 815.

²² *Id.* at 810-11.

²³ *Id.* at 810-11, 815, 819.

having it, and when she returns with a smaller one she is called a “dike.”²⁴ Her coworkers ostracize, ignore, and refuse to work with her because she is a woman.²⁵ She is assigned extra hard labor “[j]ust to break her.”²⁶

When she complains on several occasions to her supervisors, the union representative, and human resources personnel, they all fail to investigate or reprimand anyone.²⁷ Not only do her coworkers harass her, but on her first day in the company’s transmission department, her supervisor threatens to “wash [her] out” of the apprenticeship program because he doesn’t want women there.²⁸

This worker started working for the company part-time as a mail room clerk and aspired to become a “journeyman” electrical worker in the company’s transmission department—a first for a woman. But after years of enduring such cruelty, the electrical line worker sued her employer for multiple claims, including creating a sexually hostile work environment, in violation of Title VII of the Civil Rights Act of 1964. This story too is not a fictional one or from bygone days. It is a real-life story of a Consumers Energy worker in Grand Rapids, Michigan as described in a 2013 case.²⁹

Given the two workers’ similar experiences, one would expect them to have similar procedural rights. To the contrary, the latter has a right to her “day in court,” and she may join her claim with those of other women who have suffered similar misconduct while working for this company—*i.e.* a collective action.³⁰ The former cannot. This is because Congress gives survivors of harassment based on sex, but not race, the choice of bringing a case in court or arbitration, and the choice of acting individually or collectively. By enacting the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Claims Act of 2021 (hereinafter “EFASASHA” or “the Act”),³¹ Congress has provided these procedural protections to those survivors of workplace harassment who bring sex-based cases and to them alone.

Private arbitration³²—when chosen freely—can offer privacy, more creative resolutions, flexible process, subject matter expertise, and sometimes cost-savings. However, arbitration is usually presented as a take-it-or-leave-it proposition, tethered to receipt of a job, apartment, bank account,

²⁴ *Id.* at 811, 815.

²⁵ *Id.* at 811, 816, 820.

²⁶ *Id.* at 819.

²⁷ *Id.* at 811, 816-17, 820.

²⁸ *Id.* at 811, 819.

²⁹ *Id.* at 802, 810.

³⁰ In the cases above, both victims were allowed to file suit and receive relief from a jury of their peers. *See* *Diaz v. Tesla, Inc.*, 598 F. Supp. 3d 809, 816, 817 (N.D. Cal. 2022); *Waldo*, 726 F.3d at 810, 808, 812, 824. However, this is rare.

³¹ Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2022, Pub. L. No. 117-90, 136 Stat. 26 (codified as 9 U.S.C. § 401). EFASASHA is pronounced Ef-uh-sah-sha (awkward, right?).

³² This article refers to “private arbitration” agreements made between individuals and entities, rather than arbitration agreements made between workers and unions pursuant to a collective bargaining agreement.

credit card, mortgage, cell phone app, and more. Employees often enter such contracts of adhesion with little knowledge or understanding of their terms, waiving precious rights to a jury trial, robust discovery of evidence, public transparency, available remedies, application of law and precedents, and meaningful appellate review, among others. Not surprisingly, the contract terms often benefit the drafter, who will in turn reward arbitrators who repeatedly rule in their favor.³³ The ubiquity of compulsory arbitration means workers, consumers, and many everyday Americans³⁴ cannot opt out and vote with their feet, exercising their freedom to use the public civil justice system checked by constitutional due process.

Many of these workers are also foreclosed from acting collectively because of class action bans embedded in their arbitration agreements. Employers nationwide have, with Supreme Court approval, also forced their employees to challenge wrongdoing alone.³⁵ While class actions also have their downsides,³⁶ such isolation hampers a worker's ability to: pool resources necessary to attract a lawyer and afford litigation; protect themselves from retaliation for bringing suit; or effectively enforce anti-discrimination laws dependent on their functioning as private attorneys-general.³⁷

Many observers believe that, after a decade of congressional inaction to stop the rising tide of forced arbitration, EFASASHA represents a move in the right direction. This is because a vast majority of workers are forced into individual arbitration³⁸—an alternative private dispute resolution system lacking many of the procedural protections and oversight of the civil litigation system discussed above. Victims of sexual assault and harassment who dare to confront their perpetrators have been forced to raise their grievances alone and in arbitration—thereby compromising their ability to effectively challenge such abuse. With an epidemic of sexual assault and harassment in the workplace³⁹ and elsewhere, empowering victims to confront this abuse

³³ Edmund L. Andrews, *Why the Binding Arbitration Game Is Rigged Against Customers*, STAN. GRADUATE SCH. OF BUS. (Mar. 8, 2019), <https://www.gsb.stanford.edu/insights/why-binding-arbitration-game-rigged-against-customers> [<https://perma.cc/7MUL-SYCN>].

³⁴ *Id.* Throughout the article, “American” refers to the United States of America and not the Americas more generally.

³⁵ ALEXANDER COLVIN, ECON. POL’Y INST., *THE GROWING USE OF MANDATORY ARBITRATION* 2 (2018) (“Of the employers who require mandatory arbitration, 30.1 percent also include class action waivers in their procedures . . .”).

³⁶ These include time for resolution, less control over litigation, and generalized individual relief, among others.

³⁷ See Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 924, 926-28 (1978) (noting that the limited performance of EEOC resulted in workers’ reliance on private enforcement and significant worker-employer power imbalance).

³⁸ See Colvin, *supra* note 35 (finding 60.1 million Americans and 56.2% of private sector non-union employees are subject to mandatory arbitration procedures, and 65.1% of larger companies impose mandatory arbitration).

³⁹ See CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 6, 14 (2016) [hereinafter TASK FORCE]; Alanna Vagianos, *1 in 3 Women Has Been Sexually Harassed at Work, According to Survey*,

in court and to do it together with others is essential. With the momentum of social justice movements, like #MeToo and Time's Up, public outcry crescendoed to the point where Congress—in a rare convergence of bipartisan interests—took corrective action. Accordingly, the Act has been hailed as an important step forward in protecting women⁴⁰ from the ubiquity of sexual harassment.

In marked contrast to its robust support of sexual harassment and assault victims, Congress has not enacted an almost identical bill that would protect racial harassment and discrimination victims—the Ending Forced Arbitration of Race Discrimination Act (EFARDA). There is an alarming and growing epidemic of racially motivated hostility.⁴¹ Indeed, EEOC charges brought for harassment based on race and national origin exceed those based on sex.⁴² However, Congress does not provide the same procedural protection for the latter. With neither bipartisan nor bicameral support,

HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/1-in-3-women-sexually-harassed-work-cosmopolitan_n_6713814 [<https://perma.cc/B7BH-3R8C>] (finding one in three women ages 18-34 has experienced workplace sexual harassment).

⁴⁰ EFASASHA, of course, protects all sexes, including men.

⁴¹ For example, some employees of color are terrorized by physical violence, effigies and nooses, racial slurs, Ku Klux Klan references, hateful graffiti, property destruction, isolation, ridicule and more. *See, e.g.,* EEOC v. Murphy Motor Freight Lines, Inc., 488 F. Supp. at 384-86 (finding racial slurs, Ku Klux Klan symbols and violence constituted Title VII hostile work environment); EEOC v. Holmes & Holmes Indus., Inc., 2012 WL 4811209 at *1-12, *26 (D. Utah Oct. 10, 2012) (finding daily use of racist graffiti, slurs, and jokes created racially hostile work environment). There has been a significant increase in racially motivated hostility, hate crimes, and white supremacist organizations today. *See* Amy Novotney, *Hate Crimes Are on the Rise in the U.S. What Are the Psychological Effects*, AM. PSYCH. ASS'N (May 18, 2023), <https://www.apa.org/topics/gun-violence-crime/hate-crimes> [<https://perma.cc/5LM4-PRYZ>] (finding 7,314 hate crimes in 2019, and 11,679 hate crime incidents in 2024, according to the FBI). This uptick was particularly acute in the wake of Donald Trump's recent bid for re-election for president and subsequent election. *See* Wendy Shaia, *What This Election is Teaching Us About Racism*, UNIV. OF MD., BALTIMORE: VOICES AND OPINIONS (July 29, 2024), <https://elm.umaryland.edu/voices-and-opinions/2024/What-This-Election-is-Teaching-Us-About-Racism.php> [<https://perma.cc/4ZTZ-SHVK>] (showing rising race-based hate crimes, particularly anti-Black, with a 193% increase in certain areas, marking a twenty-three year upward trend in hate crimes). *See* *Crime Data Explorer*, FBI, <https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/hate-crime> (last visited Dec. 30, 2025) [<https://perma.cc/S2RW-7P7P>] (showing more than half of hate crimes reported in 2025 were racially motivated); *see, e.g.,* Adrian Florido, *'Antagonized for being Hispanic': Growing claims of racial profiling in LA raids*, NPR (July 4, 2025), <https://www.npr.org/2025/07/04/nx-s1-5438396/antagonized-for-being-hispanic-growing-claims-of-racial-profiling-in-la-raids> [<https://perma.cc/TMY6-FZLK>] (describing racial discrimination in immigration crackdown). Such hostility has made job sites and other places particularly treacherous for some BIPOC individuals. ("BIPOC" stands for Black, Indigenous, and people of color).

⁴² *See infra* III.C.1 at 44; *see also* *Enforcement and Litigation Statistics*, U.S. Equal Emp. Opportunity Comm'n, <https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0> [<https://perma.cc/QC5M-LF58>] (last visited Apr. 2, 2026) (finding 34.2% of claims based on race, 9.3% based on national origin, and 30.4% based on sex in fiscal year 2024).

EFARDA had only a one percent chance of passing when introduced and now appears effectively dead.⁴³

Congress not only eschewed race, but also affirmatively embraced age as warranting procedural protection. Just one month after Democrats introduced EFARDA, a bipartisan, bicameral group of legislators introduced the Protecting Older Americans Act (POAA), aimed at restricting the use of forced arbitration in cases where older workers challenge workforce harassment and discrimination.⁴⁴ The same Congress that rejected EFARDA resumed its call for a level playing field between powerful corporations and workers, employee choice, and the right of everyday Americans to their day in court—this time irrespective of age.⁴⁵

While POAA did not ultimately pass, its treatment was significantly more favorable. EFARDA has never had bipartisan sponsorship nor been considered in a committee.⁴⁶ By contrast, POAA was first introduced by Democratic Senator Kirsten Gillibrand in the Senate and Republican Nancy Mace in the House, received bipartisan sponsorship in the Senate, was considered by the Senate Judiciary Committee, and was reported out of committee in the Senate.⁴⁷

The juxtaposition between the treatment of race and other group identities for access to justice raises a serious question: Does such treatment threaten to create “procedural apartheid”—*i.e.* separate and unequal tracks for race-based cases and the litigants bringing such cases? Whether intentional or not, the law penalizes plaintiffs’ invocation of race by depriving the complainants of the due process and court access they deserve. When procedure devalues race-based cases, it also devalues those who bring them. This two-tiered system of procedural rights disparately disadvantages people of color (POC) who are more likely to root their grievances in race and thus lose access to an important forum and concomitant tools.

This double standard is not only normatively wrong but creates a dangerous precedent. Unfortunately, there are stories, like the one involving the Tesla worker, that involve brutal racial assaults and harassment across the United States. People nationwide face workplaces poisoned with “vicious, frequent, and reprehensible instances of racial harassment, which occur[] in several guises.”⁴⁸ Even where harassment does not rise to the scandalous

⁴³ See H.R. 3038, 118th Cong. (2023).

⁴⁴ *Small Print, Big Impact: Examining the Effects of Forced Arbitration: Hearings to Examine the Effects of Forced Arbitration Before the S. Comm. on the Judiciary*, 118th Cong. (2024) [hereinafter *Small Print, Big Impact*].

⁴⁵ *Small Print, Big Impact* at 24:18, 25:31, 27:14 (statement of Senator Graham, Member, S. Comm. on the Judiciary); see also *id.* at 19:00-24:09 (statement of Senator Durbin, Member, S. Comm. on the Judiciary).

⁴⁶ See H.R. 3038, 118th Cong. (2023); see also S. 1408, 118th Cong. (2023).

⁴⁷ See S. 1979, 118th Cong. (2023); see also H.R. 4120, 118th Cong. (2023).

⁴⁸ *EEOC v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381, 384 (D. Minn. 1980).

level described above in the Tesla case,⁴⁹ workers subjected to race-based hostility should be afforded the right to choose the forum (court versus arbitration) and form (individual versus collective) for challenging wrongdoing. It is critical that all Americans be able to access the courts and receive due process. Such procedural protections should not be a luxury for only those with the power, resources, and popularity to lobby Congress for carve outs. The Constitution's Fourteenth Amendment's Due Process promise is for everyone.

Congress should develop a coherent and consistent approach to civil court access and procedural justice. The American civil justice system is in jeopardy of devolving into one that selectively provides due process on race-based grounds. At this crucial juncture in our Nation's history, when rule of law and democracy itself are at risk, it is imperative to recalibrate and protect everyone's procedural due process rights.

This article makes three unique contributions. First, it introduces the theoretical framework and coins the term "procedural apartheid." Simply put, when race is invoked as the basis for misconduct, procedural protection is meted out inequitably, often to the detriment of people of color. This phenomenon is situated in the law's larger project to preference colorblindness over race-conscious ameliorative efforts. The article invites the reader to broadly consider where separate and unequal proceduralism exists because of the centrality of race. This article deploys the term "apartheid"—not literally,⁵⁰ but strategically—to highlight the systemic legal and racial nature of this hierarchical divide.

Second, the article contextualizes and applies this theoretical framework to mandatory arbitration and collective actions bans. It illustrates how Congress's passage of EFASASHA and serious consideration of POAA, but not EFARDA, risk procedural apartheid. This article argues that there are no principled justifications for treating the two workers described above differently. While there are meaningful differences between race and sex, they are immaterial to the right to procedural justice. Juxtaposing the treatment of race- and sex-oriented cases exposes a stark double standard. Congress devalues race by unjustifiably making a harassment case contingent upon sex as the gatekeeper to a procedural safe harbor from forced arbitration and class action bans. This devaluation relegates race cases and their proponents to separate and substandard due process tracks.

⁴⁹ See, e.g., *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987) ("Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail . . ."); *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081 (3d Cir. 1996) (stating that discrimination is "masked in more subtle forms").

⁵⁰ The article's use of "apartheid" is not the same as its formal, legal definition, found in various sources.

Third, the article fills an important void in the literature: “[r]elatively little scholarship has focused on racial harassment as opposed to sexual harassment,”⁵¹ and very little, if any, has involved procedure.

The article is organized as follows. Part I coins and defines the term “procedural apartheid.” This part describes the theoretical framework and how the invocation of race as the basis for wrongdoing can be weaponized (intentionally or unintentionally), creating a two-tiered system of procedural rights. Part II describes how Congress protects sexual assault and harassment victims through EFASASHA. This part sets out the problems of sexual harassment, mandatory pre-dispute arbitration agreements, and class arbitration bans, and explains how this new law attempts to address them. Part III explains why the Act, while groundbreaking, is not enough. This part contends that Congress unjustifiably fails to procedurally protect race-based harassment cases and their proponents. Here, the article demonstrates how Congress’s exclusion of race as a basis for procedural protection risks creating procedural apartheid. Part IV proposes legislative and non-legislative solutions to this due process disparity. Finally, the article concludes by warning how dangerous procedural apartheid is to democracy, especially during a time marred by increasing racial hostility, discrimination, and violence.

I. WHAT IS PROCEDURAL APARTHEID?

“Procedural apartheid” occurs when the law creates separate and unequal⁵² procedural tracks for race-based cases and those who bring them. Such law penalizes plaintiffs who invoke race as the basis for mistreatment,

⁵¹ MARIA L. ONTIVEROS, ROBERTO L. CORRADA, MICHAEL SELMI, NICOLE BUONOCORE PORTER, MARCIA L. MCCORMICK, EMPLOYMENT DISCRIMINATION LAW, CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 621 (10th ed. 2020); *see also generally* TASK FORCE, *supra* note 39, at 6 (noting limited data). Notable exceptions include: Pat K. Chew, *Freeing Racial Harassment from the Sexual Harassment Model*, 85 OR. L. REV. 61 (2006) [hereinafter *Freeing Racial Harassment*]; Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49 (2006) [hereinafter *Unwrapping*]; Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009); Richard Mullender, *Racial Harassment, Sexual Harassment, and the Expressive Function of Law*, 61 MOD. L. REV. 236, 236-44 (1998).

⁵² For centuries, in the United States, the doctrine of “separate but equal” was used to justify racial segregation in public schools and most facets of American life. *See Separate-but-Equal*, 1 RACE REL. L. REP. 283 (1956); Robert A. Garda Jr., *Coming Full Circle: The Journey from Separate But Equal to Separate and Unequal Schools*, 2 DUKE J. CONST’L. L. & PUB. POL’Y 1, 6-7 [hereinafter *Coming Full Circle*]. Thurgood Marshall, Charles Hamilton Houston, Pauli Murray and others successfully crafted and argued that separate was inherently unequal, leading to the Supreme Court’s unanimous rejection of the doctrine in public education in *Brown v. Board of Education*. *Coming Full Circle*, 8-9. Following *Brown*, the Court repudiated the doctrine across the board. *See generally id.*; Liz Mineo & Tomiko Brown-Nagin, *The Civil Rights Lawyer Who Paved the Path*, HARVARD GAZETTE (May 16, 2018), <https://news.harvard.edu/gazette/story/2018/05/reflecting-on-charles-hamilton-houstons-battle-against-jim-crow/> [https://perma.cc/N2XS-5GXZ]. This article similarly flags how different procedural tracks can create a separate and unequal civil justice system for Americans based on race.

by subjecting them to a second-class system of procedural rights. Because people of color disproportionately allege race-motivated misconduct, they suffer the brunt of this inequity.

The term “apartheid” may evoke a picture of the premeditated, comprehensive, systemwide separation of the races like that implemented in South Africa where white Afrikaners were afforded robust rights, while Black Africans, Indians, and Coloureds were relegated to the shadows of society. “Apartheid” in that context connotes a web of calculated laws, customs, and practices that officially racially segregated South Africa’s peoples along axes touching all aspects of life.⁵³ “Apartheid” may similarly bring to mind systems in other countries, such as the United States’ own “separate but equal” legal system that officially segregated American citizens following the enslavement of African descents.⁵⁴

In this article, the term “apartheid” may conjure up an image of Black and white people segregated into two different procedural fora—a picture too simplistic⁵⁵ (although not entirely inaccurate) to describe the more nuanced way in which the civil justice system works today.

This article does not use the term “apartheid” literally or lightly. Instead, it deploys the term to connote how law can create race-based procedural hierarchy by distributing due process in harmful ways. The term is

⁵³ The term “apartheid” is an Afrikaans word coined in the 1940s that connotes “separateness,” deriving literally from the Dutch words “apart” (separate) and “heid” (hold). Oxford English Dictionary, *Apartheid*, Oxford UK (July 2023), https://www.oed.com/dictionary/apartheid_n?tab=meaning_and_use&tl=true [<https://perma.cc/78M5-AQ3T>] [hereinafter OXFORD]. See also Legal Information Institute, *apartheid*, Cornell L. Sch. (Apr. 2022), <https://www.law.cornell.edu/wex/apartheid> [perma.cc/72W5-UL69] [hereinafter CORNELL]. (“The term ‘apartheid’, an Afrikaans word, derived from the French term ‘mettre à part’, literally translated to ‘separating, setting apart.’ Apartheid is a policy that is founded on the idea of separating people based on racial or ethnic criteria.”). Apartheid is a “policy or system of segregation or discrimination on grounds of race,” OXFORD, and “refers to the implementation and maintenance of a system of legalized racial segregation in which one racial group is deprived of political and civil rights,” OXFORD; CORNELL. See also Encyclopedia Britannica, *apartheid*, (2024), <https://www.britannica.com/topic/apartheid> [<https://perma.cc/W3CQ-URNE>] [hereinafter BRITANNICA] (“Apartheid” are National Party policies “that governed relations between South Africa’s white minority and nonwhite majority for much of the latter half of the 20th century, sanctioning racial segregation and political and economic discrimination against nonwhites.”). See generally NANCY L. CLARK & WILLIAM H. WORGER, *SOUTH AFRICA: THE RISE AND FALL OF APARTHEID* (Routledge, 4th ed. 2022) (examining the history of South Africa from 1948 to the present).

⁵⁴ See David Oshinsky, *A Powerful, Disturbing History of Residential Segregation in America*, N.Y. TIMES (Jun. 20, 2017) (describing de jure segregation in United States) <https://www.nytimes.com/2017/06/20/books/review/richard-rothstein-color-of-law-forgotten-history.html> [<https://perma.cc/99JC-SWG7>]; Jacqueline Jones, *American Apartheid*, DISSENT MAG. (Fall 2017), <https://dissentmagazine.org/article/american-apartheid/> [<https://perma.cc/4GUX-LGFX>] (describing system of U.S. segregation).

⁵⁵ “Procedural apartheid” can also occur based on socioeconomic class/income, which is highly correlated to race. See Norman W. Spaulding, Barbara Allen Babcock & Toni Massaro, *The Ideal and the Actual in Procedural Due Process*, in A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES 97, 98-105 (Coleman, et al. eds., NYU Press 2022) (contrasting “ideal procedure” with “actual procedure” everyday Americans experience) [hereinafter GUIDE TO CIVIL PROCEDURE].

deliberately meant to be provocative; it challenges the reader to consider whether and how procedural law disfavors those who challenge racial inequities, resulting in separate and unequal tiers of civil justice.

To be sure, there is a full-bodied literature on how people of color, in general, are overrepresented in courts or resolution systems that offer less robust due process. These include state,⁵⁶ municipal,⁵⁷ administrative agency,⁵⁸ immigration,⁵⁹ lawyer-less,⁶⁰ and judge-less⁶¹ courts. Litigants experience racial disparities throughout the civil process where rule creation, application, and interpretation operate to the detriment of disempowered racial groups.⁶² Procedural scholars nationwide have revealed the ubiquity of racially based procedural injustice.⁶³ The inequities run the gamut—from lawyer representation⁶⁴ to judge composition⁶⁵ to jury selection.⁶⁶ In a society so stratified along racial lines (historical and present), it is not surprising that the U.S. civil justice system mirrors such inequities.

But procedural apartheid drills deeper. It is a theoretical framing device that showcases the law's active role in compromising race-based cases and their litigants through substandard procedure. The framework highlights the centrality of law (rules, statutes, caselaw) in procedurally disfavoring race-forward

⁵⁶ Tonya L. Brito, et al., *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243, 1245 (2022) (“[S]tate civil courts subordinate racialized groups and individuals” in “access, treatment, and outcomes”). “[E]viction, debt collection, or family law matters” dominate state civil dockets. *Id.* at 1246-47.

⁵⁷ See, e.g., Norman W. Spaulding, *The Ideal and the Actual in Procedural Due Process*, 48 HASTINGS CONST. L.Q. 261, 266, 276-81 (2021) (racialized debt collection, due process, and civil contempt violations).

⁵⁸ *Id.* at 276, 288-90 (Veterans and Social Security benefits, Workers Compensation compromised).

⁵⁹ *Id.* at 266, 287-88 (lack of due process for asylum and immigration claims).

⁶⁰ Kathryn A. Sabbeth, *The Prioritization of Criminal Over Civil Counsel and the Discounted Danger of Private Power*, 42 FLA. ST. U. L. REV. 889, 931 (2015) (explaining that those unable to afford counsel in civil cases are “disproportionately poor people of color”).

⁶¹ Cf. Sara Sternberg Greene & Kristen M. Renberg, *Judging Without a J.D.*, 122 COLUM. L. REV. 1287, 1287, 1289, 1291-92 (2022) (explaining that lay judges in low-level state courts disproportionately harm Black and Latinx people).

⁶² See generally GUIDE TO CIVIL PROCEDURE, *supra* note 55.

⁶³ See *id.*

⁶⁴ Sabbeth, *supra* note 60, at 920, 931 (finding that lack of constitutionally guaranteed counsel in civil cases has negative disparate impact on Black and Latinx people).

⁶⁵ The judiciary is comprised primarily of white men, who have significant power and discretion over the course of a lawsuit. See, e.g., Seth Katsuya Endo, *Privilege and Voice in Discovery*, in GUIDE TO CIVIL PROCEDURE 278, 282; see also Brooke Coleman, *#SoWhiteMale: Federal Civil Rulemaking*, in GUIDE TO CIVIL PROCEDURE 180, 185 (rule makers are similarly homogenous). Judges are increasingly hostile to employment discrimination claims because of “wholly one-sided legal doctrines” that result from judge-made heuristics and published decisions largely granting employers summary judgment. See Nancy Gertner, *Losers Rules*, in GUIDE TO CIVIL PROCEDURE 116, 117.

⁶⁶ Kevin R. Johnson, *The Disparate Racial Impacts of Color-Blind Juror Eligibility Requirements*, in GUIDE TO CIVIL PROCEDURE 311, 317 (explaining that several “juror eligibility requirements disparately exclude people of color”).

claims. Examples of this phenomenon run the gamut and include areas such as pleadings, discovery, and summary judgment.

For example, people of color who allege race as the basis for a discrimination claim struggle more to meet the elevated “plausibility” standard post-*Ashcroft v. Iqbal*.⁶⁷ Because judges (who are predominantly white) are instructed to use their “judicial experience and common sense” when determining whether a race discrimination claim is plausible and should survive a Rule 12(b)(6) dismissal motion, such allegations are more vulnerable to a lack of awareness and bias (conscious or unconscious). Under *Iqbal*’s highly subjective and malleable standard,⁶⁸ the dismissal rate of Black workers’ racial discrimination cases has doubled.⁶⁹ Moreover, if plaintiffs allege that the discrimination is intentional, the higher evidentiary pleadings bar makes dismissal more likely absent the discovery necessary to unearth illegal and intentional motives.⁷⁰ And for plaintiffs who challenge racial discrimination in contracting under Section 1981 in particular, they must allege that racism was the “but-for” cause to survive dismissal.⁷¹

Race-forward claims⁷² also suffer more during the discovery process, where Rule 26(b)(1)’s stringent application of relevance and proportionality can take a toll.⁷³ The modern federal civil procedure rule embedding proportionality within the scope of discovery, for example, has received pushback from vulnerable litigants needing information solely in the possession of more powerful, resourced defendants.⁷⁴ Such informational asymmetry has encouraged some state courts to reject the new federal rule of proportionality.⁷⁵

⁶⁷ 556 U.S. 662 (2009); Cf. A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 195, 200 (2010) (describing *Iqbal*’s restrictive ethos towards “out-groups”).

⁶⁸ See, e.g., Roger Michalski, *Assessing Iqbal after One Year: Effects and Proposals*, HARV. L. & POL’Y REV. ONLINE (2010), <https://journals.law.harvard.edu/lpr/online-articles/assessing-iqbal/> [<https://perma.cc/SB3W-HGQ3>] (noting how *Iqbal*’s “plausibility” standard is a “highly context-specific task” driven by the “subjective experiences and evaluations of the presiding judge”).

⁶⁹ Victor D. Quintanilla, *Doorways of Discretion: Psychological Science and the Legal Construction and Erasure of Racism*, in GUIDE TO CIVIL PROCEDURE 170, 176.

⁷⁰ Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 89 (2010).

⁷¹ Deseriee Kennedy, *Pleading and Antiracism*, in GUIDE TO CIVIL PROCEDURE 251, 252 (2022).

⁷² A “race-forward claim” is one that contends race is a basis for the alleged misconduct.

⁷³ See Seth Katsuya Endo, *Privilege and Voice in Discovery*, in GUIDE TO CIVIL PROCEDURE 278, 282.

⁷⁴ See generally David F. Levi with David G. Campbell, John G. Koeltl, Chilton Varner & Derek P. Pullan, *The Nuts and Bolts*, 99 JUDICATURE 26, 26-34 (2015).

⁷⁵ See Miyoko T. Pettit-Toledo, *The Politics of Proportionality in State Civil Rulemaking*, 101 DEN. L. REV. 641, 692-93 (2024).

Racialized claims of police violence are also impaired by judges' reliance on video evidence in summary judgment determinations.⁷⁶ While the courts are expected to give the non-movant the benefit of all inferences when determining whether there is a genuine factual dispute, the Supreme Court's endorsement of permitting judicial reliance on video evidence has undermined the viability of such cases.⁷⁷

This article contends that Congress's disparate treatment of sexual and racial harassment cases and their claimants, which results in separate and unequal procedural tracks, is another example of procedural apartheid.

Congress's more recent snub toward race discrimination litigation via EFARDA's rejection is part of a larger backlash and rights retrenchment that has been in the making for decades.⁷⁸ The modern legislature is in sync with its co-branches of government, as illustrated by the Supreme Court's veritable ban on race-conscious affirmative action in higher education in *Students for Fair Admissions, Inc. (SFFA)*;⁷⁹ and the Trump Administration's assault on Critical Race Theory (CRT)⁸⁰ and Diversity, Equity, and Inclusion (DEI).

Following the nationwide racial reckoning after the murder of George Floyd in 2020, there has been a swift and strong backlash against public and private anti-racism efforts.⁸¹ The dominant philosophy of the Supreme Court and the Administration is that the Constitution requires colorblindness;⁸² recognition of race—whether harmful or benign—is impermissible;⁸³ and race discrimination against persons of color is largely something of a bygone era.⁸⁴

Within this context, EFARDA's demise—on the heels of EFASASHA's success—is no surprise. Congress's unwillingness to afford race-based harassment and discrimination cases serious protection is part of a larger

⁷⁶ See Dan M. Kahan, David A. Hoffman, Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

⁷⁷ Jasmine Gonzales Rose, *Civil Rights Summarily Denied: Race, Evidence, and Summary Judgment in Police Brutality Cases*, in GUIDE TO CIVIL PROCEDURE 286, 287 (describing judges' harmful reliance on racial character evidence at summary judgment).

⁷⁸ See Jonathan Feingold, *Colorblind Capture*, 102 B. U. L. REV. 1949, 1949, 1952, 1953 n.9 (2022).

⁷⁹ See *id.* at 2012; see also *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) [hereinafter SFFA].

⁸⁰ See Suzette M. Malveaux, *A Taxonomy of Silencing: The Law's 100 Year Suppression of the Tulsa Race Massacre*, 102 B.U. L. REV. 2173, 2216-2219 (2022) (describing Oklahoma legislation) [hereinafter Malveaux, *Taxonomy*].

⁸¹ See Feingold, *supra* note 78, at 1952.

⁸² *Id.* at 1955, 1958 (defining "colorblindness" and its opposite—"color consciousness").

⁸³ See Sonja Starr, *The Magnet School Wars and the Future of Colorblindness*, 76 STAN. L. REV. 161, 163-34, 233-34 (2024).

⁸⁴ See Khiara M. Bridges, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 25, 30-32 (2022) (describing Court's "racial common sense" tactic).

project overall. Congress's antipathy is consistent with the larger regressive colorblindness movement.⁸⁵ Efforts to delegitimize anti-racist efforts are working; among races there are wildly different perceptions about the existence of racism (individual and systemic) and the need for its correction.⁸⁶

In light of the aggressive modern countermovement against race-consciousness, Congress's rebuff of procedural parity for race-based harassment and discrimination cases is the colorblind canary.

II. HOW CONGRESS PROTECTS SEXUAL ASSAULT AND HARASSMENT VICTIMS

While normally paralyzed by gridlock and poisoned by hyper-partisanship, Congress surprisingly passed EFASASHA with strong bicameral and bipartisan support. The Act is characterized as “one of the most significant changes to employment law in years,”⁸⁷ widely celebrated as an important step in the battle against rampant sexual violence and harassment in the workplace and elsewhere. The ubiquity of sexual misconduct and procedural obstacles to full-throated legal challenges—reinforced by Supreme Court jurisprudence—necessitated legislative action.

A. EFASASHA's Imperative

Sexual harassment in the workforce has been a significant and intractable issue.⁸⁸ Women bear the brunt of this misconduct,⁸⁹ especially those at

⁸⁵ Feingold, *supra* note 78, at 1954 (“[W]e are facing a threat to civil rights and multiracial democracy unseen since the fall of Reconstruction”); *Id.* at 1958-64 (describing “colorblind story” by Right and Left).

⁸⁶ *Id.* at 1983 (critiquing “preference” framing as undermining antiracist aims).

⁸⁷ Debra Cassens Weiss, *Congress Passes Bill Banning Forced Arbitration of Harassment and Sexual Assault Claims*, ABA J. (Feb. 10, 2022, at 15:00 CT), <https://www.abajournal.com/news/article/congress-passes-bill-banning-forced-arbitration-of-harassment-and-sexual-assault-claims> [https://perma.cc/X7SP-ZZSS] (quoting Sen. Maj. Leader Schumer (D-NY)).

⁸⁸ See Claire Safran, *What Men Do to Women on the Job: A Shocking Look at Sexual Harassment*, 148 REDBOOK 149, 217 (1976) (revealing in 1976 study that 90% of respondents were sexually harassed, 92% of them identified it as a “serious problem”); Ronni Sandroff, *Sexual Harassment in the Fortune 500*, 1988 WORKING WOMAN 68, 69 (1988) (revealing in 1988 study that among Fortune 500 companies, 90% of respondents reported receiving workplace sexual harassment complaints); Michelle Ruiz, *He Said WHAT at Work?*, 258 COSMOPOLITAN 136, 137 (2015) (revealing in 2015 study that one out of three women between 18 and 34 reported sexual harassment at work); EEOC, DATA HIGHLIGHT: SEXUAL HARASSMENT IN OUR NATION'S WORKPLACES 1 (2022) (finding that from 2015 to 2018, sexual harassment charges filed with the EEOC increased significantly) [hereinafter EEOC DATA HIGHLIGHT].

⁸⁹ See Jana L. Raver & Lisa Hisae Nishii, *Once, Twice, or Three Times as Harmful? Ethnic Harassment, Gender Harassment, and Generalized Workplace Harassment*, 95 J. APPLIED PSYCH. 236, 239 (2010); see, e.g., EEOC DATA HIGHLIGHT, *supra* note 88 (finding that women filed 78.2% of sexual harassment charges from 2018–2021).

the margins, such as persons who are BIPOC,⁹⁰ low-income,⁹¹ a linguistic minority,⁹² undocumented,⁹³ and/or transgender.⁹⁴ Indeed, women of color face double jeopardy—being more likely to be sexually harassed than white women or men of color,⁹⁵ and are more vulnerable because of their overrepresentation in low-wage industries,⁹⁶ subjection to harmful stereotypes,⁹⁷ and diminished safety net.⁹⁸ Given the notorious under-reporting of sexual

⁹⁰ BIPOC stands for Black, Indigenous, People of Color. EEOC data shows that while 50% to 70% of women experience workplace sexual harassment, women of color file 56% of EEOC charges. Moreover, while EEOC charges by white women have dropped 30% over the last twenty years, they have remained steady for Black women. See Jamillah B. Williams, *Denver Ellison, & Keniece Gray, #MeToo Reforms Fail to Protect Women of Color on the Job and in Court*, NAT'L CTR. FOR INST'L DIVERSITY (Jun. 1, 2022), <https://medium.com/spark/metoo-reforms-fail-to-protect-women-of-color-on-the-job-and-in-court-9e68c545dc79> [<https://perma.cc/JMP8-H3RN>]; Rebecca Schachtman, *Bystanders' Thresholds for Intervention in Black vs. White Women's Sexual Harassment*, 19 PLoS ONE 1, 3 (2024) (same).

⁹¹ See Andrea Martin, *How to Better Protect Low-Wage Workers from Sexual Harassment in The Workplace*, J. CIV. RTS. & ECON. DEV. (2022) (noting that low-wage female workers file nearly a quarter of sexual harassment complaints); Elyse Shaw, Ariane Hegewisch & Cynthia Hess, *Sexual Harassment and Assault at Work: Understanding the Costs*, INST. FOR WOMEN'S POL. RSCH. 2 (2018) (stating that EEOC data shows “tipped” workers in “accommodation and food services” industry account for 14% of harassment charges; women restaurant workers twice as likely to experience workplace sexual assault).

⁹² See Kathleen Sexsmith, Francisco Alfredo Reyes & Megan A. M. Griffin, *Sexual Violence is a Pervasive Threat for Female Farm Workers*, THE CONVERSATION (July 31, 2023, at 08:25 ET), <https://theconversation.com/sexual-violence-is-a-pervasive-threat-for-female-farm-workers-heres-how-the-us-could-reduce-their-risk-204871> [<https://perma.cc/KU52-XD5G>] (“80% of Mexican and Mexican American women farmworkers in the U.S. have experienced some form of sexual harassment at work”); Sasha Khokan, *Female Farm Workers Speak Up About Sexual Harassment*, NPR (Jan. 4, 2014, at 07:58 ET), <https://www.npr.org/2014/01/04/259646787/female-farmworkers-speak-up-about-sexual-harassment> [<https://perma.cc/EX6S-7EF9>].

⁹³ See Sasha Khokha, *Silenced by Status Farm Workers Face Rape Sexual Abuse*, NPR (Nov. 5, 2013, 5:26 PM), <https://www.npr.org/2013/11/05/243219199/silenced-by-status-farm-workers-face-rape-sexual-abuse> [<https://perma.cc/8DVB-WJCM>].

⁹⁴ See Klvas Ciprikis, Damien Cassells & Jenny Berrill, *Transgender Labour Market Outcomes: Evidence from The United States*, 27 GENDER, WORK, & ORG. 1378, 1380-81 (2020) (finding 78% face work harassment or mistreatment).

⁹⁵ See Raver & Nishii, *supra* note 89, at 239 (citing Jennifer L. Berdahl & Celia Moore, *Workplace Harassment: Double Jeopardy for Minority Women*, 91 J. APPLIED PSYCH. 426, 432 (2006) for proposition that racial minority women reported higher overall levels of harassment than did other groups, supporting double jeopardy hypothesis); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1296 (1991) (noting that the prevalence of male violence against women of color is partly due to “intersecting patterns of racism and sexism”).

⁹⁶ See Jamillah B. Williams, *Maximizing #MeToo: Intersectionality & the Movement*, 62 B.C. L. REV. 1797, 1801 (2021).

⁹⁷ See Tanya K. Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER, RACE & JUST. 183, 195 (2000) (stereotypes); see also Williams et al., *supra* note 90 (attributing racial discrepancy in workplace sexual harassment to stereotypes and structural disadvantages).

⁹⁸ See Katherine Giscombe, *Sexual Harassment and Women of Color*, CATALYST (Feb. 13, 2018), <https://www.catalyst.org/insights/2018/sexual-harassment-and-women-of-color> [<https://perma.cc/RZ8H-C8WD>] (finding prosecutors less likely to press charges for Black women victims); CELIA MORRIS, BEARING WITNESS: SEXUAL HARASSMENT AND BEYOND 56 (1994) (finding human resources and white male authority figures more likely to protect white women).

harassment in the workplace, the number of sexual harassment victims is probably significantly higher than reported.⁹⁹

Women who *have* tried to challenge their employers for sexual harassment in the courts and collectively have been forbidden from doing so by pre-dispute mandatory arbitration agreements. Those in favor of arbitration agreements argue that such arrangements are not “mandatory” and are simply the result of private parties selecting an alternative dispute resolution system;¹⁰⁰ after all, individuals are free to forego the job offer and seek employment elsewhere.¹⁰¹ However, the actual belies the ideal.¹⁰² Contrary to the freedom to contract principle,¹⁰³ there is no knowledge or meaningful consent to arbitrate that results in a meeting of the minds. The forum requirement is often buried deep in paperwork, printed in fine print, and written in legalese—a foreign language to most workers.¹⁰⁴

For those who are fortunate enough to find and understand the mandatory arbitration provisions, the ubiquity of such employment agreements forecloses any real possibility of negotiation.¹⁰⁵ Mandatory pre-dispute arbitration agreements in employment contracts have proliferated over the last forty plus years,¹⁰⁶ threatening a privatization of the justice system.¹⁰⁷

⁹⁹ TASK FORCE, *supra* note 39, at 8, 14-16, 16 nn.62-63 (“[B]ased on the empirical data, the extent of non-reporting [of harassment] is striking” because taking formal action is the “least common response” and “on average, anywhere from 87% to 94% of individuals did *not* file a formal complaint” and unwanted physical touching was reported 8% of the time; sexually coercive conduct reported 30% of the time); Cf. Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 879-84 (2008) (examining burdens and risks that lead to under-reporting and under-counting).

¹⁰⁰ See, e.g., *Coinbase, Inc. v. Suski*, 602 U.S. 143, 153 (2024) (Gorsuch, J., concurring) (emphasizing that arbitration is grounded in clear, mutual consent).

¹⁰¹ Such agreements are also found in all manner of contract with retailers, lenders, credit card companies, cell phones, and landlords.

¹⁰² See Spaulding et al., *supra* note 55, at 283-84 (finding mandatory arbitration clauses affected over 55% of workers by 2018).

¹⁰³ See generally, MARGARET J. RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 14-15 (Princeton Univ. Press 2013).

¹⁰⁴ See *Arbitration Fairness Act of 2007: Hearing on S. 1782 Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 110th Cong. 57 (2007) (statement of F. Paul Bland, Jr., Staff Att’y, Public Just.).

¹⁰⁵ Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?* 54 HARV. C.R.-C.L. L. REV. 155, 157 (2019) (arguing prevalence of mandatory arbitration clauses weakens employees’ bargaining power).

¹⁰⁶ See Suzette M. Malveaux, *Is It Time for a New Civil Rights Act? Pursuing Procedural Justice in the Federal Civil Court System*, 63 B.C. L. REV. 2403, 2429 (2022) (describing proliferation over 30 years and citing sources) [hereinafter Malveaux, *Is It Time?*]; see also Suzette M. Malveaux, *Is It the “Real Thing”? How Coke’s One-Way Binding Arbitration May Bridge the Divide between Litigation and Arbitration*, 1 J. DISP. RESOL. 79, 80 & nn. 11-12 (2009) (citing studies) [hereinafter Malveaux, *Is It the “Real Thing”?*]; see also Colvin, *supra* note 35, at 5 (finding over 60 million American workers—more than half of nonunionized private-sector employees are bound by mandatory arbitration agreements).

¹⁰⁷ See Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a “Privatization of the Justice System,”* N.Y. TIMES (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> [https://perma.cc/H454-Z3NP]; Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal*

This exponential growth is no surprise given the Supreme Court's express favoritism for its use.¹⁰⁸ The Court has rejected attempts to invalidate arbitration agreements in almost all circumstances.¹⁰⁹ Arbitration has proceeded even when: the parties were grossly outmatched in terms of power, information, and resources; arbitrators were incompetent, non-conscientious, biased, or ignorant of the law;¹¹⁰ and arbitration itself could only provide symbolic rather than actual relief, counter to the effective vindication rule.¹¹¹ Even states that have sought to provide their citizens with greater protections against forced arbitration have been prevented from doing so.¹¹² Despite the Federal Arbitration Act (hereinafter "the FAA") drafters' express intent to cabin arbitration to sophisticated, commercial players who knowingly opt for an alternative forum to resolve common business disputes in federal court, modern arbitration goes far beyond these guardrails.¹¹³

The employment market's saturation of compulsory arbitration agreements, coupled with an indigent workforce hungry for livable wages, has created the perfect storm. As Professor Myriam Gilles aptly notes, the "get out of court free card" of arbitration funnels vulnerable workers onto a separate procedural track where claims of harassment, discrimination, and unfair labor practices are often handled.¹¹⁴ In this precarious environment, powerful companies accused of sexual misconduct have been able to exculpate

Rules of Civil Procedure, 162 U. PA. L. REV. 1793, 1795 (2014); see also Malveaux, *Is It the "Real Thing"?*, *supra* note 106, at 80-81; AT&T Mobility LLC v. Concepcion, 563 U.S. 33, 350 (2011) (Ginsburg, J., dissenting) (enforcing arbitration clauses that prevent class actions would privatize the civil justice system).

¹⁰⁸ See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (conceding "a liberal federal policy favoring arbitration agreements"); see also Malveaux, *Is It Time?*, *supra* note 106, at 2457-58 ("[T]he arbitration case law is sweeping; from *Circuit City* to *Gilmer* to *EEOC v. Waffle House*, . . . to *Concepcion* and *DIRECTV*"); *id.* at 2426-27 & nn.194, 195 (holding forum covers constitutional and statutory law claims not contemplated by FAA drafters, including RICO, ADEA, Title VII, ADA, FLSA and FMLA).

¹⁰⁹ See Malveaux, *Is It the "Real Thing"?*, *supra* note 106, at 84 & nn.43-52 (first citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624-25, 633-34 (1985); and then citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27-33 & n.4 (1991)).

¹¹⁰ *Id.*

¹¹¹ See *id.* at 2427-28 (criticizing *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 231-35 (2013) for enforcing arbitration agreement where plaintiff could not vindicate its statutory rights because of embedded class action ban).

¹¹² See *id.* at 2427 & nn.197-202 (first citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336-43, 352 (2011); and then citing *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 465 (2015)).

¹¹³ See *id.* at 2425-29 (describing the expansive scope of the FAA).

¹¹⁴ See *Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights, Testimony Before the H. Comm on the Judiciary, Subcomm. on Antitrust, Commercial, and Administrative Law* 117th Cong. 1 (2021) (statement of Myriam Gilles, Professor, Benjamin N. Cardozo Sch. of L.) [hereinafter *Justice Restored*]; see also Sternlight, *supra* note 105, at 183-84 (concluding forced arbitration deters enforcement by making it harder for employees—especially the most vulnerable—to secure representation, join class actions, or pursue claims individually).

themselves from public scrutiny and accountability in the court system and quietly settle disputes behind closed doors in private arbitration.¹¹⁵

If this weren't enough, collective action bans are embedded in many pre-dispute mandatory arbitration agreements,¹¹⁶ which force victims to fight injustice alone. As Justice Ruth Bader Ginsburg correctly observed, the Supreme Court is largely responsible for this,¹¹⁷ bolstering companies' ability to strategically divide workers who challenge corporate wrongdoing.

The divide and conquer strategy harms those who would benefit most from the collective. Individuals challenging discrimination in particular rely more heavily on the collective strength and affordability of the class action mechanism.¹¹⁸ Low-wage workers are unlikely to challenge workplace mistreatment by themselves given their lack of knowledge about their legal rights, desperation to keep their jobs, and substantial lack of power vis-à-vis their employer.¹¹⁹ Professor Gilles explains that: "the unavailability of class litigation is disproportionately more harmful to low-income groups—in ways both real and expressive, short- and long-term—than any single other factor."¹²⁰ Without the affordability and safety of a class action, many vulnerable workers forego vindicating their rights entirely¹²¹—a foreseeable outcome orchestrated by powerful institutions.

¹¹⁵ See Michelle L. Price, *Congress Approves Sex Harassment Bill in #MeToo Milestone*, AP NEWS (Feb. 10, 2022, at 16:51 ET), <https://apnews.com/article/joe-biden-business-kirsten-gillibrand-arts-and-entertainment-sexual-misconduct-e210bde4bd0efb3cddb6bf344363d5eb> [<https://perma.cc/FZ9U-DVLB>] (stating that many sexual abuse victims have been forced "to shut up, not tell anyone about it and not seek justice.") (quoting Senate Majority Leader Chuck Schumer).

¹¹⁶ Malveaux, *Is It Time?*, *supra* note 106, at 2431 (finding 41% of private sector, non-union employees subject to mandatory arbitration can't bring class actions).

¹¹⁷ *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 58, 68 (2015) (Ginsburg, J., dissenting) (warning that confluence of *DIRECTV*, *Concepcion* and *Italian Colors* will undermine consumer law enforcement); see also Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455, 506-507 (2014) (Court largely enforces such clauses) [hereinafter Malveaux, *Diamond in the Rough*]; Malveaux, *Is It Time?*, *supra* note 106, at 2431-32.

¹¹⁸ See generally Suzette Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 65 U. KAN. L. REV. 325, 329-333 (2017); see, e.g., *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 578, 599 (9th Cir. 2010), *rev'd*, 564 U.S. 338 (2011).

¹¹⁹ See Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from The Civil Docket*, 65 EMORY L.J. 1531, 1544-45 (2016); Elizabeth Kristen, Blanca Banuelos & Daniela Urban, *Workplace Violence and Harassment of Low-Wage Workers*, 36 BERKELEY J. EMP. & LAB. L. 169, 180 (2015) (fear of losing jobs deters workers); E. Christine Reyes Loya, *Low-Wage Workers and Bullying in the Workplace: How Current Workplace Harassment Law Makes the Most Vulnerable Invisible*, 40 HASTINGS INT'L & COMP. L. REV. 231, 237 (2017); see, e.g., Khokha, *supra* note 93.

¹²⁰ Gilles, *supra* note 119, at 1537.

¹²¹ Women are more reliant on aggregation as a tool for seeking redress. Women of color are impacted even more. See generally, Rosalio Castro & Lucia Corral, *Women of Color and Employment Discrimination: Race and Gender Combined in Title VII Claims*, 6 LA RAZA L.J. 159, 162 (1993); see also Katherine V. W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECON. POL'Y INST. 1, 10-14 (2015).

In light of these procedural barriers, the #MeToo movement catalyzed its legal arm, TimesUp,¹²² to spearhead litigation and policies that would empower women to sue sexual predators in court and to do so collectively, resulting in EFASASHA.¹²³

B. EFASASHA Provides Choice of Forum and Form

EFASASHA's two primary objectives are to protect victims of sexual assault or harassment from being: 1) denied court access and forced into arbitration; and 2) forced to challenge their perpetrators alone. To accomplish this, the Act amends the FAA as follows:

*. . . [A]t the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.*¹²⁴

The Act applies only to pre-dispute, not post-dispute, agreements.¹²⁵ Under the Act, a pre-dispute agreement is presumptively invalid or

¹²² Lesley Wexler, Jennifer K. Robbennolt, & Colleen Murphy, *#MeToo, Times Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 58-60 (2019).

¹²³ The same is true of non-disclosure agreements, or "NDAs." See *id.* at 60; Sara Khorasani, *Harvey of Hollywood: The Face That Launched a Thousand Stories*, 41 HASTINGS COMM. & ENT. L.J. 103, 121-23 (2019) ("harassment can be suppressed for decades" by NDAs); Kathleen McCullough, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo and Time's Up Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 2653, 2681 (2019) (NDAs hide sexual predators).

¹²⁴ Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, 9 U.S.C. § 402(a) (2022) (emphasis added).

¹²⁵ Pre-dispute refers to an agreement that was entered into prior to an employee's alleging sexual harassment or sexual assault. Post-dispute refers to an agreement that was entered into after such an allegation. The timing of when an agreement was made is important.

Pre-dispute contracts condition someone's employment, housing, retail purchase or other benefit on their willingness to go to arbitration alone to resolve future disagreements. Pre-dispute, it is unlikely that an applicant will read or understand the fine-printed proposal buried in paperwork offering a desperately needed job, place to live, or essential product or service. Knowledge and consent—bedrock criteria for a contractual meeting of the minds—are a fiction for such contracts of adhesion. See Restatement (Second) of Contracts §§ 20, 21 (Am. L. Inst. 1981) (stating that if parties attach materially different meanings to their manifestations, there may be no manifestation of mutual assent which "may prevent the formation of a contract").

By contrast, post-dispute contracts are conceived of once a conflict has arisen. Post-dispute, the plaintiff may have counsel and a greater opportunity to truly consider which forum makes the most sense to use for problem-resolution. While the power differential between employer and employee, landlord and renter, and retailer and consumer remains, the plaintiff may be better positioned to actually consider the procedural menu. See Michael Z. Green, *Measures to Encourage and Reward Post-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 8 NEV. L.J. 58, 72-74 (2007) (analogizing post-dispute agreements to settlement agreements, when parties can better assess claims' strengths and weaknesses).

unenforceable, subject to a plaintiff or class representative deciding otherwise. The law still permits the individual who signed the pre-dispute agreement to choose arbitration and forego collective action if desired. The law empowers the litigant to choose which forum and form of litigation works for them regardless of what they initially agreed to. This option aligns with the freedom to contract, recognizing that some sexual misconduct victims may prefer individual arbitration because of the privacy, informality and simplicity it can provide.¹²⁶ The law puts the survivor in the driver's seat where she belongs and does not presume to know what works for her. The crux of the Act is choice, a value articulated across the political spectrum.¹²⁷

1. Mandatory Arbitration or Public Court System

The ability to choose a forum is important because of the significant distinctions between public court and private arbitration. Robust discussion of these distinctions is beyond the scope of this paper and has been made elsewhere. However, some major ones are set forth below.

On the one hand, arbitration is an alternative that may be fitting, and perhaps ideal, under certain circumstances. For example, corporations of equal bargaining power may appropriately use arbitration to resolve ongoing, typical transactional business disputes, as the FAA intended. Other parties may contract for it because they find its relative speed, privacy, flexibility, affordability,¹²⁸ subject matter expertise, and creativity in process and remedy make it a better option than participating in the litigious, binary, adversarial, rigid, win-lose civil litigation system.¹²⁹ In addition, companies appreciate the specialized “efficiency, privacy, cost savings and litigation avoidance” of arbitration.¹³⁰ Some judges welcome the forum because it

But see Lewis L. Maltby, *Out of the Frying Pan, into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313 (2004) (describing challenges that post-dispute agreements may pose for plaintiffs with weaker cases).

¹²⁶ See Diana Lewis, *Arbitration and Mediation, an Alternative Resolution for Survivors of Sexual Violence*, 11 J. ALT. DISP. RESOL. 1, 5 (2023); cf. David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J. F. 1, 25 (2022-2023) (acknowledging some circumstances in which “victims of sexual misconduct are better off pursuing claims outside of the cumbersome judicial system”).

¹²⁷ See generally BRIAN T. FITZPATRICK, *THE CONSERVATIVE CASE FOR CLASS ACTIONS* (UNIV. OF CHICAGO PRESS, 1st ed. 2019). Fitzpatrick notes how individual autonomy, efficiency, accountability, and law enforcement are class action features that align with “conservative” values.

¹²⁸ See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 685 (2010) (discussing arbitration’s limited procedural rigor and review enable lower costs, faster resolution, and expert adjudication).

¹²⁹ See, e.g., Gary L. Voegele, Linda K. Wray & Ronald D. Ousky, *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcome*, 33 WM. MITCHELL L. REV. 971, 979-82 (2007) (summarizing collaborative law’s benefits in family disputes).

¹³⁰ See Malveaux, *Is It the Real Thing?*, *supra* note 106, at 77-78.

promotes settlement, easing judicial backlog.¹³¹ So long as the forum provides the same capacity for a plaintiff to vindicate their substantive rights, the Supreme Court has deemed private arbitration a welcome item on the dispute resolution menu.¹³²

On the other hand, private arbitration has significant drawbacks. These include: no right to a jury trial; limited discovery; an inadequate review process; no requirement to follow law or precedent; biased decision-making favoring repeat players; proscribed remedies; lack of arbitrator diversity; difficulty retaining counsel; lack of transparency; no public written record; and no subsidized adjudicator.¹³³ In addition to the lack of procedural and substantive protections, arbitration's potentially exorbitant price¹³⁴ and relatively dismal outcomes for employees and consumers challenging wrongdoing¹³⁵ make it an unattractive alternative to litigation.

The question is whether it is appropriate to *force* litigants to use arbitration.¹³⁶ While compulsory arbitration may help clear dockets for overwhelmed courts, it circumvents the civil justice system. The normative answer is to fill judicial vacancies, not replace them. Some argue that if arbitration is not required pre-dispute, most individuals will not choose it post-dispute, leading to its death knell. Assuming this is true, the conclusion proves the point. If private arbitration was so advantageous, it would not be such a hard sell.

Indeed, on occasion Congress has already softened its full-throated support of compulsory arbitration and the Supreme Court's endorsement of it.¹³⁷ EFASASHA is Congress's latest recognition of the arbitral forum's deep flaws and the unconscionability of forcing people to unwittingly use the forum. EFASASHA now gives sexual abuse victims the freedom to choose which forum is right for them.

¹³¹ *Id.* at 78-79.

¹³² *See, e.g.,* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985) (explaining how an alternative forum is welcome, so long as it enables plaintiff to vindicate their substantive rights).

¹³³ *See* Malveaux, *Is It the Real Thing?*, *supra* note 106, at 84-85 (describing features absent in arbitration).

¹³⁴ *See* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000) (recognizing excessive financial burdens can invalidate arbitration contract); Lisa A. Nagele-Piazza, *Unaffordable Justice: The High Cost of Mandatory Employment Arbitration for the Average Worker*, 23 U. MIAMI BUS. L. REV. 39, 45-46 (2014) (describing arbitration's substantial costs).

¹³⁵ *See* Nagele-Piazza, *supra* note 134, at 46.

¹³⁶ Whether and to what extent this private option is inherently inferior to the public default is highly contested and is beyond the scope of this paper.

¹³⁷ *See* Epic Systems Corp. v. Lewis, 584 U.S. 497, 526-53 (2018) (Ginsburg, J., dissenting) (noting Congress's evolving stance); *see also* Malveaux, *Is It the Real Thing?*, *supra* note 106, at 86 (exemptions for veterans, auto dealers, and certain livestock producers).

2. *Collective or Individual Action*

While most stakeholders have focused on the Act's choice of forum, equally important is the Act's choice of form. EFASASHA allows a sexual abuse survivor to decide whether to bring their case individually or collectively. The law prohibits forced "joint action waivers" which includes waivers of class actions under Federal Civil Procedure Rule 23, collective actions under the Fair Labor Standards Act (FLSA), and multi-district litigation (MDL).¹³⁸

The debate over the appropriateness of aggregate litigation is also not a new one. To be sure, aggregation—in its myriad forms—has its pros and cons. Central to this debate is the modern civil rights class action (governed primarily by Rule 23(b)(2) of the Federal Rules of Civil Procedure).¹³⁹ This joinder device was deliberately designed to empower those challenging discrimination and to level the playing field between them and the powers that be.¹⁴⁰

In a nutshell, the device promotes court access, law enforcement, and judicial economy.¹⁴¹ Victims can share costs and spread risks, enabling them to more easily afford litigation and attract counsel.¹⁴² Their numbers protect them from intimidation, retaliation, and isolation. Victims can also more easily and broadly enforce workplace anti-discrimination laws,¹⁴³ neglected by politically recalcitrant or cash-strapped federal agencies. Moreover, victims can resolve numerous cases in a single stroke, thereby saving all stakeholders scarce time and resources, and increasing the likelihood of settlement and much-desired closure.¹⁴⁴

However, the device may compromise individual autonomy and inflate settlement pressure. While an individual is usually the "master" of their own claim, a Rule 23(b)(2) class member may be represented in a lawsuit

¹³⁸ See 9 U.S.C. § 401(2) (2022) (defining "predispute joint-action waiver").

¹³⁹ See generally, Maureen Carroll, *Class Actions, Indivisibility, and Rule 23(b)(2)*, 99 B.U. L. REV. 59, 75-76 (2019).

¹⁴⁰ See Malveaux, *Is It Time?*, *supra* note 106, at 2415-16; see generally, Suzette Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 U. KAN. L. REV. 325 (2017); David Marcus, *The History of the Modern Class Action, Part I: Sturm and Drang, 1953-1980*, 90 WASH. U. L. REV. 587, 608 (2013).

¹⁴¹ See Malveaux, *Diamond in the Rough*, *supra* note 117, at 487-89.

¹⁴² Mass arbitration helps workers bypass class certification and pressure companies, but its sustainability and fairness remain unclear. See Malveaux, *Is It Time?*, *supra* note 106, at 2432-36.

¹⁴³ See generally, Malveaux, *Diamond in the Rough*, *supra* note 117, at 488.

¹⁴⁴ Such benefits have not escaped employers themselves. Companies ironically seek to settle mass individual arbitrations on a class-wide basis after opposing their workers' initial pursuit of class certification for liability. See Malveaux, *Is It Time?* *supra* note 106, at 2435 ("irony" noted by court). Moreover, some conservative scholars—contrary to their counterparts—have conceded how aggregation is in lockstep with conservative values. See generally Fitzpatrick, *supra* note 127.

without their consent or knowledge and may be bound by the outcome.¹⁴⁵ The rigorous Rule 23 class certification process creates interference, ensuring that the parties don't run afoul of the constitutional due process requirement.¹⁴⁶ Moreover, aggregation magnifies plaintiffs' bargaining power in cases some defendants characterize as "frivolous" but too expensive to settle.¹⁴⁷ But claims of "extortion" are "largely overblown and unsupported empirically"¹⁴⁸ and checked by existing Rule 23 procedural guardrails.

In sum, without access to the courts and the protective umbrella of a class action, women working at the margins have been trapped and left to fight sexual assault and harassment battles alone and in the shadows.¹⁴⁹ Even those with relatively more power were outmatched.¹⁵⁰ EFASASHA changed that. It gives victims the autonomy and agency they deserve, by empowering them to unite and publicly fight abusive practices based on sex.

III. EFASASHA IS AN ILLUSTRATION OF PROCEDURAL APARTHEID

While EFASASHA is a step forward, it is not enough. Congress's refusal to explicitly tether procedural justice to race-based cases creates a form of procedural apartheid. This is illustrated by a separate and unequal track for race-based harassment cases and the track's disparate impact on people of color, both unwarranted by normative and doctrinal arguments.

A. *Separate and Unequal Tracks Exist for Sex and Race-Based Harassment Cases*

After the passage of EFASASHA, sex and race-based harassment cases are subject to separate and unequal procedural tracks. Challenges to the notion of procedural apartheid under the Act include: some race claims being covered under EFASASHA; some protected categories other than race not receiving procedural protections; and some potentially innocuous political justifications for the disparate treatment. For the reasons set forth below, such counterarguments fall short.

¹⁴⁵ See Malveaux, *Diamond in the Rough*, *supra* note 117, at 485 (citing *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)).

¹⁴⁶ *Id.* at 486 (citing *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160-61 (1982)).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 486-87.

¹⁴⁹ See Isabela Salas-Betsch, *Ending Discrimination and Harassment at Work*, CAP (Mar. 14, 2024), [https://perma.cc/REM7-PSA8] (discussing barriers to reporting sexual harassment).

¹⁵⁰ This included Fox Broadcaster Gretchen Carlson, whose sexual harassment lawsuit against Fox News CEO Roger Ailes was subject to mandatory arbitration. See Moira Forbes, *Gretchen Carlson's Bold Vision: Rewriting the Rules of American Workplaces*, FORBES (Oct. 7, 2024), [https://www.forbes.com/sites/moiraforbes/2024/10/07/gretchen-carlsons-bold-vision-rewriting-the-rules-of-american-workplaces/] [https://perma.cc/7JK9-XNT8].

1. *Race Alone Is Not Protected*

A plaintiff must file a case that alleges an assault or harassment based on sex to be within the threshold for coverage under EFASASHA. Only under such circumstances is a plaintiff protected from mandatory arbitration and collective action bans.

By contrast, filing a complaint based on race alone—which is also a protected class subject to even stricter judicial review standards than sex¹⁵¹—fails as a basis for exemption from mandatory arbitration and collective action bans. If one brings a case based only on race, one does not receive the same procedural protections applied to a case involving sex. An exclusively race-based allegation does not trigger the Act’s application. Congress’s failure to tether procedural access to cases involving race-based harassment and discrimination creates “procedural apartheid” by separating and relegating cases based on race to unequal process.

One counterargument to the existence of “procedural apartheid” is that the characterization overstates the issue; if someone brings a case implicating race as well as sex, it is possible to benefit from the Act.¹⁵² So long as race is part of a case that relates to a sexual assault or sexual harassment dispute, racialized mistreatment should be covered by the statute. This is because the statute applies to cases, not claims.¹⁵³ Arguably, so long as a “person allege[s] conduct constituting a sexual harassment dispute or sexual assault dispute” and files a case “under Federal, Tribal, or State law” that relates to that dispute, the entire case is spared compulsory individualized arbitration.¹⁵⁴

Central to understanding the Act’s scope is whether a case relates to a sexual misconduct dispute.¹⁵⁵ While the courts are just starting to interpret EFASASHA’s scope, there is compelling support that its coverage is broad. First, the Act covers cases in which mandatory arbitration agreements are embedded in a variety of contracts. This includes employment, consumer,

¹⁵¹ See *United States v. Virginia*, 518 U.S. 515, 532 n.6 (1996) (“most stringent judicial scrutiny for classifications” reserved for race or national origin).

¹⁵² See Michael Z. Green, *Expanding the Ban on Forced Arbitration to Race Claims*, 72 U. KAN. L. REV. 455, 456, 464 (2024); see, e.g., *Mera v. SA Hosp. Grp., LLC*, No. 23-CV-03492, 2023 WL 3791712 (S.D.N.Y. June 3, 2023); *Delo v. Paul Taylor Dance Found., Inc.*, No. 22-CV-9416, 2023 WL 4883337 (S.D.N.Y. Aug. 1, 2023); *Allen v. McCurry*, 449 U.S. 90 (1980); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75 (1984). In fact, many African-Americans bring sex and race harassment claims together. See EEOC *Data Highlight*, *supra* note 88, at 2 (finding that Black individuals filed 71.2% of sexual harassment charges concurrent with race charges).

¹⁵³ EFASASHA at §§ 401-02 (rendering pre-dispute arbitration agreements unenforceable “with respect to a case”).

¹⁵⁴ See, e.g., *Johnson v. Everyrealm*, 657 F. Supp. 3d 535, 558 (S.D.N.Y. 2023) (finding Act blocked enforcement of arbitration provision for whole case).

¹⁵⁵ See Green, *supra* note 152, at 485-92.

and commercial contracts,¹⁵⁶ protecting victims in “professional, educational, consumer, health care, or long-term care” settings.¹⁵⁷

Second, the Act protects anyone whose harassment is about “sex” broadly defined. The statute itself does not define “sex.” However, Title VII¹⁵⁸—the primary federal statute forbidding employment discrimination—anchors how “sex” is understood in the context of federal anti-discrimination law.¹⁵⁹ Title VII and the Supreme Court’s interpretation of “sex” as a protected class under Title VII provide a floor that suggests many cases should be covered by EFASASHA. For example, “sex” discrimination includes discrimination on the basis of “pregnancy, childbirth, or related medical conditions,”¹⁶⁰ sexual orientation and gender identity,¹⁶¹ and gender stereotyping.¹⁶² Paradoxically, “sex” harassment need not even be “sexual.”¹⁶³ So long as the harassment was motivated by the victim’s sex, this suffices. The literature is clear that sexual harassment is more about abuse of power than sexual desire.¹⁶⁴

¹⁵⁶ Deborah A. Widiss, *New Law Limits Mandatory Arbitration in Cases Involving Sexual Assault or Sexual Harassment*, ABA (Nov. 22, 2024), [https://perma.cc/L7GB-DN3S] (explaining that EFASASHA “applies to all agreements covered by the FAA, and thus many consumer claims as well as employment claims”).

¹⁵⁷ H.R. REP. NO. 117-234, at 2-4 (2022).

¹⁵⁸ Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e17 (as amended).

¹⁵⁹ See e.g., *Title VII of the Civil Rights Act of 1964: Requiring Discrimination-Free Workplaces for 60 Years*, EEOC (last accessed Nov. 25, 2024), <https://www.eeoc.gov/title-vii-civil-rights-act-1964-requiring-discrimination-free-workplaces-60-years> [https://perma.cc/5KPN-NEBL] (Title VII as “model for other civil rights laws”); *Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 996 (8th Cir. 2022) (Fair Housing Act); *Kadel v. Folwell*, 100 F.4th 122, 163-64 (4th Cir. 2024) (Affordable Care Act); *Beck v. Dep’t of the Navy*, 997 F.3d 1171 (Fed. Cir. 2021) (Uniformed Services Employment and Reemployment Rights Act).

¹⁶⁰ See Sandra Sperino, *Escaping Arbitration and Class Action Waivers for Harassment Because of Pregnancy, Sexual Orientation or Gender Identity*, 84 OHIO ST. L.J. ONLINE 18, 21 (2023); see, e.g., *Delo v. Paul Taylor Dance Found., Inc.*, 685 F. Supp. 3d 173, 186-87 (S.D.N.Y. 2023) (holding that comments and actions related to pregnancy and childcare responsibilities plausibly constitute sexual harassment).

¹⁶¹ See Sperino, *supra* note 160, at 21; see *Bostock v. Clayton County*, 590 U.S. 644, 658-59 (2020) (holding that sexual orientation or gender identity (SOGI) discrimination is “sex” discrimination under Title VII).

¹⁶² See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 230 (1989) (explaining that gender stereotyping is sex discrimination under Title VII).

¹⁶³ See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998) (“[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.”).

¹⁶⁴ See e.g., Matthew DeLange, *Arbitration or Abrogation: Title VII Sexual Harassment Claims Should Not be Subjected to Arbitration Proceedings*, 23 J. GENDER, RACE, & JUST. 1, 227, 263 (2020) (“[S]exual harassment in the workplace is . . . rarely about sexual gratification but [is] more about power and violence.”); Vicki Schultz, *Open Statement on Sexual Harassment From Employment Discrimination Law Scholars*, UNLEASH EQUALITY (2018), <https://www.stanfordlawreview.org/online/open-statement-on-sexual-harassment-from-employment-discrimination-law-scholars/> [https://perma.cc/J6X9-S846] (Feb. 28, 2026, 10:12 AM) (noting that sexism rather than sexual desire is basis for sexual harassment); Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. 22, 33 (2018) (“wide range of nonsexual actions is used to denigrate women . . . because of their sex”).

Third, Title VII protects everyone from sexual harassment, including men,¹⁶⁵ and those victimized by persons of the same sex.¹⁶⁶ This broad understanding of “sex” and relatedly “sexual harassment” casts a relatively wide net of procedural protection for victims of sex-based misconduct.

However, the scope of EFASASHA depends on whether all claims that comprise a case—related or unrelated to the sexual assault or harassment dispute—are exempt from a compulsory arbitration contract.¹⁶⁷ The legislative history suggests that only related claims may escape mandatory arbitration,¹⁶⁸ which would exclude independent race-based allegations. The nascent case law is unclear. Some courts suggest that all claims—regardless of relatedness—are protected.¹⁶⁹ Other courts have parsed out claims, protecting only those that are intermingled with the sexual misconduct dispute while forfeiting the rest.¹⁷⁰

Central to EFASASHA’s scope is how tight the nexus is between the sexual misconduct and other conduct. This determines whether the attendant claims are sufficiently intertwined for joint resolution in the civil court

¹⁶⁵ See *Bostock*, 590 U.S. at 659 (explaining that Title VII protect “both sexes”); *Sex Discrimination*, EEOC, <https://www.eeoc.gov/youth/sex-discrimination> [https://perma.cc/WGX2-LXJV] (last visited Feb. 28, 2026, 10:17 AM) (“Everyone, regardless of gender, is protected from sex discrimination under Title VII.”).

¹⁶⁶ See *Oncale*, 523 U.S. at 80-81.

¹⁶⁷ See Imre S. Szalai, *#MeToo’s Landmark, Yet Flawed, Impact on Dispute Resolution: The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, 18 Nw. J.L. & Soc. POL’y. 1, 20-25 (2023) (describing EFASASHA’s legislative history and debate over scope).

¹⁶⁸ See 168 Cong. Rec. S625 (daily ed. Feb. 10, 2022) (statement of Sen. Joni Ernst) (“[W]e agreed that harassment or assault claims should not be joined to an employment claim without a key nexus . . . [The bill] should not be used as a mechanism to move employment claims that are unrelated to these important issues out of the current system.”); *id.* at S625-S628 (statement of Sen. Lindsey Graham) (“What we are not going to do is take unrelated claims out of the arbitration contract.”); *id.* at S626 (statement of Sen. Dick Durbin) (“[F]or cases which involve conduct that is related to a sexual harassment dispute or sexual assault dispute, survivors should be allowed to proceed with their full cases in court regardless of which claims are ultimately proven.”); *id.* at S627 (statement of Sen. Kirsten Gillibrand) (“[O]nly disputes that relate to sexual assault or harassment conduct can escape the forced arbitration clauses.”).

¹⁶⁹ See, e.g., *Johnson v. Everyrealm, Inc.*, 657 F. Supp. 3d 535, 558, 561, 562 n.23 (S.D.N.Y. 2023) (holding EFASASHA blocked arbitration of entire case including non-sexual harassment claims); *Turner v. Tesla, Inc.*, 686 F. Supp. 3d 917, 925 (N.D. Cal. 2023) (same); *Delo v. Paul Taylor Dance Found., Inc.*, 685 F. Supp. 3d 173, 185 (S.D.N.Y. 2023) (same); *Doe v. Second St. Corp.*, 105 Cal. App. 5th 552, 577 (2024) (same).

¹⁷⁰ See, e.g., *Mera v. SA Hosp. Grp., LLC*, 675 F. Supp. 3d 442, 448 (S.D.N.Y. 2023) (holding EFASASHA renders arbitration agreements unenforceable only with respect to claims that relate to sexual harassment dispute). Professor Michael Green makes a compelling argument that arbitrable race claims and non-arbitrable sexual harassment claims under EFASASHA should be tried together in court when they arise out of the same conduct and are sufficiently factually and legally intertwined. Green, *supra* note 152, at 482-87. While this may help some with race-based claims, it risks doctrinal instability and unequal access for race claims overall.

system.¹⁷¹ Examples include retaliation,¹⁷² wage and hour,¹⁷³ “sex plus,”¹⁷⁴ and intersectional claims,¹⁷⁵ in order of court receptivity.

The fact that arbitrable claims may be exempt under EFASASHA is welcome news for a subset of workers who are targeted from two directions (sex plus) or who experience harm uniquely reserved for those situated at the intersection (intersectionality). However, this law is still emerging and in some ways is unhelpful. For example, intersectionality is neither uniformly recognized by anti-discrimination law¹⁷⁶ nor by the courts.¹⁷⁷

¹⁷¹ Green, *supra* note 152, at 487 (noting that early federal court cases focused on nexus); *see also*, Szalai, *supra* note 167, at 16-19 (describing the nexus framework).

¹⁷² Retaliation claims provide a strong nexus. *See* 9 U.S.C.S. § 401(4) (“[R]etaliation resulting from a report of sexual harassment is related to conduct that is alleged to constitute sexual harassment.”); *see also* Szalai *supra* note 167, at 16-22 (same); *see, e.g.*, Olivieri v. Stifel, 112 F.4th 74, 77 (2d Cir. 2024); *Turner v. Tesla, Inc.*, 686 F. Supp. 3d 917, 924, 928 (N.D. Cal. 2023). This benefits the plaintiff because retaliation claims enjoy greater success than their underlying discrimination claims. *See* Joseph A. Seiner, *Retaliation: The Last Safe Haven for Plaintiffs*, in *THE SUPREME COURT’S NEW WORKPLACE* 91-105 (2017).

¹⁷³ Some wage and hour claims are connected to the sexual harassment dispute, while others are not. *Compare* *Turner*, 686 F. Supp. 3d at 924 (connected), *with* *Mera*, 675 F. Supp. 3d at 448 (unconnected).

¹⁷⁴ “Sex plus” claims involve discrimination on the basis of sex and another characteristic that is not a protected class. *See* *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543-44 (1971) (establishing sex-plus framework); Jamillah Bowman Williams, *Beyond Sex Plus: Acknowledging Black Women in Employment Law and Policy*, 25 EMP. RTS. & EMP. POL’Y J. 1, 13-17 (2021) (identifying non-protected classes). Some courts define “sex plus” claims to include sex plus protected traits (such as race) too. *See* *Phillips*, 400 U.S. at 542. In either case, race joins sex under EFASASHA’s umbrella.

¹⁷⁵ Intersectional claims involve discrimination based on membership in more than one protected class; this fusion results in an experience unique to this subclass. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 586-90 (1990) (describing intersectionality as rejection of sex and race essentialism); Raver, *supra* note 89, at 236 (“gender harassment co-occurs with reports of ethnic harassment . . . and harassment against sexual minorities . . .”) (citing sources); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 4 U. CHI. LEGAL F. 139, 139-40 (1989) (describing intersectional claim for Black women); Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J. 105, 111-19 (2018) (giving examples). Indeed, some scholars argue that racial motivations—often subconscious—are embedded in sexual harassment, thereby making it impossible to disaggregate race and sex as explanations for such harassment. *See* Hernández, *supra* note 97, at 184-85, 195-96.

¹⁷⁶ *See, e.g.*, S.B. 1137, 2024 Gen. Assemb., Reg Sess. (Cal. 2023) (detailing that California unlawful discriminatory practices may include “any combination” of protected characteristics or traits); Haley Morrison & Heather M. Domingo, *California Is the First State to Adopt Intersectionality of Protected Characteristics*, NAT’L L. REV. (Nov. 5, 2024), <https://natlawreview.com/article/california-first-state-adopt-intersectionality-protected-characteristics> [<https://perma.cc/8Y87-MJT9>] (last visited Feb. 28, 2026, 10:55 AM).

¹⁷⁷ *See* *Jefferies v. Harris County Community Action Ass’n*, 615 F.2d 1025, 1034 (5th Cir. 1980) (“black females as a distinct protected subgroup” under Title VII); *De Graffenreid v. Gen. Motors Assembly Div.*, 558 F.2d 480, 483 (8th Cir. 1977) (rejecting intersectional claim for Black women as a “super-remedy”); *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994) (“[W]here two bases for discrimination exist, they cannot be neatly reduced to distinct components.”); *Shazor v. Prof’l Transit Mgmt.*, 744 F.3d 948 (6th Cir. 2014) (considering Black women a protected class); *see* Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)history*, 95 B.U. L. REV. 713, 727 (2015) (“Despite the integral role of intersectional

EFASASHA's inclusion of some race-forward claims is ultimately a strawman. While the Act may cover race-based harms embedded in a case involving sexual assault or harassment, the law fails to cover them when untethered to a case regarding sex. A case alleging race solely as the basis for the assault/harassment would not be covered by the statute. In other words, the Act would not have protected the male Tesla worker who was harassed solely on the basis of race, as described at the beginning of this article.

Despite EFASASHA's broad scope, it is not intended to protect victims of race-based harassment and discrimination. When Congress had an opportunity to protect race-based misconduct, it declined. EFARDA would have given those who file a case based on racial harassment or discrimination alone the option of foregoing mandatory arbitration and mandatory individualized action. However, unlike EFASASHA, EFARDA got little traction.

EFASASHA enjoyed clear bipartisan, bicameral support among its sponsors, co-sponsors, and supporters in Congress. The bill was introduced in the House on July 16, 2021.¹⁷⁸ Its co-sponsors included seventeen Democrats and eight Republicans from varied states. The bill passed easily, with all the Democrats and over half the Republicans supporting it.¹⁷⁹ The very next day, the same bill¹⁸⁰ was introduced in the Senate by Sponsor Senator Kirsten Gillibrand (D-NY), with original co-sponsors Senators Lindsey Graham (R-SC) and Richard J. Durbin (D-IL).¹⁸¹ Eighteen Democrats and ten Republicans co-sponsored the bill with support from states as varied as Texas to Colorado to California. The Senate passed the bill without amendment by voice vote.¹⁸² A bipartisan coalition of state attorneys general from all fifty states, the District of Columbia, and the U.S. territories supported the legislation.¹⁸³ Conservative Fox Broadcaster Gretchen Carlson—well-known for her sexual harassment lawsuit against Fox News CEO Roger Ailes—brought together constituents from across the

experiences in informing the origins and early development of Title VII, court opinions that acknowledged . . . intersectionality were few and far between.”).

¹⁷⁸ Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, H.R. 4445, 117th Cong. (2021-2022). Sponsor Rep. Bustos (D-IL) introduced H.R. 4445 in the House with original co-sponsors Rep. Griffith (R-VA), Rep. Jayapal (D-WA), and Rep. Cicilline (D-RI).

¹⁷⁹ The bill passed 335-97. Democrats voted 222 yea, 0 nay, 0 abstentions, and the Republicans voted 113 yea, 97 nay, 2 abstentions. *See id.*

¹⁸⁰ Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, H.R. 4445, 117th Cong. (2021-2022).

¹⁸¹ *Id.*

¹⁸² A voice vote is a procedural mechanism used when a bill is expected to pass with little or no opposition, often reflecting a consensus and a lack of controversy. *See* VALERIE HEITSHUSEN, CONG. RSCH. SERV., THE LEGISLATIVE PROCESS ON THE SENATE FLOOR: AN INTRODUCTION, CONG. RESEARCH SERV., THE LEGISLATIVE PROCESS ON THE SENATE FLOOR: AN INTRODUCTION, Rpt. No. 96-548, 13 (2019).

¹⁸³ H.R. REP. NO. 117-234, at n.68 (2021-2022).

aisle.¹⁸⁴ Less than nine months after the bill's introduction, President Joe Biden signed it into law.¹⁸⁵

In light of Congress's rejection of forced pre-dispute arbitration and class action bans for those victimized by violence and harassment based on sex, it would logically follow that Congress would do the same for those similarly victimized based on race. However, EFARDA failed to garner bipartisan, bicameral support, with only Democrats spearheading the bill. Just one year after Congress's strong support of EFASASHA, on May 2, 2023, Representative Colin Z. Allred (D-TX) and Senator Cory A. Booker (D-NJ) introduced this almost identical¹⁸⁶ version of the law in the House¹⁸⁷ and Senate¹⁸⁸ respectively, this time substituting "race" for "sex." Instead of collective outrage: crickets. In fact, the likelihood of EFARDA's passage at the time was one percent.¹⁸⁹ In stark contrast to EFASASHA, there was no bipartisan support among sponsors or co-sponsors in the House or Senate, almost ensuring the bill's demise.¹⁹⁰

Congress's failure to pass EFARDA while strongly supporting EFASASHA is telling. Congress devalues race relative to sex by making a case contingent upon sex as the gatekeeper to a procedural safe harbor. Only assaults and harassment based on sex give a victim the option of choosing robust due process.¹⁹¹ In this regard, race is outranked by sex and deemed unworthy of the same outrage over the lack of access to justice and the same

¹⁸⁴ Weiss, *supra* note 87.

¹⁸⁵ The bill was signed on March 3, 2022.

¹⁸⁶ EFARDA is narrower because it covers only civil claims (i.e. "discrimination"), whereas EFASASHA covers a criminal claim (assault). However, EFARDA is broader because it covers "discrimination" (which includes inequities in pay, promotion, hiring, firing, discipline, etc.), whereas EFASASHA covers only one type of discrimination, harassment. To reach broad consensus, EFASASHA's coverage was narrowed from discrimination to harassment. *See* David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J. FORUM 1, 9-10 (2022) (describing this pragmatic legislative evolution). Similarly, EFARDA's scope was restricted to only discrimination. *See* Green, *supra* note 152, at 460-63 (describing EFARDA's legislative strategy and focus).

¹⁸⁷ Representatives Allred (D-TX) and "Hank" Johnson Jr. (D-GA) introduced H.R. 3038. All 36 co-sponsors were Democrats, from California, Colorado, Texas, Florida, and New York. The bill was referred to the House Judiciary Committee the same day, but nothing has happened since. *See* Ending Forced Arbitration of Race Discrimination Act of 2023, H.R. 3038, 118th Cong. (2023).

¹⁸⁸ Senator Booker (D-NJ) introduced S. 1408 with six Democratic co-sponsors. It was referred to the Senate Judiciary Committee but has seen no action since. *See* Ending Forced Arbitration of Race Discrimination Act of 2023, S. 1408, 118th Cong. (2023).

¹⁸⁹ *See* H.R. 3038: 118th Cong. (2023), *Ending Forced Arbitration of Race Discrimination Act of 2023*, GOVTRACK.US (2023), <https://www.govtrack.us/congress/bills/118/hr3038> [<https://perma.cc/L2JX-6JXH>] (last visited Nov. 10, 2024). There was also a 4% chance of the bill getting out of committee.

¹⁹⁰ The bill has since died. *Id.*

¹⁹¹ *Cf.* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563-64 (2001) (describing employment law due process options: "Cadillac" for a few to "rickshaw" for many, with "Saturn" (i.e. arbitration)—a fairer mid-level alternative).

concomitant bipartisan effort to repair. Race is relegated to a separate and unequal procedural track, resulting in “procedural apartheid.”

2. *Other Identities Are Favored Over Race*

A second counterargument to the existence of “procedural apartheid” is that Congress’s omission is not limited to race. These procedural protections are absent along other axes, not just race.¹⁹² It is not as if EFASASHA singles out race for exclusion; indeed, the statute is silent on the matter. Arguably, by passing the law, Congress has simply exercised its prerogative to focus on the salient issue of sexual assault and harassment.¹⁹³ By this measure, the term “apartheid”—a race-based division—would seem not to fit. The term is underinclusive, failing to account for bases other than race that do not enjoy exemption from mandatory arbitration and collective action bans.

While it is true that other identity groups are similarly unprotected, Congress has demonstrated a greater willingness to consider them. The Protecting Older Americans Act of 2023 (POAA)¹⁹⁴ is a case in point. Just one month after the introduction of EFARDA—which fizzled shortly after its announcement—the sponsors of EFASASHA rolled out an almost identical bill,¹⁹⁵ this time proposing to protect “age.” On June 14, 2023, the very same Congress introduced POAA in the House¹⁹⁶ and Senate,¹⁹⁷ to protect cases alleging discrimination on the basis of age from compulsory arbitration and joint action bans.

Just days after its tepid response to race-based procedural protections, Congress whip-lashed back to enthusiasm over installing procedural guardrails in the context of age-based discrimination cases.¹⁹⁸ The sponsors

¹⁹² This would include other Title VII protected classes such as religion, national origin, and color.

¹⁹³ While there are statutes that only cover sex (*see, e.g.*, Equal Pay Act, 29 U.S.C. § 206(d)), or race (*see, e.g.*, 42 U.S.C. §§ 1981, 1982, 1983), or disability (*see, e.g.*, Americans with Disabilities Act, 42 U.S.C. 12111), they largely deal with substance not procedure. Overall, this mosaic covers protected classes among several substantive laws; but they do not condition due process on identity group membership.

¹⁹⁴ Protecting Older American Act, S. 1979, 118th Cong. (2023-2025).

¹⁹⁵ Like EFARDA, POAA protects “discrimination” (including harassment) but not “assault” claims.

¹⁹⁶ On June 14, 2023, Rep. Mace (R-SC) introduced H.R. 4120, identical to the Senate version, without co-sponsors. It was referred to the House Judiciary Committee but ultimately died.

¹⁹⁷ On June 14, 2023, Senator Gillibrand (D-NY) introduced S. 1979, identical to the House bill, with bipartisan co-sponsors. It was referred to the Senate Judiciary Committee. As of July 29, 2025, the bill had 13 co-sponsors (10 Democrats, 3 Republicans), Protecting Older American Act, S. 1979, 118th Cong. (2023-2025), <https://www.congress.gov/bill/118th-congress/senate-bill/1979/cosponsors> [<https://perma.cc/LM2X-8BS8>] (last visited July 29, 2025).

¹⁹⁸ *See* Press Release, U.S. S. Comm. on the Jud., *Durbin, Gillibrand, Graham Introduce Bipartisan Legislation to Allow Victims of Age Discrimination to Seek Justice and Accountability* (June 14, 2023), <https://www.judiciary.senate.gov/press/releases/durbin-gillibrand-graham-introduce-bipartisan-legislation-to-allow-victims-of-age-discrimination-to-seek-justice-and-accountability> [<https://perma.cc/CMY6-KFNA>] (Feb. 28, 2026, 11:53 AM) (“Three out of

expressed bipartisan support and optimism over its quick passage.¹⁹⁹ Senator Graham noted that with the ranking Republican member of the Judiciary Committee supporting the bill, “we’ll get this done as fast as we can.”²⁰⁰ Some commentators at the time surmised, “Age discrimination is seen as an area that would be more palatable to the GOP.”²⁰¹ Unlike EFARDA, POAA enjoyed bipartisan support and a greater likelihood of passage: The bill had a 6% chance of being enacted and a 12% chance of getting out of committee at the time.²⁰²

Rather than treat sex, race, and age consistently, the lawmakers leapfrogged over race as worthy of procedural protection. This bipartisan support for POAA and passage of EFASASHA belies the contention that race is not being treated differently.

The fact that Congress doesn’t procedurally protect other identities doesn’t negate the significance of race as a driving force for exclusion. Congress’s disinterest reflects a larger resistance on the part of the Republican Party to recognize race’s enduring significance—exhibited by antagonism towards CRT, DEI, affirmative action, and race-conscious remedies generally. EFARDA’s icy reception is no surprise in the context of a decades-long orchestrated colorblind movement.

Moreover, the existence of procedural apartheid can co-exist with exclusions based on other identity groups. Procedural scholars, such as Professor A. Benjamin Spencer, have unearthed how various “out-groups” experience a common plight as procedural law moves from a restrictive to liberal ethos.²⁰³ Procedural apartheid unfortunately falls under a larger umbrella of exclusions grounded in “otherness,” with meaty due process reserved for those with wealth, power, and popularity.

four older workers have seen or experienced age discrimination on the job, but too often cannot pursue justice because of forced arbitration . . . , a secretive and unfair process that strips hard-working Americans of their constitutional right to a jury trial.”).

¹⁹⁹ See Emily Peck, *Bipartisan Group Unveils Bill to Protect Older Workers From Age Discrimination*, AXIOS (June 14, 2023), <https://www.axios.com/2023/06/14/bipartisan-bill-americans-age-discrimination> [https://perma.cc/32GJ-HRWU] (last visited Feb. 28, 2026, 11:48 AM).

²⁰⁰ See *id.* (quoting Senator Graham).

²⁰¹ See *id.*

²⁰² See Protecting Older Americans Act of 2023, H.R. 4120, 118th Cong. (2023), <https://www.govtrack.us/congress/bills/118/hr4120> [https://perma.cc/ML7R-TFS7] (last visited Dec. 31, 2023). The bill has since died. See *id.* “Overall, about 11% of the 15,055 bills in 2021–2023 were sent out of committee to the floor.” Analysis Methodology, GOVTRACK.US, <https://www.govtrack.us/about/analysis> [https://perma.cc/2BAA-P9XE] (last visited Feb. 21, 2026).

²⁰³ A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 195, 200 (2010) (arguing that pleadings precedent reflects a restrictive ethos, prioritizing interests of dominant or commercial-class defendants over civil claims of societal out-groups).

3. *The Greater Political Landscape Does Not Explain Race Distinction*

Third, some may counter that a variety of innocuous political considerations explain EFARDA's meek trajectory. As a general matter, these are hyper-partisan political times, with very little legislation garnering bipartisan support. Many bills at their infancy stage have a paltry chance of passing in such a divided Congress. In the 2021 to 2023 term, no bill had more than a 2% chance of being enacted and only 11% had a chance of getting out of committee.²⁰⁴ Indeed, during this time period, EFARDA's likelihood of passage was not much lower than POAA's.²⁰⁵ Moreover, there are a myriad of reasons why a bill may or may not get traction, including legislator self-referentialism,²⁰⁶ constituent power,²⁰⁷ timing, and shifting priorities on the global stage. In light of geo-political forces, civil procedure may understandably pale in importance and urgency. Finally, there are subtle differences between EFASASHA and EFARDA that could shed light on Congress's reluctance to sanction the latter.²⁰⁸

However, none of these explanations justifies Congress's timidity in procedurally protecting race-based cases. While hyper-partisanship compromises the viability of most potential legislation, there is no meaningful difference in the posture of EFARDA that would explain its struggle. The same Congress, at the same time, regarding the same substance, offered bipartisan support to a procedural rights bill focused on age (POAA), but not race (EFARDA). The bills are identical, focused equally and completely on process rather than substance. And while EFARDA slightly differs from EFASASHA,²⁰⁹ these differences are the same as those between POAA and EFASASHA.

In a nutshell, Congress has unjustifiably subjected race-based cases to a separate and unequal procedural track.

B. *Separate and Unequal Tracks Have a Negative Disparate Racial Impact*

People of color are subjected to a separate and unequal civil procedural track to enforce their legal rights because of their greater reliance on race discrimination cases. Although Congress's endorsement of EFASASHA and

²⁰⁴ Ending Forced Arbitration of Race Discrimination Act of 2023, H.R. 3038, 118th Cong. (2023).

²⁰⁵ See Peck, *supra* note 199 ("unlikely to pass").

²⁰⁶ See *id.* ("The issue [in POAA] is one that might be easier for Congress to understand—the median age in the Senate is 65," and, in support of POAA, Senator Graham shared that "I'm at an age now where my friends were retiring and trust me, there's some shenanigans going on out there."). Such self-referentialism can undermine universal due process.

²⁰⁷ See *id.* (expanding procedural protection to "older workers—a demographic with a lot of heft, and one that's becoming increasingly important as the population ages").

²⁰⁸ See *supra* note 186 (describing distinctions).

²⁰⁹ The former covers discrimination, while the latter covers assault and harassment.

not EFARDA has this negative disparate impact, some may contend there is still parity.

The argument goes like this: Anyone who has a sex-based assault/harassment dispute may benefit from EFASASHA, no matter their race. On its face, EFASASHA treats every victim of sexual misconduct equally. In this way, the statute maps onto an equality theory of anti-discrimination, where fairness is realized by treating individuals the same.²¹⁰ Everyone is protected by the statute, and any difference among beneficiaries simply reflects the different needs of societal groups.

However, this formal equality masks real harm, as recognized by anti-subordination theory.²¹¹ Congress's preferencing of sex over race by enacting protective procedural legislation for the former but not the latter disproportionately denies BIPOC people court access and collective strength. This is because BIPOC individuals are generally more likely to allege racial discrimination and racial harassment than white individuals.²¹² While some white Americans bring "reverse discrimination"²¹³ claims²¹⁴ on their own behalf and believe discrimination against them is the primary bias today,²¹⁵ Black Americans and other people of color still remain more likely to bring race discrimination cases.²¹⁶ Consequently, the absence of race as a

²¹⁰ See Monica Diggs Mange, *The Formal Equality Theory in Practice: The Inability of Current Antidiscrimination Law to Protect Conventional and Unconventional Persons*, 16 COLUM. J. GENDER & L. 1, 6-12 (2007) (arguing formal equality model treats similarly situated individuals alike while erasing meaningful differences in identity, thereby perpetuating structural harm under the guise of fairness).

²¹¹ See Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1003 (1986) ("Anti-subordination . . . rejects policies, even if facially neutral, that perpetuate the historical subordination of groups, while embracing even facially differentiating policies that ameliorate subordination.").

²¹² See Raver, *supra* note 89, at 248, 251 ("[P]articipants of racial minority reported significantly higher levels of EH [ethnic harassment] than did Caucasian participants. . . . [R]acial minorities are at increased risk for being targeted with EH [ethnic harassment].").

²¹³ William R. Corbett, *Reverse Discrimination: An Opportunity to Modernize and Improve Employment Discrimination Law*, 79 U. MIAMI L. REV. 160, 174-75 (defining "reverse discrimination").

²¹⁴ See Jessica Guynn, *DEI under siege: Why more businesses are being accused of 'reverse discrimination'*, USA TODAY (Dec. 20, 2023, 5:33 AM), <https://www.usatoday.com/story/money/careers/2023/12/20/dei-reverse-discrimination-lawsuits-increase-woke/71923487007/> [<https://perma.cc/WC7B-GVPK>] (small increase in claims challenging DEI initiatives). There is also a small number of race discrimination cases brought by whites who allege discrimination against them because of their association with Blacks, e.g., *Whitney v. Greater NY Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) (describing associational claims) or because of anti-Black discrimination which creates a hostile work environment that harms all workers, e.g., *Drake v. 3M*, 134 F.3d 878 (7th Cir. 1998); *Faulk v. Home Oil Co.*, 173 F.R.D. 311 (M.D. Ala. 1997)).

²¹⁵ See M. I. Norton & S. R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6(3) PERSP. PSYCH. SCI. 215-18 (2011) (concluding that some whites believe that they have replaced Blacks as the primary victims of racial discrimination in contemporary America).

²¹⁶ See Jessica Guynn, *Nike investigated for alleged discrimination against White workers*, USA TODAY (Feb. 4, 2026), <https://www.usatoday.com/story/money/2026/02/04/nike-dei-investigation-white-workers/88511519007/> [<https://perma.cc/2B8R-XKMZ>] ("Though white

protected class for procedural protection has a disparate adverse impact on Black Americans and other people of color.²¹⁷

A related counterargument is that those who are more vulnerable to sexual assault/harassment disparately benefit from the Act's protection. This includes women in general,²¹⁸ and women of color in particular, who are disproportionately targeted.²¹⁹ In addition, since BIPOC women are more likely to be forced into arbitration and harmed by collective action bans, the Act would seem to disparately *favor* women of color.

However, as an initial matter, BIPOC women are less able to take advantage of EFASASHA's legal protections because they collectively have less education, resources, and power. Had the law been focused on the needs of women at the margins, it might have set forth a more transformative agenda going to the root of the problem.²²⁰

Alternatively, assuming the Act does disproportionately *favor* BIPOC women, this doesn't justify the exclusion of race as a basis for procedural protection. To be sure, among victims, some subsets of the population might benefit more because they suffer more. However, all victims are worthy of procedural protection, regardless of their likelihood of falling prey to sexual abuse. The converse is illustrative. Men, in general, are less likely to be victimized by sexual assault and harassment,²²¹ and yet this fact does not countenance depriving them of EFASASHA's coverage. The important feature of the Act is that it protects everyone who alleges "sex" as the grounds for their plight—this is the umbrella under which everyone can seek shelter.

The same should be true for "race." Race, too, is a protected class and a basis upon which harassment and discrimination occur. Regardless of who is at the receiving end of race-motivated abuse and the likelihood of

workers account for about two-thirds of the U.S. workforce, their discrimination claims make up only about 10% of race-based claims"); *see also* Janice C. Whiteside, *Title VII And Reverse Discrimination: The Prima Facie Case*, 31 IND. L. REV. 413, 413 n.1 (1995) (finding that Blacks filed 86% of EEOC charges based upon race, while remaining 14% involved "reverse" racial discrimination claims).

²¹⁷ *See* Green *supra* note 152, at 456-57, 475-76, 492-93 (arguing that excluding race from arbitration exemption laws disproportionately harms Black workers and denies them equal procedural justice).

²¹⁸ *Id.* at 495.

²¹⁹ *See* Hernández, *supra* note 97, at 187 ("sexual harassers target White women as victims at disproportionately lower rates than women of color."); *see also* Enforcement Guidance on National Origin Discrimination, EEOC (Nov. 18, 2016), <https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination> [<https://perma.cc/4Z3M-GRTJ>] (explaining that "risk factors" for harassment include being someone from a different culture or nationality from the majority, a non-English speaker, or an "unskilled" worker).

²²⁰ *See* TASK FORCE, *supra* note 39, at 66-70 (making recommendations for addressing sexual harassment). Granted, this argument would apply to any law, including EFARDA. This critique goes to the limits of law in general for addressing harassment, discussed *infra* at IV.B. (Non-Legislative Proposals).

²²¹ *See* HOLLY KEARL, THE FACT BEHIND THE #MeToo MOVEMENT: A NATIONAL STUDY ON SEXUAL HARASSMENT AND ASSAULT, STOP STREET HARASSMENT 7 (RALLIANCE 2018) ("81% of women and 43% of men reported experiencing some form of sexual harassment and/or assault in their lifetime.").

that occurrence, they too should be able to seek legislative shelter. This, of course, would include white people, who are less likely to make racial allegations.²²² This article pulls back and uses a wider lens to frame the issue—using the identity groups of “sex” and “race” as the unit for analysis.

It remains true that as a group, people of color (including women) are disproportionately harmed by Congress’s refusal to procedurally protect cases based solely on race. Currently, plaintiffs alleging race claims unrelated to sex are relegated to a separate and unequal track, with BIPOC individuals disproportionately being forced into individualized arbitration and white individuals disproportionately being allowed to collectively use the public court system. In sum, legislative favoritism towards sex-based cases over race-based ones has a negative disparate impact on people of color, which can result in a form of “procedural apartheid.”

C. Procedural Protection for Sex But Not Race is Unjustified

There is no principled justification for Congress to protect sex but not race from forced arbitration and class action bans. Normatively, Congress should provide the same procedural protections for cases that relate to racial discrimination and harassment as it does for cases that relate to sexual assault and harassment. While EFASASHA is groundbreaking and important legislation, it is not enough. Given Congress’s overt recognition of the flaws in forcing harassment victims into arbitration and non-aggregation, this begs the normative question: Why stop there? If such procedural practices are unacceptable for individuals who are sexually assaulted and sexually harassed, why should it be acceptable for those who suffer similarly on racial grounds? Victims of racial discrimination and racial harassment should also be afforded court access and collective action. None of the justifications proffered for distinguishing between such sex and race-based cases are compelling.

1. The Rationales for Procedural Protection for Sex Are the Same for Race

The similarities between sex and race cases involving discrimination, assault, and harassment disputes warrant similar due process. The rationales that justify procedural protection for sex apply to race.

One justification for protecting survivors of sexual assault/harassment from compulsory arbitration and joint action bans is the significant power imbalance between the victim, on the one hand, and the perpetrator and institutional defendant, on the other.²²³ This imbalance also exists for

²²² This may be changing. *Cf.* Exec. Order. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025) (“Ending Illegal Discrimination and Restoring Merit-Based Opportunity”).

²²³ See Erin M. Morrissey, Comment, *#MeToo Spells Trouble for Them Too: Sexual Harassment Scandals and the Corporate Board*, 93 TUL. L. REV. 177, 194-97 (2018); Jean R.

those alleging racial discrimination and harassment. Whether it is between employee and supervisor, renter and landlord, or consumer and retailer, there is usually a gross disparity in bargaining power which conditions employment, housing, or commercial benefits on the victim's acceptance of substandard due process. Moreover, the arbitration drafter has the power to craft an agreement that favors itself,²²⁴ and has an ongoing relationship with the arbitrator which can advantage the outcome.²²⁵ This significant imbalance of power is not unique to cases related to sexual assault and harassment but includes those related to race discrimination and harassment as well. Indeed, this power disparity may even be more acute for race, where many BIPOC groups are also in the numerical minority.

Another justification for exempting sexual assault/harassment survivors from mandatory arbitration is its confidentiality requirement.²²⁶ Arbitration proceedings and the settlement agreements that result from them are not public and are usually strictly confidential.²²⁷ This secrecy keeps victims from being able to warn others and protects perpetrators from accountability.²²⁸ Publicity is important in finding and supporting other victims, deterring future sexual violence and abuse,²²⁹ and developing public law that creates binding precedent.²³⁰ One of Congress's major goals in enacting EFASASHA was to bring sexual assault and harassment "out of the shadows" and to incentivize institutions to affirmatively prevent misconduct in the future.²³¹ The secretive nature of arbitration applies to both sexual

Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1635 (2005) ("[M]ost powerful actors . . . [are permitted] to craft a dispute resolution system that is best for them.").

²²⁴ See Morrissey, *supra* note 223, at 195, 197 (imbalances include monetary fees, evidentiary burdens and exemptions, procedural standards).

²²⁵ See *Small Print, Big Impact*, *supra* note 44 (statement of Myriam Gilles) (understanding decision-making patterns and appealing arguments helps "more sophisticated repeat-player employers").

²²⁶ Morrissey, *supra* note 223, at 197-99; see also Sternlight, *supra* note 223, at 1672 ("public justice is not served" by closed proceedings and confidentiality).

²²⁷ Mitch Zamoff, *Safeguarding Confidential Arbitration Awards in Uncontested Confirmation Actions*, 59 AM. BUS. L.J. 505, 511-13 (2022).

²²⁸ See *Mandatory Arbitration of Sexual Harassment Disputes*, NAT'L ASS'N OF ATT'Y GEN. 2 (Feb. 12, 2018), <https://shpr.legislature.ca.gov/sites/shpr.legislature.ca.gov/files/Musell-NAAG%20Letter%20re%20mandatory%20arbitration.pdf> [<https://perma.cc/6DSJ-VDBU>] [hereinafter STATE ATTORNEYS GENERAL]; see also Brad Smith, *Microsoft Endorses Senate Bill to Address Sexual Harassment*, MICROSOFT (Dec. 19, 2017), [<https://perma.cc/2B4U-W4MM>] (discussing how Microsoft Chief Legal Officer spoke in support of EFASASHA "[b]ecause the silencing of voices has helped perpetuate sexual harassment, the country should guarantee that people can go to court to ensure these concerns can always be heard."). NDAs compounded the problem, leading Congress to enact the Speak Out Act, S.4524, 117th Cong. (2022) (prohibiting judicial enforceability of nondisclosure and nondisparagement clauses in agreements executed before a dispute arises concerning sexual assault or sexual harassment claims).

²²⁹ Rachel M. Schiff, *Not So Arbitrary: Putting an End to the Calculated Use of Forced Arbitration in Sexual Harassment Cases*, 53 U.C. DAVIS L. REV. 2693, 2711-12 (2020) (publicity); see also Morrissey, *supra* note 223, at 197-99 (reputational and economic harm).

²³⁰ Schiff, *supra* note 229, at 2714.

²³¹ See Janaki Chadha, *Gillibrand calls on Congress to pass legislation on workplace sexual harassment*, POLITICO (last visited Apr. 2, 2026) (quoting Senator Gillibrand saying that

harassment and racial harassment. Mandatory pre-dispute arbitration lacks the transparency that would flush out harassment, irrespective of motive. Indeed, such transparency around race-motivated discrimination is even more important in light of a reinvigorated colorblind movement that threatens to erase the subordination of BIPOC people from American history and from societal awareness more generally.²³²

The nature of sexual harassment need not be identical to racial harassment to justify the same court access and collective action option. For example, some sexual harassment may be more likely to take place in private. In particular, this can occur when a supervisor compels a subordinate to provide sexual favors in exchange for a job benefit (known as quid pro quo sexual harassment).²³³ Unlike hostile work environment sexual harassment—in which sex discrimination is so severe or pervasive that it unreasonably interferes with a worker’s ability to do their job and creates a hostile work environment²³⁴—quid pro quo harassment may be more likely to happen behind closed doors and at locations off-site.²³⁵ This type of sexual blackmail may take place in hotel conference rooms, closed-door offices, bathroom stalls, and even bank vaults.²³⁶ These sorts of outrageous exchanges have appropriately caught the attention and ire of the public and Congress, contributing to EFASASHA’s passage.

Such scandalous arrangements illustrate the length to which some people will go to abuse their power. But they do not demonstrate why only victims of sexual harassment should be protected. The arbitral forum shields all wrongdoers by muzzling the individual disputant and hiding potential systemic misconduct from additional disputants. The secrecy of the forum, not the secrecy of the misconduct, is what justifies procedural protection.

An additional reason lawmakers, commentators, and other leaders give for providing greater procedural protections to sexual assault/harassment victims is that it promotes worker dignity and respect. For example, the Chief Legal Officer of Microsoft, Brad Smith, spoke openly about his

“institutions are promoting cultures where power and fear keep sexual assault, sexual harassment in the shadows,” and identifying forced arbitration as an impediment to transparency and accountability).

²³² See, e.g., Malveaux, *supra* note 80, at 2173 (describing Oklahoma legislation).

²³³ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67-68 (1986) (finding that quid pro quo sexual harassment occurs when job benefits are conditioned on submission to unwelcome sexual advances, and voluntariness does not bar a claim if the conduct was unwelcome).

²³⁴ See *Faragher v. City of Boca Raton*, 524 U.S. 775, 786-88 (1998) (holding Title VII sexual harassment must be “so severe or pervasive” that it alters conditions of victim’s employment and creates abusive working environment).

²³⁵ See, e.g., Stender & Raghu, *supra* note 231, at 359 (describing how quid pro quo harassment often occurs in private or off-site locations, such as hotel rooms, where powerful individuals isolate victims under guise of promoting professional advancement).

²³⁶ See DeNeen L. Brown, *She Said Her Boss Raped Her in a Bank Vault. Her Sexual Harassment Case Would Make Legal History*, WASH. POST (Oct. 13, 2017), <https://www.washingtonpost.com/news/retropolis/wp/2017/10/13/she-said-her-boss-raped-her-in-a-bank-vault-her-sexual-harassment-case-would-make-legal-history/> [<https://perma.cc/YSR9-LSGR>]; see, e.g., *Meritor Sav. Bank*, 477 U.S. 57 (1986).

support for the Act after meeting with the bill's co-sponsor Senator Lindsey Graham (R-SC) and learning about its impact.²³⁷ In support of EFASASHA, Smith proclaimed: "Every person deserves a workplace where he or she is treated with respect. We'll continue to identify new opportunities within our own company to support the respectful culture we're working to advance, and many other companies now will do so as well."²³⁸ One opportunity is to permit victims of racial harassment and discrimination to also come out of the shadows and seek accountability like their similarly situated colleagues.²³⁹ Indeed, for some BIPOC workers, there may be an additional dignity harm associated with having to choose between race and sex or to diminish one over the other when asserting their right to a discrimination-free environment. If the goal is to provide a respectful work environment, then the dignity of all workers must be considered. Cherry-picking some types of discrimination (and indirectly some employees) over others, instead, poisons the workplace.

In a similar vein, some contend that the serious, egregious nature of sexual harassment sets it apart from other transgressions, heightening the need for due process not guaranteed in arbitration or individual litigation. On a macro level, sexual harassment harms the national economy: The American government loses approximately \$100 million annually, while American businesses lose almost \$1 billion, from sexual harassment.²⁴⁰ As Senator Lindsey Graham rightly stated in the context of EFASASHA: "It does not hurt business to make sure that people who are harassed in the workplace get treated fairly. It is better for business. . . . This is good for America."²⁴¹ On a micro level, sexual harassment deeply harms individuals—personally and professionally.²⁴²

In response to this grave harm, attorneys general from all fifty states, the District of Columbia, and all U.S. territories signed a letter in support of the Act, contending that the gravity of the problem called for victim choice and characterizing arbitrators as presumptively unqualified for the task at hand:

While there may be benefits to arbitration provisions in *other* contexts, they do not extend to sexual harassment claims. Victims of such *serious* misconduct should not be *constrained* to pursue relief from decision makers who are *not trained* as judges, are *not*

²³⁷ Smith, *supra* note 228.

²³⁸ *Id.*

²³⁹ The recent corporate retraction of policies committed to DEI, however, reveals how reliance on sustained voluntary corporate policy to provide procedural justice for race claims is unrealistic.

²⁴⁰ Nicolette Sullivan, *The Price Is (Not) Right: Mandatory Arbitration of Claims Arising Out of Sexual Violence Should Not Be the Price of Earning a Living*, 21 VAND. J. ENT. & TECH. L. 339, 364 (2018) (monetary and non-monetary costs).

²⁴¹ 168 Cong. Rec. S625, S628 (daily ed. Feb. 10, 2022) (statement of Sen. Graham).

²⁴² See Raver, *supra* note 89, at 237-38 (internal sources omitted).

qualified to act as courts of law, and are *not positioned to ensure* that such victims are accorded both procedural and substantive *due process*.²⁴³

Thus, the attorneys general urged Congress to “free [such victims] from the *injustice* of forced arbitration and secrecy when it comes to seeking redress for *egregious* misconduct *condemned by all concerned Americans*.”²⁴⁴ This universal condemnation by all the U.S. attorneys general is telling. It reveals how the severity of the sexual assault/harassment problem was enough to move the political dial from the status quo to denunciation of compulsory arbitration and its decisionmakers. In this context, they came to the exceptional conclusion that the training, qualifications, and positionality of arbitrators make them unsuited as presumptively competent decisionmakers.

There is no question that sexual assault and harassment are egregious forms of workplace abuse warranting “condemn[ation] by all concerned Americans.”²⁴⁵ But the gravity of this issue does not negate the gravity of other issues or transform arbitrators from presumptively unqualified to qualified. Indeed, there is significant harm from both sexual and racial harassment:

All forms of workplace harassment are detrimental to employees’ well-being. Indeed, one of the most consistent findings from the literature is that harassment represents a potent interpersonal stressor . . . [that predicts] . . . poor job attitudes, high levels of work withdrawal, turnover intentions, mental health symptoms, and high levels of physical symptoms or somatic complaints.²⁴⁶

Arguably, with the greater skepticism of anti-Black racism and condemnation of race-conscious remedies, it is even more important for procedural parity for race-based cases. People of color must be able to tell their collective narrative publicly using the court system to counteract the current misinformation campaign. Moreover, where POC are targeted as a group, they must be able to seek the structural remedies offered by collective action. In sum, the gravity—individualized and systemic—necessitates consistent treatment.

The prevalence of sex-related misconduct—as illustrated by the #MeToo Movement—is another common justification for EFASASHA’s procedural protections. However, like sexual harassment, racial harassment is also a significant workplace problem. The EEOC Select Task Force study

²⁴³ STATE ATTORNEYS GENERAL, *supra* note 228 at 2 (emphasis added).

²⁴⁴ *Id.* at 2 (emphasis added).

²⁴⁵ *Id.*

²⁴⁶ Raver, *supra* note 89, at 237-38. Racially motivated violence has also resulted in significant trauma and negative mental health outcomes, especially for women of color. *See Williams, supra* note 96, at 1806.

of workplace harassment reveals that race makes up a substantial number of the administrative charges filed with the EEOC and of complaints filed in federal court. From 2015 to 2019, there was an average of 9,000 racial harassment charges filed with the EEOC annually out of 26,000 total harassment complaints.²⁴⁷ In other words, racial harassment comprised approximately one third of all the harassment charges filed with the EEOC—a significant portion of the docket.

While the Task Force found that 45% of harassment charges filed by private, state, and local government employees in 2015 were based on sex, those based on race were the second highest—at 34% of the total.²⁴⁸ Moreover, 13% of the harassment charges were based on national origin.²⁴⁹ Indeed, if race and national origin charges are combined, they eclipse sex as the most common form of workplace harassment.²⁵⁰

Similarly, the EEOC Task Force found that 44% of harassment complaints filed by federal employees in 2015 were based on sex, the most common basis for harassment alleged.²⁵¹ Again, race came in second, at 36%.²⁵² Combining national origin harassment complaints (13%) with those based on race (36%) results in 49% of all harassment complaints filed in 2015, once again exceeding sex as the most common form of workplace harassment.²⁵³

More generally, there has been an alarming upward trajectory of racialized violence and harassment. For example, the prevalence of white supremacist organizations, racially motivated hate groups, and racial violence (in the workplace and elsewhere) has increased dramatically in recent years.²⁵⁴

While the #MeToo movement unearthed the ubiquity of sexual assault and sexual harassment in American society, the Black Lives Matter movement arguably did the same for racialized violence at the hands of the state. The unrelenting and unbroken string of videos of unarmed Black citizens

²⁴⁷ *Enforcement and Litigation Statistics*, EEOC, <https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0> [<https://perma.cc/S526-UA35>] (last visited Apr. 2, 2026).

²⁴⁸ This was by a comfortable margin, with the next highest harassment basis being disability at 19%. TASK FORCE, *supra* note 39, at 8.

²⁴⁹ *Id.*

²⁵⁰ If race and national origin harassment charges were combined, they would be the number one basis for workplace harassment charges in 2015, at 47%. *See id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *See, e.g.*, Liz Vinson, *Attack on Civil Rights: SPLC contributes to UN special report on state of minorities in the US*, S. POVERTY L. CTR., (Mar. 30, 2022), <https://www.splcenter.org/resources/stories/attack-civil-rights-splc-contributes-un-special-report-state-minorities-us/> [<https://perma.cc/F7TJ-NS7K>], (last visited July 29, 2025) (testifying to the UN on the rise of white supremacy, racial violence, and discriminatory laws); Stephen Starr, *US white supremacist groups emboldened with 'ethnic and racial hatred' as Trump stokes immigration fears*, THE GUARDIAN, (Feb. 22, 2025, 9: 00 AM), <https://www.theguardian.com/us-news/2025/feb/22/white-supremacist-groups-emboldened-trump-immigration> [<https://perma.cc/R66R-T9PL>] (documenting recent increase in white supremacist activity in Kentucky, Ohio and Indiana).

being wrongfully killed by police officers²⁵⁵—culminating with the murder of George Floyd—has effectively functioned as a kind of “MeToo” reckoning in the racial space.²⁵⁶ Indeed, if one were to ask Black Americans today to say “MeToo” if they have ever been racially harassed or mistreated, there would be a similar outpouring of complaints.²⁵⁷ This renewed attack on people of color²⁵⁸ illustrates the importance of procedural justice more than ever.²⁵⁹

Having said that, the observation that race and national origin together in fact surpass sex as a basis for harassment allegations does not mean that numbers should dictate policy or that comparisons should set priorities. It is immaterial to procedural justice access which category (race or sex) can claim the greater number of victims. This is precisely the problem. Justifications for access to the civil court system based on keeping score, competing for sympathy, or attempting to prove worthiness are fundamentally flawed.

²⁵⁵ See *Fatal Force: 2015–2024 Police Shootings Database*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> [https://perma.cc/7D-CX-W3AQ] (last visited July 29, 2025) (“Black Americans . . . account for roughly 14 percent of the U.S. population and are killed by police at more than twice the rate of White Americans.”); see also Cheryl W. Thompson, *Fatal Police Shootings of Unarmed Black People Reveal Troubling Patterns*, NPR (Jan. 25, 2021), <https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns> [https://perma.cc/7KUS-SL7W] (examining racial bias and systemic issues in policing that disproportionately lead to fatal shootings of unarmed Black people).

²⁵⁶ Police have also been perpetrators of sexual harassment, disproportionately against women of color. See Andrea J. Ritchie, *How Some Cops Use the Badge to Commit Sex Crimes*, WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/outlook/how-some-cops-use-the-badge-to-commit-sex-crimes/2018/01/11/5606fb26-eff3-11e7-b390-a36dc3fa2842_story.html [https://perma.cc/6MHW-A9S3] (illustrating police sexual misconduct is a systemic problem; an officer is accused of sexual misconduct every five days).

²⁵⁷ See LOLITA BUCKNER INNISS & BRIDGET J. CRAWFORD, *SOCIAL MOVEMENTS AND THE LAW* 43 (2025) (emphasizing that—like #MeToo—Black Lives Matter rapidly gained momentum following #BlackLivesMatter Facebook post following Trayvon Martin’s killing).

²⁵⁸ See, e.g., Angela R. Gover, Shannon B. Harper & Lynn Langton, *Anti-Asian Hate Crime During the COVID-19 Pandemic: Exploring the Reproduction of Inequality*, 45 AM. J. CRIM. JUST. 647, 647 (2020) (discussing ways “COVID-19 has enabled the spread of racism and created national insecurity, fear of foreigners, and general xenophobia” and its relationship “to the increase in anti-Asian hate crimes during the pandemic”); Terry Tang, *Asian Americans and Pacific Islanders are still targets of hatred 5 years after pandemic surge*, ASSOCIATED PRESS (Apr. 1, 2025), <https://apnews.com/article/stop-aapi-asian-hate-five-years-covid19-d4401047ce635e0c3c2d8949d076b7f3> [https://perma.cc/8XHX-4CKZ] (describing continued hostility against the AAPI community, and hundreds of hate crimes per year).

²⁵⁹ There has also been a surge in harassment and violence on the basis of religion, which often relates to or intersects with race and national origin. See *2023 Hate Crime Statistics*, U.S. DEPT. OF JUS. (Nov. 24, 2024), <https://www.justice.gov/crs/news/2023-hate-crime-statistics> [https://perma.cc/9A49-BZ4B] (finding that in 2023, 2,699 reported incidents of hate crimes based on religion, with over half (1,832) driven by anti-Jewish bias and an increase in Anti-Muslim incidents to 236); see also Vinson, *supra* note 254.

2. *Any Differences Between Sex and Race Are Immaterial to the Right to Procedural Justice*

The differences between sex and race cases involving discrimination, assault, and harassment disputes do not change a victim's due process rights. The distinctions based on substantive law and victim experience are immaterial to procedural justice.

a. *Differences in Harassment Law*

While the courts have generally treated harassment law the same across various protected classes,²⁶⁰ they have also distinguished between race and sex. However, racial and sexual harassment law need not be identical for their victims to warrant similar procedural protections.

One distinction is the definition of harassment itself. There is robust disagreement over what rises to the level of harassment for both race- and sex-based cases. Racial harassment may take on many forms—some obvious, some subtle. Those of different races may perceive the existence and prevalence of this harassment differently.²⁶¹ This is also true for those of different sexes in understanding sexual harassment.²⁶² Indeed, there has been such robust debate over what constitutes sexual harassment that some have called for a “reasonable woman” standard to govern such cases.²⁶³

While there is disagreement over what constitutes harassment for both race- and sex-based claims, there is an additional evidentiary hurdle for the latter. In order to make a *prima facie* showing of sexual harassment based on a hostile work environment, the victim must prove that the perpetrator's conduct was “unwelcome.”²⁶⁴ Courts, commentators, employers, and employees have struggled to discern the line between “welcome” intimacy on the one

²⁶⁰ See ONTIVEROS, *supra* note 51, at 616 (“[A]nalytical framework, burden-shifting, and other rules developed in the sexual harassment cases [apply] to claims of religious harassment.”) (citing cases); EEOC Guideline on Discrimination Because of National Origin: Harassment, 29 C.F.R. § 1606.8 (2009) (observing that standard for national origin harassment tracks that of other protected classes).

²⁶¹ *Freeing Racial Harassment*, *supra* note 51, at 633, 641-43.

²⁶² See Shonagh Leigh, Andrew G. Thomas & Jason Davies, *The effects of sex and outcome expectancies on perceptions of sexual harassment*, 16 PLoS ONE1 (2021) (finding that women are more likely to identify conduct as sexual harassment than men); Hank Rothgerber, Katherine Golway, Ciara Incorvati, C. Blake Andrew & Allison Farmer, *Is a Reasonable Woman Different from a Reasonable Person? Gender Differences in Perceived Sexual Harassment*, 84 SEX ROLES 208, 208 (2021) (same).

²⁶³ See Rothgerber, *supra* note 262. Other factors like age and culture influence people's understanding of sexual harassment. See Dawn M. Ohse & Margaret S. Stockdale, *Age Comparisons in Workplace Sexual Harassment Perceptions*, 59 SEX ROLES 240, 251 (2008) (age); Janet Sigal, Margaret S. Gibbs, Carl Goodrich, Tayyab Rashid, Afroze Anjum, Daniel Hsu, Carrol S Perrino, Hale Bolak Boratav, Aggie Carson-Arenas, Berna van Baarsen, Joop Van der Pligt & Wei-Kang Pan, *Cross-Cultural Reactions to Academic Sexual Harassment: Effects of Individualist vs. Collectivist Culture and Gender of Participants*, 52 SEX ROLES 201, 208 (2005) (culture).

²⁶⁴ *Freeing Racial Harassment*, *supra* note 51, at 632.

hand, and coercion on the other hand.²⁶⁵ By contrast, “unwelcomeness” has not been central to hostile work environment race cases. This is because, in this context, unwelcomeness is often presumed.²⁶⁶ As the EEOC has explained:

Whereas racial slurs are intrinsically offensive and presumptively unwelcome, sexual advances and innuendo are ambiguous: depending on their context, they may be intended by the initiator, and perceived by the recipient, as denigrating or complimentary, as threatening or welcome, as malevolent or innocuous.²⁶⁷

The bar is also higher for victims of sexual harassment to demonstrate that the misconduct was sufficiently “severe or pervasive” to constitute a hostile work environment.²⁶⁸

Having said that, sex harassment claims fare better than racial ones when it comes to judicial determinations of causation. Some judges are more apt to accept sex as the reason for harassment than they are race.²⁶⁹ They view racial allegations with more skepticism, offering various alternative justifications for the mistreatment of people of color.²⁷⁰ Professor Pat K. Chew attributes this disconnect to the fact that judges, who are mostly white males, may be able to imagine their female family members as sexual harassment victims, but without a similar empathic reference point, may

²⁶⁵ See, e.g., Robin West, *Consent, Legitimation, and Dysphoria*, 83 MOD. L. REV. 1 (2020) (explaining that legal and cultural reliance on concept of consent obscures distinction between genuinely welcome intimacy and coercion, particularly where social pressure or power dynamics complicate voluntary agreement); Robert J. Gregory, *You Can Call Me a “Bitch” Just Don’t Use the “N-Word”*: Some Thoughts on *Galloway v. General Motors Service Parts Operations and Rodgers v. Western-Southern Life Insurance Co.*, 46 DEPAUL L. REV. 741, 773 (1997) (discussing courts’ uncomfortable policing of “sexual give and take” and dating rituals in the workplace).

²⁶⁶ Grace S. Ho, *Not Quite Rights: How the Unwelcomeness Element in Sexual Harassment Law Undermines Title VII’s Transformative Potential*, 20 YALE J.L. & FEMINISM 131, 139 (2008) (explaining that unwelcomeness generally presumed in racial discrimination instances); Theresa M. Beiner & John M. A. DiPippa, *Hostile Environments and the Religious Employee*, 19 U. ARK. L.J. 577, 585, 585 n. 57 (1997) (same). Of course, this doesn’t negate that other doctrine harm race-based claims. See, e.g., Nancy Gertner, *Losers’ Rules*, 122 YALE L.J. ONLINE 109 (2012) (describing “stray remarks” doctrine).

²⁶⁷ *Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae* at E-6, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979); see, e.g., *Barnes v. Costle*, 561 F.2d 983, 1001 (D.C. Cir. 1977) (distinguishing “sexual advances” from “racial epithets” because former involves “social patterns that to some extent are normal and expectable” and problematic only where there is “abuse of the practice,” while the latter “serve no one’s interest”).

²⁶⁸ See Heather L. Kleinschmidt, *Reconsidering Severe or Pervasive: Aligning the Standard in Sexual Harassment and Racial Harassment Causes of Action*, 80 IND. L.J. 1119, 1125 (2005) (“[P]laintiff must suffer from more egregious conduct to win on a sexual harassment claim than for a plaintiff to win on a racial harassment claim.”).

²⁶⁹ *Freeing Racial Harassment*, *supra* note 51, at 632.

²⁷⁰ *Id.* (describing judges “finding plausible a multitude of alternative justifications for negative treatment of minority employees”).

struggle to imagine others as racial harassment victims.²⁷¹ This may, in part, explain why sexual harassment claims have a much higher success rate than racial ones.²⁷² This potential empathy or understanding gap risks growing wider in light of a post-racial, colorblindness resurgence. The gap suggests it is even more important for BIPOC litigants to be able to present their case to a jury of their peers, rather than before a single judge or arbitrator. Potential access to a diverse jury pool with varied life experiences and views on race is essential.²⁷³

In sum, commentators disagree over the propriety of analogizing and distinguishing race and sex and to what extent under harassment law.²⁷⁴ However, the relatively marginal variations in substantive law have no normative bearing on all harassment victims' right to robust court access and collective power.

b. Differences in Experience

Another justification for treating sexual harassment differently from racial harassment is that the former is "sufficiently different" than other types of violations.²⁷⁵ Even if true, this does not justify preferential due process. Ranking victim pain and worthiness is unnecessary, counterproductive, and ultimately impossible. One can support victims of sexual assault and harassment by giving them court access and collective strength without diminishing the experiences of others by denying them the same. The latter are no less worthy. It is not a zero-sum game. Comparing and pitting Americans against each other for court access commodifies and cheapens the civil justice system and is inconsistent with the ideals of due process and democracy.

²⁷¹ See *id.* at 632-33.

²⁷² See *id.* at 631 (noting "dramatic disparity in overall judicial outcomes" for race-based and sex-based harassment cases: 21.5% v. 48.2% plaintiff success rate respectively).

²⁷³ See, e.g., Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49 (2006) (discussing empirical and doctrinal challenges facing plaintiffs in racial harassment cases); see also Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597 (2006) (finding diverse juries provide an array of benefits). While very few litigants try their case before a jury, the case's success (especially settlement) hinges on how a jury might rule.

²⁷⁴ See L. Camille Hébert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819, 878-82 (1997) (analogy as a "two-edge sword"); *Unwrapping*, *supra* note 51, at 60 (considering "whether a novel legal or social perspective on racial harassment" is warranted); *Freeing Racial Harassment*, *supra* note 51, at 618-19, 621. While recognizing the analogy's reasonableness, Professor Chew argues that same treatment of race and sex may inappropriately conflate unique identities; monolithic treatment of race and sex harassment may be improper; and importation of the higher standards for sex harassment may hurt race jurisprudence.

²⁷⁵ See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (discussing how opposition to inclusion of "sex" in 1964 Civil Rights Act centered around how sex discrimination operated differently).

Moreover, applying a scarcity model to due process rights is a distraction that keeps marginalized groups from coalescing around common interests. The exercise of parsing out individuals and experiences for preferential procedural selection operates to divide and conquer and masks how the civil justice system is used to protect powerful interests.

D. Congress's Preferential Procedural Treatment of Sex Over Race is Inconsistent with Anti-Discrimination Law

Congress's procedural protection of sexual harassment, but not racial harassment, is inconsistent with the way race has been treated under substantive anti-discrimination law. As discussed below, given the central role that race has played in the development of this field of law,²⁷⁶ such procedural inequity is contrary to anti-discrimination doctrine.

1. Sexual Harassment Jurisprudence Is Rooted in Racial Harassment Precedent

Procedural protection for sexual harassment cases, but not racial ones, is inconsistent with the history of harassment law. While the majority of Title VII harassment precedent today regards sexual harassment, the Supreme Court's harassment jurisprudence springs from doctrine developed in the context of racial and ethnic harassment over fifty years ago.²⁷⁷ This jurisprudence stems from *Rogers v. EEOC*,²⁷⁸ in which the Fifth Circuit Court of Appeals recognized in 1971 that "a working environment heavily charged with [ethnic or racial] discrimination" was sufficient to "constitute an unlawful [Title VII] practice."²⁷⁹ *Rogers*, the first case to acknowledge a

²⁷⁶ People of color, in particular, have played a significant leadership role in the development of anti-discrimination law. For example, Congress's failure to provide procedural protections for race is ironic, given that EFASASHA was spurred by the #MeToo movement, started by a Black woman to support BIPOC women and girls facing sexual harassment. See Tarana Burke, *#MeToo Was Started for Black and Brown Women and Girls. They're Still Being Ignored*, WASH. POST (Nov. 9, 2017) <https://www.washingtonpost.com/news/post-nation/wp/2017/11/09/the-waitress-who-works-in-the-diner-needs-to-know-that-the-issue-of-sexual-harassment-is-about-her-too/> [https://perma.cc/4CHA-CRDN]; Samantha Cooney, *Meet the Woman Who Started #MeToo 10 Years Ago*, TIME (Oct. 19, 2017), <https://time.com/4988282/me-too-tarana-burke-interview/> [https://perma.cc/7LQS-WFPG].

²⁷⁷ *Unwrapping*, *supra* note 51, at 56 ("Though the doctrine of discriminatory harassment originated with [the] landmark racial harassment case [*Meritor*] in 1971, the development of key legal constructs and jurisprudence in discriminatory harassment subsequently focused on sexual harassment."); *see id.* at 56-57 (describing quintet of major Supreme Court sexual harassment cases integral to emerging discriminatory harassment framework); Kleinschmidt, *supra* note 268, at 1119, 1121; *Vinson*, 477 U.S. at 65-66 (citing *Rogers* and others).

²⁷⁸ *ONTIVEROS*, *supra* note 51, at 483-84; *see Rogers v. EEOC*, 454 F.2d 234, 238-39 (5th Cir. 1971) (holding Spanish-surnamed employee could show a Title VII violation based on termination tied to white employees' hostility and patient segregation).

²⁷⁹ *Rogers*, 454 F.2d at 238, 239.

hostile work environment claim, arose in the context of a complaint alleging ethnicity and race as the basis for mistreatment.

Building on *Rogers*, lower federal courts applied the hostile work environment claim to cover workplaces poisoned by discrimination on the basis of race,²⁸⁰ national origin,²⁸¹ and, subsequently, religion.²⁸² In reliance on *Rogers*'s race-based analog, the Eleventh Circuit Court of Appeals broke new ground in 1982 by recognizing sexual harassment in *Henson v. Dundee*.²⁸³

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.²⁸⁴

Other federal courts followed suit²⁸⁵ and ultimately, in 1986, the U.S. Supreme Court recognized sexual harassment claims in *Meritor Savings Bank, FSB v. Vinson*²⁸⁶—a case brought by a Black woman, Mechelle Vinson.²⁸⁷ Since this groundbreaking ruling,²⁸⁸ the federal courts have been using race- and sex-based harassment law to inform each other.²⁸⁹

²⁸⁰ See, e.g., *Firefighters Inst. for Racial Equality v. St. Louis*, 549 F.2d 506, 514-15 (8th Cir. 1977), cert. denied sub nom., *Banta v. U.S.*, 434 U.S. 819 (1977); *Gray v. Greyhound Lines, E.*, 545 F.2d 169, 176 (D.C. Cir. 1976).

²⁸¹ See, e.g., *Cariddi v. Kan. City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1977).

²⁸² See, e.g., *Compston v. Borden, Inc.*, 424 F. Supp. 157, 160-61 (S.D. Ohio 1976).

²⁸³ *Henson v. Dundee*, 682 F.2d 897 (11th Cir. 1982); Kleinschmidt, *supra* note 268, at 1122.

²⁸⁴ *Henson*, 682 F.2d at 902.

²⁸⁵ See, e.g., *Katz v. Dole*, 709 F.2d 251, 254-55 (4th Cir. 1983); *Bundy v. Jackson*, 641 F.2d 934, 934-44 (D.C. Cir. 1981).

²⁸⁶ See 477 U.S. 57, 66 (1986) (drawing from Title VII caselaw on race, religion, and national origin harassment, the Court concluded: “[n]othing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited.”) (emphasis in original).

²⁸⁷ See *id.*; Tanya Kateri Hernández, “What Not to Wear”—*Race and Unwelcomeness in Sexual Harassment Law: The Story of Meritor Savings Bank v. Vinson*, in *WOMEN AND THE LAW STORIES* 278 (Elizabeth M. Schneider & Stephanie M. Wildman eds., Foundation Press, 2011).

²⁸⁸ See *id.* at 292 (identifying *Vinson* as widely recognized as being “major achievement for the women’s movement”).

²⁸⁹ The Court confirmed that the hostile work environment standard applies equally to race and sex-based harassment, applying sex-based precedent to a racial harassment claim. See Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 116 n. 10 (2002). Since then, the Court and EEOC have imported sexual harassment precedent into racial harassment. *Unwrapping*, *supra* note 51, at 57 (describing presumption that legal principles from sexual harassment cases apply to racial harassment cases). Since *Vinson*, lower courts have relied on its analogy between racial and sexual harassment to resolve legal questions in both areas. Kleinschmidt, *supra* note 268, at 1123; *Unwrapping*, *supra* note 51, at 59-60.

Notably, even when Title VII itself was enacted, race was front and center. Some commentators contend that sex was added to Title VII at the eleventh hour,²⁹⁰ as an afterthought or as an attempt to thwart the bill's passage.²⁹¹ Others contend that a more nuanced history contradicts this simple story.²⁹² Regardless, it is clear that sex was not at the heart of the law's discrimination prohibition: race was. The primacy of sexual harassment in the civil procedural space today belies its historical origin,²⁹³ which squarely recognized the significance of race-motivated harassment.

2. *Sex Receives Less Protection Under the Constitution and Title VII*

While sex receives greater procedural protection for harassment cases, it receives less protection under constitutional and statutory anti-discrimination law. Under Constitutional law, race-conscious state conduct must survive strict scrutiny,²⁹⁴ while sex-conscious state conduct is subject to intermediate scrutiny.²⁹⁵ In other words, when a government policy relies on race, there must be a compelling state interest for doing so, and the policy must be narrowly tailored to that state interest.²⁹⁶ By contrast, when a government policy relies on sex, there need only be an important state interest and

²⁹⁰ *Vinson*, 477 U.S. at 63; see 110 Cong. Rec. 2577-2584 (1964).

²⁹¹ See ONTIVEROS, *supra* note 51, at 349 (“Most courts and commentators have viewed this sparse legislative history as evidence that ‘sex’ was included in Title VII as a ‘joke’ or a failed eleventh-hour maneuver to defeat the Civil Rights bill.”). Even after Title VII included sex, Executive Order 11246 focused on race and omitted sex. See Allen Fisher, *Women’s Rights and the Civil Rights Act of 1964*, NAT’L ARCHIVES (June 17, 2022), <https://www.archives.gov/women/1964-civil-rights-act> [https://perma.cc/CE54-5HRM]. This was rectified when Executive Order 11246 was amended two years later. *Id.*

²⁹² Compare Rachel Osterman, *Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII’s Ban on Sex Discrimination Was an Accident*, 20 YALE J.L. & FEMINISM 409, 412-16 (2009) (the “joke/sabotage theory”), with Jo Freeman, *How “Sex” Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 L. & INEQ. J. 163, 163, 176-77, 184 (1991) (discussing how consideration of sex followed significant advocacy, enabling stakeholders to take advantage), and Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 137-40 (1997) (same).

²⁹³ See *Freeing Racial Harassment*, *supra* note 51, at 618, 627 (describing how racial harassment jurisprudence has languished in comparison to sexual harassment jurisprudence).

²⁹⁴ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 220, 227 (1995); *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect.”).

²⁹⁵ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (“Racial and ethnic distinctions of any sort . . . call for the most exacting judicial examination”); *Craig v. Boren*, 429 U.S. 190, 468 (1976) (intermediate scrutiny for sex cases); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (holding that intermediate scrutiny for sex falls “[b]etween these extremes of rational basis review and strict scrutiny”).

²⁹⁶ See *Bakke*, 438 U.S. at 299 (holding race-conscious state action must be “precisely tailored to serve a compelling governmental interest”).

a policy reasonably tailored to that interest.²⁹⁷ The Court has justified its greater intolerance of race-based distinctions than sex-based ones on the long, sordid history of systemic racism in the United States. In *Bakke v. Regents of the University of California*, the Supreme Court explained:

The perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share. . . . [T]he Court has never viewed such classifications as inherently suspect or as comparable to racial and ethnic classifications for the purpose of equal protection analysis.²⁹⁸

The Court has been more permissive of state-sponsored sex-based policies than race-based ones, relying largely on biological distinctions between cisgender men and women.²⁹⁹ Today, understandings of what constitutes “sex” and “gender” are more complex and varied than before,³⁰⁰ which may inform the Court’s constitutional jurisprudence going forward.³⁰¹ But currently, the constitutional tiers of scrutiny for race and sex remain distinct. The Court is more suspect of race than sex as a protected class.

Indeed, the Court has recently drilled down on its absolutist stance toward forbidding racial classifications, even against college admissions policies designed to promote opportunities for the very people the Fourteenth Amendment was originally enacted to protect—Black Americans generally, and formerly enslaved ones particularly.³⁰² Equating university diversity initiatives enacted to level the playing field with racial discrimination, the Court in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (SFFA)*, has further concretized the strict scrutiny standard for race-conscious remedies.³⁰³

²⁹⁷ See *Boren*, 429 U.S. at 468 (defining three levels of scrutiny). Intermediate scrutiny, however, is not light. *U.S. v. Virginia*, 518 U.S. 515, 532-33 (1996) (“exceedingly persuasive justification” required).

²⁹⁸ 438 U.S. at 303. See also *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979) (“[r]ace is the paradigm”); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2158 (2023) (“foundational principle” of Equal Protection Clause was “not permit[ing] any distinctions of law based on race or color.”).

²⁹⁹ “Cisgender” refers to when a person’s gender identity aligns with the sex that was assigned at birth.

³⁰⁰ Compare *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020) (“[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex”) with *id.* at 1763 (“[I]t is entirely possible for an employer to do just that”) (Alito J., dissenting).

³⁰¹ But see *SFFA*, 143 S. Ct. 2141 at 2208-2210 (Gorsuch, J., concurring) (distinguishing Equal Protection from Title VI and VII analyses).

³⁰² John Galotto, *Strict Scrutiny for Gender, Via Croson*, 93 COLUM. L. REV. 508, 510-11 (1993) (“The undeniable difference between gender and race with respect to the Equal Protection Clause stems from the fact that the Fourteenth Amendment was passed in response to the oppression of African-Americans in the South.”).

³⁰³ *SFFA*, 600 U.S. at 214; Colker, *supra* note 211, at 1059 (“[R]ace specific policies have almost no chance of survival under strict scrutiny.”).

In contrast, as Professor Ruth Colker has noted, the “Court and Congress have permitted many more justifications for sex-specific policies or actions than for racially differentiating policies or actions.”³⁰⁴ The disparate tiers of scrutiny have enabled courts to approve of a wider range of sex-based policies, which may address subordination³⁰⁵ or perpetuate it.³⁰⁶

Ironically, this greater constitutional “protection” for race has been turned on its head. In operation, strict scrutiny has been wielded successfully to invalidate efforts to expand opportunities for those historically marginalized based on race. This wooden and ahistorical interpretation of Equal Protection, as illustrated by *SFFA*, has led to an unparalleled adherence to “colorblindness,” with the very descendants of slaves bearing the cost.³⁰⁷ Strict scrutiny is an anchor the Court has dropped, wedging government policy firmly in formal equality.³⁰⁸ But in enacting EFASASHA, Congress procedurally privileges a classification (sex) that receives less scrutiny under the Equal Protection Clause than race. Consistent with the Court’s own rhetoric, cases seeking to root out racial harassment and discrimination doctrinally should not fare worse procedurally than those based on sex.

Similarly, under statutory law, Title VII’s bona fide occupational qualification (BFOQ) exception to intentional discrimination affords race greater substantive protection than sex. Title VII permits discrimination “where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”³⁰⁹ However, the BFOQ exception excludes race and color as

³⁰⁴ Colker, *supra* note 211, at 1027-1028 (1986).

³⁰⁵ See Kim Forde-Mazrui, *Why the Equal Rights Amendment Would Endanger Women’s Equality: Lessons from Colorblind Constitutionalism*, 16 DUKE J. CONST. L. & PUB. POL’Y 1, 18 (2021) (noting that while quotas are impermissible under strict scrutiny, intermediate scrutiny permits them, which disadvantages race and benefits sex); Angelo Guisado, *Reversal of Fortune: The Inapposite Standards Applied to Remedial Race, Gender, and Orientation-Based Classifications*, 92 NEB. L. REV. 1, 3-5 (2013) (discussing how affirmative action plans for women are more likely to pass constitutional muster than race-based ones).

³⁰⁶ Colker, *supra* note 211, at 1042 (noting policies that supported paternalistic stereotype of women as “the weaker sex”).

³⁰⁷ See *SSFA*, 600 U.S. at 318-319 (Sotomayor, J., dissenting) (“[T]his Court stands in the way and rolls back decades of precedent and momentous progress. . . . [T]he Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter. The Court subverts the constitutional guarantee of equal protection by further entrenching racial inequality in education, the very foundation of our democratic government and pluralistic society.”).

³⁰⁸ See Kathryn E. Miller, *The Antisubordination Eighth Amendment*, 112 Cal. L.R. 2066, 2097 (2024) (“Antisubordination themes appear throughout the Supreme Court’s equal protection jurisprudence. Some of these scholars see an early example of antisubordination themes in Justice Harlan’s dissent in *Plessy v. Ferguson*, in which he declared that ‘in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.’”).

³⁰⁹ See 42 U.S.C. § 2000e-2(e)(1); see, e.g., *Dothard v. Rawlinson*, 433 U.S. 347, 334-35 (1977) (holding sex was a BFOQ under Title VII for guard at male maximum security prison).

permissible digressions.³¹⁰ Given that Title VII in particular, and the Civil Rights Act of 1964 in general, were enacted primarily to eradicate race discrimination, the initial drafters feared that the BFOQ exception would easily swallow the rule. A white Democratic Congressman from Mississippi introduced an amendment to Title VII's BFOQ provision to include race, which was rejected 108 to 70, for this very reason.³¹¹ Such a carveout "risk[ed] sending mixed messages to the country at a time when its rejection of race discrimination needed to be unequivocal."³¹² While the courts have since been nuanced about when race may be considered in employment contexts—such as movie casting, undercover law enforcement, and prison control—they have not permitted race as a BFOQ.³¹³

Like the Court's Equal Protection scrutiny, Congress has distinguished race discrimination as "particularly heinous," necessitating that Title VII substantive law "exercise a far more sweeping transformation of race than of gender."³¹⁴

While it may seem that race-based discrimination claims might need less procedural protection because of their more rigorous substantive protection, the colorblindness comeback suggests otherwise. For BIPOC Americans, race—like sex—may seem like a "pedestal", but "upon further inspection . . . [is] revealed as a cage."³¹⁵

In sum, doctrinally there is an unjustifiable and ironic incongruity between the treatment of race and sex when it comes to procedural protection. This incongruity threatens to create procedural apartheid—separate and unequal procedural tracks for race-based cases and their proponents. Potential solutions to this inequity are explored below.

IV. SOLUTIONS

Leveling the procedural playing field for racial harassment cases and litigants can take many forms—legislative and otherwise.

³¹⁰ See William R. Bryant, *Justifiable Discrimination: The Need for a Statutory Bona Fide Occupational Defense for Race Discrimination*, 33 GA. L. REV. 211, 213 (1998) ("Courts have consistently held that the language of Title VII precludes the use of the BFOQ exception for cases involving racial discrimination."); see Nicole Ligon, *Who Tells Your Story: The Legality of and Shift in Racial Preferences Within Casting Preferences*, 26 WM. & MARY J. RACE, GENDER, & SOC. JUST. 135, 139-40 (2019) (recognizing that while not a BFOQ, race permitted in ad as a preference, not prohibition, in casting call for musical production *Hamilton*).

³¹¹ Bryant, *supra* note 310, at 215-18; John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 686-87 (2004).

³¹² Dallan F. Flake, *Lifesaving Discrimination*, 72 AM. U. L. REV. 403, 415 (2022).

³¹³ See *id.* at 414-16; see also Skrentny, *supra* note 311, at 680 (finding diversity and role modeling permitted but not considered a BFOQ).

³¹⁴ Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F. L. REV. 473, 496-497 (2001).

³¹⁵ See *Dothard v. Rawlinson*, 433 U.S. 321, 345 (1977) (Marshall, J., dissenting in part) (regarding sex BFOQ).

A. Legislative Proposals

First, perhaps the most obvious and relatively “easy” solution is for Congress to pass EFARDA. This prescription is the proverbial “low hanging fruit.” Congress could amend the FAA to give those who allege racial harassment and discrimination the option of using the public court system and challenging misconduct collectively, irrespective of a mandatory arbitration agreement or aggregation ban. By passing EFARDA, Congress’s treatment of race and sex would be consistent, thereby eliminating the bare-faced unfairness between the two.

Some might counter that the enactment of EFARDA would promote inefficiency and threaten to topple private arbitration. One of the familiar justifications for selectively exempting certain cases and their claimants from compulsory arbitration and aggregation bans is judicial economy. Courts and Congress have been wary to permit others the benefit of forum choice and collective action on the ground that this will lead to a slippery slope: If we empower one group, we have to do the same for all groups, with no end in sight. The floodgates of litigation would open, overwhelming the civil justice system and destroying this dispute resolution alternative.

As an initial matter, this fear is overly dramatic and unfounded. There is no evidence that the civil litigation system will be deluged with new cases.³¹⁶ Professor Catherine McKinnon, almost forty-five years ago, had an apropos response to this fear of too much justice, in the context of efforts to expand rights for unions, women, and racial and ethnic minorities:

Often when courts are confronted with a massive social problem which has been ignored, the first response is “administrative” concern for the legal system. . . . The objection persists that if such groups are allowed to claim discrimination there will be no end to it. The response is that there will be an end to the claims when there is an end to the discrimination.³¹⁷

Likewise, there will be an end to demands for procedural justice when due process becomes a reality for all Americans. Moreover, the answer to deficiencies in the public court system is to bolster it with appropriate resources and judicial staffing, not selectively reduce its availability to only certain groups of Americans. Investment and structural reform are the answer to the slippery slope contention.

³¹⁶ Arbitration cases not covered by EFASASHA have increased dramatically. See FORCED ARBITRATION BY CORPORATIONS SURGES TO UNPRECEDENTED LEVELS 2, AM. ASSOC. FOR JUST. (Dec. 2023) (finding that for those outside EFASASHA’s protection, “[m]ore than 90,000 [arbitration] cases were filed [in 2022], comprising a 467% surge in cases from the previous year”). This is because of “mass arbitration”—where plaintiffs’ lawyers file individual arbitration cases seriatim on behalf of individuals forbidden from bringing class actions.

³¹⁷ CATHERINE A. MCKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 97 (1979).

A second solution to the race-sex procedural inequity is for Congress to expand procedural protection to race cases by amending Title VII, rather than the FAA. Inserting a prohibition of forced arbitration agreements and aggregation bans in Title VII has the benefit of broadening protection to a greater swath of identity groups. This prescription ensures that not only sex and race, but also color, religion, and national origin³¹⁸ would receive procedural shelter. The expansion to other familiar identity groups has the benefit of normalizing and encouraging the same for additional groups. Beyond Title VII's five protected classes, others such as disability, age, and military status—protected by analogous federal anti-discrimination statutes—may benefit normatively from Title VII's jurisprudence.³¹⁹ Indeed, Congress could amend the Civil Rights Act of 1964 (in which Title VII is embedded) to explicitly include offspring anti-discrimination statutes modeled after it.³²⁰ Even though race is the issue at hand, Congress would more efficiently and fairly cover the gamut of employees by virtue of amending Title VII.

Congress's enactment of the Lilly Ledbetter Fair Pay Act of 2009 (Ledbetter Act) is illustrative. The Ledbetter Act stemmed from Lilly Ledbetter's discovery that she was being paid thousands of dollars less than her male colleagues based on sex. Congress subsequently broadened the scope of the statute of limitations for workers bringing pay discrimination claims under Title VII. While the Ledbetter Act was largely touted as a response to pay inequities suffered by women because of its origins, it covered all of Title VII's protected classes. Congress also included the Americans with Disabilities Act of 1990 (ADA), the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act of 1967 (ADEA), in the Ledbetter Act³²¹—expanding its procedural protection on grounds far beyond sex.

Some might counter that tethering procedural protection to Title VII, however, would make relief only available in cases involving workers and employment contracts. By nestling the prohibition of mandatory arbitration and aggregation bans in Title VII, the breadth of the protection is significantly narrowed. One of EFASASHA's strengths is its coverage across groups of plaintiffs and types of contract.

This would suggest that the antidote is a third option: passage of the Forced Arbitration Injustice Repeal (FAIR) Act of 2023. The FAIR Act covers individuals, not identities, making separate statutes like EFASASHA, EFARDA, POAA, and any others unnecessary. The FAIR Act also covers

³¹⁸ See 42 U.S.C. § 2000e-17.

³¹⁹ See, e.g., Lilly Ledbetter Fair Pay Act of 2009, S. 181, 111th Cong. (2009) [hereinafter Fair Pay Act].

³²⁰ Even in the absence of explicit language, courts often interpret such offspring laws similarly to Title VII. See *Serapion v. Martinez*, 119 F.3d 982, 985 (1st Cir. 1997) (directing courts to treat Title VII, the ADEA, ERISA, and FLSA as *pari passu* so that “judicial precedents interpreting one such statute [are] instructive in decisions involving another.”).

³²¹ See Fair Pay Act, *supra* note 319.

plaintiffs subjected to different contract types and disputes, going beyond employment cases, to civil rights, consumer and anti-trust cases. It even offers procedural protection to small businesses.³²² Short of prohibiting mandatory arbitration agreements and collective action bans altogether, the FAIR Act does a good job of meting out procedural justice across the board, rather than piecemeal. Having said that, it faces significant hurdles.

As an initial matter, the FAIR Act of 2023 is unlikely to succeed in the current political climate.³²³ The 119th Congress today has not released the bill from each chamber's judiciary committee and there is no bipartisan support.³²⁴ The FAIR Act of 2022 fared slightly better, passing the House with nominal bipartisanship, but failing to leave the Senate Judiciary Committee.³²⁵

Even if the bill were to pass, it may have unintended consequences by virtue of being an amendment to the FAA, rather than a stand-alone federal statute. Indeed, Professor David Horton criticizes EFASASHA for this reason.³²⁶ While the Supreme Court has interpreted the FAA to cover a broad swath of contractual arrangements and substantive areas of law, there are some exceptions.³²⁷ For example, the Court has interpreted Section 1 of the FAA to cover all workers, except for those in transportation.³²⁸ The Court has also concluded that the FAA applies to state courts and preempts

³²² See FAIR Act, H.R. 2953, 118th Cong., §§ 2, 502 (2023).

³²³ The bill had a 2% chance of being enacted; it has since died. *S. 1376 (118th): Forced Arbitration Injustice Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/118/s1376> [https://perma.cc/N9ZX-RS42] (last visited May 11, 2026).

³²⁴ H.R. 2953 had 102 co-sponsors, all Democrats. *H.R. 2953 (118th): FAIR Act of 2023*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/118/hr2953> [https://perma.cc/F4FV-TWTY] (last visited May 11, 2026). *S. 1376* had 38 Democrats and 1 Independent co-sponsor. *S. 1376 (118th): Forced Arbitration Injustice Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/118/s1376> [https://perma.cc/N9ZX-RS42] (last visited May 11, 2026).

³²⁵ The FAIR Act of 2022, H.R. 963, 117th Cong. (2022), passed the House with 202 Democrats and 1 Republican favorable votes. *Actions Overview: H.R.963 — 117th Congress (2021-2022)*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/963/all-actions> [https://perma.cc/78C7-8WQS] (last visited Apr. 3, 2026). The Senate version, *S. 505*, 117th Cong. (2022), languished in the Judiciary Committee. *Actions Overview: S.505 — 117th Congress (2021-2022)*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/senate-bill/505/all-actions> [https://perma.cc/2VL7-2AZV] (last visited Apr. 3, 2026).

³²⁶ See David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L. REV. 2-3 (2022).

³²⁷ *Id.* at 2, 10.

³²⁸ *Id.* at 2, 10-17. See *Circuit City v. Adams*, 532 U.S. 105, 118 (2001) (finding employment contracts generally covered under FAA unless they are “contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce” under FAA’s § 1); *New Prime, Inc. v. Oliveira*, 586 U.S. 105, 121 (2019) (extending § 1 to cover independent contractors); *Southwest Airlines v. Saxon*, 596 U.S. 450, 463 (2022) (holding airplane ramp agent supervisors are exempt); *Bissonnette v. Lepage Bakeries Park St.*, 601 U.S. 246, 252 (2024) (holding truck drivers not part of the transportation industry may be exempt). The Court’s interpretation of § 1 not to cover workers more generally has garnered robust criticism. See *Cir. City*, 532 U.S. at 132 (Stevens, J., dissenting); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Act Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 146-49 (2006).

state law.³²⁹ Thus, transportation workers—who are exempt from the FAA—rely on state law when litigating the legality of a mandatory arbitration agreement.³³⁰ Norton warns that EFASASHA expands the pool of workers exempt from the FAA, leaving them to rely on state law to fill the gap.³³¹ The problem is that states vary in their hospitality to compulsory arbitration. Thus, in states which require arbitration of sexual harassment claims, EFASASHA undermines Congressional intent.³³²

Likewise, should Congress enact EFARDA, POAA, or the FAIR Act, each would amend the FAA—rather than be a stand-alone statute—which would exempt yet another protected identity group from FAA coverage. Like transportation workers, these “protected” groups would be subject to the arbitration law of the state in which they sit. This would result in a pocked-rights approach, not unlike that already present. Nationwide protection from forced arbitration and collective action bans would not be achieved through piecemeal, statewide law.

Granted, some may prefer a state-led approach. For example, California could resume its protective stance,³³³ while Arkansas³³⁴ could do otherwise. Court access could become yet another federalism battleground,³³⁵ where a federal floor no longer sets a nationwide standard for the states. From a normative lens, this “solution” would be terribly troubling, arbitrarily tethering an individual’s due process rights to geography. This suggests that a stand-alone law that covers civil rights, consumer, and anti-trust cases, for all identity groups, is a preferable legislative direction.

Moreover, if Congress enacts a statute apart from the FAA, Congress must be very clear that it intends to foreclose mandatory arbitration and aggregation bans to avoid a battle of the federal statutes. As *Epic Systems Corp. v. Lewis* illustrates, the Court is keen to harmonize potentially conflicting federal statutes,³³⁶ especially those up against the FAA.³³⁷ In *Epic Systems*, the plaintiffs contended that pursuant to the National Labor

³²⁹ See *Southland Corp. v. Keating*, 465 U.S. 1, 8 (1984); *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 649-50, 655-56, 660-62 (2022) (holding that while California substantive labor law did not violate FAA, state joinder rule was preempted by FAA); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336-43, 351-52 (2011).

³³⁰ *Horton*, *supra* note 326, at 13.

³³¹ *Id.* at 17-20.

³³² *Id.* at 2-3, 17, 20, 22. Some states require arbitration without an exclusion for any type of worker or claim through their adoption of the Revised Uniform Arbitration Act (RUAA). See *id.* at 19, 22 & n. 133; see also *id.* at 25 (citing West Virginia as example).

³³³ See *Schiff*, *supra* note 229, at 2702-03 (California legislative efforts to ban forced arbitration in employment cases); see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (finding California law pre-empted).

³³⁴ This is because Arkansas, like many states, have adopted the language of the Revised Uniform Arbitration Act (RUAA), which goes even further than the FAA in its pro-arbitration stance. See *Horton*, *supra* note 326, at 18-20, 22 n.138.

³³⁵ See *id.* at 22.

³³⁶ 138 S. Ct. at 1624 (finding that the Court “must . . . strive ‘to give effect to both.’”).

³³⁷ *Id.* at 1627.

Relations Act (NLRA), an employee's right to engage in "concerted activities for the purpose of . . . mutual aid and protection"³³⁸ included class actions, in contravention of class arbitration bans. The Court, however, rejected this contention on the ground that Congress failed to express a "clear and manifest" intention to displace the FAA's preference for enforcing arbitration agreements according to their terms.³³⁹ As Justice Gorsuch warned, displacing the FAA is a "heavy burden," requiring Congress to be clear and explicit when it veers away from the statute.³⁴⁰ Thus, any new stand-alone law protecting cases and their proponents from forced arbitration and collective action bans would need to be unambiguous and transparent.

Any legislative proposal should also track the approach recommended by Professor Brooke D. Coleman in *Endangered Claims*.³⁴¹ Coleman encourages law reformers to shift their focus from the interests of the powerful and well-resourced, to those of the marginalized, to protect claims in jeopardy of extinction.³⁴² Endangered claims, such as those in cases subject to forced arbitration and class action bans, should be protected in the law's evolution. Darwin's "survival of the fittest" overlay on the civil litigation system would be replaced with a conservationist approach, protecting cases based on race rather than undermining them.

Professor Norman W. Spaulding similarly urges those involved in procedural design to elevate the voices of the marginalized and identify any impact on the most vulnerable populations.³⁴³ He bemoans the pernicious procedural failure that many Americans experience:

[I]n every area of adjudication outside the federal courts there is alarming evidence of failure, and the more marginal the relevant population of individual claimants, the more systemic the failure, the more inhumane the treatment of litigants appears to be, and the more demoralizing and compromising the position of . . . decision makers.³⁴⁴

He includes private compulsory arbitration as a locus of such procedural failure and encourages those intent on reforming it to start by getting real about the actual and the ideal.³⁴⁵ This article attempts to do just that.

³³⁸ *Id.* at 1625, 1635.

³³⁹ *Id.* at 1624.

³⁴⁰ *Id.*

³⁴¹ Brooke D. Coleman, *Endangered Claims*, 63 WM. & MARY L. REV. 345, 393-401 (2021) (describing claims unable to adapt or migrate risk extinction).

³⁴² Professor Coleman identifies civil rights claims in jeopardy of extinction because of more rigorous pleadings and summary judgment standards, *id.* at 386, and consumer claims in jeopardy of extinction because of class action bans, *id.* at 386-87.

³⁴³ Spaulding, *supra* note 57.

³⁴⁴ *Id.* at 266.

³⁴⁵ *Id.*

B. Non-Legislative Proposals

Ultimately, a new law may not be the answer. As an initial matter, the legislative solution assumes that Congress has the political will and numbers to make it happen. With a Republican-controlled House, Senate, and presidency, and an exceptionally polarized and chaotic political environment, bipartisan support is extremely unlikely.

In the absence of Congressional action, federal courts and administrative agencies may be called upon to fill in the procedural parity gap. For example, as discussed, lower federal courts can enable EFASASHA's reach through receptivity to sex-plus, intersectional, and intermingled claims. But within the guardrails of doctrinal law and discretion checked by an increasingly skeptical Supreme Court,³⁴⁶ judicial power is limited. Administrative agency power is also shrinking in light of severe resource cuts and the Court's constrictive jurisprudence.³⁴⁷

Moreover, law is limited in its ability to change the societal culture and institutional norms necessary to bring about fundamental change. While EFASASHA has been touted as one of the most important recent developments in the battle against sexual assault and harassment, the law is not helpful if victims are too scared or can't afford to bring a formal claim, in arbitration or court. As discussed, it is well established that sexual harassment is wildly under-reported. *No one* is likely to bring a sexual harassment claim, especially those who are more vulnerable and marginalized. Those unlikely to formally challenge sexual misconduct in arbitration may be unlikely to do the same in the public court system. The civil litigation system has its own drawbacks.³⁴⁸ Significant risk, time, and expense are involved regardless of forum.³⁴⁹

The fact that EFASASHA enables plaintiffs to publicly expose misconduct on a large scale may incentivize companies to voluntarily prevent and correct harassment themselves. But while legislation may help to correct and deter some abuse, it is but one tool for addressing misogyny in the workplace. Any serious attempt to address this fundamental problem admittedly requires a far more sweeping and transformative strategy aimed at changing underlying culture, values, economic parity, and power imbalances.³⁵⁰

³⁴⁶ See, e.g., *Trump v. CASA*, 145 S. Ct. 2540 (2025) (prohibiting court from issuing injunctive relief beyond parties).

³⁴⁷ See, e.g., *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024) (eliminating agency deference under *Chevron v. Natural Resources Defense Council*).

³⁴⁸ See generally Malveaux, *Is It the Real Thing?*, *supra* note 106.

³⁴⁹ See Starr, *supra* note 83, at 267 (“[I]t is notoriously hard to win disparate treatment suits.”).

³⁵⁰ See, e.g., Vicki Shultz, *Open Statement on Sexual Harassment From Employment Discrimination Law Scholars*, UNLEASH EQUALITY, <https://www.unleashequality.com/manifesto> [<https://perma.cc/EP79-J7YA>] (proposing 10 principles for addressing sexual harassment through legal analysis and policy study by academics); TASK FORCE, *supra* note 39 (transformative recommendations for addressing sexual harassment); Michelle Simpson Tuegel, *Forced*

Law is not a panacea, and a healthy skepticism about its utility is warranted here.³⁵¹

Professor Michael Green argues that corporate America should take the lead on aligning its dispute resolution policies across sex, race, and other identity groups.³⁵² He argues that the private sector has a role to play in shifting societal norms.³⁵³ Employers, retailers, and other businesses can proactively reconcile conflicting approaches to how sex and race harassment cases are resolved. He argues that inconsistent treatment across employees can result in reputational harm, loss of business, and low morale.³⁵⁴ Indeed, given the diversification and globalization of the workforce, it is better for the bottom line to embrace all employees—putting the more xenophobic national climate aside.

However, Green warns that the corporate “two-step” between race- and sex-based harassment procedural policies indicates that company commitment to fairness may be merely performative.³⁵⁵ Indeed, if the recent corporate retraction from DEI initiatives is any indication, relying on the private sector for lasting, meaningful change is wishful thinking.

Finally, grassroots activism and political mobilization are essential to lasting change. As Professor Lani Guinier notes, “demosprudence”—the theory that “lawmaking is a collaborative enterprise between formal elites . . . and ordinary people” is crucial.³⁵⁶ Mobilization of nonlegal actors is often the catalyst to systemic change. The walkout of 20,000 Google employees in response to the company’s forced arbitration of sexual harassment claims is a case in point.³⁵⁷ This activism led the company to abandon its compulsory arbitration and collective action bans, a move adopted by other major companies.³⁵⁸ This convergence of interests between grassroots activists and #MeToo’s powerful players also resulted in EFASASHA’s passage. Professor Green proposes the formation of a Black Labor Matters

Arbitration Ban Good Start, But More Needs to Be Done, DAILY LABOR REPORT (July 28, 2022, at 4:00 ET), <https://news.bloomberglaw.com/daily-labor-report/forced-arbitration-ban-good-start-but-more-needs-to-be-done> [<https://perma.cc/Z36Y-U8Q6>] (encouraging advocates to change power imbalances); Jamilah Bowman Williams, *Beyond Sex-Plus: Acknowledging Black Women in Employment Law and Policy*, 25 EMP. RTS. & EMP. POL’Y J. 1, 8-10 (2021).

³⁵¹ Federal anti-discrimination laws exclude many vulnerable groups, including domestic farm, gig, temp, and small business workers, as well as interns. See Williams, et al., *supra* note 90.

³⁵² Green, *supra* note 152, at 465-66.

³⁵³ *Id.* at 499-502.

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 510.

³⁵⁶ Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 545 (2009).

³⁵⁷ See Green, *supra* note 152, at 502-03; but see Rachel M. Schiff, *supra* note 229, at 2729-30 (2020) (explaining activism’s drawbacks include limited awareness of forced arbitration and added strain on overburdened employees).

³⁵⁸ Green, *supra* note 152, at 503 (noting policy changes by Facebook, Microsoft, Intuit and Adobe).

coalition—consisting of labor organizers, BLM, and plaintiff attorneys—to challenge the status quo.³⁵⁹ Such creativity and collectivism are essential.

CONCLUSION

In conclusion, there is no principled justification for treating survivors of racial harassment and discrimination differently than survivors of other forms of harassment and discrimination. EFASASHA, while an important step forward, exposes an uncomfortable truth—the risk of “procedural apartheid”—where cases involving race and those who bring them are subjected to separate and unequal due process. If Congress continues to selectively express outrage over mandatory agreements and collective action bans—allowing some Americans the freedom to choose while denying others—it risks its own legitimacy as the people’s representative.

The broken Tesla worker—a Black man—described at the beginning of this article represents a broken civil justice system. While both he and the Consumers Energy electric line worker—a white woman—suffered brutal abuse at their work sites, they would not be entitled to the same due process. Under the current law, his experience is devalued in comparison to that of the white female worker at Consumers Energy. Because he suffered racial harassment, he can be denied court access and collective strength. By contrast, because she suffered sexual harassment, she is entitled to robust due process. She can access the full panoply of procedural rights in the public court system and challenge systemic wrongdoing with other women. Imagine a system that honors them both; that is what this article does.

Absent intervention, the American civil litigation system risks devolving into “procedural apartheid.” But the risk does not stop there. In these tumultuous times, now more than ever, it is important to identify where and how Americans are being denied procedural justice and work to eradicate such inequity.³⁶⁰

³⁵⁹ *Id.* at 506-07.

³⁶⁰ Professor Spaulding highlights where marginalized groups are predominant, including arbitration, public courts, and agencies like Veterans Affairs and Social Security. *See* Spaulding, *supra* note 57, at 266-67 n.21.