No. 24-3760

IN THE

United States Court of Appeals for the Sixth Circuit

MICHELLE SCOGGINS,

Plaintiff-Appellee,

v.

MENARD, INC. and BILL NELSON,

Defendants-Appellants.

On appeal from the United States District Court
for the Southern District of Ohio, Eastern Division, Case No. 2:24-CV-00377

BRIEF OF PUBLIC JUSTICE, NATIONAL WOMEN'S LAW CENTER, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AND AMERICAN ASSOCIATION FOR JUSTICE AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae certify that they are all non-profit organizations. They have no parent corporations, and no publicly owned corporation that owns 10% or more of their stock.

/s/Shelby Leighton
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INTERESTS OF AMICI CURIAE[1]

Public Justice is a national public interest advocacy organization that fights against abusive corporate power and predatory practices, assaults on civil rights and liberties, and the destruction of the earth's sustainability. The organization maintains an Access to Justice Project that pursues high-impact litigation and advocacy efforts to remove procedural obstacles that unduly restrict the ability of workers, consumers, and people whose civil rights have been violated to seek redress in the civil court system. Towards that end, Public Justice has a longstanding practice of challenging the unlawful use of mandatory arbitration clauses that deny workers their day in court. Public Justice has specifically advocated for full implementation of the EFAA, including filing amicus briefs regarding the interpretation and scope of the EFAA in *Johnson v. Everyrealm, Inc.*, *Yost v. Everyrealm, Inc.*, and *Mera v. SA Hospitality Group* in the Southern District of New York, *Olivieri v. Stifel, Nicolaus & Co.* in the U.S. Court of Appeals for the Second Circuit, and *Cornelius v. CVS Pharmacy, Inc.* in the U.S. Court of Appeals for the Third Circuit.

The National Women's Law Center (NWLC) is a nonprofit legal organization that fights for gender justice, including the right of all persons to be free from sex

[1] No counsel for any party authored this brief in whole or in part. In addition, no party or party's counsel and no person—other than amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief. Counsel of record for both parties do not object to the filing of this brief.

discrimination. Since 1972, NWLC has worked to advance workplace justice, educational opportunities, health and reproductive rights, and income security. NWLC has participated in numerous workplace civil rights cases in state and federal courts, including through filing amicus briefs that highlight the critical importance of retaining litigation in court as an option for survivors of sexual violence seeking justice. In our briefs, we have emphasized the myriad ways that forced arbitration hinders the broader mission of civil rights laws to create a more just workplace and society.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country focused on empowering workers' rights attorneys. NELA is comprised of lawyers who represent workers in labor, employment, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace, including representing employees in sexual harassment cases. NELA members represent survivors of sexual harassment and sexual assault across the United States, and the questions of first impression in this case about the interpretation of the EFAA, are important for ensuring those workers are able to get justice.

The American Association for Justice (AAJ) is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been

wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including cases involving sexual assault and sexual harassment. Throughout its 78-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

INTRODUCTION AND SUMMARY OF ARGUMENT

Passed in 2022 with bipartisan support, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFAA or the Act), Pub. L. No. 117-90, 136 Stat. 26 (2022), codified at 9 U.S.C. §§ 401-402, provides survivors of sexual assault and sexual harassment with the right to seek justice in court instead of being forced into arbitration proceedings. The law states that, "at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute … no predispute arbitration agreement … shall be valid or enforceable with respect to a case which is filed under Federal, Tribal or State law and relates to the sexual assault dispute or the sexual harassment dispute." 9 U.S.C. § 402(a).

The district court correctly applied that language to conclude that Plaintiff-Appellee Michelle Scoggins's case, which included sexual harassment claims, was not subject to arbitration. Defendants-Appellants Menard, Inc. and Bill Nelson say

that decision was wrong for three reasons, none of which can stand up to the clear statutory text of the Act or the purpose behind it. First, Defendants contend that, because Ms. Scoggins did not raise the EFAA below, she must be forced into arbitration because she did not elect to proceed in court as the statute requires. But Ms. Scoggins *did* elect to proceed in court by filing her claims in court in the first place. Compelling her to arbitrate would undermine the EFAA's purpose, which is to give survivors of sexual assault and sexual harassment a choice of forum.

Second, Defendants argue that the EFAA does not cover Ms. Scoggins's case because the Act applies only to "any dispute or claim that arises or accrues on or after the date of enactment of this Act," March 3, 2022, and she alleges sexual harassment that occurred before that date. Pub. L. 117-90, § 3, 136 Stat. 26, 28. But the majority of district and appellate courts to have addressed the issue have held that this statutory language imposes two alternative requirements: either that a claim accrued *or* that a dispute arose after the enactment date. Here, Ms. Scoggins meets either requirement because she alleged that the harassing conduct continued after the statute's enactment, so her claim accrued after that date, and because her dispute with Defendants arose when she filed a charge of discrimination with an administrative agency nearly a year after the EFAA was enacted.

Finally, Defendants' argument that the EFAA permits only Ms. Scoggins's sexual harassment claim, and not her other claims, to proceed in court is contrary to

the plain language of the statute, which invalidates the arbitration agreement as to the entire "case," and their reading has been resoundingly rejected by all but one of the district courts around the country that have examined that language.

For these reasons, this Court should affirm the district court's denial of Defendants' motion to compel arbitration.

ARGUMENT

I. Filing Claims in Court Is Sufficient to Elect to Invalidate an Arbitration Agreement Under the EFAA.

The EFAA provides that "at the election of the person alleging conduct constituting a sexual harassment dispute … no predispute arbitration agreement … shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law" relating to the "sexual harassment dispute." 9 U.S.C. § 402(a). The statute does not define "election" or specify any procedures for making an election. *See* 9 U.S.C. §§ 401-402. In the absence of a statutory definition, the Court should give "election" its "ordinary, contemporary, common meaning." *Delaware v. Pennsylvania*, 598 U.S. 115, 128 (2023) (internal quotations omitted). As this Court has held and Defendants acknowledge, to elect means "to choose" or "pick out." Opening Br. at 11 (quoting *Smith v. Thomas*, 911 F.3d 378, 382 (6th Cir. 2018)); *see also Rudisill v. McDonough*, 601 U.S. 294, 311 (2024) ("to 'elect' just means to choose"). An election, therefore, is just "[t]he exercise of a choice." *Election*, Black's Law Dictionary (12th ed. 2024).

Accordingly, a plaintiff makes an "election" when she exercises her choice to bring her claims in court rather than arbitration—as Ms. Scoggins has done. *See* Complaint, RE 2; *see also* Response Br. at 11 (making clear Ms. Scoggins is electing to forgo arbitration).[2] Nothing more is required because Congress did not require plaintiffs to plead or raise the EFAA's protections at any particular time or in any specific way. *See* 9 U.S.C. § 402(a).

Defendants argue that Ms. Scoggins has not "elected to forgo arbitration" because she did not plead or brief the EFAA below and she did not dispute that she had formed a valid arbitration agreement with Menards. *See* Opening Br. at 11. But, as explained above, once Ms. Scoggins filed her complaint in court, there was no magic moment at which she was required to incant the EFAA's protections. As this Court has observed, "[t]he word 'elect' does not by itself require formal procedures." *Smith*, 911 F.3d at 382 (construing Copyright Act, 17 U.S.C. § 504(c)(1)). And the "text's silence about other formal procedures speaks volumes. It does not contain a 'magic words incantation' requirement," so the Court is "not at liberty to invent one." *Id*. Indeed, as another court observed, "[n]o language in the EFAA says once a plaintiff initiates arbitration she cannot file a lawsuit in court and 'elect' to invalidate

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[2] Indeed, Ms. Scoggins has doubly confirmed her election to bring the case in court and invalidate the arbitration agreement by opposing the motion to compel and defending the district court's denial of the motion to compel on appeal. *See* Response Br. at 11.

the arbitration agreement. Congress could have so limited the EFAA, but it did not do so." *Ding v. Structure Therapeutics, Inc.*, No. 24-cv-01368-JSC, __ F. Supp. 3d __, 2024 WL 4609593, at *10 (N.D. Cal. Oct. 29, 2024). Thus, because Ms. Scoggins "file[d]" in court a "case … under Federal, Tribal, or State law" relating to a "sexual harassment dispute," 9 U.S.C. § 402(a), the EFAA applies.

Interpreting the EFAA's "election" language as requiring plaintiffs to specifically plead or otherwise raise the statute would undermine its purpose of *removing* barriers to survivors of sexual assault or sexual harassment bringing cases in court, not creating new pleading hurdles for them to overcome. As Senator Richard Durbin explained, "[t]he premise of this legislation is simple: Survivors of sexual assault or harassment … should be able to choose whether to bring a case forward, instead of being forced into a secret arbitration proceeding where the deck is stacked against them." 168 Cong. Rec. S626 (daily ed. Feb. 10, 2022). The legislative history makes clear that the "at the election" language was included to provide flexibility for survivors by allowing them to choose between court or arbitration. *See, e.g.*, 168 Cong. Rec. H985 (daily ed. Feb. 7, 2022) (Statement of Rep. Nadler) ("H.R. 4445 removes these barriers to justice for survivors of sexual assault or sexual harassment by giving them a real choice of whether to go to court or to arbitrate their claim."); *id.* at H987 (Statement of Rep. Griffith) (noting that survivors "will have a choice instead of having to go in front of company-picked

arbiters who will make a decision for them that will affect them the rest of their lives."). Requiring Ms. Scoggins to arbitrate her claims despite her choice to pursue them in court would undermine that statutory purpose.

Finally, even though Ms. Scoggins did not specifically invoke the EFAA, the district court did not err in raising the EFAA's application sua sponte. As the Supreme Court has explained, "to invoke its statutory powers under §§ 3 and 4 [of the FAA] to stay litigation and compel arbitration according to a contract's terms, a court must first know whether the contract itself falls within or beyond the boundaries of §§ 1 and 2." *New Prime, Inc. v. Oliveira*, 586 U.S. 105, 111 (2019). And because the EFAA is an explicit statutory exception to the enforcement mandate in § 2 of the FAA, the court can compel arbitration only if it is first satisfied that the dispute falls within the boundaries of § 2 because the EFAA does not apply. *See* 9 U.S.C. § 2 (incorporating EFAA as grounds for invalidating otherwise enforceable arbitration agreement); *Olivieri v. Stifel, Nicolaus & Co.*, 112 F.4th 74, 84 (2d Cir. 2024) ("The EFAA is codified directly into the FAA and limits the scope of [the FAA's] broad mandate to enforce arbitration agreements."); *see also, e.g.*, *Grajales-El v. Amazon Prime*, No. 23-2984, 2024 WL 3983335, at *1 (3d Cir. Aug. 29, 2024) (per curiam) (holding that district court erred by compelling arbitration without first considering potentially applicable exception to the FAA, even though no party raised it).

Moreover, courts have an independent obligation to apply the correct legal standards, regardless of the legal arguments the parties make. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."); *United States v. Cabbage*, 91 F.4th 1228, 1231 (6th Cir. 2024) ("Parties aren't allowed to stipulate to legal conclusions because courts have an independent obligation to get the law right."). Thus, far from erring by raising the EFAA's application sua sponte, the district court had an obligation to do so before compelling arbitration.

II. The EFAA Applies to Claims That Accrue or Disputes That Arise After the Act's Effective Date.

This Court should affirm the district court and hold that the EFAA applies to Ms. Scoggins's case for two separate and independent reasons: First, Ms. Scoggins's sexual harassment claim accrued after the effective date of the Act. Second, even if it did not, this dispute arose after the Act's effective date.

a. The Act Provides Two Separate Methods for Calculating Whether the Act Applies: When the Claim Accrued and When the Dispute Arose.

The EFAA states in a statutory note that it "shall apply with respect to any dispute *or* claim that arises *or* accrues on or after the date of enactment of this Act"—*i.e.*, March 3, 2022. Pub. L. No. 117-90, § 3, 136 Stat. 26, 28 (emphases added). As

the district court reasoned, Congress's use of "or" created two separate methods to determine whether the Act applies: "[W]hen the 'disputes … arise' and when the 'claims … accrue.'" Opinion and Order, RE 13, PageID# 89 (quoting *Hodgin v. Intensive Care Consortium, Inc.*, 666 F. Supp. 3d 1326, 1329 (S.D. Fla. 2023) ("That is the only way to reconcile the redundancy of saying that a claim arises *and* accrues—those dates would be the same. Moreover, I do not see how a 'dispute' could 'accrue.'") (emphasis in original)). Other courts have reached the same conclusion. *See, e.g.*, *Famuyide v. Chipotle Mexican Grill, Inc.*, No. CV 23-1127 (DWF/ECW), 2023 WL 5651915, at *3 (D. Minn. Aug. 31, 2023), *aff'd*, 111 F.4th 895 (8th Cir. 2024) ("The EFAA only applies if Famuyide's claims accrued or a dispute arose on or after March 3, 2022."); *Kader v. S. Cal. Med. Ctr., Inc.*, 317 Cal. Rptr. 3d 682, 689 (Cal. Ct. App. 2024) (discussing difference between dispute arising and claim accruing under the EFAA); *see also Olivieri*, 112 F.4th at 90 n.8 (approvingly citing Eighth Circuit's interpretation of the separate "dispute" prong in case deciding when claim "accrued," noting the Eighth Circuit's decision "supports our conclusion that events occurring before the EFAA's effective date can be relevant to application of the EFAA").

Defendants create what they call a "Majority Test" and a "Minority Test." Opening Br. at 12-13. But, in doing so, they conflate the separate tests that courts have applied for when a claim accrues and when a dispute arises. First, the only case

they cite for their so-called "Majority Test," *Castillo v. Altice USA, Inc.*, is not only not binding here but expressly recognizes the statutory distinction between "claim accrues" and "dispute arises." 698 F. Supp. 3d 652, 657 (S.D.N.Y. 2023) ("To hold otherwise would mean that the applicability of the EFAA would hinge not on when a dispute arose *or* a claim accrued, *as the statute dictates*.") (emphases added). The *Castillo* court recognized that "a claim accrues when the plaintiff has a complete and present cause of action," and the plaintiff conceded that her claims accrued prior to March 3. *Id.* (internal quotation marks omitted). As a result, "the Court need[ed] only [to] examine the reference to a 'dispute' in the statutory note regarding the EFAA's effective date," and its analysis focused on the meaning of "dispute arises." *Id*. at 656. Therefore, Defendants misread the only case they cite in support of their argument that there is a single "majority test" under the statute. If anything, *Castillo* demonstrates some disagreement among district courts regarding what it means for a dispute to arise. But, as explained below, this Court need not even reach that question because it is clear that Ms. Scoggins's claims accrued after the effective date of the EFAA.

b. Sexual Harassment Claims Continue to Accrue Until the Last Component Act of Harassment Occurs.

The EFAA applies because Ms. Scoggins alleged a pattern of harassment that began before its effective date but ended—and thus "accrued"—after its effective date. As the district court held, when a plaintiff "alleg[es] a continuing violation of

civil rights laws [such as ongoing sexual harassment] … beyond the effective date of the EFAA through her termination … [then] the EFAA applies." RE 13, PageID 91 (citations omitted).

The district court's interpretation of when a sexual harassment claim accrues is supported by the only circuit court to define "accrue" under the EFAA. *Olivieri*, 112 F.4th at 85-87. In *Olivieri*, the Second Circuit explained that "the time a claim 'accrues' means the point at which the statute of limitations clock starts ticking." *Id*. at 87. Accordingly, when the claim accrues "depends on the nature of the claim, and is informed by common law principles." *Id*. (citing *McDonough v. Smith*, 588 U.S. 109, 116 (2019)).

The Supreme Court has explained that there are generally two frameworks that govern when a discrimination claim accrues: (i) the discrete acts framework, which considers when a plaintiff knew or should have known of the injury; and (ii) the hostile work environment framework, which applies to harassment claims because "[t]heir very nature involves repeated conduct." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114-15 (2002); *see also Olivieri*, 112 F.4th at 87-88 (holding that hostile work environment cases "provide[] an exception to the normal knew-or-should-have-known accrual date—meaning an exception to how accrual normally works") (internal quotation marks omitted). Like Ms. Scoggins, the plaintiff in *Olivieri* asserted hostile work environment claims under federal and state

law. As the Second Circuit explained, *Morgan* held that "unlike discrete acts, … [a] hostile work environment generally doesn't occur on any one day; it emerges 'over a series of days or perhaps years.'" *Olivieri*, 112 F.4th at 88 (quoting *Morgan*, 536 U.S. at 115). As a result, "[a] hostile work environment claim continues to accrue, or reaccrues, each time the defendant engages in an act that is 'part of the ongoing, discriminatory practice that created a hostile work environment.'" *Id.* (internal quotation omitted); *see also Morgan*, 536 U.S. at 118 ("The statute does not separate individual acts that are part of the hostile environment claim from the whole for the purposes of timely filing and liability."). Therefore, Ms. Scoggins's federal hostile work environment claims accrued at the time of the last component act of the hostile work environment. *See Bannister v. Knox Cnty. Bd. of Educ.*, 49 F.4th 1000, 1015 (6th Cir. 2022) (explaining that "a plaintiff has filed a timely suit for *all* of the acts that make up the hostile work environment (including those that would fall outside the limitations period) as long as the suit is timely with respect to at least *one* of those acts" (citing *Morgan*, 536 U.S. at 117-20) (emphasis in original)).

Likewise, as the district court held, Ms. Scoggins alleged hostile work environment claims under Ohio law, Ohio Rev. Code § 4112.02(A). RE 13, PageID# 86-87 (citing *Hampel v. Food Ingredients Specialties, Inc.*, 729 N.E.2d 726, 732 (Ohio 2000)). Ms. Scoggins's state-law hostile work environment claims are subject to a statute of limitations rule similar to that articulated by the Supreme Court in

Morgan for Title VII cases: "the filing period begins to run anew with each new discriminatory act" that makes up the hostile work environment, or "each new day of the continuing violation," i.e., the hostile work environment. Ohio Admin. Code 4112-3-01(D)(2); *see also Chapa v. Genpak, LLC*, 2014-Ohio-897, ¶ 100, 2014 WL 1347980 (Ohio Ct. App. Mar. 11, 2014) (applying *Morgan* to discrimination claims under Ohio law).

Defendants ask this Court to reject the reasoning in *Morgan* and *Olivieri* and instead hold that a sexual harassment claim accrues under the EFAA "when a potential plaintiff knows of her injuries." Opening Br. at 14. In doing so, they ask the Court to ignore both Supreme Court precedent and Congress's clear intent in using a centuries-old legal term of art with a settled meaning in the sexual harassment context. The Supreme Court has repeatedly explained that:

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Molzof v. United States, 502 U.S. 301, 307 (1992) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)). Thus, when Congress chose to use the term "accrues," it intended for courts to rely on the centuries of case law interpreting what it means for a claim to accrue, i.e., for the statute of limitations to begin to run. If

this Court departs from those common law principles, it will usurp Congress's lawmaking authority, creating confusion and unnecessary litigation as parties try to relitigate existing case law that governs these exact terms and concepts, and it will invite an unnecessary circuit split.

Finally, Defendants' unsupported interpretation of the Act also thwarts the public policy behind the law. Congress enacted the EFAA to "restore access to justice for millions of victims of sexual assault or harassment who are currently locked out of the court system and are forced to settle their disputes against companies in a private system of arbitration that often favors the company over the individual." H.R. Rep. No. 117-234, at 4 (2022). Defendants seek to flip that purpose on its head by giving anyone who was already engaging in sexual harassment before the Act's enactment date a free pass to continue evading public accountability, even when the illegal conduct continues after the Act's effective date. This cannot be what Congress intended. Defendants should not be permitted to deny Ms. Scoggins access to court when the Act was passed precisely to allow it.

Since under both state and federal law, Ms. Scoggins's claims continued to accrue until the last component act of the hostile work environment, the EFAA applies if her complaint alleges that any part of the hostile work environment occurred after March 3, 2022. The district court correctly held that it did because Ms. Scoggins "alleges that the harassing behavior continued into 2022 and 2023." RE 13,

PageID# 91. Specifically, Ms. Scoggins's complaint alleges that Nelson continued to harass her after January 2022 until Menard terminated her on April 17, 2023—well after the Act's effective date. *See* Complaint, RE 2, PageID# 22, ¶¶ 15-18; PageID# 25, ¶ 49. As a result, her hostile work environment claim accrued after the EFAA's effective date.

c. A Dispute Arises When the Parties Are Made Adverse to Each Other in a Conflict or Controversy.

Separately and independently, the EFAA applies here because this "dispute … ar[o]se[]" after its effective date. Pub. L. No. 117-90, § 3, 136 Stat. 26, 28. The Act does not define the term "dispute," but the district court correctly followed the approach of the Eighth Circuit—the only circuit court to have addressed this question—by "apply[ing] the ordinary meaning of the term." *See Famuyide*, 111 F.4th at 898; RE 13, PageID# 89. As the Eighth Circuit held, in ordinary legal usage, a dispute arises when there is a "conflict or controversy, esp[ecially] one that has given rise to a particular lawsuit." *Famuyide*, 111 F.4th at 898 (quoting Black's Law Dictionary 593 (11th ed. 2019)). Applying that definition, the court rejected the employer's arguments that the dispute arose at the time the sexual assault occurred or when the employee's counsel sent letters to the employer asking it to preserve all potentially relevant evidence in anticipation of litigation. *Id.* The court explained that, when the assault occurred, "[t]here was no conflict or controversy between company and employee" and that even the pre-suit letter from counsel did not

"establish a dispute or inevitably lead to one," as the letter indicated they were still investigating the claims and seeking a resolution to avoid filing a lawsuit in court. *Id.*

In accordance with *Famuyide*, the district court here concluded that "a dispute arises when a person 'asserts a right, claim, or demand and is met with disagreement on the other side.'" RE 13, PageID# 89 (quoting *Famuyide*, 2023 WL 5651915, at *3 (other citations omitted)). That is also in line with the approach taken by district courts around the country that have concluded a dispute arises when the parties are in an adversarial posture. *See, e.g.*, *Hodgin*, 666 F. Supp. 3d at 1330 (holding dispute arose at time of EEOC filing "because the Plaintiff was now in an adversarial posture with her employer in a forum with the potential to resolve the claim"); *Silverman v. DiscGenics, Inc.*, No. 22-cv-354-JNP-DAO, 2023 WL 2480054, at *2 (D. Utah Mar. 13, 2023) (holding dispute arose when a charge of discrimination was filed); *Rosser v. Crothall Healthcare, Inc.*, No. CV 22-4925, 2024 WL 3792222, at *4 (E.D. Pa. Aug. 13, 2024) ("[M]ultiple courts have found that a dispute arises when a plaintiff is in an adversarial posture with their employer. … This Court agrees with the findings of its sister courts across the country.") (citations omitted); *Kader*, 317 Cal. Rptr. 3d at 688 (holding that "[a] dispute arises when one party asserts a right, claim, or demand, and the other side expresses disagreement or takes an adversarial posture").

Based on one outlier district court case, Defendants ask this Court to reject the Eighth Circuit's and other courts' plain-language approach and conclude that "a dispute arises when the conduct which constitutes the alleged sexual assault or sexual harassment occurs." Opening Br. at 13 (quoting *Castillo*, 698 F. Supp. 3d at 657). But as the district court here explained, that interpretation of "dispute arises" makes no sense in the context of the rest of the Act: "If the mere conduct underlying a claim alone—the sexual harassment—automatically resulted in a dispute, then the legislature's inclusion of the word 'dispute' in the definition would be superfluous: a 'sexual harassment dispute' would mean 'conduct that is alleged to constitute sexual harassment.'" RE 13, PageID# 90. Moreover, if, as Defendants contend, "dispute arises" means the occurrence of the sexual harassment itself, that would mean the same thing as "claim accrues," which would likewise violate the rule that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). As described in section II(a) above, interpreting "dispute arises" to mean something different than "claim accrues" is the only way to effectuate Congress's choice to use both phrases.[3]

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[3] In any event, *Castillo*'s definition of when a "dispute arises" was dicta because it ultimately held that, regardless of how "dispute" is defined, the plaintiff's "dispute"

Defendants also argue, again relying on *Castillo*, that the EFAA's applicability should not depend on "when a litigant chose to file a formal administrative charge or complaint." Opening Br. at 13 (quoting *Castillo*, 698 F. Supp. 3d at 657). Again, this argument ignores Congress's choice of the word "dispute," but it also mischaracterizes the fact-specific test that the Eighth Circuit and other courts have actually applied, which does not require the filing of an administrative complaint or lawsuit. *See, e.g.*, *Famuyide*, 111 F.4th at 898 (suggesting that correspondence between attorneys could constitute a "dispute" based on the particular context); *Kader*, 317 Cal. Rptr. 3d at 688 ("We conclude the date that a dispute has arisen for purposes of the Act is a fact-specific inquiry in each case, but a dispute does not arise solely from the alleged sexual conduct. A dispute arises when one party asserts a right, claim, or demand, and the other side expresses disagreement or takes an adversarial posture."); *Jacky R. v. AG Seal Beach, LLC*, No. B328654, 2024 WL 3271078, at *3 (Cal. Ct. App. July 2, 2024), *as modified* (July 8, 2024) (rejecting the argument that a lawsuit filed after the effective date was the first time the dispute arose). In these cases, the question was when the parties were first in conflict or in an adversarial posture with each other, regardless of whether that occurred with the filing of a complaint or at some other time.

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arose prior to the effective date, and for that reason determined the Act did not apply. *Castillo*, 698 F. Supp. 3d at 657.

Here, Ms. Scoggins's dispute arose in April 2023, when she filed a charge with the Ohio Civil Rights Commission, putting "the parties in an adversarial posture" for the first time. RE 13, PageID# 90 (quotation omitted). Thus, her dispute arose after the Act's March 2022 effective date.

III. The EFAA Allows the Entire "Case" to Proceed in Court.

The district court correctly joined the vast majority of courts that have addressed the issue in holding that "the arbitration agreement is unenforceable against the entirety of Plaintiff's case, not just her claims of sexual harassment." RE 13, PageID# 92. The plain language of the statute, which exempts from arbitration any "case" that "relates to" the "sexual harassment dispute," compels that holding. 9 U.S.C. § 402(a). "This text is clear, unambiguous, and decisive as to the issue here. It keys the scope of the invalidation of the arbitration clause to the entire 'case' relating to the sexual harassment dispute," not "the claim or claims in which that dispute plays a part." *Johnson v. Everyrealm, Inc.*, 657 F. Supp. 3d 535, 558 (S.D.N.Y. 2023). As *Johnson* explained, "[t]he term 'case' is familiar in the law" and means the entire suit or cause of action. *Id.* at 558-59 (citing dictionary definitions of "case"). In other words, "case" "captures the legal proceeding as an undivided whole. It does not differentiate among causes of action within it." *Id.* at 559.

Had Congress wanted to differentiate among causes of action within a particular suit, it could have easily done so by using the word "claim" or "cause of action." *See id.* at 559-60 (citing dictionary definitions and case law establishing that those terms "refer[] to a specific assertable or asserted right within such a proceeding"). Indeed, Congress did use the word "claim" in the separate statutory note discussed in section II, *supra* at 9-10. Pub. L. No. 117-90, § 3, 136 Stat. 26, 28. "Congress, in enacting the EFAA, thus can be presumed to have been sensitive to the distinct meanings of the terms 'case' and 'claim.'" *Johnson*, 657 F. Supp. 3d at 560; *see also Digital Realty Tr., Inc. v. Somers*, 583 U.S. 149, 161 (2018) ("[W]hen Congress includes particular language in one section of a statute but omits it in another[,] … this Court presumes that Congress intended a difference in meaning." (alternations in original; internal quotation marks omitted)). Moreover, had Congress intended the Act to encompass only the sexual harassment claim and not other claims in the case, it could have omitted mention of a "case" altogether and simply prohibited arbitration "with respect to the sexual harassment dispute." Again, all words in the statute should be given effect, and we should take Congress at its word that "case" means "case," and not just the part or subset of the case that constitutes the "sexual harassment dispute." *See Simmons v. Himmelreich*, 578 U.S. 621, 627 (2016) ("Congress says what it means and means what it says.").

Although acknowledging that "[a] majority of courts" have concluded that "case" means the entire case, Opening Br. at 16, Defendants predicate their argument on a single contrary out-of-circuit district court order. *Id.* (citing *Mera v. SA Hosp. Grp., LLC*, 675 F. Supp. 3d 442, 447 (S.D.N.Y. 2023)). The holding in that case—that the EFAA applies only "with respect to the claims in the case that relate to the sexual harassment dispute"—is wrong because it reads the words "claims in the" into the statute without explanation. *Mera*, 675 F. Supp. 3d at 447. That is why it is the *only* case to reach that result and why other courts in the same district and around the country have either outright rejected its holding or declined to apply it in the way Defendants urge the court to do here. *See, e.g.*, *Diaz-Roa v. Hermes Law, P.C.*, No. 24-cv-2105 (LJL), 2024 WL 4866450, at *13 n.9 (S.D.N.Y. Nov. 21, 2024); *Williams v. Mastronardi Produce, Ltd.*, No. 23-13302, 2024 WL 3908718, at *7 (E.D. Mich. Aug. 22, 2024); *Baldwin v. TMPL Lexington LLC*, No. 23 Civ. 9899 (PAE), 2024 WL 3862150, at *8 n.5 (S.D.N.Y. Aug. 19, 2023); *Turner v. Tesla, Inc.*, 686 F. Supp. 3d 917, 925-96 (N.D. Cal. 2023); *Doe v. Second Street Corp.*, 326 Cal. Rptr. 3d 42, 59-60 (Cal. Ct. App. 2024).

In addition to being irreconcilable with the the EFAA's plain text, *Mera* is also inconsistent with its legislative history, which reflects the drafters' deliberate intent not to divide cases by separating some claims out for arbitration. Several senators, including a lead sponsor of the Act, expressly addressed this issue during

debates, stating that keeping cases whole "is exactly what we intended the bill to do." 168 Cong. Rec. S627. Senator Gillibrand explained that the bill included the "relates to" language to keep cases covered by the EFAA together throughout litigation. "When a sexual assault or sexual harassment survivor files a court case in order to seek accountability, her single case may include multiple claims," the Senator explained. *Id.* "[I]t is essential that all the claims related to the sexual assault or harassment can be adjudicated at one time" to ensure that a victim need not "relive that experience in multiple jurisdictions." *Id.* Reiterating the Act's intent for the record, she concluded, "To ensure that a victim is able to realize the rights and protections intended to be restored to her by this legislation, all of the related claims will proceed together." *Id.* Senator Durbin, Chair of the Judiciary Committee, agreed: "So to clarify, for cases which involve conduct that is related to a sexual harassment dispute or sexual assault dispute, survivors should be allowed to proceed with their full case in court regardless of which claims are ultimately proven. I am glad that is what this bill provides." 168 Cong. Rec. S626-S627 (statement of Sen. Durbin).

If there were any remaining ambiguity as to congressional intent, Congress's rejection of The Resolving Sexual Assault and Harassment Disputes Act of 2021, S.3143, 117th Cong. (2021), during the same session demonstrates its intent to exempt entire cases, not just individual component claims, from arbitration. That bill would have exempted only "claim[s]" of sexual harassment or sexual assault, while

allowing for arbitration for other claims in a case. *Id.* at § 2. It also lacked the "relates to" language, further underscoring Congress's intent to remove whole cases from arbitration under the EFAA, rather than splitting claims between differing proceedings. *Id.* Congress declined to move that bill along, instead moving forward with the more comprehensive bill that is now the EFAA and contains the broader reference to "case," not "claim."

That Congress selected the whole-case approach makes sense. Drawing a bright line between a claim of sexual harassment and a claim of another type of discrimination or retaliation does not fit with the reality of survivors' on-the-ground experiences of sexual harassment. As this Court has recognized, under Title VII an employee with intersectional identities (i.e., who is a member of multiple protected classes) may experience discrimination, including a hostile work environment, based on several of those identities at the same time. *See, e.g.*, *Shazor v. Pro. Transit Mgmt., Ltd.*, 744 F3d 948, 958 (6th Cir. 2014) (holding that the plaintiff successfully established a prima facie claim under Title VII for discrimination on the basis of race and sex combined); *see also Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1049 (10th Cir. 2020) ("A failure to recognize intersectional discrimination [in Title VII] obscures claims that cannot be understood as resulting from discrete sources of discrimination.") (internal quotation marks omitted); *Cruz v. Coach Stores*, *Inc.*, 202 F.3d 560, 572 (2d Cir. 2000) (recognizing that "the

interplay between the two forms of harassment" can rightly serve as evidence about the severity of workplace harassment claims, since "a jury could find that … racial harassment exacerbate[s] the effect of … sexually threatening behavior and vice versa"); *Lam v. Univ. of Hawai'i*, 40 F.3d 1551, 1562 (9th Cir. 1994) (finding that Title VII requires consideration of whether an "employer discriminates on the basis of [a] *combination* of factors, not just whether it discriminates against people of the same race or of the same sex"); *Jefferies v. Harris Cty. Cmty. Action Ass'n*, 615 F.2d 1025, 1032 (5th Cir. 1980) (finding that "the use of the word 'or'" in Title VII's list of protected characteristics "evidences Congress' intent to prohibit employment discrimination based on *any or all* of the listed characteristics'") (emphasis added); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139 (1989) (discussing cases in which workers experienced discrimination specifically because they were Black women, not because of their gender or race separately).

Here, the district court correctly found that Ms. Scoggins's sex-based hostile work environment claims were "intertwined" with her other claims for disability discrimination and violations of the Family Medical Leave Act. RE 13, PageID# 91. Especially for people like Ms. Scoggins who experience harassment based on multiple protected identities, it is critical that they be permitted to bring interrelated

claims against the same employer in one forum to be analyzed as parts of a whole. This is exactly what the EFAA was enacted to accomplish.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's Order denying Defendants' motion to compel arbitration.

Respectfully submitted,

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Dated: December 19, 2024

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,437 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and 6 Cir. R. 32(b)(1). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman type style.

Date: December 19, 2024

/s/ Shelby Leighton
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CERTIFICATE OF SERVICE

I, Shelby Leighton, counsel for amici curiae and a member of the Bar of this Court, hereby certify that on December 19, 2024, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF. All participants in this case are registered CM/ECF users.

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Addendum - Designation of Relevant District Court Documents

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