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Expanding the Ban on Forced Arbitration to Race Claims

Michael Z. Green

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Abstract

When Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFASASHA") in March 2022, it signaled a major retreat from the Supreme Court's broad enforcement of agreements to force employees and consumers to arbitrate discrimination claims. But the failure to cover protected discriminatory classes other than sex, especially race, tempers any exuberance attributable to the passage of EFASASHA. This Article prescribes an approach for employees and consumers to rely upon EFASASHA as a tool to prevent both race and sex discrimination claims from being forced into arbitration by employers and companies. This approach relies upon procedural and societal norms, as well as the text and legislative development of the statute, that warrants joining both race and sex discrimination claims in court. This overall prescription seeks to end the forced arbitration of race discrimination claims for employees and consumers.

This Article asserts that despite focusing on sex-based claims, the application of the EFASASHA statute in the courts will result in many race-based claims also being prohibited from being forced into arbitration.

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Many people of color pursue discrimination claims based on race that also intersect with claims of sex. As these claims arise from the same transaction or occurrence, employees and consumers must take the same steps to bring these claims together in federal court or face res judicata prohibitions leading to inconsistent results.

This Article also concludes that social movements and creative plaintiff efforts that led some businesses to abandon their mandatory arbitration practices before Congress passed EFASASHA should also influence companies to not force arbitration of race claims. These companies must recognize the double-dealing involved in identifying themselves as progressive businesses committed to non-discrimination if they still force arbitration of race discrimination claims when they may not subject similar sex discrimination claims to arbitration after EFASASHA. Although Congress may have political reasons for not listing racial claims explicitly in the EFASASHA legislation, this Article highlights how businesses should understand that the concerns and rationales justifying EFASASHA's ban on forced arbitration of claims based on sex applies with equal force with respect to arbitration of claims based on race.

I. INTRODUCTION: NAVIGATING ARBITRATION OF RACE AND SEX CLAIMS

Social movements have functioned as a last line of action in addressing access to justice when courts and legislatures have failed to consider concerns for those with less power in our society.[1] Both the Black Lives Matter ("BLM") and #MeToo movements have fostered broad social protests against mistreatment of persons based upon race and sex, respectively.[2] These movements have offered unique perspectives when considering the enforcement of arbitration agreements[3] purportedly being used as a powerful tool for corporate interests desiring to prevent employees and consumers of color and women from pursuing public vindication of their discrimination claims through the court system.[4]

Pursuant to the Federal Arbitration Act (FAA),[5] the United States Supreme Court has consistently enforced agreements to arbitrate, including standard form agreements between an individual consumer or employee, sometimes referred to as mandatory or forced arbitration.[6] As a result, companies have used their bargaining power to require the use of arbitration instead of the courts to resolve disputes and also to obtain the

1. *See* Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758, 783, 807–08 (2020) (discussing the importance of social movements in our society from the "abolitionist movement, through the suffragette movement and the social movements of the 1960s, to current movements such as #MeToo and Black Lives Matter" in addressing systemic and structural discrimination and the development of other justice movements "committed to the empowerment of stigmatized communities").

2. *See* Jamillah Bowman Williams, Lisa Singh, & Naomi Mezey, *#MeToo As Catalyst: A Glimpse into 21st Century Activism*, 2019 U. CHI. LEGAL F. 371, 376–77, 383–392 (2019) (discussing how activist movements have used social media such as #BlackLivesMatter for race, #MeToo for sex, and #LoveWins for LGBTQIA+ to spark social protests, strikes, marches, and legal actions resulting in changes in workplace sexual harassment and arbitration policies at McDonalds, Google, Microsoft, Uber and many hotel chains while also inspiring state and federal legislative actions to address the same workplace policies).

3. *See* Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 158–60 (2019).

4. *See* Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1329–31 (2015) (discussing how so many employees and consumers are now subjected to arbitration clauses but the fact that such a "small number" of claims are filed in arbitration suggests arbitration suppresses the pursuit of these claims).

5. Arbitration Act of 1925, ch. 213, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1–15).

6. *See* Jill I. Gross, *Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOK. L. REV. 111, 116, 132 (2015) (discussing how the Court has failed in protecting the interests and rights of employees and consumers in obtaining justice in courts by enforcing standard form agreements implemented by businesses to require arbitration of any claims brought against those businesses); Sternlight, *supra* note 3, at 178 (describing the Supreme Court's broad endorsement of arbitration and enforcement of agreements that mandate arbitration so that "employees have little hope of convincing courts to instead allow them to litigate their disputes").

waiver of class resolution of disputes in both arbitration and the courts.[7] Without any objection to arbitration in general, most legislative efforts and creative legal challenges have attempted to, and primarily failed to, abolish forced arbitration by protecting statutory discrimination claims from being foisted out of the courts and into private resolution.[8]

Only after the BLM and #MeToo protests have we started to see positive changes evolve in the effort to subvert the FAA legal "juggernaut" created by the Supreme Court's primarily unfettered approval of agreements to arbitrate.[9] In the wake of these movements, recent surveys indicate that most people do not approve of mandatory arbitration agreements.[10] These movements also led to the first major amendment to the FAA prohibiting mandatory arbitration for sex-based discrimination claims after nearly thirty years of failed legislative efforts seeking to ban

7. Sternlight, *supra* note 3, at 156–60 (describing how employees and consumers have the arbitration process imposed upon them with little understanding or knowing about the consequences of the agreement to arbitrate); *see also* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 689–90, 705–07 (2018) (discussing how employers through arbitration clauses and waivers of aggregate rights have significantly increased the number of employees being subjected to arbitration); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2863–74 (2015) (referring to wholesale business and employer attempts to make consumers and employees have to arbitrate their disputes).

8. Sternlight, *supra* note 3, at 205–08 (discussing failed legislative actions seeking to ban mandatory arbitration for employees and consumers); *see also* Kevin E. Davis & Mariana Pargendler, *Contract Law and Inequality*, 107 IOWA L. REV. 1485, 1538 n.239 (2022) (citing "Katherine V.W. Stone & Alexander J.S. Colvin, ECON. POL'Y INST., THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS 26 (2015), https://files.epi.org/2015/arbitration-epidemic.pdf [https://perma.cc/8J3Y-F2HS] (describing the turn to arbitration 'in the past three decades [as] . . . a massive shift in the civil justice system that is having dire consequences for consumers and employees'); James P. Nehf, *The Impact of Mandatory Arbitration on the Common Law Regulation of Standard Terms in Consumer Contracts*, 85 GEO. WASH. L. REV. 1692, 1695 (2017) (positing that, due to the greater use of arbitration of consumer contracts, 'the common law doctrines of unconscionability and good faith . . . are essentially frozen in time')"). Other recent representative decisions indicate the Supreme Court's broad enforcement of agreements to arbitrate under the FAA. *See, e.g.*, Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1418–19 (2019); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 237 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 347–48 (2011); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 687 (2010). In somewhat of a departure from its repeated rulings in favor of arbitration agreement enforcement, the Court has ruled recently that certain groups of workers are not covered by the FAA, including airport ramp supervisors who frequently help cargo loaders, Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 1789–90 (2022), and independent contractors, New Prime Inc. v. Oliveira, 139 S. Ct. 532, 541–542 (2019).

9. Estlund, *supra* note 7, at 686–87; *see also* Williams, Singh, & Mezey, *supra* note 2, at 383–84; Sternlight, *supra* note 3, at 201–205 (describing company responses to social movements either out of social responsibility or shaming that led to rescission of arbitration polices).

10. *See* Michelle Nadeau, *The Push to End Employee Forced Arbitration*, KWALL, BARACK, NADEAU, PLLC (June 17, 2019), https://www.employeerights.com/blog/2019/june/the-push-to-end-employee-forced-arbitration/ [https://perma.cc/W2VK-4R9R] (noting that a Hart poll of 1200 voters found that 84% supported legislation to end forced arbitration requirements and 87% of Republicans and 84% of Democrats support such legislation).

mandatory arbitration.[11]

On March 3, 2022, with bipartisan political support, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFASASHA") that bans the use of forced arbitration to resolve sexual-assault and sexual-harassment-related conflicts.[12] This legislation initially developed in part as a response to the #MeToo movement. When the Democratic House and Senate had the control to bring the legislation forward in Congress, and some Republicans ended up supporting the legislation, it became the law.[13]

EFASASHA's ban does not address claims of racial harassment, racial assault, or any other discrimination claims brought by workers and consumers based on protected classes other than sex.[14] The House of

11. *See* Erik Encarnacion, *Discrimination, Mandatory Arbitration, and the Courts*, 108 GEO. L.J. 855, 902–03 (2020) (discussing failed legislative attempts since the 1990s aimed at amending the FAA to prohibit arbitration of discrimination claims and suggesting the precursor to EFASASHA, the Ending Forced Arbitration of Sexual Harassment Act of 2017, was most "likely to gain traction" due to "existing bipartisanship [that] can be leveraged to reform the FAA" as "piecemeal legislative reform [that] looks more promising in the near term" despite the need to remove all discrimination claims from FAA coverage); David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J. F. 1–2 (2022) (referring to passage of EFASASHA as "the first major amendment in the one-hundred-year history of the Federal Arbitration Act").

12. *See* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 90, 136 Stat. 26 (2022) (codified at 9 U.S.C. §§ 401-402); *see also* Sara Sirota & Austin Ahlman, *Biden Signs Law Banning Forced Arbitration — But Only Over Sexual Misconduct*, THE INTERCEPT (Mar. 3, 2022, 4:23 PM), https://theintercept.com/2022/03/03/sexual-harassment-forced-arbitration-fair-act/ [https://perma.cc/9LXS-W3CS] (describing the signing of the legislation as a first step for many politicians and support groups who hope to carve out all employment and consumer matters from enforcement under the FAA either through an additional piecemeal approach or through the broader Forced Arbitration Injustice Repeal Act).

13. *See* H.R. REP. NO. 117-234, at 11–12 (2022), https://www.congress.gov/117/crpt/hrpt234/CRPT-117hrpt234.pdf [https://perma.cc/4LR2-RVWE] (describing how the legislation developed); *see also* Cristina Marcos, *House Passes Bill to End Forced Arbitration in Sexual Misconduct Cases*, THE HILL (Feb. 7, 2022, 7:39 PM), https://thehill.com/homenews/house/593206-house-passes-bill-to-end-forced-arbitration-in-sexual-misconduct-cases/ [https://perma.cc/TN2C-Q756]. More details about the political motivations involved in the passage of EFASASHA are discussed in Section II *infra*.

14. At this point it is worth identifying an assumption that I make throughout this Article: Federal legislation banning sexual harassment and sexual assault in the workplace and for consumers does not list sexual assault or sexual harassment specifically. *See* Title VII, 42 U.S.C. § 2000e–2 (prohibiting discrimination under federal law "because of such individual's race, color, religion, sex, or national origin"). Sexual harassment is considered discrimination "because of sex" after a landmark 1986 Supreme Court decision. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986). As a result, I will refer to sex discrimination and race discrimination throughout with the understanding that those references also encompass assaults and harassment based on sex and race, respectively, and also broadly in defining how sexual harassment and race harassment may occur. *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) (describing how Title VII does not contain the term "sexual harassment" and that term is instead a "theory of discrimination"

Representatives also passed the Forced Arbitration Injustice Repeal ("FAIR") Act of 2022 (H.R. 963) on February 10, 2022, which would have covered racial discrimination claims by employees and consumers.[15] The FAIR Act of 2022 would have banned not only mandatory arbitration of race discrimination claims but all "predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes."[16] Unfortunately, the Senate never acted on this proposed law leaving any final action on the FAIR Act of 2022 languishing with a Senate committee.[17] On April 27, 2023, Democratic Representative Hank Johnson and Democratic Senator Richard Blumenthal reintroduced the same legislation, now titled the FAIR Act of 2023.[18]

In May 2023, Democratic Senator Corey Booker and Democratic Representative Colin Allred introduced legislation sponsored by them and other Democratic legislators, the Ending Forced Arbitration of Racial Discrimination Act ("EFARDA") of 2023.[19] If passed, EFARDA would ban forced arbitration of race discrimination claims.[20] Unfortunately, because EFARDA only lists Democratic sponsors, its passage or any subsequent attempts in the near future to pass a specific legislative ban on forced arbitration for race discrimination appears unlikely.[21] EFASASHA

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developed through Supreme Court cases that not only refers to harassment based on sexual behavior but it also encompasses pregnancy, sexual orientation, and gender identity harassment).

15. H.R. 963, 117th Cong. (2022) (describing FAIR Act of 2022 passed by House of Representatives on March 17, 2022 and how the last action on the proposed legislation was receiving it in the Senate, reading it twice, and referring it to the Committee on the Judiciary on March 21, 2022).

16. *Id.*

17. *Id.*

18. FAIR Act of 2023, H.R. 2953, 118th Cong. (2023–2024); Forced Arbitration Injustice Repeal Act, S. Res. 1376, 118th Cong. (2023–2024); *Rep. Johnson & Sen. Blumenthal Re-Introduce Legislation to End Forced Arbitration & Restore Accountability for Consumers, Workers*, HANK JOHNSON (Apr. 28, 2023), https://hankjohnson.house.gov/media-center/press-releases/rep-johnson-sen-blumenthal-re-introduce-legislation-end-forced [https://perma.cc/9XXL-JXK5].

19. *See* Devan Markham, *Democrats Introduce Bill to Ban Arbitration of Race Claims*, NEWSNATION (May 5, 2023, 08:48PM), https://www.newsnationnow.com/politics/democrats-bill-ban-arbitration-race-claims/ [https://perma.cc/56NA-3NU5]; Khorri Atkinson, *Ending Forced Arbitration of Race Claims is New Diversity*, BLOOMBERG L. (June 6, 2023, 4:15 AM), https://news.bloomberglaw.com/ip-law/ending-forced-arbitration-of-race-claims-is-new-diversity-focus [https://perma.cc/228E-NSGS].

20. Markham, *supra* note 19; Atkinson, *supra* note 19.

21. *See* Mike Lillis, *Republican Problems on Race Add Up*, THE HILL (July 15, 2023 6:00 AM), https://thehill.com/homenews/house/4098746-republican-problems-on-race-add-up/ [https://perma.cc/33TX-7ZSC] (referring to how Republicans' racial "polarization rose to new heights under former President Trump, who stirred countless race-based controversies, including a show of support for the white nationalists who marched in Charlottesville, Va., in 2017, and for similar groups that stormed the Capitol on Jan. 6, 2021" and noting that "[m]ost Republicans, meanwhile, have rejected the idea that their party promotes racial inequality in any form" and describing a belief by

passed, in part, because it had bipartisan support from Democrats and Republicans including Senator Lindsey Graham.[22] Shortly after EFARDA was introduced, Democratic Senators Dick Durbin and Kirsten Gillibrand introduced new legislation in June 2023, the Protecting Older Americans Act ("POAA").[23] Unlike EFARDA, the POAA has bipartisan support as Republican Representative Nancy Mace and Republican Senator Graham also sponsored that legislation.[24]

One can only speculate why Graham, Mace, or other Republican legislators who supported EFASASHA to ban forced arbitration of sex discrimination claims and also the POAA's ban on forced arbitration of age discrimination claims have not yet been willing to support legislation banning mandatory arbitration of race discrimination claims as well.[25]

"many Black lawmakers" that "Republicans reflect a broader lack of empathy" regarding racial discrimination); Encarnacion, *supra* note 11, at 902–03 (describing the necessity of bipartisanship support in passing legislation related to arbitration). Due to partisan bickering extending to matters beyond race, Congress has struggled to even pass basic legislation increasing debt limits to keep the government paying its bills on time without a default. *See* Joan E. Greve, *U.S. Lawmakers Blame Each Other for Debt Ceiling Standoff: 'They are not negotiating'*, THE GUARDIAN (May 24, 2023, 4:53PM), https://www.theguardian.com/us-news/2023/may/24/mccarthy-biden-debt-ceiling-nearing-deadline [https://perma.cc/4HSH-SS9A] (referring to spats between Democrats and Republicans over debt ceiling legislation negotiation); David Morgan & David Lawder, *U.S. Hits Debt Ceiling as Partisan Standoff Sparks Economic Worries*, REUTERS (Jan. 20, 2023, 1:56 PM), https://www.reuters.com/world/us/us-govt-touches-debt-limit-amid-standoff-between-republicans-democrats-2023-01-19/ [https://perma.cc/2FP9-9TVV] **(**describing how partisan challenges resulted in a "standoff by prioritizing debt payments."). Arguably any legislation seeking to protect workers right now can only be passed in Congress if it garners bipartisan sponsorship, such as recent laws protecting pregnant workers by allowing accommodations during pregnancy and also providing all post-partum workers with a space and accommodations to express milk for their babies, passed in December 2022, respectively the Pregnancy Workers Fairness Act, effective July 2023, and the Providing Urgent Maternal Protection Act (PUMP Act), effective April 2024. *See* Danielle Marie Holland, *New Laws that Protect Pregnant and Nursing Employees are Finally Here*, YAHOO! FIN. (Jan. 6, 2023), https://finance.yahoo.com/news/laws-support-pregnant-nursing-employees-172129596.html [https://perma.cc/5RVN-MNFH]; Diego Areas Munhoz, *Bipartisan Passage of Workplace Laws Puts Employers on Notice*, BLOOMBERG L. (Feb. 3, 2023, 4:25AM), https://news.bloomberglaw.com/daily-labor-report/bipartisan-passage-of-workplace-laws-puts-employers-on-notice [https://perma.cc/DAX4-MUH3].

22. *See* Sirota & Ahlman, *supra* note 12 (discussing bipartisan sponsorship and support that led to the passage of EFASASHA).

23. Protecting Older Americans Act of 2023, S. 1979, 118th Cong. (2023). If passed, this legislation would amend the FAA by creating §§ 501 & 502 to allow a plaintiff alleging age discrimination to avoid pre-dispute arbitration agreements and joint-action waivers at the election of the person alleging age discrimination. *Id.*

24. See Durbin, Gillibrand, Graham Introduce Bipartisan legislation to Allow Victims of Age Discrimination to Seek Justice and Accountability., U.S. SEN. COMM. ON THE JUDICIARY (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/RMT2-9Z4D].

25. *See* Larry J. Pittman, *Arbitration and Federal Reform: Recalibrating the Separation of*

Possibly, there will continue to be a partisan divide on all matters regarding race whether at the federal or the state level.[26] With only EFASASHA (and not FAIR and not likely EFARDA without bipartisan support) becoming law, this creates some uncertainty as to whether race discrimination claims brought by the same employee or consumer could be forced into arbitration while intertwining sex discrimination claims would have to be resolved in the courts.[27]

Because EFASASHA requires that sexual assault or sexual harassment claims may not be forced into arbitration, allowing other claims related to or intertwined with the sexual assault or sexual harassment to be resolved separately in arbitration could affect the overall vindication of the sexual assault or sexual harassment claims in court as intended by EFASASHA.[28] With piecemeal resolutions, employees and

Powers Between Congress and the Court, 80 WASH. & LEE L. REV. 893, 915 (2023) ("In other words, if the Ending Forced Arbitration Act excludes women with sexual abuse and sexual harassment claims from forced arbitration, there is no good reason, other than Congressional politics, that it should not also exclude African Americans, Hispanics, and other people of color from forced arbitration when they bring other types of Title VII claims."); *see also* Lillis, *supra* note 21 (referring to political polarization on matters of race and implying a lack of sympathy or willingness by Republicans to support any legislation addressing race discrimination).

26. *See* Olivia Olander, *Democratic AGs Blast Republicans Trying to 'Intimidate' Corporations on Diversity Efforts*, POLITICO (July 19, 2023, 5:45 PM), https://www.politico.com/news/2023/07/19/corporate-dei-efforts-top-democratic-state-lawyers-00107189 [https://perma.cc/GP76-GS5Q] (describing competing letters sent by state attorney generals to Fortune 100 companies based upon a recent Supreme Court decision regarding affirmative actions in admissions at Harvard University where 13 Republican state attorney generals told the companies that they were being warned to not engage in "discriminating on the basis of race, whether under the label of 'diversity, equity, and inclusion' or otherwise" and how more than 20 Democratic state attorney generals responded to the companies by attacking the Republican letter and stating that they will provide legal cover from the threats and intimidation in the Republican letter); *see also* David Hood, *Democratic AGs Pledge Legal Cover for Companies' Diversity Goals*, BLOOMBERG L. (July 19, 2023, 12:47 PM), https://news.bloomberglaw.com/esg/democratic-ags-pledge-legal-cover-for-companies-diversity-goals [https://perma.cc/4RJC-8N83] (describing Democratic state attorney generals' letter in response to Republicans); *see also* Letter from Aaron D. Ford, Nev. State Att'y Gen., to Fortune 100 CEOs (July 19, 2023), https://aboutblaw.com/9pR [https://perma.cc/JNE2-ES72] (providing the letter).

27. *See* Erin Webb, *Analysis: #Me Too Law May Keep Entire 'Case' in Court*, BLOOMBERG L. (Mar. 21, 2022, 11:20 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-metoo-law-may-keep-entire-case-in-court [https://perma.cc/Y3NN-JXXU] (suggesting that language in EFASASHA stating that the legislation prohibits a "predispute arbitration agreement or predispute joint-action waiver" from being "enforceable with respect to a case which is filed . . . and relates to the sexual assault or sexual harassment dispute" opens the door to other claims by using the broader term "case" rather than a claim to suggest that other claims in the "case" that are "related" may also be litigated rather than arbitrated).

28. *See* Sperino, *supra* note 14, at 26 (discussing the purpose of EFASASHA and how an "interpretation that best effectuates the underlying goals" of the statute should cover claims "intertwined with other types of sex-based harassment and discrimination" to make certain that in using this "umbrella term" of "sexual harassment" Congress intended EFASASHA to incorporate its

consumers could be subjected to issue preclusion and claim preclusion concerns as both res judicata doctrines could limit full recovery or create inconsistent recovery for those pursuing EFASASHA's nonarbitrable sexual assault or sexual harassment claims.

Given that many discrimination complaints involving both race and sex discrimination cannot be separated in a way that would allow vindication of the sex discrimination claim in court, as intended by EFASASHA, this Article argues that courts must resolve the race and sex discrimination claims together. Principles developed through the application of res judicata doctrines, including both claim and issue preclusion, require this result.[29] The doctrine of claim preclusion "prevents a party from suing on a claim or cause of action that has or could have been determined by a competent court in a final and binding judgment."[30] Whereas, the doctrine of "[c]ollateral estoppel prevents relitigation of specific issues actually litigated and determined by a final judgment, where the issues were essential to the judgment."[31]

Further, that businesses continue to embrace their social responsibilities, while also demanding that race discrimination claims be arbitrated amidst so much public criticism over resolving sex discrimination claims in arbitration, suggests that any pragmatic response by those businesses should involve abolishing their arbitration agreements. If these businesses do not discontinue their pursuit of arbitration when dealing with claims for race discrimination, plaintiffs' firms have another option. These firms could pursue mass racial arbitration filings of multiple individual claims against a single business as a way to convince that business to decide that mandating arbitration for

broad meaning through the "underlying Title VII structure"); *see also* Mera v. SA Hosp. Grp., LLC, No. 23-CV-03492, 2023 WL 3791712, at *6 (S.D.N.Y. June 3, 2023) (finding allegations of homophobic slurs and touching and grabbing of a male by his male supervisor involved claims of sex harassment not just based upon sexualized behavior but because of sex under Title VII as being covered by EFASASHA's prohibitions regarding arbitration of sex harassment claims); Delo v. Paul Taylor Dance Found., Inc., No. 22-CV-9416, 2023 WL 4883337, at *7 (Aug. 1, 2023) (sex harassment defined as "unwanted gender-based conduct" under New York law and includes comments about pregnancy for EFASASHA).

29. *See* Allen v. McCurry, 449 U.S. 90, 94 (1980) ("[R]es judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication."); *see also* Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984) (discussing that res judicata "consist[s] of two preclusion concepts: 'issue preclusion' and 'claim preclusion.'").

30. Jarrod Wong, Court or Arbitrator—Who Decides Whether Res Judicata Bars Subsequent Arbitration Under the Federal Arbitration Act?, 46 SANTA CLARA L. REV. 49, 53 (2005).

31. *Id.*

race discrimination claims is not a viable option.[32] At a minimum, all these pressures and potential legislation should lead to the end of forced arbitration with respect to race discrimination claims and possibly all protected class discrimination claims.[33]

This Article proceeds as follows. Section II highlights the nature of the problem that employees have faced for the last thirty years as businesses have been able to demand that individuals agree to arbitrate discrimination disputes as a condition of employment or a consumer transaction. Section III discusses EFASASHA, why its statutory prohibition on arbitrating sex discrimination claims was passed, and how employers may want to respond to it in light of key comments from those

32. *See* Sam Heavenrich, *Concerted Arbitration*, 132 YALE L.J. F. 29, 30 (2022) (identifying "mass arbitration" by describing how "plaintiff-side firms have inundated companies unaccustomed to dealing with more than a trickle of claims" by pursuing "arbitrat[ion] disputes efficiently and on a massive scale" while "leveraging new technology, novel solicitation methods, and arbitral forum rules that allow workers and consumers to file claims at little or no cost. . . ."); *see also* J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1289 (2022) (describing "mass arbitration" as the process employed by "enterprising and (highly) capitalized attorneys" who choose to "file arbitration demands on behalf of individual claimants subject to mandatory arbitration agreements" and they bring each claim "against the same defendant for the same course of conduct" and they repeatedly pursue such claims as a tool to circumvent enforcement of mandatory arbitration by businesses who attempt to prevent class claims from proceeding in arbitration). However, businesses may look for creative ways to back away from their arbitration agreements when presented with mass arbitration demands. *See, e.g.*, Cyrus Farivar, *Ex-Employees Suing Twitter Say It's Not Cooperating On Arbitration, Asks to Keep Case in Court*, FORBES (Feb. 3, 2023, 6:00 AM), https://www.forbes.com/sites/cyrusfarivar/2023/02/10/ex-employees-suing-twitter-say-its-not-cooperating-on-arbitration-asks-to-keep-case-in-court/ [https://perma.cc/9YLX-QNG5] (describing how Twitter fought class lawsuit claims and sought to compel arbitration but after mass arbitration filings, Twitter allegedly refused to arbitrate and requested that individuals provide proof of their agreements to arbitrate which all suggested that Twitter would prefer to resolve all the claims back in court rather than addressing them through mass arbitration filings); Joel Rosenblatt, *Twitter Accused by Fired Workers of Sabotaging Severance Faceoff*, BLOOMBERG (Feb. 8, 2023, 7:40 PM), https://www.bloomberg.com/news/articles/2023-02-09/twitter-accused-by-fired-workers-of-sabotaging-severance-faceoff [https://perma.cc/L4JQ-HPN2] (discussing how Twitter sought to compel arbitration when a class claim was brought challenging Twitter's handling of severance agreements and how Twitter now refuses to participate in arbitrations unless employees present a copy of the agreement to arbitrate and file the arbitration claim and how Twitter is refusing to pay fees for arbitration and not cooperating in trying to identify arbitrators). Even more likely, businesses, as the parties who craft the arbitration agreements, may start to use their power to limit or prevent mass arbitration. *See* J. Maria Glover, *Recent Developments in Mandatory Arbitration Warfare: Winners and Losers (So Far) in Mass Arbitration*, 100 WASH. U. L. REV. 1617, 1635–45 (2023) (describing how employees and consumers have been winning with respect to ending mandatory arbitration through mass arbitration filings which is leading to certain business responses to combat mass arbitration including eliminating friendly fee-shifting provisions, adopting batching provisions that stop mass filings at a certain number and place them in a small batch to be arbitrated before proceeding to further filings, and seeking new arbitral providers that offer more favorable terms to limit or even prohibit mass arbitration filings).

33. With respect to pending pressure from Congress, all forms of discrimination claims can be prohibited from mandatory arbitration eventually through passing piecemeal legislation such as EFARDA for race and POAA for age joining with EFASASHA's coverage of sex claims.

involved in the passage of the legislation. Section IV explores the concept of intersectional discrimination and how claims involving both race and sex should be regarded as one claim overall and joined with each other as related claims in resolving EFASASHA coverage issues.

Section V discusses the intertwining doctrine that arose in the 1980s to analyze and establish the necessary joinder of arbitrable and nonarbitrable claims, why the Supreme Court rejected this intertwining doctrine out of deference to the enforcement of agreements to arbitrate pursuant to the FAA, and how this intertwining doctrine might now be applied to prevent race discrimination claims arising from the same transaction as sex discrimination claims from being arbitrated. Section V also argues that the doctrines underlying res judicata support a finding for reversing the Court's prior rejection of the intertwining doctrine under the FAA. To presently allow the intertwining arbitrable and nonarbitrable claims to be resolved in a court as a result of EFASASHA when those claims involve both race and sex discrimination from the same transaction represents the correct approach. Section VI highlights the opportunities arising from the passage of EFASASHA to place pressure on businesses and employers to abandon forced arbitration policies for other forms of discrimination, especially race discrimination.

This Article concludes that companies should abandon any practices that would continue mandatory arbitration of claims based upon race when sex claims may not be arbitrated.[34] Businesses should dismantle their mandatory arbitration of race discrimination practices to show they care about their broader social responsibilities in light of BLM related protests and calls for racial reckoning.[35] These responses let employees and consumers know they will not have to arbitrate claims of discrimination based upon race when businesses must resolve similar claims of

34. *See* Atkinson, *supra* note 19 (suggesting that although "no major employer has said it would stop using mandatory arbitration pacts to keep workplace racial bias accusations out of court," corporate racial diversity pledges made in response to George Floyd's death are starting to "fizzle."). Because no legislation similar to EFASASHA has been passed to address race discrimination claims, some major companies could still decide to end their forced arbitration practices as a "tangible and viable way" to deliver "on the commitments they made following Floyd's murder in 2020. . . ." *Id.*

35. *Id.*; *see also* Khadeeja Safdar, *Racial-Discrimination Settlements Usually Came With an NDA. That's Changing.*, WALL ST. J. (Oct. 20, 2020, 11:36 AM), https://www.wsj.com/articles/racial-discrimination-settlements-usually-came-with-an-nda-thats-changing-11603208180 [https://perma.cc/8ZZG-7VDV] (describing "a shift in attitudes" by businesses that "started after #MeToo put a spotlight on how settlements might be used to suppress information about wrongdoing, and has built steam since the killing of George Floyd . . . and the ensuing protests about racism in society" as some employer lawyers rarely seek to enforce such agreements "for allegations related to racial discrimination" because it would be "a PR nightmare right now" as Black executives feel "a heightened sense of responsibility in the wake of Mr. Floyd's killing" to speak out about racial discrimination experiences rather than agree to such non-disclosure provisions).

discrimination based upon sex in the courts after EFASASHA. This gives greater certainty when claims of race and sex discrimination may be inextricably intertwined.

II. AGREEMENTS TO ARBITRATE EMPLOYMENT DISCRIMINATION CLAIMS: 1991-2022

Before 1991, most employers and employees likely believed that an employee could not be required to arbitrate a statutory employment discrimination claim.[36] In part, that belief existed because of the Supreme Court's 1974 decision in *Alexander v. Gardner-Denver*.[37] There, the Court found that employees covered by a collective bargaining agreement with an arbitration clause did not have to forego the pursuit of their statutory employment discrimination claims in courts despite such claims also being subject to resolution through the arbitration process.[38] The *Gardner-Denver* decision, in essence, allowed an employee to pursue discrimination claims as a contractual remedy within the grievance and arbitration provisions of a collective bargaining agreement while also being able to pursue those same discrimination claims in courts under a statute such as Title VII.[39]

Prior to the *Gardner-Denver* decision in 1974, another Supreme Court decision in 1953, *Wilko v. Swan*,[40] found that a consumer's statutory claims brought pursuant to the Securities Act of 1933 could not be forced

36. *See, e.g.*, Utley v. Goldman Sachs & Co., 883 F.2d 184, 187 (1st Cir. 1989) (finding based upon Supreme Court law at that time that agreements to arbitrate disputes with individual employees did not prevent lawsuits based upon statutory employment discrimination claims); Swenson v. Mgmt. Recruiters Int'l, Inc., 858 F.2d 1304, 1306–07 (8th Cir. 1988).

37. 415 U.S. 36 (1974).

38. *Id.* at 59–60, 74.

39. *Id.* at 49–52; *see* Title VII, 42 U.S.C. §2000e–2 (prohibiting employment discrimination "because of such individual's race, color, religion, sex, or national origin."). In following *Gardner-Denver*, the Supreme Court also prevented other workers' statutory employment claims from being compelled to be arbitrated. *See* Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 745–46 (1981) (prohibiting forced arbitration through the collective bargaining agreement process of an employee's Fair Labor Standards Act statutory wage and hour claim by following *Gardner-Denver*); McDonald v. City of W. Branch, 466 U.S. 284, 290 (1984) (prohibiting forced arbitration through the collective bargaining agreement process of an employee's Section 1983 statutory claim by following *Gardner-Denver*). *But see* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 260–64 (2009) (providing that an employee may be compelled to arbitrate a statutory discrimination claim pursuant to a collective bargaining agreement's arbitration process if the language represents a clear and unmistakable waiver of an employee's right to pursue a judicial forum).

40. 346 U.S. 427, 438 (1953) (finding a customer's agreement to arbitrate a statutory Securities Act claim of 1933 with a broker was not arbitrable despite the "not easily reconcilable" policy of the FAA that strongly enforces agreements to arbitrate), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

into arbitration.[41] Despite the federal policy of enforcement of arbitration under the FAA, the Court in *Wilko* found the agreement to arbitrate "invalid . . . for arbitration of issues arising under the [Securities] Act" because of a concern that these federal statutory claims should be resolved through the courts.[42]

The perspective that employees could not be compelled to arbitrate their statutory employment discrimination claims, due to *Wilko* and *Gardner-Denver*, started to change in 1991 with the Court's decision in *Gilmer v. Interstate/Johnson Lane Corp*.[43] The *Gilmer* decision followed a host of decisions in the 1980s.[44] In 1989, the Supreme Court overruled the rationale from *Wilko* of not enforcing agreements to arbitrate statutory claims.[45] The Court, pursuant to the FAA, instead began to pursue a mostly wholesale endorsement of agreements to arbitrate statutory claims and almost any other claims.[46] In *Gilmer*, the Court found that an employee's statutory claim for age discrimination was subject to arbitration pursuant to the strong policy of arbitration enforcement under the FAA after the employee failed to show that Congress intended to preclude arbitration of those statutory claims.[47]

Since *Gilmer*, the Supreme Court has broadly enforced arbitration of discrimination claims.[48] Ten years after *Gilmer*, the Court decided *Circuit City Stores, Inc. v. Adams*[49] and found that the FAA supported the enforcement of agreements to arbitrate with virtually all employees except those in contracts of employment covering interstate transportation

41. *Id.*

42. *Id.*

43. 500 U.S. 20 (1991).

44. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 616, 626–27, 648–50 (1985) (enforcing an agreement to arbitrate a statutory Sherman Act antitrust claim, 15 U.S.C. §§ 1–7, and questioning any analysis suggesting that statutory claims may not be resolved by arbitrators); Shearson/Am. Express v. McMahon, 482 U.S. 220, 238, 241–42 (1987) (enforcing an agreement to arbitrate statutory Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) and Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1961 et seq.) claims brought by consumers against securities brokers).

45. *See* Rodriguez de Quijas v. Shearson/Am. Express Inc., 490 U.S. 477, 480–84 (1989) (enforcing consumer investors arbitration agreement of Securities Act of 1933 (15 U.S.C. § 77l(2)) claims and overruling *Wilko* after acknowledging the Court's view about arbitrating statutory claims had changed as indicated in cases such as *Mitsubishi*, 473 U.S. 614, and *McMahon*, 482 U.S. 220).

46. See Kristen M. Blankley, New Directions in Domestic and International Dispute Resolution: Creating a Framework for Examining Federal Agency Rules Impacting Arbitration, 63 WASH. U. J.L. & POL'Y 9, 19 (2020).

47. *Gilmer*, 500 U.S. at 35.

48. Estlund, *supra* note 7, at 705–07.

49. 532 U.S. 105, 130 (2001).

workers.[50] Although in 2002, the Supreme Court in *EEOC v. Waffle House, Inc.*[51] found that the EEOC, the federal agency charged with enforcing Title VII, could still pursue a statutory employment discrimination claim in court even if the individual employee filing the charge of discrimination with the EEOC had signed an agreement to arbitrate.[52] The Court found the EEOC was not a party to the agreement to arbitrate and Congress had authorized the EEOC to pursue court claims to vindicate the broader public interest in eradicating workplace discrimination pursuant to Title VII.[53] Although *Waffle House* might suggest a way around forced arbitration by obtaining EEOC representation to advance the discrimination claim in the courts, the reality is that the EEOC is unlikely to take a high percentage of cases to court.[54]

In 2009, the Supreme Court in *14 Penn Plaza LLC v. Pyett*[55] found that employees could be compelled to arbitrate statutory employee claims through a collective bargaining agreement, if the agreement represented a clear and unmistakable waiver of the right to pursue court claims for the employees covered.[56] The arbitration clause in the collective bargaining agreement was broad and stated that statutory discrimination claims were covered by the grievance and arbitration process.[57] In the Court's 2012 decision in *Rent-A-Center, W., Inc. v. Jackson*,[58] an employer moved to

50. *Id.* at 119.

51. 534 U.S. 279 (2002).

52. *Id.* at 294. An interesting issue is whether an employer can push an employee to arbitrate the matter and then assert res judicata to affect any recovery the EEOC may be able to attain. *See id.* at 298; *see also* Michael Z. Green, *Retaliatory Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 201, 217–23 (2014) (discussing how employers may attempt to proceed to arbitration with employees who have signed agreements to arbitrate even if the EEOC may proceed independently because the employer may be able to assert res judicata to prevent an employee who has arbitrated a dispute as having complete relief being granted and not entitled to obtain recovery from whatever the EEOC ends up obtaining).

53. *Waffle House*, 534 U.S. at 284.

54. *See* Green, *supra* note 52, at 217 & n.94 (discussing "the EEOC's inability to pursue more than a small percentage of charges filed as court claims"); *see also EEOC Fiscal Year 2022 Agency Final Report*, EEOC (Nov. 9, 2022), https://www.eeoc.gov/eeoc-fiscal-year-2022-agency-financial-report# [https://perma.cc/6QZX-GUAN] (describing how the EEOC resolved "10 systemic suits" through litigation in fiscal year 2022 "obtaining a total of just over $28 million for nearly 1,300 individuals and significant equitable relief" but it filed only "13 new systemic lawsuits in fiscal year 2022").

55. 556 U.S. 247 (2009).

56. *Id*. at 260–64 & nn.7 & 8 (finding a clear and unmistakable waiver in collective bargaining agreement can bar an employee's right to a judicial forum for a statutory discrimination claim, that prior decisions, including *Gardner-Denver* and its progeny, had been read too broadly to suggest a waiver could not occur, and to the extent the dissent's understanding of *Gardner-Denver* and its progeny as preventing a waiver proved true, then *Gardner-Denver* should be expressly overruled).

57. *Id.*

58. 561 U.S. 63, 65 (2010).

compel arbitration of an employee's claim brought against it pursuant to the Civil Rights Act of 1866 ("Section 1981")[59] that asserted race discrimination. The employee challenged the validity of an agreement to arbitrate, which he had signed as a condition of employment, by arguing that the contract was unconscionable.[60] In *Jackson*, the Court found that the employee only challenged the validity of the overall contract and not the specific delegation clause provision within the contract which granted the arbitrator the authority to decide the overall validity of the arbitration agreement.[61] As a result, the arbitrator was left to decide the unconscionability issue.

In 2018, the Supreme Court in *Epic Sys. Corp. v. Lewis*[62] found that arbitration agreements with provisions prohibiting class actions while requiring individual arbitration of workplace disputes did not interfere with the National Labor Relations Act's protection of an employee's right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[63] The Court's decisions in *Adams*, *Waffle House*, *Pyett*, *Jackson*, and *Lewis* represent just a small sampling of the number of cases decided by the Supreme Court where claims of statutory employment discrimination after *Gilmer* led to repeated enforcement of agreements to arbitrate pursuant to the FAA.

59. 42 U.S.C. § 1981. For a more comprehensive discussion of *Jackson* and its impact, please see David Horton, *Arbitration About Arbitration: The Legacy of* Rent-A-Center West, Inc. v. Jackson, *in* FEDERAL ARBITRATION ACT: SUCCESSES, FAILURES AND A ROADMAP FOR REFORM (Jill Gross & Rick Bales eds., forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4368688 [https://perma.cc/9LH6-9LD9].

60. 561 U.S. at 65–66.

61. *Id.* at 66–67, 72–76.

62. 138 S. Ct. 1612 (2018).

63. *Id.* at 1624 (citing 29 U.S.C. § 157).

III. ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT

The provisions of EFASASHA establish the following as an amendment to the FAA:

> Notwithstanding any other provision of this title, at 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.[64]

A sexual assault dispute is defined as "a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 or similar applicable Tribal or State law, including when the victim lacks capacity to consent."[65] A sexual harassment dispute is defined as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."[66] This landmark legislation created a major change with respect to enforcement of arbitration agreements that will require further exploration for employees, consumers, employers, and businesses.[67]

EFASASHA enjoyed bipartisan support led by Democratic Senator Kirsten Gillibrand from New York and Republican Senator Lindsey Graham from South Carolina.[68] It did take a while for the legislation to reach President Biden's desk.[69] Senator Gillibrand first introduced the legislation in 2017.[70] Several comments from Senators may help explain the purpose and scope of EFASASHA. Republican Senator Joni Ernst from Iowa stated:

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64. 9 U.S.C. § 402(a).

65. 9 U.S.C. § 401(3).

66. 9 U.S.C. § 401(4).

67. *See* Tammy Binford, *Policy Change on Way as Bill Ending Forced Sexual Harassment Arbitration Passes*, HR ADVISOR, (Mar. 31, 2022), https://hrdailyadvisor.blr.com/2022/03/31/policy-changes-on-way-as-bill-ending-forced-sexual-harassment-arbitration-passes/ [https://perma.cc/SKG8-NS8B].

68. *Id.*

69. *See* H.R. 4445, 117th Cong. (2022) (showing that EFASASHA was passed by the Senate on Feb. 10, 2022, presented to the President on Mar. 2, 2022, and signed by the President on Mar. 3, 2022); *see also* Encarnacion, *supra* note 11, 902–03 (describing earlier stages of the attempts to pass the legislation).

70. Binford, *supra* note 67; Sirota & Ahlman, *supra* note 12.

> [W]e agreed to come to the floor and ensure the congressional intent of . . . [EFASASHA] . . . was crystal clear. . . . [T]his bill should not be the catalyst for destroying predispute arbitration agreements in all employment matters. . . . My hope is that the legislative intent of this bill reflects . . . that the [EFASASHA] should not effectively destroy arbitration in employment litigation. . . . Specifically, we agreed that harassment or assault claims *should not be joined to an employment claim without a key nexus*. Harassment and assault allegations are very serious and should stand on their own. The language of this bill should be narrowly interpreted. It should not be used as a mechanism to move employment claims that are *unrelated* to these important issues out of the current system. These clarifications are needed.[71]

Likewise, Senator Graham, one of the sponsors, stated:

> I say to the Senator [Ernst], I agree with everything you said. You said it well. So what is the goal here? . . . We do not intend to take *unrelated* claims out of the contract. . . . If lawyers try to game the system, they are acting in bad faith. They could be subject to disciplinary proceedings by courts. What we are not going to do is take *unrelated claims* out of the arbitration contract. So if you have got an hour-and-wage dispute with the employer, you make a sexual harassment, sexual assault claim, the hour-and-wage dispute stays under arbitration *unless it is related*. That is the goal. . . . We talked to Microsoft about 3 or 4 years ago about this. They jumped onboard and started changing it internally. I have heard from the Chamber. I am open-minded about making sure we don't hurt business. 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 not bad for business. This is good for America.[72]

Democratic Senator Dick Durbin from Illinois responded to Senator Ernst:

> The Senator from Iowa discussed her concerns about the bill being used to move claims that are "*unrelated*" to allegations of sexual harassment or sexual assault. The bill is clear on this point. . . . [N]o predispute arbitration agreement shall be valid or enforceable "*with respect to a case* which is filed under federal, tribal or state law and *relates to* the sexual assault dispute or the sexual harassment dispute." That resolves the Senator's concern. . . . There is *nothing in the bill directing courts to dismiss related claims and compel them to forced arbitration if a victim ultimately does not prevail on her sexual assault or harassment claim*. . . . So to clarify, for 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 case* in court *regardless of which*

71. *See* 168 CONG. REC. S625 (2022) (statement of Sen. Ernst) (emphasis added).

72. *Id.* at S625, S628 (statement of Sen. Graham) (emphasis added).

> *claims are ultimately proven*. I am glad that is what this bill provides.[73]

Further, Senator Gillibrand also addressed Senator Ernst's comments:

> The bill plainly reads, which is very relevant to Senator Ernst's concerns, that only disputes that *relate* to sexual assault or harassment conduct can escape the forced arbitration clauses. "That relate to" is in the text. . . . [I]t is essential that *all the claims related* to the sexual assault or harassment can be *adjudicated at one time* for the specific purpose that Senator Ernst is well aware of. *We don't want to have to make a . . . victim relive that experience in multiple jurisdictions*. So we want to be able to deal with all the . . . claims in one goal. . . . Every State and Federal court in the country requires a person to allege certain things in a certain way in order to properly plead a case such that it won't be immediately dismissed. Victims here must follow the rules and plead a case correctly, and then they must also affirm to the Court that they have *a good-faith basis* for doing so. Attorneys must do the same thing. . . . Forced arbitration clauses are . . . especially prevalent in *low-wage* fields and industries with *disproportionately high numbers of women of color*.[74]

Senate Majority leader, Charles Schumer, from New York added:

> It is an outrage, just an outrage, that *women and men who are abused* cannot seek justice, are forced to be quiet, are forced to keep the agony inside themselves. It is outrageous. For decades, this forced arbitration has just deprived millions of people, almost all women, from basic rights to justice.[75]

Clear and consistent points come from these statements of the Senators. This includes an understanding that all claims "related" to the sexual assault or sexual harassment claims can and should be brought within the case filed in federal court pursuant to EFASASHA. The Senators seem to understand that there can be claims that are not sexual assault or sexual harassment that may *relate* to those claims that will still be prohibited from arbitration under EFASASHA. Further, the plaintiffs can be women, men, and women of color, especially those in low-wage fields. The next steps will involve seeing how businesses and employers respond and how consumers and employees choose to litigate these matters, especially when race and sex concerns arise.

IV. INTERSECTIONAL RACE/SEX DISCRIMINATION WARRANTS JOINDER

73. *Id.* at S626 (statement of Sen. Durbin) (emphasis added).
74. *Id.* at S627 (statement of Sen. Gillibrand) (emphasis added).
75. *Id.* at S628 (statement of Sen. Schumer) (emphasis added).

OF CLAIMS

As Senator Gillibrand noted, women of color can more likely benefit from no longer being subjected to forced arbitration.[76] It is not unusual for claimants to blend race and sex claims in their court filings that all may arguably be related to a particular harassment or assault claim.[77] A classic example of such a lawsuit was filed in August 2022 when a tenured Black female law professor, Laura Beny, sued the University of Michigan Law School and its dean for employment discrimination under federal and state law based on claims including allegations of race and sex discrimination.[78]

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76. *Id.* at S627 (statement of Sen. Gillibrand).

77. *See, e.g.*, Burgos v. Southeast Works, No. 13-CV-704S, 2017 WL 2403305, at *7–9 (W.D.N.Y. May 31, 2017) (describing how a plaintiff alleged hostile work environment claim due to sex and race in violation of Title VII and § 1981 and continued after an unsuccessful summary judgment challenge to those claims); Conteh v. Diversified Prot. Corp., No. 20-CV-03032, 2022 WL 874937, at *3–5 (D. Md. Mar. 24, 2022) (describing how a male plaintiff from Sierra Leone alleged both national origin and sex discrimination under Title VII and successfully proceeded on both claims together despite a motion to dismiss); Europe v. Equinox Holdings, Inc., No. 20-CV-7787, 2022 WL 4124763, at *1, *5 (S.D.N.Y. Sept. 28, 2022) (referring to "plaintiff, a Black woman," who "alleges disparate treatment on the basis of race and sex, a hostile work environment based on race and sex . . . [and] [f]or the following reasons, under each of these statutes, the plaintiff's disparate treatment and hostile work environment claims survive" the employer's summary judgment challenge); Bogan v. MTD Consumer Grp., Inc., 919 F.3d 332, 335 (5th Cir. 2019) (discussing "a four-day trial" involving a Title VII claim where the jury found that the employer discriminated against an employee "on the basis of her race and/or gender"). The following search conducted on LEXIS on January 22, 2024 led to 4,898 cases, with many of them involving claims of race and sex: ("race and sex") /5 discrim! and Title /3 VII.

78. *See* Patrick Dorrian, *Michigan Law Professor Alleges Race, Sex, Family Status Bias*, BLOOMBERG L. (Aug. 29, 2022, 12:30 PM), https://news.bloomberglaw.com/daily-labor-report/michigan-law-professor-alleges-race-sex-familial-status-bias [https://perma.cc/359V-DDG5] (describing lawsuit brought by Black tenured female law professor charging a host of discriminatory actions based upon race and sex, including not receiving pay raises, not receiving a chaired professorship, and harassing remarks of a sexual nature allegedly made by her law school dean portraying the plaintiff as a "dominatrix" as well as retaliation for having advocated for Black and female students and hiring candidates); *see also* Stephanie Francis Ward, *Law Prof's Suit Against Law School Alleges Race and Gender Discrimination, Family Status Bias*, ABA J. (Aug. 31, 2022, 8:49 AM), https://www.abajournal.com/web/article/law-professor-sues-the-university-of-michigan-law-school-for-civil-rights-violations [https://perma.cc/7K82-MG69] (referring to Beny's allegation that the dean charged with misconduct had asserted "that he would put a photo of [Beny's] infant daughter on his desk and tell everyone that the child was his" as part of allegations that the defendant "'never spoke to other new mothers, white women, on the faculty in the same offensive manner'"); Riley Holder & Irena Li, *U-M Law Professor Sues UMich, Claims Racial and Gender-Based Discrimination*, MICH. DAILY (Aug. 29, 2022), https://www.michigandaily.com/news/news-briefs/u-m-law-professor-sues-umich-claims-racial-and-gender-based-discrimination/
[https://perma.cc/4FWF-QR6L] (describing same). The plaintiff brought claims pursuant to several antidiscrimination statutes on the basis of race, gender, and retaliation. *See* Pl.'s Compl. & Jury Demand at ⁋⁋ 2 & 4, Beny v. Univ. of Mich., No. 22-CV-12021 (E.D. Mich. Aug. 26, 2022), https://aboutblaw.com/4Gh [https://perma.cc/X24F-R6TF] (bringing claims under "Title VI of the Civil Rights Act, as amended and codified at 42 U.S.C. § 2000d, et. seq. ("Title VI"); Title VII of the

An employee's claims such as the ones in Beny's lawsuit could be motivated independently by race and sex. But the lawsuit could also involve the intersection of those claims.

"Intersectionality is . . . not simply that there's a race problem here, a gender problem here, and a class or LGBTQ problem there. Many times that framework erases what happens to people who are subject to all of these things."[79] Black and transgendered actress and activist, Laverne Cox, has also explained the intersectionality of race and transgender: "Just because you are LGBTQIA+, I am still Black. I still experience structural racism. Trans folks still experience that on top of transphobia, on top of sexism . . . on top of classism."[80] Essentially, these examples demonstrate how in many circumstances claims of race and sex discrimination may be inextricably intertwined.

Angela Onwuachi-Willig has illustrated how the gains from the #MeToo movement have failed to capture the intersections of race and sex in addressing the treatment of women of color in the workplace.[81] In what she called "#UsToo," Onwuachi-Willig argued that sexual harassment's legal analysis of what a reasonable person would find as offensive behavior should consider the perspective of someone in the

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Civil Rights Act of 1964, as amended and codified at 42 U.S.C. § 2000e, et. seq. ("Title VII"); Title IX, 20 U.S.C. § 1681, et. seq. ("Title IX"); the Civil Rights Act of 1866, as amended and codified at 42 U.S.C. § 1981 ("Section 1981"); and under 42 U.S.C. § 1983 ("Section 1983") for violation of her "federal civil rights and constitutional rights" and state law for "violations based on sex and race discrimination, harassment, and retaliation; and familial status and marital discrimination").

79. *Kimberlé Crenshaw on Intersectionality, More than Two Decades Later*, COLUM. L. (June 8, 2017), https://www.law.columbia.edu/news/archive/kimberle-crenshaw-intersectionality-more-two-decades-later [https://perma.cc/VV4Z-NHTH]; Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (discussing intersectionality for Black women as being subordinated by not taking into account the impact of both their race and sex as unique from "women's experience" or "the Black experience"); Katy Steinmetz, *She Coined the Term 'Intersectionality' Over 30 Years Ago. Here's What It Means to Her Today*, TIME (Feb. 20, 2020, 7:27 AM), https://time.com/5786710/kimberle-crenshaw-intersectionality/ [https://perma.cc/VU2N-8RCB] (referring to Professor Kimberlé Crenshaw's discussion of her initial coining of the phrase intersectionality and how the term has been distorted politically as a "mechanism to turn white men into new pariahs" rather than its real purpose to provide "a lens, a prism, for seeing the way in which various forms of inequality often operate together and exacerbate each other" and how we tend to look at "race inequality as separate from inequality based on gender, class, sexuality or immigrant status" when "some people are subject to all of these, and the experience is not just the sum of its parts").

80. Alexander Kacala*, Laverne Cox on Transgender Lives: 'We Cannot Leave Anyone Behind'*, NBC TODAY (June 25, 2020), https://www.today.com/popculture/laverne-cox-black-trans-lives-t185180 [https://perma.cc/8R24-8E64].

81. Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J. F. 105, 112–19 (2018) (discussing how the #MeToo movement has failed to address the intersection of race and sex when addressing harassment based upon both race and sex for women of color).

"complainant's intersectional and multidimensional shoes."[82] Jamillah Bowman Williams has also explained that "existing law has failed to address unique experiences of women of color" who are "disproportionately subject to workplace sexual harassment" due to "entrenched racial and economic disparities."[83]

According to the EEOC's compliance manual, intersectional discrimination claims appear possible through its example of a "Black woman named Kyra" who is "subjected to a hostile work environment because of her race, sex, or the intersection of both, in light of the pattern of offensive comments and evidence that the bias altered the terms and conditions of Kyra's employment."[84] Williams has catalogued many of the United States Courts of Appeals cases where Black women have attempted to raise claims that include both race and sex and their intersectionality with the results lacking any real clarity and providing overall confusion as to the viability of these claims under Title VII discrimination.[85]

One area where one might think that race intersects sufficiently with sex to integrate both types of discrimination when brought by women of color relates to their hair texture and hairstyles.[86] One of the leading proponents in examining this form of discrimination, Wendy Greene, has noted that there is now a "#FreeTheHair movement [that] is a part of a contemporary, global civil rights movement to combat the systemic discrimination that African descendants around the world endure on the

82. *Id.* at 119.

83. *See* Jamillah Bowman Williams, *Maximizing the #MeToo Movement: Intersectionality & the Movement*, 62 B.C. L. REV. 1797, 1801, 1856 (2021).

84. Jamillah Bowman Williams, *Beyond Sex-Plus: Acknowledging Black Women in Employment Law and Policy*, 25 EMP. RTS. & EMP. POL'Y J. 13, 24 (2021); *see also id.* at 24 n.59 (citing EEOC Compliance Manual § 15(VII)(A), ex. 19 (Apr. 19, 2006), https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#VIIA [https://perma.cc/A34V-BRZT] (scroll down to Example 19)).

85. *See id.* at 24–39 (referring to and discussing various race and sex cases as subject to intersectional claims and culminating with the charting of the claims by category captured as Table 1).

86. *See* Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1114, 1117 (2010) (describing unique burdens placed on Black women with respect to maintaining certain hairstyles); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 378–82 (1991) (discussing the nature of hair discrimination and its intersectionality aspects involving race and gender when considering discriminatory stereotypes applied to Black women); Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 COLO. L. REV. 1355, 1370–76 (2008) (noting difficulties in bringing hair discrimination claims under Title VII law initially due to analysis under grooming code comparators and by findings of no discrimination after accepting arguments asserting that hairstyles do not involve immutable characteristics).

basis of their natural hairstyles and hair texture."[87] As part of that movement, national and international efforts have proceeded to pass legislation to address this specific form of discrimination, known as the Creating a Respectful and Open World for Natural Hair Act or C.R.O.W.N. Act.[88] There are at least twenty-three states that have passed some form of C.R.O.W.N. Act legislation and many more cities or municipalities.[89] The need for specific legislation sprung from concerns about inadequate analysis under Title VII based upon consideration of grooming policies and findings that discrimination against hairstyles may not be protected because it does not involve an immutable characteristic.[90]

Despite the difficulties posed by current Title VII legal analysis when considering how claims of race and sex can be inextricably intertwined, the Supreme Court has recently provided some glimmer of hope in helping to join both race and sex claims as a form of intersectional discrimination that may help women of color facing workplace harassment.[91] The Supreme Court's 2020 decision in *Bostock v. Clayton County*[92] identified that sex could be a but-for cause of workplace discrimination while recognizing that but-for causation represents a "sweeping standard" where there could be "multiple but-for causes."[93] In reading this commentary from Justice Gorsuch in *Bostock* about multiple but-for causes, the prospect of asserting both race and sex causation or the intersection of

87. See Wendy Greene, #FREETHEHAIR: How Black Hair is Transforming State and Local Civil Rights Legislation, 22 NEV. L.J. 1117, 1119 (2022).

88. *See id.* at 1122–24; *see also CROWN Coalition: About the CROWN Act*, https://www.thecrownact.com/about [https://perma.cc/UG5J-5WTT].

89. *CROWN Coalition*, *supra* note 88; Greene, *supra* note 87, at 1123–24 (discussing number of states and municipalities that have passed a version of the C.R.O.W.N. Act as of 2019). Unfortunately, although C.R.O.W.N. Act has bipartisan support and even made it through the House of Representatives at the end of 2022, the legislation was stalled in the Senate by not having enough votes to get past a filibuster by Republican Senator Rand Paul. *See* Jayla Whitfield-Anderson, *Senate Republicans Block CROWN Legislation Again. But Advocates Aren't Deterred*, YAHOO! NEWS (Dec. 21, 2022), https://news.yahoo.com/senate-republicans-block-crown-legislation-again-but-advocates-arent-deterred-200840509.html [https://perma.cc/XSR9-P235].

90. Greene*, supra* note 87, at 1121. Despite these analytical concerns about establishing Title VII liability due to arguments regarding mutable characteristics and grooming policies, Senator Paul asserted that the reason for his filibuster in stopping the C.R.O.W.N. legislation from moving forward to become law was his belief that Title VII already covers this form of discrimination. Whitfield-Anderson, *supra* note 89.

91. *See* Williams, *supra* note 84, at 14, 40 (discussing how intersectional discrimination claims under Title VII are analyzed by the courts and suggesting that the Supreme Court's *Bostock* decision and its sex-plus analysis may have opened the door to more viable claims under that approach for Black women); *see also generally* Sidney E. Holler, Note, *Braids, Locs, and* Bostock*: Title VII's Elusive Protections for LGBTQ+ and Black Women*, 26 J. GENDER RACE & JUST. 223 (2023) (asserting how *Bostock* may help establish intersectionality claims).

92. 140 S. Ct. 1731, 1743, 1747 (2020).

93. *Id.* at 1739.

multiple protected classes as the but-for cause of workplace discrimination now appears more feasible.[94] As a result, consideration of the intersectional doctrine with respect to race and sex claims requires that courts see how both claims can be joined instead of seeking to ignore the sex-based components of the harassment when considering the racial harassment.[95]

V. PRECLUSION OF ARBITRATION FOR RACE/SEX DISCRIMINATION CLAIMS?

In considering whether race discrimination claims alleged in the same case as sex discrimination claims can be subjected to arbitration when the sex discrimination claims may not be subjected to arbitration under EFASASHA, concerns about judicial economy must be considered as a whole along with the overall policy of EFASASHA. The Supreme Court in *Allen v. McCurry*[96] explained the judicial economy concepts of res judicata and collateral estoppel:

> The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing

94. *See* Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1045 (10th Cir. 2020) (reviewing claim of sex and age intersection to state "Title VII also prohibits discrimination based on a combination of protected characteristics, such as 'sex-plus-race' discrimination, i.e., discrimination targeted only at employees of a particular race and sex."); *see also* Robert Iafolla, *New Sex-and-Age Bias Ruling Signals Reach of LGBT Worker Case*, BLOOMBERG L. (July 27, 2020, 4:05 AM), https://news.bloomberglaw.com/daily-labor-report/new-sex-and-age-bias-ruling-signals-reach-of-lgbt-worker-case [https://perma.cc/3RXG-TJHQ] (describing how *Bostock* guided the Court's finding of an intersection of sex and age discrimination claims); *see also* Patrick Berning-O'Neill, Comment, *"A Reasonably Comparable Evil": Expanding Intersectional Claims Under Title VII Using Existing Precedent*, 24 U. PA. J. CONST. L. 907, 908, 937–38 (2022) (referring to discriminating against a Black woman via a stereotype of being a welfare mother as an example of intersectional race and sex discrimination using *Bostock* analysis).

95. *See* Onwuachi-Willig, *supra* note 81, at 111–19 (describing how harassing treatment of Black actress Leslie Jones and Black reporter Jemele Hill while being considered mostly as racial harassment also included key notions of acting on stereotypes based on both race and gender that women of color must face via joint intersections).

96. 449 U.S. 90 (1980).

inconsistent decisions, encourage reliance on adjudication.[97]

These preclusion concepts can apply to a plaintiff's claims as well as a defendant's defenses.[98]

These concepts have also been extended to employment discrimination claims.[99] In *Kremer v. Chemistry Construction Corp*., the Supreme Court dismissed an employee's national origin and religious discrimination claims under Title VII pursuant to res judicata because he had pursued the same claims previously and litigated them under New York law.[100] The Court in *Kremer* relied upon federal law, the Full Faith and Credit Act, that requires all United States courts to afford the same full faith and credit to state court judgments that would apply in a state's own courts.[101]

The question of res judicata under the Full Faith and Credit Act may be different when considering an arbitration proceeding.[102] The Second

97. *Id*. at 94 (citations omitted); *see also* Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981) (finding res judicata or claim preclusion bars the relitigation, not only of claims that were "actually raised" in a prior action, but also of those claims that "were or could have been raised" in the prior action); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979).

98. *See* Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc., 140 S. Ct. 1589, 1594–95 (2020) (describing how claim preclusion not only precludes relitigating the same claims in a subsequent action but also the same claims that could have been raised in the prior litigation, the same defenses in a subsequent action, and the same defenses that could have been raised in the prior litigation, where "same" claim or "same" defense means it arises from the same transaction or it involves a common nucleus of operative facts).

99. *See, e.g.*, Kremer v. Chem. Constr. Corp., 456 U.S. 461 (1982); *see also* EEOC v. Waffle House, Inc., 534 U.S. 279, 298 (2002) (discussing how "ordinary principles of res judicata" can apply when an individual employee brings a discrimination claim that is resolved in arbitration even if the EEOC decides to pursue broader vindication of employee rights related to that claim).

100. *Kremer*, 456 U.S. at 485 (finding "[i]n our system of jurisprudence the usual rule is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another forum" and there was no reason "to deny res judicata or collateral estoppel effect to a state court judgment affirming that a claim of employment discrimination is unproved").

101. *Id.* at 462–63, 466 (citing 28 U.S.C. § 1738 and finding that "Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged.").

102. *See* McDonald v. City of W. Branch, 466 U.S. 284, 287–88 (1984) (finding that full faith and credit statute gives preclusive effect to a State's judicial proceedings but does not apply to arbitration awards because arbitration is not a judicial proceeding); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 222–23 (1985) (finding the same result while discussing *McDonald*). Because *McDonald* relied on outdated notions from *Gardner-Denver* about the inability of arbitrators to resolve statutory and constitutional employment claims as part of its decision not to establish a common law rule of preclusion by finding arbitration would not be "an adequate substitute for a judicial proceeding," it is uncertain how its holding would apply today. *McDonald*, 466 U.S. at 223. *See also Byrd*, 470 U.S. at 222–23; *Kremer*, 456 U.S. at 477–78. Although beyond the scope of this Article, concerns about whether a prior arbitration could result in res judicata or collateral estoppel with respect to a nonarbitrable federal statutory employment discrimination claim as related to an arbitrable federal

Restatement of Judgments has taken the position that any "valid and final award by arbitration has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court."[103] The Supreme Court has also found that it "regularly turns to the Restatement (Second) of Judgments" for guidance on issues regarding the application of res judicata.[104]

On the other hand, some courts have found that courts do not have to give res judicata or collateral estoppel effect to "an unappealed arbitration award" not resulting in a confirmation through a judicially-reviewed court decision because arbitration is not a judicial proceeding.[105] Whether a confirmed or unconfirmed arbitration award, "a general consensus" has arisen pursuant to section 13 of the FAA to allow broad discretion to the judge or the arbitrator in the later proceeding to consider "established judicial tests" to determine whether claim and issue preclusion would apply.[106] For claim preclusion, those tests establish that the "claims or causes of action must be identical and arise out of the same operative facts" and may "cover not just claims that were raised and decided but also claims that could have been asserted in the case."[107] For issue preclusion,

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statutory employment discrimination claim that has already been arbitrated represents unique concerns that the parties would have to explore in a particular case as a result of the passage of EFASASHA. But there is precedent to raise an argument that res judicata and collateral estoppel would apply to the arbitration proceedings. *See* Clark v. Bear Stearns, 966 F.2d 1318, 1320–21 (9th Cir. 1992) (first citing Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568–69 (1951); and then citing Ashe v. Swenson, 397 U.S. 436, 444 (1970)); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 84(1) (AM. L. INST. 1982) ("Except as stated in [previous subsections], a valid and final award by arbitration has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court."). A court would need to examine the arbitration record "to pinpoint the exact issues previously determined" and assess whether they were actually litigated to determine if collateral estoppel would apply. *Clark*, 966 F.2d at 1322–23; *see also Byrd*, 470 U.S. at 223 ("The collateral-estoppel effect of an arbitration proceeding is at issue only after arbitration is completed, of course . . . . Suffice it to say that in framing preclusion rules in this context, courts shall take into account the federal interests warranting protection.").

103. Wong, *supra* note 30, at 54 (quoting from RESTATEMENT (SECOND) OF JUDGMENTS § 84(1) (AM. L. INST. 1982)).

104. *See* B&B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 148 (2015).

105. *See, e.g.*, W.J. O'Neil Co. v. Shepley, Bulfinch, Richardson & Abbott, Inc., 765 F.3d 625, 629 (6th Cir. 2014) (citing *McDonald*, 466 U.S. at 288) (proposing that because arbitration is not a judicial proceeding, courts do not have to give the same preclusive effect to those awards as opposed to state court opinions that it would have to give full faith and credit).

106. *See* Stuart M. Widman, *The Preclusive Effect of Arbitration Awards*, 47 NO. 1 LITIG. 35, 37 (2020).

107. *Id*. (citing FleetBoston Fin. Corp. v. Alt, 638 F.3d 70, 79 (1st Cir. 2011) and Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 847 F.3d 1221, 1239 (10th Cir. 2017)); *see also* Lindsey D. Simon, *Claim Preclusion and the Problem of Fictional Consent*, 41 CARDOZO L. REV. 2561, 2603 (2020) (advocating the value of allowing the "decisionmakers" the "discretion" to determine whether claim preclusion should apply by balancing the interests of "finality" with the concerns about "autonomy" as well as having one's "day in court").

those tests include that the "identity of issues raised in the prior . . . proceeding" must result from "a final ruling on the actually litigated and necessary issue in the first matter" with the "precluded party" having "a full and fair opportunity . . . to contest the issue in the first matter."[108]

Adam Steinman has explained recently the longstanding principle decided by the Supreme Court's 1966 decision, *United Mine Workers v. Gibbs*,[109] that a federal court may hear a pendent claim that is not subject to federal court jurisdiction:

> The Constitution permits jurisdiction over claims that lack an independent basis for federal subject-matter jurisdiction as long as those claims arise from the same 'common nucleus of operative fact' as the claims that do fall within . . . [the same case or controversy] categories authorized by Article III [of the Constitution] . . . [and the] 'justification lies in considerations of judicial economy, convenience and fairness to litigants.[110]

Congress codified this pendent claim jurisdictional analysis in what it referred to as its supplemental jurisdiction statute.[111] The supplemental jurisdiction statute states: Federal "district courts may decline to exercise supplemental jurisdiction over a [pendent] claim" when:

> (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.[112]

Unfortunately, if the claims justifying federal court jurisdiction are dismissed, the Supreme Court has explained "that in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims."[113]

The supplemental jurisdiction statute does not necessarily apply

108. Widman, *supra* note 106 (citing B-S Steel of Kan., Inc. v. Tex. Indus., Inc., 439 F.3d 653 (10th Cir. 2006)).

109. United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

110. *See* Adam N. Steinman, *Beyond* Bristol-Meyers*: Personal Jurisdiction Over Class Actions*, 97 N.Y.U. L. REV. 1215, 1241 (2022) (quoting *Gibbs*, 383 U.S. at 725–26).

111. 28 U.S.C. § 1367.

112. *Id*. at § 1367(c)(1)–(4).

113. Carnegie–Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988).

directly to the issue of arbitrable race-based claims and nonarbitrable sex-based claims because both claims may be brought under the same federal statute, Title VII.[114] As a result, both claims would be subject to federal court jurisdiction. It is only because of enforcement of another federal statute, the FAA, that the race discrimination claims may be subject to arbitration or arbitrable; when pursuant to EFASASHA, the sex discrimination claims are not subject to arbitration. In such instances, if relying upon federal discrimination law, there is no state claim involved that the court would need to assert pendent jurisdiction over pursuant to the strictures of the supplemental jurisdiction statute. However, the underlying rationale for pendent claim jurisdiction arises out of concerns about res judicata and making sure that a party brings all related claims in the same case because "the weighty policies of judicial economy and fairness to parties reflected in res judicata doctrine were in themselves strong counsel for the adoption of a rule which would permit federal courts to dispose of the state as well as the federal claims."[115] Those concerns suggest that intertwined arbitrable claims (race discrimination) and nonarbitrable claims (sex discrimination) should proceed more efficiently in court together for final resolution based upon prior Supreme Court analysis and the clear purpose of EFASASHA.

A. Intertwining Arbitrable and Nonarbitrable Claims: 1985-2022

In the early 1980s, the Supreme Court had to address how to analyze cases involving claims subject to arbitration, sometimes referred to as arbitrable, versus related claims that could not be subjected to arbitration, sometimes referred to as non-arbitrable, because the Court had ruled earlier that some statutory claims could not be compelled to arbitration.[116] This dilemma forced federal courts to adopt a doctrine called "intertwining" to find that when disputes include both "arbitrable and nonarbitrable claims aris[ing] out of the same transaction, and are sufficiently 'intertwined' factually and legally," these claims can be tried together despite an agreement to arbitrate.[117]

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114. *See* 42 U.S.C. § 2000e-2(a)(1) (prohibiting discrimination under federal law "because of such individual's race, color, religion, sex, or national origin").

115. *See Gibbs*, 383 U.S. at 724.

116. *See* Wilko v. Swan, 346 U.S. 427, 438 (1953) (finding agreement to arbitrate disputes could not compel arbitration of Securities Act claims despite strong policy to enforce arbitration agreements under the FAA).

117. *See* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 216 (1985) (internal quotations added); *see also* KPMG LLP, v. Cocchi, 565 U.S. 18, 19 (2011) (discussing how courts had applied

In deference to its strong endorsement of the FAA, the Supreme Court, in its 1985 decision *Dean Witter Reynolds v. Byrd*,[118] rejected the intertwining doctrine and found that whenever a nonarbitrable claim was intertwined with an arbitrable claim, the Court should still order that the parties pursue the arbitrable claim in arbitration.[119] In 2011, the Supreme Court continued its analysis from the prior *Byrd* decision in 1985 by holding the following in *KPMG v. Cocchi*:[120] "[C]ourts must examine with care the complaints seeking to invoke their jurisdiction in order to separate arbitrable from nonarbitrable claims. A court may not issue a blanket refusal to compel arbitration merely on the grounds that some of the claims could be resolved by the court without arbitration."[121]

B. Applying Intertwining Doctrine After EFASASHA: Reconciling Byrd

In *Byrd*,[122] the Supreme Court addressed the issue of "whether, when a complaint raises both federal securities claims and pendent state claims, a Federal District Court may deny a motion to compel arbitration of the state-law claims despite the parties' agreement to arbitrate their disputes."[123] The Court also noted that the lower courts had applied two different approaches when deciding "whether to compel arbitration of pendent state-law claims when the federal court will in any event assert jurisdiction over [the] federal-law claim."[124]

In assessing the first approach, the Court in *Byrd* considered that some courts had relied on the "doctrine of intertwining" to find that if "arbitrable

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intertwining doctrine to allow both arbitrable and nonarbitrable claims to be litigated together but rejecting the application of that doctrine to support instead the strong policy to enforce agreements to arbitrate under the FAA by finding that "if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation."); *see also* Anthony G. Buzbee, *When Arbitrable Claims are Mixed With Nonarbitrable Ones: What's A Court To Do?*, 39 S. TEX. L. REV. 663, 682 (1998) (describing intertwining of arbitrable and nonarbitrable claim); Mary Elizabeth Bierman, Note, *Mixed Arbitrable and Nonarbitrable Claims in Securities Litigation:* Dean Witter Reynolds, Inc. v. Byrd, 34 CATH. U. L. REV. 525, 527 n. 19 (1985) (citing "Miley v. Oppenheimer & Co., 637 F.2d 318, 335 (5th Cir. 1981) (explaining that the intertwining doctrine is an exception to the policy favoring arbitration, created to preserve the courts' exclusive jurisdiction of federal securities claims); [Warren H.] Hyman, *Churning in Securities: Full Compensation for the Investor*, 9 U. Dayton L. Rev. 1, 28 (1983) (intertwining doctrine is an exception to the [Federal] Arbitration Act, allowing the courts to refuse to sever arbitrable and nonarbitrable federal claims)").

118. *Byrd*, 470 U.S. at 217.
119. *Id.*
120. 565 U.S. 18 (2011).
121. *Id.* at 19.
122. *Byrd*, 470 U.S. 213.
123. *Id.* at 214.
124. *Id.* at 216.

and nonarbitrable claims arise out of the same transaction, and are sufficiently intertwined factually and legally," then a court "may in its discretion deny arbitration as to the arbitrable claims and try all the claims together in federal court."[125] The courts that adopted this "intertwining" approach balanced the policy of enforcing arbitration agreements under the FAA with two concerns: (1) a fear that if the arbitration finished before the court proceedings, "the factfinding done by the arbitrator might thereby bind the federal court through collateral estoppel"[126] and (2) overall efficiency by preventing "bifurcated proceedings and perhaps redundant efforts to litigate the same factual questions twice."[127]

With respect to the second approach, the Court in *Byrd* considered that other courts found that the strong public and federal policy of enforcing agreements to arbitrate under the FAA controlled compelling arbitration and removed any discretion to substitute thoughts of "economy and efficiency" for what Congress has mandated.[128] The Court in *Byrd* adopted the second approach and agreed with those lower court findings and congressional intentions under the FAA when it held that "we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute."[129]

As a result, considerations of whether issues that may be addressed and resolved by the arbitrator in a race discrimination arbitration might preclude litigation of that issue by being subject to collateral estoppel in the sex discrimination litigation in court. This represents an important new development now that Congress has passed EFASASHA. Further, while in the federal court proceeding addressing sex discrimination claims, the employee or consumer could be subjected to res judicata claim preclusion if not also bringing the race discrimination claim at that time. These aspects of issue and claim preclusion would contravene the very reason that Congress passed EFASASHA by inhibiting a plaintiff seeking sexual

125. *Id.* at 216–17; *see also* Valerie Dixon, Note, *Supreme Court Issues Notice to Courts: Bifurcated Proceedings Still Required:* KPMG LLP v. Cocchi, 2012 J. DISP. RESOL. 611, 613–15 (2012) (reviewing *KMPG* Supreme Court case and continuing to reject intertwining doctrine in favor of arbitration); Michael Bekesha, Note, *Rejecting the Intertwining Doctrine: Favoring ADR While Hindering Judicial Efficiency and Economy:* Ingold v. AIMCO/ Bluffs, LLC. Apartments, 2008 J. DISP. RESOL. 293, 298–99 (discussing how the Colorado Supreme Court had applied the intertwining doctrine to maximize judicial efficiency and resource allocation but then decided to reject intertwining in favor of enforcing agreements to arbitrate).

126. *Byrd*, 470 U.S. at 217.

127. *Id.*

128. *Id.*

129. *Id.* at 221.

harassment or sexual assault claims from obtaining full recovery regarding all "related" claims and having to keep dealing with full vindication by having to address the nature of the dispute in multiple forums. Also, the Supreme Court has recently made it clear that any policy favoring the arbitration of disputes under the FAA does not require courts to create special rules varying from normal federal procedural rules just to favor compelling arbitration instead of court resolution.[130]

However, the Supreme Court's prior discussion in *Byrd* about how to address the joinder of arbitrable and nonarbitrable claims and its rejection of the intertwining doctrine presents a hurdle that now warrants a different result in light of the passage of EFASASHA.[131] This Article asserts that EFASASHA represents a "countervailing policy manifested in another federal statute" that opposes the strict adherence to the FAA that *Byrd* imposed because the Court in *Byrd* did not have a statute such as EFASASHA to consider.[132] The existence of EFASASHA warrants a reversal of the holding in *Byrd* when the claims involved are nonarbitrable sex discrimination claims being brought in the same case where there are related race discrimination claims subject to arbitration.[133]

Also, the Supreme Court decided a case last term, *Viking River Cruises, Inc. v. Moriana*,[134] that raised an issue between the joinder of an arbitrable claim and a nonarbitrable claim in the state courts. The issue in *Moriana* related to the requirements for joinder of claims under a state law, California's Labor Code Private Attorneys General Act ("PAGA"), versus preemption under the FAA due to an agreement to arbitrate.[135] Under

130. *See* Morgan v. Sundance, 596 U.S. 411, 415–18 (2022) (finding that FAA policy favoring arbitration does not require some special rule of showing prejudice before applying basic procedural principles to find that the parties had waived arbitration of the matter through their conduct so that the plaintiff could proceed with claims in court instead of being compelled to arbitrate them).

131. *See Byrd*, 470 U.S. at 221 (referring to "a countervailing policy manifested in another federal statute" as being a basis to support rejecting arbitration of an intertwining claim and to allow it to proceed in court); *see also* Johnson v. Everyrealm, Inc., 657 F. Supp. 3d 535, 560 (S.D.N.Y. 2023) (noting that because EFASASHA specifically amended the FAA as a whole and not some separate statute, this "reinforces Congress's intent to override—in the sexual harassment context—the FAA's background principle" from *KPMG* and *Byrd* that a related arbitrable claim still "must be sent to arbitration even if this will lead to piecemeal litigation.") (quoting KPMG LLP v. Cocchi, 565 U.S. 18, 19 (2011)).

132. *Byrd*, 470 U.S. at 221.

133. *See Johnson*, 657 F. Supp. 3d at 561 ("Congress's choice to amend the FAA directly with text broadly blocking enforcement of an arbitration clause with respect to an entire 'case' 'relating to' a sexual harassment dispute reflects its rejection—in this context—of the FAA norm of allowing individual claims in a lawsuit to be parceled out to arbitrators or courts depending on each claim's arbitrability.").

134. 596 U.S. 639 (2022).

135. *Id.* at 649–650.

PAGA, an employee may bring a claim for violations directly affecting that individual and also a representative claim under PAGA as an agent of and on behalf of the state as a violation of state labor law regarding other employees.[136] California courts have found that a representative PAGA claim cannot be waived and any individual PAGA claims must be joined with the employee's representative PAGA claim.[137]

The Court found that the state's rule that representative PAGA claims could not be waived from court proceedings through an arbitration agreement was not a violation of the FAA.[138] However, the Court in *Moriana* was also asked to determine whether PAGA's rule of requiring joinder of all PAGA claims could still prevail when that employee's individual PAGA claim was subject to mandatory arbitration and the representative claim was not subject to arbitration.[139] Presented with the arbitrable claim (the individual employee's PAGA claim) and a nonarbitrable claim (the PAGA representative claim on behalf of the state), the question of the FAA's preemptive role raised the stakes for the employee and the employer because the Court noted the importance of arbitration "even if bifurcated proceedings are an inevitable result."[140] The Court found that the California joinder rule under PAGA preventing the division of PAGA actions into an individual and non-individual/representative claim was preempted by the FAA.[141]

According to the Court, the joinder rule prevents the parties from deciding to "agree to restrict the scope of an arbitration to disputes arising out of a particular 'transaction' or 'common nucleus of facts.'"[142] Pursuant to that prevention, the parties would have to resolve *all* PAGA claims (both individual and representative) either in arbitration or in the courts when they clearly intended to arbitrate only the individual claims arising from the same transaction or common nucleus of facts.[143] Instead of allowing piecemeal adjudication pursuant to the parties' arbitration agreement, this joinder rule coerces the parties into expanding the scope

136. *See* Anita Alem, *Viking River: Understanding What the Court's Newest Arbitration Case Does to PAGA (and How California Can Fix it)*, ONLABOR (June 16, 2022), https://onlabor.org/viking-river-understanding-what-the-courts-newest-arbitration-case-does-to-paga-and-how-california-can-fix-it/ [https://perma.cc/H5GW-YAZK].

137. *See* Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 146–47 (Cal. 2014).

138. *Moriana*, 596 U.S. at 655–56.

139. *Id.* at 659–60.

140. *Id.* (citing Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220–221 (1985)).

141. *Id.* at 660–62.

142. *Id.* (citing Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc, 140 S. Ct. 1589, 1595 (2020)).

143. *Id.*

of the arbitration beyond the claims they have agreed to arbitrate or otherwise seek a judicial forum for all the PAGA claims when they clearly wanted to arbitrate the individual PAGA claim.[144]

While the *Moriana* decision adds some interesting analogies, it does not resemble a case involving the arbitration of both race and sex discrimination claims. The issues are different with the discrimination claims because you are reconciling the direct policies of two federal laws, the FAA as a whole versus the FAA as specifically amended by EFASASHA. This is not a situation like *Byrd* where the analysis looked at the other federal securities statute in question to see if it was intended to address or overcome the same policies for arbitral enforcement arising under the FAA. Nor is this a situation as in *Moriana* of reviewing preemption of a conflicting state joinder law. Instead, EFASASHA provides the statutory mechanism that was missing from *Byrd* by creating "a countervailing policy manifested in another federal statute" as a basis to support rejecting arbitration of an intertwining claim based on race and to allow that claim to also proceed in court with a sex claim.[145]

This approach to EFASASHA is consistent with how the first few federal court cases have handled this issue in terms of focusing on a nexus to show nonarbitrable claims are sufficiently related to the sex claims.[146] In a recent case, *Johnson v. Everyrealm, Inc*.,[147] judge Paul Engelmayer from the Southern District of New York federal court found that claims of sexual harassment and hostile work environment, brought pursuant to state human rights law by a former employee of a digital real estate company, could not be compelled to be arbitrated as a result of EFASASHA.[148] The plaintiff, Teyo Johnson, also brought claims of race discrimination under federal law; pay discrimination under state labor law; sexual harassment, hostile environment, and discrimination based upon gender, race, and ethnicity under state human rights law and city human rights law; aiding and abetting the claims brought under state human rights law and city human rights law; whistleblower retaliation in violation of state labor law;

144. *Id.*

145. *Byrd*, 470 U.S. at 221.

146. 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, 22–27 (2023) (arguing that EFASASHA should be interpreted under the author's nexus view so that nonarbitrable claims that are "related" through some nexus to the sexual harassment or sexual assault claims covered by EFASASHA will also be allowed to go forward in the courts).

147. 657 F. Supp. 3d 535, 561 (S.D.N.Y. 2023).

148. *Id*.

and common law intentional infliction of emotional distress.[149]

When Everyrealm moved to compel arbitration pursuant to an arbitration agreement between Johnson and Everyrealm, Johnson argued that EFASASHA prohibited his claims from being arbitrated because his complaint included sexual harassment claims.[150] In response, Everyrealm argued that Johnson had alleged sexual harassment claims that were not pled with any plausible basis or were even frivolous and should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[151] The court in *Johnson* found that most of the court decisions regarding EFASASHA at that time had "solely concerned whether it applies retroactively and whether the claims at issue in those cases accrued after March 3, 2022."[152] The court was now being asked possibly for the first time to decide the application of EFASASHA and the consequences when the plaintiff has alleged arbitrable race discrimination claims arguably related to nonarbitrable sex discrimination claims.

The court examined the pleading standard required for establishing a sexual harassment claim to be covered by EFASASHA through satisfying Federal Rule of Civil Procedure 12(b)(6) and if not lacking that sufficiency whether EFASASHA could still apply as long as the pleading was not frivolous pursuant to Federal Rule of Civil Procedure 11.[153] In *Johnson*, the court did not have to resolve this issue because the court found that the pleading was sufficient to survive a Rule 12(b)(6) motion.[154] In another case with the same judge, in the same court, with the same defendant and decided on the same day as *Johnson*, *Yost v. Everyrealm, Inc*.,[155] the court found that the sufficiency of pleading needed to show a sexual harassment claim under EFASASHA to prevent a motion to compel arbitration and proceed on any related claims would have to be enough to survive a Rule 12(b)(6) motion.[156] More importantly, in *Johnson*, after finding that the sexual harassment claims in the pleading were sufficiently plead, the court

149. *Id.* at 540–41 (citing state discrimination law). The intentional infliction of emotional distress claim was later withdrawn by the plaintiff. *Id.* at 547 n.5.

150. *Id.* at 547.

151. *Id.* at 551.

152. *Id.* at 550 (citing cases).

153. *Id*. at 562 n.24.

154. *Id.* (noting that any favorable ruling on a Rule 11 motion asserting that the filed sexual harassment claim in the case was frivolous would be inconsistent in light of the court's ruling that it had already found the claim sufficient pursuant to Rule 12(b)(6)).

155. Yost v. Everyrealm, Inc., 657 F. Supp. 3d 563, 567, 588 (S.D.N.Y. 2023) (finding that pleading was insufficient under Rule 12(b)(6) to establish sexual harassment claim and was dismissed and then EFASASHA did not apply to prevent compelling arbitration).

156. *Id*. at 586.

found that the other claims in the case were also prohibited from being compelled into arbitration as a result of EFASASHA.[157]

The court in *Johnson* may have suggested that EFASASHA's language allows all other non-sexual harassment claims in the case to also be prohibited from arbitration under EFASASHA when it stated:

> [EFASASHA] makes a pre-dispute arbitration agreement invalid and unenforceable "with respect to a *case* which is filed under Federal, Tribal, or State law and relates to the . . . sexual harassment dispute." 9 U.S.C. § 402(a) []. This text is clear, unambiguous, and decisive as to the issue here. It keys the scope of the invalidation of the arbitration clause to the entire "case" relating to the sexual harassment dispute. It thus does not limit the invalidation to the claim or claims in which that dispute plays a part.[158]

While noting that "case" captures the proceeding as a whole, as opposed to claims or a cause of action, the court goes too far if it is suggesting that all claims brought together with a well-pleaded sexual harassment claim in a case must also avoid arbitration under EFASASHA. Such a reading ignores the language in EFASASHA that refers to a case that relates to a "sexual harassment dispute."[159] The *Johnson* court even acknowledges in footnote 23 that although not present in the *Johnson* case, there could be claims in another case that do not *relate* to the sexual harassment dispute in that case:

> The Court does not have occasion here to consider the circumstances under which claim(s) far afield might be found to have been improperly joined with a claim within [EFASASHA] so as to enable them to elude a binding arbitration agreement. Johnson's claims against Everyrealm and its executives all arise from his employment at Everyrealm and are clearly properly joined in a common lawsuit.[160]

In finding the claims "all arise from his employment," the narrow reading from the court in *Johnson* is that all the claims in that particular case relate to that sexual harassment dispute. As a result, footnote 23 suggests merely that there could be other claims in a case that are separate from the sexual harassment dispute that should not be prohibited from arbitration by EFASASHA.

Another recent case also addresses this concern about unrelated claims

157. *Johnson*, 657 F. Supp. 3d at 562 n.23 (noting that the other claims were not so far afield to be unrelated).

158. *Id.* at 558.

159. 9 U.S.C. § 401(4).

160. *Johnson*, 657 F. Supp. 3d at 562 n.23.

in the case under EFASASHA. In *Mera v. SA Hosp. Grp., LLC*,[161] the New York federal district court determined what type of claims may be alleged in the same case that will not be sufficiently related to the sexual harassment claims to still be subject to arbitration.[162] The plaintiff in *Mera* filed claims for unpaid wages under the Fair Labor Standards Act[163] and New York labor law as well as for sexual harassment and sex discrimination under New York City and State Human Rights laws.[164] The court found that because the sexual harassment claims were covered by EFASASHA, they were nonarbitrable and could proceed through the court system.[165]

On the other hand, the court found that the unpaid wage claims did not "single[] out" the plaintiff per se and only related to a pattern of not paying wages that affected "all non-exempt employees" including the plaintiff.[166] As a result, the wage claims did not relate to the sexual harassment conduct specific to the plaintiff and were subject to arbitration.[167] This approach of focusing on the conduct uniquely specific to the plaintiff may create a helpful analytical tool in future cases. If the employer had decided not to pay certain wages as part of the process of sexually harassing this particular plaintiff in *Mera*, it would appear that those type of unpaid wage claims could be related to the sexual harassment claims. But in *Mera*, the unpaid wage claims were arbitrable as they were found to not be related to the "distinct" sexual harassment claims "on the basis of [the plaintiff's] sexual orientation."[168]

In another case, *Delo v. Paul Taylor Dance Found., Inc.*,[169] an employee, Barbara Delo, sued her employer alleging gender, caregiving and familial discrimination related to her nursing and caring for her newborn while at work.[170] After her employer moved to compel arbitration pursuant to the FAA, Delo argued that her claims were not arbitrable as a result of EFASASHA.[171] Her employer claimed that

161. No. 23-CV-03492, 2023 WL 3791712 (S.D.N.Y. June 3, 2023).

162. *Id.* at *4 ("Since Plaintiff's wage and hour claims under the FLSA and the NYLL do not relate in any way to the sexual harassment dispute, they must be arbitrated, as the Arbitration Agreement requires.").

163. 29 U.S.C. §§ 202–219.

164. *Mera*, 2023 WL 3791712, at *1.

165. *Id*. at *3.

166. *Id*. at *4.

167. *Id*.

168. *Id.*

169. No. 22-CV-9416, 2023 WL 4883337 (S.D.N.Y. Aug. 1, 2023).

170. Id. at *4.

171. *Id.*

EFASASHA did not apply in this case because Delo's gender and familial claims were not labeled "as 'sexual harassment'" and further that the conduct alleged did not otherwise amount to sexual harassment.[172] The court disagreed and found that Delo had sufficiently alleged a "hostile environment," a recognized form of sexual harassment. [173] With respect to the merits of Delo's allegations, the court found that pursuant to New York Law, the allegations of sexual harassment only need to show that the plaintiff has been treated less well than other employees because of her gender, based on unwanted "gender-based conduct."[174] As a result, the New York federal district court in *Delo* continued to outline the necessary parameters for sufficient pleading to invoke EFASASHA.

In a case arising out of a federal district court in California, *Turner v. Tesla, Inc*.,[175] the court addressed the discrimination claims of a female, Tyonna Turner, hired at the age of 18 years old on November 30, 2020 as a production associate in her employer's manufacturing facility.[176] Turner filed claims in state court asserting that she had been subjected to sexual harassment by her co-workers "'persistently [and] approximately 100 times'. . . for several months " before being terminated on September 14, 2022.[177] Turner's complaint also alleged her termination was an act of retaliation for reporting workplace-related injuries.[178] In addition, the complaint asserted that her employer had wrongly refused to pay her wages due after her termination.[179]

After removing the case to federal court, the employer sought to compel arbitration or alternatively to sever the arbitrable non-sexual harassment claims from the case and stay the non-arbitrable sexual harassment claims until an arbitration outcome had occurred.[180] The court addressed each of Turner's claims and found the arbitration agreement unenforceable as to all of her claims because the core of her case alleged "conduct constituting a sexual harassment dispute" under EFASASHA.[181] The court found that the retaliation claim was otherwise "inherently intertwined with the other causes of action such that it makes sense to have

172. *Id.* at *5.
173. *Id.* at *5–6.
174. *Id.* at *6.
175. No. 23-CV-02451, 2023 WL 6150805 (N.D. Cal. Aug. 11, 2023).
176. *Id*. at *1.
177. *Id*. at *1–2.
178. *Id.* at *2.
179. *Id*. at *5.
180. *Id*. at *2.
181. *Id*. at *3.

this claim proceed alongside the other causes of action."[182] With respect to her claim based on failure to pay wages after her termination, the court found that claim also "arose out of the same facts and circumstances underlying Turner's sexual harassment causes of action and is substantially related to her sexual harassment claim."[183] As a result, the intertwining doctrine appears to be alive and well after the passage of EFASASHA.

VI. PRUDENT EMPLOYERS SHOULD ABANDON FORCED RACIAL ARBITRATION

Employers have not clearly indicated how they will respond to EFASASHA even after Congress passed additional legislation related to arbitration agreements near the end of 2022, the Speak Out Act,[184] which bans predispute nondisclosure and nondisparagement agreements ("NDAs") in sexual assault and sexual harassment disputes.[185] Those supporting the passage of EFASASHA and the Speak Out Act intend to continue pressuring businesses to focus on prohibiting NDAs and arbitration agreements for claims involving other protected classes emphasizing the "disparities" faced by "[n]early 60% of Black workers . . . and 65% of workers who make minimum wage or slightly above [who] are bound by forced arbitration."[186] A primary champion in this area, "Gretchen Carlson, former Fox News host . . . co-founded Lift Our Voices, a nonprofit initiative dedicated to ending forced arbitration and NDAs, with former colleague Julie Roginsky and journalist Diana Falzone."[187] Carlson, Roginsky and Falzone have now worked with "Athena Alliance, a membership organization for executives," to get support for banning these agreements for all forms of discrimination claims including "age, disability, race, gender, LGBTQ+, etc."[188] The

182. *Id.* at *7 (citing Johnson v. Everyrealm, Inc., 657 F. Supp. 3d 535, 546–47 (S.D.N.Y. 2023); Mera v. SA Hosp. Group, LLC, No. 23-CV-03492, 2023 WL 3791712, at *3 (S.D.N.Y. June 3, 2023).

183. *Id.* at *8.

184. 136 Stat. 2290; Pub. L. No. 117-224 (2022), to be codified at 42 U.S.C. §§19401 et. seq.

185. *See* Emilie Shumway, *Are NDAs on the Way Out?*, LEGAL DIVE (Oct. 17, 2022), https://www.legaldive.com/news/ndas-nondisclosureagreements-metoo-arbitration-speakoutact-nondisparagement-doordash/633761/ [https://perma.cc/8FP9-WLSP] (describing efforts to pass Speak Out legislation and speculating on the pursuit of additional legislation to ban NDAs and forced arbitration for all discrimination claims); Sareen Habeshian, *Biden Signs Bill to Curb Use of Sexual Harassment NDAs*, AXIOS (Dec. 7, 2022), https://www.axios.com/2022/12/07/biden-bill-sexual-harassment-ndas [https://perma.cc/BZ24-M22M].

186. Shumway, *supra* note 185.

187. *Id.*

188. *Id.*

need for pragmatic responses from employers and companies should recognize that not only will there continue to be legislative efforts to ban race discrimination claims from being arbitrated, but activists groups and creative plaintiff's attorneys may also make the use of arbitration for these claims more challenging for businesses and employers.

A. A Pragmatic Joinder of Race and Sex Discrimination Claims

The legislative efforts leading to the passage of the Speak Out Act as well as EFASASHA could represent a powerful suggestion for businesses to embrace a broader approach and end forced arbitration of all statutory discrimination complaints of employees and consumers and especially for claims based upon race.[189] Shortly after EFASASHA passed, one attorney who represents employers, Eve I. Klein, Chair of Duane Morris' Employment, Labor, Benefits, and Immigration Practice Group, identified a few questions for employers to consider regarding their ongoing pursuit of arbitration policies after EFASASHA including:

1. Will they still seek to cover sex discrimination claims not involving harassment in arbitration agreements leading to possible resolution of certain sex-based discrimination claims in different forums?;

2. What message do they want to send to their employees if sexual harassment claims can be brought in courts but harassment claims based upon race, religion and membership in other protected classes must be resolved through arbitration?; and

3. Will they modify their arbitration agreements for only new employees or to both new and existing employees?[190]

These questions identify a broad concern for businesses who still want to pursue arbitration policies and consider EFASASHA merely a narrow exception to their overall arbitration policy.

Before addressing these questions, one must consider what drives employers and businesses in their quest to mandate arbitration rather than

189. *See, e.g.*, Denis Demblowski, *Analysis: GCs Can Be Change Agents for Ending Forced Arbitration*, BLOOMBERG L. (Apr. 21, 2022, 4:00 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-gcs-can-be-change-agents-for-ending-forced-arbitration [https://perma.cc/39U3-YFZE].

190. *See* Eve I. Klein, Jonathan A. Segal, Jonathan D. Wetchler, Linda B. Hollinshead, Caroline M. Austin & Elisabeth Bassani, *#MeToo Movement Inspires the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Claims Act*, ON PRACTICE LAW.COM (Mar. 3, 2022), https://onpractice.law.com/4046164/metoo-movement-inspires-forced-arbitration-sexual-assault-sexual-harassment-claims-act [https://perma.cc/S9DU-EWNF].

letting disputes be resolved through the courts. One study by the Chamber of Commerce, "Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration," from 2014–2021, suggests that consumers and employees prevail more in arbitration than in litigation.[191] According to this study, "'consumers initiated and prevailed in 41.7% of arbitrations that ended with awards compared to 29.3% of litigations that ended with awards.'"[192] Also, this study found that "'employees initiated and prevailed in 37.7% of arbitrations that terminated with awards compared to 10.8% of litigations that terminated with awards[.]'"[193]

This study raises further questions related to the motivation of businesses and employers to pursue arbitration. Given the Chamber of Commerce supports businesses, why would it support a dispute resolution process where consumers and employees prevail more than in litigation? Ironically, businesses do not seem to be as motivated to agree to arbitrate their own disputes as they rarely negotiate arbitration clauses with each other.[194]

One explanation for the powerful business push to make "little guys" such as individual consumers and employees arbitrate their claims could be that businesses prefer arbitration in these disputes when also joined with waivers of class claims.[195] Those combined actions deter individuals with "low-value claims" from joining together as a class when "it is only through collective efforts that consumer and employment rights can truly

191. *See House Passes Arbitration Bill, Study Says Consumers Prevail More in Arbitration vs. Litigation*, ACA INT'L (March 21, 2022, 1:00 PM), https://www.acainternational.org/news/house-passes-arbitration-bill-study-says-consumers-prevail-more-in-arbitration-vs-litigation/ [https://perma.cc/3YFG-NXRP] (citing Nam D. Pham & Mary Donovan, *Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration*, NDP (2022), https://instituteforlegalreform.com/wp-content/uploads/2022/03/FINAL-ndp-Consumer-and-Employment-Arbitration-Paper-2022.pdf [https://perma.cc/AY3X-5JCZ]).

192. House Passes Arbitration Bill, supra note 191.

193. Id.

194. Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Noncompete Contracts*, 41 U. MICH. J.L. REFORM 871, 886–87 (2008) (discussing results from study showing how businesses rarely agree to arbitration to resolve their own disputes).

195. *See* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637, 637 (1996) (criticizing mandatory arbitration because it allows big corporate interests to harm the interests of the "little guys," including employees, consumers, and franchisees). More recently, Sternlight has referred to this unique segment of persons subjected to forced arbitration by businesses and employers as the "vulnerable and disempowered" and defined those terms as "groups who are less powerful in the social and political process, whether due to their race, ethnicity, gender, gender preference, lack of economic means, immigrant status, tenuous employment situation, or other factors." Sternlight, *supra* note 3, at 182.

be protected."[196] This bottom line suggests that businesses and their legal counsel may still be seeking mandatory arbitration more as an overall suppression of claims and definitely class claims rather than thinking that arbitration really represents a better, fairer, and quicker resolution for all involved.

A 2015 study conducted by UCLA Law Professor Katherine Stone and Cornell Industrial and Labor Relations Professor Alex Colvin for the Economic Policy Institute contradicts the results from the Chamber of Commerce study. Specifically, Stone and Colvin found that "employees and consumers win less often and receive much lower damages in arbitration than they do in court."[197] Furthermore, Colvin's additional work in 2017 found that "women and Black workers are more likely to be subject to the practice" of being forced to arbitrate their claims.[198]

Whether partisan members of Congress or lobbyists for big business want to send different messages to employees and consumers about harassment protections based on sex versus harassment protections based on race, religion, age, or disability, do individual employers and businesses want to send those different messages? Most millennial employees, who will represent 75% of the workforce by 2025, now expect that their employers and the businesses that they invest in and buy products from should be socially responsible.[199] As a result, employers and businesses should embrace the idea that EFASASHA has opened the door

196. Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, #414 ECON. POL'Y INST. 17 (2015), https://files.epi.org/2015/arbitration-epidemic.pdf [https://perma.cc/ZAY7-8UB6].

197. *Id.* at 3.

198. *See* Emilie Shumway, *After the #Metoo Bill, is the Future of Mandatory Arbitration in Question?*, HR DIVE (Feb. 22, 2022), https://www.hrdive.com/news/after-the-metoo-bill-is-the-future-of-mandatory-arbitration-in-question/619229/ [https://perma.cc/R4R7-SV97] (citing *Women and African Americans are More Likely to be Subject to Mandatory Arbitration*, ECON. POL'Y INST. (Apr. 6, 2018), https://www.epi.org/press/women-and-african-americans-are-more-likely-to-be-subject-to-mandatory-arbitration/ [https://perma.cc/564K-HE3S] (discussing Colvin's 2017 study)); *see also* Alexander J.S. Colvin, *The Metastasization of Mandatory Arbitration*, 94 CHI.-KENT L. REV. 3, 15–16 (2019) (providing Colvin's discussion of the results from his 2017 study and stating that "59.1 percent of African-American workers are subject to mandatory arbitration, 54.3 percent of Hispanic workers are subject to mandatory arbitration, and 55.6 percent of White-NonHispanic workers are subject to mandatory arbitration" and "[i]t is the employers with the lowest paid workforces that are most likely to impose mandatory arbitration on their employees").

199. *See* Peggy Pelosi, *Millennials Want Workplaces With Social Purpose. How Does Your Company Measure Up?*, CHIEF LEARNING OFFICER (Feb. 20, 2018), https://www.chieflearningofficer.com/2018/02/20/millennials-want-workplaces-social-purpose-company-measure/ [https://perma.cc/JX6R-G2PE] (discussing a commissioned study by PwC consulting firm in 2011, *Millennials at Work Reshaping the Workplace*, PWC (2011), https://www.pwc.com/co/es/publicaciones/assets/millennials-at-work.pdf [https://perma.cc/B879-J5JL] (showing how millennials will be "75 percent of the workforce by 2025" and they "want to be active participants in the social purpose of the companies they work for")).

to adopt new approaches to resolving disputes that do not require employees or consumers to use arbitration to seek vindication.

The Congressional Report leading to the passage of EFASASHA considered surveys indicating that both Democratic and Republican constituents do not support forced arbitration.[200] As a result, there appears to be no strong constituency, other than maybe some business lobbyists and some corporate lawyers, out there seeking to fight the good fight to maintain mandatory arbitration. Because of the reputational considerations that "play[] a major role in corporate success" and the threat that a business may be perceived as "'a disgusting company'" that protects discriminators through private arbitration and NDA agreements—whether that is true or not—companies may start to see that continuing to use these forced agreements for race discrimination claims represents bad judgment.[201]

B. A Preemptive Elimination of Racial Group Backlash

Despite the pragmatic reasons to abolish mandatory arbitration for all protected classes now that EFASASHA prohibits sex discrimination claims, no business has come forward to represent the bellwether progressive organization to lead the charge to abolish mandatory arbitration completely in recognition of EFASASHA's limitations in not covering race discrimination. Some businesses still appear to be determined to continue to mandate arbitration of race discrimination. These businesses are willing to pursue mandatory arbitration of race discrimination claims even though discrimination charges filed based upon race tend to slightly surpass the number of employment discrimination charges filed with the EEOC based on sex each year since 1997 through 2022.[202] This information suggests that all the concerns

200. *See* Nadeau, *supra* note 10 (discussing a Hart poll of 1200 voters that found that 84% supported legislation banning mandatory arbitration and 87% Republican and 84% Democratic support).

201. *See* Shumway, *supra* note 185 (providing comments by corporate attorney, Aaron Goldstein, suggesting that businesses will likely fare better in court as arbitration has lost its appeal given challenges to class action waivers that had limited joint pursuit of small claims and deterred pursuit of those claims overall with courts now ordering businesses to arbitrate thousands of individual cases and pay fees for each case).

202. *See Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2022 (2022)*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2022 [https://perma.cc/DJJ2-T3B6] (identifying 73,485 EEOC charges filed in fiscal year 2022 with 20,992 Title VII race charges or 28.6% of all charges filed and 19,805 Title VII sex charges or 27.0% of all charges filed). There were 28,462 retaliation charges filed under Title VII or 38.7% of all fiscal year 2022 charges. *Id.* There were also 25,004 disability charges filed under the Americans With Disabilities Act statute including 34.0% of all charges filed with the EEOC. *Id.*

about resolving sex discrimination claims privately through forced arbitration that were the impetus for passing EFASASHA will represent even more concerns for forced arbitration of racial discrimination claims.[203]

Many businesses agreed to pursue racial justice policies in light of the racial protests that evolved after the death of George Floyd and the growth of BLM.[204] Although some backlash had led to lawsuits challenging these corporate responses,[205] most businesses should and can follow their racial justice initiatives without violating discrimination laws and while creating more inclusive environments that will help them defend against discrimination lawsuits.[206] When assessing whether to continue pursuing mandatory arbitration of racial discrimination claims as a good and viable business action or one that will lead to racial backlash, a review of two particular types of challenges to businesses that continue to arbitrate racial discrimination claims so far may be instructive.

The first and most specific challenge represents a direct and individual attack on forced arbitration as taken by Black coaches who sued for racial

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203. *See* Pittman, *supra* note 25, at 912 (describing how the fact that more race charges are filed with the EEOC than sex charges, this result supports the importance of addressing the same concerns in EFASASHA that led to banning mandatory arbitration of sex claims to also support banning of mandatory arbitration for race claims).

204. *See* Megan Armstrong, Eathyn Edwards & Duwain Porter, *Corporate Commitments to Racial Justice: An Update*, MCKINSEY INST. FOR BLACK ECON. MOBILITY (Feb. 21, 2023), https://www.mckinsey.com/bem/our-insights/corporate-commitments-to-racial-justice-an-update [https://perma.cc/4JP7-D429] (describing corporate financial pledges to racial justice causes since 2020); Richard Feloni & Yusuf George, *Commentary: These are the corporate responses to the George Floyd protests that stand out*, BUS. & HUM. RTS. RES. CTR. (June 30, 2021), https://www.business-humanrights.org/en/latest-news/commentary-these-are-the-corporate-responses-to-the-george-floyd-protests-that-stand-out/ [https://perma.cc/L4PU-JYVR] (identifying how companies "embraced Black Lives Matter en masse" after the George Floyd murder and specifying various company racial justice responses); *see also* Michael Z. Green, (*A)Woke Workplaces*, 2023 WISC. L. REV. 811, 813, 824–826 (listing various measures taken by companies in support of racial justice and Black Lives Matter); Karthik Balakrishnan, Rafel Copat, Danieia De la Parra & K. Paresh, *Racial Diversity Exposure and Firm Responses Following the Murder of George Floyd*, 61 J. ACCT. RES. 737–804 (2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4387740 [https://perma.cc/DV34-HYAS] (documenting the nature of corporate responses to the death of George Floyd and how those responses affected stock prices of the companies who took various responsive measures).

205. *See* David Hood, *Lawsuits Challenge Corporate Diversity Pledges after Floyd*, BLOOMBERG L. (Apr. 7, 2023, 4:00 AM), https://news.bloomberglaw.com/esg/host-of-companies-sued-alleging-unmet-diversity-equity-pledges [https://perma.cc/QV24-M4BD] (describing reverse discrimination and investor lawsuits challenging company diversity efforts).

206. *See* Olander, *supra* note 26 (referring to how companies should not fear criticisms of diversity as businesses may still pursue "corporate efforts to recruit diverse workforces and create inclusive work environments [which] are legal and reduce corporate risk for claims of discrimination"); Green, *supra* note 204, at 869–72 (describing legal responsibilities and social responsibilities to justify continuing to pursue diversity, equity, and inclusion initiatives despite political and reverse discrimination backlash).

discrimination against the National Football League (NFL), an organization with a majority of Black players and an ongoing commitment to racial justice. The second challenge relates to creative and collaborative movements that have sought to level the playing field for consumers and employees being subjected to forced arbitration by employing certain strategies and tactics including mass arbitration and mass organizing. In evaluating the impact from these challenges, businesses and employers may better consider their choices regarding the continued pursuit of mandatory arbitration for race claims.

1. The NFL's Negative Racial Arbitration Messages in its *Flores* Case

The NFL has taken the position that it will still seek to arbitrate claims of racial discrimination even after EFASASHA's passage.[207] The NFL has sought to compel arbitration of the claims of racial discrimination in the hiring of football coaches brought by Brian Flores and joined by two other Black coaches, Steve Wilks and Ray Horton.[208] Notably, the NFL has faced recent allegations of sexual harassment and sexual assault involving one of its teams, the Washington Commanders and its then-owner, Dan Snyder.[209] The NFL has also faced dozens of sexual assault allegations made by several massage therapists against one of its key players, Deshaun Watson, who now plays for the Cleveland Browns.[210]

207. *See* Daniel Kaplan, *NFL Responds to Brian Flores' Motion to Avoid Arbitration in Racial Discrimination Lawsuit*, THE ATHLETIC (Sep. 16, 2022), https://theathletic.com/3601920/2022/09/16/nfl-brian-flores-arbitration-lawsuit/ [https://perma.cc/Y5BL-4UKA] (describing how Flores has sought to keep his race discrimination claims in court and has objected to arbitration, in part, because the arbitrator would be the NFL Commissioner, Roger Goodell, who works for the NFL, the party Flores is suing).

208. *Id.*

209. *See* V. James DeSimone, *Sexual Harassment is Illegal, Even in the NFL*, BLOOMBERG L. (July 15, 2022, 3:00 AM), https://news.bloomberglaw.com/us-law-week/sexual-harassment-is-illegal-even-in-the-nfl [https://perma.cc/ML2U-WZT3] (describing allegations of sexual harassment misconduct involving Commanders' treatment of women and how the NFL and its Commissioner Goodell paid thousands of dollars to investigate the misconduct but will not be transparent in publishing the report even though it had published a report a few years earlier involving sexual misconduct involving the Miami Dolphins team); *see also* Jack Baer, *Details Emerge from Dan Snyder Sexual Misconduct Allegations that Led to $1.6 Million Settlement*, YAHOO! SPORTS (June 21, 2022), https://sports.yahoo.com/commanders-owner-dan-snyder-sexual-misconduct-allegations-settlement-021550184.html [https://perma.cc/2KVW-AJ5T] (describing allegations against Snyder and a resulting $1.6 million settlement with a requirement of non-disclosure by the woman making the charges and how even during later investigation on sexual harassment charges, Snyder's attorney sued the investigator seeking to prevent her from talking to the woman who filed the allegations and even after the investigator did speak to this woman, the NFL is still keeping the report private).

210. *See* Alaa Elassar, Around 10 of the Women Who Accused Deshaun Watson of Sexual Misconduct Expected to Attend His Cleveland Browns Debut vs. Houston, Attorney Says, CNN

As part of a long suspension and reinstatement that went through arbitration, the NFL sought an aggressive disciplinary approach with Watson asking initially for a suspension for an entire season and eventually appealing an arbitrator's decision of a six-game suspension to eventually settle with Watson on an 11-game suspension.[211] NFL Commissioner Roger Goodell said the NFL pushed for a "harsher punishment for Watson" because "'there [were] multiple violations here and they were egregious and it was predatory behavior.'"[212]

The civil lawsuits filed by the women making allegations against Watson and his NFL team at the time, the Houston Texans, were not subject to arbitration and were eventually settled in most aspects.[213] Today, if the women involved with the sexual misconduct suits against Watson and his team at the time, the Texans, or the women involved in the sexual harassment claims against Snyder and his team at the time, the Commanders, filed claims in federal court and also joined the NFL as a defendant, EFASASHA would prevent any attempts by the NFL to compel the resolution of those claims in arbitration. Even if these women had signed agreements to arbitrate with the NFL, those predispute agreements would be unenforceable after EFASASHA.

Yet, the NFL continues seeking to compel arbitration for the race discrimination claims by Flores, Wilks, and Horton despite the fact the

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SPORTS (Dec. 4, 2022, 11:36 PM), https://www.cnn.com/2022/12/04/sport/deshaun-watson-attend-game-houston-cleveland-browns/index.html [https://perma.cc/R7HQ-UF9F] (describing dozens of allegations of sexual assault against Watson by massage therapists, how those allegations were found to be in violation of the NFL's conduct policy, and how the arbitrator ruled that Watson would receive a six-game suspension as no other player had received a suspension of longer than three games; the NFL sought a 17-game suspension and appealed the arbitrator's ruling eventually leading to a settlement with an agreement to suspend Watson 11 games).

211. *Id.* (describing ruling by former judge Sue L. Robinson selected by the NFL and Watson's union to decide the disciplinary matter and how six games was the standard and the most ever applied by the NFL for such misconduct); *see also* Jaime E. Galvan, *Who is Sue L. Robinson, the Arbitrator in Deshaun Watson's Disciplinary Case*, KHOU 11 (Aug. 1, 2022, 11:12 AM), https://www.khou.com/article/sports/nfl/who-is-sue-l-robinson-arbitrator-in-the-deshaun-watson-case/285-1265da74-e625-4380-91b4-7c651a0d3f08 [https://perma.cc/G8RQ-BC2N] (referring to Robinson's decision as arbitrator).

212. Elassar, *supra* note 210.

213. *See* Jake Trotter, *Houston Texans Settle Claims vs. Team in Relation to Sexual Misconduct Allegations Involving Deshaun Watson*, ESPN (July 15, 2022, 1:41 PM), https://www.espn.com/nfl/story/_/id/34248377/houston-texans-settle-claims-vs-team-relation-sexual-misconduct-allegations-involving-deshaun-watson [https://perma.cc/EM5S-MDE3] (describing how Houston Texans NFL team settled lawsuits with 30 women who had pursued claims against Watson); Ben Shpigel & Jenny Vrentas, *Deshaun Watson Is Returning to Play Football: Here's What to Know*, N.Y. TIMES (Dec. 1, 2022), https://www.nytimes.com/article/deshaun-watson-sexual-assault-lawsuit.html [https://perma.cc/KV6J-VVRG] (describing how Watson has settled 23 out of the 24 civil suits lawsuits against him and the Houston Texans settled with all 30 women).

NFL is a league that is "majority Black."[214] It is not surprising that after EFASASHA passed, Flores became a key advocate for passing the FAIR Act to prevent the use of mandatory arbitration for all employment, consumer, antitrust, and civil rights cases.[215] According to Flores, the problems presented by being forced into private arbitration for race discrimination claims include deterring other employees from pursuing claims and creating a feeling that employees have no viable access to justice. These problems seem very similar to many of the concerns about forcing arbitration of sex discrimination claims that led to the passage of EFASASHA. In particular, Flores made a personal appeal to Goodell as the leader of the NFL to stop using forced arbitration:

> [M]y case will be litigated behind closed doors, confidentially and without transparency, essentially done in secrecy. With forced arbitration, there won't be a jury of my peers who will hear my claims, which is one of the most important and fundamental rights we have in this country . . . . [T]he transparency of public accountability that is integral to our judicial system is going to be absent. . . . It's our sincere hope that the commissioner will move away from forced arbitration. . . . I think Commissioner Goodell has the influence to do what's right. . . . Our hope is that he uses that influence to create the change, the diversity, the inclusion that he said publicly that he's looking for the National Football League. I don't think you can create that change in a secret setting, in a confidential setting. I think that change needs to happen in transparency and an open setting. I think he has an influence to make sure that happens.[216]

Although the NFL has committed over $250 million dollars to combat systemic racism over a ten-year period and Goodell released a video in

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214. *See* Carron J. Phillips, *Choosing Orlando for the Pro Bowl exemplifies the NFL's wishy-washy stance on racial, social issues*, DEADSPIN (July 27, 2023, 11:00 AM), https://deadspin.com/nfl-pro-bowl-ron-desantis-orlando-goodell-flores-1850682464 [https://perma.cc/WH9C-TU5W]; s*ee also* Michael Conklin, Jennifer Barger-Johnson & Marty Ludlum, *Brian Flores's Employment Discrimination Lawsuit Against the NFL: A Game Changer or Business as Usual?*, 29 JEFFREY S. MOORAD SPORTS L.J. 299, 304 n.36 (2022) (questioning the complaint allegation in the Flores case that "70% of the players in the NFL are Black" and suggesting the number, while still a majority, is at a lower percentage from a study showing "57.5% of the NFL is Black" and even accounting for players who were not specifically identified "it would still only total 63.4%") (citing "Richard E. Lapchick, *The 2020 Racial and Gender Report Card: National Football League*, INST. FOR DIVERSITY AND ETHICS IN SPORT (2020), https://43530132-36e9-4f52-811a-182c7a91933b.filesusr.com/ugd/326b62_b84c731ad8dc4e62ba330772b283c9e3.pdf [https://perma.cc/9TYL-6WPV]").

215. *See* Karen Ocamb, *Coach Brian Flores: Forced Arbitration is an Unfair 'rigged system,' Urges House to Pass the FAIR Act*, MEDIUM (Mar. 17, 2022), https://medium.com/public-justice/coach-brian-flores-forced-arbitration-is-an-unfair-rigged-system-urges-house-to-pass-the-fair-fed6f89c7313 [https://perma.cc/GA4X-D689].

216. *Id.*

which he declared Black Lives Matter,[217] Flores' appeal to Goodell to not seek private arbitration with respect to the coaches' race discrimination claims has not worked. A year after the case was filed, the matter had still not moved forward because of the NFL's effort to compel arbitration and the judge asked the parties to submit briefs to consider the forced arbitration issue.[218]

After reviewing those briefs, the judge ordered arbitration of those race discrimination claims in the *Flores* case where the Black coaches had signed arbitration agreements when they began working for those teams being sued.[219] However, the judge found that a systemic discrimination class claim based upon race could proceed in court against those NFL teams where a Black coach had interviewed but had not signed any agreement to arbitrate with those teams because those teams never hired the coach.[220] The court recognized the message being sent by the NFL in adamantly and broadly pursuing forced arbitration for the Black coaches' race discrimination claims. As a result, the court provided Flores a small window to pursue his day in court against only those NFL teams who had interviewed him but did not hire him and require he sign an arbitration agreement with that team. The judge highlighted the further bad publicity for the NFL involved in this continuing litigation by stating: "This case shines an unflattering spotlight on the employment practices of [NFL] teams. Although the clear majority of professional football players are Black, only a tiny percentage of coaches are Black."[221]

Nevertheless, the majority of the race discrimination claims in the *Flores* case were ordered to be arbitrated by the judge.[222] This result

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217. *See* Judy Battista, *NFL Commits $250M over 10-year Period to Combat Racism*, NFL.COM (June 11, 2020), https://www.nfl.com/news/nfl-commits-250m-over-10-year-period-to-combat-systemic-racism [https://perma.cc/42J8-S5JV].

218. *See Federal Judge Seeks More Briefing Regarding Possible Arbitration of Brian Flores Case*, PRO FOOTBALL TALK (Feb. 1, 2023, 4:04 PM), https://profootballtalk.nbcsports.com/2023/02/01/federal-judge-seeks-more-briefing-regarding-possible-arbitration-of-brian-flores-case/ [https://perma.cc/QS6B-ZFH4].

219. *See* Flores v. Nat'l Football League, No. 22-CV-0871, 2023 WL 2301575, at *1, *4 (S.D.N.Y. Mar. 1, 2023); *see also* Tom Schad, *Judge Compels Arbitration of Some, Not All, Claims in the Brian Flores Case*, PRO FOOTBALL TALK (Mar. 1, 2023, 3:27 PM), https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/judge-compels-arbitration-of-some-not-all-claims-in-the-brian-flores-case [https://perma.cc/7HKL-YMBE]; Larry Neumeister, *NFL Coach Brian Flores' Discrimination Case Going to Court,* ASSOCIATED PRESS (Mar. 1, 2023, 5:40 PM), https://apnews.com/article/nfl-coach-brian-flores-football-discrimination-lawsuit-5322d8efcb685c9508e703cd40c3a5f1 [https://perma.cc/7VU3-AFNE].

220. *Flores*, 2023 WL 2301575, at *4.

221. *Id.* at *1.

222. *Id.* at *4 ("For the reasons discussed below, the Court finds that Mr. Flores's claims against

portends another example of how these matters may result in piecemeal litigation that likely helps neither of the parties. The agreement to arbitrate that NFL coaches must sign follows some of the arbitration process that the NFL players union uses because it incorporates the NFL Constitution by reference. However, the agreement to arbitrate for the coaches is not an arms-length negotiation of terms as compared to the negotiations the NFL entertains with the players union regarding its contract with the players.[223] Part of the NFL Constitution allows the Commissioner to serve as the arbitrator.[224] Whether Goodell will choose that option or seek an outside arbitrator, the fact that the NFL seemed determined to keep the race discrimination claims in the *Flores* case in private arbitration and out of the courts appears to send a negative message about how the NFL wants to address race discrimination claims despite the message sent from EFASASHA. Although public pressure has not yet seen the NFL abandon forced arbitration for race discrimination claims by its employees, continued public pressure and backlash may be the best way for Black employees and consumers to effectuate change regarding the NFL's forced arbitration practices.[225]

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the Dolphins, Mr. Wilks's claims against the Cardinals, and Mr. Horton's claims against the Titans must be submitted to arbitration; Mr. Flores may, however, litigate his claims against the Broncos, Giants, and Texans in federal court.").

223. *Id.* at *5 (discussing incorporation of Section 8.3 of NFL Constitution allowing the Commissioner to arbitrate any dispute with a coach).

224. *Id.* (describing the NFL players' grievance process that allows Commissioner Goodell to serve as the arbitrator); *see also* Conklin Barger-Johnson & Ludlum, *supra* note 214, at 306 (referring to how NFL coaches sign contracts that incorporate the provisions of the NFL players agreement including Section 8.3(E) of the NFL Constitution and Bylaws that allows the NFL Commissioner to serve as the arbitrator). There is some debate as to whether contract provisions allowing Goodell to serve as arbitrator for individual NFL employees rather than through a collectively-bargained agreement with the players may represent an unconscionable, one-sided agreement preventing its enforcement. *Id*. at 306–07.

225. One of the first cases allowing both race discrimination and sexual harassment claims to go forward and not be compelled into arbitration as a result of EFASASHA involved a former NFL player. *See* Yost v. Everyrealm, 657 F. Supp. 3d 563, 567–568 (S.D.N.Y. 2023). If the Flores case ends up being unsuccessful in shining a public spotlight on the NFL's dealings with racism, another case claiming race discrimination by the NFL being brought by a Black male and former NFL reporter, Jim Trotter, may be able to offer greater accountability because Trotter did not sign an arbitration agreement. *See* Michael McCann and Eben Novy-Williams, *NFL Reporter's Racism Claims Spotlight League-Owner Ties*, SPORTICO (Sep. 13, 2023, 2:05 PM), https://www.sportico.com/law/analysis/2023/jim-trotter-discrimination-lawsuit-nfl-roger-goodell-1234738486/[https://perma.cc/267G-FFQL] (discussing how Trotter's case could lead to discovery of sensitive emails and texts and depositions possibly leading to damaging testimony by Goodell, owners, and other witnesses); *see also* Mike Florio, *NFL Files Motion to Dismiss Jim Trotter's Wrongful Termination Lawsuit*, PRO FOOTBALL TALK (Jan. 27, 2024, 03:43 AM), https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/nfl-files-motion-to-dismiss-jim-trotters-wrongful-termination-lawsuit (discussing how the NFL has attempted to get Trotter's lawsuit dismissed at the pleading stage in order to prevent any discovery via depositions of key NFL managers and owners about the NFL's record regarding racism).

2. Creative Challenges: Mass Racial Arbitrations and Organizing

EFASASHA only became law after several businesses like Google responded to mass protesters and abandoned their forced arbitration policies.[226] Initially, Google abandoned its forced arbitration policy for sexual harassment and sexual assault claims in November 2018 after 20,000 employees walked out of Google offices in protest of the company's responses to sexual harassment claims.[227] Then in February 2019, Google expanded the scope of its response to abolish its forced arbitration policy for all claims of "discrimination or wrongful termination" and announced it would stop prohibiting employees "from joining together in class-action suits."[228] In addition, Facebook, Microsoft, and several law firms had already abolished their arbitration policies with respect to sexual harassment before Google's action in 2019.[229] In addition to Google, Intuit and Adobe have also agreed to ban mandatory arbitration agreements for all employees.[230] More companies should now come forward, as Google did back in 2019, to become a new industry leader and bellwether by refusing to force arbitration of all discrimination claims. These actions would represent some part of a racial reckoning to resemble the #MeToo reckoning fostered by Google and more precisely the reckoning achieved by Google's protester employees back in 2019.

A mass social movement can start to engage businesses and law firms that still continue to pursue arbitration of statutory discrimination claims based upon race and ask them to explain why they still take such actions when EFASASHA bans them from doing so for sex discrimination

226. *See* Nitasha Tiku, *Google Ends Forced Arbitration After Employee Protest*, WIRED (Feb. 21, 2019, 6:59 PM), https://www.wired.com/story/google-ends-forced-arbitration-after-employee-protest/ [https://perma.cc/26FJ-52Y4].

227. *Id.*

228. *Id.*

229. *See* Jena McGregor, *Google and Facebook Ended Forced Arbitration for Sexual Harassment Claims. Why More Companies Could Follow*, WASH. POST (Nov. 12, 2018, 4:42 PM), https://www.washingtonpost.com/business/2018/11/12/google-facebook-ended-forced-arbitration-sex-harassment-claims-why-more-companies-could-follow/ [https://perma.cc/4GJQ-BWMJ]; *see also* Jeremy Wright, Essay, *Arbitration in the Workplace: The Need for Legislative Intervention*, 117 NW. U. L. REV. ONLINE at *2 (2022) (describing abolition of arbitration policies for discrimination claims by Google and Facebook and by various "major law firms").

230. *See* Rakeen Mabud, *Google Put An End To Forced Arbitration—And Why That's So Important,* FORBES (Feb. 26, 2019, 6:00 AM), https://www.forbes.com/sites/rakeenmabud/2019/02/26/worker-organizing-results-in-big-change-at-google/?sh=99217774399d [https://perma.cc/F2E5-QYFH] (referring to Google's decision to end mandatory arbitration for all disputes as "following the lead of other companies such as Adobe and Intuit.").

claims.[231] When these businesses know that similar statutory discrimination claims based upon sex could not be arbitrated, they have to recognize that they send a broad racial message by continuing to arbitrate racial discrimination claims. Business motivations to mandate arbitration have long been questioned as being part of an overall scheme intended to deny employees and customers any realistic vindication when being forced to arbitrate while also being banned from seeking class resolution of their claims.[232] As a strategy to respond to these claim-suppressing efforts through mandatory arbitration class action waivers, plaintiffs' attorneys have employed the tactic of pursuing so-called mass arbitration filings.[233] They started representing multiple plaintiffs in several individual arbitrations against a particular business or employer.[234] One

231. *See* Jessica Guyn, *Microsoft Should Ban Private Arbitration in Racial Discrimination Cases, Too: Lawmakers*, USA TODAY (Dec. 12, 2017, 2:03 PM), https://www.usatoday.com/story/tech/news/2017/12/20/microsoft-should-ban-private-arbitration-racial-discrimination-cases-too-lawmakers/969299001/ [https://perma.cc/SPG9-ULYD] (discussing how Microsoft abandoned its practice of mandating arbitration for sexual harassment and how members of the Congressional Black Caucus wrote to Microsoft to request that it stop using mandatory arbitration for racial discrimination cases, too).

232. See Developments in the Law—Labor and Employment Chapter Three: The Enforcement Opportunity: From Mass Arbitration to Mass Organizing, 136 HARV. L. REV. 1652, 1652–53 (2023) (discussing how mandatory arbitration clauses and class action waivers have led to "claim-suppressive effects" that "have eliminated up to ninety-eight percent of all employment claims and virtually insulated employers from liability altogether"); see also Daniel Wiessner, Twitter Stalling Hundreds of Ex-Workers' Legal Cases: Lawsuit, REUTERS (July 3, 2023, 1:16 PM), https://www.reuters.com/legal/litigation/twitter-stalling-hundreds-ex-workers-legal-cases-lawsuit-2023-07-03/ [https://perma.cc/Y5PV-3A5X] (describing how employees terminated by Twitter when Elon Musk took over leadership had pursued multiple mass individual arbitration claims after Twitter insisted upon arbitration and then once the mass individual arbitrations were filed, Twitter again delayed in pursuing resolution of those claims leading to the matter coming back into the courts); Stone & Colvin, supra note 196, at 17 (discussing how class bans associated with mandatory arbitration send messages to individuals with "low-value claims" that they can be deterred from joining together as a class when "it is only through collective efforts that consumer and employment rights can truly be protected").

233. *See* Glover, *supra* note 32, at 1289 (discussing mass arbitration strategy of filing scores of individual arbitration claims against the same business and how it can lead to settlement given the extensive filing fee costs for each individual arbitration filing).

234. *See Developments in the Law*, *supra* note 232, at 1652–53 (describing the mass arbitration strategy's successful attempts to turn the tables on businesses and how businesses have attempted to respond by adopting counter strategies to deter and defend against mass arbitration actions); *see also* Travis Lenkner & Amy Schmitz, *Arbitration Conversation No. 86: Travis Lenkner, Managing Partner of Keller Lenkner LLC., The Attorney Who Took On Amazon*, ARBITRATE.COM (May 30, 2023), https://arbitrate.com/arbitration-conversation-no-86-travis-lenkner-managing-partner-of-keller-lenkner-llc-the-attorney-who-took-on-amazon/ [https://perma.cc/3ENZ-UQGH] (capturing interview and conversation with Travis Lenkner describing mass individual arbitrations that his firm brought based on 75,000 individual arbitration demands against Amazon asserting legal claims that Amazon's Alexa service had recorded information without consumers' consent as part of a strategy to provide a mechanism for plaintiffs to respond to businesses who had been successful in using mandatory

of the lead attorneys in pursuing mass arbitration, Travis Lenkner, has explained that the mass arbitration idea developed as part of a strategy to respond to the strong endorsement of arbitration by businesses and the Court's broad enforcement.[235] Plaintiffs were being frustrated by not having any realistic opportunity for relief when they could not join their claims into a class resolution.[236] But when plaintiffs' attorneys started employing mass arbitration actions, the determination of businesses to ultimately resolve these disputes in arbitration appeared less desirous.[237]

In fact, the desire to enforce a class arbitration ban ignores many of the litigation benefits that a business gains from not being engaged in numerous and multiple litigation forums over the same matters as it helps them to prevent being subjected to inconsistent obligations. Despite business claims about the harms of class actions, those same businesses tend to benefit from and thrive by engaging in aggregate litigation.[238] They can aggregate overall damages and streamline adjudication of multiple claims by multiple plaintiffs into a single proceeding.[239] Nevertheless, as class action reform has evolved, businesses have attacked class litigation as a way to stifle class claims that may have negative economic impacts on businesses while those same businesses have also been criticized for using class action settlements to limit the overall recovery of plaintiffs. These responses allow businesses to have their cake (suppressing class claims) and eat it, too (controlling outcomes in a single litigation setting that is binding on all possible claimants through class litigation).

Business responses aimed at chilling mass arbitration actions include restructuring of fees by arbitration service providers to more fairly accommodate for business costs, including fee-shifting provisions for

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arbitration and class action bans to suppress plaintiffs' claims); Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, WALL ST. J. (June 1, 2021, 7:30 AM), https://www.wsj.com/articles/amazon-faced-75-000-arbitration-demands-now-it-says-fine-sue-us-11622547000 [https://perma.cc/94ZP-WHAG] (discussing Amazon mass arbitration case).

235. *See* Lenkner & Schmitz, *supra* note 234 (discussing mass arbitration with attorney Lenkner about same).

236. *Id.*

237. *See* Farivar, *supra* note 32 (discussing Twitter's cyclical responses of seeking to mandate arbitration but then attempting to not go forward with multiple arbitration after plaintiffs' attorneys sought mass arbitration through filing a large number of individual demands for arbitration); Randazzo, *supra* note 234 (referring to how Amazon backed away from its arbitration practice after the mass arbitration filings); Wiessner, *supra* note 232 (also discussing Twitter suits).

238. *See* Jack Zarin-Rosenfeld, *Built for Business: The Commercial Need for Aggregate Litigation*, 55 CONN. L. REV. 431, 476–92 (2023) (describing benefits of aggregate and class litigation due to mass consumer and employee litigation and also identifying disconnects between those businesses and others who have sought to limit class actions until the Court began allowing companies to ban class actions and force individual arbitrations).

239. *See id.* at 481–82.

frivolous claims to deter large numbers of claims, and adding pre-mediation sessions that limit time for recovery and include waiting periods.[240] Nevertheless, mass arbitration still represents a creative challenge to mandatory arbitration that the "judiciary is currently sympathetic to" and businesses may view it as a reason to stop using mandatory arbitration.[241] With big business mounting a concerted effort to challenge mass arbitration and given their base of power and the overall Supreme Court's jurisprudence, these efforts may soon lead to the end of mass arbitration.[242] As a result, plaintiffs and their advocates need to continue to capitalize on mass arbitration while they can.

Even if mass arbitration countermeasures end up being successful, another form of mass protest aimed at business practices could also be a responsive action—so-called mass organizing.[243] Worker-focused coalitions as mass racial organizing could include concrete measures such as forming a labor union. But these coalitions could also include more broader actions aimed at "plaintiff-side attorneys and organizers" developing "a collective platform that is explicitly and strategically tilted toward organizing further economic action, including pursuing subsequent legal action and political advocacy" to benefit workers.[244] In particular, this Article suggests that coalitions between BLM, labor organizers, and plaintiff-side attorneys who have been pursuing mass arbitration can develop into what will be coined herein as a Black Labor Matters mass racial organizing coalition.[245]

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240. *Developments in the Law*, *supra* note 232, at 1659.

241. *Id*.

242. *See generally* Andrew J. Pincus, Archis A. Parasharami, Kevin Ranlett, & Carmen Longoria-Green, *Mass Arbitration Shakedown: Coercing Unjustified Settlements*, CHAMBER OF COM. INST. LEG. REFORM (Feb. 28, 2023), https://instituteforlegalreform.com/research/mass-arbitration-shakedown-coercing-unjustified-settlements/ [https://perma.cc/GXT5-5MP2] (criticizing mass arbitration and calling for actions by neutral service providers to change their fee structures and asking for state bar associations to start ethical investigations of attorneys who bring mass arbitrations as well as other reforms).

243. *Developments in the Law*, *supra* note 232, at 1660–1675 (discussing how mass labor organizing of workers can spring nicely from coalitions starting with the mass arbitration approach).

244. *Id.* at 1661.

245. This collective would be a broad-based form of mass racial organizing, such as the "Black Workers Matter" movement, which is a "neighborhood-based, independent movement of workers fighting racism in hiring and on the job" in the Chicago, Illinois Austin area's "west side" and "near west suburban [tax increment financing] industrial districts." *See* Black Workers Matter, *We Fighting For*, https://blackworkersmatter.org/ [https://perma.cc/3ARP-X3N9] (last visited Nov. 10, 2023); *see also* Michael Romain, *West Side Labor Activists Take on Amazon*, AUSTIN WKLY. NEWS (Apr. 2, 2021), https://www.austinweeklynews.com/2021/04/02/west-side-labor-activists-take-on-amazon/ [https://perma.cc/EGR6-R62N] (describing how Black Workers Matter protested about working conditions at an Amazon facility in a western suburb of Chicago; Cicero, Illinois; after receiving a

This Black Labor Matters racial organizing coalition could stage protests and highlight broad-based concerns about working conditions being faced by Black workers while also seeking support from local or national politicians, unions, and other influencers.[246] Within the last few years, key labor organizing campaigns have been successful in some previously unorganized settings including Starbucks, Amazon, Trader Joe's, and Chipotle.[247] As Black workers faced the hardships and indignities arising from the COVID-19 pandemic, the need for Black worker coalitions became an important organizing tool.[248] Many of the so-called "essential workers" were Black workers.[249] All workers who were required to still work in the face of the pandemic began to realize their lack of bargaining power in negotiating about basic safety and other workplace concerns.[250] Other successful labor organizing campaigns have arisen all over the country and seem to include other essential workers including unique union organizing successes among healthcare workers and college campus workers.[251]

A landmark organizing campaign at an Amazon warehouse resulted from the formation of an internal union led in part by a Black worker, Christian Smalls, two years after he was fired for protesting about working

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report from a worker about horrid working conditions who wanted to remain anonymous out of a fear of retaliation by Amazon). Other organizations that might provide some tools to model are Black Workers for Justice and the Los Angeles Black Worker Center. *See About Us*, BLACK WORKERS FOR JUST., http://blackworkersforjustice.com/about-us/ (last visited Nov. 10, 2023), and *Los Angeles Black Worker Center*, UCLA LAB. CTR., https://www.labor.ucla.edu/what-we-do/black-worker-center/ (last visited Nov. 10, 2023).

246. *See, e.g.*, Romain, *supra* note 245 (describing efforts of Black Work Matters coalition boycott at Amazon that led to a media response by Amazon about its working conditions); *see also* Guyn, *supra* note 231 (describing how the Congressional Black Caucus appealed to Microsoft about its arbitration policy based upon race).

247. See John Logan, America is in the Middle of a Labor Mobilization Moment—With Self-Organizers at Starbucks, Amazon, Trader Joe's and Chipotle Behind the Union Drive, THE CONVERSATION (Sep. 2, 2022, 8:18 AM), https://theconversation.com/america-is-in-the-middle-of-a-labor-mobilization-moment-with-self-organizers-at-starbucks-amazon-trader-joes-and-chipotle-behind-the-union-drive-189826 [https://perma.cc/347T-7FC2].

248. *See* Sarah Anderson, Marc Bayard, & Rebekah Entralgo, *9 Black Labor Leaders and Advocates Reflect on the Pandemic and What Comes Next*, INEQUALITY.ORG (Sep. 2, 2021), https://inequality.org/research/labor-day-black-worker-views/ [https://perma.cc/48UP-SGSK].

249. *See* Tiana N. Rogers, Charles R. Rogers, Elizabeth VanSant-Webb, Lily Y. Gu, Bin Yan, & Fares Qeadan, *Racial Disparities in COVID-19 Mortality Among Essential Workers in the United States*, 12 WORLD MED. HEALTH POL'Y 311, 312 (2020), (finding that "Blacks hold more essential-worker positions").

250. *See* Abigail Abrams, *The Challenges Posed By COVID-19 Pushed Many Workers to Strike. Will the Labor Movement See Sustained Interest?*, TIME (Jan. 25, 2021, 12:46 PM), https://time.com/5928528/frontline-workers-strikes-labor / [https://perma.cc/ZCU2-ELGQ].

251. Andrea Hsu, *Union Wins Made Big News This Year. Here Are 5 Reasons Why it's Not the Full Story*, OPB (Dec. 27, 2022, 6:14 PM), https://www.opb.org/article/2022/12/27/union-wins-made-big-news-this-year-here-are-5-reasons-why-its-not-the-full-story/ [https://perma.cc/LB2Q-P4RE].

conditions.[252] Smalls, a popular warehouse employee, had worked for Amazon for five years without any concern until he staged a work stoppage at the Staten Island, New York warehouse over a lack of protective gear and hazard pay for employees.[253] After Amazon fired Smalls for purportedly not following safety protocols, he helped create an internal union of Amazon Staten Island warehouse workers.[254] In a report that was made public during the organizing campaign, Amazon's General Counsel, David Zapolsky, believed that having Smalls as the leader of the labor organizing campaign would lead to its demise.[255] Apparently, Amazon management did not consider Smalls "smart," "articulate," or polished enough to be the face charged with enrolling the workers into voting for a union and gaining public support for their actions.[256] Unfortunately for Amazon, it underestimated Smalls and the union he helped form won an election conducted by the National Labor Relations Board to become the bargaining representative for the Staten Island warehouse employees.[257]

Smalls has now become a national labor leader and a key figure in transforming the current role that Black labor can play in addressing the improvement of working conditions.[258] At least one commentator, Steven Greenhouse, has asserted that the "key to worker power in America" is to

252. Shirin Ghaffary, *Amazon Fired Chris Smalls. Now the New Union Leader Is One of its Biggest Problems.*, VOX (Jun. 7, 2022, 6:30 AM), https://www.vox.com/recode/23145265/amazon-fired-chris-smalls-union-leader-alu-jeff-bezos-bernie-sanders-aoc-labor-movement-biden [https://perma.cc/H4F8-XF4C].

253. *Id.*

254. *Id.*

255. *See* Julia Carrie Wong, *Amazon Execs Labeled Fired Worker 'Not Smart or Articulate' in Leaked PR Notes*, THE GUARDIAN (Apr. 2, 2020, 7:47 PM), https://www.theguardian.com/technology/2020/apr/02/amazon-chris-smalls-smart-articulate-leaked-memo [https://perma.cc/5CTC-B23S].

256. *Id.*

257. Ghaffary, *supra* note 252.

258. *See* Charlotte Alter, *He Came Out of Nowhere and Humbled Amazon. Is Chris Smalls the Future of Labor?* TIME (Apr. 25, 2022, 7:00 AM), https://time.com/6169185/chris-smalls-amazon-labor-union [https://perma.cc/5PZ9-HR9Q]; *see also* Anna Gifty Opoku-Agyeman & Katie Camacho Orona, *Amazon Union's Chris Smalls Is Part of the Legacy of Black Organizing*, TEENVOGUE (Apr. 5, 2022), https://www.teenvogue.com/story/amazon-union-chris-smalls [https://perma.cc/DB9L-6TZU] (describing the importance of Smalls' role as a Black labor leader and how his efforts to improve conditions for Black workers can help all workers); Alina Selyukh, *Chris Smalls Started Amazon's 1st Union. He's Now Heard From Workers at 50 Warehouses*, NPR (Apr. 6, 2022, 5:00 AM), https://www.npr.org/2022/04/06/1091130929/chris-smalls-amazon-union-50-warehouses [https://perma.cc/L9Y4-TPHG] (describing how Smalls was contacted by fifty different locations throughout the United States as well as locations in South Africa, India, the United Kingdom, and Canada about organizing workers to form a union).

"[l]et a thousand Chris Smalls bloom."[259] Also, a Time magazine article asked: "Is Chris Smalls the Future of Labor?"[260] Whether Smalls, himself, or a thousand like-minded Black organizers come forward via mass racial organizing aimed at improving working conditions for Black workers, this response can be quite powerful in changing corporate behavior as overall Americans are approving of labor unions at the highest rate since 1965.[261] These broad coalition responses can target businesses and employers who still openly choose to step around the legal prohibitions from EFASASHA regarding sexual discrimination claims and continue to pursue racial discrimination claims in arbitration.

VII. CONCLUSION: ENDING THE RACIAL TWO-STEP AROUND SEX CLAIMS VIA ARBITRATION

Employers and companies now face an important window in resolving race discrimination disputes. EFASASHA clearly prohibits sex discrimination claims from being arbitrated without expressly prohibiting the forced arbitration of race discrimination claims. While Congress has not yet addressed this discrepancy, there appears to be no good rationale for businesses to continue to pursue mandatory arbitration of racial discrimination claims when EFASASHA prohibits mandatory arbitration of sex discrimination claims.

If all the concerns about being forced into private resolution via mandatory arbitration were justified in passing EFASASHA, then those same concerns still exist for race discrimination claims, too. Judges will need to address some of these matters as parties face procedural and judicial efficiency challenges to arbitration of claims based on race when joined with sex claims through court proceedings pursuant to EFASASHA. "A single suit serves 'judicial economy, avoidance of

259. Steven Greenhouse, *The Key to Worker Power in America? Let a Thousand Chris Smalls Bloom*, THE GUARDIAN, (May 12, 2022, 8:53 AM), https://www.theguardian.com/commentisfree/2022/may/12/the-key-to-worker-power-in-america-let-a-thousand-chris-smalls-bloom [https://perma.cc/CW5P-HG4N].

260. *See* Alter, *supra* note 258.

261. *See* Andrew Elrod, *Union and Nonprofit Leaders: Labor Should Shift its Focus to Organizing Black Workers*, IN THESE TIMES (May 12, 2015), https://inthesetimes.com/article/organizing-black-workers [https://perma.cc/Q6PK-VSMT] (describing the impact on all workers and industries through organizing Black workers); Jennifer Elias & Amelia Lucas, *Employees Everywhere Are Organizing. Here's Why It's Happening Now*, CNBC (May 7, 2022, 12:05 PM), https://www.cnbc.com/2022/05/07/why-is-there-a-union-boom.html [https://perma.cc/ZH9Y-P68D] (discussing the impact of unions on younger adults from 18 to 34 who "approve of unions at a rate of 77%" and are being called "Gen U." Polls overall "showed 68% percent of Americans approve of labor unions—the highest rate since 71% in 1965"); Greenhouse, *supra* note 259 (discussing the broad impact of Smalls).

piecemeal litigation, and overall convenience of the parties' better than fragmentary litigation about the same issues."[262] Because EFASASHA states that claims "related" to its covered sex claims must also be litigated, it will not be surprising to discover that many claims based on race that are also related to or intersect with EFASASHA claims will be litigated as well rather than forced into arbitration. Regardless of what the proponents of EFASASHA may have expected regarding the narrow scope of its coverage, this result of joining arbitrable race discrimination claims in court may likely occur and already has occurred with some of the initial cases addressing EFASASHA. Rather than still force the resolution of a racial discrimination claim in arbitration, courts should ignore this two-step around the litigation of the sex discrimination claims when the racial claims are arguably related.

More pragmatically, businesses should abolish their forced arbitration policies for all discrimination claims.[263] Businesses should allow employees and consumers to proceed with both race and sex claims together in the court system. These businesses may even learn that any fears about large jury verdicts and excessive litigation costs via court resolution may prove to be irrational and unfounded.[264] Employees and consumers may also find that some disputes may be better resolved

262. *See* Christine P. Bartholomew & Anya Bernstein, *Ford's Underlying Controversy*, 99 WASH. U. L. REV. 1175, 1199 (2022).

263. *See* Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting) (finding "it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens."); Williams, *supra* note 83, at 1857 (calling for the end of all mandatory arbitration agreements for any types of discrimination and harassment to support "women of color" who "are more likely to be denied access to courts due to mandatory arbitration.").

264. *See* Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L. J. 399, 454–60 (2000) (describing irrational jury fears as a motivation for employer pursuit of forced arbitration of discrimination claims when employers prevail significantly in the court system especially through summary judgment motions and rushed to arbitration when they were not broken in using the court system); Shumway, *supra* note 185 (describing comments of corporate lawyer Goldstein regarding how class action waivers can backfire if individuals pursue mass arbitration claims similar to the claims pursued in a suit involving DoorDash and suggesting how employers may find better results in court despite employer fears about juries after a 2013 study demonstrated how summary judgment motions were granted for "nearly 4 in 5 employers facing discrimination charges") (citing Eric Bachman, *Summary Judgment Explained: The Critical Juncture in Employment Law Cases*, FORBES (Dec. 20, 2021, 1:14 PM), https://www.forbes.com/sites/ericbachman/2021/12/20/summary-judgment-explained-the-critical-juncture-in-employment-law-cases/ [https://perma.cc/565U-4M2Y]).

through private processes including arbitration[265] as long as they have the option to make that choice after a dispute arises.[266]

EFASASHA has removed the option of mandatory arbitration for sex claims and sent a strong signal to business leaders that they should end forced arbitration for all discrimination claims, especially claims based upon race. Also, businesses should embrace the complete abolition of forced arbitration because public support for this form of arbitration is waning.[267] These companies can lead the change even before all the stars align to mandate the abolition of forced arbitration for all discrimination claims through the passage of the FAIR Act or EFARDA or some other legislative action.

Many companies still considering the question of continuing race discrimination arbitration are also the same companies that made positive statements embracing BLM at the time of the George Floyd protests. Collective targeting of these businesses could demand they abandon forced arbitration of race discrimination claims as a step in demonstrating how they have not failed by merely making performative statements as a public showing without any real commitment to racial justice. Although social movements played a crucial role in passing EFASASHA to address forced arbitration of claims based upon sex, these movements have not yet resulted in any comprehensive and direct ban on forced arbitration for claims based upon race.

This Article asserted that no real basis exists to treat race claims any differently from sex claims when enforcing agreements to arbitrate against consumers or employees. With the passage of EFASASHA, sexual harassment and sexual assault claims have escaped the forced arbitration

265. *See* Michael Selmi, *Bending Towards Justice: An Essay in Honor of Charles Sullivan*, 50 SETON HALL L. REV. 1465, 1472–79 (2020) (debunking the literature suggesting that employees fare worse in arbitration than in the courts and suggesting that employees likely will have a hearing on the merits in arbitration rather than in the courts. This is because cases are dismissed through summary judgment motions and motion appeals where employees never have a hearing, and motion results are harder to compare with arbitration results or settlements in both venues).

266. *See* Jean R. Sternlight, *In Defense of Mandatory Binding Arbitration (If Imposed on the Company)*, 8 NEV. L.J. 82, 88–90 (2007) (arguing that mandatory arbitration should be imposed on businesses and employers after a dispute arises to address whether it presents a better option than litigation while giving employees and consumers and other little guys the option to choose after a dispute arises); *see also* Michael Z. Green, *Measures to Encourage and Reward Post-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 8 NEV. L.J. 58, 71–80 (2007) (asserting that Congress should create mechanisms and offering proposed legislation to create incentives for parties especially employees to reap benefits that may encourage post-dispute agreements to arbitrate employment discrimination claims). EFASASHA allows the option of still choosing to use arbitration after a dispute arises.

267. *See* Wright, *supra* note 229, at *18 (noting "changes in people's perceptions of arbitration"); Nadeau, *supra* note 10 (finding 84% of voters support legislation ending forced arbitration).

regime that the Supreme Court has heavily endorsed for thirty years in preventing so many individual employees and consumers from having their day in court. Unfortunately, discrimination claims brought by Black consumers and workers may still be forced into arbitration even after EFASASHA.

As attorneys representing employees and consumers become more creative in finding ways to circumvent forced arbitration clauses through mass racial arbitration and mass racial organizing, employers and businesses need to decide what the continued benefit would be in forcing arbitration of claims based on race when they may not insist upon the arbitration of claims based on sex. Rather than step around the sexual assault and sexual harassment claims to still pursue race claims in arbitration, employers and businesses should step back and think about the broader reputational dangers in treating race claims in a more differential manner. Regardless of how it occurs, the disparate dispute resolution processes based on race discrimination claims versus sex discrimination claims after EFASASHA must end. Employers and businesses should take the pragmatic approach to making this change to boost their reputations. Likewise, they can take the preemptive step of making this change before Congress passes additional legislation or mass racial arbitration or related mass racial organizing efforts demand such a change.