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Title VII's Participation Clause and Circuit City Stores v. Adams: Making the Foxes Guardians of the Chickens

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Title VII's Participation Clause and
*Circuit City Stores v. Adams:* Making the Foxes Guardians of the Chickens

Edward A. Marshall†

"Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right[s guaranteed by the statute]. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens."

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I. INTRODUCTION

The Supreme Court’s recent decision in *Circuit City Stores, Inc. v. Adams*\(^2\) signified not the conception, but the affirmation of a principle
inimical to the effectiveness of Title VII.\(^3\) For years, a majority of the federal courts of appeals recognized that the Federal Arbitration Act’s
(FAA)\(^4\) strong presumption in favor of arbitrability extended to pre-dispute arbitration clauses in most employment contracts.\(^5\) In line with this
presumption, these courts have discerned nothing in the text, legislative
history, or purposes underlying Title VII mandating an exception for the
civil rights statute.\(^6\) Indeed, prior to *Circuit City* only the Ninth Circuit had
declined to enforce compulsory arbitration of Title VII claims,\(^7\) reasoning, *inter alia*, that the FAA's exclusion of "contracts of employment of seamen,
railroad employees, or any other class of workers engaged in foreign or

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   provision in any... contract evidencing a transaction involving commerce to settle by arbitration a
   controversy thereafter arising out of such contract... shall be valid, irrevocable, and enforceable, save
   upon such grounds as exist at law or in equity for the revocation of any contract."
5. *Circuit City*, 532 U.S. at 109 ("All but one of the Courts of Appeals which have addressed the
   issue interpret [§ 1 of the FAA] as exempting contracts of employment of transportation workers, but
   not other employment contracts, from the FAA’s coverage.").
   (listing all federal circuits but the Ninth and noting that "each of those courts of appeals agrees with us
   that Title VII claims may be subject to mandatory arbitration").
7. Id.
interstate commerce" removed all contracts of employment from the ambit of the statute's presumption in support of arbitration. Despite its congruence with the approach taken by a majority of the circuits, the Supreme Court's decision in *Circuit City* is perhaps the most monumental abrogation of the efficacy of Title VII since the statute's inception.10

Numerous commentators and scholars have urged that, by approving the arbitration of employment disputes, *Circuit City* struck a significant blow to the ability of Title VII to vindicate society's interest in preventing and remedying workplace discrimination. Most of these authors, however, have focused almost exclusively on the disadvantages associated with the arbitration forum, such as the "repeat player" phenomenon and limited discovery, while virtually ignoring the impact of compulsory arbitration on employees' substantive rights under Title VII. This Article confronts one such substantive deprivation, the ability of employers to use compulsory arbitration to unilaterally eviscerate the protection from employer retaliation guaranteed by Title VII's participation clause.

In practice, if not by design, Title VII places the initial burden of enforcing its substantive provisions upon the individual victims of workplace discrimination.12 Although the Equal Employment Opportunity

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9. See Craft v. Campbell Soup Co., 177 F.3d 1083 (9th Cir. 1999) (holding that FAA § 1 excluded contracts of employment, generally, from statute's coverage), overruled by *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); see also Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998) (holding that legislative history of the Civil Rights Act of 1991 demonstrates congressional intent not to permit pre-dispute compulsory arbitration agreements in the Title VII context).
10. Notably, the Court in *Circuit City* never squarely addressed the effect of its holding on Title VII claims because the plaintiff had only asserted a host of state law claims to challenge the alleged discrimination. However, as the courts of appeals have recognized, there is little doubt in the wake of *Circuit City* that the FAA's presumption in favor of arbitrability will mandate the enforcement of arbitration agreements even as to claims arising under Title VII. See Borg-Warner Protective Servs. Corp., 245 F.3d at 835 ("We cannot say whether the Ninth Circuit will continue to adhere to *Duffield* in the face of the Supreme Court's *Circuit City* decision (which overruled another Ninth Circuit case."). Moreover, the possibility that the *Circuit City* decision did not reach Title VII was implicitly rejected by the Supreme Court in *EEOC v. Waffle House, Inc.*, 122 S. Ct. 754, 760 (2002) (permitting EEOC to bring ADA suit for money damages on individual's behalf even when individual is bound by predispute arbitration agreement; using Title VII as "starting point for [its] analysis").
Commission ("EEOC." or "the Commission"), has the authority to investigate and commence claims on its own initiative, it does so with pronounced infrequency.\textsuperscript{3} Indeed, statistics indicate that the Commission files less than one percent of the total charges filed each year and "even among the cases where it finds reasonable cause, the [Commission] files suit in less than five percent of those cases."\textsuperscript{4} Appreciating the substantial role aggrieved employees must play in bringing an employer's discriminatory practices to light, Congress crafted Title VII to provide individual actors with virtually absolute\textsuperscript{5} protection from employer retaliation when the employees make charges, testify, or "participate[ ] in any manner" in an EEOC investigation or court proceeding (the "participation clause").\textsuperscript{6} As the courts recognize, such "exceptionally broad protection"\textsuperscript{7} is necessary to "ensure not only that employers cannot intimidate their employees into foregoing the Title VII grievance process, but also that investigators will have access to the unchilled testimony of witnesses."\textsuperscript{8}

Significantly, however, courts have consistently, and somewhat controversially,\textsuperscript{9} held that this broad protection from employer reprisal does not attach to employees who act outside the "statutory machinery" of Title VII\textsuperscript{2} or file complaints or testify in an employer's own, internal grievance process.\textsuperscript{19} This denial of absolute retaliation protection to employees acting outside of the EEOC and the judicial system leaves employees forced into compulsory arbitration—a "private form of

\begin{center}
\textsuperscript{14} Id.
\textsuperscript{17} Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1006 n.18 (5th Cir. 1969).
\textsuperscript{18} Glover v. S. Carolina Law Enforcement Div., 170 F.3d 411, 414 (4th Cir. 1999).
\textsuperscript{19} \textit{See generally} Larkin, \textit{supra} note 15 (criticizing courts for denying participation clause protection to employees engaged in internal complaint mechanisms); \textit{see also} Edward A. Marshall, \textit{Excluding Participation in Internal Complaint Mechanisms From Absolute Retaliation Protection: Why Everyone, Including the Employer, Loses}, 5 EMPLOYEE RTS. & EMP. POL'Y J. 549 (2001) (same).
justice"—without the protections from reprisal that have long been recognized as essential to the effective enforcement of Title VII. With more employers seeking to impose pre-dispute arbitration agreements on their employees as a result of the Court's decision in *Circuit City* and more courts willing to hold that Title VII claims fall within the scope of disputes that may be subject to compulsory arbitration, this denial of participation clause protection to employees engaged in internal processes of dispute resolution may substantially impede the effectiveness of Title VII.

The purpose of this Article is to evaluate the potential effects of the courts' willingness to enforce compulsory arbitration of Title VII disputes in light of the exclusion of participation in internal dispute resolution mechanisms from the scope of the statute's participation clause. Part II of this Article will track the Supreme Court's treatment of arbitration of statutory employment discrimination disputes from *Alexander v. Gardner-Denver Co.* to *EEOC v. Waffle House, Inc.* Part III will provide an overview of Title VII's retaliation clause, including the impact of the Court's recent decision in *Clark County School District v. Breeden.* Then, Part IV will evaluate the effects of compulsory arbitration on complainants under Title VII, with an emphasis on the effects of the denial of participation clause protection on the willingness of employees to file complaints and testify in the arbitration setting. Finally, Part V will discuss the need for congressional action to alleviate the inadequacies under the current system of compulsory arbitration and will suggest proposals to effectuate such alleviation. I conclude that, at a minimum, Congress must unequivocally extend to arbitration complainants the same retaliation protections traditionally enjoyed by employees in the judicial context under Title VII's participation clause.

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22. Triplett, *supra* note 11, at C-I (quoting Jeffrey White, associate general counsel of the ATLA).

23. See David H. Gibbs, *Employment Survey Says that Major Companies Increasingly Use Tailored Programs and Processes*, 19 ALTERNATIVES TO HIGH COST LITIG. 237, 237 ("Growing numbers of U.S. workers are subject to some sort of alternative dispute resolution policy that addresses employment disputes. The *Circuit City* decision will lead many employers to adopt mandatory arbitration or ADR programs.").

24. See Borg-Warner Protective Servs. Corp. v. EEOC, 245 F.3d 831, 834 (D.C. Cir. 2001) (discussing increasing willingness of courts to hold that Title VII disputes may be subject to compulsory arbitration).


II.

*Circuit City Stores v. Adams*: Compulsory Arbitration Under Title VII

A. Antecedents to the Circuit City Decision

One can hardly appreciate the effect of *Circuit City* on the arbitrability of statutory antidiscrimination claims without a clear understanding of the law as it stood before the Supreme Court's 2001 decision. A historical evaluation of the Court's treatment of arbitration of such claims must begin with its unanimous 1974 holding in *Alexander v. Gardner-Denver*, a decision that reflected the Court's strong reservations regarding the ability of arbitration to effectively vindicate society's interest in maintaining a discrimination-free workplace.

1. Gardner-Denver

*Gardner-Denver* involved allegations by a black employee that he was terminated on the basis of his race in violation of Title VII. Prior to filing a charge with the EEOC, the plaintiff had sought arbitration under the union's collective bargaining agreement, asserting that he was "unjustly discharged." After the employee filed a charge with the EEOC but before the issuance of a "right to sue" letter, the arbitrator under the collective bargaining agreement held that the plaintiff was "discharged for cause." Due to this prior resolution of the plaintiff's claim in arbitration, the district court dismissed his lawsuit, holding that the employee had waived his right to a judicial proceeding under Title VII by resolving his claim in arbitration. The Tenth Circuit affirmed.

The Supreme Court, however, unanimously reversed the dismissal of the plaintiff's suit, holding that, by submitting his complaint to arbitration under a collective bargaining agreement, the plaintiff did not waive his right to resolve the allegations of discrimination in a judicial forum. Beginning by acknowledging the substantial role federal courts play under the statutory framework, and noting that Title VII was silent as to whether an

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29. Id. at 39-42.
30. The plaintiff initially filed a charge with a state civil rights agency, which in turn referred the complaint to the EEOC. Id. at 42.
31. Id. at 39.
32. Id. at 42.
33. Id. at 43.
34. Id.
35. Id. at 52 (emphasis added).
arbitral decision divests the federal courts of jurisdiction, the Court continued:

[W]e think it clear that there can be no prospective waiver of an employee’s rights under Title VII... Title VII’s strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII.36

The Court further explained that an employee’s statutory right to be free from discrimination and any contractual rights to discharge only “for cause,” while complementary, were distinct.37 While it was the arbitrator’s prerogative to enforce the terms of the collective bargaining agreement in an effort to maintain industrial peace,38 such contractually-conferred authority did not permit the arbiter to resolve statutory employment discrimination claims “regardless of whether... contractual rights are similar to, or duplicative of, [those] secured by Title VII.”39

The Court in Gardner-Denver, however, did not end its analysis with a recitation of the differences inherent between rights contractually granted an employee under a collective bargaining agreement and those under Title VII. The Court continued by emphasizing that arbitration, with its less “complete” record, discovery, and evidentiary rules, was an inappropriate forum for resolving statutory discrimination claims.40 Justice Powell, writing for a unanimous Court, explained:

The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for the enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal. Furthermore, we have long recognized that the choice of forums inevitably affects the scope of the substantive right to be vindicated. Respondent’s deferral rule is necessarily premised on the assumption that arbitral processes are commensurate with judicial processes and that Congress impliedly intended federal courts to defer to arbitral decisions on Title VII issues. We deem this supposition unlikely.41

Due in no small part to this clear assessment of arbitration as an inappropriate forum to resolve Title VII disputes, the circuit courts in the years following Gardner-Denver consistently held that pre-dispute arbitration agreements could not force employees to waive their right to

36. Id. at 51.
37. Id. at 52-53.
38. Id.
39. Id. at 54.
40. Id. at 57-60 (“[T]he informality of arbitral procedure... enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues[,]”). Id. at 58.
41. Id. at 56 (internal quotations and citations omitted).
judicial resolution of their claims under Title VII. As the Ninth Circuit observed in Duffield v. Robertson Stephens & Co., "the circuit courts read Gardner-Denver as sending a simple message: Title VII is different . . . [the decision] simply precluded Title VII cases from being subjected to compulsory arbitration." Thus, although courts continued to approve compulsory arbitration of statutory claims outside the employment context it was no doubt a surprise to the legal community when the Supreme Court, in Gilmer v. Interstate/Johnson Lane Corp., held that an employee could be compelled to submit age discrimination claims arising under the ADEA to mandatory arbitration.

2. Gilmer

The plaintiff in Gilmer, a manager of financial services for the defendant-employer, was required to register with the New York Stock Exchange (NYSE). The NYSE registration application provided, through reference to NYSE Rules, that claims arising out of the applicant's employment would be subject to binding arbitration. When the plaintiff was fired at 62 years of age and brought suit against his employer alleging age discrimination in violation of the ADEA, the employer filed a motion to compel arbitration. The district court denied the motion, relying principally on the Supreme Court's decision in Gardner-Denver. The Fourth Circuit reversed.

The Supreme Court affirmed the Fourth Circuit's decision, agreeing that the FAA's strong presumption in favor of arbitrability applied to the

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42. E.g., Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1188 (9th Cir. 1998) (citing Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104, 105-08 (5th Cir. 1990); Utley v. Goldman Sachs & Co., 883 F.2d 184, 185-87 (1st Cir. 1989); Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304, 1305-07 (8th Cir. 1988); Rosenfeld v. Department of Army, 769 F.2d 237, 239 (4th Cir. 1985); EEOC v. Children's Hosp. Medical Ctr., 719 F.2d 1426, 1431 (9th Cir. 1983) (en banc) (Fletcher, J., concurring)).
43. Duffield, 144 F.3d at 1188 (internal quotations and citations omitted).
46. Id.
47. Id. at 23.
48. Id.
49. Id. at 23-24
50. Id.
51. Id.
dispute and that, as such, "the burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum" under the ADEA; such intent would be "discoverable in the text of the [statute], its legislative history, or [in an] 'inherent conflict' between arbitration and the [statute's] underlying purposes." After noting that Gilmer conceded that neither the text nor the legislative history of the ADEA precluded arbitration of disputes arising under the statute, the Court rejected the plaintiff's argument that the arbitral forum was inconsistent with the purposes underlying the ADEA. The Court began by asserting the general principle that, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." It continued by noting that both arbitration and judicial resolution of discrimination claims vindicate the individual complainant's interest as well as the interests of society as a whole. The Court also asserted that compulsory arbitration did not undermine the interest of the EEOC in enforcing the ADEA, because a "claimant subject to an arbitration agreement will still be free to file a charge with the [Commission.]"

The Court then rejected the "host of challenges to the adequacy of arbitration procedures" asserted by the plaintiff, including the potential bias of arbiters in favor of repeat player employers, lack of discovery, lack of written opinions, and arbiters' inability to fashion equitable relief. While explaining that the NYSE's own attempts to fashion a fair arbitral forum ameliorated many of these concerns, the Court emphasized:

[I]n our recent arbitration cases we have already rejected most of these arguments as insufficient to prelude arbitration of statutory claims. Such generalized attacks on arbitration rest on suspicion of arbitration as a

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52. Id. at 25.
53. Id. at 26.
54. Id.
55. Id. at 27-34.
56. Id. at 26 (citing Mitsubishi v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).
57. Id. at 27-28.
58. Id. at 28.
59. Id. at 30 (emphasis added).
60. Id. at 27-34. See John A. Criswell, The "Mandatory" Arbitration of Employees' Statutory Claims, 30 COLO. LAW. 71, 72 (2001) (providing concise summary of arguments advanced by Gilmer and response by the Court).
61. For instance, the Court, in addressing the potential bias of arbitrators in favor of repeat player employers, noted that the NYSE Rules provided for unbiased arbitrators and permitted biased awards to be set aside. Gilmer, 500 U.S. at 30. Similarly, in addressing the plaintiff's objection to the discovery procedures provided in arbitration, the Court explained that "there ha[d] been no showing ... that the NYSE discovery provisions, which allow for document production, information requests, depositions, and subpoenas ... will prove insufficient to allow ADEA claimants such as Gilmer a fair opportunity to present their claims." Id. at 31.
method of weakening the protections afforded in the substantive law to would-be complainants, and as such, they are far out of step with our current strong endorsement of the [FAA's] favoring this method of resolving disputes.\(^{62}\)

The Court similarly disposed of the plaintiff's assertion that the disparity of bargaining power in the employment relationship precluded arbitration of ADEA claims, pointing to the FAA's "purpose [of] plac[ing] arbitration agreements on the same footing as other contracts."\(^{63}\)

Finally, the Court rejected the plaintiff's assertion that the holding in \textit{Gardner-Denver} foreclosed compulsory arbitration of statutory employment claims.\(^{64}\) While distinguishing \textit{Gardner-Denver} primarily on the fact that the agreement in \textit{Gardner-Denver} appeared in a collective bargaining agreement,\(^{65}\) the Court also observed that the \textit{Gardner-Denver} decision reflected "the view that arbitration was inferior to the judicial process for resolving statutory claims."\(^{66}\) That "mistrust of the arbitral process," said the Court, "has been undermined by our recent arbitration decisions [under the FAA]."\(^{67}\)

While a striking departure from \textit{Gardner-Denver}'s apparent rejection of arbitration as a proper forum for resolving statutory employment claims, the Court's holding in \textit{Gilmer}, standing alone, was arguably one of little practical importance to most employees. As Justice White, writing for the majority, emphasized, the arbitration clause in question appeared not in an \textit{employment contract}, but in an application to register with the NYSE.\(^{68}\) As a result, the majority declined to resolve the more broadly applicable question of whether Section 1 of the FAA, which precludes the application of the statute to cases involving "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce[,]"\(^{69}\) shielded \textit{employment contracts generally} from the

\(^{62}\) Id. at 30 (quoting Rodríguez de Quijas, 490 U.S. at 481.).
\(^{63}\) Id. at 33.
\(^{64}\) Id. at 35.
\(^{65}\) Id.
\(^{66}\) Id. at 34 n.5.
\(^{67}\) Id.; see also supra note 44 and accompanying text (discussing intervening decisions that "undermined" the mistrust of the arbitral forum for resolving statutory claims). A similar statement by the Court reflecting skepticism as to the continuing vitality of \textit{Gardner-Denver} can be found in \textit{Wright v. Universal Maritime Service Corp.}, 525 U.S. 70 (1998). There, the Court "expressly declin[ed] the invitation to hold that a union's waiver of an employee's right to a federal forum was never enforceable, and instead held that, before such a waiver could be enforced, it had to be clear and unmistakable." Fahrbach, supra note 11, at 66 (internal quotations omitted). In \textit{Wright}, the Court expressed doubt as to "whether or not \textit{Gardner-Denver}'s seemingly absolute prohibition of union waiver of employees' federal forum rights survives \textit{Gilmer[,]" Wright, 525 U.S. at 81. While undeniably a significant development in the area of arbitrability of statutory employment claims, \textit{Wright}'s primary import is in the context of collective bargaining agreements and, thus, is not analyzed here.

\(^{68}\) \textit{Gilmer}, 500 U.S. at 25 n.2.
FAA’s strong presumption in favor of arbitrability.\textsuperscript{70} If that question were answered in the affirmative, then employees could avoid compulsory arbitration of statutory employment claims without bearing the arduous burden of demonstrating a textual, historical, or “inherent” conflict between the arbitral forum and the statute in question that the \textit{Gilmer} Court indicated would show that Congress intended to preclude a waiver of the judicial forum. Free from the “healthy regard for the federal policy favoring arbitration”\textsuperscript{71} compelled by the FAA, the courts could reject compulsory arbitration as inconsistent with the congressional goals underlying Title VII, just as the Supreme Court had apparently done years before in \textit{Gardner-Denver}.\textsuperscript{72} The Court, however, determined that Section 1 of the FAA did not exempt all employment contracts from compulsory arbitration in \textit{Circuit City Stores, Inc. v. Adams}.\textsuperscript{73}

\textbf{B. Circuit City Stores v. Adams}

Saint Clair Adams, when applying for a job at Circuit City Stores, signed an employment application providing that all claims arising out of his employment would be subject to mutually binding, mandatory arbitration.\textsuperscript{74} Two years after being hired as a sales counselor, Adams filed numerous claims in state court alleging employment discrimination in violation of California law.\textsuperscript{75} In response, Circuit City filed suit in federal court seeking to enjoin the state action and compel arbitration of Adam’s claims pursuant to the FAA. The District Court granted the employer’s request.\textsuperscript{76} The Ninth Circuit reversed, reasoning that Section 1 of the FAA rendered the statute inapplicable to Adam’s case.\textsuperscript{77}

The Supreme Court, however, noting that “the Ninth Circuit’s conclusion that all employment contracts are excluded from the FAA conflicts with every other Court of Appeals to have addressed the question[,]”\textsuperscript{78} held in a five-to-four decision that “Section 1 exempts from the FAA only contracts of employment of \textit{transportation workers}.”\textsuperscript{79} Justice Kennedy, writing for the majority, explained that the Court’s limited

\begin{footnotesize}
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\item \textsuperscript{70} \textit{Gilmer}, 500 U.S. at 25 n.2.
\item \textsuperscript{71} \textit{Id.} at 26 (quoting Moses H. Cone Memorial Hospital \textit{v. Mercury Construction Corp.}, 460 U.S. 1, 24 (1983)).
\item \textsuperscript{72} See supra notes 36-41 and accompanying text (discussing Court’s reasoning in \textit{Gardner-Denver}).
\item \textsuperscript{73} 532 U.S. 105, 123 (2001).
\item \textsuperscript{74} \textit{Id.} at 109-110.
\item \textsuperscript{75} \textit{Id.} at 110.
\item \textsuperscript{76} \textit{Id.}
\item \textsuperscript{77} \textit{Id.}
\item \textsuperscript{78} \textit{Id.} at 110-111.
\item \textsuperscript{79} \textit{Id.} at 119 (emphasis added).
\end{itemize}
\end{footnotesize}
interpretation of the FAA's exclusionary provision was rooted in the text of Section 1 itself. The majority stated that the language in Section 1 demanded application of the statutory canon of *ejusdem generis*, which provides that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Here, according to Justice Kennedy, that canon required the exclusion of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" be construed to "give effect to the terms 'seamen' and 'railroad employees,' and thus, precluded an interpretation that would "exclude all contracts of employment" from the FAA's strong presumption in support of arbitration.

Moreover, the Court rejected the contention that the phrase "any other class of workers engaged in foreign or interstate commerce" mandated a different result. The Court reasoned that, while the phrases "affecting commerce" and "involving commerce" demonstrated congressional intent to use plenary power under the Commerce Clause, the phrase "engaged in commerce" evidenced "a much more limited intent." Nor was the Court persuaded by Adams' argument that the phrase "engaged in ... interstate commerce" should be interpreted more broadly due to the Court's restrictive interpretation of the Commerce Clause at the inception of the FAA in 1925. Such a "variable standard for interpreting common, jurisdictional phrases[,]" reasoned the Court, "would contradict our earlier cases and bring instability to statutory interpretation.

Notably absent from the majority's analysis in *Circuit City* was any extended discussion of the policy ramifications of its decision on the resolution of employment discrimination claims. Instead, its conclusions

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80. Id.
81. Id. at 114-115.
83. *Circuit City Stores*, 532 U.S. at 115 (emphasis added).
85. *Circuit City Stores*, 532 U.S. at 115 (emphasis added).
86. Id. As recognized in the seminal case of *United States v. Lopez*, 514 U.S. 549, 556 (1995), the Court's interpretation of the Commerce Clause prior to 1937 imposed much more restrictive and literal limitations on Congress' power to regulate "interstate commerce." See also *The Employers' Liability Cases*, 207 U.S. 463, 498 (1908) (holding that Federal Employers' Liability Act's purported application to "every common carrier engaged in trade or commerce" was unconstitutionally expansive and not supported by Congress' authority under the Commerce Clause).
87. 532 U.S. at 115.
88. See generally id. at 105. Also omitted from the majority's opinion was any thorough examination of the legislative history underlying the adoption of the FAA's exclusionary provision. *Id.* at 119 ("As the conclusion we reach today is directed by the text of § 1, we need not assess the legislative history of the exclusion provision."). This absence led the dissenting Justices to accuse the
seemed to rest primarily, if not exclusively, on principles of statutory construction.\(^8\) It would be inaccurate, however, to assume that the Court was unaware of the effects compulsory arbitration would have on claimants alleging unlawful discrimination in the employment setting. To the contrary, Justice Kennedy acknowledged the plaintiff's assertions that arbitration was an inappropriate forum to resolve employment disputes, but explained:

We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts. These litigations costs to parties (and the accompanying burden to the Courts) would be compounded by the difficult choice-of-law questions that are often presented in disputes arising from the employment relationship.\(^9\) The considerable complexity and uncertainty that the construction of § 1 urged by respondent would introduce into the enforceability of arbitration agreements in employment contracts would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers, in the process undermining the FAA's proarbitration purposes and breeding litigation from a statute that seeks to avoid it.\(^9\)

Thus, notwithstanding the clear reservations expressed in *Gardner-Denver* regarding the inappropriateness of resolving federal anti-discrimination claims in the arbitral forum, the majority in *Circuit City* unambiguously rejected the Ninth Circuit's more expansive reading of Section 1 of the Federal Arbitration Act, holding that the Act's presumption in favor of arbitration extended to virtually all contracts of employment. What remained unclear, however, was the role the EEOC was to play in the resolution of grievances filed by workers subject to mandatory, binding arbitration of their discrimination claims. That issue was to be resolved the following year in *EEOC v. Waffle House, Inc.*

**C. The Waffle House “Exception”**

The Supreme Court's holding in *Circuit City*, while unambiguously extending the FAA's strong presumption in favor of arbitrability to

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89. See supra notes 80-87 and accompanying text (discussing the Court's application of statutory construction principles to Section 1 of the FAA).

90. *Circuit City Stores*, 532 U.S. at 122, 123 (internal quotations and citations omitted).
arbitration clauses in “a broad range of employment contracts[,]”91 left a myriad of unanswered questions. Among these was whether an agreement between an employee and employer to arbitrate employment claims precluded the EEOC from seeking “victim-specific judicial relief, such as back pay, reinstatement, and damages, in an enforcement action” pursuant to its authority under federal employment discrimination laws.92 The Sixth Circuit held that an arbitration agreement between an employee and employer could not bind the EEOC as a nonparty to the agreement, but the Second and Fourth Circuits took a contrary position, holding that “the policy goals expressed in the FAA required giving some effect to... arbitration agreement[s].”93 Those circuits, in an attempt to “balance” the policies underlying the FAA and those expressed in statutory antidiscrimination laws, held that the EEOC was restricted to seeking “large-scale injunctive relief” when the aggrieved employees were bound by arbitration agreements, as it was only in that circumstance that the EEOC’s primary focus was the vindication of broad, public interests, rather than merely the private interests of the arbitration-bound employee.94

The Supreme Court rejected this “balancing” approach in EEOC v. Waffle House, Inc., by holding that “the EEOC has the authority to pursue victim-specific relief regardless of the forum that the employer and the employee have chosen to resolve their disputes[.]”95 In Waffle House, the EEOC brought suit on behalf of Baker, a former Waffle House employee, alleging that he was terminated due to his disabilities in violation of the Americans with Disabilities Act (“ADA”).96 While recognizing that the suit arose under the ADA, the Court explained that, since the EEOC’s enforcement powers under the ADA mirrored those granted under Title VII, “the provisions of Title VII defining the EEOC’s authority provide the starting point for our analysis.”97

The Court began its analysis by acknowledging that the 1972 amendments to Title VII “created a system in which the EEOC was intended ‘to bear the primary burden of litigation[,]’”98 With this congressional grant of authority as a backdrop, the Court explained that this congressional intent was not “trump[ed]”99 by the FAA:

93. Id.
94. Id.
95. Id. at 765 (emphasis added).
96. Id. at 758-59.
97. Id. at 760.
98. Id. But see id at 762 (relating Justice Stevens’ commentary on the infrequency with which the Commission actually brings claims on behalf of victims of workplace discrimination).
99. Id. at 764.
Nothing in the [Federal Arbitration Act] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement. The FAA does not mention enforcement by public agencies; it ensures the enforceability of private agreements to arbitrate, but otherwise does not purport to place any restriction on a nonparty’s choice of a judicial forum.100

Justice Stevens, writing for the majority, further explained that “[i]f it were true that the EEOC could prosecute its claim only with Baker’s consent, or if its prayer for relief could be dictated by Baker, the [appellate] court’s analysis might be persuasive.”101 According to the majority, however, “the exact opposite is true”—the ADA establishes the EEOC as “master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake.”102 Relying on that statutory grant of independent authority, as well as the FAA’s failure to expressly bind nonparties to an arbitration agreement, the Court concluded that “the pro-arbitration policy goals of the FAA do not require the [EEOC] to relinquish its statutory authority if it has not agreed to do so.”103 Thus, while the Court in Waffle House left undisturbed an employer’s ability to bind employees to resolution of their employment discrimination disputes in the arbitral forum, it simultaneously rejected any limitation on the EEOC’s authority to prosecute charges of discrimination in the traditional judicial arena.

III.
AN OVERVIEW OF THE TITLE VII RETALIATION CLAUSE:
PROTECTED ACTIVITY

In addition to protecting employees from discrimination based on race, color, religion, sex, or national origin,104 Title VII also prohibits certain forms of employer retaliation. Section 2000e-3(a) provides, in pertinent part, that:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.105

100. Id. at 762 (emphasis added).
101. Id. at 762-63.
102. Id. at 763.
103. Id. at 764.
The courts, relying on this disjunctive wording in the anti-retaliation provision, have afforded employees differing degrees of retaliation protection when they engage in one of two forms of "protected activity."\(^{106}\) First, an employee may gain protection from retaliation under Title VII when he "oppose[s] any practice made an unlawful employment practice by this subchapter" (the "opposition clause").\(^{107}\) Second, the anti-retaliation clause of the statute shields from reprisal any employee who "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter" (the "participation clause").\(^{108}\)

While Title VII, on its face, does not distinguish between protections afforded to each form of activity,\(^{109}\) the distinction between the clauses is "significant[,] because federal courts have generally granted less protection for opposition than for participation in enforcement proceedings."\(^{110}\) This section analyzes the scope of activities and the strength of protection encompassed by the two facets of the retaliation clause and addresses the impact of the opposition/participation distinction in light of the Supreme Court's recent decision in *Clark County School District v. Breeden*.\(^{111}\)

### A. The Participation Clause.

Title VII's participation clause protects employees who file charges with, testify, or participate in an EEOC, state administrative, or court proceeding or investigation.\(^{112}\) The federal judiciary has long recognized these activities as "essential to the machinery set up by Title VII[,,]\(^{113}\) and, accordingly, extended "exceptionally broad protection" to these activities under the participation clause.\(^{114}\) Indeed, courts have even held that "[p]rotection [under the participation clause] is not lost if the employee is wrong on the merits of the charge, nor is protection lost if the contents of the charge are malicious and defamatory as well as wrong."\(^{115}\) As the Fourth Circuit explained in *Glover v. South Carolina Law Enforcement Division*:

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106. See *Morris v. Boston Edison Co.*, 942 F. Supp. 65, 70 (D. Mass. 1996) ("the opposition and participation clauses are drafted in the disjunctive, indicating that there is a distinction to be made in the actions prohibited by each.").
108. *Id.* (emphasis added).
109. *See § 2000e-3(a).*
112. *See Marshall, supra note 19, at 557 (2001); see also EEOC COMPLIANCE MANUAL, at § 8-Ill(C)(I) (May, 1998) (enumerating activities protected by participation clause).*
115. *Booker*, 879 F.2d at 1312 (internal citations omitted).
This conclusion [that "participating" employees receive unequivocal retaliation protection] is consistent with the purpose of the participation clause: Maintaining unfettered access to statutory remedial mechanisms. Section 704(a)'s protections ensure not only that employers cannot intimidate their employees into foregoing the Title VII grievance process, but also that investigators will have access to the unchilled testimony of witnesses. . . . If a[n employee] in a Title VII proceeding were secure from retaliation only when her testimony met some slippery reasonableness standard, she would surely be less than forthcoming. It follows that the application vel non of the participation clause should not turn on the substance of the testimony.116

Because of this "absolute" protection from employer retaliation conferred by the participation clause,117 the courts have limited the scope of activities constituting employee "participation."118 Significantly, courts have consistently excluded virtually all forms of involvement in an employer's own, internal conciliation procedures from participation clause protection.119 The courts have reasoned that "[t]he participation clause covers participation in 'an investigation . . . under this subchapter,' that is, an investigation under subchapter VI of Chapter 21 of Title 42."120 As such, it "protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC[.]")121 Indeed, courts have granted participation protection to an employee making charges or statements within an employer's grievance process only if the employee has filed a prior or contemporaneous charge with the EEOC122 Even this

116. Glover, 170 F.3d at 414 (internal quotations and citations omitted).
118. Marshall, supra note 19, at 557-558 (2001) (describing "range of activities protect under the participation clause" as "conspicuously narrow").
120. Total Sys. Servs., Inc., 221 F.3d at 1174.
121. Id.
122. See id. at 1174 n.2 ("[A]t a minimum, some employee must file a charge with the EEOC (or its designated representative) or otherwise instigate proceedings under the statute for the conduct to come under the participation clause[.]"); see also Glover v. Total Sys. Servs. Inc., 176 F.3d 1346 (11th Cir. 1999) ("[B]y participating in her employer's investigation conducted in response to an EEOC notice of charge of discrimination, [plaintiff] engaged in statutorily protected activity under the participation clause.") (emphasis added); McNair v. Computer Data Sys., Inc., No. 98-1110,1999 WL 30959 (4th Cir. Jan. 26, 1999) ("Once appellant filed her first charge with the EEOC, the protections of the 'participation clause' were unquestionably triggered. Because appellant alleges that CDSI retaliated against her for actions taken before she filed her first EEOC charge, however, we need only consider this claim under the . . . 'opposition clause.'"); Booker, 879 F.2d at 1313 ("Accordingly, any activity by the employee prior to the instigation of statutory proceedings is to be considered pursuant to the opposition clause . . .") (emphasis added).
“derivative” protection\textsuperscript{123} has not been recognized by all circuits. For example, the Ninth Circuit held that “[a]ccusations made in the context of charges before the Commission are protected by the [participation clause]; charges outside of that context are made at the accuser’s peril.”\textsuperscript{124}

Given this traditionally rigid distinction between charges and testimony made within the “statutory machinery” of Title VII and those made in “internal,” private contexts, it is likely that the vast majority of employee activity in compulsory arbitration—a “private form of justice”\textsuperscript{125}—will not be protected under the participation clause. As a result, such activity may only receive the diluted retaliation protection provided by the statute’s “opposition clause.”

\textbf{B. The Opposition Clause}

In contrast to the narrow range of activities protected under Title VII’s participation clause, the opposition clause potentially shields employees from employer reprisal when engaging in a broad array of activities, ranging from internal complaints to outright protest.\textsuperscript{126} The retaliation protections under the opposition clause, however, are not inviolate. Instead, to constitute “protected activity” under the opposition clause, an employee’s conduct must take a reasonable form, and be directed at employer conduct the employee reasonably perceives to be unlawful.\textsuperscript{127}

In defining the contours of a “reasonable” form of activity, the courts have traditionally balanced the employee’s right to oppose unlawful employer conduct and the interest of society in enforcement of Title VII against the employer’s need to maintain productivity and stability in the workplace.\textsuperscript{128} Thus, the courts have found that filing internal complaints in compliance with an employer’s established grievance procedures is a reasonable form of employee opposition.\textsuperscript{129} On the other hand, an illegal

\begin{footnotes}
\textsuperscript{123} Marshall, \textit{supra} note 19, at 559.
\textsuperscript{124} Vasconcelos v. Meese, 907 F.2d 111, 113 (9th Cir. 1990); see also Morris v. Boston Edison Co., 942 F. Supp. 65, 71 (D. Mass. 1996) (“In sum, all the activity being described as being under the participation clause relates to actions taken in outside, formally statutorily created proceedings…. Such conduct in an internal company investigation quite simply is not protected activity under the federal participation clause.”); Larkin, \textit{supra} note 15, at 1197 (“The federal courts have taken two approaches when confronting whether employees participating in internal investigations are protected under the participation clause. Some courts reject participation clause protection for any employees participation in an internal investigation.”).
\textsuperscript{125} Tripplet, \textit{supra} note 11, at C-1 (quoting Jeffrey White, associate general counsel of the ATLA).
\textsuperscript{126} Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 259 (4th Cir. 1998) (“[O]pposition activity encompasses utilizing informal grievance procedures as well as staging informal protests and voicing one’s opinions in order to bring attention to an employer’s discriminatory activities.”).
\textsuperscript{127} EEOC \textit{COMPLIANCE MANUAL}, \textit{supra} note 112, at § 8-II(B)(3)(a).
\textsuperscript{128} \textit{Id}.
\textsuperscript{129} \textit{Id. But see} Rollins v. Fla. Dep’t of Law Enforcement, 868 F.2d 397 (11th Cir. 1989) (stating that filing overwhelming number of complaints may constitute unprotected employee opposition).
\end{footnotes}
protest, such as an unlawful stall-in, may constitute an unreasonable form of employee opposition. Notably, however, an employee who bypasses the established channels of an employer's complaint procedure to file an internal charge may be lawfully terminated by the employer for an unreasonable form of opposition.

More important for the purposes of this Article, however, the courts have traditionally held that an employee's conduct is not protected under the opposition clause unless the employee is challenging an employer practice he reasonably and in good faith believes to be a violation of Title VII. Though courts have not required that the challenged employer practice actually be unlawful for the employee to receive opposition clause protection, they have recognized that the language of the clause, requiring opposition to "any practice made an unlawful employment practice by this subchapter," only extends to actions by employees who have a reasonable and good faith basis for believing an employer's conduct violates Title VII.

The rigor with which the lower courts have applied the subject matter reasonableness requirement has varied from circuit to circuit. Some place primary emphasis on the employee's subjective, good faith belief that the opposed conduct was unlawful, while others demand that the employee's belief in the unlawfulness of the challenged practice be "measured against existing substantive law." Under the latter approach, an employee engaging in opposition conduct runs a significant risk that his actions will fall outside the range of "protected activity" under the opposition clause, since the courts applying that standard have been unmoved by arguments regarding the reasonableness of the average layperson's belief as to what

131. See, e.g., Robbins v. Jefferson County Sch. Dist., 186 F.3d 1253, 1260 (10th Cir. 1999) (stating that employee opposition was unreasonable because, inter alia, employee disregarded established channels of complaint).
132. But see infra notes 157, 166 and accompanying text (discussing the Breeden Court's apparent reservations regarding the "reasonably and in good faith" standard).
133. Cf. Michael J. Zimmer et al., Cases and Materials on Employment Discrimination 717 (5th ed. 2000) (under opposition clause, "[t]he courts sometimes have stressed subjective good faith, but more often have applied objective reasonableness, and frequently have required both good faith and a reasonable belief in the unlawfulness of the practice.").
136. See Sias v. City Demonstration Agency, 598 F.2d 692, 695 (1978) (stating that quoted language of opposition clause mandates that employee at least "reasonably believe[ ] that discrimination exists").
137. See, e.g., Shinwari v. Raytheon Aircraft Co., No. 00-553, 215 F.3d 1337, 2000 WL 731782, at *5 (10th Cir. June 8, 2000), cert. denied, 531 U.S. 1104 (purporting to apply only good faith standard to determine subject matter of protected opposition).
might constitute unlawful employment discrimination.\textsuperscript{139}

To appreciate the gravity of the risk to an employee under the "measured against substantive law" approach to determining whether the subject matter of a complaint is reasonable, consider the Eleventh Circuit's decision in \textit{Harper v. Blockbuster Entertainment Corporation}.\textsuperscript{140} In \textit{Harper}, four male Blockbuster employees were terminated after complaining to a supervisor about a newly adopted policy prohibiting males, but not females, from wearing long hair.\textsuperscript{141} The employees brought suit alleging, \textit{inter alia}, that their termination violated Title VII's retaliation clause.\textsuperscript{142} The district court dismissed, holding that the employees' belief in the unlawfulness of the opposed policy was unreasonable, and, consequently, that they had not engaged in any form of "protected activity" under the statute.\textsuperscript{143} The Eleventh Circuit affirmed, explaining that "[t]he reasonableness of the plaintiffs' belief in this case is belied by the unanimity with which the courts have declared grooming policies like Blockbuster's non-discriminatory."\textsuperscript{144} The court continued:

The plaintiffs also argue that when judging the reasonableness of their belief, we should not charge them with substantive knowledge of the law as set forth in... the [line of] cases cited above. We reject the plaintiffs' argument because it would eviscerate the objective component of our reasonableness inquiry. If the plaintiffs are free to disclaim knowledge of the substantive law, the reasonableness inquiry becomes no more than speculation regarding their subjective knowledge.\textsuperscript{145}

More striking than the Eleventh Circuit's imperviousness to the lay employees' unfamiliarity with precedent, however, was the degree to which the court scrutinized the reasonableness of the employees' belief "measured against existing substantive law." While acknowledging that the EEOC, as late as 1996, had viewed such grooming policies as subject to attack under Title VII,\textsuperscript{146} the court refused to accept plaintiffs' arguments that there was some basis in precedent for urging that the policy at issue reasonably could be seen as a violation of the statute's prohibition on sex discrimination.\textsuperscript{147} Rejecting the plaintiff's reliance on the Supreme Court's "simple test of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different[,]"\textsuperscript{148} the Eleventh Circuit

\textsuperscript{139} See Marshall, \textit{supra} note 19, at 577 (2001).
\textsuperscript{140} 139 F.3d 1385 (11th Cir. 1998).
\textsuperscript{141} \textit{Id.} at 1386.
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{Id.} at 1388
\textsuperscript{145} \textit{Id.} at 1388 & n.2 (citations omitted).
\textsuperscript{146} \textit{Id.} at 1388.
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} 139 F.3d at 1389 (quoting City of Los Angeles, Dep't of Water and Power v. Manhart, 435
distinguished the case establishing that test on its facts, noting that it involved discrimination in pension contributions rather than grooming rules, and that the discrimination there was based on the characteristic of sex alone, not sex plus some voluntary characteristic (e.g., maleness plus hair length).  

This application of the content-reasonableness requirement—holding laypersons to a standard that requires not only familiarity with caselaw, but the ability to distinguish precedent based on the facts of a given case before their opposition to an employer’s policy is protected under Title VII—undeniably has the potential to expose many individual complainants to employer retaliation without redress.

Further exacerbating the risk that even benign forms of opposition will escape the protections of the opposition clause is the employer-focused application of the good faith requirement adhered to by some courts. Under this view, the employer retains the primary authority to assess the veracity of an employee’s belief as to the unlawfulness of the opposed practice, and, if the employer reasonably chooses to disbelieve the employee, it may retaliate against him with impunity. As explained by the Eleventh Circuit in *EEOC v. Total System Services, Inc.*, “at least when the circumstances give the employer good reason to believe that [a] fictitious [account of workplace discrimination] was the result of a knowingly false statement by one of its employees, the law will not protect the employee’s job.”

**C. The Implications of Clark County School District v. Breeden**

In *Clark County School District v. Breeden*, a female employee brought suit under Title VII alleging, inter alia, that she had been unlawfully transferred for making an internal complaint regarding perceived sexual harassment by one of her supervisors. According to the plaintiff, during a meeting to evaluate job applicants at which she was present, her supervisor related an instance wherein an applicant had told a co-worker, “I hear making love to you is like making love to the Grand Canyon.” When the supervisor commented that he did not understand the meaning of the simile, a co-worker of the plaintiff replied, “Well, I’ll tell you later,”

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149. *Id.* at 1389.
150. 221 F.3d 1171, 1176 (11th Cir. 2000).
152. *Id.* The plaintiff alleged alternatively that her transfer was unlawfully based on charges filed with the Nevada Equal Rights Commission and the EEOC. *Id.* at 271. The Court addressed that allegation—separately, concluding that the plaintiff had not established the requisite causal connection between the charges and her subsequent transfer. *Id.* at 273.
153. *Id.* at 269.
and both men began to laugh. The Supreme Court, in a unanimous per curiam decision, reversed the Ninth Circuit’s holding that genuine issues of fact remained as to whether the plaintiff had engaged in “protected activity” by relating the incident to her employer. It explained:

The Court of Appeals for the Ninth Circuit has applied § 2000e-3(a) to protect employee “oppos[ition]” not just to practices that are actually “made . . . unlawful” by Title VII, but also to practices that the employee could reasonably [and in good faith] believe were unlawful. We have no occasion to rule on the propriety of this interpretation, because even assuming it is correct, no one could reasonably believe that the incident . . . violated Title VII.

Significantly, the Supreme Court in Breeden determined that no one could reasonably believe that the supervisor’s conduct violated Title VII only after surveying over a decade of precedent that—established the standard for determining whether a supervisor had engaged in actionable sexual harassment under the statute. According to the Court, this line of cases clarified that activity is sexual harassment in violation of Title VII “only if it is so severe or pervasive as to alter the conditions of [the victim’s] employment and create an abusive working environment.” Moreover, the Court reiterated that, in order to establish a violation of the statute, an employee must demonstrate not only that she subjectively perceived the behavior as sufficiently severe or pervasive, but also that the conduct was “so objectively offensive as to alter the ‘conditions’ of [her] employment[,]” explaining that “[a] recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’” It was only with these prior holdings as a backdrop that the Court concluded that “[n]o reasonable person could have believed that the single incident recounted [by the plaintiff] violated Title VII’s standard.”

Although the Supreme Court declined to articulate the precise “test” that must be applied in determining the protected status vel non of employee opposition, its per curiam holding in Breeden is illuminating in at least two respects. First, the Court apparently acquiesced to the distinction

154. Id.
155. Id. at 270.
156. Id. (emphasis added).
158. Id. at 270 (quoting Faragher, 524 U.S. at 786) (internal quotations omitted).
159. Id. at 271 (quoting Oncale, 523 U.S. at 81) (emphasis added).
160. Id. (quoting Faragher, 524 U.S. at 788) (alterations in original).
161. Id.
between "statutory machinery" and internal activity to which lower courts had long followed by declining to give the plaintiff unequivocal opposition protection for lodging a complaint internally.\textsuperscript{162} Significantly, when the Court later analyzed the plaintiff's claim of retaliation for filing charges with the Nevada Equal Opportunity Commission and the EEOC, it did not inquire into whether her actions constituted "protected activity."\textsuperscript{163} This, presumably, was because such charges fell within the "absolute" protections afforded by Title VII's participation clause.\textsuperscript{164} Second, the Court made clear that a plaintiff, \textit{at the very least}, must establish that her perception of unlawful employer activity is "reasonable" in light of existing precedent in order to gain the retaliation protections of the opposition clause.\textsuperscript{165} While not explicitly adopting the Eleventh Circuit's requirement that a plaintiff's perception of unlawfulness be "measured against existing law," the Court's lengthy recitation of sexual harassment caselaw before dismissing the plaintiff's complaint as "unreasonable" belies any notion that a layperson's perception of unlawfulness of the challenged conduct will shield opposition activity from employer retaliation.\textsuperscript{166} Taken together, these implications of the Court's reasoning in \textit{Breeden} emphatically reinforce the Ninth Circuit's admonition a decade earlier: "Accusations made in the context of charges before the Commission are protected by [Title VII]; charges outside of that context are made at the accuser's peril."\textsuperscript{167}

\begin{footnotesize}

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  \item \textsuperscript{162} See Marshall, \textit{supra} note 19, at 558 (2001) (discussing lower court case law to this effect).
  \item \textsuperscript{163} \textit{Breeden}, 532 U.S. at 273.
  \item \textsuperscript{164} See Marshall, \textit{supra} note 19, at 551.
  \item \textsuperscript{165} \textit{Id.} Arguably, the Court's decision in \textit{Breeden} may lay the groundwork for an interpretation of the opposition clause requiring that the employer conduct in question actually \textit{be} unlawful before the complainant receives protection.
  \item \textsuperscript{166} \textit{Id.}
  \item \textsuperscript{167} Vasconcelos v. Meese, 907 F.2d 111, 113 (9th Cir. 1990); see also Morris v. Boston Edison Co., 942 F. Supp. 65, 71 (D. Mass. 1996); Larkin, \textit{supra} note 15, at 1197 ("The federal courts have taken two approaches when confronting whether employees participating in internal investigations are protected under the participation clause. Some courts reject participation clause protection for any employees participating in an internal investigation.").
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IV.

AN ASSAULT ON THE EFFICACY OF TITLE VII

A. Concerns Related to the Arbitral Forum\textsuperscript{168}

The great weight of scholarly commentary relating to the inability of Title VII to function effectively under a system of compulsory arbitration has concentrated on the characteristics of the arbitral forum.\textsuperscript{169} Authors have urged that, at least without adequate policing by the courts, mandatory arbitration possesses several attributes likely to disadvantage complainants while favoring employers, rendering the arbitral forum inappropriate for the resolution of statutory employment claims.\textsuperscript{170} First, critics of compulsory pre-dispute arbitration agreements in the employment setting urge that arbitrators may be biased, either consciously or unconsciously, in favor of “repeat player” employers.\textsuperscript{171} These commentators explain that the employer’s control over the selection of arbitrators “may produce [a] . . . bias toward the only party who offers arbitrators the prospect of repeat business.”\textsuperscript{172} Second, critics of mandatory arbitration contend that the limited discovery procedures available in the arbitral forum provide employees inadequate access to the employer-controlled information essential to demonstrate workplace discrimination, creating a “major impediment to successful prosecution of meritorious claims.”\textsuperscript{173} Third, these critics note that many employers impose fee-splitting agreements, the costs of which will preclude, or at least dissuade, some employees from pursuing the arbitration of their statutory claims.\textsuperscript{174}

The judiciary has not been entirely impervious to these criticisms of the arbitral forum in the employment context and has frequently scrutinized

\textsuperscript{168} As explained above, the primary focus of this Article is the effect of the Court’s holding in \textit{Circuit City} given the exclusion of employee involvement in compulsory arbitration from Title VII’s participation clause. Thus, the survey of the literature regarding potential inadequacies of the arbitral forum presented here is not intended to be comprehensive. It is instead provided to allow the reader to place the concerns of this Article in context. For a more thorough analysis of concerns related to the arbitral forum in the employment setting, see generally Charles B. Craver, \textit{The Use of Non-Judicial Procedures to Resolve Employment Discrimination Claims}, 11 KAN. J.L. & PUB. POL’Y 141 (2001); Martin H. Malin, \textit{Privatizing Justice—But By How Much? Questions Gilmer Did Not Answer}, 16 OHIO STATE J. ON DISP. RESOL. 589 (2001).

\textsuperscript{169} See supra note 11 and accompanying text (explaining that potential inadequacies of arbitral forum have been central focus in literature addressing the ramifications of \textit{Circuit City}).

\textsuperscript{170} See, e.g., Craver, supra note 168; Malin, supra note 168; Fahrbach, supra note 11.

\textsuperscript{171} Malin, supra note 168, at 601-613; Fahrbach, supra note 11, at 74-75.

\textsuperscript{172} Malin, supra note 168, at 594.

\textsuperscript{173} Id. at 594, 613-15.

\textsuperscript{174} Id. at 617-20. This enumeration of criticisms is by no means an exclusive list of critics’ responses to compulsory arbitration in the employment setting; instead, it is intended only to highlight some of the more commonly advanced grounds of disapproval of such arbitration.
arbitration agreements, with varying degrees of intensity, to guard against unfair employer bias. For example, courts have attempted to ameliorate the potential bias of arbitrators in favor of employers by striking down arbitration agreements that unduly restrict the selection of the arbitrator to a list of employer-selected candidates. Similarly, courts have been unwilling to enforce pre-dispute arbitration agreements with inadequate discovery procedures and have been especially hostile to employer attempts to limit an employee’s substantive rights under the antidiscrimination laws. Moreover, the judiciary has been reluctant to allow an employer to allocate a substantial portion of the costs of arbitration to the employee, with some courts holding fee-splitting clauses in pre-dispute arbitration agreements to be per se invalid.

In addition to these “external” restraints, internal standards adopted by arbitration associations may also alleviate the potential pro-employer bias of arbitration. For example, representatives of the National Academy of Arbitrators, the American Arbitration Association (AAA), the Society of Professionals in Dispute Resolution, and the Labor and Employment Law Section of the American Bar Association have developed the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship (the “Protocol”). The Protocol attempts to augment judicial efforts to reduce such bias by setting forth standards to help ensure a fairer arbitral forum. Among these standards are

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175. See Tripllett, supra note 11, at C-1 (noting that the standards for enforceability of compulsory arbitration agreements are “far from being resolved” by the courts) (internal quotations omitted).
176. Criswell, supra note 60, at 72.
177. See, e.g., Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) (striking down arbitration agreement that restricted arbitrator-candidates to individuals selected by employer); see also Penn v. Ryan’s Family Steak Houses, Inc., 269 F.3d 753, 756-57 (7th Cir. 2001) (striking down arbitration agreement that restricted arbitrator-candidates to individuals selected by EDS, an arbitration organization funded by “repeat player” employers); Floss v. Ryan’s Family Steak Houses, Inc., 211 F.3d 306, 314 (6th Cir. 2000) (expressing in dictum “serious reservations” about potential bias where employer selected for-profit arbitration organization to resolve all employment disputes).
178. See, e.g., Penn, 269 F.3d at 757 (striking down agreement that provided employee with only one deposition); Ferguson v. Countrywide Credit Indus., Inc., CV 00-13096 AHM, 2001 U.S. Dist. LEXIS 14436, at *14-15 (C.D. Cal. 2001) (striking down arbitration agreement that, while allowing arbitrator to expand discovery for good cause, limited depositions of corporate representatives to “no more than four designated subjects”).
179. See Cannon v. Circuit City Stores, Inc., 262 F.3d 677 (8th Cir. 2001) (invalidating employer attempts to limit punitive recovery to $5,000); Perez v. Globe Airport Sec. Servs., 253 F.3d 1280 (11th Cir. 2001) (invalidating entire arbitration agreement when employer attempted to allocate costs of arbitration to employee despite Title VII’s provision awarding fees to prevailing employee).
180. See e.g., Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465, 1484-85 (D.C. Cir. 1997). However, this per se rule has begun to erode in many circuits in light of the Supreme Court’s decision in Green Tree Fin. Corp. v. Randolph, 121 S. Ct. 513 (2000), which held that the party challenging an arbitration agreement under the FAA bears the burden of demonstrating the likelihood that the imposed financial burden impedes access to arbitration. Criswell, supra note 60, at 72.
recommendations that the arbitration agreement be “knowingly made[,]” that neutral arbitrators preside over hearings, that the employee be permitted to select a representative of his choosing, and that such representative have access to “all relevant information in connection with a claim, despite the limited pretrial discovery utilized in arbitration.” 182

Although the Protocol lacks binding effect, the organizations that promulgated the standards have attempted to ensure compliance with the recommendations, and the AAA has reserved the right to refuse to provide arbitrators to programs that fall below the standards set forth in the Protocol. 183

Despite these judicial and private efforts to eliminate arbitration procedures that inadequately protect the rights of employees, the arbitration process has not been “cleansed” of its pro-employer bias. Perhaps most importantly, courts, in order to preserve the efficiency and cost-effectiveness of the arbitral forum, have upheld arbitration agreements that contain relatively austere discovery rules. Indeed, some courts have even upheld agreements limiting discovery “to one deposition and those documents which are clearly relevant and material to the dispute and for which the party has a substantial, demonstrable need.” 184 In the context of employment discrimination, where access to employer-controlled information is frequently essential to the establishing a claim, 185 such limited discovery may seriously impede an employee’s chances of prevailing in arbitration. 186 As the Supreme Court noted in Gilmer, however, “by agreeing to arbitrate, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.” 187

These criticisms are not to imply, however, that the new system of compulsory arbitration fails to confer any benefit upon employees. Proponents of mandatory arbitration urge that judicial enforcement of predispute arbitration agreements may provide aggrieved employees with greater access to fora in which to resolve their disputes. 188 As Professor

182. Id.; Fahrbach, supra note 11, at 73-74 (internal quotations omitted).
183. Fahrbach, supra note 11, at 73-74.
184. DeGroff v. MasoTech Forming Tech., Inc., 179 F. Supp. 2d 896, 908 (N.D. Ind. 2001); but see Penn v. Ryan’s Family Steak Houses, 269 F.3d 753, 757 (7th Cir. 2001) (striking down similar provision when potential of arbitrator bias was present).
185. Malin, supra note 168, at 594.
186. Id.
188. Samuel Estreicher, Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements, 16 OHIO ST. J. ON DISP. RESOLUTION 559, 563-70 (2001); see also Malin, supra note 168, at 597 ("Merely because mandatory arbitration advantages employers, however, does not mean it necessarily disadvantages employees . . . . Arbitration, as a faster, less expensive procedure, may enable employees to bring claims that would not be litigated because of the costs of going to court.").
Estreicher has argued, judicial resolution of employment claims is inaccessible to many employees due to the difficulty of finding willing counsel and the exorbitant cost of litigation.\textsuperscript{189} Indeed, scholars have estimated that, under the current system, as few as five percent of workers with employment claims succeed at obtaining counsel.\textsuperscript{190} Since arbitration typically involves significantly reduced expenditure of time and resources by attorneys, the availability of the arbitral forum may significantly increase the probability that particularly aggrieved employees will find their way to an arena for the resolution of their grievances.\textsuperscript{191} Thus, while the arbitral forum itself may disadvantage employees, a system of pre-dispute compulsory arbitration, to use Professor Estreicher’s analogy, “stands a better chance of providing Saturns for average claimants, in place of the rickshaws now available to the many so that a few can drive Cadillacs.”\textsuperscript{192}

Importantly, however, increased access to a forum for resolving employment disputes is of little significance if employees are too afraid of employer reprisal to take advantage of the forum’s availability. It is therefore ironic that the denial of participation clause protection to employees involved in compulsory arbitration will leave these complainants more vulnerable to employer retaliation than was ever deemed appropriate for those invoking the traditional “statutory machinery” of Title VII. It is to this irony, and its detrimental effects on the efficacy of Title VII, that I now turn.

\textit{B. Concerns Related to the Inadequate Protection from Retaliation}

\textit{1. Predictable Effects of the Denial of Participation Clause Protection}

Despite congressional steps to provide the EEOC with a more substantial role in initiating Title VII litigation,\textsuperscript{193} individual employee action remains the prime vehicle for achieving the statute’s goal of the elimination of invidious employer discrimination.\textsuperscript{194} In order for Title VII to be effective, employees must make Title VII claims and fellow employees must participate in these claims. Due to the crucial role of

\begin{itemize}
  \item \textsuperscript{189} Estreicher, \textit{supra} note 188, at 563-70.
  \item \textsuperscript{190} Theodore J. St. Antoine, \textit{The Changing Role of Labor Arbitration}, 76 IND. L.J. 83, 91 (2001).
  \item \textsuperscript{191} Estreicher, \textit{supra} note 188, at 564.
  \item \textsuperscript{192} Id.
  \item \textsuperscript{193} See EEOC v. Waffle House, Inc., 122 S. Ct. 754, 760 (2002) (“In 1972, Congress amended Title VII to authorize the EEOC to bring its own enforcement actions; indeed, we have observed that the 1972 amendments created a system in which the EEOC was intended to bear the primary burden of litigation.”) (internal quotations omitted).
  \item \textsuperscript{194} See \textit{supra} notes 13-14 and accompanying text (discussing infrequency with which EEOC brings litigation on behalf of aggrieved employees).
\end{itemize}
aggrieved employees and employee-witnesses in the enforcement of Title VII, the courts have long granted such actors virtually absolute protection from employer reprisal under the participation clause.\textsuperscript{195} Denying the same protection to employees forced to bring claims and testify in the arbitral forum may drastically reduce the effectiveness of the statute, especially since compulsory arbitration is likely to proliferate exponentially in the wake of Court’s recent decision in \textit{Circuit City}.\textsuperscript{196}

Employer retaliation is a very real and disturbingly pervasive problem in the modern workplace. EEOC records reveal that, over the past decade, the number of retaliation charges filed with the Commission has nearly doubled, rising from 10,499 in 1992 to 20,407 in 2001.\textsuperscript{197} Researchers have demonstrated that these allegations of employer reprisal for challenges to allegedly unlawful practices may be well-founded.\textsuperscript{198} Studies of sexual harassment victims, for example, demonstrate that between thirty-three to sixty-two percent of women who filed a complaint against a supervisor were subjected to some form of employer retaliation, including lower job evaluations and termination.\textsuperscript{199} While little research has been done to verify similar trends in the arbitration context, such employer reprisal is not likely to be a phenomenon relegated to the internal complaint setting.\textsuperscript{200} Indeed, prior research has demonstrated that more assertive responses by complainants to perceived workplace discrimination correlates to a higher risk of resulting retaliation.\textsuperscript{201} If that is the case, then one would expect a greater probability of employer reprisal if an employee filed a demand to arbitrate than if she lodged a more informal, internal complaint. If

\textsuperscript{195} Glover v. S. Carolina Law Enforcement Div., 170 F.3d 411, 414 (4th Cir. 1999).

\textsuperscript{196} See Gibbs, \textit{supra} note 23, at 237 (“Growing numbers of U.S. workers are subject to some sort of alternative dispute resolution policy that addresses employment disputes. The \textit{Circuit City} decision will lead many employers to adopt mandatory arbitration or ADR programs.”). \textit{But see} Victoria Roberts, \textit{Arbitration: Attorneys Debate Impact of Circuit City on Use of Mandatory Arbitration Agreements}, EMP. POL’Y & L. DAILY, May 9, 2001, at D2 (noting that “not every employer will or should adopt a mandatory arbitration process,” especially when employer has history of few claims or wants to avoid potential of altering employees’ at-will status).

\textsuperscript{197} EEOC, \textit{Charge Statistics FY 1992 Through FY 2001}, available at http://www.eeoc.gov/stats/charges.html (Feb. 22, 2002). In contrast, the total number of charges filed with the Commission (including those alleging retaliation) during the same time period increased less than 12%, from 72,302 in 1992 to 80,840 in 2001. \textit{Id}.


\textsuperscript{199} \textit{Id}.

\textsuperscript{200} It is, of course, difficult to ascertain the extent of employer retaliation in the arbitral forum by focusing on caselaw. Complaints of such retaliation certainly exist. See \textit{e.g.}, Robbins v. Jefferson County School District R-1, 186 F.3d 1253 (10th Cir. 1999) (discussing retaliation claim of employee giving testimony in arbitration; testimony given after complainant filed EEOC charge). However, the majority of such claims are unlikely to find their way into court; employees subject to compulsory arbitration of employment claims will be restricted to the arbitral forum even when alleging employer retaliation in the arbitral forum.

\textsuperscript{201} Fitzgerald et al., \textit{supra} note 198, at 123.
aggrieved employees have only the protection of the opposition clause against retaliation, they will be without redress unless they can demonstrate that their perception of unlawfulness comported with "existing substantive law" and that their employer lacked reasonable grounds to disbelieve them.\footnote{202}

Perhaps more important than the actual frequency of employer retaliation, however, is the pervasiveness of the \textit{fear of retaliation} among employees, and the resultant impact from such fear in dissuading employee action to combat workplace discrimination. Indeed, the court's understanding of the deterrent effect fear of reprisal might have on employees' willingness to come forward and report unlawful discrimination led the courts to provide "exceptionally broad protection" under the participation clause.\footnote{203} As the Fourth Circuit summarized in \textit{Glover}: This conclusion [that "participating" employees receive unequivocal retaliation protection] is consistent with the purpose of the participation clause: Maintaining unfettered access to statutory remedial mechanisms. Section 704(a)'s protections ensure not only that employers cannot intimidate their employees into foregoing the Title VII grievance process, but also that investigators will have access to the unchilled testimony of witnesses... If a[n employee] in a Title VII proceeding were secure from retaliation only when her testimony met some slippery reasonableness standard, she would surely be less than forthcoming. It follows that the application \textit{vel non} of the participation clause should not turn on the substance of the testimony.\footnote{204}

Moreover, the conclusions of the Fourth Circuit were not merely the products of judicial speculation. Empirical data emphatically support the \textit{Glover} court's conclusion that fear of employer reprisal greatly inhibits employee opposition to perceived unlawful discrimination.\footnote{205} Research focusing on sexual harassment, for example, suggests that as many as eighty percent of women faced with harassment never report the conduct to their employer\footnote{206} with the \textit{most} common reason for the failure to report being fear of retaliation.\footnote{207}

\footnotetext{202. See \textit{supra} notes 126-150 and accompanying text (discussing austere protections under opposition clause).}
\footnotetext{203. Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1006 n.18 (5th Cir. 1969).}
\footnotetext{204. Glover v. S.C. Law Enforcement Div., 170 F.3d 411, 414 (4th Cir. 1999) (internal quotations and citations omitted).}
\footnotetext{205. See Fitzgerald et al., \textit{supra} note 198, at 122 (stating that "[t]he most common reason [for failing to report workplace discrimination]... is fear—fear of retaliation, of not being believed, of hurting one's career, or of being shamed and humiliated" and citing ten studies supporting this assertion).}
\footnotetext{207. See Fitzgerald et al., \textit{supra} note 198, at 123; Feldman-Summers, \textit{supra} note 206, at 309 & n.12 (stating that nearly 70% of women confronted with failure to report sexual harassment cited fear of}
Further, it is likely that this unsettling trend of underutilization in the internal complaint context will translate with equally disturbing potency to the arbitration setting. Indeed, despite the benefits commonly associated with arbitration, and contrary to the assertions that the availability of the arbitral forum would increase the number of complainants alleging discrimination,\(^\text{208}\) early research suggests that the imposition of compulsory arbitration often results in a decrease of employee claims.\(^\text{209}\) While this reduction in claims may be the result of an amicable employee reaction to perceived conciliatory efforts by employers, studies of underutilization in the internal grievance context suggest that fear of employer reprisal is a reason, if not the primary reason, for this reduction.\(^\text{210}\)

Significantly, fears of employer retaliation may not only reduce the number of aggrieved employees coming forward with complaints but may further tilt the potential bias of the arbitration forum in favor of employers.\(^\text{211}\) Employee-witnesses, similarly deprived of participation clause protection for testimony in arbitration, may be tempted to proffer artificially favorable testimony regarding their employer to protect their own jobs.\(^\text{212}\) In conjunction with the restrictive discovery procedures frequently provided in the arbitral arena,\(^\text{213}\) this potential to inhibit the truthful testimony of employee-witnesses may render arbitration not only less utilized, but inherently unfair as well.

Clearly, Title VII cannot effectively vindicate society's interest in achieving a workplace free from discrimination if employees are too afraid of employer reprisal to engage or participate in the arbitration forum; a forum that, as a result of Circuit City, may become the only available arena for the adjudication of discrimination claims for much of the American workforce.\(^\text{214}\) Yet, with only the austere support of the opposition clause

\(^\text{208}\). See supra notes 189-192 and accompanying text (discussing suggestions that informality and lower expenses associated with arbitration will result in increase of claims).

\(^\text{209}\). See Gibbs, supra note 23, at 238-39 ("None of the companies [after adopting policies requiring binding arbitration of employment disputes] reported that a program's adoption led to increased claims. In fact, the majority of companies surveyed reported a decrease.").

\(^\text{210}\). See supra notes 170-175 and accompanying text (discussing pervasive fears of retaliation in internal complaint context, and effect of that fear on employee underutilization). Although the focus of these studies was not the arbitral forum, the similarities between arbitration and employer-established internal complaint mechanisms, including a high degree of employer control over access to and procedures within both arenas, as well as the identical austerity of retaliation protection, intimate that similar motivations and inhibitors of employee action are at work in both settings.

\(^\text{211}\). See supra notes 170-175 and accompanying text (discussing potential bias of arbitration forum in favor of employers).

\(^\text{212}\). Cf. Glover v. S. Carolina Law Enforcement Div., 170 F.3d 411, 414 (4th Cir. 1999) (stating that witnesses receiving only opposition clause protection are not likely to be forthcoming).

\(^\text{213}\). See supra notes 186-88 and accompanying text (discussing restrictive discovery procedures frequently adopted by employers, and enforced by courts, in arbitral forum).

\(^\text{214}\). See supra note 24 and accompanying text (discussing probable proliferation of pre-dispute,
providing redress, employees have a valid reason to fear such employer retaliation. Without Title VII's participation clause, employers may retaliate with impunity, so long as the employee's perception of unlawfulness falls short of what existing precedent deems violative of the statute, or when the employer believes the employee's testimony lacks veracity. Such inadequate protection can only feed the ubiquitous fears of employer reprisal that operate to inhibit employee action vital to the continued effectiveness of Title VII—a statute that relies principally, if not exclusively, on employee action to achieve the enforcement of its egalitarian mandate.

2. "Derivative Protection" Through Filing of a Contemporaneous EEOC Charge: An Inadequate and Unlikely Alternative

Of course, employees in the arbitral forum may manage to avoid denial of absolute retaliation protection by simply filing charges with the EEOC before entering the arbitration arena.\textsuperscript{215} As described above, employees filing a contemporaneous charge with the EEOC while engaging in activities outside the traditional "statutory machinery" of Title VII may receive "derivative" participation clause protection.\textsuperscript{216} Since participation clause protection is greater than opposition clause protection, an employee facing arbitration of a workplace discrimination claim would be well-advised to file a charge with the Commission before pursuing a claim in the arbitral context.\textsuperscript{217} However, at least two characteristics of this "derivative" participation clause protection render it an unacceptable substitute for the absolute retaliation protection employees receive when engaging in traditional "participation" activities within the Title VII mechanism.

First, most employees are likely to be unaware of the benefits that filing a contemporaneous EEOC charge will have on their immunity from employer retaliation for their activities within the arbitral forum. Unlike the fear of retaliation, an intuitive reservation about acting against one's employer,\textsuperscript{218} employees are not likely to be aware of the intricacies of Title VII's enforcement provisions or realize the advantages of seeking

\textsuperscript{215} See supra notes 127-151 and accompanying text (discussing effects of filing contemporaneous EEOC charge before engaging in "internal" activities).

\textsuperscript{216} Id.

\textsuperscript{217} A caveat to this recommendation is that an employee challenging perceived supervisory harassment may face greater exposure to the Ellerth/Faragher affirmative defense if she foregoes employer-established conciliatory mechanisms. For a more in-depth exploration of this dilemma, see Larkin, supra note 15 (discussing dilemma victims of harassment face in light of the tension between denial of participation clause protection to employees engaging internal grievance mechanisms and the Ellerth/Faragher affirmative defense); Marshall, supra note 19 (same).

\textsuperscript{218} Cf. supra notes 206-208 and accompanying text (discussing pervasiveness of fears of reprisal).
administrative assistance in resolving perceived discriminatory treatment.\textsuperscript{219} Furthermore, the process of arbitrating a Title VII claim will not alert employees to the need to file a contemporaneous EEOC charge. While filing an EEOC charge is a prerequisite to bringing suit under Title VII, there is no such requirement for compulsory arbitration.\textsuperscript{220} Instead, the precursors to arbitration typically involve filing grievances with the employer's Human Resources Department, and seeking more informal resolutions of the dispute through a multi-tiered system established by the employer.\textsuperscript{221} The informal nature of these internal antecedents to arbitration leads most employees to enter this internal thicket without the guidance of counsel\textsuperscript{222} or an understanding of the dangers of failing to file a charge with the EEOC. Once entered, however, this thicket becomes increasingly difficult to "untangle," whether the motivation for employer retaliation stems from the activities preceding the charge, which may receive opposition clause protection, or activities subsequent to the charge, which may receive so-called "derivative" participation clause protection.\textsuperscript{223}

Second, and as a consequence of the first characteristic, an employee's protection from retaliation in the arbitral forum is uncertain, even when she files a charge with the EEOC. To begin with, not all circuits have explicitly adopted the view that an employee participating in activities outside the "statutory machinery" of Title VII are entitled to derivative participation clause protection.\textsuperscript{224} Indeed, at least a few circuits appear to regard the distinction between "internal" and "statutory machinery" activities as especially rigid, finding any activity outside the context of administrative investigations or judicial hearings subject to the diluted protections of the

\textsuperscript{219} Indeed, this understandable ignorance of the intricacies of Title VII precedent makes the "reasonableness" requirement under opposition clause an arduous burden on the average employee. See supra notes 137-150 and accompanying text (discussing effect of "measured against existing substantive law" standard under opposition clause).

\textsuperscript{220} C.f. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) ("An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action.") (emphasis added).

\textsuperscript{221} See Gibbs, supra note 23, at 237 (noting that while "[t]here [are] a great variety of steps and programs . . . [t]he trend for companies is to move toward [ADR] programs that are mandatory and use multiple steps.").

\textsuperscript{222} See id. at 238 ("Companies reported that 85%-95% of all claims under mandatory programs were resolved prior to arbitration. Most claims were resolved internally, without lawyers.").

\textsuperscript{223} See supra notes 122-124 and accompanying text (discussing "derivative" participation clause protection afforded employees who filed EEOC charge prior to or contemporaneously with internal activity); Booker v. Brown & Williamson Tobacco, Inc., 879 F.2d 1304, 1313 (6th Cir. 1989) ("The purpose of the statute is to protect access to the machinery available to seek redress for civil rights violations and to protect the operation of that machinery once it has been engaged. Accordingly, any activity by the employee prior to the instigation of statutory proceedings is to be considered pursuant to the opposition clause.") (emphasis added).

\textsuperscript{224} See supra notes 123-124 and accompanying text (noting that not all circuits have adopted derivative participation protection view).
opposition clause.\textsuperscript{225} Moreover, due to the structured, multi-tiered dispute resolution systems adopted by most employers imposing pre-dispute arbitration agreements as a condition of employment,\textsuperscript{226} there is always the possibility that an employer could establish that activities outside the protective umbrella of the participation clause motivated the challenged action against an employee. That is, an employer could conceivably avoid the implications of the participation clause by arguing that the employee activity motivating adverse employment action occurred in the context of internal procedures—such as a human resources investigation following the filing of an internal complaint—with no apparent nexus to the EEOC charge. While some circuits adopting the derivative protection approach have defined the “test” for whether an employee receives participation clause protection as simply whether the activity which motivated the reprisal occurred before or after the filing of the charge,\textsuperscript{227} the reasoning underlying that distinction appears to be that internal investigations occurring subsequent to the charge were instigated in response to the charge with the Commission.\textsuperscript{228} If an employer, pointing to the conformance of any investigation mandated by their own dispute resolution policies, could establish that the EEOC charge did not affect its decision to investigate allegations of discrimination, then the employee taking part in such an

\textsuperscript{225} See Vasconcelos v. Meese, 907 F.2d 111, 113 (9th Cir. 1990) (“Accusations made in the context of charges before the Commission are protected by the [participation clause]; charges outside of that context are made at the accuser’s peril.”); see also Morris v. Boston Edison Co., 942 F. Supp. 65 (D. Mass. 1996); Larkin, supra note 15, at 1197.

\textsuperscript{226} See Gibbs, supra note 23, at 237 (noting that while “[t]here [are] a great variety of steps and programs . . . [t]he trend for companies is to move toward [ADR] programs that are mandatory and use multiple steps.”).

\textsuperscript{227} See Booker, 879 F.2d at 1313 (“...any activity by the employee prior to the instigation of statutory proceedings is to be considered pursuant to the opposition clause”) (emphasis added).

\textsuperscript{228} See Clover v. Total Sys. Servs., 176 F.3d 1346, 1353 (11th Cir. 1999) (“Because the information the employer gathers as part of its investigation in response to the notice of charge of discrimination will be utilized by the EEOC, it follows that an employee who participates in the employer’s process of gathering such information is participating, in some manner, in the EEOC’s investigation.”) (emphasis added). Although Clover could be read as simply establishing a \textit{a per se} rule that all participants in investigations subsequent to the EEOC notice of charge would receive participation clause protection, the court’s repeated emphasis on the fact that the investigation was \textit{in response to} the notice of charge suggests that investigations not “in response to” such notices may not receive the derivative protection of the participation clause. See id. at 1353 (“Here, we recognize that, at least where an employer conducts its investigation \textit{in response to} a notice of charge of discrimination, and is thus aware that the evidence gathered at that inquiry will be considered by the EEOC as part of its investigation, the employee’s participation is participation ‘in any manner’ in the EEOC investigation.”) (emphasis added). Even if the reasoning in Clover was simply that participants in all investigations after the notice of charge will receive participation clause protection, employees filing such charges after initiating the multi-tiered, internal ADR process might still receive only opposition clause protection if the employer can demonstrate that activities before the charge were the basis for the adverse employment action. See supra notes 223-225 and accompanying text (discussing preceding/subsequent distinction).
investigation is, arguably, not entitled to the “derivative” protection as a result of filing the contemporaneous charge. Thus, while filing a charge prior to seeking arbitration of a dispute with the employer is advisable, such filing does not ensure that the employee, or witnesses testifying on her behalf, will receive more than the diluted retaliation protection flowing from the opposition clause.229

The probability that most employees will not be aware of the benefits of filing an EEOC charge prior to demanding arbitration, as well as the uncertainty whether filing such a charge will result in protection under the participation clause, renders derivative participation protection an inadequate substitute for that traditionally afforded “participating” employees. An alternative riddled with uncertainty will not likely quell the pervasive fears of retaliation present in the workforce230 or avoid the detrimental effects of such fears on the efficacy of Title VII.

3. Waffle House: A Snowball’s Chance “Exception”

The Supreme Court’s recent decision in Waffle House,231 holding that the EEOC may seek victim-specific judicial relief on behalf of individual employees bound by pre-dispute arbitration agreements,232 arguably ameliorates many of the aforementioned concerns regarding the inadequacy of retaliation protection in the arbitral setting. Indeed, for the employee fortunate enough to have the Commission pursue her claim, Waffle House permits the resolution of employment discrimination disputes in a forum that confers the inviolate retaliation protection of the participation clause. Evaluation of the effect of the “Waffle House exception,” however, requires due regard for the infrequency with which the Commission actually initiates litigation. Statistics reveal that such initiation is an exceptionally rare occurrence.233 To illustrate, while the EEOC received nearly eighty thousand charges of employment discrimination in fiscal year 2000, it initiated only 291 lawsuits in that same period,234 bringing suit in less than five percent of cases in which it found “reasonable cause” to suspect unlawful employer discrimination.235

It is also unlikely that the EEOC will increase its enforcement activities

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229. See supra notes 127-126 and accompanying text (discussing austere protections afforded by Title VII’s opposition clause).
230. See supra notes 201-208 and accompanying text (discussing pervasiveness of fears of employer reprisal among employees).
232. See supra notes 91-103 and accompanying text (discussing Court’s holding in Waffle House).
233. Waffle House, 122 S. Ct. at 762 n.7.
234. Id.
235. Id.
in light of the Court’s decision in *Waffle House*. The Commission has been chronically under-funded and understaffed; pragmatic limitations will likely preclude any resurgence of administrative action on behalf of individual victims of workplace discrimination.  

In the words of one commentator, “the EEOC is spread six miles wide and an inch deep[.]” This lack of resources will likely continue to prevent the Commission from pursuing a significant number of charges in litigation.

As a result, it is exceedingly unlikely that the *Waffle House* exception will remove a substantial number of employees from the arbitral forum or provide a sufficient incentive for employees covered by mandatory pre-dispute arbitration agreements to file charges with the Commission before entering the arbitral arena. Indeed, Justice Stevens, writing for the majority in *Waffle House*, acknowledged as much when responding to the dissent’s insistence that the holding would dissuade many employers from establishing arbitration systems. He explained:

> These claims [that permitting the Commission to seek victim-specific judicial relief would discourage the use of arbitration agreements] are highly implausible given the EEOC’s litigation practice over the past 20 years. When speculating about the impact this decision might have on the behavior of employees and employers, we think it is worth recognizing that the EEOC files suit in less than one percent of the charges filed each year.

In sum, quite apart from any employer favoritism in the arbitral forum, the denial of participation clause protection to employees engaging or participating in compulsory arbitration may significantly impede the effectiveness of Title VII. Not only may the pervasive fears of retaliation in the workplace dissuade aggrieved employees from demanding arbitration, but such fears may also discourage employee-witnesses from giving truthful testimony in arbitration proceedings regarding employer discrimination. Moreover, neither the possibility of “derivative” participation clause protection to employees filing contemporaneous charges with the EEOC, nor the Supreme Court’s recent decision in *EEOC v. Waffle House*, are likely to ameliorate this assault on the efficacy of Title VII. The former is unlikely to be pursued by most employees, who will be unaware of the benefit of filing such contemporaneous charges, and even if the EEOC

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236. See Larkin, supra note 15, at 1214 to 1217 (discussing Commission’s lack of resources).


238. Id.

239. See *Waffle House*, 122 S. Ct. at 762 n.7. (rejecting lower court’s view that “the federal policy favoring arbitration will be undermined unless the EEOC’s remedies are limited”).

240. Id.
charge is made and derivative participation protection is established, this derivative protection may be circumvented by employers demonstrating that their action was unrelated to the employee's "participation" activities. The latter will likely have "negligible effect" on the behavior of most employers and employees. Thus, the \textit{Waffle House} exception is unlikely to avoid the detrimental consequences that the denial of participation clause protection to actors in the arbitral setting may have upon the ability of Title VII to prevent and remedy invidious workplace discrimination.

\textbf{V. RESPONDING TO THE ASSAULT ON THE EFFICACY OF TITLE VII: HOW CONGRESS MUST ACT}

In light of the potential impact that the denial of absolute retaliation protection to employees in the arbitral context may have on the efficacy of Title VII, it is clear that some remedial action is necessary to ensure the continued vitality of the statute. It is, of course, tempting, especially given the voluminous body of scholarly commentary criticizing the potential bias of the arbitral forum in favor of employers, to simply conclude that mandatory pre-dispute arbitration agreements should be eliminated as inherently antithetical to the purposes of Title VII. Indeed, some members of Congress have apparently adopted that view and have introduced the Preservation of Civil Rights Protection Act, which would legislatively "overrule" \textit{Circuit City} and amend the FAA to permit only post-dispute arbitration agreements in the employment setting.

Such wholesale rejection of the enforceability of pre-dispute arbitration agreements in the employment context is premature. It is unclear at present whether the arbitration associations and judiciary will be able to sufficiently eradicate the bias of the arbitral forum in favor of employers, and, given the rapidly increasing use of dispute-resolution mechanisms by much of the American workforce via compulsory arbitration, it would be unwise to universally prohibit mandatory pre-dispute agreements to arbitrate employment claims before the efficacy of these policing activities can be fully evaluated.

\begin{itemize}
\item \textit{Cf. Id.}
\item \textit{See supra} notes 169-175 and accompanying text (discussing viewpoints of critics of compulsory pre-dispute arbitration agreements).
\item \textit{See Susan J. McGolrick, Arbitration: House Democrats Introduce Legislation to Overturn High Court's \textit{Circuit City} Ruling, EMP. POL'Y & L. DAILY, June 12, 2001, at D9 (discussing proposed legislation)}.
\item \textit{See supra} notes 176-181 and accompanying text (discussing efforts by courts and arbitration associations to eradicate bias in favor of employers).
\item \textit{See supra} notes 189-193 and accompanying text (discussing potential benefits of compulsory arbitration for employees unable to retain private attorneys to pursue their claims in court).
\end{itemize}
Instead, Congress should confer the same absolute protection from retaliation to employees participating in the arbitration arena as those employees would have received had their access to judicial resolution of those claims not been foreclosed. Such congressional action would realize the benefits of increased access to dispute-resolution forums by aggrieved employees while ensuring the continued effectiveness of Title VII.

Extension of the "absolute" protections from retaliation enjoyed by those engaging the traditional "statutory machinery" of Title VII to actors in the arbitral setting, could significantly ameliorate the invidious effects of fears of employer reprisal on the efficacy of the statute. Employees constrained to compulsory arbitration should be able to seek resolution of their claims without relying solely upon the diluted guarantees of the opposition clause to protect them from employer reprisal. Such protection would no longer be conditioned on the "reasonableness" of the employee's

246. Despite the fact that the broad protection of the participation clause was itself the product of policy-based judicial reasoning, see Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1006 n.18 (5th Cir. 1969) (reasoning that participation activities must be granted "exceptionally broad protection" because "[t]he Act will be frustrated if the employer may unilaterally determine the truth or falsity of the charges and take independent action"), the courts have been reluctant to "carve out" exceptions to the exclusion of non-EEOC activity from the guarantees of the participation clause. For a more in-depth exploration of this dilemma, see generally Larkin, supra note 15 (discussing dilemma victims of harassment face in light of the tension between denial of participation clause protection to employees engaging internal grievance mechanisms and the Ellerth/Faragher affirmative defense); Marshall, supra note 19 (2001) (same). Moreover, given the prevailing view among the courts that "[t]he participation clause covers [only] participation in 'an investigation ... under this subchapter,' that is, an investigation under subchapter VI of Chapter 21 of Title 42[,"] EEOC v. Total Sys. Servs., Inc., 221 F.3d 1171, 1174 (11th Cir. 2000), it is exceedingly unlikely that the judiciary would be willing or able to extend the participation clause's protection to actors outside the traditional "statutory machinery" of Title VII. In short, the current denial of participation clause protection to employees acting within the confines of the arbitral arena is best understood as a "statutory problem," the resolution of which will require congressional intervention.

247. See supra notes 206-208 and accompanying text (discussing pervasiveness of fears of reprisal among employees, and effect on employee inaction). Arguably, this absolute retaliation protection should extend not only to the filing of the demand to arbitrate and the investigations and hearings ancillary to arbitration, but to employer-established prerequisites to arbitration as well. See supra note 223 and accompanying text (noting that most employers adopting compulsory arbitration establish multi-tiered systems with more informal internal complaint procedures serving as prerequisites to arbitration). Should Congress extend participation clause protection to employees filing demands to arbitrate, employers would not be able to defend a retaliatory action by pointing to the "unreasonableness" of an employee's conduct in bypassing tiers within the conciliatory system; such form-reasonableness arguments are only relevant under the opposition clause. See supra notes 128-131 and accompanying text (discussing form-reasonableness requirement under opposition clause). The irrelevance of such employer arguments under the participation clause, however, may not be appreciated by many employees, who are generally unfamiliar with the intricacies of retaliation doctrine and would perceive the employer's prerequisites as a condition precedent to arbitration. The anomaly of leaving actors engaged in internal grievance processes with only opposition clause protection has been discussed at length elsewhere. See generally, Larkin, supra note 15; Marshall, supra note 19. The perceived necessity of engaging employer-created complaint mechanisms is likely to be similarly present when employees are not subject to pre-dispute agreements to arbitrate, and thus any resolution of whether Congress should protect employees engaging in such activities is beyond the scope of this Article.
perception of unlawfulness against "existing substantive law," nor would the employer be able to retaliate with impunity based on a unilateral determination that the employee's charge lacks veracity. Instead, employees could be assured that, should their employer chose to take adverse action against them for their involvement in arbitration, they would have legal recourse under Title VII's participation clause.

Anything short of this unqualified grant of retaliation protection may not be sufficient to quell the pervasive fears of employer reprisal that have the potential to undermine the effectiveness of Title VII in the wake of *Circuit City*. Admittedly, employees who make truly frivolous or untruthful assertions about employer discrimination are not normatively "entitled" to statutory protection from retaliation. Retaining the possibility that employers could retaliate against employees involved in the arbitral process under any circumstances, however, only feeds the ubiquitous fears of employer reprisal that discourage many employees from coming forward or testifying truthfully in response to legitimate concerns of unlawful employment discrimination. Indeed, this potential to "chill" even justifiable employee action led the courts to extend "exceptionally broad protection under the participation clause to employees engaging the traditional "statutory machinery" of Title VII."249

In sum, to ensure the continued effectiveness of Title VII following *Circuit City*, Congress must not permit compulsory arbitration to eviscerate the protections of the participation clause. Instead, Congress must grant employees lacking access to the judicial forum due to mandatory, pre-dispute arbitration agreements the same unequivocal protection from retaliation long deemed appropriate for actors in the traditional "statutory machinery" of the statute. To do otherwise would be to still the lifeblood of Title VII through a deprivation of adequate protection from employer reprisal, leaving unfulfilled the statute's promise of a workplace free from invidious employer discrimination.

 VI.

CONCLUSION

Despite intensive scholarly commentary on the ramifications of the Court's recent decision in *Circuit City Stores, Inc. v. Adams*, one of the most inimical attributes of the holding has escaped adequate academic response. By allowing employers to foreclose employee access to the

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248. See *supra* notes 127-151 and accompanying text (discussing austere protection from retaliation under opposition clause).


250. See *supra* notes 114-116 and accompanying text (setting forth reasoning underlying grant of unequivocal protection under participation clause).
courts through pre-dispute arbitration agreements, *Circuit City* has relegated a growing number of employment discrimination claims to an arena that denies employees the absolute protections from employer reprisal consistently granted to those seeking resolution of their grievances in the judicial forum. This deprivation of unequivocal protection from retaliation may seriously hinder the effectiveness of Title VII, as many employees faced with only the austere guarantees of the opposition clause may be less likely to voice legitimate concerns about employer discrimination, and, as witnesses, may be less forthcoming with testimony against their employers.

While employees may gain "derivative" participation clause protection by filing charges with the EEOC prior to demanding arbitration, this derivative protection is unlikely to significantly ameliorate the chilling effects of the fears of employer reprisal. First, most employees are not likely to appreciate the advantages of filing with the EEOC especially where filing EEOC charges is not prerequisite to arbitration. Second, even if an employee eventually does employ the services of the EEOC, an employer may be able to circumvent the employee's "derivative" participation protection by demonstrating that the real motivation for the termination was activity predating the filing of the charge or occurring in internal mechanisms not initiated "in response to" the EEOC's notice of charge.

Similarly, the infrequency with which the EEOC initiates suits on behalf of complainants belies any suggestion that the availability of victim-specific relief in suits brought by the Commission will remove a significant number of workers from the arbitral forum or provide a sufficient incentive for employees subject to compulsory arbitration to file EEOC charges. Considering that the EEOC brings suit in less than five percent of the cases in which it finds "reasonable cause" to suspect unlawful employment discrimination, the Supreme Court's recent decision in *Waffle House* will likely have a "negligible" effect on the actions of aggrieved employees.  

Since employees subject to compulsory arbitration are not likely to adequately facilitate the enforcement of Title VII, legislation overruling *Circuit City* and prohibiting the enforcement of pre-dispute arbitration agreements in the employment context may seem advisable. Advocates of this course of action, however, ignore the potential for compulsory arbitration to supply resolution mechanisms for a far greater number of employees than the judicial forum has been able to provide. Furthermore, they underestimate the ability of courts and private organizations to eventually eradicate the present pro-employer bias in the arbitral arena. Instead, Congress should provide employees involved in arbitration the same unequivocal protections from retaliation presently enjoyed by those

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seeking judicial resolution of their claims. Such congressional action is necessary to fully realize the benefits of increased access to dispute resolution forums while safeguarding the ability of the Title VII to effectively vindicate society's interest in maintaining a workplace free from invidious employer discrimination.