No. 25-1075

IN THE
Supreme Court of the United States

LAW OFFICES OF ADAM ZOLONZ, APC, ET AL.,
Petitioners,
v.
CHRISTINA RAMIREZ,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

BRIEF OF CALIFORNIA EMPLOYMENT LAW COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

When only a small minority of the multiple causes of action in a lawsuit are related in any way to sexual assault/harassment (here at most three of the fifteen causes of action), does the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (9 U.S.C. §§ 401, 402 ("EFAA")) prohibit enforcement of an arbitration agreement with respect to the unrelated causes of action?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae California Employment Law Council ("CELC") is a voluntary, non-profit organization that promotes fostering the development in California of reasonable, equitable, and progressive rules of employment law. CELC's membership includes approximately 70 private-sector employers in the State of California who collectively employ hundreds of thousands of Californians. CELC has participated as *amicus* in many employment cases before this Court.[1] [2]

SUMMARY OF ARGUMENT—AN UNSUPPORTED ASSERTION THAT ALL ISSUES IN A MULTI-ISSUE LAWSUIT ARE "RELATED" TO SEXUAL HARASSMENT IS NOT AN AUTOMATIC GET-OUT-OF-ARBITRATION-FREE CARD

As the title makes clear, the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (9 U.S.C. §§ 401, 402 ("EFAA")) was intended to remove from the protection afforded

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel other than *amicus curiae* and its counsel made a monetary contribution to fund preparation or submission of this brief. Petitioner herein is not a member of CELC. Counsel of Record and all parties, upon the filing of this brief, will have received timely notice of the filing of this brief. The above statements are made pursuant to Supreme Court Rule 37.6 and Rule 36.2, and so are in compliance therewith.

[2] *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246 (2024).

arbitration agreements by the Federal Arbitration Act ("FAA") only sexual harassment/assault and "related" claims. What makes a claim "related"? And who decides if a claim is related? Is it: (1) plaintiff by so asserting in a complaint; or (2) some combination of neutrals—the arbitrator selected by the parties (who is supposed to resolve the unrelated claims) and/or the court (which is supposed to resolve the related claims)?

The California Employment Law Council ("CELC") argues herein that a plaintiff cannot evade a valid arbitration agreement simply by asserting that over a dozen claims that appear to have no relation to sexual harassment are in fact related. The unrelated claims in this case found exempt from arbitration as "related' to sexual harassment include:

(1) Failure to provide adequate meal periods;
(2) Failure to provide adequate rest periods;
(3) Failure to reimburse cell phone expense; and
(4) Failure to engage in the interactive process to determine a need for an accommodation based on mental and physical disabilities.

If Congress intended that all employment claims in a complaint that included a sexual harassment claim would be exempt from arbitration, Congress could have easily so stated. But Congress did not do so—only complaints "related" to sexual harassment were excluded.

This Court should grant *certiorari* and rule as follows: First, the mere assertion by a plaintiff that clearly unrelated claims are "related" should receive no weight. Second, the "related" determination must be made by a neutral. If the parties agree, or the Court so orders, the initial decision separating "related" claims from "unrelated" claims can be made by the Arbitrator. Alternatively, the trial court should order to arbitration the claims that court decides are unrelated. Following the Arbitrator's decision, the trial court should proceed to resolve the remaining sexual harassment related claims.

In short, as envisioned by Congress, an Arbitrator should resolve the non-sexual harassment related claims, and the trial court should resolve the remainder. This procedure will discourage adding frivolous sexual harassment claims to run-of-the-mill overtime, meal, rest, expense reimbursement, and off-the-clock cases in an effort to avoid arbitration. We elaborate on some of these points below.

ARGUMENT

I. SO LONG AS A COMPLAINT CONTAINS A SINGLE CLAIM RELATING TO A SEXUAL-HARASSMENT OR SEXUAL-ASSAULT DISPUTE, CALIFORNIA TRIAL COURTS VOID ARBITRATION AGREEMENTS AS TO ALL CLAIMS IN THAT COMPLAINT, INCLUDING CLAIMS HAVING NOTHING TO DO WITH THE SEXUAL HARASSMENT OR ASSAULT DISPUTE—THIS IS CLEAR ERROR

In California trial courts, plaintiffs may now exempt an entire case from arbitration—even when the parties have unambiguously agreed to arbitrate—by simply tacking a sexual harassment claim onto a complaint that otherwise has nothing to do with that allegation. This Court should grant review to correct that erroneous view of the EFAA, which upends this Court's longstanding protection of parties' agreements to arbitrate. This protection continues to play a critical role in encouraging efficient, private, and cost-effective dispute resolution.

II. AN ARBITRATION AGREEMENT THAT COVERS CLAIMS NOT RELATED TO SEXUAL HARASSMENT REMAINS ENFORCEABLE FOR THE UNRELATED CLAIMS

When parties agree to arbitrate disputes the terms of their agreements govern. *See Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 685

(2010) (courts must "give effect to the contractual rights and expectations of the parties") (citation omitted). Those terms are binding. Yet by holding that California courts may void arbitration agreements whenever a plaintiff appends a single sexual harassment claim to a complaint, the decision below points litigants to a backdoor way of avoiding arbitration: add a sexual harassment claim, regardless of its merit. Indeed, some brazen plaintiffs have already put this strategy into action, contriving sexual harassment claims after defendants move to compel. *E.g., Yost v. Everyrealm, Inc.*, 657 F. Supp. 3d 563, 587 (S.D.N.Y. 2023) ("Only after the Everyrealm defendants moved to compel arbitration based on Yost's arbitration agreement . . . did Yost suggest sexual harassment claims so as to implicate the EFAA.")

The Court of Appeal's decision thus threatens to bury employers and California courts in frivolous sexual harassment allegations engineered to avoid arbitration. That not only saddles employers with the burdensome task of defending meritless claims but also renders meaningless parties' agreements to arbitrate. Such agreements are supposed to be just as binding as any other contract. This result is especially perplexing for employers, including many of *amicus curiae's* members, who have expressly carved sexual harassment claims from their arbitration agreements to ensure the agreements are enforceable for other disputes.[3]

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[3] *See, e.g.,* Didi Martinez, *Facebook, Airbnb and eBay Join Google in ending forced arbitration for sexual harassment claims,* NBC NEWS (Nov. 12, 2018), https://www.nbcnews.com/tech/tech-news/facebook-airbnb-eba

The Court of Appeal's decision renders those thoughtful carveouts (which are consistent with the purpose of the EFAA) useless, even though they were knowingly agreed to by both parties to the agreement. This Court's review is thus necessary (1) to prevent litigants from circumventing arbitration agreements by adding a sexual harassment claim to unrelated employment litigation; (2) to restore pre-dispute agreements to binding force; and (3) to guide the bench and bar who face uncertainty about the future validity of arbitration agreements.

III. THE DECISION BELOW WILL MAKE DISPUTE RESOLUTION MORE EXPENSIVE AND TIME CONSUMING FOR EMPLOYERS AND EMPLOYEES ALIKE

Arbitration provides "efficient, streamlined procedures" and "expeditious results." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) (arbitration offers "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes") (citation omitted). Indeed, by one estimate, arbitration resolves disputes over a year faster than litigation. *See* Mark Fellows, *The Same Result As in Court, More Efficiently: Comparing Arbitration and*

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join-google-ending fored arbitration-sexual harassment-n935451; Danie Taub & Hannah Levitt, *Wells Fargo Ends Forced Arbitration for Sexual Harassment,* BLOOMBERG LAW (Feb. 12, 2020), https://news.bloomberglaw.com/banking-law/wells-fargo-ends-forced-arbitration-for-sexual-harassment-claims.

Court Litigation Outcomes, THE METROPOLITAN CORPORATE COUNSEL (July 2006) (median duration of 4.35 months for arbitration versus 19.4 months for litigation); *see also Stolt-Nielsen S.A.*, 559 U.S. 662, at 685 (arbitration agreements typically foreclose appellate review). And unlike ordinary court filings, arbitration proceedings are usually confidential which protects both employers and employees from having to publicly air their grievances. *E.g.*, AAA & ABA, Code of Ethics for Arbitrators in Commercial Disputes, Canon VI(B) (2004) ("The arbitrator should keep confidential all matters relating to the arbitration proceeding."); accord AAA Commercial Arbitration Rules R-23 (2009). *Amicus curiae's* members can attest firsthand to those benefits.

That is why *amicus curiae's* members also know the grave consequences of the California decision. Now, anytime an employee pads his or her otherwise arbitrable suit with a sexual harassment claim, the bargained-for benefits of arbitration will be lost. Cases will take more time to resolve, will cost more money, and will be subject to lengthy appeals.

CELC's members use pre-dispute arbitration agreements to avoid these consequences. Those consequences are far worse than whatever inefficiency might stem from resolving arbitrable and non-arbitrable claims in different forums. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985) (district courts must "compel arbitration of pendent arbitrable claims . . . even where the result would be the possibly inefficient maintenance of separate proceedings in different forums"). In truth, however, it is not clear that the California court's

decision will actually lead to greater efficiency. Defendants seeking to dismiss meritless sexual harassment claims will almost certainly rely on time-consuming and extensive motion practice to defeat those allegations. If and when those motions are successful, Defendants will then have to move to compel the remaining claims to arbitration, possibly for a second time. And if the initial motion is not successful, the parties will have to participate in fact development before seeking summary judgment—which could very well end in the same place: dismissal of the sexual harassment claim and then another renewed motion to compel arbitration.

IV. THE DECISION BELOW WILL ENCOURAGE FORUM SHOPPING BETWEEN STATE AND FEDERAL COURTS

The California court's decision will encourage forum shopping between state and federal courts. Unlike the California state court below most federal courts that have considered this issue have held that the EFAA exempts only claims relating to sexual harassment or sexual assault. *See, e.g., Silverman v. DiscGenics, Inc.*, No. 2:22-cv-00354-JNP-DAO, 2023 WL 2480054, at *3 (D. Utah Mar. 13 2023) (compelling arbitration of employment claims that did not relate to sexual harassment); *Zeng v. Ellenoff Grossman & Schole LLP*, No. 23-CV-10348 (JGLC), 2024 WL 4250387, at *3 (S.D.N.Y. Sept 19, 2024), *appeal dismissed* No. 24-2557 (2d Cir. Jan 13, 2025) (compelling arbitration of employment claims that did not relate to sexual harassment). That is true even within California. *E.g., Ding v. Structure*

Therapeutics, Inc., 755 F. Supp. 3d 1200, 1218-19 (N.D. Cal. 2024) (compelling arbitration of all claims not "relate[d]" to "sexual harassment dispute"); *Turner v. Tesla, Inc.*, 686 F. Supp. 3d 917, 925 (N.D. Cal. 2023) (similar). In federal court, then, claim splitting is the norm. *See KPMG LLP v. Cocchi*, 565 US. 18, 22 (2011) ("when a complaint contains both arbitrable and nonarbitrable claims," the FAA contemplates "separate proceedings in different forums") (citation omitted). Indeed, had the Plaintiff here pursued her claims in federal court, the partes would have resolved just two or three of those claims in court and the other 12 or 13 in arbitration.

Litigants who are bound by arbitration agreements but want to avoid arbitration thus have a clear path to do so: tack on a sexual harassment claim and file in a California state court. Yet that is exactly the sort of forum shopping Congress sought to eliminate by making arbitration agreements equally enforceable in federal and state courts. *See Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984) (FAA applies in state court to discourage forum shopping), *overruled on other grounds by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

V. INTERMINGLING SEXUAL HARASSMENT CLAIMS WITH UNRELATED CLAIMS WILL CREATE IMPOSSIBLE PROBLEMS FOR TRIAL COURTS

Consider what will happen down the road if the arbitrable and non-arbitrable claims are litigated together in court. For example, assume after much discovery focusing on class certification and sexual

harassment, and long after the complaint is filed, the Court grants summary judgment on the sexual harassment claim and on some but not all of the wage-hour claims.

What a mess! What wasted effort. What if the plaintiff seeks an interlocutory appeal of the sexual harassment summary judgment? Can the wage-hour case go to where it should have been in the first place—to arbitration? Is the Court's grant of summary judgment on some but not all wage-hour claims valid since we now know the wage-hour claims should have gone to the arbitrator in the first instance?

VI. NOW CONSIDER AN ALTERNATIVE SCENARIO: SUMMARY JUDGMENT IS DENIED ON THE SEXUAL HARASSMENT CLAIM BASED SOLELY ON PLAINTIFF'S TESTIMONY; CLASS CERTIFICATION IS GRANTED ON SOME WAGE-HOUR CLAIMS AND DENIED ON OTHERS AND AT TRIAL PLAINTIFF LOSES ON SEXUAL HARASSMENT BUT WINS ON ONE OR MORE WAGE-HOUR CLAIMS

Now we have a real mess! The jury did not believe plaintiff's unsupported testimony that sexual harassment occurred. Enormous resources have been expended. We now know with certainty that the wage-hour claim should not have been in court. Can defendant get the claims on which it lost sent to arbitration? Can plaintiff get a second chance in arbitration on the claims on which plaintiff did not prevail in court? Is the result different if the Court concludes the sexual

harassment claim was not only meritless but frivolous? Without guidance from this Court, trial courts will reach vastly different results.

CONCLUSION

It cannot be consistent with the Federal Arbitration Act for California courts to hold that the mere assertion by a litigant that all 15 dissimilar causes of action in a run-of-the-mill wage-hour lawsuit are "related" to sexual harassment deprives the other party of its federally guaranteed contractual right to a quick inexpensive arbitral determination of the unrelated claims. A neutral—either the jointly selected arbitrator or the trial court—must quickly decide which claims are not "related" within the meaning of the statute, and those claims should proceed to a prompt agreed upon arbitral resolution. Much mischief will occur in courts throughout the United States until this Court grants *certiorari*. The inevitable consequence of review will be a holding that a naked assertion that all causes of action in a boilerplate employment lawsuit, such as meal, rest, overtime, and expense reimbursement claims, are related to the sexual harassment claims, is not a free pass to avoid FAA protected contractually agreed upon arbitration. The "which causes of action are related" issue must be decided at the outset either by the arbitrator or by the trial court.

The problems with the California court's decision described above can be avoided if this Court grants certiorari and concludes that the intent of Congress was that claims related to sexual

harassment are for the court, and unrelated claims are for the mutually selected arbitrator.

Respectfully submitted.

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