UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DANILO MERA, on behalf of himself and all others similarly situated, Plaintiff, v. SA HOSPITALITY GROUP, LLC, et al., Defendants.	Case No. 1:23-cv-03492-PGG-SDA

BRIEF OF AMICI CURIAE PUBLIC JUSTICE, AMERICAN ASSOCIATION FOR JUSTICE, AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 7.1, amici curiae Public Justice, American Association for Justice, and National Employment Lawyers Association are all non-profit entities that have no parent corporation. No publicly held corporation holds 10% or more of any stake or stock in any of the amici curiae.

Dated: July 19, 2023

/s/ Shelby Leighton
Shelby Leighton
Public Justice
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INTERESTS OF AMICI CURIAE

Amici are nonprofit organizations committed to ensuring access to justice.[1] Public Justice is a national public interest advocacy organization that fights against abusive corporate power and predatory practices, the assault 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 fighting against the unlawful use of mandatory arbitration clauses that deny workers their day in court. Indeed, just this past spring Public Justice won a unanimous Supreme Court victory in *Morgan v. Sundance*, 142 S. Ct. 1708 (2022), in which Taco Bell workers challenged the enforcement of a mandatory arbitration agreement. Additionally, Public Justice has specifically advocated for full implementation of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFASASHA), including filing amicus briefs regarding the interpretation and scope of EFASASHA in *Johnson v. Everyrealm, Inc.*, No. 1:22-cv-06669, 2023 WL 2216173 (S.D.N.Y. Feb. 24, 2023), and *Olivieri v. Stifel, Nicolaus & Co.*, No. 1:21-cv-0046, 2023 WL 2740846 (E.D.N.Y. Mar. 31, 2023).

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's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer

[1] No party or party's counsel authored this brief in whole or in part. No person, other than amicus curiae, its members, and its counsel, contributed money that was intended to fund the preparation or submission of this brief.

cases, and other civil actions, including cases involving forced arbitration, sexual harassment, and sexual assault. Throughout its more than 75-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

Founded in 1985, the National Employment Lawyers Association (NELA) is the largest bar association in the country focused on empowering workers' rights attorneys. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of workers, in discrimination, harassment, wage and hour, labor, and civil rights cases. NELA attorneys litigate daily in every circuit and regularly represent workers in arbitration, giving NELA a unique perspective on how legislation and principles announced by courts in employment cases actually play out on the ground. As such, NELA has a particular interest in ensuring that workers are able to vindicate their rights in court, an opportunity often denied to them by the inclusion of forced arbitration clauses in employment contracts.

INTRODUCTION

On March 3, 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFASASHA" or "the Act"), Pub. L. No. 117-90, 136 Stat. 26, 9 U.S.C. §§ 401-402. The law, passed with bipartisan support, gives plaintiffs with cases involving sexual assault or sexual harassment the right to pursue their case in court instead of being forced into secretive, unfair arbitration procedures. Specifically, the law says that "no predispute arbitration agreement . . . shall be valid or enforceable with respect to a case which . . . relates to [a] sexual assault dispute or [a] sexual harassment dispute." 9 U.S.C. § 402(a). The new law, heralded as "one of the most significant workplace reforms in the last 50 years," ensures that survivors of sexual assault or sexual harassment have access to their choice of forum for seeking justice, and that employers and other businesses cannot continue to sweep

sexual misconduct under the rug.[2]

Now that this historic law has been enacted, the meaning of its text is being addressed in the courts for the first time. This is the second case in the Southern District of New York—but one of the first cases in the country—to rule on the scope of EFASASHA when a plaintiff has claims for other legal violations in addition to their sexual harassment claim. Under the Act, a plaintiff cannot be forced to arbitrate any "case which . . . relates to" a "sexual harassment dispute." 9 U.S.C. § 402. The statute in turn defines "sexual harassment dispute" as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." 9 U.S.C. § 401(4). Thus, to determine whether Plaintiffs' claims here are subject to arbitration, the central question is whether there is a "sexual harassment dispute." The Magistrate Judge correctly found that there is because Mr. Mera alleged a sexual-orientation-based hostile work environment. Given that there is a "sexual harassment dispute," it follows that this is a "case" that "relates to" that dispute. But instead of reaching that conclusion, the Magistrate Judge erroneously narrowed the scope of the Act to only those *claims* within the larger case that relate to the sexual harassment dispute, splitting Plaintiff's claims between court and arbitration. That attempt to rewrite the statute should be rejected for several reasons.

First, the text and legislative history show that the Act was intended to have a broad scope, covering any *case* related to conduct that is alleged to constitute sexual harassment. Second, that decision by Congress to exempt the entire case from arbitration makes sense because it reflects the complex reality of harassment claims and promotes judicial efficiency by ensuring that the same facts do not need to be litigated in separate proceedings with the same

[2] Press Release, Sen. Kirsten Gillibrand, *Gillibrand, Graham Celebrate Senate Passage of Landmark Bill to Void and Prevent Forced Arbitration Agreements for Sexual Harassment and Sexual Assault* (Feb. 10, 2022), https://www.gillibrand.senate.gov/news/press/release/gillibrand-graham-celebrate-senate-passage-of-landmark-bill-to-void-and-prevent-forced-arbitration-agreements-for-sexual-harassment-and-sexual-assault.

witnesses and evidence. Third, contrary to the Magistrate Judge's assertion, there is nothing in the Act that limits its application to only individual actions rather than class or collective actions. And at this preliminary stage in the case, the court must decide merely whether Mr. Mera's entire case—including both his sexual harassment and wage and hour claims—can proceed in court, not whether the claims of other class or collective action members fall within EFASASHA's scope.

ARGUMENT

I. The Plain Language of EFASASHA Exempts Entire Cases—Not Just Individual Claims—from Arbitration

The Magistrate Judge correctly held that Mera's sexual orientation-based hostile work environment allegations were sufficient to constitute a "sexual harassment dispute" under EFASASHA. That holding compelled the conclusion that this is a "case" that "relates to" the "sexual harassment dispute," and is therefore exempted from arbitration under the plain language of EFASASHA. 9 U.S.C. § 402(a). Instead, the Magistrate Judge split the case between court and arbitration, adding a requirement that appears nowhere in the statutory language that only the "*claims* in the case" that relate to the sexual harassment dispute are subject to EFASASHA. Order on Motion to Compel Arbitration ("Order"), at *3 (emphasis added). That requirement is contrary to the Act's language and case law interpreting it, and plainly ignores the Act's legislative history.

Congress clearly and intentionally used the words "case" to expand the scope of the statute beyond just claims of sexual harassment. 9 U.S.C. § 402(a). Indeed, had the Act been intended to encompass only the sexual harassment dispute and no other claims in the case, it could have omitted the mention of a "case" altogether, and simply prohibited arbitration "with respect to the sexual harassment dispute." Likewise, if Congress wanted to cover only those

claims in a case that directly relate to the sexual harassment dispute, it could have used the word "claims" instead of "case" in the statute. Congress should be taken at its word that "case" means the entire "case," not just the allegations or claims that are closely related to the sexual harassment dispute. *See Simmons v. Himmelreich*, 578 U.S. 621, 627 (2016) ("Congress says what it means and means what it says.").

The one other judge in this district to have addressed this issue held precisely that. In *Johnson v. Everyrealm, Inc.*, 2023 WL 2216173, at *17, Judge Engelmayer held that EFASASHA's "text is clear, unambiguous, and decisive" as to the scope of the arbitration exemption, which applies "to the entire 'case' relating to the sexual harassment dispute," not just "the claim or claims in which that dispute plays a part," as the Magistrate Judge held here. *Id.* As Judge Engelmayer explained, "the term 'case' stands in contrast to the terms 'claim' and 'cause of action'": "a 'case' or 'action' refers to an overall legal proceeding filed in a court, whereas a 'claim' or a 'cause of action' refers to a specific assertable or asserted right within such proceeding." *Id.* (citing case law and dictionary definitions). And particularly because Congress used the word "claim" elsewhere in the statute, it "thus can be presumed to have been sensitive to the distinct meanings of the terms 'case' and 'claim'" when it enacted EFASASHA. *Id.* at *18. And, as Judge Engelmayer concluded, "Congress's choice to amend the FAA directly with text broadly blocking enforcement of an arbitration clause with respect to an entire 'case' 'relating to' a sexual harassment dispute reflects its rejection—in this context—of the FAA norm of allowing individual claims in a lawsuit to be parceled out to arbitrators or courts depending on each claim's arbitrability." *Id.* at 19.[3]

[3] To distinguish *Johnson*, the Magistrate Judge relied on a footnote in *Johnson* stating that the court did not have occasion "to consider the circumstances under which claim(s) far afield might be found to have been improperly joined with a claim within the EFAA so as to enable them to elude a binding arbitration agreement." Order at *4 (citing *Johnson*, 2023 WL 2216173, at *20 n.23). But, as explained in Mr. Mera's brief, Defendants have never

Judge Engelmayer's reading of the plain language is also supported by the legislative history. 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 (daily ed. Feb. 10, 2022) (statement of Sen. Kirsten Gillibrand). Senator Gillibrand explained that the bill included the "relates to" language to keep cases covered by EFASASHA 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." *Id.* Senator Durbin, Chair of the Judiciary Committee, echoed that intent, stating that "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. S626-7 (daily ed. Feb. 10, 2022) (statement of Sen. Richard Durbin).

If there were any remaining ambiguity as to congressional intent, another bill the legislature rejected during the same session demonstrates that Congress intended to exempt entire cases, and not just individual claims, from arbitration. That bill would have limited the legislation to "claim[s]" of sexual harassment or sexual assault between employees and employers, while allowing for arbitration for other claims in a case. Resolving Sexual Assault and Harassment Disputes Act of 2021, S.3143, 117th Cong. (2021). It also lacked the "relates to" language that further underscores the intent to remove whole cases from arbitration, rather than split claims between differing proceedings. The lead sponsor of the bill, Senator Ernst, even spoke to those differences for the record, highlighting the known effect of the language in the bills. 168 Cong. Rec. S625 (daily ed. Feb. 10, 2022) (statement of Sen. Joni Ernst). Congress

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argued here that Mr. Mera's claims were improperly joined under the Federal Rules, and the Magistrate Judge here did not find that Mr. Mera's claims were improperly joined, so that footnote does not apply.

declined to move that bill along, instead moving forward with the more comprehensive bill that is now law. Thus, Congress made an intentional choice to exempt entire cases—not just individual claims—from arbitration.

II. Keeping the Entire Case Together Better Addresses the Complex Reality of Sexual Harassment Claims and Promotes Judicial Efficiency

That Congress selected the whole-case approach over parsing individual claims makes sense because drawing a bright line between a claim of sexual harassment and other workplace violations does not fit with the reality of survivors' on-the-ground experiences of sexual harassment. Unfortunately, in the restaurant industry in which Mr. Mera works, sexual harassment and wage and hour violations often go hand in hand as part of the same abusive workplace environment. In one survey, 71% of women in the restaurant industry reported that they had been sexually harassed at work, while half reported not making minimum wage and more than a third reported not being paid overtime.[4]

Some recent examples from the news highlight the relationship between wage theft and harassment. Last year, a New York City bar was ordered to pay a large fine after an investigation by the New York Attorney General concluded that the owner had fostered a hostile work environment through inappropriate sexual comments and advances, failing to pay employees overtime, and stealing employees' tips.[5] As one employee involved in that case put it, "I wish I could say this was the first time I was harassed by my employer in the service industry, or even the first time I've received a settlement for nonpayment of wages. This case is emblematic of intersecting national problems: the subjugation of workers, and sexual harassment of women in

[4] One Fair Wage, *Unlivable: Increased Sexual Harassment and Wage Theft Continue to Drive Women, Women of Color, and Single Mothers Out of the Service Sector* (April 2022), at 3-4, https://onefairwage.site/wp-content/uploads/2022/04/OFW_Unlivable.pdf.

[5] Ben Coley, *NYC Bar to Pay $500k Over Harassment, Wage Theft Claims*, FSR MAGAZINE (July 14, 2022), https://www.fsrmagazine.com/legal/nyc-bar-pay-500k-over-harassment-wage-theft-claims.

the workplace."[6] Likewise, in 2021, a world-renowned restaurant and inn in Washington state settled a lawsuit by employees alleging that they had been bullied with sexist and racist language, pressured to have sex with kitchen staff, and forced to work 16- to 18- hour days without paid breaks and without overtime pay.[7]

These examples show how wage theft and sexual harassment can operate together as means of controlling workers. Indeed, withholding of wages or tips can be used to directly further sexual harassment, whether by a supervisor, coworkers, or customers.[8] For example, studies have found that workers who depend for wages on tips from customers experience both more sexual harassment and more instances of retaliation for reporting that harassment.[9] Forcing employees to litigate their harassment claims and wage claims in different forums ignores the way in which these abuses are connected.

Moreover, splitting claims would create inefficiencies that would make both plaintiffs' and defendants' cases more expensive and difficult to litigate. For example, to prove his sexual harassment claim in court, Mr. Mera will need evidence and witnesses that will overlap with those needed to prove his wage claim in arbitration because both cases involve the same employer and the same decision-makers, as well as the same employee-witnesses. This duplication would waste time and judicial resources, force Defendants to defend against overlapping allegations in two different fora, and burden third parties who would potentially have to appear to testify multiple times. For precisely those reasons, courts have long recognized a rule against "claim splitting." *See AmBase Corp. v. City Investing Co. Liquidating Trust*, 326

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[6] *Id.*
[7] Julia Moskin, *The Willows Inn Closes After Abuse Allegations and Lawsuits*, NEW YORK *TIMES* (November 29, 2022), https://www.nytimes.com/2022/11/29/dining/willows-inn-closes-allegations-abuse.html.
[8] The Rest. Opportunities Ctrs. United, *Take Us Off the Menu: The Impact of Sexual Harassment in the Restaurant Industry* (May 2018), at 2-3, https://rocunited.org/wp-content/uploads/sites/7/2020/02/TakeUsOffTheMenuReport.pdf.
[9] One Fair Wage, Unlivable, at 4.

F.3d 63, 73 (2d Cir. 2003) (explaining that rule against claim splitting is motivated by belief that it is "fairer to require a plaintiff to present in one action all of his theories of recovery relating to a transaction, and all of the evidence relating to those theories, than to permit him to prosecute overlapping or repetitive actions in different courts or at different times").

Indeed, as a practical matter, these inefficiencies would likely force the party with fewer resources—typically the employee—to choose between litigating one claim or the other. As a result, the Magistrate Judge's reading of EFASASHA could have the effect of *discouraging* survivors of sexual harassment from pursuing their claims, which is contrary to the statute's purpose of shedding light on sexual harassment by ensuring that survivors have their day in court.

III. There is No Basis for Excluding Putative Class or Collective Claims from EFASASHA's Scope

The Magistrate Judge held that Mr. Mera's wage claims must be split from his sexual harassment claims because they were not "distinct to" him and were also brought on behalf of putative members of the class and collective action. But the Magistrate Judge did not point to anything in the statute imposing a requirement that it applies only to "distinct" claims and not to class claims. To the contrary, the Act's broad language makes clear that any "case"—whether or not it is a class or collective action—is exempted from arbitration if it relates to a sexual harassment dispute. 9 U.S.C. § 402(a). Removing class or collective actions from the statute's scope would have the perverse result of exempting cases involving workplace abuses affecting one person from arbitration while requiring arbitration of claims based on widespread abuses affecting many employees.

Moreover, no collective action or class action has been certified yet in this case, so the only question before the Court is whether Mr. Mera's claims—not the claims of potential

collective or class members who are not part of this action—are exempt from arbitration. The question whether other members of the class or collective are bound by arbitration agreements is a merits question to be decided after certification. *See, e.g.*, *Zambrano v. Strategic Delivery Sols., LLC*, No. 1:15-cv-8410, 2021 WL 4460632, at *10 (S.D.N.Y. Sept. 28, 2021) ("[T]he weight of law in this Circuit holds that a collective may be conditionally certified, and notice given, notwithstanding that some or all of the prospective members of the collective may have signed arbitration agreements."); *Varghese v. JP Morgan Chase & Co.*, Nos. 1:14-cv-1718, 1:15-cv-3023, 2016 WL 4718413, at *9 (S.D.N.Y. Sept. 9, 2016) ("[C]ourts have consistently held that the existence of arbitration agreements is 'irrelevant' to collective action approval 'because it raises a merits-based determination.'"). For that reason, the putative class or collective status of this action should have been irrelevant to the Magistrate Judge's analysis, and it is not a basis for distinguishing *Johnson* or sending some of Mr. Mera's claims to arbitration.

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In sum, the text and legislative history of EFASASHA make clear that, when a lawsuit "relates to" a "sexual assault dispute," the entire "case" cannot be forced into arbitration. And the practical realities of workplace discrimination and litigation underscore why Congress made that choice. Therefore, once the Magistrate Judge found that the Mr. Mera's case involved a "sexual harassment dispute" as broadly defined in EFASASHA, his claims within that case cannot be separated, and the entire case must be litigated in court if he elects to do so.

CONCLUSION

For the foregoing reasons, amici curiae respectfully urge this Court to sustain Plaintiff's objection and deny Defendants' Motion to Compel Arbitration in its entirety.

Dated: July 19, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 19, 2023, this amicus brief in support of Plaintiff was served on all parties or their counsel through the CM/ECF system.

Dated: July 19, 2023

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