25-0927-cv

United States Court of Appeals

for the

Second Circuit

REBECCA ANNE BRAZZANO,

Plaintiff-Appellee,

– v. –

THOMPSON HINE LLP, RICHARD ANTHONY DE PALMA, in his individual and professional capacity, DEBORAH ZIDER READ, in her individual and professional capacity,

Defendants-Appellants,

THOMAS LAWENCE FEHER, in his individual and professional capacity,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION/ NEW YORK AND AMERICAN ASSOCIATION FOR JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE OF THE DISTRICT COURT'S DECISION

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CORPORATE DISCLOSURE STATEMENT (FRAP 29(a)(4)(A))

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(A), Amici Curiae National Employment Lawyers Association/New York and American Association for Justice hereby certify that they are non-profit organizations, do not issue stock, and have no parent corporations.

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I. INTEREST OF AMICI CURIAE

This brief is submitted on behalf of the National Employment Lawyers Association/New York ("NELA/NY"), the New York affiliate of NELA, and the American Association for Justice ("AAJ").[1]

NELA is a national bar association dedicated to the vindication of the rights of individual employees. It is the nation's only professional organization comprised exclusively of lawyers who represent individual employees. NELA has over 4,000 member attorneys and 69 circuit, state, and local affiliates, all of which focus their expertise on employment discrimination, employee compensation and benefits, and other issues arising out of the employment relationship. NELA/NY is one of NELA's largest affiliates, with more than 450 members. It is dedicated to advancing the rights of employees to work in an environment that is free of discrimination, harassment, and retaliation. The organization aims to highlight the practical effects of legal decisions on the lives and rights of working people. Its members advance these goals by providing legal representation, as well as filing amicus briefs, in cases that raise important questions related to employment law. NELA/NY members have represented thousands of clients in employment matters within the borders of the

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), amici curiae submit this brief without an accompanying motion for leave to file or leave of court because all parties have consented to its filing. No counsel for any party authored this brief in whole or in part, and no person or entity other than amici, their members, or their counsel, made a monetary contribution to its preparation or submission.

Second Circuit, including in sexual harassment cases, and have seen firsthand how forced arbitration clauses frustrate their clients' ability to enforce their rights under the New York City and State Human Rights Laws. Accordingly, NELA/NY has a substantial interest in ensuring that Congress's intent in passing the EFAA: to fully give workers in "sexual harassment" cases, including however that terms is understood under state law, the right to pursue their claims in public courts before judges and juries, and not in closed-door arbitrations.

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's members primarily represent plaintiffs in personal injury actions, employee rights cases, consumer cases, and other civil actions, including claims for sexual assault and sexual harassment. Throughout its more than 79-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

Amici curiae submit this brief to further the Court's understanding of the public policies expressed in the New York City Human Rights Law ("NYCHRL"), and to explain the interplay between this broadly protective statute and the EFAA. The proposed brief surveys case law analyzing NYCHRL sexual harassment claims

through the lens of the EFAA and explains why deference to state and local law definitions of sexual harassment is essential to effectuating the purpose of the EFAA.

The standard urged by Appellants, if adopted by this Court, would greatly undermine the interests of amici's members and their clients. Imposing an EFAA-specific eroticism requirement for state and local sexual harassment claims would force countless sexual harassment plaintiffs to arbitrate in secret their otherwise plausible state-law claims—precisely the outcome the EFAA seeks to prevent. Such a result would contravene Congress's intent in enacting the EFAA, as well as the authority of localities to enact employment laws that offer protections above Title VII's floor.

II. ARGUMENT

In prohibiting the forced arbitration of disputes involving sexual harassment, Congress chose to defer to existing law rather than impose its own definition of sexual harassment. The EFAA declares that "no predispute arbitration agreement . . . shall be valid or enforceable with respect to a case which is **filed under Federal, Tribal, or State law** and relates to . . . [a] sexual harassment dispute." 9 U.S.C. § 402(a) (emphasis added). The statute similarly defines a "sexual harassment dispute" as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable **Federal, Tribal, or State law**." *Id.* § 401(4) (emphasis added). These references to "Federal, Tribal, or State law" were

deliberate. Congress could have specified that the statute barred the forced arbitration of only sexual harassment claims *arising under Title VII*, or only claims involving lewd, sexual, or romantic conduct or language—that is, *erotic* sexual harassment. Indeed, an earlier version of the bill did exactly that. But Congress instead adopted language that incorporates State law definitions, recognizing that not all state laws define sexual harassment the same way.

The NYCHRL—undeniably a state law for purposes of the EFAA—establishes its own definition of sexual harassment. Under case law interpreting the NYCHRL, a plaintiff pleading sexual harassment need allege only that her employer treated her less well on the basis of gender or subjected her to unwanted gender-based conduct; she need not allege that this conduct was erotic in nature. In this case, Appellee Rebecca Brazzano alleged just this: that she was treated less well than male colleagues and subjected to a slew of unwanted gender-based actions, none of which involved sexual advances toward her. *See Brazzano v. Thompson Hine LLP*, No. 24-CV-01420 (ALC) (KHP), 2025 WL 963114, at *1-2 (S.D.N.Y. Mar. 31, 2025) (SPA-2–5). Based on the totality of the conduct that she alleged, the district court correctly held that the EFAA precluded arbitration of her claims. *Id.* at *7-8 (SPA-15–17).

This Court should reject Appellants' invitation to impermissibly and unnecessarily narrow the EFAA. To properly interpret the EFAA, courts must take the state-level definitions of sexual harassment as they find them. Adopting an erotic

harassment requirement would not only impose an extra-statutory pleading requirement, it would also require courts to create a federal common law of sexual harassment. The EFAA neither instructs nor authorizes federal courts to engage in this policymaking exercise. In deference to both Congress and state and local law, this Court should affirm the district court's decision.

A. The NYCHRL Does Not Limit Sexual Harassment to Erotic Harassment.

The NYCHRL N.Y.C. Admin. Code § 8-101, et seq., does not require plaintiffs to allege erotic conduct in order to state a claim of sexual harassment. The Court should not add this requirement simply because the EFAA is implicated.[2]

The NYCHRL standard for a sexual harassment claim is meaningfully more protective than the analogous federal standard. "Under the NYCHRL, a plaintiff alleging . . . sexual harassment only needs to show that 'she has been treated less well than other employees because of her gender,' or put differently, faced 'unwanted

[2] Although Ms. Brazzano also alleged sexual harassment under the New York State Human Rights Law and Title VII, the district court analyzed only her NYCHRL claims. *See Brazzano*, 2025 WL 963114, at *7 (SPA-14). Amici accordingly do not address in depth whether the EFAA independently precludes arbitration of Ms. Brazzano's other harassment claims. *Cf. Bacolitsas v. 86th & 3rd Owner, LLC*, 702 F.3d 673, 681 (2d Cir. 2012) ("[G]enerally we decline considering arguments not addressed by the district court."). But courts regularly apply the NYCHRL standard to NYSHRL claims in the EFAA context. *See, e.g.*, *Kulick v. Gordon Prop. Grp., LLC*, No. 23-CV-9928 (KPF), 2025 WL 448333, at *8 (S.D.N.Y. Feb. 7, 2025); *Wright* v. *City of New York*, No. 23-CV-3149 (KPF), 2024 WL 3952722, at *6 (S.D.N.Y. Aug. 27, 2024). And even under Title VII, sex-based "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

gender-based conduct.'" *Delo v. Paul Taylor Dance Found., Inc.*, 685 F. Supp. 3d 173, 182 (S.D.N.Y. 2023) (quoting *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 110 (2d Cir. 2013)). The NYCHRL does not distinguish sexual harassment claims from other gender-based discrimination claims. "There is no 'sexual harassment provision' of the law to interpret; there is only the provision of the law that proscribes imposing different terms, conditions and privileges of employment based, inter alia, on gender." *Williams v. New York City Hous. Auth.*, 872 N.Y.S.2d 27, 37 (1st Dep't 2009).

This liberal standard comports with the NYCHRL's instruction to courts to construe the law "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." *Albunio v. City of New York*, 16 N.Y.3d 472, 477-78 (2011); *see also* N.Y.C. Admin. Code § 8-130. Although for many years federal courts construed the NYCHRL coextensively with federal law, the Local Civil Rights Restoration Act of 2005 amended the NYCHRL, requiring courts to "analyze NYCHRL claims separately and independently." *See Mihalik*, 715 F.3d at 109. The amended law instructs that "even if the challenged conduct is not actionable under federal and state law, federal courts must consider separately whether it is actionable under the broader New York City standards." *Id.* And, as set forth above, under the NYCHRL's separate, "uniquely broad and remedial" standard, there is no

separate sexual harassment provision, just a broad prohibition on any discrimination on the basis of gender. N.Y.C. Admin. Code § 8-130.

B. Courts Have Not Imposed an Eroticism Requirement on NYCHRL Claims to Invoke the EFAA.

Faithfully adhering to the NYCHRL, courts have repeatedly held that the EFAA precludes arbitration of gender-based harassment claims under the NYCHRL where the plaintiff alleges "unwelcome verbal or physical behavior based on . . . gender, regardless of whether that behavior is lewd or sexual in nature." *Owens v. PricewaterhouseCoopers LLC*, No. 1:24-CV-5517 (GHW), --- F. Supp. 3d ----, 2025 WL 1677001, at *9 (S.D.N.Y. June 12, 2025), *appeal docketed*, No. 25-1717 (2d Cir. July 11, 2025) (internal quotation marks and citation omitted). The proper inquiry, as these courts and the district court here have recognized, is whether the plaintiff has alleged "unwanted gender-based conduct," not whether such conduct involved sexual advances toward the plaintiff. *See Brazzano*, 2025 WL 963114, at *7 (SPA-15).[3]

[3] Ms. Brazzano did allege that her employer once commented that "judges know lawyers who provide legal services are working on a *pro bono* basis, and it's like getting jerked off by a judge." *Id.* (internal quotation marks and citation omitted). Although the district court characterized this specific comment as a "key allegation," it reasoned that she had "moreover" pleaded a hostile work environment based on her allegations that she was treated less well than her male colleagues and was singled out for failing to "subordinate herself to [her supervisor's] misogynistic values." *Id.* (internal quotation marks and citation omitted). In other words, the district court concluded that the comment about "getting jerked off" was not necessary to Ms. Brazzano's NYCHRL claim.

In *Delo*, for example, the plaintiff alleged that her employer subjected her to unwanted gender-based conduct by, among other things, questioning what she would "do with the baby" during her job interview; criticizing her, but not male employees, for bringing her child to the workplace; and once "reach[ing] across her body and 'hover[ing] closely over' her to use her desk phone while she was pumping breast milk." 685 F. Supp. 3d at 177, 183. The court held that these allegations, "[t]aken together," were sufficient to state a claim for sexual harassment under the NYCHRL and invoke the EFAA to keep her claims in court. *Id.* at 184-85. The court did not analyze whether the last allegation (or any allegation) was sufficiently erotic, nor did it suggest that the pumping allegation was critical to its holding that the EFAA precluded arbitration of the plaintiff's claims. *See id.* at 183-85. Rather, it carefully applied the NYCHRL's "notably—and intentionally—broad" sexual harassment standard. *Id.* at 184.

Mitura v. Finco Services, Inc., 712 F. Supp. 3d 442 (S.D.N.Y. 2024), *reconsideration denied*, No. 23-CV-2879 (VEC), 2024 WL 1160643 (S.D.N.Y. Mar. 18, 2024), likewise involved a plaintiff who alleged unwanted gender-based comments, but not that such comments were motivated by sexual desire. There, the plaintiff alleged that her supervisor repeatedly called her an "old Asian woman," questioned whether she still menstruated, and asked whether she got breast cancer because her "breasts were so large." *Id.* at 450 (internal quotation marks and citation

omitted). The court held that the EFAA applied because the plaintiff had sufficiently alleged sexual harassment under the NYCHRL based on the "weekly, degrading comments and insults." *Id.* at 453. The court did not characterize the comment about plaintiff's breasts as erotic, but instead focused on the gender-based nature of the comments and the apparent "effort to humiliate her." *Id.*

Similarly, in *Owens*, the court expressly "decline[d] to adopt a requirement that the unwelcome verbal or physical behavior be lewd or sexual in nature." 2025 WL 1677001, at *9. The plaintiff in *Owens* had alleged, among other things, that her employer "denigrated her in front of subordinates and verbally threatened and berated her," but did not subject male employees to such treatment. *Id.* at *3, *11. The court concluded that these allegations were "sufficient to meet the NYCHRL's low bar for pleading discriminatory intent" and avoid arbitration under the EFAA—even though the alleged conduct "evince[d] no romantic, sexual, or lewd undertones." *Id.* at *12 (internal quotation marks and citation omitted).

Finally, in *Ding v. Structure Therapeutics*, *Inc.*, 765 F. Supp. 3d 897 (N.D. Cal. 2025), *appeal docketed*, No. 25-1532 (9th Cir. Mar. 10, 2025), the court focused on the ways in which the plaintiff was treated less well. The court held that the plaintiff had pleaded sexual harassment under the NYCHRL by alleging that her employer expressed a preference for hiring a man for her position, sidelined her from her responsibilities, criticized her as "too aggressive," belittled her experience of

domestic violence and suggested that she "may be more sensitive to it than others," and ultimately terminated her. *Id.* at 900-01 (internal quotation marks and citation omitted). There, too, the court "consider[ed] the conduct as a whole, not piecemeal," and recognized certain comments as gender-based even if, "in a vacuum," they may have appeared gender-neutral. *Id.* at 901. The *Ding* court also rejected the defendants' argument that "'gender discrimination' and 'sexual harassment' are not coextensive under the statute," emphasizing that "[t]he NYCHRL, as interpreted by New York courts, says sexual harassment is conduct involving treating the plaintiff less well than other employees based on her gender. The EFAA requires the Court adopt that definition." *Id.* at 901-02.

Courts are not unanimous in this approach. The purported eroticism requirement was set forth most fulsomely in *Singh v. Meetup LLC*, 750 F. Supp. 3d 250, 253 (S.D.N.Y. 2024), *reconsideration denied*, No. 23-CV-9502 (JPO), 2024 WL 4635482 (S.D.N.Y. Oct. 31, 2024). But that opinion ignores the text and purpose of the EFAA, as discussed in Section II.B. Moreover, *Singh* relied on guidance materials from the New York City Commission on Human Rights while misconstruing those same materials. The agency includes as an example of sexual harassment "making sexist remarks or derogatory comments based on gender," with no requirement that those comments be sexualized. *See Stop Sexual Harassment Act*

Notice, N.Y.C. Comm'n on Hum. Rts.[4] And those same materials define sexual harassment as "unwelcome verbal or physical behavior based on a person's gender"—again, with no lewdness requirement. *See id.* This guidance is consistent with the legislature's intent of ensuring that the NYCHRL's protections extend to any "unwelcomed conduct that intimidates, interferes with, oppresses, threatens, humiliates or degrades a person based on such a person's gender." N.Y.C. Council Stated Meeting Tr. 64:25-65:3 (Apr. 11, 2018).[5]

The courts that have analyzed NYCHRL claims under the governing "treated less well" or "unwanted gender-based conduct" standard have upheld the principles of federalism and comity expressed in the EFAA itself. They have declined to alter their pleading standards as a precondition to invoking the EFAA and have instead deferred to the definitions of sexual harassment these laws established before the EFAA's enactment. By contrast, the standard Appellants propose—and the outlier approach exemplified in *Singh*—would force courts to analyze the fact-intensive and highly subjective question of the perpetrator's sexual intent as a threshold question to assessing the applicability of the EFAA. Courts would have to ask: Did the

[4]Available online at: https://www.nyc.gov/assets/cchr/downloads/pdf/materials/SexHarass_Notice8.5x14-English.pdf (last visited July 11, 2025).

[5] Available online at: https://legistar.council.nyc.gov/View.ashx?M=F&ID=6234420&GUID=1891A771-82D9-43EA-AB21-00F171AEA46E.

coworker or supervisor touch the employee because he thought she was sexually attractive? Or did he do it just to humiliate her? And harassers might seek to force claims back into arbitration simply by arguing, for example, that they actually found the victim unattractive and did not want to have sex with her.

The laws the EFAA references do not draw such an absurd line, and it is hard to believe that Congress intended the EFAA to do so. The Court should therefore decline defendants' invitations to add a requirement that plaintiffs plead erotic conduct.

C. Creating a Federal Common Law of Erotic Sexual Harassment Would Be Inconsistent with the EFAA's Purpose and Text.

Congress worded the EFAA intentionally to preserve states' definitions of sexual harassment. Although an initial bill defined a "sexual harassment dispute" as limited to erotic conduct,[6] H.R. Rep. No. 117-234, at 21 (2022), the statute passed

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[6] The bill originally provided that:

> The term "sexual harassment dispute" means a dispute relating to the any of the following conduct directed at an individual or a group of individuals:
>
> (A) Unwelcome sexual advances.
>
> (B) Unwanted physical contact that is sexual in nature, including assault.
>
> (C) Unwanted sexual attention, including unwanted sexual comments and propositions for sexual activity.
>
> (D) Conditioning professional, educational, consumer, health care or long-term care benefits on sexual activity.
>
> (E) Retaliation for rejecting unwanted sexual attention.

H.R. Rep. No. 117-234, at 21 (2022).

only after an amendment redefined the term "sexual harassment dispute" by reference to "applicable Federal, Tribal, or State law." 168 Cong. Rec. H991-93 (daily ed. Feb. 7, 2022). That amendment "embrac[ed] sexual harassment jurisprudence" and clarified that the EFAA's definition of sexual harassment did not supersede federal, state, or tribal law, but instead covered "anything related to sexual harassment . . . as currently defined by law." *Id.* at H991-92; *see also* 168 Cong. Rec. S627 (daily ed. Feb. 10, 2022) (statement of Sen. Kirsten Gillibrand) ("To be clear, there are no new legal burdens to sexual harassment established in the bill. . . . It is all tied to existing Federal, State, and Tribal law.").

That change responded to some legislators' concerns that the bill was "singular[ly] focus[ed] on sexual harassment involving unwelcome sexual advances, propositions, and sexual attention" and would still require the arbitration of claims of harassment that are "not sexual in nature but . . . motivated by a sex-based animus or hostility," even if such claims would otherwise be viable under existing law. *Id.* at H991 (statement of Rep. Robert Scott). As one legislator noted, the amendment "ma[de] clear that anything related to sexual harassment . . . *as currently defined by law* is covered by this bill," and "reflect[ed] an important compromise struck to protect these cases." *Id.* at H992 (emphasis added). (statement of Rep. Jerrold L. Nadler). Indeed, this amendment was critical to many legislators' support of the EFAA and its passage with bipartisan approval. *Id.* at H991 (statement of Rep.

Morgan Griffith) ("This amendment will bring more Members of the minority party onto the bill.").

Congress could not have been clearer: The EFAA was intended to cover sexual harassment claims as defined by *existing* law, not to alter that body of law. To import an eroticism requirement into the EFAA would contravene this legislative intent and undermine the care that Congress took to ensure that the federal statute did not disrupt preexisting sexual harassment law. *Cf. Jam v. Int'l Fin. Corp.*, 586 U.S. 199, 209 (2019) ("According to the 'reference' canon, when a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises." (citation omitted)). Consistent with the weight of authority and the purpose of the EFAA and the NYCHRL, this Court should hold that the EFAA does not require sexual harassment plaintiffs to plead conduct that is erotic in nature.

D. The EFAA Applies to All Sexual Harassment Claims, Including Those Under Local Law.

The EFAA reflects "Congress's judgment that sexual assault and harassment cases belong, *as a category*, in courts—and not in 'secretive' arbitration proceedings that 'often favor[ ] the company over the individual.'" *Johnson v. Everyrealm, Inc.*, 657 F. Supp. 3d 535, 552 n.14 (S.D.N.Y. 2023) (quoting H.R. Rep. No. 117-234, at 4 (2022)) (emphasis added). Consistent with that purpose, courts have unanimously held that the EFAA applies to local laws such as the NYCHRL. *See, e.g.*, *id.*

("Although the term 'State law' is undefined, the Court reads that term to encompass local (for example, municipal) laws barring sexual harassment such as the NYCHRL."); *Yost v. Everyrealm, Inc.*, 657 F. Supp. 3d 563, 578 n.10 (S.D.N.Y. 2023) (same); *Delo*, 685 F. Supp. 3d at 183 n.2 (agreeing with *Johnson*'s analysis); *Kelly v. Rosenberg & Estis, P.C.*, No. 25-CV-4776 (CM), 2025 WL 2709157, at *2 (S.D.N.Y. Sept. 23, 2025) ("'State law' under § 401(4) of the EFAA encompasses local laws prohibiting sexual harassment, including the NYCHRL."); *Ding*, 2025 WL 405699, at 900 n.2 ("Courts agree 'state law' under the EFAA includes local laws such as the NYCHRL.").

There is good reason for the courts' unanimity on this point: Under New York law, local law is definitionally a subset of state law. The legislative "grant of power to municipalities is expressly made subject to contrary state legislation." *Matter of Council of City of New York v. Bloomberg*, 6 N.Y.3d 380, 392 (2006). The New York City Council thus exercises only the legislative authority delegated to it by the state legislature, subject to the state legislature's veto power. *Id.* at 392-93 (quoting NY Const, art IX, § 2(c)(ii); N.Y. Municipal Home Rule Law § 10(1)(ii)).

That local law is a subset of state law is a longstanding, "familiar principle." *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 376 (N.Y. 1989). Congress itself has repeatedly "defined 'state' . . . broadly as including states' subdivisions." *Johnson*, 657 F. Supp. 3d at 552 n.14 (collecting statutes). And the

United States Supreme Court has repeatedly recognized municipal law as a form of state law. *See, e.g.*, *John P. King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100, 111 (1928) ("[A] municipal ordinance passed under authority delegated by the Legislature is a state law within the meaning of the Federal Constitution.") (citation omitted); *City of New Orleans v. Dukes*, 427 U.S. 297, 301 (1976) (collecting cases and reasoning that a "municipal ordinance is a 'State statute' for purposes of" the Court's jurisdiction); *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 608 (1991) ("The exclusion of political subdivisions cannot be inferred from the express authorization to the 'State[s]' because political subdivisions are components of the very entity the statute empowers."). *Cf. United Bldg. & Const. Trades Council of Camden Cnty. & Vicinity v. Mayor & Council of City of Camden*, 465 U.S. 208, 215 (1984) ("[F]undamentally, a municipality is merely a political subdivision of the State from which its authority derives.").

Nothing in the legislative history of the EFAA expresses an intent to invoke existing state law to the exclusion of the local law it creates—indeed, the statute's categorical approach suggests just the opposite. The Court should decline Appellants' invitation to place local law beyond the EFAA's reach.

III. CONCLUSION

For the above reasons, the Court should affirm the district court's order denying Appellants' Motion to Compel Arbitration.

Date: October 3, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because this brief contains 3,961 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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