No. 25-322

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KATIE ELLEN PURIS,
Plaintiff-Appellee,

v.

TIKTOK INC., BYTEDANCE LTD, BYTEDANCE INC.,
Defendants-Appellants,

DOUYIN LIMITED, LIDONG ZHANG, DOUYIN CO., LTD,
Defendants.

On Appeal from the United States District Court
for the Southern District of New York
No. 1:24-cv-944 - Judge Denise L. Cote

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Amici Curiae National Women's Law Center, American Association for Justice, and National Employment Lawyers Association state that they are non-profit organizations, do not issue stock, and have no parent corporations.

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INTEREST OF AMICI CURIAE[2]

The National Women's Law Center ("NWLC") is a nonprofit organization that fights for gender justice in the courts, in public policy, and in our society, and works across issues that are central to the lives of women and girls, especially women of color, LGBTQI+ people, and low-income women. Since 1972, NWLC has worked to advance educational opportunities, workplace justice, health and reproductive rights, and income security. The NWLC Fund houses and administers the TIME'S UP Legal Defense Fund, which improves access to justice for those facing workplace sex harassment, including through grants to support legal representation. NWLC has participated in numerous workplace civil rights cases in federal and state 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.

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

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[2] No party's counsel authored this brief in whole or in part, nor did a party, its counsel, or any other person contribute money to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E). The parties consent to the filing of this brief.

plaintiffs in personal injury actions, employee rights cases, consumer cases, and other civil actions. Throughout its more than seventy-nine-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 sixty-nine circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of workers in employment, wage and hour, labor, and civil rights disputes. NELA members represent workers who have experienced sexual harassment and assault in the workplace, giving NELA a unique interest in ensuring that the EFAA is interpreted correctly by the courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants (collectively referred to herein as "TikTok," *see* Resp. Br. 1 n.1) ask this Court to limit the scope of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFAA" or "the Act"), 9 U.S.C. §§ 401–402. TikTok asks to limit the EFAA in two ways: by limiting the type of sexual harassment disputes that trigger its application and limiting the claims that may be exempt from arbitration if it applies. Neither can be squared with the Act's text or legislative history.

The EFAA gives people who have been sexually assaulted or harassed the right to seek justice in court rather than be forced into arbitration proceedings. Passed in 2022 with bipartisan support, the Act 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." *Id.* § 402(a).

Congress enacted the EFAA to provide survivors of sexual assault and sex-based harassment with meaningful access to justice in court. The statute passed in response to a pattern of survivors being forced into an arbitration system that is "secretive, closed, and private . . . designed . . . to evade oversight and accountability." H.R. Rep. No. 117-234, at 6 (2021). The House report specifically noted that the "secretive nature of arbitration" perpetuates a "culture of silence" that insulates wrongdoers from accountability while also ensuring that other potential victims and the public cannot learn about the misconduct. *Id.* at 4–5 (citation omitted). Ultimately, this confidentiality can foster "office cultures that ignore harassment and retaliate against those who report it." *Id.* at 4.

At the time of the EFAA's passage, it was estimated that eighty percent of private-sector workers would be forced to sign arbitration clauses by 2024. *Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual*

Harassment in the Shadows: Hearing before the H. Comm. on the Judiciary, 117th Cong. 2 (2021) (statement of Rep. Jerrold L. Nadler) [hereinafter *Silenced*]. The House report specifically noted a 2017 study that found that employees forced into arbitration were less likely to bring their claims, less likely to win, and recovered less. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration* at 5–6, Econ. Pol'y Inst. (2017) (cited by H.R. Rep. No. 117-234, at 9–10). More recent studies confirm these findings: employees who bring their claims in arbitration are less likely to succeed, and if they do succeed, they receive far less money. *See* Alexander J.S. Colvin & Mark Gough, *Mandatory Employment Arbitration*, 19 Ann. Rev. of L. & Soc. Sci. 131, 136 (2023); *id.* at 133 (concluding that mandatory arbitration "has tended to suppress access to justice" based on a survey of existing academic literature and comparing employees' win rates and awards in arbitration and in federal and state courts).

In light of these concerns, Congress passed the EFAA so that survivors of sexual assault and sex-based harassment could pursue justice through the courts, where they could "enforce their rights under state and federal legal protections," access "the transparency and precedential guidance of the justice system," and "even simply share their experiences." H.R. Rep. No. 117-234, at 3 (2022); *see also Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R.963, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust,*

Commercial, and Admin. Law of the H. Comm on the Judiciary, 116th Cong. 1 (2019) [hereinafter *Justice Denied*]; *Silenced*, 117th Cong. 4 (statement of Rep. Jerrold L. Nadler) ("H.R. 4445 would 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."). By allowing survivors this option to pursue their claims in court, Congress sought to "fix a broken system that protects perpetrators and corporations and end the days of silencing survivors." 168 Cong. Rec. S627 (daily ed. Feb. 10, 2022) (statement of Sen. Kirsten Gillibrand).

The district court correctly interpreted the Act's text—and effectuated the congressional intent underlying it—by concluding that Plaintiff-Appellee Katie Ellen Puris's case, which includes sex-based harassment claims, was not subject to arbitration. TikTok argues that the district court erred because Ms. Puris's case does not conform with its own narrow definition of sexual harassment and that the EFAA should not cover the additional claims in the complaint. Those arguments, however, directly contravene the text of the Act. First, the Act allows plaintiffs to avoid arbitration of all cases that "relate[] to" a "sexual harassment dispute," which includes cases with claims for sex-based hostile work environments and retaliation for reporting sex-based harassment. 9 U.S.C. § 402(a). Second, the EFAA

invalidates an arbitration agreement as to an entire case involving such a claim or dispute, as the vast majority of courts around the country that have examined this issue have resoundingly affirmed. Congress intended the EFAA to have a broad and inclusive scope, both in how it defines disputes related to sexual harassment and in its application to the entire case related to such alleged conduct. TikTok's interpretation, by contrast, would lead to the exact result Congress intended to avoid, making it more burdensome for plaintiffs to access justice and vindicate their rights.

For these reasons, and those provided by Ms. Puris, this Court should affirm the district court's denial of TikTok's motion to compel arbitration.

ARGUMENT

I. The EFAA allows plaintiffs to avoid arbitrating cases related to sexual harassment, regardless of whether the harassment takes the form of sexual advances.

The EFAA's text, case law, and legislative history all support the conclusion that a plaintiff alleging "sexual harassment" in the form of a hostile work environment may avoid arbitration under the EFAA so long as they allege sexual harassment as defined "under applicable Federal, Tribal, or State law." 9 U.S.C. § 401(4). Title VII and similar laws therefore supply the EFAA's definition of "sexual harassment." And those laws make clear that conduct creating a sex-based hostile work environment constitutes sexual harassment regardless of whether it

takes the form of sexual advances or is motivated by sexual desire. This straightforward method of determining what constitutes "sexual harassment" under the EFAA best effectuates Congress's intent to provide a workable standard so that people experiencing sexual harassment can more easily pursue their claims in court. By contrast, TikTok's suggested alternative, which would cabin "sexual harassment" to some ill-defined subset of conduct solely motivated by sexual desire, would only create more confusion for litigants and courts and subvert the statute's text and purpose.

A. Federal and state laws define sexual harassment to include sex-based harassing conduct that need not take the form of sexual advances.

TikTok's attempt to reverse-engineer the definition of "sexual harassment" to exclude Ms. Puris's case finds no footing in the EFAA's text. *See* Opening Br. 21–23 (arguing the definition of sexual harassment under the EFAA should be "unwelcome sexual advances or other verbal or physical contact of a sexual nature"). The EFAA defines a "sexual harassment dispute" by reference to the laws under which the suit is filed. *See* 9 U.S.C. § 401(4) ("The term 'sexual harassment dispute' means a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."). The laws under which Ms. Puris has brought her claims—Title VII, New York State Human Rights Law (NYSHRL), and New York City Human Rights Law (NYCHRL)—do not require

a plaintiff to allege sexual advances or conduct motivated by sexual desire to plead a sexual harassment claim.

Title VII does not itself use the term "sexual harassment," but it prohibits discrimination because of sex in the terms and conditions of employment, 42 U.S.C. § 2000e-2(a). As the Supreme Court has repeatedly emphasized, this includes sexual harassment that creates a hostile work environment. *See, e.g.*, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993) ("When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive . . . Title VII is violated."); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65–67 (1986) (holding that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment").

As the Supreme Court has made clear, such 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). Accordingly, "[t]his court has found workplace situations discriminatory under a hostile work environment theory where the conduct at issue, though lacking any sexual component or any reference to the victim's sex, could, in context, reasonably be interpreted as having been taken on the basis of plaintiff's sex." *Gregory v. Daly*, 243 F.3d 687, 695 (2d Cir. 2001); *see also Kaytor v. Elec.*

Boat Corp., 609 F.3d 537, 548 (2d Cir. 2010) (holding that "[e]ven if they did not evince sexual desire, a factfinder would be entitled to take" the harasser's statements "into consideration in assessing the work environment and in determining whether the abuse" the plaintiff endured was motivated "by her gender"); *Raniola v. Bratton*, 243 F.3d 610, 617–18 (2d Cir. 2001) (reciting that "sexual harassment" can have "nothing to do with sexuality" and that a jury could find plaintiff "was subjected to a hostile work environment" based on verbal abuse, disparate treatment, and workplace sabotage) (internal quotation marks omitted).

No circuit has adopted the narrow standard for sexual harassment TikTok suggests—nor, of course, could they under *Oncale*. *See, e.g.*, *Tang v. Citizens Bank, N.A.,* 821 F.3d 206, 216 (1st Cir. 2016) (holding that Title VII "does not require evidence of overtly sexual conduct for a sexual harassment claim."); *EEOC v. Boh Bros. Const. Co., L.L.C.*, 731 F.3d 444, 460–61 (5th Cir. 2013) ("Although sexual harassment must be based on sex, it need not be motivated by sexual desire. Sexual harassment may include extremely insensitive conduct because of sex/gender."); *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 788–89 (7th Cir. 2007) (rejecting argument that proving "sexual harassment" created a hostile work environment requires "sexual advances" or other "conduct of a sexual nature" in a case involving primarily sexist comments) (internal quotation marks omitted); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 148 (3d Cir. 1999) (holding "non-

sexual but gender-based" actions may create hostile work environment under Title VII, including "hostile or paternalistic acts based on perceptions about womanhood or manhood").[3]

Moreover, under the NYCHRL, "a plaintiff alleging a hostile work environment theory of 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 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)). And the NYSHRL was amended in 2019 "to render the standard for claims under the NYSHRL closer to the standard under the NYCHRL." *Id.* (quotation omitted); *see also Johnson v. Everyrealm, Inc.*, 657 F. Supp. 3d 535, 552 (S.D.N.Y. 2023) (explaining the court's decision to use the NYCHRL standard for NYSHRL claim in the EFAA context "because the NYCHRL supplies the—or ties with the NYSHRL for the—most lenient applicable liability standard").

Under Title VII, NYCHRL, and NYSHRL—and so, too, under the EFAA—a sex-based hostile work environment is sexual harassment even if it is not

[3] Defendants' cited case, *Friel v. Mnuchin*, 474 F. Supp. 3d 673, 692 (E.D. Pa. 2020), is not to the contrary. *Friel* held that "harassment must be linked to discrimination, in this case sex," and that the plaintiff failed to "show that the non-sexual harassment" he alleged "was directed at him because he is male." *Id*.

motivated by sexual desire and does not take the form of sexual advances. TikTok's attempt to define Ms. Puris's sexual harassment out of existence by limiting the definition of "sexual harassment" to sexual advances cannot be squared with the statute or with controlling case law.[4]

B. Legislative drafting history underscores that Congress intended the EFAA to cover all disputes related to sexual harassment, regardless of whether the harassment takes the form of sexual advances.

Even if the statutory text and related case law were not clear on this point, the EFAA's drafting history clarifies that Congress intended the phrase "sexual harassment dispute" to be interpreted broadly to include sex-based hostile work environment claims, retaliation claims based on reporting sexual harassment, and other related claims. Indeed, Congress specifically considered—and rejected—a version of the Act that would have included a narrower definition of sexual harassment similar to the one TikTok now urges. *See* 168 Cong. Rec. H984 (daily ed. Feb. 7, 2022). That rejected version proposed defining "sexual harassment dispute" as a dispute relating to "[u]nwelcome sexual advances," "[u]nwanted physical contact that is sexual in nature," "[u]nwanted sexual attention, including unwanted sexual comments and propositions for sexual activity," conditioning

[4] Amici do not address in depth the issue of Ms. Puris's claim for retaliation based on reporting sexual harassment, but of course, as she explains in her brief, "retaliation resulting from a report of sexual harassment is" also "'relat[ed] to conduct that is alleged to constitute sexual harassment.'" *Olivieri v. Stifel, Nicolaus & Co.*, 112 F.4th 74, 92 (2d Cir. 2024) (quoting 9 U.S.C. § 401(4)).

benefits on sexual activity, and "[r]etaliation for rejecting unwanted sexual attention." H.R. 4445, 117th Cong. § 401(4) (July 16, 2021).

Instead, Congress chose to adopt a broader definition that would harmonize the EFAA with the scope of Title VII and other laws prohibiting sexual harassment. *See* 9 U.S.C. § 401(4); 168 Cong. Rec. H991 (daily ed. Feb. 7, 2022) (statement of Rep. Robert Scott) (stating that the relevant amendment "encompasses a broader array of harassing conduct" because it "embrac[es] sexual harassment jurisprudence"). As Representative Scott explained, the earlier version's "singular focus on sexual harassment involving unwelcome sexual advances, propositions, and sexual attention, fails to account for the other, harmful, and common, forms of sex-based harassment that occur[] in the workplace" that are "not sexual in nature but [are] motivated by a sex-based animus or hostility." 168 Cong. Rec. H991 (daily ed. Feb. 7, 2022) (statement of Rep. Robert C. Scott) (2022). "This kind of harassment," he emphasized, "can involve offensive and derogatory comments about women working in male-dominated industries, physically intimidating conduct directed at men who fail to conform to stereotypical gender norms," and other forms of "non-sexual, sex-based harassment that have been recognized by the Supreme Court." *Id.*

In further support of that broadening amendment, Representative Nadler noted that it would provide more recourse for survivors by "making clear that

anything related to sexual harassment or assault as currently defined by law is covered by this bill, . . . includ[ing] retaliation or any other misconduct that gives rise to the underlying claim . . . and reflects an important compromise struck to protect these cases." *Id.* at H992 (statement of Rep. Jerrold L. Nadler).

Discussion in the Senate further underscored the Act's intent to encompass the broad reach of federal and state law. *See* 168 Cong. Rec. S628 (daily ed. Feb. 10, 2022) (statement of Sen. Kristen Gillibrand) ("There are no new legal burdens to sexual harassment established in the bill."). In its enacted version, the Act's intentionally expansive definition of sexual harassment ensures that Ms. Puris and other survivors in similar situations can now have their day in court.

C. TikTok's crabbed definition of "sexual harassment dispute" would subvert Congress's goal of reducing barriers to justice for survivors.

Congress intended the EFAA to address the unjust barriers and unnecessary trauma that survivors face when forced to go through arbitration. Here, TikTok proposes defining "sexual harassment" as "unwelcome sexual advances or other verbal or physical contact of a sexual nature," Opening Br. 21–23, which seemingly rests on the perpetrator's sexual or non-sexual intent. Not only is this definition irreconcilable with the statutory text, case law, and legislative history, but it would also create additional barriers for survivors and risk traumatizing them further. This is the very opposite of Congress's intent.

In passing the EFAA, Congress was specifically concerned with limiting the needless barriers survivors would encounter in seeking justice. *See Silenced*, 117th Cong. 4 (statement of Rep. Jerrold L. Nadler) (explaining "forced arbitration . . . lacks many of the fundamental due process and transparency safeguards present in the courts" and that it "is difficult to fathom the true human toll of forced arbitration," where the employer nearly always wins and the employee is bound "to secrecy forever"); *Justice Denied*, 116th Cong. 33 (statement of Gretchen Carlson) ("These women put their trust into a company and its employees, only to suffer the trauma of being sexually assaulted and then continue to suffer as the company did little to help them and instead tried to silence them."); 168 Cong. Rec. H985 (daily ed. Feb. 7, 2022) (statement of Rep. Jerrold L. Nadler) (explaining "H.R. 4445 removes these barriers to justice for survivors of sexual assault or sexual harassment").

The standard TikTok proposes would force the parties and the court to analyze the fact-intensive question of the perpetrator's sexual intent as a threshold question before invoking the EFAA. But this approach would only retraumatize survivors and subvert the Act's purpose of creating a more just and workable system for them. TikTok would, in essence, require plaintiffs to ask: Did my coworker or supervisor touch me or say sexist things to me because he thought I was sexually attractive—in which case the EFAA applies? Or did he do it just to

humiliate me—in which case it doesn't? It would allow harassers seeking to force claims back into arbitration to do so simply by arguing, for example, that they actually found the victim unattractive and didn't want to have sex with her; they just wanted to take her down a peg. The laws the EFAA references do not draw such an absurd line, *see supra* Section I.A, and neither does the EFAA.

II. The EFAA prohibits arbitration of whole *cases* involving claims of sex-based harassment, not just the sex harassment claims.

A. The legislative history confirms that Congress intended the EFAA to exempt entire cases from arbitration.

Next, Congress's decision to allow plaintiffs to void a predispute arbitration agreement with respect to an entire "case which . . . relates to the sexual assault dispute or the sexual harassment dispute" doubly effectuates its goal of allowing survivors to more effectively and publicly pursue justice. 9 U.S.C. § 402(a). As Senator Richard Durbin, Chair of the Judiciary Committee, summarized, the "premise of this legislation is simple: Survivors of sexual assault or harassment … should be able to choose whether to bring a case forward [in court], 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) (statement of Sen. Richard Durbin).

To accomplish this goal, the EFAA directly amended the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*., so that survivors of sex-based harassment and assault

cannot be forced to arbitrate any "case which . . . relates to . . . [a] sexual harassment dispute," 9 U.S.C. § 402(a). Congress understood that to provide survivors with an opportunity to meaningfully pursue their allegations of sexual assault or harassment in court, the EFAA would have to apply to entire cases, not just individual claims. Senator Gillibrand, the lead sponsor of the Act, noted that keeping cases whole "is exactly what we intended the bill to do." *See* 168 Cong. Rec. S627 (daily ed. Feb. 10, 2022) (statement of Sen. Kirsten Gillibrand). She elaborated, "[w]hen a sexual assault or sexual harassment survivor files a court case in order to seek accountability, her single case may include multiple claims." *Id.* Rather than force someone to "relive that experience in multiple jurisdictions," her claims must be able to "proceed together" so that she can "realize the rights and protections intended to be restored to her by this legislation." *Id.*

Senator Durbin echoed this intent, noting, "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." *Id.* at S626–27 (statement of Sen. Richard Durbin) (emphasis added). Senator Durbin illustrated the importance of this approach with a real-life example: Ms. Taylor Gilbert, at age 22, was assaulted and raped by her manager and then harassed by other colleagues. When she reported this to her company, not only did they take "no action," but she was then "bypassed for promotions and raises." *Id.* at S626. As Senator Durbin

explained, "it was essential that the company's conduct in enabling the abuse and harassment and *also retaliating against her* be brought to light, *not covered up by being separated* and forced into arbitration." *Id.* (emphases added). In other words, for the EFAA to achieve its intended goal, plaintiffs must be permitted to exempt their entire case from arbitration, not just their claims of sexual assault or sex-based harassment.

The House of Representatives agreed, noting in its report that a "suit" by "an employee" who had been "assaulted or harassed at work" or by a "consumer" who had been "assaulted at a business" should be granted access to a "court of law." H.R. Rep. No. 117-234, at 3. Representative Bobby Scott emphasized that "the best reading of the language in the bill that refers to 'a case . . . [that] relates to a sexual harassment dispute' is that it was meant to encompass [] scenarios" in which a plaintiff brings both harassment and other "negative employment action" claims in one action. 168 Cong. Rec. H991 (daily ed. Feb. 7, 2022) (statement of Rep. Bobby Scott) (first two alterations in original).

Notwithstanding the extensive legislative history, TikTok instead maintains that Congress intended to exempt from arbitration only those claims with a narrowly defined "connection" to alleged assault or harassment. *See* Opening Br. 42. As support, it cites to general statements in the legislative record that the EFAA would not "take unrelated claims out of the contract [for arbitration]." *See,*

e.g., Opening Br. 44–45 (quoting 168 Cong. Rec. S625 (daily ed. Feb. 10, 2022) (statements of Sens. Lindsey Graham and Joni Ernst)).

But these legislative generalities do not reach as far as TikTok would stretch them. As explained in Ms. Puris's brief and above, the Act's plain text and legislative history are clear that, for the EFAA to apply, the "case" as a whole—not each individual claim—must relate to the sexual assault or harassment dispute. 9 U.S.C. § 402(a). And, practically speaking, a "case" can contain only those claims that are properly joined because they are: (1) brought against the same defendant, Fed. R. Civ. P. 18; (2) "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences," Fed. R. Civ. P. 20; or (3) concern common questions of law or fact, *id.* Thus, the EFAA does not cover claims that "have no connection" to the sexual harassment claim because those claims cannot be properly joined into a single case. Opening Br. 42.

The comments from Senators Ernst and Graham that TikTok cites actually *support* Ms. Puris's argument that the EFAA exempts entire cases, not just individual claims, from arbitration. Importantly, Senator Ernst specifically emphasized that "harassment or assault claims" can be "joined" with other "employment claims" when there is a "key nexus" between the claims—that is, when the claims are properly joined. 168 Cong. Rec. S625 (daily ed. Feb. 10, 2022) (statement of Sen. Joni Ernst). So, while the Act was not intended to

preclude arbitration of "*all* employment matters," it can do so where, as Senator Ernst acknowledged, "a sexual assault or harassment claim is brought forward in conjunction with another employment claim." *Id.* (emphasis added).

TikTok also emphasizes Senator Graham's comment that "if you have got an hour-and-wage dispute with the employer, you make a sexual harassment, sexual assault claim, the hour-and-wage dispute stays under arbitration unless it is related." Opening Br. 44–45 (quoting 168 Cong. Rec. S625 (daily ed. Feb. 10, 2022) (statement of Sen. Lindsey Graham)). TikTok reads this statement to support the proposition that the EFAA's protections might not apply to a plaintiff's wage claim if she also brought a sex-based harassment or assault claim against the same defendant—even if those claims could be properly joined. But its reading imputes intent to Senator Graham's words that the broader legislative record—and the statute's plain text—do not support. Properly contextualized, this statement instead explains that tacked-on claims of sex-based harassment or sexual assault, if completely unrelated to the other claims, would not necessarily bring the whole case within the scope of the EFAA. *See* 168 Cong. Rec. S625 (daily ed. Feb. 10, 2022) (statement of Sen. Joni Ernst) (noting concern about "any subsequent litigation manipulat[ing] the text to game the system")); *id.* (similar statement of Sen. Lindsey Graham); *id.* at S625–26 (statement of Sen. Richard Durbin acknowledging Sen. Joni Ernst's concern). Indeed, if the harassment or assault

claim shared no common questions of law or fact with the plaintiff's wage claims, it could not be properly joined. Therefore, contrary to TikTok's assertions, Senator Graham's remarks do not establish that the EFAA allows for related employment claims, properly joined to a case involving sex-based harassment or sexual assault, to be excluded from the statutory arbitration exemption.

Further underscoring this point, Congress chose to move forward with the EFAA instead of another bill, addressed during the same session, that would have limited the legislation to "claim[s]" of sexual assault between employees and employers, while allowing other claims in the same case to remain in arbitration. *See* Resolving Sexual Assault and Harassment Disputes Act of 2021, S.3143, 117th Cong. (2021). In enacting the EFAA instead, Congress rejected a claim-splitting approach and instead chose to exempt from arbitration "*any case* which . . . relates to . . . a sexual harassment dispute." 9 U.S.C. § 402(a) (emphasis added); *see also* 168 Cong. Rec. S627 (daily ed. Feb. 10, 2022) (statement of Sen. Kirsten Gillibrand) (explaining that the EFAA applies when a plaintiff is "alleging conduct constituting a sexual harassment dispute or a sexual assault dispute," not when each of their claims relates to such disputes).

Here, the district court correctly found that Ms. Puris plausibly alleged a sex-based harassment claim against TikTok. JA.18. And TikTok has not argued that her remaining claims are not properly joined. Nor could it, because all of Ms.

Puris's claims—including those involving the harassment she experienced and the related retaliation—occurred contemporaneously, involve the same employer and actors, and turn on the nature of her employment relationship with TikTok. The district court was therefore correct to deny TikTok's motion to compel arbitration. *See* SPA-29. Keeping Ms. Puris's case whole "is exactly what [Congress] intended the [EFAA] to do." 168 Cong. Rec. S627 (daily ed. Feb. 10, 2022) (statement of Sen. Kirsten Gillibrand).

B. Ensuring that all related claims can proceed together in court protects survivors, encourages efficiency, and reflects the realities of harassment.

TikTok's interpretation of the EFAA to require claim-splitting not only conflicts with the Act's plain text and legislative history but would also silence survivors of sexual assault and sex-based harassment—precisely contradicting Congress's intent. In situations where cases include arbitrable and non-arbitrable claims, courts have discretion "to stay the balance of the proceedings pending arbitration." *Zachman v. Hudson Valley Fed. Credit Union*, 49 F.4th 95, 101 (2d Cir. 2022). Legally and practically, splitting the claims and staying the court proceedings pending arbitration could prevent a plaintiff from ever having their claims related to a sexual assault or sex-based harassment dispute heard in court.

This Court has recognized that res judicata and collateral estoppel can apply to preclude litigation of issues resolved by arbitration. *See State Farm Mut. Auto.*

Ins. Co. v. Tri-Borough NY Med. Prac., 120 F.4th 59, 81 (2d Cir. 2024). As a result, under TikTok's interpretation, even if a survivor elects to keep her claim related to assault or harassment in court, she may not be able to litigate that claim insofar as it turns on an issue also raised—and already resolved—in arbitration. Here, for example, Ms. Puris alleges both sex- and age-based retaliation claims. If the age-based retaliation claims were sent to arbitration, a negative decision on the merits could preclude Ms. Puris from pursuing sex-based retaliation claims in court—if, say, the arbitrator found TikTok fired her for legitimate and nondiscriminatory reasons. In effect, TikTok's approach would enable employers to make an end run around the EFAA by securing arbitral rulings on related claims that would have a preclusive effect on a plaintiff's sex-based harassment or sexual assault claims in court, which would undermine the very access to the courts that Congress enacted the EFAA to protect.

Additionally, even in circumstances where an arbitrator's decision does not preclude pursuing non-arbitrable claims in court, TikTok's approach would likely make it more difficult to litigate such claims as a practical matter. For example, to prove her sex-based harassment claims in court, Ms. Puris would require evidence that necessarily overlaps with the evidence she would need to prove related claims in arbitration because all of Ms. Puris's claims involved the same employer and actors, are related to her experience as TikTok's employee, and occurred

contemporaneously. As the legislative record notes, forcing "bifurcation" and duplication would "only lead to unnecessary expense and an administrative burden" for the court, the parties who must defend against or advance overlapping allegations in different forums, and third parties who may have to appear to testify multiple times. *See* 168 Cong. Rec. H991 (daily ed. Feb. 7, 2022) (statement of Rep. Bobby Scott). For exactly these reasons, this Court has reiterated 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." *AmBase Corp. v. City Investing Co. Liquidating Trust*, 326 F.3d 63, 73 (2d Cir. 2003).

Beyond judicial inefficiency, these inefficiencies could also practically limit employees' legal options, as they typically have fewer resources than their employers. They might be forced to choose between litigating one claim over another, discouraging them from litigating sexual harassment claims that have been stayed as the arbitration proceeds first. Preventing survivors from pursuing justice in this way would directly contravene Congress's purpose in enacting the EFAA.

Finally, ensuring an entire case can proceed together in court upholds the EFAA's goals because it recognizes the reality of how workers experience harassment. There is rarely a bright line separating sex-based harassment claims

from other employment claims an employee might bring. For example, a worker may experience discrimination based on their sex and other aspects of their identity, such as their race, ethnicity, or disability. *See Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 110 (2d Cir. 2010) ("[W]here two bases of discrimination exist, the two grounds cannot be neatly reduced to distinct components."); *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, citation omitted)); *see also, e.g.*, *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 572 (2d Cir. 2000) (holding that "the interplay between . . . two forms of harassment" can rightly serve as evidence about the severity of workplace harassment claims, because "a jury could find that . . . racial harassment exacerbate[s] the effect of . . . sexually threatening behavior and vice versa.").

It can also be difficult if not "impossible to tease out," particularly early in litigation, "sex discrimination" claims from seemingly non-discrimination claims, such as whistleblowing claims, *see Roy v. Correct Care Sols., LLC*, 914 F.3d 52, 64 (1st Cir. 2019) (citations omitted), and wage-and-hour claims. Underscoring this point, recent studies have found that tipped workers experience not only more wage theft, but also more sex-based harassment, as well as retaliation related to

such harassment. *See* Debbie Elliott & Emma Bowman, *Tipped Service Workers Are More Vulnerable Amid Pandemic Harassment Spike*, NPR (Dec. 6, 2020, at 7:55 ET), https://tinyurl.com/5eurhyyr. Forcing employees to litigate harassment, whistleblowing, and wage claims separately would ignore the reality that the harms giving rise to such claims are all too often connected.

The EFAA's intent and purpose, therefore, reinforce what its text clearly states: When a lawsuit includes allegations "relate[d] to" a "sexual harassment dispute," the entire "case" cannot be forced into arbitration. 9 U.S.C. § 402(a). Both the limitations of forced arbitration and the practical realities of how people experience workplace discrimination and pursue litigation to address it underscore why Congress chose to enact a version of the EFAA that provides these critical protections for survivors.

CONCLUSION

For the foregoing reasons and the reasons stated in Ms. Puris's brief, the Court should affirm the district court's order denying TikTok's motion to compel arbitration.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) and Local Rules 29.1(c) and 32.1(a)(4)(A) because it contains 6151 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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 it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14 point.

September 2, 2025

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CERTIFICATE OF SERVICE

I certify that on September 2, 2025, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

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