UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PATRICIA OLIVIERI,

Plaintiff,

v.

STIFEL, NICOLAUS & COMPANY, INCORPORATED, NEIL ISLER and ROBERT CODIGNOTTO, in their individual and professional capacities,

Defendants.

Civil Action No. 21-cv-00046 (JMA)(ARL)

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

Ellen Noble
Matthew C. Clifford
Public Justice
1620 L Street, N.W., Suite 630
Washington, D.C. 20036
(240) 620-3645
enoble@publicjustice.net
mclifford@publicjustice.net

Counsel for Amici Curiae

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-New York are all non-profit entities that have no parent corporation. No publicly held corporation holds 10% or more of any stake or stock in amici curiae.

Dated: August 19, 2022

/s/ Ellen Noble
Ellen Noble
Public Justice
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF AMICI CURIAE[1]

Amici are nonprofit organizations committed to ensuring access to justice. 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.

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 cases, and other civil actions. 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.

NELA/NY is the approximately 350-member New York chapter of The National Employment Lawyers Association (NELA), the nation's only professional bar organization

[1] Counsel for the parties did not author this brief in whole or in part, and no entity or person other than the amici curiae and their counsel contributed money that was intended to fund the preparation or submission of this brief.

comprised exclusively of lawyers who represent individual employees. Through its various activities, including amicus work, NELA/NY promotes effective legal protections for employees and offers a perspective on the impact of laws and regulations on working people and the workplace relationship.

Given Public Justice, AAJ, and NELA/NY's commitment to protecting workers' access to justice, they share a strong interest in the proper interpretation and application of the new Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2022, which provides survivors with access to courts and promotes public accountability.

INTRODUCTION

On March 3, 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("the Act"), Pub. L. No. 117-90, 136 Stat. 26, 9 U.S.C. §§ 401-402. The law, passed with bipartisan support, gives victims of sexual assault or sexual harassment the right to pursue their claims 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 have access to justice and that employers cannot continue to sweep sexual misconduct under the rug.[2]

The question here is whether the Act applies to cases filed before the Act went into effect, but where the employer's wrongful conduct continues after the Act went into effect. The

[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.

answer is in the plain meaning of the statute's text. Section 3 of the Act states that the Act shall apply to any dispute or claim that "arises or accrues" on or after the Act went into effect on March 3, 2022, and it is well established that continuing violations of Title VII or the New York State Human Rights Law (NYSHRL) continue to "accrue" so long as the wrongful, tortious conduct continues. Because Ms. Olivieri has alleged that she continued to be subject to hostile and retaliatory conduct in violation of Title VII and the NYSHRL *after* March 3, 2022, the new law applies.

Defendants cannot avoid the centuries-old case law explaining that claims continue to "accrue" when there is a continuous violation. When Congress uses a term of art rooted in legal tradition, as it did here, courts must assume that Congress intended for the legal meaning of the term, and accompanying legal principles, to apply. If Congress had wanted the Act to apply only to claims that *first* accrued after March 3, it could have said so—as it has done in other statutes. Defendants also cannot rely on the language "which is filed" to limit the Act to cases filed after March 3. Read in context, those words do not distinguish between pending and prospective cases, nor do they appear in Section 3, the specific section defining the temporal scope of the Act. Finally, contrary to defendants' arguments, there is nothing retroactive about applying the Act. Defendants continued to harass Ms. Olivieri after the Act went into effect, and the question presented is whether the court, after the Act went into effect, should enforce a predipute arbitration agreement.

Beyond the text, defendants' overly narrow interpretation of "arises or accrues" undermines the public policy embodied by the Act. Congress passed the Act to bring sexual misconduct and related claims into the open, recognizing that unsafe work environments and discriminatory practices can go undetected for years when employees are forced into secretive

arbitration proceedings. Defendants' approach would keep many of those cases in the dark, even when the plaintiff is alleging ongoing and continuous hostility and harassment that post-dates the Act. Thus, according to both the plain text and purpose of the Act, defendants cannot force Ms. Olivieri to arbitrate her case.

ARGUMENT

I. The Act applies because Ms. Olivieri's claims continued to accrue after the Act went into effect.

The Act applies because, even though Ms. Olivieri filed suit before the Act went into effect, her claims continued to accrue *after* the Act went into effect. Section 3 of the Act states: "This Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act." Pub. L. No. 117-90, § 3, 136 Stat 26, 28 (2022). The language "arises or accrues" is a specific legal term of art that encompasses longstanding common law principles. *See McDonough v. Smith*, 139 S. Ct. 2149, 2156 (2019).

For federal causes of action, like Ms. Olivieri's Title VII claims, "the time at which [the] claim accrues is a question of federal law, conforming in general to common-law tort principles." *Id.* at 2155. Under federal law, "[i]t is well-settled that [w]hen a tort involves continuing injury, the cause of action accrues . . . at the time the tortious conduct ceases." *Page v. United States*, 729 F.2d 818, 821 (D.C. Cir. 1984) (citing cases); *see also Hoery v. United States*, 324 F.3d 1220, 1222 (10th Cir. 2003) (explaining that "for continuing torts . . . the claim continues to accrue as long as tortious conduct continues"); *Centifanti v. Nix*, 865 F.2d 1422, 1433 (3d Cir. 1989) (observing that plaintiff's "action continues to accrue on each day of the alleged wrong").

Such a continuing violation under federal law "typically arises in the context of a complaint of unlawful workplace discrimination challenged under Title VII of the Civil Rights

Act of 1964." *Gonzalez v. Hasty*, 802 F.3d 212, 220 (2d Cir. 2015). Under Title VII, there is a continuing violation "if a plaintiff has experienced a continuous practice and policy of discrimination." *Washington v. Cnty. of Rockland*, 373 F.3d 310, 317 (2d Cir. 2004). The Supreme Court has specifically recognized that a hostile work environment claim may be a continuing violation because "[i]t occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 103 (2002). It is "composed of a series of separate acts that collectively constitute one 'unlawful employment practice.'" *Id.* at 111. Thus, a hostile work environment claim continues to accrue so long as the wrongful acts contributing to the claim continue. *See Amaya v. Ballyshear LLC*, 295 F. Supp. 3d 204, 218 (E.D.N.Y. 2018) (citing *Morgan*, 536 U.S. at 117).

For state law claims, like Ms. Olivieri's NYSHRL claims, "state law determines when [the] cause of action accrues." *Kelly v. Stello*, No. 92-7662, 1993 WL 152240, at *1 (5th Cir. Apr. 19, 1993) (per curiam); *see also Berlin v. Jetblue Airways Corp.*, 436 F. Supp. 3d 550, 566 (E.D.N.Y. 2020) (applying state law accrual rules to state law claims). Like federal causes of action, a cause of action under New York law continues to accrue if the wrongful acts are continuous. *See Boland v. State*, 284 N.E.2d 569, 571 (N.Y. 1972) (citing 19 Carmody-Wait, 2d, Actions in the Court of Claims, § 120.17, at pp. 746-747) ("where wrongful acts are continuous, a new cause of action accrues each day upon the commission of each new wrong")); *see also Town of Huntington v. Cnty. of Suffolk*, 910 N.Y.S.2d 454, 461 (N.Y. App. Div. 2010) (same).

The continuous violations doctrine is even broader under New York law than it is under federal law. "New York courts have held that the pre-*Morgan*, more generous continuing violations doctrine continues to apply to *discrete* acts of employment discrimination under

NYCHRL." *Dimitracopoulos v. City of New York*, 26 F. Supp. 3d 200, 212 (E.D.N.Y. 2014) (emphasis added). A continuing violation may be found as a matter of state law "where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice." *Id.* (quoting *Fitzgerald v. Henderson*, 251 F.3d 345, 359 (2d Cir. 2001)). Thus, even if there is a series of discrete incidents which may be independently actionable, if the incidents are related and together amount to a discriminatory policy or practice, then there is a continuing violation and the plaintiffs' claims will continue to accrue until the discriminatory policy or practice stops.

Under the governing federal and state law claim accrual standards, Ms. Olivieri established that her Title VII and NYSHRL claims continued to accrue after the Act went into effect on March 3, 2022. Ms. Olivieri originally alleged that she "continues to work in a hostile work environment where she feels unsafe," Am. Compl. ¶ 146, and she now seeks to amend the complaint with extensive, specific allegations of ongoing wrongful harassment and retaliation that took place *after* the Act went into effect and that are closely related to the pre-Act instances of discrimination. Because Ms. Olivieri has adequately alleged that her Title VII and NYSHRL claims continued to accrue after the Act went into effect, the Act applies and the predispute arbitration agreement is unenforceable.

II. Defendants cannot evade the plain language of the Act.

Defendants cannot ignore the fact that Congress, in defining the applicability of the Act, used a centuries-old legal term of art with a well-settled meaning. Congress stated that the Act applies to any dispute or claim that "arises or accrues" after March 3, 2022. Yet defendants claim that the entire body of case law concerning when a claim "arises or accrues" in the statute of limitations context is "inapplicable," and suggests that the term means something entirely different in this context. *See* April 18, 2022 Response Letter [ECF 34] at 3.

Defendants' argument violates a cardinal rule of statutory construction. 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 "arises or accrues," Congress intended for courts to rely on the centuries of case law, mostly in the statute of limitations context, that define the term.

It makes sense that Congress would want courts to rely on case law addressing when a claim "arises or accrues" in the statute of limitations context. In that context, the term is used to define the temporal scope of claims subject to the statute, and the term is used for the very same purpose in the Act. By directing courts to an existing body of law, Congress can create a more predictable statutory scheme and minimize litigation. That is precisely what Congress did here. Instead of having courts reinvent the wheel, it directed courts to apply well-established principles that govern when claims "arise or accrue." If this Court departs from those common law principles, including the continuing violations doctrine, it will not only usurp Congress' lawmaking authority, but it will create confusion and unnecessary litigation as parties try to relitigate hundreds of years of case law that govern when a claim arises or accrues.

Defendants may argue that a claim accrues as soon as the plaintiff knew or should have known the facts giving rise to the claim. But defendants cannot pick and choose

from "the cluster of ideas" that are attached to the centuries-old legal term. *Molzof*, 502 U.S. at 307. "The continuing violation doctrine, where applicable, provides an '*exception* to the normal knew-or-should-have-known accrual date.'" *Gonzalez*, 802 F.3d at 220 (2d Cir. 2015) (quoting *Harris v. City of New York*, 186 F.3d 243, 248 (2d Cir. 1999)) (emphasis added); *see also Leonhard v. United States*, 633 F.2d 599, 613 (2d Cir. 1980) (explaining that the general accrual rule "is subject to the modification that a claim to redress a continuing wrong will be deemed to have accrued on the date of the last wrongful act"). Defendants cannot distort the law in their favor and ignore the well-settled principle that when an action "accrues" depends on whether or not the wrongful conduct is continuous. If defendants were to state the accrual rule for non-continuous violations, without acknowledging the accrual rule for continuous violations, they would simply be misstating the law of when a claim "arises or accrues."

Moreover, if Congress had wanted the Act to apply only to claims that *first* accrued after March 3, 2022, it would have said so. Indeed, it has said so before. *See* 28 U.S.C. § 2501 (providing that the Court of Claims had jurisdiction over claims filed "within six years after the claim *first* accrues") (emphasis added). Congress has also referred to claims that accrued *prior to* or *before* a specific date. *See, e.g.*, 43 U.S.C. § 641a; 28 U.S.C. § 2679; 14 U.S.C. § 937; 24 U.S.C. § 225g; 45 U.S.C. § 1203. Congress understands that some actions continue to accrue over time and knows how to write a statute to exclude all claims that first accrued before a certain date. But in this statute, Congress stated that the Act applied to any dispute or claim arising or accruing after March 3, thereby ensuring that the Act applies to claims, like Ms. Olivieri's, that continued to accrue after that date.

Defendants also wrongly argue that separate language in the Act, specifically the phrase "case which is filed," means that the Act only applies to cases filed after March 3 and where the underlying sexual harassment or sexual assault dispute arose after that date. *See* May 26, 2022 Response Letter [ECF 37] at 3. The statutory text does not support either requirement. First, the statute says: "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 assault dispute or [a] sexual harassment dispute." 9 U.S.C. § 402. Defendants replaced "under Federal, Tribal, or State law" with ellipses. But when read in full, this context demonstrates that Congress was not using the phrase "which is filed" to impose any limit on the temporal scope of the Act; rather, it was explaining that the law applies to cases brought under all types of law. Indeed, it is common usage to say a pending case "is filed under tribal law" or "is filed in the Eastern District of New York." The language is not inherently or exclusively prospective.

Nor can the phrase "a case which is filed" override Congress' specific guidance regarding the temporal applicability of the Act under Section 3. Under the heading "Applicability," Section 3 provides that the Act applies to any dispute or claim that arises or accrues after March 3. Yet defendants would have this Court graft the additional words "and where the case was filed after March 3" onto Section 3. There is no reason Congress would have included different, contradictory limits on the Act's applicability in other parts of the statute. In determining the Act's applicability, the Court should look at the provision under the heading "Applicability"—not phrases buried in other parts of the statute. *See Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) (noting that section headings "'supply cues' as to what Congress intended").

Second, defendants mischaracterize Section 3 as saying that the Act only applies where the *sexual harassment or sexual assault* dispute, in particular, arose on or after March 3. But that is not what the text says. Section 3 states that the Act shall apply to "any dispute or claim" that arises or accrues after March 3. 9 U.S.C. § 401, "Effective Date." Section 3 does not distinguish between sexual harassment or assault disputes, and claims that *relate to* sexual harassment or assault disputes. In fact, the Act only refers to sexual harassment or assault disputes, not claims. Section 3's provision that the Act applies to any "dispute *or claim*" arising after March 3 makes it abundantly clear that Congress intended for the Act to apply to claims accruing after March 3 relating to sexual harassment or assault disputes predating March 3.

Finally, contrary to defendants' argument, applying a new law to a pending case is not a "retroactive" application of the law. As the Supreme Court has explained, "[a] statute does not operate retrospectively merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994). The Act, as applied here, restricts conduct—specifically, defendants' enforcement of a predispute arbitration agreement—that took place *after* the Act went into effect. Moreover, the Act only applies in this case because defendants continued to engage in wrongful conduct *after* the Act went into effect. But even if defendants want to characterize this application of the Act as "retroactive," contrary to Supreme Court authority, such application of the law would still be permissible because it is mandated by the statute's text. *See id.* at 272 (explaining statutes will be construed to have retroactive effect if "their language requires this result").

Thus, defendants cannot evade, distort, or otherwise edit the plain meaning of "arises or accrues," and this case does not require any retroactive application of the new law. Because Ms.

Olivieri's claims continued to accrue after March 3, the Act applies and the predispute arbitration agreement is unenforceable.

III. Defendants' approach undermines the public policy embodied by the Act, leaving workers vulnerable to ongoing abuse.

Defendants' unsupported interpretation of Section 3 is not only inconsistent with the text, it also thwarts the public policy under the new law. 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." Cong. Rec. S626 (daily ed. Feb. 10, 2022). Today, more than 50% of nonunion, private-sector employees are subject to mandatory arbitration agreements, barring them from raising claims of any kind in court.[3] And that number is likely to rise to 80% by 2024.[4]

Congress prohibited the enforcement of mandatory arbitration agreements in cases related to sexual harassment or sexual assault 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). "Because arbitration lacks the transparency and precedential guidance of the justice system, there is no guarantee that the relevant law will be applied to these disputes or that fundamental notions of fairness and equity will be upheld in the process." *Id.* at 3. Additionally, "the purportedly neutral arbitrator may be motivated by the prospect of obtaining repeat business from the company rather than the desire

[3] Alexander J.S. Colvin, Econ. Policy Inst., *The Growing Use of Mandatory Arbitration* (2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.

to fairly assess the claim." *Id.* at 5 (citing Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 Ohio St. J. on Disp. Resol. 19, 35–37 (1999)).

Congress, in enacting the law, also recognized that the "secretive nature" of forced arbitration is particularly pernicious in the context of sexual harassment claims because it "prevents victims from sharing their stories." H.R. Rep. No. 117-234, at 4. "This allows for the growth of office cultures that ignore harassment and retaliate against those who report it, prevent future victims from being warned about dangerous companies and individuals, and create incentives for the corporate protection of rapists and other serial harassers." *Id.* As the bipartisan group of attorneys general stressed in their plea for legislative reform, "[e]nding mandatory arbitration of sexual harassment claims would help to put a stop to the culture of silence that protects perpetrators at the cost of their victims." *Id.* at 11. The secretive nature of arbitration "has allowed outrageous violations, in some cases years of sexual harassment and predation, to remain hidden from view and therefore to continue."[5] But with the Act's enactment, "the days of taking sexual harassment . . . claims and burying them in the basement of arbitration are over." Cong. Rec. S628 (daily ed. Feb. 10, 2022) (statement of Sen. Lindsey Graham).

Defendants' interpretation of Section 3 undercuts the strong and explicit public policy embodied by the Act. The Act confirms that forced arbitration clauses in the context of sexual misconduct are not just unfair, but dangerous, because they are used to conceal and enable ongoing sexual harassment and assault. Contrary to the Act's purpose of casting a light on sexual

[4] Kate Hamaji et al., Ctr. for Pop. Dem., Econ. Pol'y Inst., *Unchecked Corporate Power: Forced Arbitration, the Enforcement Crisis, and How Workers Are Fighting Back* 1 (2019), https://www.epi.org/publication/unchecked-corporate-power/.

harassment, assault, and other related wrongful conduct, defendants seek to flip the Act on its head by giving any employer that was already engaging in such discriminatory policies or practices before the enactment date a free pass to continue to evade public accountability. Defendants should not be permitted to silence Ms. Olivieri and deny her access to court as they continue to discriminate against her through ongoing harassment and retaliation. "As a remedial statute," the Act "should be construed liberally to give effect to its purposes." *Next Millenium Realty, LLC v. Adchem Corp.*, 690 F. App'x 710, 714 (2d Cir. 2017).

CONCLUSION

For the reasons above, this Court should grant Ms. Olivieri's motion for reconsideration and hold that defendants cannot compel arbitration of her claims because her claims continued to accrue *after* the Act went into effect.

Dated: August 19, 2022

Respectfully submitted,

/s/ Ellen Noble
Ellen Noble
Matthew C. Clifford
Public Justice
1620 L Street, NW, Suite 630
Washington, D.C. 20036
(240) 620-3645
enoble@publicjustice.net
mclifford@publicjustice.net

Counsel for Amici Curiae

[5] Terri Gerstein, *Forced Arbitration is Unjust and Deeply Unpopular. Can Congress End It?*, Slate (Mar. 1, 2019), https://slate.com/news-and-politics/2019/03/congress-forced-arbitration-fair-act.html.

CERTIFICATE OF SERVICE

I certify that on August 19, 2022, this amicus brief in support of plaintiff was served on all parties or their counsel through the CM/ECF system.

Dated: August 19, 2022

/s/ Ellen Noble
Ellen Noble

Counsel for Amici Curiae