

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act and Textualism

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ABSTRACT

The Federal Arbitration Act's ("FAA") impact on workplaces is immeasurable. Congress passed the FAA a century ago to help merchants resolve disputes. Yet in the 2000s, the Supreme Court ignored its legislative history and exploited its skeletal text to extend it into employment settings. Now, approximately sixty million nonunionized workers must pursue claims against their employers in a private, often confidential, process that typically prohibits class actions and permits arbitrators to decide whether a case must be arbitrated.

But in March 2022, Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFAA"). This measure permits sexual misconduct victims to opt out of forced arbitration. Although the EFAA's passage received widespread attention, nobody has examined how it has functioned on the ground.

This Article reviews every electronically accessible EFAA case decided between March 2022 and August 2025 and reaches three conclusions. First, the statute's impact is unsettled. Courts disagree about its temporal scope and pleading standards, whether "sexual harassment" includes nonsexualized wrongdoing like gender-based discrimination, and its effect on claims not involving sexual impropriety. Second, this discord exists because the EFAA's language, like the FAA's, sweeps beyond some lawmakers' intentions. Courts reading the EFAA broadly take it at face value, and judges construing it narrowly rely on context and legislative history. Third, given textualism's primacy, expansive EFAA interpretations stand on firmer footing than limited readings. Yet with nine textualist Supreme Court Justices, this purposivism is unlikely to prevail, and the EFAA will deeply impact employment law.

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INTRODUCTION

In March 2017, Kirsten Tiger started working as a bartender at The Bridges, a country club in Rancho Santa Fe, California.¹ Her job quickly became a nightmare. One club member offered to pay her for sex, and another barraged her with X-rated texts and “half-naked pictures of himself.”² She began to hide in the kitchen to avoid certain patrons.³ The toxicity also extended to Tiger’s coworkers and supervisors.⁴ A club security guard propositioned Tiger and once “reached into [her] car, pulled her hair, and explained that he would do this to her in bed.”⁵ When Tiger reported the incident, her manager responded: “Women

¹ See Complaint for Damages at 3, *Tiger v. Bridges Club at Rancho Santa Fe*, No. 37-2022-00032467-CU-OE-NC, 2023 Cal. Super. LEXIS 17843 (Mar. 17, 2023) [hereinafter *Tiger Complaint*].

² *Id.* at 3, 5.

³ *Id.* at 4, 6.

⁴ See *id.* at 6.

⁵ *Id.*

should be at home making babies.”⁶ Finally, in April 2022, Tiger quit.⁷ Four months later, she sued The Bridges in state court for twelve causes of action, including sexual harassment, breach of contract, negligent supervision and retention, and failure to provide meal and rest breaks.⁸

* * *

In early 2022, Yanni Michael, a transgender female, became a server at Bravo Brio Restaurant in Freehold, New Jersey.⁹ Michael’s supervisor refused to use her preferred name, called her “a boy” or by homophobic slurs, declared that “there’s [sic] only two genders,” spread rumors that Michael was dating a coworker, and told Michael, “I bet you take it like a little bitch!”¹⁰ On busy nights, Michael’s supervisor assigned her fewer tables than her cisgender peers, preventing her from earning tips.¹¹ When Michael confronted him about this issue, he replied: “You need to man up and use what God gave you between your legs.”¹² Michael reported this to Bravo Brio’s regional manager and human resources department, and they responded by suspending her.¹³ Michael resigned and sued Bravo Brio for sex discrimination and retaliation.¹⁴

* * *

In 2019, Katie Ellen Puris joined TikTok’s New York office as Managing Director and U.S. Head of Business Marketing.¹⁵ Executives at ByteDance, TikTok’s parent company, made her life miserable because of her gender, age, and disability.¹⁶ One refused to give her tasks because Puris celebrated her team’s successes and thus did not conform to the executive’s belief that women “should remain quiet and humble at all times.”¹⁷ In addition, Puris was in her late forties, and ByteDance’s founder made it no secret that he preferred younger workers.¹⁸ Finally, in 2021, Puris’s long hours began to take a toll, and her health declined.¹⁹

⁶ *Id.* at 6–7.

⁷ *Id.* at 7.

⁸ *See id.* at 7–19.

⁹ *See* Complaint at 2, Michael v. Bravo Brio Rests., No. 23-3691, 2024 WL 2923591 (D.N.J. June 10, 2024).

¹⁰ *Id.* at 3–5 (emphasis omitted).

¹¹ *See id.* at 5.

¹² *Id.* (emphasis omitted).

¹³ *See id.* at 6.

¹⁴ *See id.* at 7–8.

¹⁵ Complaint at 1, Puris v. TikTok Inc., No. 24-cv-00944, 2025 WL 343905 (S.D.N.Y. Jan. 30, 2025) [hereinafter *Puris* Complaint].

¹⁶ *See id.* at 1–27.

¹⁷ *Id.* at 8–9.

¹⁸ *See id.* at 12.

¹⁹ *Id.* at 13.

Yet when she took time off for doctor's visits, management punished her for going on vacation.²⁰

The last straw came in June 2022, after a company dinner in Cannes, France.²¹ During the event, an employee with another company got drunk, physically forced Puris to sit next to him, and repeatedly touched her, making her uncomfortable.²² She informed her boss, but TikTok did not take immediate action, forcing her to miss meetings for fear of encountering that man again.²³

Three months later, Puris formally complained to human resources "about the treatment of women at TikTok, age discrimination, the Cannes incident, and the work environment at the company."²⁴ TikTok fired her.²⁵ In 2024, she sued TikTok and ByteDance in federal court for violating the Family and Medical Leave Act of 1993²⁶ and for age, gender, and disability discrimination.²⁷

* * *

Historically, these kinds of plaintiffs would not have seen the inside of a courtroom. Like an estimated sixty million nonunionized American workers,²⁸ they were bound by forced arbitration clauses.²⁹ They had agreed to pursue complaints against their employers in a parallel justice system in which hearings are private, awards are often confidential, class actions are almost always forbidden, and arbitrators frequently decide whether the matter even belongs in arbitration.³⁰

²⁰ See Second Amended Complaint at 63, *Puris*, No. 24-cv-00944, 2025 WL 343905.

²¹ See *Puris* Complaint, *supra* note 15, at 24.

²² See *id.*

²³ See *id.* at 25–26.

²⁴ *Puris*, 2025 WL 343905, at *4.

²⁵ *Id.*

²⁶ Pub. L. No. 103-3, 107 Stat. 6 (codified in scattered sections of 29 U.S.C.).

²⁷ See *Puris* Complaint, *supra* note 15, at 27–33.

²⁸ See Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST., 1–2 (Apr. 6, 2018), <https://files.epi.org/pdf/135056.pdf> [<https://perma.cc/LR87-BUD6>].

²⁹ See Declaration of Kelly Ann Rogers in Support of Defendant's Petition to Compel Arbitration at 2, *Tiger v. Bridges Club at Rancho Santa Fe*, No. 37-2022-00032467-CU-OE-NC, 2023 Cal. Super. LEXIS 17843 (Mar. 17, 2023); Memorandum of Law in Support of Defendant's Motion to Compel Arbitration at 1–2, *Michael v. Bravo Brio Rests.*, No. 23-3691, 2024 WL 2923591 (D.N.J. June 10, 2024); Defendant TikTok Inc., ByteDance Ltd., & ByteDance Inc.'s Memorandum of Law in Support of Their Motion to Compel Arbitration and Stay the Action at 2, *Puris*, No. 24-cv-00944, 2025 WL 343905.

³⁰ See, e.g., AM. ARB. ASS'N, EMPLOYMENT/WORKPLACE ARBITRATION RULES AND MEDIATION PROCEDURES 18 (2025), https://adr.org/media/0vrpbnm0/2025_employment_arbitration_rules.pdf [<https://perma.cc/T84H-6W7B>] ("The arbitrator and the [American Arbitration Association] shall maintain the privacy of the hearings unless the law provides to the contrary."); JAMS, JAMS EMPLOYMENT ARBITRATION RULES AND PROCEDURES 13 (2021), https://jamsadr.widen.net/s/6k-8ps78qvc/jams_employment_arbitration_rules-2021 [<https://perma.cc/Z7KF-ZU7T>] ("JAMS and the [a]rbitrator shall maintain the confidential nature of the [a]rbitration proceeding and the [a]ward . . ."); *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 187 (2019) (explaining that the FAA

For decades, fine-print dispute-resolution terms like these have radiated with the ferocious power of the Federal Arbitration Act (“FAA”).³¹ Over a century ago, Congress passed the FAA to abolish ancient strands of the common law that made it difficult to obtain specific performance of a predispute arbitration agreement.³² Lawmakers intended the statute to be a mere procedural rule for federal courts that would help merchants resolve simple breach of contract claims quickly and informally.³³ But because the FAA is “a relic from a far more innocent age of drafting,” few of these limits appear on its face.³⁴ Since the 1980s, the U.S. Supreme Court has, therefore, ignored the law’s relatively modest ambitions and exploited its open-ended text to transform it into a juggernaut.³⁵

Forced arbitration is especially controversial in employment cases. For one, the FAA was not supposed to apply to employment agreements.³⁶ Yet in 2001, the Court held otherwise, christening the era of forced arbitration in the workplace.³⁷ Also, requiring employees to “consent” to arbitration seems particularly coercive. As the California Supreme Court once remarked, “[F]ew employees are in a position to refuse a job because of an arbitration requirement.”³⁸ Finally, unlike small-dollar consumer grievances or bloodless commercial conflict, employment matters can involve discrimination, intolerable work conditions, or failure to pay earned wages.³⁹ Arguably, these high-stakes claims do not belong in a forum that has a reputation “as the place where ‘lawsuits go to die.’”⁴⁰

Despite these concerns, progressives have long been unable to achieve reform. Since 2007, congressional Democrats have repeatedly introduced the Arbitration Fairness Act (“AFA”)⁴¹ and the Forced

includes a powerful default presumption against class proceedings); David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 370 (2018) (describing the ubiquity of delegation clauses, which permit arbitrators to decide whether a claim falls within the scope of an enforceable arbitration provision).

³¹ 9 U.S.C. §§ 1–16.

³² See H.R. REP. NO. 68-96, at 1 (1924) (explaining that Congress intended to put arbitration agreements “upon the same footing as other contracts”).

³³ See *infra* text accompanying notes 97–102.

³⁴ Alan Scott Rau, *Everything You Really Need to Know About “Separability” in Seventeen Simple Propositions*, 14 AM. REV. INT’L ARB. 1, 32 (2003).

³⁵ See *infra* notes 106–19 and accompanying text.

³⁶ See *infra* notes 112–14 and accompanying text.

³⁷ See *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

³⁸ *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000).

³⁹ See Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 682–83, 683 n.18 (2018).

⁴⁰ *Hawkins v. Region’s*, 944 F. Supp. 2d 528, 532 (N.D. Miss. 2013).

⁴¹ S. 1782, 110th Cong. (2007).

Arbitration Injustice Repeal Act (“FAIR Act”),⁴² which would nullify predispute agreements to arbitrate “employment disputes.”⁴³ Lobbyists and organizations like the U.S. Chamber of Commerce, however, have marshaled enough opposition to defeat these measures.⁴⁴ Moreover, the FAA preempts state laws that discriminate against arbitration.⁴⁵ Thus, the statute has overridden countless attempts by state lawmakers to exempt socially beneficial claims or vulnerable parties from private tribunals.⁴⁶

But in March 2022, forced arbitration’s critics finally notched what looked like a significant yet narrow victory. Congress passed, and President Joe Biden signed, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (“EFAA”),⁴⁷ the first major amendment to the FAA in its long history.⁴⁸ The new statute gives victims of sexual misconduct the right to opt out of predispute arbitration clauses. Its core provision, 9 U.S.C. § 402(a), declares that “no predispute arbitration agreement . . . shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to [a] sexual assault dispute or [a] sexual harassment dispute.”⁴⁹

The EFAA succeeded after so many previous anti-arbitration bills had failed largely because of the perception that it addressed a pressing and discrete problem. When the statute passed, the #MeToo movement had been gathering momentum for about half a decade.⁵⁰ Polling revealed widespread support for increasing awareness of sexual misconduct at work,⁵¹ and activists had identified forced arbitration as “a sexual harasser’s best friend” because “[i]t keeps proceedings secret, findings sealed, and victims silent.”⁵² The EFAA achieved a surprising

⁴² S. 610, 116th Cong. (2019).

⁴³ See *id.* § 2; Arbitration Fairness Act of 2007, S. 1782, 110th Cong. § 2 (2007).

⁴⁴ See Andrew Garcia, *The Fairness Agenda: Arbitration Legislation Advances in the Wake of a Critical Report*, 37 ALTS. TO HIGH COST LITIG. 157, 157 (2019).

⁴⁵ See, e.g., *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (“Congress precluded States from singling out arbitration provisions for suspect status . . .”).

⁴⁶ See *infra* text accompanying notes 136–40.

⁴⁷ 9 U.S.C. §§ 401–402.

⁴⁸ See Michael J. Yelnosky, *Fully Federalizing the Federal Arbitration Act*, 90 OR. L. REV. 729, 745 (2012) (“The FAA was enacted in 1925, and it has never been meaningfully amended.”).

⁴⁹ 9 U.S.C. § 402(a).

⁵⁰ See, e.g., Margaret Renkl, *The Raw Power of #MeToo*, N.Y. TIMES (Oct. 19, 2017), <https://www.nytimes.com/2017/10/19/opinion/the-raw-power-of-metoo.html> [<https://perma.cc/T732-V7CX>].

⁵¹ See Anna Brown, *More than Twice as Many Americans Support than Oppose the #MeToo Movement*, PEW RSCH. CTR. (Sep. 29, 2022), <https://www.pewresearch.org/social-trends/2022/09/29/more-than-twice-as-many-americans-support-than-oppose-the-metoo-movement/> [<https://perma.cc/75NB-FAA3>].

⁵² Gretchen Carlson & Bethany Cianciolo, *Gretchen Carlson: The Supreme Court Tried to End #MeToo. Here’s How We’re Fighting Back.*, FORTUNE: COMMENTARY (May 31, 2018, at 11:06

amount of support from the right. In sharp contrast to the AFA and the FAIR Act, which split Congress down party lines, the statute boasted eight Republican cosponsors in the House and ten in the Senate.⁵³ During the floor debate on the bill, these unlikely allies expressed their support for a targeted intervention that “ensure[s] [that] survivors of sexual assault [and sexual harassment] have their voices heard.”⁵⁴

The EFAA’s passage made a splash in the media⁵⁵ and law journals.⁵⁶ Yet since then, it has received less attention. How it is playing out on the ground remains unclear.⁵⁷

This Article fills this gap by collecting every available case involving the EFAA between March 2022, when it became operational, and the end of June 2025. It uses this dataset of 230 opinions from twenty-five jurisdictions to make three main points.

First, the EFAA has bred vast confusion. Indeed, courts disagree about each of the statute’s key moving parts. For one, about a third of

ET), <http://fortune.com/2018/05/31/gretchen-carlson-supreme-court-ruling-arbitration-metoo/> [<https://perma.cc/C837-WE6L>].

⁵³ See Cosponsors for H.R. 4445: Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/4445/cosponsors?pageSort=alphaByParty> [<https://perma.cc/4W9C-8U6D>] (last visited June 3, 2026); Cosponsors for S. 2342: Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/senate-bill/2342/cosponsors?pageSort=alphaByParty> [<https://perma.cc/3PCV-DKLW>] (last visited June 3, 2026).

⁵⁴ 168 CONG. REC. S625 (daily ed. Feb. 10, 2022) (statement of Sen. Joni Ernst).

⁵⁵ See, e.g., Tom Spiggle, *Congress Passes New Law Ending Forced Arbitration for Sexual Harassment and Assault Claims*, FORBES (Feb. 18, 2022, at 03:42 ET), <https://www.forbes.com/sites/tomspiggle/2022/02/16/congress-passes-new-law-ending-forced-arbitration-for-sexual-harassment-and-assault-claims/> [<https://perma.cc/6UZP-RGUA>] (describing the statute as a rare exception to “the bitter partisan divide in Congress”).

⁵⁶ Several thoughtful articles about the EFAA appeared shortly after the statute became law. Because these pieces followed so closely on the heels of the legislation, however, they do not address how judges have interpreted it. See, e.g., Myriam Gilles, *Arbitration’s Unraveling*, 172 U. PA. L. REV. 1063, 1075 (2024) (“As of this writing, only a handful of federal district courts have engaged with these questions.”); Michael Snyder, *The Super Statute’s Kryptonite: The FAA After EFASA-SHA*, 38 NOTRE DAME J.L. ETHICS & PUB. POL’Y 435, 465 (2024) (“[C]ourts around the country have barely scratched the surface.”); 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, 20 (2023) (“There are very few written opinions interpreting [the EFAA]”); Emma Kate Dillon, Comment, *Bombshell Bipartisanship: The Fate of Related Claims Within the Confines of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, 91 UMKC L. REV. 909, 923 (2023) (“As of July 2022, the [statute] ha[s] been addressed in only a handful of cases.”); 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, 1 (offering a helpful analysis of the statute but not citing a single case interpreting it).

⁵⁷ After this Article had been accepted for publication, this Author became aware of two other pieces that analyze the case law interpreting the EFAA. See generally Deborah Widiss, *The Sexual Harassment Silo*, 174 U. PA. L. REV. 699 (2026) (analyzing case law regarding the EFAA); Tamar Meshel, *Chapter 4 of the Federal Arbitration Act: An Empirical Analysis*, 27 CARDOZO J. CONFLICT RESOL. (forthcoming 2026) (same).

the decisions so far revolve around whether a complaint satisfies the EFAA's timing provision, which limits the statute to "any dispute or claim that arises or accrues on or after" March 3, 2022.⁵⁸ This language is hard to decipher. For example, as the Sixth Circuit noted, "[W]e lack a set legal framework to determine when a dispute arises."⁵⁹ Some judges hold that the pivotal moment is when the plaintiff was injured, but others try to pinpoint when the parties first disagreed over the underlying facts.⁶⁰

Similarly, courts split over the process for deciding whether the statute applies. Most require the complaint to comply with Federal Rule of Civil Procedure 12(b)(6) by stating a facially viable cause of action for sexual misconduct.⁶¹ A small but growing cadre of judges, however, reject this approach on the grounds that it "reads a plausibility requirement in the EFAA that is not explicit in the statutory text."⁶² Instead, these courts ask the plaintiff to assert a nonfrivolous cause of action for sexual harassment.⁶³

Another source of dissensus is what the EFAA means by "sexual harassment." For most people, that phrase brings to mind "uninvited and unwelcome verbal or physical behavior of a sexual nature."⁶⁴ Conversely, under many civil rights laws, "sexual harassment" is a capacious term that includes any discrimination *because of sex*—not just *sexualized* wrongdoing.⁶⁵ If the EFAA incorporates this view, it applies to plaintiffs who have suffered a hostile work environment due to their *gender*.⁶⁶

Lastly, there are crucial open questions about the EFAA's effect. Here is how a federal district court in Michigan described the conundrum: "[I]f a single case includes both claims of sexual harassment/assault and other kinds of claims . . . , does the EFAA preclude enforcement of an otherwise applicable arbitration agreement as to the whole

⁵⁸ Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, § 3, 136 Stat. 26, 28 (2022), *reprinted in* 9 U.S.C. § 401 note.

⁵⁹ See *Memmer v. United Wholesale Mortg., LLC*, 135 F.4th 398, 409 (6th Cir. 2025).

⁶⁰ See *infra* Section II.C.1.a.

⁶¹ See *infra* Section II.C.2.

⁶² *Gill v. U.S. Data Mgmt.*, No. 24-cv-05255, 2024 WL 5402494, at *3 (C.D. Cal. Dec. 2, 2024).

⁶³ See *infra* Section II.C.2. No case has grappled in depth with what pleading standard governs claims of sexual assault. *Cf. Delirium TV, LLC v. Dang*, 714 S.W.3d 640, 645 (Tex. App. 2024) (suggesting that the rule might be different in sexual assault cases).

⁶⁴ *Simmons v. Nev. Sys. of Higher Educ.*, No. 19-cv-00382, 2020 WL 607123, at *5 (D. Nev. Feb. 6, 2020) (quoting *Sexual Harassment*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sexual%20harassment> [<https://perma.cc/D6Q2-HHY2>] (last visited June 6, 2026)).

⁶⁵ See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998).

⁶⁶ See *infra* Section II.C.3.a; see also Sperino, *supra* note 56, at 18–19 (arguing that the EFAA's definition of "sexual harassment" "embraces sexualized harassment, sex-based harassment, pregnancy harassment, and harassment because of sexual orientation and gender identity").

case or just the sexual harassment/assault claims?”⁶⁷ As the judge noted, “[T]his . . . will very likely be a matter for the United States Supreme Court to decide.”⁶⁸

This tees up this Article’s second contribution, which shows that much of this doctrinal chaos exists because the EFAA, just like the FAA, boasts statutory language that ranges beyond what some members of Congress believed were its goals. For the most part, the judges who have read the EFAA as partially retroactive, as imposing a minimalist pleading standard, as applying to anyone who has suffered discrimination because of sex, or as covering every claim in a plaintiff’s lawsuit have focused on the statute’s “text, interpreting it in accordance with its plain meaning.”⁶⁹ Conversely, the courts that have endorsed defendants’ narrow readings hone in on the law’s comparatively narrow “stated purpose” of “empower[ing] sexual harassment claimants to pursue their claims in a judicial, rather than arbitral, forum.”⁷⁰ Accordingly, the EFAA’s legacy hinges on whether judges apply the statute’s text or objectives.

Third, given this dynamic, this Article argues that the EFAA is much broader than many people believe.⁷¹ The point of departure here is to recognize that the current Supreme Court will enforce the statute as written.⁷² Textualists currently “occupy all nine seats,”⁷³ and the Court has recently construed the FAA literally, even when this has meant ruling against employers.⁷⁴ Seen through this prism, the EFAA governs a surprisingly large class of plaintiffs and causes of action.

⁶⁷ *Williams v. Mastronardi Produce, Ltd.*, No. 23-13302, 2024 WL 3908718, at *6 (E.D. Mich. Aug. 22, 2024).

⁶⁸ *Id.* at *7.

⁶⁹ *See, e.g., Bulic v. Celebrity Cruises, Inc.*, No. 25-21231-civ, 2025 WL 1783865, at *3–5 (S.D. Fla. June 27, 2025).

⁷⁰ *Newman v. Ambry Genetics Corp.*, No. 24-cv-00887, 2024 WL 4164738, at *5–6 (D.S.C. Apr. 26, 2024), *report and recommendation adopted in part, rejected in part*, No. 24-cv-00887, 2024 WL 3811606 (D.S.C. Aug. 14, 2024).

⁷¹ A paper published shortly after the EFAA’s passage argued that Congress had restricted the statute’s coverage by inserting it into the FAA, thus subjecting it to state law for cases in which the FAA does not apply. *See* David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J.F. 1, 2 (2022). Even though this Article does not address the intersection of the EFAA, the FAA, and state law due to space constraints, it briefly notes that the intersection is unsettled. *Compare* *Griffin v. DHSE, Inc.*, No. cvPS2401047, 2024 Cal. Super. LEXIS 35148, at *5 (Aug. 22, 2024) (holding that the EFAA does not apply when a contract “clearly states that the parties are electing California law to apply and makes no reference to the FAA applying”), *with* *Casey v. Super. Ct. of Contra Costa Cnty.*, 329 Cal. Rptr. 3d 518, 527 (Ct. App. 2025) (opining that “relying on [a state law] choice-of-law provision would directly contravene Congress’s purpose and objectives in enacting the EFAA”).

⁷² *See infra* Section III.A.

⁷³ Ryan H. Nelson, *An Employment Discrimination Class Action by Any Other Name*, 91 FORDHAM L. REV. 1425, 1482 n.341 (2023).

⁷⁴ *See infra* Section III.A.

The cases at the start of this Article provide a glimpse of the statute's potential. For one, recall that Kirsten Tiger not only sued for sexual harassment; she also contended that The Bridges breached a contract to pay her a bonus and violated the labor code by failing to provide meal breaks, rest periods, and a proper wage statement.⁷⁵ A California trial court noted that § 402(a) of the EFAA declares that “no predispute arbitration agreement . . . shall be valid or enforceable *with respect to a case* which . . . relates to the . . . sexual harassment dispute.”⁷⁶ Because this “text [is] clear, unambiguous, and decisive,” the court refused to send any part of Tiger’s “case” to arbitration.⁷⁷ This feature of the EFAA may be described as the “railroad switch”: If a plaintiff flips the statute into its “on” position, it diverts *every claim* against *every defendant* into the judicial system.

Yanni Michael’s lawsuit showcases another way in which, properly understood, the EFAA sweeps broadly. The EFAA defines a “sexual harassment dispute” as a “dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.”⁷⁸ This link to how “applicable . . . law”—not lay people—conceptualizes “sexual harassment” extends the statute to plaintiffs like Michael who did not suffer sexualized wrongdoing.⁷⁹ Indeed, a New Jersey federal judge found that Michael’s allegation that Bravo Brio “discriminated against her because she is a transgender female” triggered the EFAA, although it “d[id] not include the words ‘sexual assault’ or ‘sexual harassment.’”⁸⁰

Similarly, Katie Ellen Puris identified multiple “sexual harassment dispute[s].”⁸¹ For one, her assertion that TikTok fired her after she complained that an executive with another company had behaved inappropriately at the dinner in Cannes is a “dispute relating to conduct that is alleged to constitute sexual harassment”—even though the wrongdoer did not work at TikTok.⁸² Alternatively, the EFAA absorbs state and municipal civil rights laws, some of which are very friendly to plaintiffs.⁸³ For example, Puris stated a claim against TikTok and ByteDance for a hostile work environment under the New York City Human Rights Law,⁸⁴ which only requires an employee to establish

⁷⁵ See *Tiger Complaint*, *supra* note 1, at 15–19.

⁷⁶ *Tiger v. Bridges Club at Rancho Santa Fe*, No. 37-2022-00032467-CU-OE-NC, 2023 Cal. Super. LEXIS 17843, at *6 (Mar. 17, 2023) (emphasis added) (quoting 9 U.S.C. § 402(a)).

⁷⁷ *Id.* at *10.

⁷⁸ 9 U.S.C. § 401(4).

⁷⁹ See *supra* notes 9–14 and accompanying text.

⁸⁰ *Michael v. Bravo Brio Rests.*, No. 23-3691, 2024 WL 2923591, at *6 (D.N.J. June 10, 2024).

⁸¹ See *Puris v. TikTok Inc.*, No. 24-cv-00944, 2025 WL 343905, at *5 (S.D.N.Y. Jan. 30, 2025).

⁸² *Id.*

⁸³ See *infra* Sections II.C.3.b–c.

⁸⁴ N.Y.C. ADMIN. CODE §§ 8-101 to 8-134 (2025).

that they were “treated ‘less well’ because of [their] gender.”⁸⁵ Either claim, standing alone, was enough to activate the railroad switch and exempt her entire sprawling lawsuit, with its nine causes of action, from arbitration.⁸⁶

It may be helpful to clarify three issues at the outset. First, this Article concedes that not every lawmaker who supported the EFAA read it the same way. Because “Congress is a ‘they’ and not an ‘it,’” legislation stems from “so many brains with so many different objectives that it is almost facetious to impute a joint goal or purpose to the collectivity.”⁸⁷ Indeed, the EFAA’s legislative history is often ambiguous. Yet these sources also establish that at least *some* members of Congress who supported the bill likely did not foresee how broad it would turn out to be.⁸⁸ Second, and similarly, when this Article says that Congress’s goals with the EFAA were somewhat modest, it does not mean to diminish the accomplishment of the stakeholders who helped pass it. Amending a one-hundred-year-old and deeply polarizing law for the first time in an era of partisan rancor is remarkable. Third, this Article will use a thin definition of “textualism.” As readers may know, “textualism” is not monolithic, and there are raging debates over its contours.⁸⁹ Nevertheless, this Article’s thesis only depends on the idea that contemporary statutory interpretation typically starts and stops with unambiguous legislative text.⁹⁰

This Article contains three Parts. Part I provides background. It sketches the long-running controversy over forced arbitration and offers a primer on the EFAA. Part II is this Article’s descriptive heart. It surveys all 230 EFAA decisions that were accessible on Bloomberg, Westlaw, and Lexis between the beginning of March 2022 and the end of August 2025 and reveals that courts that interpret the statute textually have held that it is quasi-retroactive, is easy to invoke, and governs a variety of claims that do not involve sexual assault or sexual harassment. Part III contends that the Supreme Court is likely to honor the EFAA’s sweeping language, making the statute a formidable weapon for aggrieved employees.

⁸⁵ *Puris*, 2025 WL 343905, at *10 (quoting *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 110 (2d Cir. 2013)).

⁸⁶ *See id.* at *5–6.

⁸⁷ *United States v. Mitra*, 405 F.3d 492, 495 (7th Cir. 2005).

⁸⁸ *See* H.R. REP. NO. 117-234, at 3–4 (2022) (describing the EFAA as opening the courthouse door to a relatively narrow group of plaintiffs).

⁸⁹ *See, e.g.*, Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 267 (2020) (discussing the tension between “formalistic textualism,” which elevates statutory language above all, and “flexible textualism,” which considers context and consequences).

⁹⁰ *See, e.g.*, *Dep’t of Hous. & Urb. Dev. v. Rucker*, 535 U.S. 125, 132 (2002) (“[R]eference to legislative history is inappropriate when the text of the statute is unambiguous.”).

I. FROM THE FAA TO THE EFAA

This Part sets the stage for the rest of this Article. It educates generalist readers about the FAA, focusing on how the Supreme Court has expanded its ambit and impact over the past century by exploiting its imprecise text and ignoring its legislative history. It then pivots to the EFAA, highlighting that some members of Congress saw the new law as a tailored response to the #MeToo movement.

A. *The FAA*

Although Congress passed the FAA to help merchants settle conflicts privately, arbitration now “pervade[s] virtually every corner of the daily economy.”⁹¹ How did this metamorphosis occur? The answer is complex and contested,⁹² but this Section explores one key factor: the discrepancy between the statute’s text and its goals.

Congress enacted the FAA in 1925.⁹³ At common law, courts refused to grant the remedy of specific performance for breach of a predispute arbitration clause.⁹⁴ The FAA—the brainchild of business groups and the American Bar Association—sought to abolish this “anachronism.”⁹⁵ The statute does so through its cornerstone, § 2, which instructs judges to enforce arbitration provisions in agreements that involve interstate commerce unless the arbitration provisions violate a garden-variety contract rule like fraud, duress, lack of consideration, or unconscionability.⁹⁶

Lawmakers meant to limit the FAA in several ways but failed to make these restrictions explicit. The statute’s legislative history suggests that it does not govern adhesion contracts⁹⁷ and is a procedural rule for

⁹¹ Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1428–29 (2008).

⁹² See generally IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* (1992) (describing the FAA’s ascent and interpretations); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006) (same); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5 (2004) (same); Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002) (same).

⁹³ See Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16).

⁹⁴ See, e.g., *Kill v. Hollister* (1746) 95 Eng. Rep. 532, 532 (KB); *Vynior’s Case* (1609) 77 Eng. Rep. 597, 599 (KB).

⁹⁵ H.R. REP. NO. 68-96, at 1 (1924).

⁹⁶ See 9 U.S.C. § 2.

⁹⁷ During the testimony of W.H.H. Piatt, who chaired an American Bar Association Committee that supported the statute, Senator Thomas Walsh broached the topic:

The trouble about the matter is that a great many of these contracts that are entered into are really not voluntarily [sic] things at all. . . . It is the same with a good many contracts

federal courts that neither applies in state courts nor preempts state law.⁹⁸ Yet the FAA is silent about these issues. This silence is almost certainly because Congress never even thought that the statute might encroach on these spheres. Section 2 applies to contracts that implicate interstate commerce;⁹⁹ in turn, before the New Deal, few transactions satisfied that criterion.¹⁰⁰ Thus, § 2's "involving commerce" element cabined its scope to high-value, cross-border agreements and excluded consumer contracts and the parochial exchanges that bred litigation in state court.¹⁰¹

Likewise, Congress intended to exclude employment contracts from § 2. Section 1 declares that the FAA does not "apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce."¹⁰² Secretary of Commerce Herbert Hoover proposed this language to assuage organized labor's concerns that the statute might apply to certain workers.¹⁰³ Section 1 did not flatly exclude employment contracts because, in 1925, few such agreements had a sufficient link to interstate commerce to trigger § 2.¹⁰⁴ As a result, lawmakers assumed that they only needed to carve out these possible exceptions: employment contracts involving people who

of employment. A man says, "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court . . .

Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary, 67th Cong. 9 (1923) [hereinafter *Sales and Contracts Hearing*]. Piatt responded that he "would not favor any kind of legislation that would permit . . . forcing a man to sign that kind of [sic] a contract" and explained that an arbitration agreement is simply "a contract between merchants one with another, buying and selling goods." *Id.* at 10.

⁹⁸ The FAA's legislative record suggests that it rests largely on Congress's Article III power "to establish and control inferior [f]ederal courts," which is a power that does not extend into state courts. *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomm. of the H. Comm. and S. Comm. on the Judiciary*, 68th Cong. 37 (1924) [hereinafter *Joint Hearings*]. The statute also lacks an express preemption clause, see *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989), and some of its provisions, other than § 2, regulate federal courts, see, e.g., 9 U.S.C. §§ 3–4. Finally, Julius Henry Cohen, the FAA's draftsman, assured the Judiciary Committee that the statute "relate[s] solely to procedure of the [f]ederal courts," "is no infringement upon the right of each [s]tate," and cannot "force an individual [s]tate into an unwilling submission to arbitration enforcement." *Joint Hearings, supra*, at 37, 40.

⁹⁹ See 9 U.S.C. § 2.

¹⁰⁰ See, e.g., *The Employers' Liability Cases*, 207 U.S. 463, 493 (1908) (observing that Congress could not regulate wholly intrastate activity).

¹⁰¹ *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1085 (9th Cir. 1998), *abrogated by* *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

¹⁰² 9 U.S.C. § 1.

¹⁰³ See *Sales and Contracts Hearing, supra* note 97, at 14 (suggesting an amendment to defuse the "objection . . . to the inclusion of workers' contracts in the law's scheme").

¹⁰⁴ See *supra* note 100 and accompanying text.

moved between states on the job, such as “seamen, railroad employees,” and others like them.¹⁰⁵

When Congress’s Commerce Clause power exploded, however, so too did the scope of the FAA.¹⁰⁶ In a long and polarizing string of opinions, the Court took the statute at face value and “[p]lay[ed] ostrich” with its history and legislative record.¹⁰⁷ For example, in 1984’s *Southland Corp. v. Keating*,¹⁰⁸ the Court determined that § 2 governs state courts and eclipses state law.¹⁰⁹ The Justices reasoned that § 2 requires an arbitration clause to appear in an agreement with a nexus to interstate commerce and to comply with black letter contract doctrines, but “nothing in the Act indicat[es] that the broad principle of enforceability is subject to any additional limitations under State law.”¹¹⁰

Seventeen years later, in *Circuit City Stores, Inc. v. Adams*,¹¹¹ the Court deployed a similar tactic to interpret § 1’s exclusion.¹¹² The plaintiff’s brief was a *tour de force* that devoted dozens of pages to historical proof that § 1 “manifest[ed] Congress’ intent *not* to have the FAA apply to *any* ‘contracts of employment.’”¹¹³ The Justices, however, refused to engage with these nuanced arguments and read the exemption for “workers engaged in . . . interstate commerce” in its literal sense—only covering “transportation workers”—thus denying § 1’s protection to the vast majority of employees.¹¹⁴

To be sure, the looseness of the FAA’s text was not the only factor that fueled its growth. The Court also relied heavily on the statute’s overarching goals.¹¹⁵ As is well known, some Justices saw arbitration as a form of docket control.¹¹⁶ These Justices turned a blind eye to what Congress tried to accomplish in 1925 and instead invented the idea that the statute radiates with “a liberal federal policy favoring arbitration

¹⁰⁵ 9 U.S.C. § 1.

¹⁰⁶ See Stephen J. Ware, *The Supreme Court’s Defensible Interpretations of the Federal Arbitration Act*, in *THE FEDERAL ARBITRATION ACT: SUCCESSES, FAILURES, AND A ROADMAP FOR REFORM* 336, 337 (Richard A. Bales & Jill I. Gross eds., 2024).

¹⁰⁷ *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 128 (2001) (Stevens, J., dissenting); see *infra* notes 109–19 and accompanying text.

¹⁰⁸ 465 U.S. 1 (1984).

¹⁰⁹ See *id.* at 10–11.

¹¹⁰ *Id.*

¹¹¹ 532 U.S. 105 (2001).

¹¹² See *id.* at 119.

¹¹³ Brief for Respondent at 6–39, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (No. 99-1379), 2000 WL 1369473, at *7–39.

¹¹⁴ *Adams*, 532 U.S. at 109.

¹¹⁵ See *id.* at 111 (discussing the purpose of the FAA).

¹¹⁶ See *Jones v. Detroit Auto. Inter-Ins. Exch.*, 335 N.W.2d 39, 41 n.2 (Mich. Ct. App. 1983) (citing evidence that “the United States Supreme Court is encouraging arbitration to relieve the overburdened courts”).

agreements.”¹¹⁷ These pro-arbitration vibes figured prominently in several pathbreaking opinions¹¹⁸ and spawned a vast body of federal common law.¹¹⁹ Thus, arbitration hegemony stemmed both from the FAA’s textual indeterminacy and a kind of artificial purposivism.

Arbitration has become increasingly pervasive and political. Every Fortune 500 firm uses some kind of arbitration agreement.¹²⁰ Forced arbitration provisions bind at least half of nonunionized private sector workers¹²¹ and households,¹²² and judges issue roughly 1,500 electronically accessible orders on motions to compel arbitration annually.¹²³ Conservatives argue that arbitration offers a creative private solution to the inefficient court system,¹²⁴ but liberals protest that arbitration applies ad hoc rules, is incompatible with class actions, and uses decision-makers who are often compensated by the defendant as a form of corporate “self-deregulation.”¹²⁵

Despite the controversy that has long swirled around the FAA, efforts to rein it in have largely failed. Democrats in Congress have repeatedly introduced either the AFA or the FAIR Act—both of which would end forced arbitration in antitrust, civil rights, consumer, and employment matters.¹²⁶ Yet the U.S. Chamber of Commerce, which “spen[ds] more money on federal lobbying than any other entity,”¹²⁷ has mobilized enough opposition to defeat these bills.¹²⁸ Similarly,

¹¹⁷ Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

¹¹⁸ See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25, 27 (1991) (citing the federal policy in favor of arbitration to hold that claims under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634, are arbitrable).

¹¹⁹ See, e.g., Myriam Gilles, *Arbitration Exceptionalism*, 112 VA. L. REV. 409, 421–53 (2026) (collecting examples).

¹²⁰ David Horton, *Forced Arbitration in the Fortune 500*, 109 MINN. L. REV. 2165, 2205 (2025).

¹²¹ See COLVIN, *supra* note 28, at 1.

¹²² See Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America’s Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234 (2019).

¹²³ See Tamar Meshel & Moin A. Yahya, *The Gatekeepers of the Federal Arbitration Act: An Empirical Analysis of the FAA in the Lower Courts*, 94 MISS. L.J. 485, 490 (2025).

¹²⁴ See Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 HARV. NEGOT. L. REV. 29, 107 (2017).

¹²⁵ David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 62.

¹²⁶ See Arbitration Fairness Act of 2007, S. 1782, 110th Cong. § 2(b) (2007); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 2(b) (2009); Arbitration Fairness Act of 2015, S. 1133, 114th Cong. § 3 (2015); Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. § 3 (2017); Arbitration Fairness Act of 2018, S. 2591, 115th Cong. § 3 (2018); Forced Arbitration Injustice Repeal Act, S. 610, 116th Cong. § 3 (2019); Forced Arbitration Injustice Repeal Act, S. 1376, 118th Cong. § 3 (2023).

¹²⁷ Myriam Gilles, “A Force Created”: *The U.S. Chamber of Commerce and the Politics of Corporate Immunity*, 72 DEPAUL L. REV. 139, 139 n.3 (2023).

¹²⁸ See, e.g., Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 205–06 (2019). Less ambitious measures have done better. For example, Congress passed a series of anti-arbitration

after *Southland*, the FAA has preempted scores of state arbitration regulations.¹²⁹ These futile laws included efforts to nullify arbitration clauses that were inconspicuous¹³⁰ or covered certain claims.¹³¹ In 2020, California lawmakers took things up a notch by passing a statute that made an employer's use of forced arbitration a misdemeanor,¹³² only to have the Ninth Circuit declare that the FAA overrides "state rules that prevent parties from entering into arbitration agreements in the first place."¹³³

In sum, one catalyst for the FAA's exponential growth has been the Court's tendency to "prioritize statutory text far above legislative history."¹³⁴ The next Section explains how the birth of #MeToo prompted Congress to amend the FAA for the first time.

B. The EFAA

This Section describes the EFAA, beginning by telling the statute's origin story. It then explains that the law sailed smoothly through the legislative process because of the perception that it was relatively narrow.

In October 2017, #MeToo became a cultural sensation.¹³⁵ *The New York Times* and *The New Yorker* revealed that Hollywood titan Harvey Weinstein had long been preying on "vulnerable women who hope[d] he [would] get them work."¹³⁶ In response to the stories, actress Alyssa

measures in discrete industries. *See, e.g.*, 15 U.S.C. § 1226 (car franchising); 7 U.S.C. § 197c (livestock industry); 10 U.S.C. § 987(f)(4) (loans to active duty military personnel); 15 U.S.C. § 1639c(e)(1) (residential mortgages).

¹²⁹ *See, e.g.*, *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 269–72 (1995) (reiterating the Court's holding in *Southland* and explaining how the FAA has preemptive effect against an Alabama law).

¹³⁰ *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 689 (1996) (finding that the FAA preempted a Montana statute requiring drafters to give notice on the first page of a contract that it contained an arbitration provision).

¹³¹ *See, e.g.*, *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (determining that the FAA trumped a California statute excluding claims for lost wages from arbitration).

¹³² *See* CAL. LAB. CODE §§ 432.6, 433 (West 2025).

¹³³ *Chamber of Com. of the U.S. v. Bonta*, 62 F.4th 473, 484–85 (9th Cir. 2023).

¹³⁴ Stephen J. Ware, *A Short Defense of Southland, Casarotto, and Other Long-Controversial Arbitration Decisions*, 30 LOY. CONSUMER L. REV. 303, 318 (2018).

¹³⁵ *See, e.g.*, Edward Felsenthal, *Silence Breakers TIME Person of the Year 2017: How We Chose*, TIME (Dec. 6, 2017), <https://time.com/collections/time-person-of-the-year-2017/7376170/silence-breakers-time-person-of-the-year-2017-how-we-chose/> [<https://perma.cc/43X9-48XA>].

¹³⁶ *See* Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/QJ9X-KTVY>]; Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/5RE4-URA7>].

Milano tweeted, “If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.”¹³⁷ Within twenty-four hours, over 12.5 million people had used that hashtag,¹³⁸ sharing harrowing accounts of noxious behavior in academia, banking, hospitality, journalism, and politics.¹³⁹ It soon became clear that abusers often relied on arbitration’s “black box” nature—its privacy and confidentiality—to cover their tracks.¹⁴⁰ These revelations caused some technology companies and law firms to rewrite their arbitration provisions to exclude claims of sexual impropriety¹⁴¹ and states to pass symbolic and sure-to-be-preempted statutes barring the arbitration of such claims.¹⁴²

A few months after Milano’s tweet, Senator Kirsten Gillibrand and Representative Cheri Bustos introduced the Ending Forced Arbitration of Sexual Harassment Act.¹⁴³ The bill invalidated predispute arbitration clauses to the extent they covered “a sex discrimination dispute,” which it defined as allegations “that would form the basis of a claim based on

¹³⁷ Mary Pflum, *A Year Ago, Alyssa Milano Started a Conversation About #MeToo. These Women Replied*, NBC NEWS (Oct. 15, 2018, at 17:59 ET), <https://www.nbcnews.com/news/us-news/year-ago-alyssa-milano-started-conversation-about-metoo-these-women-n920246> [https://perma.cc/33T5-M4RS].

¹³⁸ See Renkl, *supra* note 50.

¹³⁹ See *id.*; Pflum, *supra* note 137.

¹⁴⁰ See, e.g., Rachel M. Schiff, Note, *Not So Arbitrary: Putting an End to the Calculated Use of Forced Arbitration in Sexual Harassment Cases*, 53 U.C. DAVIS L. REV. 2693, 2699–701, 2714 (2020) (explaining that the public never learned of “extensive and prolonged harassment” at Fox because of forced arbitration); Meagan Glynn, Note, *#TimesUp for Confidential Employment Arbitration of Sexual Harassment Claims*, 88 GEO. WASH. L. REV. 1042, 1047 (2020) (observing that forced arbitration “hide[s] the misconduct from public view, allowing the offender to potentially evade accountability and continue the harassment”). Similar concerns had previously prompted the federal government to prohibit companies with which it contracted for more than one million dollars to force arbitration of sexual assault or sexual harassment claims. See Exec. Order No. 13,673, 79 Fed. Reg. 45,309 (Aug. 5, 2014), *revoked by* Exec. Order No. 13,782, 82 Fed. Reg. 15,607 (Mar. 30, 2017); Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 9011, 123 Stat. 3409, 3454–55 (2009) (originally applying a similar ban to Department of Defense contractors).

¹⁴¹ See, e.g., Nick Wingfield & Jessica Silver-Greenberg, *Microsoft Moves to End Secrecy in Sexual Harassment Claims*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/2017/12/19/technology/microsoft-sexual-harassment-arbitration.html> [https://perma.cc/8BH6-8EAU]; Greg Bensinger, *Uber Ends Mandatory Arbitration Clauses for Sexual-Harassment Claims*, WALL ST. J. (May 15, 2018, at 06:00 ET), <https://www.wsj.com/articles/uber-ends-mandatory-arbitration-clauses-for-sexual-harassment-claims-1526378400> [https://perma.cc/2T69-826Z]; Natalie Rodriguez, *Munger Tolles Arbitration Dust-Up May Spark BigLaw Changes*, LAW360 (Mar. 26, 2018, at 22:08 ET), <https://www.law360.com/articles/1026032?scroll=1> [https://perma.cc/4K6E-A3BZ].

¹⁴² See Kathleen McCullough, Note, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo- and Time’s Up-Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 2653, 2677–83 (2019) (surveying these laws); Rollag v. Cowen Inc., No. 20-cv-5138, 2021 WL 807210, at *5 (S.D.N.Y. Mar. 3, 2021) (holding that the FAA trumps New York’s law purporting to annul “any clause or provision . . . which requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to mandatory arbitration to resolve any allegation or claim of discrimination” (quoting N.Y. C.P.L.R. § 7515 (McKinney 2026))).

¹⁴³ S. 2203, 115th Cong. (2017); H.R. 4570, 115th Cong. (2017).

sex”¹⁴⁴ actionable under Title VII of the Civil Rights Act of 1964.¹⁴⁵ In sharp contrast to the down-the-aisle split of the FAIR Act and the AFA, several Republicans served as cosponsors,¹⁴⁶ and attorneys general of fifty-six states and U.S. territories wrote a letter in support.¹⁴⁷ The measure died in committee, but normally outspoken pro-arbitration groups were aware of the optics and lobbied in the shadows.¹⁴⁸

In July 2021, Senator Gillibrand and Representative Bustos proposed an expanded version of their 2017 bill, which they renamed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act.¹⁴⁹ They proposed adding a section to the FAA that would give plaintiffs with sexual misconduct allegations the right to invalidate a predispute arbitration clause:

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.¹⁵⁰

The bill defined a “sexual assault dispute” as “a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in [federal law prohibiting sexual abuse] or similar applicable Tribal or State law, including when the victim lacks capacity to consent.”¹⁵¹ Initially, it specified that a “sexual harassment dispute” is related to one of five types of sexualized misconduct:

¹⁴⁴ H.R. 4570 §§ 401–402.

¹⁴⁵ 42 U.S.C. §§ 2000e to 2000e-17.

¹⁴⁶ See Cosponsors for S. 2203: Ending Forced Arbitration of Sexual Harassment Act of 2017, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/2203/cosponsors?pageSort=alphaByParty> [<https://perma.cc/JH4C-4QNX>] (last visited Apr. 26, 2026); Cosponsors for H.R. 4570: Ending Forced Arbitration of Sexual Harassment Act, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/4570/cosponsors?pageSort=alphaByParty> [<https://perma.cc/WYST-TEPY>] (last visited Apr. 26, 2026).

¹⁴⁷ See Sarah Gruber, Salvatore G. Gangemi & Murtha Cullina, *Attorneys General Support Ending Arbitration of Workplace Sexual Harassment Claims*, NAT’L L. REV. (Feb. 20, 2018), <https://natlawreview.com/article/attorneys-general-support-ending-arbitration-workplace-sexual-harassment-claims> [<https://perma.cc/2T66-2Q5F>].

¹⁴⁸ See Marina Fang, *Business Groups Might Be Quietly Killing a Bill That Would Bring Sexual Abuse Claims to Light*, HUFFINGTON POST (May 17, 2018, at 16:02 ET), https://www.huffpost.com/entry/forced-arbitration-sexual-harassment_n_5afda846e4b0a59b4e019e0a [<https://perma.cc/7VF3-BQF2>].

¹⁴⁹ S. 2342, 117th Cong. (2021); H.R. 4445, 117th Cong. (2021).

¹⁵⁰ 9 U.S.C. § 402(a).

¹⁵¹ 168 CONG. REC. H984 (daily ed. Feb. 7, 2022); 9 U.S.C. § 401(3).

- (A) Unwelcome sexual advances.
- (B) Unwanted physical contact that is sexual in nature, including assault.
- (C) Unwanted sexual attention, including unwanted sexual comments and propositions for sexual activity.
- (D) Conditioning professional, educational, consumer, health care or long-term care benefits on sexual activity.
- (E) Retaliation for rejecting unwanted sexual attention.¹⁵²

In February 2022, however, this definition of “sexual harassment” drew fire. Members of both parties criticized its bespoke nature. Republicans objected that, because it did not borrow from any existing framework for assessing whether behavior rises to the level of sexual harassment, it “possibly made unenforceable arbitration agreements going well beyond sexual harassment disputes.”¹⁵³ And on the flip side, Democrats voiced concern that its repeated use of the word “sexual” meant that it would not encompass “harassment [that] is not sexual in nature but is motivated by a sex-based animus or hostility.”¹⁵⁴ As a result, Congress passed a proposal by Representative Ken Buck that redefined “sexual harassment” as “a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.”¹⁵⁵ This Article will refer to this as the “Buck Amendment.”

During floor debates, lawmakers repeatedly addressed the EFAA’s impact on causes of action that do not stem directly from sexual assault or sexual harassment. Several Republicans argued that the legislation covers sex-related claims exclusively. For example, Senator Lindsey Graham, who cosponsored the bill, explained that “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.”¹⁵⁶ In the same vein, another cosponsor, Senator Joni Ernst, asserted that the law governs sexual wrongdoing exclusively:

[H]arassment 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

¹⁵² 168 CONG. REC. H984 (daily ed. Feb. 7, 2022).

¹⁵³ *See id.* at H992 (statement of Rep. Dan Bishop).

¹⁵⁴ *See id.* at H991 (statement of Rep. Robert Cortez Scott).

¹⁵⁵ *See id.* at H992–93.

¹⁵⁶ 168 CONG. REC. S625 (daily ed. Feb. 10, 2022) (statement of Sen. Lindsey Graham).

claims that are unrelated to these important issues out of the current system.¹⁵⁷

Even some Democrats shared this view. For instance, Senator Gillibrand declared that the EFAA could not “move claims that are ‘unrelated’ to allegations of sexual harassment or sexual assault” into the court system.¹⁵⁸

Members of Congress also expressed divergent views about what would happen to other claims if a court dismissed the allegations of sexual misconduct. Senator Richard Durbin declared that the complaint would remain in the court system:

[T]he bill should not be interpreted to require that if a sexual assault or harassment claim is brought forward in conjunction with another related claim and the assault or harassment claim is later dismissed, the court must remand the other claim back to forced arbitration. That is not what the bill requires.¹⁵⁹

Conversely, Senators Gillibrand and Ernst agreed that if “a sexual assault or harassment claim is brought forward in conjunction with another employment claim and the assault or harassment claim is later dismissed, a court should remand the other claim back to the arbitration system under this bill.”¹⁶⁰

The EFAA encountered little resistance from Republicans and even attracted mild criticism from some liberals.¹⁶¹ It moved quickly through the House by a lopsided 335–97 tally and passed by voice vote

¹⁵⁷ *Id.* (statement of Sen. Joni Ernst).

¹⁵⁸ *Id.* at S626 (statement of Sen. Kirsten Gillibrand); *see also id.* at S642 (statement of Sen. Kirsten Gillibrand) (“[T]his bill allows any conduct alleging a violation of [sexual assault or sexual harassment] laws, and any claims related to such conduct, to move forward together in one case.” (emphasis added)); *cf.* 168 CONG. REC. H991 (daily ed. Feb. 7, 2022) (statement of Rep. Robert Cortez Scott) (expressing concern that “harassment based on . . . race or national origin” would still be forced into arbitration). To be fair, at least one Democrat cosponsor read the statute more broadly. *See* 168 CONG. REC. S626–27 (daily ed. Feb. 10, 2022) (statement of Sen. Richard Durbin) (“[F]or cases which involve conduct that is related to a sexual harassment dispute or sexual assault dispute, survivors should be allowed to proceed with their full case in court regardless of which claims are ultimately proven.”).

¹⁵⁹ 168 CONG. REC. S626 (daily ed. Feb. 10, 2022) (statement of Sen. Richard Durbin).

¹⁶⁰ *Id.* at S625 (statement of Sen. Joni Ernst); *id.* at S627 (statement of Sen. Kirsten Gillibrand) (“[A]s Senator Ernst said, if those claims o[f] harassment or assault are dismissed, then [the plaintiff] would go back to the arbitration process.”).

¹⁶¹ *See, e.g.,* Terri Gerstein, *Forced Arbitration in Workplace Sexual Assault Cases Is Ending. But What About Other Disputes?*, NBC NEWS (Feb. 11, 2022, at 11:57 ET), <https://www.nbcnews.com/think/opinion/forced-arbitration-workplace-sexual-assault-cases-ending-what-about-other-ncna1288968> [<https://perma.cc/BS9J-MWD8>] (calling the EFAA’s passage “good news” but lamenting the fact that it leaves “vulnerable workers [exposed] to all kinds of mistreatment, from dangerous working conditions to wage theft to race discrimination”).

in the Senate¹⁶²—a procedure used for “uncontroversial” legislation.¹⁶³ On March 3, 2022, President Biden signed it while promising “to push for broader legislation” that would prohibit the forced “arbitration of claims regarding discrimination on the basis of race, wage theft, and unfair labor practices.”¹⁶⁴

II. STUDY

This Part analyzes every reported opinion applying the EFAA from the first forty months of its existence. It begins by discussing the advantages and disadvantages of this research genre. It then dives into the cases and reveals that judges disagree on virtually every aspect of the statute. Finally, it demonstrates that, in general, courts that employ textualism construe the statute broadly, and judges who focus on legislative history and purpose read the statute much more narrowly.

A. *Methodology and Caveats*

The technique was simple. This Article used “ending forced arbitration of” as the search term to search within Bloomberg Law’s dockets collection and the all-cases databases of Westlaw and Lexis. Duplicates, trial court orders that were superseded by appellate opinions, and federal district court rulings that merely accepted a report and recommendation from a magistrate judge were excluded from the data set.¹⁶⁵

Admittedly, this approach has drawbacks. As Professors Peter Siegelman and John J. Donohue III quipped, collecting publicly accessible decisions is like “[s]tudying the [i]ceberg from [i]ts [t]ip.”¹⁶⁶ There are two problems. First, most disputes settle and thus are never

¹⁶² See *Roll Call 33 | Bill Number: H.R. 4445*, OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES (Feb. 7, 2022, at 19:24 ET), <https://clerk.house.gov/Votes/202233> [<https://perma.cc/V8QN-VLYN>]; Carrie N. Baker, *Biden Signs Bill to End Forced Arbitration for Sexual Assault and Harassment Claims, Protect Right to File Class-Action Lawsuits*, MS. MAG. (Mar. 3, 2022, at 16:40 PT), <https://msmagazine.com/2022/02/15/congress-ends-arbitration-protects-right-to-file-class-action-lawsuits> [<https://perma.cc/R3B9-Y4U9>].

¹⁶³ See, e.g., *Hurlburt v. Black*, 925 F.3d 154, 168 (4th Cir. 2019) (Wilkinson, J., dissenting).

¹⁶⁴ Phil Mattingly & Maegan Vazquez, *Biden Signs Bill Overhauling Workplace Sexual Misconduct into Law*, CNN (Mar. 3, 2022, at 18:32 ET), <https://www.cnn.com/2022/03/03/politics/biden-sexual-misconduct-bill-signing/index.html> [<https://perma.cc/H2Z8-ACKN>].

¹⁶⁵ One unusual case contained two motions to compel arbitration that targeted unique parts of the complaint. *Compare* *Ding v. Structure Therapeutics, Inc.*, 755 F. Supp. 3d 1200, 1217 (N.D. Cal. 2024) (discussing the first motion to compel arbitration), *with* *Ding v. Structure Therapeutics, Inc.*, 765 F. Supp. 3d 897, 903–04 (N.D. Cal. 2025) (discussing the second motion to compel arbitration). Because the filings involved discrete issues, each one was treated as a separate matter.

¹⁶⁶ See Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC’Y REV. 1133, 1133–34, 1133 n.1 (1990).

memorialized in a court determination.¹⁶⁷ The lack of settlement data means that judicial opinions overrepresent the kinds of conflicts that, for one reason or another, the parties could not resolve privately.¹⁶⁸ Second, “commercial databases are vulnerable to serious selection biases.”¹⁶⁹ For example, Westlaw’s compendium of federal court cases is “broad and deep,” but its universe of state court opinions is minuscule.¹⁷⁰ Lexis boasts that it has “56% more state trial court orders than Westlaw,” but, as noted below, most of these opinions appear to be from a single state: California.¹⁷¹ Finally, although Bloomberg allows users to search within pleadings—a feature that permits users to identify relevant lawsuits that settled before the court weighed in—it excludes most state trial courts.¹⁷²

Two additional factors problematize attempts to measure the EFAA’s effect. For starters, the statute seems to leave a mark in cases that do not mention it. In several matters, a defendant did not even attempt to enforce an arbitration clause against a complaint that included claims of sexual assault or sexual harassment.¹⁷³ These disputes reveal that the EFAA’s anti-arbitration impact can operate in ways that will never show up in judicial opinions. Likewise, arbitration agreement drafters are excluding allegations of sexual wrongdoing from the agreement’s scope.¹⁷⁴ For example, one financial services company mandates

¹⁶⁷ See, e.g., Christina L. Boyd, Pauline T. Kim & Margo Schlanger, *Mapping the Iceberg: The Impact of Data Sources on the Study of District Courts*, 17 J. EMPIRICAL LEGAL STUD. 466, 483–84 (2020).

¹⁶⁸ See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984).

¹⁶⁹ Alexander A. Reinert, *Measuring Selection Bias in Publicly Available Judicial Opinions*, 38 REV. LITIG. 255, 258 (2019).

¹⁷⁰ See generally *Litigation Analytics Coverage*, WESTLAW, [https://1.next.westlaw.com/Analytics/Coverage?transitionType=Default&contextData=\(sc.Default\)#/coverage/explanation](https://1.next.westlaw.com/Analytics/Coverage?transitionType=Default&contextData=(sc.Default)#/coverage/explanation) [<https://perma.cc/V7MC-9FA8>] (last visited Oct. 17, 2025) (demonstrating Westlaw’s database of federal versus state court cases).

¹⁷¹ See *20 Reasons to Choose Lexis+ Case Law*, LEXISNEXIS (2022), https://www.lexisnexis.com/community/cfs-file/_key/telligent-evolution-components-attachments/01-81-00-00-00-04-96-36/20-Reasons-to-Choose-Lexis-Case-Law.pdf [<https://perma.cc/5KRZ-9PVK>]; *infra* Section II.B.

¹⁷² See *Litigation, Overview—Using Bloomberg Law Dockets*, BLOOMBERG L., <https://www.bloomberglaw.com/external/document/X9HLF7600000000/litigation-overview-using-bloomberg-law-dockets> [<https://perma.cc/59DP-37HQ>] (last visited Oct. 10, 2025).

¹⁷³ In these cases, the plaintiffs preemptively argued in their complaint that an arbitration clause they had signed was “void . . . under the [EFAA].” Complaint at 9, *Wassiely v. Reel Sec. Cal., Inc.*, No. 23STcv17290 (Cal. Super. Ct. July 24, 2023). The defendants apparently agreed because—although they asserted they were not waiving their right to compel arbitration—they ultimately did not seek arbitration. See Answer at 1–2, *Wassiely*, No. 23STcv17290 (Sep. 11, 2023).

¹⁷⁴ See, e.g., *Hager v. AMTRAK*, No. 23-3536, 2024 U.S. Dist. LEXIS 10524, at *3–4 (E.D. Pa. Jan. 22, 2024) (featuring a contract that “excluded from arbitration any dispute ‘that may not be subject to predispute arbitration agreements under the [EFAA]’”); see also *Deatherage v. Stifel*, No. 30-2023-01344151-CU-OE-CXC, 2024 Cal. Super. LEXIS 63089, at *11 (Dec. 19, 2024)

arbitration for claims filed by its employees except for “sexual harassment and sexual assault disputes arising under federal, state, or tribal law”—a carve-out that tracks the EFAA and reduces the odds that the contract will generate a court order citing the statute.¹⁷⁵ Thus, surveys of EFAA litigation, like this Article, understate the statute’s profound real-world consequences.

But examining available EFAA opinions can still be instructive in several ways. The statute is so new that any information about how courts construe it is helpful. Moreover, the cases in this study are likely to be influential precisely *because* they appear on Westlaw, Lexis, or Bloomberg. Judges, law clerks, parties, and attorneys can find them and therefore will rely on them. These decisions will loom large over the next few years as the EFAA comes into focus.¹⁷⁶

B. Results

This Article found 230 cases in which a plaintiff¹⁷⁷ cited the EFAA to try to annul a forced arbitration clause.¹⁷⁸ These matters span twenty-five states and the U.S. Courts of Appeals for the Second, Third, Fourth,

(involving an agreement that informed the plaintiffs that “you shall not be required to arbitrate a sexual harassment dispute or sexual assault dispute as defined in the [EFAA]”).

¹⁷⁵ Doe v. Heidrick & Struggles, Inc., No. 24-cv-01113, 2024 U.S. Dist. LEXIS 111006, at *18 (C.D. Cal. May 31, 2024).

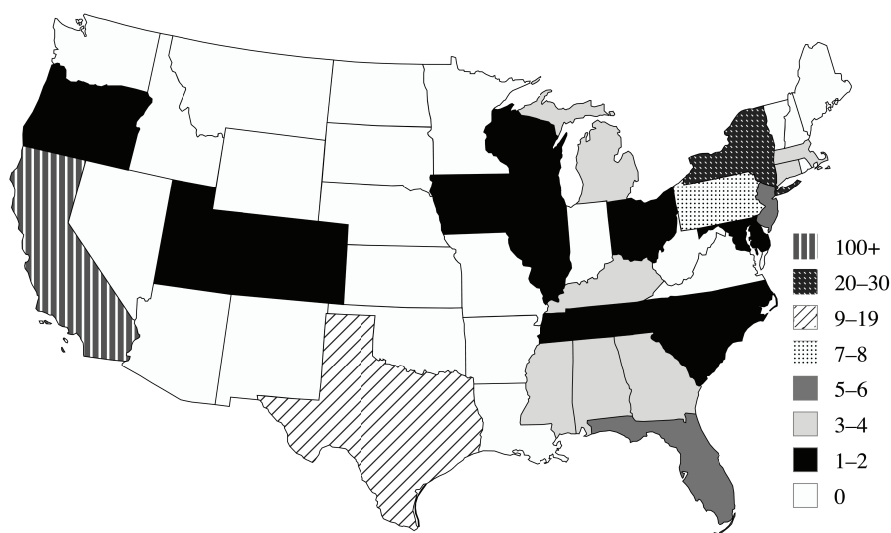
¹⁷⁶ For quasi-empirical studies that also rely on reported cases, see Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 COLUM. L. REV. 319, 349–50 (2023) (collecting examples and explaining why such a dataset “even with its limitations, yields important insights for scholars, judges, lawmakers, and advocates”).

¹⁷⁷ Although the EFAA is often described as a “workplace” law, *see, e.g.*, Morgan Chalfant, *Biden Signs Bill Banning Forced Arbitration in Sexual Misconduct Cases*, HILL (Mar. 3, 2022, at 18:26 ET), <https://thehill.com/homenews/administration/596815-biden-signs-bill-ending-forced-arbitration-in-sexual-misconduct-cases> [<https://perma.cc/WVX3-7H5A>], “the language of the statute does not limit the Act to only employment contracts or work-related sexual assault claims.” Ferrell v. Imperial Care Ctr., No. 22STcv26984, 2023 WL 2161345, at *1, *4, *6 (Cal. Super. Ct. Feb. 10, 2023) (applying the statute to a plaintiff who was confined in the defendant’s facility); Ybarra v. Adame, No. 37-2023-00025790-CU-PO-NC, 2024 Cal. Super. LEXIS 10856, at *1 (Mar. 1, 2024) (“This action involves alleged sexual abuse of a memory care facility resident.”). This understanding is consistent with the House Report on the statute, which repeatedly refers to the evils of arbitration in both the consumer and the employment setting. *See, e.g.*, H.R. REP. NO. 117-234, at 3, 6, 8 (2022).

¹⁷⁸ This Article also includes one case that did not involve a motion to compel arbitration; rather, the court refused to grant the defendants a protective order barring class discovery because the EFAA invalidated their class waivers. *See* Corral v. Pooh Bah Enters., Inc., No. 23-cv-01603, 2025 WL 2306762, at *8 (N.D. Ill. Aug. 11, 2025). Similarly, this Article counted another opinion that did not show up in the original research pass because it contained a typo and referred to the “Ending of Forced Arbitration in Sexual Assault and Sexual Harassment Act.” Smith v. Boehringer Ingelheim Pharms., LLC, No. 24-cv-01266, 2025 WL 2403042, at *1 (D. Conn. Aug. 19, 2025) (emphasis added).

Sixth, and Eighth Circuits.¹⁷⁹ As mentioned, California dominates the dataset: One-hundred and ten decisions, or forty-eight percent, came from state-level trial courts in that jurisdiction. This result is likely a product of Lexis's disproportionate inclusion of materials from the California Superior Court and, as this Article will discuss, the Golden State's relative hospitality to plaintiffs' lawyers.¹⁸⁰ Other states with a notable number of filings are New York with twenty-seven, Texas with nine, Pennsylvania with seven, and Florida with six. Figure 1 displays the geographic spread of these EFAA cases.

FIGURE 1. GEOGRAPHIC DISTRIBUTION OF REPORTED EFAA CASES¹⁸¹



Courts concluded that the EFAA barred arbitration in whole or in part 123 times and determined that the statute did not apply 105 times.¹⁸²

C. Common Issues

Parties often clashed over (1) whether a case fell within the EFAA's temporal scope, (2) if a complaint was detailed enough to trigger the statute, (3) the meaning of "sexual harassment dispute," and (4) the legislation's effect on causes of action that do not involve sex-related impropriety. This Section explores these issues. As it does so, it highlights

¹⁷⁹ See *supra* Section II.A.

¹⁸⁰ See *infra* notes 298-99 and accompanying text.

¹⁸¹ This Article did not assign a state to the six federal appellate court decisions.

¹⁸² Two cases did not reach a result on the merits.

that some courts are interpreting the EFAA quite expansively, and the common denominator in these decisions is textualism.

1. *Timing*

Questions about the EFAA's timing provision have been a fertile source of litigation. This Section examines the tangled case law on point.

The EFAA contains a statutory note declaring that it governs “any dispute or claim that arises or accrues on or after” it became operational on March 3, 2022.¹⁸³ Courts agree that the note is the equivalent of “congressionally enacted text”;¹⁸⁴ and therefore, the EFAA governs if either the sexual assault or sexual harassment (1) “dispute[] . . . arise[s]” or (2) “claim[] . . . accrue[s]” after the statute's effective date.¹⁸⁵

The most common reason that plaintiffs lost was that their dispute and claim predated the statute.¹⁸⁶ Indeed, sixty-eight of the one hundred and five opinions holding that the EFAA did not apply, or sixty-five percent, rested on those grounds. Figure 2 shows that these decisions came fast and furious immediately after the law passed, but, as one would expect, have started to taper off—and will eventually disappear.

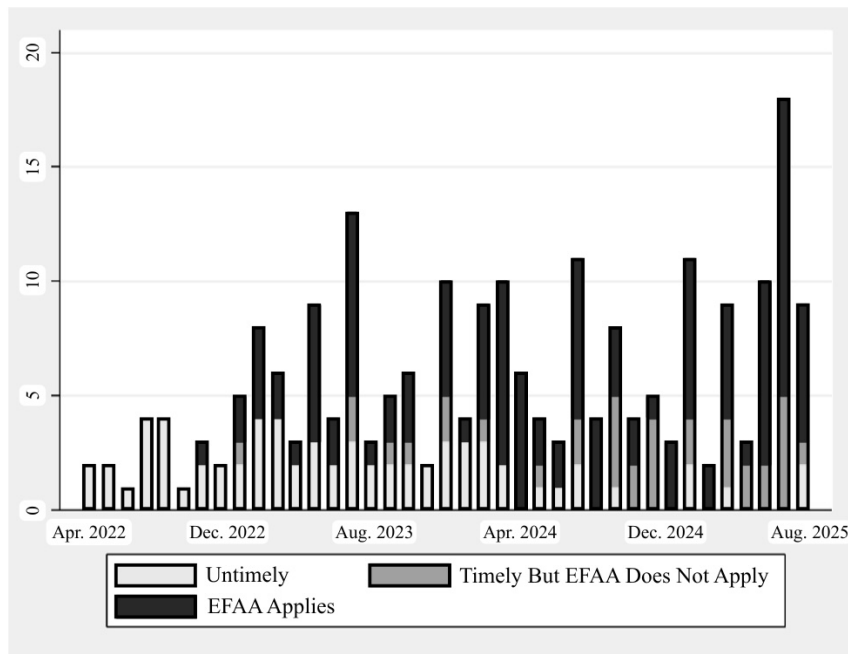
¹⁸³ Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, § 3, 136 Stat. 26, 28 (2022), *reprinted in* 9 U.S.C. § 401 note (identifying effective date of 2022 Amendment).

¹⁸⁴ *Johnson v. Everyrealm, Inc.*, 657 F. Supp. 3d 535, 559 n.19 (S.D.N.Y. 2023) (“It is of no moment that this provision was later codified as a statutory note, as opposed to a statutory subsection, by the Office of Law Revision Counsel.”).

¹⁸⁵ See *Papaconstantinou-Bauer v. Jackson Hosp. & Clinic*, No. 22cv178, 2024 WL 1158362, at *5 (M.D. Ala. Mar. 18, 2024) (“This is the most reasonable reading of the statutory language.”); see also *Doe v. Second St. Corp.*, 326 Cal. Rptr. 3d 42, 53–55 (Ct. App. 2024) (collecting cases). *But see* *Zinsky v. Russin*, No. 22-cv-547, 2022 WL 2906371, at *3 (W.D. Pa. July 22, 2022) (conflating these issues).

¹⁸⁶ To be clear, this Section deals only with whether a dispute arose, or a claim accrued in a timely fashion under the EFAA's timing metric. Courts can also reject a plaintiff's attempt to rely on the EFAA for the distinct reason that their sexual assault or sexual harassment allegations are untimely—and thus not viable—under the governing civil rights law. See, e.g., *Hale v. Paradise Ent. Grp., Inc.*, No. 25-cv-1633, 2025 U.S. Dist. LEXIS 168951, at *19 (N.D. Ga. Aug. 29, 2015) (holding that the plaintiff had no plausible Title VII claim because she did not file her lawsuit within the ninety-day deadline after receiving her right-to-sue letter from the Equal Employment Opportunity Commission or in accordance with a tolling agreement).

FIGURE 2. OUTCOME OF REPORTED EFAA CASES BY MONTH



Yet even though the EFAA's timing provision has been a hurdle for victims, the next two Sections show that it could be significantly worse. For a law that is not supposed to be retroactive,¹⁸⁷ the statute—at least according to some courts—covers cases that originated before March 3, 2022.

a. Disputes

Courts have struggled to pinpoint when a “dispute . . . arises.”¹⁸⁸ Some early cases held that “[a] dispute arises when the conduct which constitutes the alleged sexual assault or sexual harassment occurs.”¹⁸⁹ This approach may be described as the “misconduct” theory.

The misconduct theory stems from *Barnes v. Festival Fun Parks, LLC*.¹⁹⁰ Madalyne Barnes, a lifeguard at a waterpark, alleged that her boss called her slurs in June 2021 when she began dating another female employee.¹⁹¹ Barnes reported the offensive remarks, but after

¹⁸⁷ There has been no dispute that, at least on paper, “the EFAA is not retroactive.” *Snyder v. Kan. City Auto. Co.*, No. 23-cv-02564, 2024 WL 3677499, at *3 (D. Kan. Aug. 6, 2024).

¹⁸⁸ 9 U.S.C. § 401 note.

¹⁸⁹ *E.g.*, *Barnes v. Festival Fun Parks, LLC*, No. 22-cv-165, 2023 WL 4209745, at *10 (W.D. Pa. June 27, 2023).

¹⁹⁰ No. 22-cv-165, 2023 WL 4209745 (W.D. Pa. June 27, 2023).

¹⁹¹ *See id.* at *1.

her employer conducted an investigation, they fired her.¹⁹² Barnes lodged an Equal Employment Opportunity Commission complaint in September 2021, received a right-to-sue letter in June 2022, and filed a sexual harassment case in court in September 2022.¹⁹³ There was little doubt that Barnes's "claim accrued" at the latest in July 2021, when she lost her job, which was eight months before the EFAA hit the books.¹⁹⁴ Thus, Barnes argued that her "dispute arose" in September 2022 when she initiated her lawsuit.¹⁹⁵

A federal judge in Pennsylvania disagreed for two reasons.¹⁹⁶ First, the court noted that dictionaries define a "dispute" as "[a] conflict or controversy, esp[ecially] one that has given rise to a particular lawsuit"¹⁹⁷ and "arise" as "to begin to occur or exist: to come into being or to attention."¹⁹⁸ Putting these pieces together, the judge opined that "a dispute arises when the conduct complained of occurs."¹⁹⁹ Second, the court reasoned that Barnes's reading—that a dispute arises with the filing of the complaint—was hard to square with the statute's legislative history, which suggests that "Congress did not intend to apply the [EFAA] retroactively and, instead, chose to temper the sea change in enforcing arbitration agreements through prospective applicability."²⁰⁰ Thus, because Barnes sought relief for a dispute that arose before the EFAA's passage, the court held that the statute did not apply.²⁰¹

More recently, though, the Third, Sixth, and Eighth Circuits have rejected the misconduct perspective.²⁰² These decisions focus closely on a factor that *Barnes* raised but then glossed over: "[T]he ordinary meaning of ['dispute'] involves some *opposition or disagreement* between the parties."²⁰³ These courts have held that a "dispute" "does

¹⁹² *See id.*

¹⁹³ *Id.*

¹⁹⁴ *See id.* at *12.

¹⁹⁵ *See id.* at *9.

¹⁹⁶ *See id.* at *10–11.

¹⁹⁷ *Id.* at *10 (alteration in original) (quoting *Silverman v. DiscGenics, Inc.*, No. 22-cv-00354, 2023 WL 2480054 (D. Utah Mar. 13, 2023)).

¹⁹⁸ *Id.* at *11 (quoting *Arise*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/arise> [<https://perma.cc/6PUE-6JFL>] (last visited June 7, 2026)).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *See id.* at *12.

²⁰² *See Cornelius v. CVS Pharmacy Inc.*, 133 F.4th 240, 247 (3d Cir. 2025); *Memmer v. United Wholesale Mortg., LLC*, 135 F.4th 398, 409 (6th Cir. 2025); *Famuyide v. Chipotle Mexican Grill*, 111 F.4th 895, 898 (8th Cir. 2024).

²⁰³ *Cornelius*, 133 F.4th at 247 (emphasis added); accord *Memmer*, 135 F.4th at 409 ("The relevant question is when the parties became adverse to one another."); *Famuyide*, 111 F.4th at 898 (looking to Black's Law Dictionary for "the ordinary meaning of the term"); *Kader v. S. Cal. Med. Ctr.*, 317 Cal. Rptr. 3d 682, 688 (Ct. App. 2024) ("A dispute arises when one party asserts a right, claim, or demand, and the other side expresses disagreement or takes an adversarial posture."); *Hodgin v. Intensive Care Consortium, Inc.*, 666 F. Supp. 3d 1326, 1329–30 (S.D. Fla. 2023)

not arise simply because the plaintiff suffers an injury,”²⁰⁴ but requires the employee to “register[] disagreement—through either an internal complaint, external complaint, or otherwise,” and for the employer “expressly or constructively [to] oppose[] that position.”²⁰⁵ This Article will refer to this as the “disagreement” theory.

The disagreement theory makes the EFAA quasi-retroactive. *Famuyide v. Chipotle Mexican Grill*²⁰⁶ offers a dramatic example. Eniola Famuyide worked at a Chipotle restaurant where she suffered a horrific sexual assault by a coworker in November 2021.²⁰⁷ In February 2022, her lawyer sent letters to Chipotle asking it to place a litigation hold on relevant documents and floated the idea of “an out-of-court resolution.”²⁰⁸ On March 1, 2022, a mere forty-eight hours before the EFAA became law, Chipotle sent a detailed response that touted its “strong defenses.”²⁰⁹ In July 2022, Famuyide sued, alleging that the perpetrator was a registered sex offender and that Chipotle was vicariously liable for his actions.²¹⁰ Inexplicably, Chipotle failed to introduce the March 1 letter into evidence,²¹¹ and the trial court held that the EFAA applied because the dispute arose when Famuyide filed her complaint.²¹²

The case went up on appeal, and the Eighth Circuit affirmed.²¹³ The appellate panel rejected Chipotle’s assertion that the dispute came into being when the assault happened, reasoning that “[a]t that point, . . . Famuyide had not asserted any right, claim, or demand against Chipotle, and Chipotle had not registered disagreement with any position of Famuyide’s.”²¹⁴ The Eighth Circuit held that the February letters from Famuyide’s counsel also did not create a dispute:

This sort of exploratory letter from counsel does not establish a dispute or inevitably lead to one. Sometimes a dispute ensues after this type of correspondence. But sometimes it does not, either because the client decides not to proceed further after

(“A dispute entails disagreement, not just the existence of an injury (which would be the claim accruing).”).

²⁰⁴ *Kader*, 317 Cal. Rptr. 3d at 689.

²⁰⁵ *Cornelius*, 133 F.4th at 247.

²⁰⁶ 111 F.4th 895 (8th Cir. 2024).

²⁰⁷ See *id.*; Complaint at 1, 8–9, *Famuyide v. Chipotle Mexican Grill*, No. 23-1127, 2023 WL 5651915 (D. Minn. Aug. 31, 2023) [hereinafter *Famuyide* Complaint].

²⁰⁸ See Declaration of Matthew D. Treco at 4–10, *Famuyide*, No. 23-1127, 2023 WL 5651915.

²⁰⁹ Brief for Defendants-Appellants at 5–7, *Famuyide*, 111 F.4th 895 (No. 23-3201).

²¹⁰ See *Famuyide* Complaint, *supra* note 207, at 1, 5, 7. Famuyide originally sued in state court, voluntarily dismissed that action, and then refiled in federal court in April 2023 after an unsuccessful mediation. See *Famuyide*, 2023 WL 5651915, at *2.

²¹¹ See *Famuyide*, 111 F.4th at 899.

²¹² See *Famuyide*, 2023 WL 5651915, at *4.

²¹³ *Famuyide*, 111 F.4th at 899.

²¹⁴ *Id.* at 898.

investigation or because the communications result in an amicable resolution between the correspondents.²¹⁵

Finally, although the March 1 letter from Chipotle would almost certainly have initiated a dispute—and doomed Famuyide’s attempt to utilize the statute—the court refused to consider it because it was not part of the record.²¹⁶ Accordingly, the EFAA controlled even though the wrongdoing occurred while the bill was still pending in Congress.²¹⁷

b. Claims

Similarly, two nuances regarding when “claims . . . accrue[]” extend the EFAA’s reach.²¹⁸ For starters, “claim[s]” for hostile work environment “accrue” on a rolling basis.²¹⁹ For statute of limitations purposes, a “claim ordinarily accrues ‘when [a] plaintiff has a complete and present cause of action.’”²²⁰ But in hostile work environment cases, the underlying misconduct “generally doesn’t occur on any one day” but instead consists of a “constellation of events” that can span months or even years.²²¹ Thus, courts in such matters use the continuing violations doctrine, which dictates that the clock does not start ticking “until the last discriminatory act” occurs.²²² The Second Circuit and several lower courts have imported this principle into the EFAA setting, holding that “claims accrue, and reaccrue, each time the defendant commits an act that is part of the same course of harassing conduct.”²²³

This principle opens the door for plaintiffs to rely on the EFAA even when they seek relief for wrongdoing that began before the law’s effective date. For instance, in *Betancourt v. Rivian Automotive, LLC*,²²⁴ Angela Betancourt began working for electric car maker Rivian Automotive in December 2021 and endured coworkers who touched her and

²¹⁵ *Id.*

²¹⁶ *See id.* at 899 (“Chipotle had ample opportunity to file the March 1 letter in the district court, including with supplemental briefing after a hearing on this precise matter, but chose not to do so.”).

²¹⁷ *See id.* at 898–99.

²¹⁸ *Betancourt v. Rivian Auto., LLC*, No. 22-1299, 2023 WL 5352892, at *2–3 (C.D. Ill. Aug. 21, 2023).

²¹⁹ *See infra* note 235 and accompanying text.

²²⁰ *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014) (alteration in original) (quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)).

²²¹ *Olivieri v. Stifel, Nicolaus & Co.*, 112 F.4th 74, 88 (2d Cir. 2024).

²²² *Id.*

²²³ *Id.*; *see also Doe v. Second St. Corp.*, 326 Cal. Rptr. 3d 42, 55 (Ct. App. 2024) (collecting authority). It is unclear whether federal or state law governs the issue of when claims accrue under the EFAA. *See Ruiz v. Butts Foods, L.P.*, No. W2023-01053-COA-R3-cv, 2025 WL 1099966, at *7 (Tenn. Ct. App. Apr. 14, 2025).

²²⁴ No. 22-1299, 2023 WL 5352892 (C.D. Ill. Aug. 21, 2023).

showed her explicit images on their phones.²²⁵ These episodes occurred in 2022 on January 20, February 9, February 10, and April 13 through April 20.²²⁶ Citing the first three incidents, Rivian Automotive contended that Betancourt's "claim[] . . . accrued" before March 3, 2022.²²⁷ A federal judge in Illinois disagreed, finding that under the continuing violations rule, Betancourt's "claim[] . . . accrued" "at different points," including when "the misconduct reached the level of a hostile work environment" and "later, while she was subjected to additional harassment."²²⁸

Similarly, civil rights laws prohibit retaliation,²²⁹ which sometimes occurs after a plaintiff has quit or been terminated. The gravamen of a retaliation allegation is that an employer punished an employee for helping expose sexual misbehavior.²³⁰ These punitive measures can breathe life into EFAA arguments that would otherwise be stale. In *Silverman v. DiscGenics, Inc.*,²³¹ two former employees sued pharmaceutical startup DiscGenics for sexual harassment that, for one of them, had started back in 2011.²³² The company demanded arbitration, observing that because the plaintiffs both left the company in the summer of 2021, their claims accrued "well before the [EFAA's] effective date."²³³ But while this motion was pending, the plaintiffs amended their complaint to allege that DiscGenics had continued to lash out against them, including by maliciously threatening to countersue them for defamation in August 2022.²³⁴ As a federal judge in Utah acknowledged, this retaliatory act postdated the EFAA and thus brought the statute into play.²³⁵

To conclude, the meaning of the EFAA's timing provision remains contested, but the case law is trending towards interpreting it in a manner that favors plaintiffs. As discussed next, the same dynamic is playing out with procedural issues.

²²⁵ *Id.* at *1.

²²⁶ *See id.*

²²⁷ *See id.* at *2.

²²⁸ *Id.* at *5.

²²⁹ *See, e.g.*, 42 U.S.C. § 2000e-3(a); CAL. GOV'T CODE § 12940(h) (West 2025).

²³⁰ *See, e.g.*, *Olivieri v. Stifel, Nicolaus & Co.*, 112 F.4th 74, 92 (2d Cir. 2024); *Solis v. Prime Comms Retail, LLC*, No. 24-cv-02389, 2025 WL 1255143, at *3 (C.D. Cal. Apr. 7, 2025); *Hicks v. CEC Ent. Holdings I, Inc.*, No. 24-1120, 2025 WL 1770787, at *3 (D. Del. June 26, 2025).

²³¹ No. 22-cv-00354, 2023 WL 2480054 (D. Utah Mar. 13, 2023).

²³² *Id.* at *1; Complaint at 2–5, *Silverman*, No. 22-cv-00354, 2023 WL 2480054.

²³³ Defendant's Motion to Compel Arbitration at 10, *Silverman*, No. 22-cv-00354, 2023 WL 2480054.

²³⁴ *See* First Amended Complaint at 63, *Silverman*, No. 22-cv-00354, 2023 WL 2480054.

²³⁵ *See Silverman*, 2023 WL 2480054, at *3; *see also* *Clay v. FGO Logistics, Inc.*, 751 F. Supp. 3d 3, 17 (D. Conn. 2024) (applying the EFAA to a plaintiff's complaint even though his "hostile work environment and sexual harassment claims did not accrue after the EFAA's effective date" because his "retaliation claim did").

2. Procedure

Judges look at the plaintiff's complaint when deciding if the EFAA applies.²³⁶ Yet they "disagree [about] the appropriate standard for determining 'the allegations that are necessary to invoke the EFAA in the first place.'"²³⁷ This Section explains that it is unclear whether plaintiffs must plead a plausible or a merely nonfrivolous claim of sexual harassment.²³⁸

An overview of Federal Rule of Civil Procedure 12(b)(6) can frame this topic. Rule 12(b)(6) allows courts to dismiss a complaint for "failure to state a claim upon which relief can be granted."²³⁹ Traditionally, plaintiffs could clear this low bar by identifying the parties and sketching the facts—a regime called "notice pleading."²⁴⁰ In the late 2000s, however, with *Bell Atlantic Corp. v. Twombly*²⁴¹ and *Ashcroft v. Iqbal*,²⁴² the Court abandoned notice pleading in favor of a "plausibility" pleading regime.²⁴³ Since then, to survive a defendant's motion to dismiss, plaintiffs have needed to go beyond "labels and conclusions" and set forth "enough facts to state a claim to relief that is plausible on its face."²⁴⁴

Against this backdrop, most courts have ruled that the EFAA only applies if a complaint features plausible allegations of sexual harassment. This view originated in the Southern District of New York in 2023, with Judge Paul Engelmayer's decision in *Yost v. Everyrealm, Inc.*²⁴⁵ Katherine Yost sued her former employer and several of its officers and affiliates for causes of action ranging from labor code violations to sexual harassment.²⁴⁶ Yet the parts of her complaint dealing with sexual

²³⁶ See *Martinez v. San-I-Pak Pac., Inc.*, No. STK-cv-UWT-2023-4088, 2024 Cal. Super. LEXIS 12986, at *5 (Mar. 5, 2024) ("Application of the EFAA is to be decided based on the allegations of the complaint.").

²³⁷ *Van De Hey v. EPAM Sys. Inc.*, No. 24-cv-08800, 2025 WL 829604, at *3 (N.D. Cal. Feb. 28, 2025) (quoting *Diaz-Roa v. Hermes L., P.C.*, 757 F. Supp. 498, 533 (S.D.N.Y. 2024)).

²³⁸ The split between plausibility and nonfrivolousness only seems to govern allegations of sexual harassment, not sexual assault. See *infra* text accompanying notes 440–43.

²³⁹ FED. R. CIV. P. 12(b)(6).

²⁴⁰ See, e.g., *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

²⁴¹ 550 U.S. 544 (2007).

²⁴² 556 U.S. 662 (2009).

²⁴³ See *Twombly*, 550 U.S. at 555 ("[A] formulaic recitation of the elements of a cause of action will not do."); *Iqbal*, 556 U.S. at 679 ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.").

²⁴⁴ *Twombly*, 550 U.S. at 555, 570. There is an extensive literature on these twin decisions, which are commonly known as *Twiqbal*. David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1204–05 & nn.6–7 (2013) (collecting citations).

²⁴⁵ 657 F. Supp. 3d 563 (S.D.N.Y. 2023).

²⁴⁶ *Id.* at 566.

impropriety were “threadbare” and asserted only that an executive had made stray comments “about the sexual activities or orientations of coworkers.”²⁴⁷ Judge Engelmayer thus granted Everyrealm’s motion to dismiss Yost’s sexual harassment claims.²⁴⁸

Judge Engelmayer then addressed what happens when “a plaintiff’s only basis for claiming that a complaint triggers the EFAA are *implausibly* pled claims of sexual harassment.”²⁴⁹ He noted that the statute “relates to conduct that is ‘alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.’”²⁵⁰ He interpreted this reference to violations of the substantive law as a “legal measuring stick” that requires a plaintiff to articulate a plausible claim.²⁵¹ He also reasoned that implying a plausibility standard would close a loophole that would otherwise permit a plaintiff to invalidate an arbitration clause by adorning their complaint with “facially unsustainable and quickly dismissed claims of sexual harassment.”²⁵² Thus, because Yost had no credible cause of action for sexual harassment, Judge Engelmayer held that the EFAA did not govern.²⁵³

Yost has been influential. Although it grappled with the impact of the dismissal of sexual harassment claims on the plaintiff’s remaining allegations, courts soon borrowed its logic to decide the threshold question of whether the EFAA applies. Judges in California,²⁵⁴ Connecticut,²⁵⁵

²⁴⁷ *Id.* at 580.

²⁴⁸ *Id.* at 583.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 585 (quoting 9 U.S.C. § 401(4)).

²⁵¹ *Id.*

²⁵² *Id.* at 586.

²⁵³ *See id.* at 588.

²⁵⁴ *See* Van De Hey v. EPAM Sys. Inc., 24-cv-08800, 2025 WL 829604, at *3 (N.D. Cal. Feb. 28, 2025) (“The Court finds that the Rule 12(b)(6) pleading standard applies, for the reasons explained by the court in *Yost* . . .”); Johannessen v. JUUL Labs, Inc., No. 23-cv-03681, 2024 WL 3173286, at *4 (N.D. Cal. June 24, 2024) (“To read the EFAA more broadly . . . would violate the plain meaning of the statute, and lead to an improper dilution of the ‘liberal federal policy favoring arbitration.’” (quoting AT&T Mobility LLC v. Conception, 563 U.S. 333, 339 (2011))); Ding v. Structure Therapeutics, Inc., 765 F. Supp. 3d 897, 900 (N.D. Cal. 2025) (applying the plausibility standard); La O v. Laurel Ave., LLC, No. 30-2024-01400033-CU-WT-CJC, 2024 Cal. Super. LEXIS 40322, at *2 (Oct. 14, 2024) (“[W]ithout a plausibility requirement, any plaintiff could merely allege a baseless sexual harassment claim to avoid being compelled to arbitrate.”); Griffin v. DHSE, Inc., No. cvPS2401047, 2024 Cal. Super. LEXIS 35148, at *5 (Aug. 22, 2024) (“[T]he court must first examine whether the pleading states a plausible claim of sexual harassment under federal, tribal, or state law.”).

²⁵⁵ *See* Smith v. Boehringer Ingelheim Pharms., LLC, No. 24-cv-01266, 2025 WL 2403042, at *6 (D. Conn. Aug. 19, 2025).

Florida,²⁵⁶ Georgia,²⁵⁷ Iowa,²⁵⁸ North Carolina,²⁵⁹ and other judges in New York²⁶⁰ have now determined that the price of admission to the EFAA is “rais[ing] a plausible claim for sexual harassment.”²⁶¹

A more plaintiff-friendly minority position, however, is also gaining traction. Ironically, this perspective also emanates from the Southern District of New York. In *Diaz-Roa v. Hermes Law*,²⁶² Judge Lewis Liman rejected Judge Engelmayer’s logic.²⁶³ For one, Judge Liman noted that the EFAA says only that a plaintiff must “alleg[e] conduct,” not that they must “plead a claim for sexual assault or sexual harassment” and certainly not that they must plead “a claim upon which relief can be granted.”²⁶⁴ In addition, Judge Liman cited the fact that the EFAA allows a plaintiff to defuse a forced arbitration agreement by identifying a “dispute,” not by pleading a “claim.”²⁶⁵ According to Judge Liman, this matters because “[d]isputes, unlike claims, are not subject to motions to dismiss.”²⁶⁶ Finally, Judge Liman accused Judge Engelmayer of conflating motions to dismiss and motions to compel arbitration:

The Rule 12(b)(6) standard is designed to test whether the plaintiff’s allegations, if proven, would entitle the plaintiff to relief on the claims that the plaintiff has asserted. . . . If the defendant prevails on a Rule 12(b)(6) motion, it is entitled to judgment on the merits By contrast, a motion to compel arbitration is designed to test who—a judge and jury or an

²⁵⁶ See *Harkins v. Hillstone Rest. Grp., Inc.*, No. 24-23800-civ, 2025 WL 522674, at *4 (S.D. Fla. Feb. 18, 2025) (“[I]f the Court finds that [the plaintiff’s] claims do not survive the motion to dismiss, it must also find that the Act is not applicable, and thus must compel arbitration on the remaining claims.”).

²⁵⁷ See *Delgado v. Apple Ga., LLC*, No. 24-cv-82, 2024 WL 4993645, at *6 (M.D. Ga. Dec. 5, 2024) (“[N]othing in the EFAA suggests that Congress intended to override the Federal Arbitration Act in cases with no viable sexual harassment (or sexual assault) claim.”).

²⁵⁸ See *Holliday v. Wells Fargo Bank*, No. 23-cv-00418, 2024 WL 194199, at *5 (S.D. Iowa Jan. 10, 2024).

²⁵⁹ See *Mangum v. Ross Dress for Less, Inc.*, 777 F. Supp. 3d 519, 529 (E.D.N.C. 2025) (“[T]he court examines whether [the plaintiff] plausibly alleges a Title VII sexual harassment claim.”).

²⁶⁰ See *Delo v. Paul Taylor Dance Found.*, 685 F. Supp. 3d 173, 180–82 (S.D.N.Y. 2023); *Singh v. Meetup LLC*, 750 F. Supp. 3d 250, 253–54 (S.D.N.Y. 2024).

²⁶¹ *Holliday*, 2024 WL 194199, at *5.

²⁶² 757 F. Supp. 3d 498 (S.D.N.Y. 2024).

²⁶³ See *id.* at 533.

²⁶⁴ *Id.* at 534.

²⁶⁵ See *id.* at 535.

²⁶⁶ *Id.* at 534.

arbitrator—is to decide the case on the merits. It goes to adjudicative capacity.²⁶⁷

Accordingly, Judge Liman and a growing number of other federal district judges merely insist that a plaintiff assert “nonfrivolous claims” of sexual harassment to shelter under the EFAA’s safe harbor.²⁶⁸

3. *Substance*

Recall that the EFAA defines “sexual harassment dispute” as a “dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.”²⁶⁹ This Section discusses the types of claims that have been popping up in EFAA cases. It first explores the issue of whether sexual harassment requires sexualized misconduct under Title VII and then considers the impact of state and local laws.

a. *Federal Law*

Title VII, the marquee federal antidiscrimination law, is expansive in one way that is especially relevant for this Article’s purposes. The statute prohibits discrimination “against any individual with respect to [their] compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.”²⁷⁰ In turn, because the atmosphere of a job is a “term[], condition[], or privilege[] of employment,”²⁷¹ the Supreme Court has held that “a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile . . . work environment.”²⁷² To state such a cause of action, a worker must allege that they experienced “severe or pervasive” conduct that

²⁶⁷ *Id.* at 537 (citations omitted).

²⁶⁸ *Id.* at 533; Gill v. U.S. Data Mgmt., 24-cv-05255, 2024 WL 5402494, at *3 (C.D. Cal. Dec. 2, 2024) (“Defendant reads a plausibility requirement in the EFAA that is not explicit in the statutory text”); Cardenas v. F.D. Thomas, Inc., 24-cv-01814, 2025 WL 418753, at *4 (E.D. Cal. Feb. 6, 2025) (“The court is persuaded that this more liberal pleading standard is applicable to this determination, and adopts the reasoning as set out by the district court in *Diaz-Roa*.”); Anderson v. Louis Vuitton N. Am., Inc., No. cv 25-2878, 2025 WL 1591800, at *5 (C.D. Cal. June 5, 2025) (following *Diaz-Roa*); Holland-Thielen v. Space Expl. Techs. Corp., No. 24-cv-06972, 2025 WL 2190619, at *12 (C.D. Cal. July 11, 2025) (“*Diaz-Roa* is persuasive.”); Kegelmeyer v. Cellular Sales Servs. Grp., No. 24-cv-839, 2025 U.S. Dist. LEXIS 147576, at *13 (W.D.N.Y. July 31, 2025) (“In my view, if Congress had intended to restrict the application of the EFAA only to plaintiffs alleging conduct constituting a sexual harassment *claim*, it could have easily done so, and in far fewer words.”).

²⁶⁹ 9 U.S.C. § 401(4).

²⁷⁰ 42 U.S.C. § 2000e-2.

²⁷¹ *Id.*

²⁷² Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986). Title VII also bars quid pro quo harassment, which entails offering benefits in return for sexual favors. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752–53 (1998).

was subjectively and objectively offensive and was based on their sex.²⁷³ Crucially, a hostile work environment can be actionable if it stems not just from the employee's gender, but also from their pregnancy status, sexual orientation, or gender identity.²⁷⁴ And even more important, judges consider a hostile work environment to be a species of "sexual harassment" even if the inappropriate behavior was *nonsexualized*.²⁷⁵ As the Second Circuit once put it, "Although sexual harassment is usually thought of in terms of sexual demands, it can include employer action based on [sex] but having nothing to do with sexuality."²⁷⁶

It is unclear, however, whether the EFAA's definition of "sexual harassment" includes hostile work environment claims that do not feature sexualized conduct. Some judges have opined that, under the EFAA, "sex discrimination differs from sexual harassment."²⁷⁷ Although these cases are thinly reasoned, they seem to assume either that the statute incorporates the mainstream definition of "sexual harassment" or that the law cannot extend further than Congress's aim of stamping out forced arbitration of sex-related misconduct.²⁷⁸ For instance, in

²⁷³ See, e.g., *Riggs v. Akamai Techs.*, No. 23-cv-06463, 2024 WL 3347032, at *4 (S.D.N.Y. July 8, 2024).

²⁷⁴ See *Bostock v. Clayton Cnty.*, 590 U.S. 644, 660 (2020) ("[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."); *Koester v. City of Novi*, 580 N.W.2d 835, 840 (Mich. 1998) ("[B]ecause [T]itle VII was amended to include pregnancy, the federal courts have held that harassment on the basis of pregnancy is sexual harassment."), *overruled on other grounds by Haynie v. State*, 664 N.W.2d 129 (Mich. 2003).

²⁷⁵ See, e.g., *Tang v. Citizens Bank*, 821 F.3d 206, 216 (1st Cir. 2016) ("Title VII . . . does not require evidence of overtly sexual conduct for a sexual harassment claim.").

²⁷⁶ *Raniola v. Bratton*, 243 F.3d 610, 617 (2d Cir. 2001); see *Bailey v. Henderson*, 94 F. Supp. 2d 68, 75 (D.D.C. 2000) (noting that the "argument[] that only conduct of a sexual nature can be the basis of a sexual-harassment suit[] has been considered and rejected by several courts"); Brian Soucek & Vicki Schultz, *Sexual Harassment by Any Other Name*, 2019 U. CHI. LEGAL F. 227, 237 (2019) ("[S]exual harassment is actionable whenever it amounts to sex discrimination in the terms and conditions of employment—not under some special offshoot of Title VII that pertains specifically to sexual conduct.").

²⁷⁷ *Moulds v. Skillcycle, Inc.*, No. cv 23-4873, 2024 WL 2206464, at *1 n.1 (E.D. Pa. Mar. 27, 2024).

²⁷⁸ See *Smith v. Boehringer Ingelheim Pharms., LLC*, No. 24-cv-01266, 2025 WL 2403042, at *9 (D. Conn. Aug. 19, 2025) (reasoning that under the EFAA, "a sexual harassment claim must go beyond gender based discrimination and include conduct that is offensive and sexual in nature"); *Brown v. Patel*, No. 24-cv-05036, 2025 WL 1168282, at *3 (S.D. Tex. Apr. 22, 2025) ("Brown has not alleged any conduct constituting sexual harassment—only sex discrimination."), *report and recommendation adopted*, No. 24-cv-05036, 2025 WL 1456806 (S.D. Tex. May 21, 2025); *Dixon v. Dollar Tree Stores*, No. 22-cv-131S, 2023 WL 2388504, at *7 (W.D.N.Y. Mar. 7, 2023) (opining that the EFAA does not govern "allegations of disparate treatment because of . . . gender[] that do not allege sexual assault or harassment"); *La O v. Laurel Ave., LLC*, No. 30-2024-01400033-CU-WT-CJC, 2024 Cal. Super. LEXIS 40322, at *3 (Oct. 14, 2024) ("The language of the EFAA does not reflect an intent to exclude all gender discrimination claims from arbitration, only those arising from 'sexual assault' or 'sexual harassment.'").

Moulds v. Skillcycle, Inc.,²⁷⁹ a federal district court in Pennsylvania held that allegations of gender and pregnancy discrimination did not trigger the EFAA because they did not involve “unwelcome sexual advances or other verbal or physical contact of a sexual nature.”²⁸⁰

But a line of cases involving gay or transgender plaintiffs points in the opposite direction.²⁸¹ Consider *Doe v. Saber Healthcare Group*,²⁸² which was also decided by a federal district court in Pennsylvania.²⁸³ The plaintiff, a gender-nonconforming lesbian, worked at a nursing home.²⁸⁴ When her supervisor heard that she was engaged, the supervisor announced, “I don’t believe in gay marriage.”²⁸⁵ Later, when a resident attacked the plaintiff, the supervisor laughed, and the nursing home did nothing.²⁸⁶ The court held that the plaintiff’s Title VII claim was a “sexual harassment dispute” under the EFAA, even though it did not feature X-rated comments or images.²⁸⁷ As the judge saw it, the defendants’ antagonism arguably stemmed from “bias or prejudice toward [the plaintiff’s] sexual orientation and gender nonconformity,” which was all that a “sexual harassment” claim under Title VII and the EFAA required.²⁸⁸

b. State Law

In this Article’s data, plaintiffs often relied on state laws that prohibit sexual harassment. This choice may be because Title VII sets a high bar for sexual harassment claimants. For example, it applies only to companies with at least fifteen employees.²⁸⁹ Conversely, many state and local antidiscrimination laws cover smaller businesses.²⁹⁰ Also, as mentioned, Title VII requires plaintiffs in hostile work environment cases to prove that the illicit behavior was “severe or pervasive,” which

²⁷⁹ No. cv 23-4873, 2024 WL 2206464 (E.D. Pa. Mar. 27, 2024).

²⁸⁰ *Id.* at *1 n.1.

²⁸¹ See *Doe v. Saber Healthcare Grp.*, No. 23cv1608, 2024 WL 2749156, at *6–7 (M.D. Pa. May 29, 2024); *Michael v. Bravo Brio Rests.*, No. 23-3691, 2024 WL 2923591, at *5 (D.N.J. June 10, 2024); *Aguilar v. Hrb Green Res.*, No. 23STcv07947, 2023 Cal. Super. LEXIS 62370, at *4–5 (Aug. 21, 2023).

²⁸² No. 23cv1608, 2024 WL 2749156 (M.D. Pa. May 29, 2024).

²⁸³ *Id.* at *1.

²⁸⁴ See *id.*

²⁸⁵ *Id.*

²⁸⁶ See *id.* at *1, *6.

²⁸⁷ See *id.* at *6.

²⁸⁸ *Id.* at *6–7.

²⁸⁹ See 42 U.S.C. § 2000e(b).

²⁹⁰ See, e.g., Rob Hopkirk, Alison Hagani, Taylor-Ryan Nedd, Serena Dineshkumar, Payton Gannon & Mell Chhoy, *State Regulation of Sexual Harassment*, 25 GEO. J. GENDER & L. 1043, 1055–57 & nn.93–94 (2024) (canvassing state statutes).

means “both subjectively and objectively offensive.”²⁹¹ Nevertheless, a handful of states and the District of Columbia have broken this mold, declaring that “[c]onduct need not be severe or pervasive to constitute harassment”²⁹² or that “[a] single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment.”²⁹³

The California Superior Court opinions that this Author located are especially revealing. All but one of them invoked state antidiscrimination law and assiduously avoided mentioning Title VII. This tactic serves two purposes. First, in the many cases that did not qualify for diversity jurisdiction because both parties were domiciled in California, omitting a cause of action under federal law insulated the matter from removal to federal court.²⁹⁴ This decision was helpful both because state courts have a reputation for being more hospitable to claimants,²⁹⁵ and because state courts are less likely than federal courts to have adopted the EFAA’s plausibility standard.²⁹⁶ Second, the California Fair Employment and Housing Act²⁹⁷ deviates from Title VII in ways that assist plaintiffs, like making employers strictly liable for harassment

²⁹¹ *Musleh v. Amazon.com Servs., LLC*, No. 22-cv-3742, 2023 WL 6141560, at *2 (N.D. Ill. Sep. 20, 2023); *Liles v. C.S. McCrossan, Inc.*, 851 F.3d 810, 823 (8th Cir. 2017).

²⁹² D.C. CODE ANN. § 2-1402.11(c-2)(3) (West 2025); *accord* *Ding v. Structure Therapeutics, Inc.*, 765 F. Supp. 3d 897, 903 (N.D. Cal. 2025) (explaining that New York lawmakers amended the state’s human rights law in 2019 to eliminate the “severe or pervasive” standard); *cf.* *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222, 231 (Minn. 2020) (“For the severe-or-pervasive standard to remain useful in Minnesota, the standard must evolve to reflect changes in societal attitudes towards what is acceptable behavior in the workplace.”).

²⁹³ CAL. GOV’T CODE § 12923(b) (West 2025).

²⁹⁴ Under the well-pleaded complaint rule, “federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.” *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). The fact that either the FAA or the EFAA may be implicated is not sufficient for federal question jurisdiction in the absence of “‘an independent jurisdictional basis’ over the parties’ dispute.” *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009) (quoting *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 582 (2008)) (discussing the FAA); *see* *Alvarado v. Sweetgreen, Inc.*, 712 F. Supp. 3d 393, 402 (S.D.N.Y. 2024) (“[T]he EFAA presents a mere defense here—a relationship far more attenuated to Plaintiffs’ causes of action than the affirmative defense that courts have long deemed adequate to raise federal question jurisdiction”).

²⁹⁵ *See, e.g.*, Helen Hershkoff & Luke Norris, *The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline*, 122 MICH. L. REV. 1, 20 (2023) (“Federal courts are thought to be less solicitous of plaintiffs’ claims than some state courts . . .”).

²⁹⁶ *See, e.g.*, *Yi v. Gori Co.*, No. 23STcv22167, 2024 Cal. Super. LEXIS 54245, at *7 (Jan. 31, 2024) (“California civil procedure has no plausibility requirement for complaints.”).

²⁹⁷ CAL. GOV’T CODE §§ 12900–12996 (West 2025).

committed by the victim's supervisor²⁹⁸ and discouraging courts from granting summary judgment motions.²⁹⁹

c. Municipal Law

The most promising path for aggrieved employees under the EFAA is also the most obscure: city ordinances. Because the EFAA recognizes sexual harassment under "state law,"³⁰⁰ and cities are "political subdivision of the [s]tate,"³⁰¹ courts have held that the statute recognizes asserted violations of local law.³⁰² This gives victims a powerful tool.

Consider the New York City Human Rights Law ("NYCHRL").³⁰³ At first blush, the NYCHRL merely seems to mirror Title VII and its state analogs by barring discrimination "in terms, conditions or privileges of employment" based on gender or sexual orientation, among other characteristics.³⁰⁴ In 2005, however, the New York City Council passed the Local Civil Rights Restoration Act,³⁰⁵ which instructed courts to read the NYCHRL "liberally" regardless of whether "federal or New York State civil and human rights laws . . . with provisions comparably-worded to provisions of this title, have been so construed."³⁰⁶ There is a broad consensus that the NYCHRL's thresholds are "much less demanding than the standards under Title VII."³⁰⁷ To establish a hostile work environment under the NYCHRL, a plaintiff "only needs to show that 'she has been treated less well than other employees because of her gender.'"³⁰⁸

²⁹⁸ See, e.g., *State Dep't of Health Servs. v. Super. Ct. of Sacramento Cnty.*, 79 P.3d 556, 562–63 (Cal. 2003) (distinguishing U.S. Supreme Court authority on Title VII and holding that, under the California Fair Employment and Housing Act, "an employer is strictly liable for *all* acts of sexual harassment by a supervisor").

²⁹⁹ See, e.g., *Wawrzewski v. United Airlines, Inc.*, 327 Cal. Rptr. 3d 245, 274 (Ct. App. 2024) ("Harassment cases are rarely appropriate for disposition on summary judgment.").

³⁰⁰ 9 U.S.C. § 401(4).

³⁰¹ *United Bldg. & Const. Trades Council v. Mayor of Camden*, 465 U.S. 208, 212, 215 (1984).

³⁰² For an extended discussion of this point, see *Yost v. Everyrealm, Inc.*, 657 F. Supp. 3d 563, 578 n.10 (S.D.N.Y. 2023) (observing that Congress usually defines a "State" to include its subdivisions or expressly precludes this reading and that "[i]nterpreting the EFAA as reaching local laws aligns with Congress's judgment that sexual assault and harassment cases belong, as a category, in courts"). For other opinions permitting plaintiffs to use municipal law to activate the EFAA, see *Johnson v. Everyrealm, Inc.*, 657 F. Supp. 3d 535, 540, 552 n.14 (S.D.N.Y. 2023), *Singh v. Meetup LLC*, 750 F. Supp. 3d 250, 255 n.1 (S.D.N.Y. 2024), and *Delo v. Paul Taylor Dance Found.*, 685 F. Supp. 3d 173, 182 n.2 (S.D.N.Y. 2023).

³⁰³ N.Y.C. ADMIN. CODE §§ 8-101 to 8-134 (2025).

³⁰⁴ *Id.* § 8-107.

³⁰⁵ N.Y.C. LOCAL LAW No. 85 of 2005 (Oct. 3, 2025).

³⁰⁶ *Id.* § 7 (emphasis omitted).

³⁰⁷ *Brazzano v. Thompson Hine LLP*, No. 24-cv-01420, 2025 WL 963114, at *7 (S.D.N.Y. Mar. 31, 2025).

³⁰⁸ *Delo v. Paul Taylor Dance Found.*, 685 F. Supp. 3d 173, 182 (S.D.N.Y. 2023) (quoting *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 110 (2d Cir. 2013)).

Plaintiffs are aware of this soft spot. Of the twenty-three accessible complaints from the state of New York, fifteen of them, or sixty-five percent, included a cause of action under the NYCHRL.³⁰⁹ For instance, in *Brazzano v. Thompson Hine LLP*,³¹⁰ a lawyer at a firm in New York alleged that the vice chair of her litigation group “badmouthed her, excluded her from gatherings, and made comments in the vein of ‘nice of you to show up’ when she arrived at meetings.”³¹¹ In addition, he once “brought [her] into his office and, in describing a new pro bono opportunity, told her that ‘judges know lawyers who provide legal services are working on a pro bono basis, and it’s like getting jerked off by a judge.’”³¹² The court held that even under the plausibility approach, these facts stated a viable NYCHRL claim and consequently activated the EFAA because they involved “unwanted gender-based conduct.”³¹³

4. *Effect*

Finally, the contours of the EFAA’s arbitration-killing function remain hazy. Indeed, “courts have taken different approaches when a case includes both claims for sexual [assault or] harassment and claims that do not directly pertain to sexual [assault or] harassment.”³¹⁴

For decades, the FAA has sometimes mandated that plaintiffs pursue lawsuits both in court and in arbitration. Indeed, the statute “require[s] 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.”³¹⁵ This pro-arbitration norm prevails even

³⁰⁹ The NYCHRL requires a nexus to New York City, which may be why not every plaintiff has tried to invoke it. *See, e.g.*, *Hoffman v. Parade Publ’ns*, 933 N.E.2d 744, 746 (N.Y.2010) (“[N]onresidents of the city . . . must plead and prove that the alleged discriminatory conduct had an impact within [its] boundaries.”). Conversely, some plaintiffs with New York ties pled a violation of the NYCHRL in filings in other states. *See, e.g.*, *Ding v. Structure Therapeutics, Inc.*, 765 F. Supp. 3d 897, 900 (N.D. Cal. 2025). In addition, plaintiffs’ lawyers are exploring sexual harassment claims under other city codes. *See* Civil Complaint at 2, *Moulds v. Skillcycle, Inc.*, No. cv 23-4873, 2024 WL 2206464 (E.D. Pa. Mar. 27, 2024) (pleading a violation of a Philadelphia ordinance).

³¹⁰ No. 24-cv-01420, 2025 WL 963114 (S.D.N.Y. Mar. 31, 2025).

³¹¹ *Id.* at *2.

³¹² *Id.*

³¹³ *Id.* at *7. As in the Title VII setting, there is a split of authority over whether the EFAA’s definition of “sexual harassment” includes nonsexualized conduct under state and local laws. *Compare* *Singh v. Meetup LLC*, 750 F. Supp. 3d 250, 258–59 (S.D.N.Y. 2024) (refusing to apply the EFAA to allegations under New York state and city law because “not all gender discrimination is sexual harassment”), *with* *Ding*, 765 F. Supp. 3d at 902 (“Despite the popular notion that ‘sex discrimination’ and ‘sexual harassment’ are two distinct things, it is of course[] the case that the latter is one species of sex- or gender-based discrimination.”).

³¹⁴ *Martinez v. San-I-Pak Pac., Inc.*, No. STK-cv-UWT-2023-4088, 2024 Cal. Super. LEXIS 12986, at *11 (Mar. 5, 2024).

³¹⁵ *KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011) (per curiam).

if it produces “the possibly inefficient maintenance of separate proceedings in different forums.”³¹⁶

Likewise, under the EFAA, if a plaintiff pursues multiple legal theories, some judges “parse” the lawsuit and compel arbitration of claims that “are not based on sexual discrimination or harassment.”³¹⁷ For example, in *Carreon v. 24 Hour Fitness United States, LLC*,³¹⁸ Dan Carreon asserted that his boss at a gym belittled his Mexican heritage, required him to perform manual labor after he had suffered a debilitating arm injury, and made vulgar remarks about customers.³¹⁹ A California trial court declined to exempt all of Carreon’s allegations from arbitration, opining that regardless of what the EFAA says, applying it to race and disability claims would flout its “original intent.”³²⁰

But most courts have reached a different conclusion based on the EFAA’s text. Recall that the statute states that “no predispute arbitration agreement . . . shall be valid or enforceable *with respect to a case* [that] . . . relates to the sexual assault dispute or the sexual harassment dispute.”³²¹ Many judges have cited this language to extend the EFAA beyond claims of sexual misconduct.³²²

³¹⁶ Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 217 (1985).

³¹⁷ *Carreon v. 24 Hour Fitness U.S., LLC*, No. 37-2023-00029582-CU-OE-NC, 2023 Cal. Super. LEXIS 77787, at *7 (Oct. 27, 2023); *see also* *Noguera v. Emer*, No. 23SMcv05324, 2024 Cal. Super. LEXIS 52347, at *1 (Apr. 25, 2024) (compelling arbitration of labor code claims but exempting sexual harassment allegations from arbitration under the EFAA); *Williams v. Apro, LLC*, No. 22STcv38325, 2023 Cal. Super. LEXIS 108098, at *6 (July 18, 2023) (“Nothing in the statute suggests a plaintiff may merge allegations subject to [the EFAA] with others that are not, and thereby avoid arbitration of the non-[EFAA] claims.”); *Sparkman v. Emer*, No. 23STcv01347, 2023 Cal. Super. LEXIS 25718, at *3 (May 1, 2023) (opining that the plaintiff’s argument that the EFAA invalidates the arbitration clause for her entire complaint “sweeps a bit too broadly”); *Hodges v. Starbucks Corp.*, No. 23STcv02667, 2023 WL 12011197, at *2 (Cal. Super. Ct. June 16, 2023) (warning the plaintiff that if she “files a motion to assert non-sexual harassment claims, the [c]ourt may prohibit her from doing so or may revisit the issue of arbitration”).

³¹⁸ No. 37-2023-00029582-CU-OE-NC, 2023 Cal. Super. LEXIS 77787 (Oct. 27, 2023).

³¹⁹ *See* Complaint for Damages at 2–6, *Carreon*, No. 37-2023-00029582-CU-OE-NC, 2023 Cal. Super. LEXIS 77787.

³²⁰ *Carreon*, 2023 Cal. Super. LEXIS 77787, at *6.

³²¹ 9 U.S.C. § 402(a) (emphasis added).

³²² *See, e.g., Johnson v. Everyrealm, Inc.*, 657 F. Supp. 3d 535, 562 (S.D.N.Y. 2023) (holding that the EFAA mandates that “defendants’ motion to compel arbitration must be denied with respect to . . . this entire case”); *Williams v. Mastronardi Produce, Ltd.*, No. 23-13302, 2024 WL 3908718, at *7 (E.D. Mich. Aug. 22, 2024) (“This Court shall follow the majority of the district courts that have addressed this issue, and rules that the EFAA precludes arbitration of this whole case”); *Liu v. Miniso Depot CA, Inc.*, 326 Cal. Rptr. 3d 286, 293 (Ct. App. 2024) (“[O]ne cannot reasonably interpret [the EFAA] as invalidating an arbitration agreement only with respect to certain claims within a case.”); *Puris v. TikTok Inc.*, No. 24-cv-00944, 2025 WL 343905, at *6 (S.D.N.Y. Jan. 30, 2025); *Delo v. Paul Taylor Dance Found.*, 685 F. Supp. 3d 173, 180 (S.D.N.Y. 2023); *Clay v. FGO Logistics, Inc.*, 751 F. Supp. 3d 3, 18 (D. Conn. 2024); *Turner v. Tesla, Inc.*, 686 F. Supp. 3d 917, 925 (N.D. Cal. 2023); *Doe v. Second St. Corp.*, 326 Cal. Rptr. 3d 42, 60 (Ct. App. 2024); *Aleman v. DHS We Care, Inc.*, No. cvPS2403017, 2024 Cal. Super. LEXIS 43814, at *5 (Oct. 31, 2024).

Nevertheless, these courts further divide into two subtly different camps. One insists that the satellite causes of action be “closely related to, or intertwined with, the sexual assault or sexual harassment dispute.”³²³ The principal opinion here is *Mera v. SA Hospitality Group*,³²⁴ in which Danilo Mera, a busser at a restaurant, alleged that his employer violated the New York State Human Rights Law (“NYSHRL”) and the NYCHRL for “failing to address the constant harassment and abuse made against [him] on the basis of his sexual orientation by his co-workers.”³²⁵ Mera also sought to pursue a class action against the restaurant for violating the Fair Labor Standards Act (“FLSA”)³²⁶ and New York Labor Law (“NYLL”)³²⁷ by withholding wages.³²⁸ A federal district court in New York found that the EFAA applied to claims under the NYSHRL and NYCHRL but not the FLSA and NYLL, opining that the class allegations were “unrelated claims affecting a broad group of individuals having nothing to do with the particular sexual harassment affecting the plaintiff alone.”³²⁹ This approach may be described as the “intertwining” approach.

The second group of cases reads the EFAA more generously. According to these courts, the intertwining approach clashes with the statute’s language:

[The EFAA’s] text is clear, unambiguous, and decisive It keys the scope of the invalidation of the arbitration clause to the entire “case” relating to the sexual [assault or] harassment

³²³ *Bruce v. Adams & Reese, LLP*, No. 24-cv-00875, 2025 WL 611071, at *14 (M.D. Tenn. Feb. 25, 2025) (articulating but not adopting this view), *aff’d*, No. 25-5210, 2026 WL 523180 (6th Cir. Feb. 25, 2026); *see also Turner*, 686 F. Supp. 3d at 926–28 (inquiring whether the additional claims are “substantially related” to the plaintiff’s sexual harassment allegations); *Ohumukini v. 24 Hour Fitness U.S., LLC*, No. 37-2023-00006424-CU-OE-CTL, 2023 Cal. Super. LEXIS 45466, at *6 (June 30, 2023) (applying the EFAA to the plaintiff’s entire complaint because her “causes of action [were] not ‘far afield’ of her sexual harassment and battery claims”); *Avilez v. W. Golf Props.*, No. cvPS2204092, 2023 Cal. Super. LEXIS 74226, at *7 (Mar. 2, 2023) (“Even assuming that the causes of action here were not premised on sexual assault and harassment, they are so intertwined with the remaining causes of action that they cannot be meaningfully carved out without the threat of conflicting rulings on common issues and potentially inconsistent results.”).

³²⁴ 675 F. Supp. 3d 442 (S.D.N.Y. 2023), *aff’d in part, rev’d in part*, No. 23 civ. 3492, 2025 WL 3202080 (S.D.N.Y. Nov. 17, 2025).

³²⁵ *Id.* at 446 (alteration in original).

³²⁶ Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–209.

³²⁷ N.Y. LAB. LAW §§ 650–665 (McKinney 2026).

³²⁸ *See* Class and Collective Action Complaint at 21–22, *Mera*, 675 F. Supp. 3d 442 (No. 23-cv-03492).

³²⁹ *Mera*, 675 F. Supp. 3d at 447.

dispute. It thus does not limit the invalidation to the claim or claims in which that dispute plays a part.³³⁰

For example, in *Cruz v. Tustin Hills Healthcare Inc.*,³³¹ the plaintiff filed a fourteen-count, seventy-six-page complaint against her former employer, alleging sexual assault, sexual harassment, sexual battery, disability discrimination, wrongful firing, unfair business practices, and failure to provide meal, rest, bathroom, and water breaks.³³² As a California trial judge observed, this document “repeat[ed] verbatim” the same allegations in each section, making it hard to discern “the specific factual basis for each cause of action.”³³³ The court, however, held that the EFAA excluded every claim from arbitration, reasoning that “[t]he terms ‘case’ and ‘relating to’ should be afforded their ordinary meaning.”³³⁴ This Article will call this the “blanket invalidity” rule.

* * *

In sum, the EFAA “raises difficult questions of statutory interpretation.”³³⁵ Many of them concern whether to enforce the statute’s text or its spirit. And, as this Article explains next, given textualism’s dominance, the EFAA will likely leave a deep imprint on federal arbitration law.

III. INTERPRETING THE EFAA

This Part addresses unresolved questions about the meaning of the EFAA. It first contends that the contemporary Supreme Court will take

³³⁰ *Johnson v. Everyrealm, Inc.*, 657 F. Supp. 3d 535, 558 (S.D.N.Y. 2023); *Bruce v. Adams & Reese, LLP*, No. 24-cv-00875, 2025 WL 611071, at *14 (M.D. Tenn. Feb. 25, 2025) (“[B]ecause the plaintiff states a colorable sexual harassment claim, the [a]rbitration [a]greement is unenforceable as to the entire case.”); *Delo v. Paul Taylor Dance Found.*, 685 F. Supp. 3d 173, 185 (S.D.N.Y. 2023) (“Because [the plaintiff] has, at the very least, plausibly pled sexual harassment violations of the NYCHRL, the EFAA applies to block arbitration of all her claims.”); *Liu v. Miniso Depot CA, Inc.*, 326 Cal. Rptr. 3d 286, 297 (Ct. App. 2024) (refusing to “employ any type of ‘intertwining’ analysis”). Admittedly, some cases seem to straddle the boundary between the intertwining and blanket invalidity principles. *See, e.g., Ding v. Structure Therapeutics, Inc.*, 755 F. Supp. 3d 1200, 1219 (N.D. Cal. 2024) (applying the EFAA to the entire case when the plaintiff’s “non-sexual-harassment claims are based upon the same underlying facts as her sexual harassment claim”); *Cardenas v. F.D. Thomas, Inc.*, No. 24-cv-01814, 2025 WL 418753, at *5 (E.D. Cal. Feb. 6, 2025) (finding that the EFAA applies to the entire complaint when “the core of plaintiffs’ case alleges conduct constituting sexual harassment”).

³³¹ No. 30-2023-01352478-CU-WT-CJC, 2024 Cal. Super. LEXIS 31245 (June 24, 2024).

³³² *See generally* Complaint for Damages, *Cruz*, No. 30-2023-01352478-CU-WT-CJC, 2024 Cal. Super. LEXIS 31245 (describing the fourteen counts).

³³³ *Cruz*, 2024 Cal. Super. LEXIS 31245, at *8–9.

³³⁴ *Id.* at *14.

³³⁵ *Watson v. Blaze Media LLC*, No. 23-cv-0279, 2023 WL 5004144, at *4 (N.D. Tex. Aug. 3, 2023).

Congress at its word. It then demonstrates that, with one exception, the best interpretation of the statute is the broadest.

A. *FAA Textualism*

Increasingly, there has been a striking change in the way the Supreme Court has resolved FAA cases. Rather than citing the federal policy in favor of arbitration, the Justices have interpreted the FAA by “proceed[ing] methodically through [its] wording.”³³⁶ As this Section explains, the Court will read the EFAA this way as well.

It is no secret that textualism is the coin of the realm among sitting Justices. In 2015, Justice Elena Kagan quipped, “We are all textualists now.”³³⁷ Since then, this trend has accelerated with the elevation of Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—all of whom interpret statutes according to their letter.³³⁸

Somewhat surprisingly, plaintiffs in FAA cases have benefited from this shift. They have won a series of unlikely victories at the Court by using a strategy called “progressive textualism,” which foregrounds the “common meaning [of the FAA] at the time the statute was passed.”³³⁹ For instance, in *New Prime Inc. v. Oliveira*,³⁴⁰ the Court determined that independent contractors qualified for § 1’s exclusion of “contracts of employment of . . . workers engaged in . . . interstate commerce.”³⁴¹ In an opinion by Justice Gorsuch, the Court explained that, in 1925, “a ‘contract of employment’ usually meant nothing more than an agreement to perform work.”³⁴² Although the defendant objected that such an interpretation was anti-arbitration, Justice Gorsuch declined to “pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal.”³⁴³

Likewise, in *Southwest Airlines Co. v. Saxon*,³⁴⁴ Justice Clarence Thomas held that § 1’s carveout covers people who merely help with the interstate transport of goods.³⁴⁵ *Saxon* presented the issue of whether a “ramp supervisor” for Southwest Airlines fell within § 1 because she

³³⁶ *Badgerow v. Walters*, 596 U.S. 1, 10 (2022).

³³⁷ HARVARD LAW SCHOOL, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, at 08:28 (YouTube, Nov. 25, 2015), https://www.youtube.com/watch?v=d-pEtszFT0Tg&feature=emb_title (on file with the George Washington Law Review).

³³⁸ See Austin Peters, *Are They All Textualists Now?*, 118 NW. U. L. REV. 1201, 1203 & n.1 (2024).

³³⁹ Brief for Respondent at 1, *New Prime, Inc. v. Oliveira*, 586 U.S. 105 (2019) (No. 17-340).

³⁴⁰ 586 U.S. 105 (2019).

³⁴¹ *Id.* at 116 (emphasis omitted).

³⁴² *Id.* at 114.

³⁴³ *Id.* at 120.

³⁴⁴ 596 U.S. 450 (2022).

³⁴⁵ See *id.* at 453.

handled bags, airmail, and freight on the tarmac.³⁴⁶ Justice Thomas cited dictionaries from the early twentieth century to determine that to be “engaged” in “interstate commerce” means “to be ‘occupied,’ ‘employed,’ or ‘involved’ in it.”³⁴⁷ Accordingly, Justice Thomas concluded that “airline employees who physically load and unload cargo on and off planes traveling in interstate commerce are, as a practical matter, part of the interstate transportation of goods.”³⁴⁸ Finally, Justice Thomas rejected Southwest’s attempt to invoke the federal policy in favor of arbitration, declaring that the plain text of of § 1 “suffices to show that airplane cargo loaders are exempt from the FAA’s scope, and we have no warrant to elevate vague invocations of statutory purpose over the words Congress chose.”³⁴⁹

*Morgan v. Sundance, Inc.*³⁵⁰ offers a final clue for how the Court will read the EFAA. *Morgan* involved the question of how federal courts should decide whether a party has waived its entitlement to arbitrate.³⁵¹ Although waiver generally occurs when a person or entity deliberately surrenders a known right,³⁵² many federal judges had applied a more demanding test for waiver of the ability to compel arbitration.³⁵³ Citing the FAA’s pro-arbitration penumbras, these judges had required a plaintiff to prove that the defendant’s delay—for instance, trying to dismiss the case or conducting discovery before seeking arbitration—had caused the plaintiff prejudice, which is some kind of financial or strategic loss.³⁵⁴ In an opinion by Justice Kagan, however, the Court eliminated this additional prejudice element, reasoning that “the text of the FAA makes clear that courts are not to create arbitration-specific procedural rules”³⁵⁵ and that “[t]he federal policy is about treating arbitration contracts like all others, not about fostering arbitration.”³⁵⁶

These decisions suggest that the Court will analyze the EFAA based on its text. Not only did the Justices prioritize the FAA’s language over the federal policy favoring arbitration and the interests of corporations, but they were practically unanimous: There were no dissents,

³⁴⁶ *Id.* at 454.

³⁴⁷ *Id.* at 456–57.

³⁴⁸ *Id.* at 457.

³⁴⁹ *Id.* at 463.

³⁵⁰ 596 U.S. 411 (2022).

³⁵¹ *See id.* at 413.

³⁵² *See, e.g., Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 20 n.1 (2017).

³⁵³ *See, e.g., Chen-Oster v. Goldman, Sachs & Co.*, 449 F. Supp. 3d 216, 237–39 (S.D.N.Y. 2020).

³⁵⁴ *See Morgan*, 596 U.S. at 416–18.

³⁵⁵ *Id.* at 413–14, 419. Justice Kagan was referring to § 6 of the FAA, which states that “any [motions] under the statute . . . ‘shall be made and heard in the manner provided by law.’” *Id.* at 419 (quoting 9 U.S.C. § 6). As she saw it, “[a] directive to a federal court to treat arbitration applications ‘in the manner provided by law’ for all other motions is simply a command to apply the usual federal procedural rules, including any rules relating to a motion’s timeliness.” *Id.*

³⁵⁶ *Id.* at 418.

and other than a stray concurrence and two self-recusals, every Justice signed each majority opinion.³⁵⁷ The next Section will discuss how reading the EFAA the same way will have profound implications.

B. *EFAA Textualism*

This Section analyzes the EFAA through the lens the Court will use. It argues that the statute's plain language (1) exempts every properly joined claim and party from arbitration, (2) extends to nonsexualized conduct and plaintiffs who did not personally experience sexual assault or sexual harassment, and (3) reaches back in time to govern some misconduct that occurred before March 3, 2022. Finally, this Section addresses pleading standards—the one issue where the EFAA's text offers little guidance—and proposes a compromise between the plausibility and nonfrivolousness views.

1. *The Railroad Switch*

No issues will determine the EFAA's legacy more than its impact on claims and parties that are not closely related to the sexual assault or sexual misconduct dispute. This Section argues that the statute is even more far-reaching than many courts have realized.

The EFAA's most notable component is its railroad switch: that no forced arbitration provision “shall be valid or enforceable with respect to a case” that “relates to the sexual assault dispute or the sexual harassment dispute.”³⁵⁸ This provision fuses two supercharged concepts. “A case” is a “civil . . . proceeding.”³⁵⁹ As the Virginia Supreme Court explained in a different context, “Its plain meaning includes all claims asserted in the proceeding.”³⁶⁰ And “related” means “[c]onnected in some way.”³⁶¹ Together, these words signify that the EFAA applies across the board to *every claim* in any lawsuit that has a link to sexual misconduct.

³⁵⁷ *New Prime Inc. v. Oliveira* was a 7–0–1 decision, with Justice Ruth Bader Ginsburg concurring and Justice Brett Kavanaugh on the sidelines. 586 U.S. 105, 107 (2019). *Southwest Airlines Co. v. Saxon* was an 8–0 decision with Justice Amy Coney Barrett recused. 596 U.S. 450, 452 (2022). *Morgan v. Sundance, Inc.* was a 9–0 decision. 596 U.S. at 412.

³⁵⁸ 9 U.S.C. § 402(a).

³⁵⁹ *Case*, BLACK'S LAW DICTIONARY (12th ed. 2024); *Johnson v. Everyrealm, Inc.*, 657 F. Supp. 3d 535, 558–59 (S.D.N.Y. 2023) (“The term ‘case’ is familiar in the law. Dictionaries define a ‘case’ as ‘a suit or action in law or equity’” (quoting *Case*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/case> [<https://perma.cc/SZ7G-ANV8>] (last visited June 8, 2026))).

³⁶⁰ *Gordon v. Kiser*, 821 S.E.2d 531, 537 (Va. 2018).

³⁶¹ *Related*, BLACK'S LAW DICTIONARY (12th ed. 2024). As the Eleventh Circuit explained when referring to the term “related to,” “It is hard, candidly, to think of a more capacious term to use in defining the coverage of a provision.” *AQuate II LLC v. Myers*, 100 F.4th 1316, 1321 (11th Cir. 2024).

Four consequences flow from this conclusion. First, the smattering of courts that have read the statute only to cover *claims* of sexual misconduct are wrong.³⁶² One judge hit the proverbial nail on the head by remarking that “[a]ny assertion that the EFAA only applies to specific claims, as opposed to an entire case, is unsupported by [its] plain language.”³⁶³

Although employers have vigorously resisted this conclusion, their arguments impermissibly ask courts to elevate purpose over text. For example, one defendant’s brief in the California Court of Appeals included a massive excerpt from the floor debate in the House of Representatives to suggest that the EFAA does not govern “intersectional and related issues that arise in sexual harassment cases.”³⁶⁴ But the appellate panel correctly held that because the EFAA’s text is crystal clear, it “ha[d] no grounds to consider the legislative history.”³⁶⁵

Second, contrary to what some judges have held, the EFAA does not apply only to claims that are intertwined with the causes of action for sexual assault or sexual harassment. The leading intertwining decision, *Mera v. SA Hospitality Group*, declared that the legislation governs “the claims in the case that relate to the sexual harassment dispute.”³⁶⁶ But that is not what the EFAA says. Rather, the statute works its magic on “a case” that “relates to the sexual assault dispute or the sexual harassment dispute.”³⁶⁷ Moreover, Congress’s use of the comprehensive term “case” was not an accident. Lawmakers knew how to refer to discrete aspects of a proceeding: Indeed, the statute also contains the terms “claim” and “dispute.”³⁶⁸ Because the EFAA goes beyond these narrower words and covers the whole “case,” it imposes the blanket invalidity rule.

Third, to bring the “case” within the EFAA,³⁶⁹ the plaintiff needs only to identify *one* timely “dispute” or “claim” involving sexual

³⁶² But see *supra* notes 357–61 and accompanying text.

³⁶³ *Doe v. Jack in the Box Inc.*, No. 23STcv10282, 2024 Cal. Super. LEXIS 53713, at *21 (Jan. 22, 2024).

³⁶⁴ Appellants’ Reply Brief at 20, *Liu v. Miniso Depot Ca., Inc.*, 326 Cal. Rptr. 3d 286 (Ct. App. 2024) (No. B338090).

³⁶⁵ *Liu*, 326 Cal. Rptr. 3d at 296; see also *Van Meurs-Bradley v. AutoNation, Inc.*, No. C100938, 2025 WL 1923593, at *6 (Cal. Ct. App. July 14, 2025) (refusing to “review portions of the EFAA’s legislative history” and “to address the statute’s purpose” because “the statute’s language is clear on its face and unambiguous”).

³⁶⁶ *Id.* at 447 (emphasis added).

³⁶⁷ 9 U.S.C. § 402(a) (emphasis added).

³⁶⁸ See *supra* note 204 and accompanying text; see also *Johnson v. Everyrealm, Inc.*, 657 F. Supp. 3d 535, 559 (S.D.N.Y. 2023) (“[A] surrounding EFAA provision—the one that sets the EFAA’s effective date—uses the narrower term ‘claim.’”); *Ramos v. Prime Wheel Corp.*, No. 23CMcv00301, 2023 Cal. Super. LEXIS 53651, at *6 (Aug. 10, 2023) (“[T]he EFAA distinguishes a ‘claim’ from a ‘case.’”).

³⁶⁹ 9 U.S.C. § 402(a).

wrongdoing.³⁷⁰ For example, in *Clay v. FGO Logistics, Inc.*,³⁷¹ John Clay Jr. complained to his employer that a manager at a warehouse to which he made deliveries said things that were racist and sexist.³⁷² The manager was fired in November 2021.³⁷³ In April 2022, Clay lost his own job.³⁷⁴ He sued his and the manager's former employers for retaliation, sexual harassment, and racial discrimination.³⁷⁵ Most of these causes of action ripened no later than late 2021, when the manager was terminated, and the wrongdoing stopped.³⁷⁶ But a federal district court in Connecticut astutely recognized that because Clay's retaliation claim accrued when he was fired two months after the EFAA's effective date, it did not matter that his other sexual harassment claims arose too early.³⁷⁷ He had flipped the railroad switch, and therefore, "the entire case cannot be arbitrated."³⁷⁸

Fourth, the EFAA extends to *every party* in the complaint. The case law on this subject points in two different directions. On the one hand, judges have uniformly found that the statute governs all named defendants, allowing employees to often sue other individuals or businesses in addition to their employer, such as their coworkers or their employers' subsidiaries or affiliates.³⁷⁹ In turn, these additional litigants can often piggyback on the employer's arbitration clause through agency principles, equitable estoppel, or the third-party beneficiary doctrine.³⁸⁰ Yet

³⁷⁰ 9 U.S.C. § 401 note.

³⁷¹ 751 F. Supp. 3d 3 (D. Conn. 2024).

³⁷² *See id.* at 7–9.

³⁷³ *See id.* at 9.

³⁷⁴ *See id.*

³⁷⁵ *See id.* at 10.

³⁷⁶ *See id.* at 9, 17. Although the manager sent Clay inappropriate text messages after the manager was fired, these too stopped in November 2021. *See id.* at 9.

³⁷⁷ *See id.* at 20.

³⁷⁸ *Id.* ("When a covered 'dispute' or 'claim' arises or accrues after March 3, 2022, therefore, any arbitration agreement that would otherwise govern that dispute or claim may be invalidated with respect to all claims in the case by the person alleging the covered dispute or claim."); *see also* *Molchanoff v. SOLV Energy, LLC*, No. 23cv653, 2024 WL 899384, at *4 (S.D. Cal. Mar. 1, 2024) (exempting entire case from arbitration even though most of the plaintiff's sexual assault and sexual harassment claims accrued before the EFAA's effective date). A few cases have reached the opposite conclusion, but they do not engage with the EFAA's text. *See Silverman v. DiscGenics, Inc.*, No. 22-cv-00354, 2023 WL 2480054, at *2–3 (D. Utah Mar. 13, 2023) (compelling arbitration of a plaintiff's pre-EFAA claims despite finding that some of her allegations were "covered by the Ending Forced Arbitration Act and that the arbitration agreements may not be enforced for these claims"); *O'Sullivan v. Jacaranda Club, LLC*, 206 N.Y.S.3d 562, 564 (N.Y. App. Div. 2024) (citing *Silverman* for the proposition that the court cannot "retain jurisdiction over plaintiffs' claims that accrued prior to March 3, 2022").

³⁷⁹ *See, e.g.,* Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531, 569 (2014) ("Attempts by non-signatories to attach themselves to a contract and to force arbitration of a dispute arise frequently and are a fertile source of litigation.").

³⁸⁰ *See* *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009) (explaining that the FAA absorbs "'traditional principles' of state law [that] allow a contract to be enforced by or against

because the EFAA applies to the entire “case,” courts have determined that even if just one defendant purportedly engaged in sexual misconduct, “the EFAA bars enforcement of the arbitration agreement . . . as to [them] all.”³⁸¹

But on the other hand, in *Lambert v. New Start Capital LLC*,³⁸² a federal district court in New York applied a different approach to a lawsuit filed by multiple plaintiffs.³⁸³ Seven former sales representatives sued New Start Capital and several of its officers for a variety of wrongdoings.³⁸⁴ The judge held that the EFAA applied to three groups of plaintiffs: Alana Lambert, who claimed that her supervisor had sexually exploited her in exchange for giving her profitable sales leads;³⁸⁵ Omnaya Abouzaid, who asserted that she was fired for reporting the harassment of Lambert;³⁸⁶ and Matthew Jamele and Mladen Vasic, who contended that they earned less in commission because of Lambert’s supervisor.³⁸⁷ But the court found that the statute did not govern two other plaintiffs, Kimarah LeRouge and Joseph Jacobs, because their FLSA and NYLL “allegations do not relate to Lambert’s . . . harassment allegations or to any other conduct constituting sexual harassment.”³⁸⁸ The court reasoned that “the EFAA does not apply to all the plaintiffs in this action simply because they chose to file their claims in a single complaint” and opined that “[t]he text of the EFAA supports this interpretation”

nonparties to the contract through ‘assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel’” (quoting 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:19 (4th ed. 2001))).

³⁸¹ *Molchanoff v. SOLV Energy, LLC*, No. 23cv653, 2024 WL 899384, at *3 (S.D. Cal. Mar. 1, 2024); see *Clay*, 751 F. Supp. at 20 (“[W]hen a claim against one party is covered by the EFAA, the entire case cannot be arbitrated if the plaintiff so elects.”); *Delirium TV, LLC v. Dang*, 714 S.W.3d 640, 649 (Tex. App. 2024) (“Nothing in [the statute’s] language requires a certain relationship to exist between the parties before the arbitration agreement is invalidated by the EFAA.”). Similarly, the EFAA applies even if the sole defendant was not the perpetrator of the sexual assault or sexual harassment. See *SJ Med. Ctr. v. Anozie*, 694 S.W.3d 915, 917, 924 (Tex. App. 2024) (applying the EFAA when a nurse alleged that her former employer, a hospital, fired her after she reported that “a mental health patient . . . assaulted her by slapping her ‘buttock area’”).

³⁸² 799 F. Supp. 3d 258 (S.D.N.Y. 2025).

³⁸³ See *id.* at 267.

³⁸⁴ See [Proposed] Second Amended Complaint at 1, *Lambert*, 799 F. Supp. 3d 258 (No. 24-cv-8055).

³⁸⁵ See *Lambert*, 799 F. Supp. 3d at 281.

³⁸⁶ See *id.*

³⁸⁷ See *id.* at 287 (“While the intent of the EFAA . . . may not have been to protect the claims of individuals like Jamele and Vasic, who are a degree separated from the actual alleged sexual harassment, the text of the statute defines applicable disputes broadly as those that ‘relate to’ conduct constituting sexual harassment.”).

³⁸⁸ *Id.* at 282, 286 n.12. The court declined to exercise jurisdiction over another plaintiff, Erica Wiltz, who asserted only state law claims for race and disability discrimination. See *id.* at 276.

because it covers “a case to the extent the case ‘relates to the sexual assault dispute or the sexual harassment dispute.’”³⁸⁹

Lambert misreads the EFAA. The statute does not “appl[y] to a case to the extent the case ‘relates to the sexual assault dispute or the sexual harassment dispute.’”³⁹⁰ Instead, the law governs “case[s]”—full stop—that relate to sexual misconduct.³⁹¹ To be sure, the rules of misjoinder permit courts to strike far-flung parties or causes of action from a complaint.³⁹² But nothing in the EFAA allows courts to determine that particular individuals or claims do not belong within a “case” brought by a survivor of sexual assault or sexual harassment.³⁹³ Under the railroad switch, every claim and party in the “case” should remain in the court system.

2. Sexual Harassment

Even though the definition of “sexual harassment dispute” is integral to the EFAA, its contours remain elusive. What, exactly, is “a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law”?³⁹⁴ This Section makes two assertions about the scope of that language. First, it is not limited to sexualized wrongdoing. Second, the plaintiff need not have personally experienced sexual assault or sexual harassment.

a. Nonsexualized Misconduct

There is a wide split in authority over whether “sexual harassment” under the EFAA requires sexualized misbehavior.³⁹⁵ This Section argues that the statute defers to existing civil rights law. Thus, in cases involving Title VII and some of its state and local counterparts that permit workers to bring hostile work environment claims based on

³⁸⁹ *Id.* at 282–83 (quoting 9 U.S.C. § 402(a)). In addition, the court noted that the EFAA’s legislative history is shot through with statements from lawmakers reinforcing “the view that its scope should be limited to the case of the person or class alleging conduct constituting a sexual harassment or sexual assault dispute.” *Id.* at 284.

³⁹⁰ *Id.* at 283 (emphasis added) (quoting 9 U.S.C. § 402(a)).

³⁹¹ 9 U.S.C. § 402(a).

³⁹² See, e.g., FED. R. Civ. P. 21 (“On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.”); *DirectTV, Inc. v. Leto*, 467 F.3d 842, 844 (3d Cir. 2006) (“[M]isjoinder . . . occurs when there is no common question of law or fact or when . . . the events that give rise to the plaintiff’s claims against defendants do not stem from the same transaction.”).

³⁹³ *Contra* *Baldwin v. TMPL Lexington LLC*, No. 23 civ. 9899, 2024 WL 3862150, at *8 (S.D.N.Y. Aug. 19, 2024) (suggesting in dicta that the EFAA might not govern “improperly joined claims” such as “antitrust or securities law violations”).

³⁹⁴ 9 U.S.C. § 401(4).

³⁹⁵ See *supra* notes 314–34 and accompanying text.

nonsexualized conduct, the EFAA covers “sexual harassment” that is not overtly sexual.

Courts that limit the EFAA to allegations that are “sexual in nature” misinterpret the statute.³⁹⁶ As mentioned, these decisions assume, based on the ordinary meaning of “sexual harassment” or the EFAA’s goals, that Congress restricted the statute to “unwelcome sexual advances.”³⁹⁷ But the EFAA specifies that “sexual harassment” is “conduct that is alleged to constitute sexual harassment *under applicable . . . law*.”³⁹⁸ As a result, no matter what dictionaries say or some lawmakers intended, the EFAA expressly incorporates the *legal* definition of “sexual harassment.” And as discussed above, judges have long deemed “sexual harassment” under Title VII and similar legislation to include hostile work environments that are devoid of sexual overtones.³⁹⁹

The EFAA’s evolution during the drafting process reinforces this conclusion. Although textualists generally ignore legislative history, some consider “statutory history,” which refers to changes to a bill’s language as Congress debates it.⁴⁰⁰ As noted, until February 2022, the EFAA declared that “sexual harassment” only referred to five kinds of sexually charged malfeasance, such as “[u]nwanted physical contact that is sexual in nature.”⁴⁰¹ The Buck Amendment, however, replaced that bespoke definition with “a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.”⁴⁰² This decision to defer to existing law makes sense: Asking

³⁹⁶ *But see* Smith v. Boehringer Ingelheim Pharms. LLC, No. 24-cv-01266, 2025 WL 2403042, at *9 (D. Conn. Aug. 19, 2025) (“[T]he Court concludes that a sexual harassment claim must . . . include conduct that is offensive and sexual in nature.”).

³⁹⁷ Johannessen v. JUUL Labs, Inc., No. 23-cv-03681, 2024 WL 3173286, at *4 (N.D. Cal. June 24, 2024) (discussing sexual harassment under California law).

³⁹⁸ *Id.* (emphasis added).

³⁹⁹ *See supra* notes 281–88, 291–93, 303–08 and accompanying text. Some of the courts that insist that the EFAA only governs sexualized behavior cite a passage in *Bostock v. Clayton County* in which “the Supreme Court . . . recognized that ‘[s]exual harassment’ is conceptually distinct from sex discrimination, but it can fall within Title VII’s sweep.” *Smith*, 2025 WL 2403042, at *8 (second alteration in original) (quoting *Bostock v. Clayton Cnty.*, 590 U.S. 644, 669 (2020)); *Moulds v. Skillcycle, Inc.*, No. cv 23-4873, 2024 WL 2206464, at *1 n.1 (E.D. Pa. Mar. 27, 2024). But *Bostock*, which extended Title VII’s protections to transgender individuals, did not hold that hostile work environment claims require sexualized conduct. Indeed, as lower courts have recognized, “[a]lthough the Court expanded the groups of individuals protected by Title VII, it in no way altered the preexisting legal standard for sexual harassment.” *Newbury v. City of Windcrest*, 991 F.3d 672, 677 (5th Cir. 2021).

⁴⁰⁰ *See* Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 271–73 (2022) (“[T]he Roberts Court[s] . . . textualist and textualist-leaning Justices . . . have at times employed unenacted drafting history to infer statutory meaning in the opinions they have authored.”).

⁴⁰¹ *See supra* notes 152–53 and accompanying text.

⁴⁰² 9 U.S.C. § 401(4); 168 CONG. REC. H992 (daily ed. Feb. 7, 2022) (statement of Rep. Ken Buck) (“The issue arose here because there was a question of whether the definition that was contained in this law would supersede Federal, State, or Tribal law; *it doesn’t*.” (emphasis added)).

courts to reinvent the wheel by applying a unique conception of “sexual harassment” would have spawned countless interpretive disputes. Thus, Congress wisely chose to economize by “embracing sexual harassment jurisprudence.”⁴⁰³

b. Plaintiff Status

The EFAA also does not require the plaintiff to have been the *victim* of sexual assault or sexual harassment. Again, it merely demands that a plaintiff bring a “case” that “relates to” “a dispute relating to conduct that is alleged to constitute sexual harassment under applicable . . . law.”⁴⁰⁴ It therefore applies when someone alleges that their employer penalized them for engaging in protected activity, including participating in an investigation of sexual misconduct directed at someone else.⁴⁰⁵

In *Newman v. Ambry Genetics Corp.*,⁴⁰⁶ the question of whether the EFAA covers a “plaintiff who did not personally experience” sexual impropriety first emerged.⁴⁰⁷ Wayne Newman, an account executive at Ambry, alleged that he was riding in a car after a client dinner when his boss looked directly at him, said that one of Newman’s coworkers was “a big, fat girl with a big fat butt,” and laughed.⁴⁰⁸ The next week, Ambry asked Newman for a written witness statement, which Newman provided.⁴⁰⁹ Two weeks later, Newman was fired.⁴¹⁰ A federal magistrate judge in South Carolina held that Newman’s Title VII retaliation claim did not trigger the EFAA.⁴¹¹ The court noted that the coworker who had been targeted had filed a report that “contains no allegation of sexual harassment” but rather objected that the remark “was intended to ‘demean her.’”⁴¹² The court thus concluded that there was no “sexual harassment dispute.”⁴¹³

Newman was wrongly decided. It ignored two nuances about retaliation claims. First, such a cause of action does not require “any underlying discrimination claim [to] actually amount[] to a Title VII

⁴⁰³ 168 CONG. REC. H991 (daily ed. Feb. 7, 2022) (statement of Rep. Robert Cortez Scott).

⁴⁰⁴ 9 U.S.C. §§ 401–402(a).

⁴⁰⁵ *See id.*

⁴⁰⁶ No. 24-cv-00887, 2024 WL 4164738 (D.S.C. Apr. 26, 2024), *report and recommendation adopted in part and rejected in part*, No. 24-cv-00887, 2024 WL 3811606 (D.S.C. Aug. 14, 2024).

⁴⁰⁷ *Id.* at *5–6.

⁴⁰⁸ *Id.* at *1.

⁴⁰⁹ *See id.* at *2.

⁴¹⁰ *See id.*

⁴¹¹ *See id.* at *3.

⁴¹² *Id.* at *5.

⁴¹³ *Id.* at *4.

violation.”⁴¹⁴ Instead, all that matters is that the plaintiff “had a reasonable, but mistaken good faith belief that Title VII had been violated.”⁴¹⁵ As a result, the fact that Newman’s coworker did not sue should not have been dispositive. Second, “retaliation resulting from a report of sexual harassment is ‘relat[ed] to conduct that is alleged to constitute sexual harassment.’”⁴¹⁶ Thus, the judge failed to see that Newman satisfied the EFAA’s prerequisites by bringing a “case” that “relates to” “a dispute relating to conduct that is alleged to constitute sexual harassment under applicable . . . law.”⁴¹⁷

Indeed, more recently, in *Hicks v. CEC Entertainment Holdings I*,⁴¹⁸ a federal judge in Delaware reached the opposite result on similar facts.⁴¹⁹ Deborah Hicks worked at a Chuck E. Cheese restaurant and alleged that she was fired after she complained about her boss’s lewd conduct towards other people, including “sexual harassment of female crew members” and “solicitation of female minors for underage sex.”⁴²⁰ The defendant protested that the EFAA did not apply because Hicks did not allege that she was harassed.⁴²¹ The defendant bolstered this argument by citing Senator Ernst’s remarks on the Senate floor that “[t]his bill is narrow and scoped to address sexual assault and sexual harassment cases . . . [and] the specific challenges that *victims* of these particular allegations face.”⁴²² The court rejected this assertion because it gave short shrift to the statute’s text:

[The defendant] argues that Congress intended the EFAA only to protect alleged victims of sexual harassment or sexual abuse, relying on a statement by one Senator. But my job is to

⁴¹⁴ *Ludwig v. Rochester Psychiatric Ctr.*, 550 F. Supp. 2d 394, 397 (W.D.N.Y. 2008), *aff’d*, 347 F. App’x 685 (2d Cir. 2009).

⁴¹⁵ *Pruitt v. Kansas*, 364 F. Supp. 2d 1264, 1270 (D. Kan. 2005). For another case that makes the same mistake as *Newman*, see *Mitchell v. Raymond James & Assocs.*, No. 23-cv-2341, 2024 WL 4486565, at *11 (M.D. Fla. Aug. 23, 2024) (concluding that the EFAA did not apply when the plaintiff failed to state a plausible claim of sexual harassment, leaving her with “a stand-alone retaliation claim”), *report and recommendation adopted*, No. 23-cv-2341, 2024 WL 4263151 (M.D. Fla. Sep. 23, 2024).

⁴¹⁶ *Olivieri v. Stifel, Nicolaus & Co.*, 112 F.4th 74, 92 (2d Cir. 2024) (alteration in original) (quoting 9 U.S.C. § 401(4)); *see also* 168 CONG. REC. H992 (daily ed. Feb. 7, 2022) (statement of Rep. Jerrold Nadler) (asserting that the EFAA’s definition of sexual harassment “include[s] retaliation”). *But see Newman*, 2024 WL 4164738, at *5–6 (expressing doubt that “a retaliation claim falls within the purview of the EFAA where the relation claim ‘related to’ the sexual harassment of *someone else*”).

⁴¹⁷ 9 U.S.C. §§ 401(4), 402(a).

⁴¹⁸ No. cv 24-1120, 2025 WL 1770787 (D. Del. June 26, 2025).

⁴¹⁹ *See id.* at *3.

⁴²⁰ *Id.* at *2.

⁴²¹ *See id.* at *1.

⁴²² Defendant CEC Entertainment LLC’s Reply in Support of Its Motion to Dismiss and Compel Arbitration at 3, *Hicks*, No. cv 24-1120, 2025 WL 1770787 (emphasis omitted).

attempt to apply the text of the statute. The text of the EFAA does not limit its reach to “victims,” but instead gives rights to “person[s] alleging conduct constituting” “a dispute relating to conduct that is alleged to constitute sexual harassment.” Ms. Hicks is such a person.⁴²³

Accordingly, as *Hicks* illustrates, one need not have suffered sexual harassment to rely on the EFAA.⁴²⁴

3. *Dispute Revisited*

As noted, courts split over whether the word “dispute” in the EFAA’s timing provision means the date of the underlying wrongdoing—the misconduct theory—or when the parties took opposing positions—the disagreement view.⁴²⁵ This Section shows why the disagreement approach dovetails with the EFAA’s language.

For several reasons, the disagreement approach is more likely to take root than its rival. For starters, no lay or legal dictionary equates a dispute with misconduct. Instead, a “dispute” is an “argument or disagreement, especially an official one,”⁴²⁶ a “conflict or controversy, esp[ecially] one that has given rise to a particular lawsuit,”⁴²⁷ “an assertion of opposing views or claims.”⁴²⁸ Or, a “dispute” is a “verbal controversy: [debate].”⁴²⁹ These sources “foreclose[] [the] contention that a dispute arises merely when some conduct alleged as sexual harassment has occurred.”⁴³⁰

In addition, the disagreement theory fits better with the rest of the EFAA than the misconduct view. For instance, Congress defined a “sexual harassment dispute” as “a dispute relating to conduct that is alleged

⁴²³ *Hicks*, 2025 WL 1770787, at *3 (citations omitted) (quoting 9 U.S.C. §§ 401(4), 402(a)).

⁴²⁴ A federal court in Illinois recently reached the same result as *Hicks* without citing that opinion. See *Thomas v. Pooh Bah Enters., Inc.*, No. 25-cv-77, 2025 WL 2084159, at *2 (N.D. Ill. July 24, 2025) (rejecting the defendant’s argument “that a retaliation claim based upon something that is not plausibly sexual harassment does not meet the EFAA’s requirement that a case be related to a sexual harassment dispute”).

⁴²⁵ See *supra* Section II.C.1.

⁴²⁶ *Kader v. S. Cal. Med. Ctr.*, 317 Cal. Rptr. 3d 682, 688 (Ct. App. 2024) (quoting *Dispute*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/dispute> [<https://perma.cc/UEM6-7B2K>] (last visited June 16, 2026)).

⁴²⁷ *Id.* (quoting *Dispute*, BLACK’S LAW DICTIONARY (11th ed. 2019)).

⁴²⁸ *Id.* (quoting *Dispute*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/dispute> [<https://perma.cc/H7YQ-33GW>] (last visited June 16, 2026)).

⁴²⁹ *Overland Bond & Inv. Corp. v. Calhoun*, 253 N.E.3d 295, 304 (Ill. App. Ct. 2023) (quoting *Dispute*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/dispute> [<https://perma.cc/H7YQ-33GW>] (last visited June 16, 2026)).

⁴³⁰ *Hix v. Dave & Buster’s Mgmt. Corp.*, No. 23-cv-623, 2023 WL 9425283, at *5 (D. Or. Nov. 14, 2023), *report and recommendation adopted*, No. 23-cv-00623, 2024 WL 326592 (D. Or. Jan. 29, 2024).

to constitute sexual harassment.”⁴³¹ This language already references misconduct through the phrase “conduct that is alleged to constitute sexual harassment.”⁴³² So if “dispute” also meant “misconduct,” the provision would be redundant and nonsensical; indeed, it would specify that a “sexual harassment dispute” is misconduct relating to misconduct.⁴³³

Finally, a close look at the opinions that endorsed the misconduct view reveals where they veered off course. Recall the facts of the leading misconduct case, *Barnes v. Festival Fun Parks*⁴³⁴: The plaintiff suffered sexual harassment at work, separated from her employer in 2021, and sued shortly after the EFAA kicked in on March 3, 2022.⁴³⁵ This order of events is a common thread in nearly all of the misconduct decisions.⁴³⁶ Because these plaintiffs’ claims had accrued before the EFAA’s effective date, they lobbed a Hail Mary and contended that their dispute did not arise until they sued.⁴³⁷ Courts rejected this theory because “Congress simply has not provided for the filing date as controlling the effective date of the Act.”⁴³⁸ That is both true and irrelevant. Although the day that the plaintiff sues is not *automatically* the day the dispute arises, it *can be* if the parties have not yet squared off in an adversarial posture.⁴³⁹

⁴³¹ 9 U.S.C. § 401(4).

⁴³² *Id.*

⁴³³ Likewise, the definition of “sexual assault dispute” uses the term “dispute” and then describes the misconduct, making it unlikely that “dispute” means “misconduct.” *See* 9 U.S.C. § 401(3) (“a dispute involving a nonconsensual sexual act or sexual contact”); *cf.* *Famuyide v. Chipotle Mexican Grill*, No. cv 23-1127, 2023 WL 5651915, at *4 (D. Minn. Aug. 31, 2023) (“If the underlying conduct alone . . . automatically gave rise to a dispute, then the legislature’s use of the word ‘dispute’ . . . would be superfluous.”), *aff’d*, 111 F.4th 895 (8th Cir. 2024).

⁴³⁴ No. 22-cv-165, 2023 WL 4209745 (W.D. Pa. June 27, 2023).

⁴³⁵ *See id.* at *1.

⁴³⁶ *See, e.g.*, *Grimsley v. Patterson Co.*, No. M2022-00987-COA-R3-cv, 2023 WL 7327720, at *1 (Tenn. Ct. App. Nov. 7, 2023) (involving a plaintiff who alleged that she was sexually harassed until she quit in December 2021 and then sued on March 16, 2022); *Walters v. Starbucks Corp.*, 623 F. Supp. 3d 333, 336 (S.D.N.Y. 2022) (featuring almost exactly the same timeline); *Edwards v. CVS Health Corp.*, 714 F. Supp. 3d 239, 242 (S.D.N.Y. 2024) (dealing with a plaintiff who was fired in 2020 and filed her complaint in January 2023).

⁴³⁷ *See Walters*, 623 F. Supp. 3d at 338 (“Walters does not contest that her claims ‘accrued’ . . . before March 3, 2022. Instead, Walters argues that the statute applies to any claims that were filed after March 3.”); *Edwards*, 714 F. Supp. 3d at 248 (noting that the plaintiff “urges that the word ‘dispute’ means ‘litigates’ or ‘brings a case’”); *cf. Barnes*, 2023 WL 4209745, at *9 (“Plaintiff asks this Court to adopt an interpretation of the [statute] that would apply its provisions when a Complaint is filed after the Act’s effective date, regardless of when the dispute or claims arose or accrued.”).

⁴³⁸ *Grimsley*, 2023 WL 7327720, at *5.

⁴³⁹ For a shining example, see the discussion of *Famuyide v. Chipotle Mexican Grill*, 111 F.4th 895 (8th Cir. 2024), *supra* notes 203–14 and accompanying text. Admittedly, one downside of the disagreement theory is that it can raise mind-bending questions. A plaintiff may do several things after experiencing a sexual assault or sexual harassment, such as file a police report, complain to human resources, quit their job, file a charge with federal or state regulators, hire counsel and send a demand letter, or sue. Likewise, a defendant might investigate, fire the plaintiff, or do nothing.

4. *Plausibility or Nonfrivolousness*

Does the EFAA require plaintiffs to allege a plausible or nonfrivolous sexual harassment claim?⁴⁴⁰ This Section explains why this question has no perfect answer. It urges courts to split the difference by adopting the plausibility requirement for allegations of sexual harassment but bending over backward to allow claimants to amend their complaint.

Although the EFAA does not say how closely courts should scrutinize sexual harassment claims, it implies that this review should be superficial. The statute defines a “sexual harassment dispute” as “a dispute relating to conduct *that is alleged* to constitute sexual harassment under applicable Federal, Tribal, or State law.”⁴⁴¹ One “alleges” a thing just by asserting it, regardless of whether it turns out to be true.⁴⁴² Indeed, “a mistaken allegation is an allegation nonetheless.”⁴⁴³ Thus, on its face, the EFAA applies even if a plaintiff merely *contends* that their complaint pertains to behavior that “constitute[s] sexual harassment,” no matter how misguided their theory.

But this interpretation could spawn absurd outcomes. Subject to Federal Rule of Civil Procedure 11 and its state analogues, reading the EFAA this way would invite people to “describe[] conduct in the vernacular as ‘sexual harassment’” and “neutralize an arbitration agreement.”⁴⁴⁴ Read literally, the statute applies even if a plaintiff alleges that a credit card late fee, a slip and fall accident, or an unsolicited telemarketing call is “sexual harassment.”⁴⁴⁵ Thus, it is unsurprising that both

It is not always clear when either of them has crossed the line into a full-fledged “dispute.” *Cf.* *Combs v. Netflix, Inc.*, No. 24-cv-09037, 2025 WL 1423344, at *4 (C.D. Cal. Apr. 16, 2025) (finding that a dispute arose when the plaintiff’s employer “effectively expressed disagreement with [her] complaints through silence—that is, it took a position adverse to [her] by not addressing her concerns”).

⁴⁴⁰ The cases dealing with this issue have uniformly involved allegations of sexual harassment, not sexual assault. *See supra* note 63.

⁴⁴¹ *Yost v. Everyrealm Inc.*, 657 F. Supp. 3d 563, 565 (S.D.N.Y. 2023) (emphasis added).

⁴⁴² *See, e.g., Towers Watson & Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, No. 20-cv-810, 2024 WL 993871, at *4 (E.D. Va. Mar. 6, 2024) (“‘Allege’ means simply ‘to assert without proof or before proving,’ or ‘to bring forward as a reason or excuse.’” (quoting *Allege*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/allege> [<https://perma.cc/W9KX-C5ZU>] (last visited June 16, 2026)), *aff’d*, 138 F.4th 786 (4th Cir. 2025).

⁴⁴³ *Dunham v. Portfolio Recovery Assocs.*, 663 F.3d 997, 1002 (8th Cir. 2011).

⁴⁴⁴ *Yost*, 657 F. Supp. 3d at 585.

⁴⁴⁵ In fact, the EFAA’s language is so wide-ranging that it could cover a *perpetrator* of sexual harassment. Take, for example, Mark Raupp, who was accused of sexually harassing a female colleague. *See Raupp v. Compass Grp. USA*, No. 24-10565, 2024 WL 4948838, at *1 (E.D. Mich. Dec. 3, 2024). His former employer investigated the matter and concluded that Raupp had not engaged in sexual harassment. *See id.* About two weeks later, Raupp was fired, and he sued, arguing that the EFAA applied because “his ‘retaliation claims relate to [the original accuser’s] sexual harassment dispute.’” *Id.* at *2. A federal judge in Michigan disagreed, opining that “[t]he plain text of the EFAA confers the choice of whether or not arbitration is required to the person who ‘alleges

Judge Engelmayer in *Yost* and Judge Liman in *Diaz-Roa* looked for a mechanism to narrow the cases in which the EFAA applies.⁴⁴⁶

The plausibility approach is a slightly better limiting principle for two main reasons. For starters, although only one case seems to have noticed, the plausibility test has an anchor in section 402(b) of the EFAA, which provides that “[a]n issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law.”⁴⁴⁷ This section suggests that the statute incorporates “the federal pleading rules,” including the plausibility requirement.⁴⁴⁸

Conversely, the idea that the EFAA implicitly adopts nonfrivolousness as the benchmark is a stretch. Judge Liman also tried to ground the nonfrivolousness rule in federal law by citing Supreme Court precedent admonishing federal courts only to dismiss cases for lack of federal question jurisdiction “where the alleged claim under the Constitution or federal statutes clearly appears to be . . . wholly insubstantial and frivolous.”⁴⁴⁹ Yet it is not clear why the EFAA would import a doctrine from the unrelated area of federal subject matter jurisdiction as its gatekeeper instead of plausibility, which is “as familiar a standard as any used in modern case law.”⁴⁵⁰

Three other considerations warrant discussion. First, although the Justices might not look beyond the EFAA’s language, atextual sources also tip the scales towards plausibility. To be sure, as noted above, the legislative history is inconclusive on this issue.⁴⁵¹ But the nonfrivolousness perspective coexists uneasily with Congress’s tight focus on helping survivors of sexual malfeasance. Under Judge Liman’s approach, a plaintiff

conduct constituting a sexual harassment dispute.” *Id.* (quoting 9 U.S.C. § 402(a)). But the court never explained why this language excludes Raupp. Indeed, contrary to the judge’s conclusion, Raupp fits the statute to a T: He “allege[d]” that “conduct” had occurred that was “alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.” *Id.* The only wrinkle—that Raupp was *accused* of harassment—does not seem to make a difference under the text of the EFAA. This perverse result reinforces the need for judges to make some kind of preliminary assessment about whether a complaint triggers the EFAA rather than taking the words of the statute literally.

⁴⁴⁶ See *supra* notes 245–68 and accompanying text.

⁴⁴⁷ 9 U.S.C. § 402(b); *Mitchell v. Raymond James & Assocs.*, No. 23-cv-2341, 2024 WL 4486565, at *6 (M.D. Fla. Aug. 23, 2024) (adopting plausibility because “the EFAA expressly states that federal law governs whether the EFAA applies to a dispute”), *report and recommendation adopted*, No. 23-cv-2341, 2024 WL 4263151 (M.D. Fla. Sep. 23, 2024).

⁴⁴⁸ *Mitchell*, 2024 WL 4486565, at *6. Admittedly, this creates awkwardness in state courts. Roughly half of American jurisdictions have rejected plausibility pleading and continue to use a notice pleading regime. See Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CAL. L. REV. 411, 425 (2018). Thus, courts in these states may not be familiar with a plausibility standard, and so must grant a motion to compel arbitration even when a sexual harassment claim would survive a motion to dismiss under state law.

⁴⁴⁹ *Diaz-Roa v. Hermes L., P.C.*, 757 F. Supp. 3d 498, 542 (S.D.N.Y. 2024).

⁴⁵⁰ *Yost v. Everyrealm Inc.*, 657 F. Supp. 3d 563, 585 (S.D.N.Y. 2023).

⁴⁵¹ See *supra* notes 170–75 and accompanying text.

could invalidate an arbitration clause for an array of causes of action merely by asserting weak allegations of sexual harassment.

Second, the plausibility standard only governs sexual harassment claims—not allegations of sexual assault. The plausibility principle springs from the fact that a “sexual harassment dispute” must “relat[e] to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.”⁴⁵² The italicized language serves as a “legal measuring stick” that tasks judges with assessing whether the “conduct . . . constitute[s] sexual harassment under applicable . . . law.”⁴⁵³ These words, however, do not appear in the definition of “sexual assault dispute,” which is “a dispute involving a nonconsensual sexual act or sexual contact.”⁴⁵⁴ Thus, a federal district court in Florida correctly rejected the plausibility standard in sexual assault matters on the grounds that the EFAA’s coverage in this setting “hinges on the facts alleged, not the claims pleaded.”⁴⁵⁵

Third, the proper judicial response to an initial complaint that fails to plausibly allege sexual harassment should be to allow the plaintiff to amend. If the EFAA embraces federal pleading doctrine, then it also incorporates Federal Rule of Civil Procedure 15, which announces that “[t]he court should freely give leave [to amend] when justice so requires.”⁴⁵⁶ Because “[t]he policy in favor of allowing amendments is extremely liberal,”⁴⁵⁷ courts should bend over backwards to give plaintiffs the opportunity to allege a viable sexual harassment claim.

CONCLUSION

Congress enacted the EFAA to empower victims of sexual assault and sexual harassment “to pursue their claims in a judicial forum instead

⁴⁵² 9 U.S.C. § 401(4) (emphasis added).

⁴⁵³ *Yost*, 657 F. Supp. 3d at 585.

⁴⁵⁴ 9 U.S.C. § 401(3).

⁴⁵⁵ *Doe v. Celebrity Cruises, Inc.*, 792 F. Supp. 3d 1371, 1380 (S.D. Fla. 2025); *see also* *Bulic v. Celebrity Cruises, Inc.*, No. 25-21231-civ, 2025 WL 1783865, at *4 (S.D. Fla. June 27, 2025) (observing that the EFAA’s definition of “sexual assault dispute” revolves around “the nature of the conduct rather than the legal theory invoked” and thus “stands in contrast to the statute’s sexual harassment prong”); *Delirium TV, LLC v. Dang*, 714 S.W.3d 640, 648 (Tex. App. 2024) (“We note that the EFAA’s definition of ‘sexual harassment dispute’ includes additional terms not found in the definition of ‘sexual assault dispute.’”). This conclusion is important because, as Professor Deborah Widiss has observed, plaintiffs may be able to use the EFAA’s sexual assault prong when they sue for isolated instances of unwanted touching that are not “severe or pervasive” enough to constitute sexual harassment. *See* Widiss, *supra* note 57 at 729–30.

⁴⁵⁶ FED. R. CIV. P. 15(a)(2); *see also* *Foman v. Davis*, 371 U.S. 178, 182 (1962) (“If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.”).

⁴⁵⁷ *Kealoha v. Haw. Dep’t of Pub. Safety*, No. 09-00299, 2010 U.S. Dist. LEXIS 50837, at *11 (D. Haw. May 21, 2010).

of arbitration.”⁴⁵⁸ But this Article’s review of every accessible EFAA case for the past three and a half years reveals that the statute’s text transcends its purpose. In this way, the EFAA is much like the FAA. And just like the statute it amended, the EFAA will likely ride the wake of textualism to become a civil justice landmark.

⁴⁵⁸ Delgado v. Apple Georgia, LLC, No. 24-cv-82, 2024 WL 4993645, at *6 (M.D. Ga. Dec. 5, 2024).