25-1717

In the United States Court of Appeals
FOR THE SECOND CIRCUIT

NINA OWENS,

Plaintiff - Appellee,

v.

PRICEWATERHOUSECOOPERS LLC, PRICEWATERHOUSECOOPERS ADVISORY SERVICES LLC, PWC US CONSULTING LLP, PWC US GROUP LLP, PWC USA LLP,

Defendants - Appellants.

On Appeal from the United States District Court for the Southern District of New York, No. 24-cv-5517, Hon. Gregory H. Woods

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, the Chamber of Commerce of the United States of America states that it is a non-profit tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of vital concern to the Nation's business community, such as the enforceability of arbitration agreements and the application of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. ("FAA").

Many of the Chamber's members and their affiliates include arbitration agreements in their contractual relationships. Arbitration allows contracting parties to resolve their disputes promptly, efficiently, and fairly, while avoiding the costs and delay associated with litigation in

[1] No counsel for any party authored this brief in whole or in part, and no party, party's counsel, person, or entity other than amicus curiae, its members, or its counsel contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

court. Arbitration is speedy, inexpensive, and less adversarial than such litigation. Relying on the legislative policy embodied in the FAA and the Supreme Court's consistent affirmation of the law's protections for arbitration agreements, the Chamber's members and their affiliates have structured millions of contractual relationships around the use of arbitration to resolve disputes.

The Chamber therefore has a strong interest in ensuring that the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 remains the limited carveout to the Federal Arbitration Act ("FAA") that Congress passed by overwhelming, bipartisan majorities. The district court's application of this statute weakens a crucial limitation and threatens the enforceability of arbitration agreements far beyond Congress's direction. If the ruling below stands, plaintiffs in a wide range of workplace-discrimination disputes will be able to disregard their arbitration agreements regardless whether they suffered sexual assault or sexual harassment. The Court should reverse that ruling and enforce the requirements that Congress wrote into the statutory text.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FAA generally embodies a strong policy in favor of enforcing arbitration agreements according to their terms. In 2021, Congress created a limited exception to that pro-arbitration policy for disputes involving sexual assault or sexual harassment. 9 U.S.C. § 402. This legislation had broad bipartisan support. But key to that support was the understanding that the new carveout would apply narrowly. It would ensure that claimants alleging sexual assault or sexual harassment could pursue justice in a public forum. It would not, however, open a giant loophole permitting plaintiffs to cast aside arbitration agreements in a wide range of work-related disputes.

The district court below recognized that Congress's reference to "sexual harassment" means something more precise than discrimination based on sex. Courts in this Circuit, and elsewhere, have emphasized that important limitation. But the district court then went astray in offering a novel definition of sexual harassment that effectively removes the limitation. In the district court's view, sexual harassment (at least in New York City) requires only "unwelcome verbal or physical behavior based on a person's gender." *Owens v. PricewaterhouseCoopers LLC*, 786

F. Supp. 3d 831, 846 (S.D.N.Y. 2025). That conception of sexual harassment stretches the statute too far and sweeps in a broad swath of sex-discrimination claims that do not involve sexual harassment in the settled, ordinary sense of that term.

This case proves the point. Even accepted as true, Plaintiff's allegations bear no resemblance to the categories of sexual assault or sexual harassment that Section 402 addresses. Plaintiff did not allege any episodes of sexually charged actions or comments. At most, she alleges discrimination based on gender under the liberal antidiscrimination standards of the New York City Human Rights Law ("NYCHRL"). This Court should reject Plaintiff's attempt to escape her arbitration agreement by trying to shoehorn a gender-discrimination claim within the FAA's sexual-harassment exception. Congress did not intend Section 402 to have that effect. On the contrary, it wrote the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, as the name suggests, to limit arbitration of sexual-assault and sexual-harassment disputes.

The district court reached the wrong result because it misunderstood the NYCHRL and, more fundamentally, because it placed undue weight on that non-federal body of law. Section 402 directs that the scope

of the statutory exception is to be determined as a matter of *federal* law. So a court asks the wrong question when it focuses on whether a non-federal body of law would classify particular acts as sexual harassment. Congress, with good reason, did not design Section 402's sexual-harassment exception to turn on the intricacies of substantive law in various non-federal jurisdictions. Such a design would have enmeshed courts in costly and complicated choice-of-law disputes and merits-related issues, throwing a wrench in the gears of the FAA's normal procedures. Congress would not have enacted such a departure from the usual process of compelling arbitration without very clear language that cannot be found in Section 402. On the contrary, the statute tells courts to focus on federal law, under which "sexual harassment" has a well-understood meaning.

The Court should confine this significant new legislation to its intended domain: disputes involving sexual assault or sexual harassment. Because no such dispute exists here, the Court should reverse the denial of the motion to compel arbitration.

ARGUMENT

I. Section 402's arbitration exception was written for cases of sexual misconduct, not sex discrimination more generally.

The FAA "was a response to [the] hostility of American courts to the enforcement of arbitration agreements." *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001). Its main substantive provision makes covered arbitration agreements as "valid, irrevocable, and enforceable" as other types of contracts. 9 U.S.C. § 2. The "preeminent concern" behind this statute "was to enforce private agreements into which parties had entered." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). Congress decided "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Id.* at 219-20. So, ordinarily, the FAA requires courts to "'rigorously enforce' arbitration agreements according to their terms." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (citation omitted).

In 2021, Congress carved out an exception to that general rule by adding Chapter 4 to the FAA. *See* 9 U.S.C. § 2 (providing that the ordinary requirement to enforce arbitration agreements does not apply "as otherwise provided in chapter 4"). This new legislation makes predispute

arbitration agreements unenforceable (upon a plaintiff's election) in relation to alleged "conduct constituting a sexual harassment dispute or sexual assault dispute." 9 U.S.C. § 402(a).

The statute defines "sexual assault dispute" as "a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in [18 U.S.C. § 2246] or similar applicable Tribal or State law, including when the victim lacks capacity to consent." 9 U.S.C. § 401(3). This definition clearly contemplates conduct of a sexual nature. The term "sexual harassment dispute" is defined differently. That phrase means "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).

These definitions demonstrate a deliberate decision by Congress not to exempt the full category of sex-discrimination claims from the FAA's ordinary rule. Instead, the statute exempts a narrower range of disputes involving alleged sexual assault or sexual harassment.

There is no need to speculate about that. The law's main sponsors, Representative Cheri Bustos and Senator Kristen Gillibrand, had proposed legislation in 2017 explicitly including sex discrimination, which never got traction. Their proposed Ending Forced Arbitration of Sexual

Harassment Act of 2017 would have made predispute arbitration agreements invalid and unenforceable if they "require[d] arbitration of a sex discrimination dispute." S. 2203, 115th Cong. § 2 (2017); H.R. 4570, 115th Cong. § 2 (2017). This proposed legislation defined "sex discrimination dispute" using the standards of Title VII. S. 2203, 115th Cong. § 2 (2017); H.R. 4570, 115th Cong. § 2 (2017). Representative Bustos reintroduced legislation using the same definitions in the following Congress, and that proposal also failed. H.R. 1443, 116th Cong. § 2 (2019).

Congress took a more targeted approach with the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. It targeted claims involving conduct of a sexual nature. The years leading up to this legislation had seen the start of the #MeToo movement and Time's Up campaign. And the legislation followed in the wake of some high-profile examples in which individuals accused of workplace sexual misconduct allegedly tried to avoid public scrutiny by invoking nondisclosure agreements and arbitration clauses. *See* Kathleen McCullough, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo- and Time's Up-Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 2653, 2655-56 (2019).

The legislative history confirms that the concerns leading to enactment of Section 402 involved misconduct of a sexual nature—not discrimination on the basis of sex or gender more broadly. Legislators worried that "victims of sexual violence and harassment are often unable to seek justice in a court of law, enforce their rights under state and federal legal protections, or even simply share their experiences." H.R. REP. NO. 117-234, at 3 (2022). The exception was narrowly drafted to govern situations arising in that context.

Consistent with the enacted text, Congress did not design this legislation to "be the catalyst for destroying predispute arbitration agreements in all employment matters." 168 CONG. REC. S624-01, S625 (daily ed. Feb. 10, 2022) (statement of Sen. Ernst). Rather, legislators recognized that sexual "[h]arassment and assault allegations are very serious and should stand on their own." *Id.* To give effect to this policy choice, the statute's language "should be narrowly interpreted" and should not be misused "as a mechanism to move employment claims that are unrelated to these important issues out of the current system." *Id.*[2]

[2] The Senate cosponsors of the legislation agreed that the bill was not intended to widely address allegations unrelated to sexual misconduct. *See* 168 CONG. REC. at S625 (statement of Sen. Graham) ("We

Had Congress wanted to sweep more broadly, it knew how. In 2010, Congress restricted the federal government's ability to award work to government contractors who seek to require arbitration of "any claim under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention." Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8116, 123 Stat. 3409, 3454-55 (2009). *See generally Talhouk v. RMR Grp. LLC*, No. 22-cv-3122, 2023 WL 6192774, at *4-5 (N.D. Ga. Mar. 23, 2023) (discussing case law applying this provision), *report and recommendation adopted*, 2023 WL 6192719 (N.D. Ga. Aug. 15, 2023). But Congress took a far more targeted approach in Chapter 4 to the FAA.

Section 401(4)'s drafting history confirms this understanding of "sexual harassment dispute." The statute's ultimate definition of "sexual

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do not intend to take unrelated claims out of the contract. What we are preventing here is sexual assault and sexual harassment claims being forced into arbitration, which perpetuates the problem."); *id.* at S627 (statement of Sen. Gillibrand) ("The bill plainly reads, which is very relevant to Senator Ernst's concerns, that only disputes that relate to sexual assault or harassment conduct can escape the forced arbitration clauses.").

harassment dispute" differs from the definition in the original House version, which would have defined "sexual harassment dispute" through five categories—all explicitly sexual in nature:

> [A] dispute relating to 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. 4445, 117th Cong. § 2 (as reported by H. Comm. on the Judiciary, Jan. 28, 2022). Congress ultimately adopted an amendment that removed this list of sexual-harassment examples from the definition. But it did not do so to broaden that definition. Rather, it eliminated the list to simplify the definition and make clear that this arbitration legislation was not altering the preexisting understanding of sexual harassment.

The sponsor of the amendment, Representative Ken Buck, explained the motivation behind this change in the statutory definition:

> Madam Speaker, this amendment is really very simple. It changes a somewhat convoluted definition of sexual harassment to the following: "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."
>
> Simple, straightforward, understandable. **The issue arose here because there was a question of whether the definition that was contained in this law would supersede Federal, State, or Tribal law; it doesn't. However, this clarifies that, and I would ask my colleagues to support this.**

168 CONG. REC. H983, H992 (daily ed. Feb. 7, 2022) (statement of Rep. Buck) (emphasis added). Thus, the change to the definition aimed to remove confusion and avoid any changes to substantive law, not to broaden the new exception to the FAA.

If anything, the amended definition sought to *narrow* the statute's scope. The amendment was described as an example of "the majority party taking into account the views of the minority party" to build bipartisan consensus. *Id.* (statement of Rep. Griffith); *see also id.* (statement of Rep. Bustos). Some legislators pushing for the amendment worried that the original definition went too far and "possibly made unenforceable arbitration agreements *going well beyond sexual harassment disputes*." *See id.* (statement of Rep. Bishop) (emphasis added). The final

definition makes clear that a "sexual harassment dispute" must allege "sexual harassment."

The full statutory context shows that Congress's definition of "sexual harassment dispute" did not seek to push the boundaries of sexual-harassment law. Just the opposite—Congress wanted to track existing boundaries and clarify the limited nature of the Section 402 exception to the FAA's policy favoring arbitration.

II. Section 402's reference to sexual harassment is best understood as requiring allegations of sexual misconduct.

Because Congress defined "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), courts properly confine this exception to circumstances where the plaintiff has "allege[d] conduct that, taken as true, states a plausible sexual harassment claim." *Yost v. Everyrealm, Inc.*, 657 F. Supp. 3d 563, 584 (S.D.N.Y. 2023); *see also, e.g.*, *Holliday v. Wells Fargo Bank, N.A.*, No. 23-cv-418, 2024 WL 194199, at *5 (S.D. Iowa Jan. 10, 2024) ("To trigger the EFAA, Holliday would have to raise a plausible claim for sexual harassment."); *K.T. v. A Place for Rover*, No. 23-cv-2858, 2023 WL 7167580, at *5 (E.D. Pa. Oct. 31, 2023) ("Plaintiffs do not allege a claim for 'sexual harassment'

as the term is defined in the EFAA."). If a complaint does not plausibly allege sexual harassment, Section 402's sexual-harassment carveout does not apply.

Yet while the statute defines "sexual harassment dispute," 9 U.S.C. § 401(4), it does not separately define the critical phrase "sexual harassment." Undefined "statutory terms are generally interpreted in accordance with their ordinary meaning." *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (citation omitted). And "[w]hen a statutory term is 'obviously transplanted from another legal source,' it 'brings the old soil with it.'" *Taggart v. Lorenzen*, 587 U.S. 554, 560 (2019) (citation omitted). So "when Congress employs a term of art, '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.'" *FAA v. Cooper*, 566 U.S. 284, 292 (2012) (citation omitted). Whether one starts with the ordinary meaning of sexual harassment or the meaning the term has acquired under case law, one ends in the same place: "sexual harassment" within the meaning of the FAA's carveout is a type of discrimination involving misconduct of a sexual nature.

Leading dictionaries define "sexual harassment" exactly that way. *See, e.g.*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("Verbal or physical maltreatment, pestering, or abuse of a sexual nature, including lewd remarks, salacious looks, and unwelcome touching, esp. when occurring in the workplace or in a professional setting."); MERRIAM-WEBSTER.COM DICTIONARY (2025) ("uninvited and unwelcome verbal or physical behavior of a sexual nature especially by a person in authority toward a subordinate (such as an employee or student)"); OXFORD ENGLISH DICTIONARY (online ed. 2025) ("Harassment (typically of a woman by a man) in a workplace or other professional or social situation, involving the making of unwanted sexual advances, obscene remarks, etc.").

Courts, too, have identified a sexual-harassment claim as a species of sex discrimination that occurs when "sexual misconduct" discriminatorily affects the terms and conditions of employment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986). For example, courts have long held that Title VII's prohibition on sex discrimination includes, among other things, two discrete categories of sexual harassment: "quid pro quo" sexual harassment and "hostile environment" sexual harassment. *See id.* In the first category, the harasser carries out "threats to

retaliate against" an employee through identifiable adverse employment actions "if she denied some sexual liberties." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998). The second category, on the other hand, encompasses sexually demeaning behavior that is sufficiently "severe or pervasive" to implicitly alter the terms and conditions of employment. *Id.* at 752.

Like quid pro quo harassment, the hostile work environment category of sexual harassment evolved in the context of conduct of a sexual nature. *See Burlington Indus.*, 524 U.S. at 753-54 (a case where plaintiff alleged that a supervisor made remarks about her breasts, told her that wearing shorter skirts would make her job easier when denying permission for something, and made other sexual comments); *Faragher v. City of Boca Raton*, 524 U.S. 775, 780, 787 (1998) (discussing a "sexually objectionable" environment in a case where plaintiff alleged "uninvited and offensive touching" and "lewd remarks"); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77 (1998) ("Oncale was forcibly subjected to sex-related, humiliating actions against him[.]").

Under Title VII, the "quid pro quo" and "hostile work environment" categories are the only two theories generally recognized as claims for

"sexual harassment." Both involve misconduct of a sexual nature. *See* BLACK'S LAW DICTIONARY, *supra* (defining "quid pro quo sexual harassment" as "[s]exual harassment in which an employment decision is based on the satisfaction of a sexual demand" and defining "hostile-environment sexual harassment" as "[s]exual harassment in which a work environment is created where an employee is subject to unwelcome verbal or physical sexual behavior that is either severe or pervasive").

For decades, the Equal Employment Opportunity Commission ("EEOC") has embraced this understanding of sexual harassment. Since 1980, EEOC guidance has explained:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a); *see* Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, as Amended; Adoption of Final Interpretive Guidelines, 45 Fed. Reg. 74676, 74677 (Nov. 10, 1980); *see*

also Meritor Sav. Bank, 477 U.S. at 65-67 (invoking these guidelines' definition of "sexual harassment"). Only very recently—in 2024—did the EEOC change its position and attempt to recharacterize sexual harassment to extend beyond misconduct of a sexual nature. *See Enforcement Guidance on Harassment in the Workplace*, U.S. Equal Emp. Opportunity Comm'n (Apr. 29, 2024), https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace. But the EEOC's 2024 change in position sheds no light on the meaning of "sexual harassment" when Congress added Chapter 4 to the FAA several years earlier in 2021. *See* PwC Br. 43 n.4.

Informed by this case law and regulatory guidance, the overwhelming weight of district court authority refuses to extend the sexual-harassment exception to claims of nonsexual gender discrimination. These courts correctly recognize that "not all gender discrimination is sexual harassment." *Singh v. Meetup LLC*, 750 F. Supp. 3d 250, 258 (S.D.N.Y. 2024), *reconsideration denied*, No. 23-cv-9502, 2024 WL 4635482 (S.D.N.Y. Oct. 31, 2024); *see also, e.g.*, *Montanus v. Columbia Mgmt. Inv. Advisers, LLC*, No. 25-cv-2798, 2025 WL 2503326, at *7 (S.D.N.Y. Sept. 2, 2025) ("[T]he remarks at issue . . . lack the sexualized content required

to constitute sexual harassment under the EFAA."); *Smith v. Boehringer Ingelheim Pharms., LLC*, No. 24-cv-1266, 2025 WL 2403042, at *9 (D. Conn. Aug. 19, 2025) ("[A] sexual harassment claim must go beyond gender based discrimination and include conduct that is offensive and sexual in nature."); *Faith v. Khosrowshahi*, No. 21-cv-6913, 2023 WL 5278126, at *7 n.5 (E.D.N.Y. Aug. 16, 2023) ("Plaintiff alleges employment discrimination . . . [,] not a 'sexual harassment dispute or sexual assault dispute' that would trigger the EFAA's provisions.").

Under a proper conception of sexual harassment, Plaintiff's allegations fall well short. She does not allege any conduct of a sexual nature. Instead, the district court's analysis relied on allegations that a colleague "harassed her with unwelcome verbal behavior on the basis of her gender." *Owens*, 786 F. Supp. 3d at 848. This colleague allegedly "denigrated her in front of subordinates and verbally threatened and berated her, sometimes yelling at her in front of directors." *Id.* These allegations, even if true, do not describe sexual harassment even if they might support a plausible claim of gender-based discrimination. They involve the sort of nonsexual comments that other courts have found insufficient to trigger the sexual-harassment exception. *See, e.g.*, *Singh*, 750 F. Supp.

3d at 258; *Smith*, 2025 WL 2403042, at *3, *9; *Cornelius v. CVS Pharmacy, Inc.*, No. 23-cv-1858, 2023 WL 6876925, at *1 (D.N.J. Oct. 18, 2023), *aff'd in part, vacated in part, remanded*, 133 F.4th 240 (3d Cir. 2025). The district court's contrary conclusion wipes out the distinction between sexual harassment and gender-based discrimination, which is crucial to the statute that Congress enacted.

Indeed, it is hard to imagine an example of gender-based discrimination that does not involve "unwelcome verbal or physical behavior based on a person's gender." *Owens*, 786 F. Supp. 3d at 847. Adverse employment action necessarily involves "unwelcome verbal or physical behavior." And while the district court at one point seemed to suggest a further requirement that the behavior be "directed at" the plaintiff and not "behind [her] back," *id.* at 849, that requirement is unlikely to screen out any discrimination claims, either. Workplace discrimination nearly always includes at least some direct confrontation or conflict. And in any event, it is not clear how the district court justified this additional requirement, which the court mentioned only in passing. *See id.*

III. The district court improperly extended Section 402 beyond sexual harassment by fixating on the substantive details of New York City's antidiscrimination law.

Rather than stick to the normal understanding of sexual harassment, the district court purported to derive its more expansive definition of sexual harassment from the NYCHRL. Defendants persuasively explain why the NYCHRL's understanding of sexual harassment is not nearly as broad as the district court's. *See* PwC Br. 24-37. But the district court's ruling also suffers from a more fundamental problem: Section 402's scope depends on federal law, not the specific substantive details of New York City law.

To be sure, the statute's definition of "sexual harassment dispute" refers to "conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." 9 U.S.C. § 401(4). But this language does not say that courts should determine the statute's applicability based on the particulars of whichever body of substantive law the plaintiff has chosen to invoke. It does not say, for example, that the exception applies if the conduct is "sexual harassment *as defined by* applicable Federal, Tribal, or State law." Rather, when read in context, this definition simply makes clear that the claim for sexual harassment may

be asserted under federal, tribal, or state law and that the arbitration-exception is not limited to federal claims only. Whether the statute applies, however, depends on whether the plaintiff has alleged something federal law would recognize as sexual harassment, regardless which jurisdiction supplies her cause of action. That is the only interpretation consistent with the provision stating that "[a]n issue as to whether [Chapter 4] applies with respect to a dispute shall be determined *under Federal law*." 9 U.S.C. § 402(b) (emphasis added). A court cannot make the arbitrability determination under federal law if it is laser-focused on the substantive details of non-federal law.

Nor would it make sense for Congress to make arbitrability under Section 402 turn on how the allegations measure up under the (potentially idiosyncratic) details of the applicable body of state law—or in this case, municipal law.[3] Generally speaking, complaints do not need allegations establishing which body of domestic law governs the plaintiff's claims. *See* FED. R. CIV. P. 8(a). And many choice-of-law disputes are hard or even impossible to resolve at the pleading stage. *See, e.g.*, *Bristol-*

[3] For present purposes, this brief assumes that the law of New York City can qualify as "State" law under FAA chapter 4. But that assumption is being disputed in other cases. *See* PwC Br. 23 n.3.

Myers Squibb Co. v. Matrix Lab'ys Ltd., 655 F. App'x 9, 13 (2d Cir. 2016) ("Numerous district courts in this Circuit have concluded that choice-of-law determinations are fact-intensive inquiries that would be premature to resolve at the motion-to-dismiss stage.").

What's more, it can be difficult to determine the content of a particular jurisdiction's requirements for a claim of "sexual harassment," as this case illustrates:

> [T]he NYCHRL does not create a claim of "sexual harassment." Nor does it define what conduct constitutes "sexual harassment." Instead, the NYCHRL simply makes it unlawful "[f]or an employer or an employee or agent thereof, because of the actual or perceived . . . gender . . . of any person . . . [t]o discriminate against such person in compensation or in terms, conditions or privileges of employment."

Owens, 786 F. Supp. 3d at 843 (citation omitted). When the NYCHRL does not even recognize "sexual harassment" as a category of legal violation distinct from sex discrimination, and there is no body of case law applying such a distinction, trying to identify for FAA purposes the line separating sexual harassment and other sex discrimination under New York City law becomes an artificial exercise.

And it is not an exercise that Congress would have wanted to consume the time and attention of courts or litigants on a motion to compel arbitration. Congress's "clear intent" in creating the FAA was "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). That intent is thwarted if a threshold question before compelling arbitration requires an *Erie* guess (perhaps following a choice-of-law determination) about how a specific body of tribal or state law would classify different fact patterns under their antidiscrimination and antiharassment laws. Such "'complexity and uncertainty' would 'breed[] litigation from a statute that seeks to avoid it.'" *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246, 254 (2024) (quoting *Cir. City*, 532 U.S. at 123).

Courts would also find themselves entangled in substantive issues potentially important to the merits of the claims, even when the merits of the claims are properly reserved for the arbitrator. That result, too, would be in deep tension with ordinary arbitration principles. *See, e.g.*, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 69 (2019)

("[A] court may not decide a merits question that the parties have delegated to an arbitrator.").

Congress did not adopt that unwieldy approach in Chapter 4 of the FAA. Instead, it instructed courts to determine the Chapter's applicability as a matter of federal law. 9 U.S.C. § 402(b). And federal law already has a well-established concept of sexual harassment. Plaintiff's allegations do not describe sexual harassment under the proper federal standard, so the arbitration exception does not apply.

CONCLUSION

For all these reasons, the Court should reverse the order denying the motion to compel arbitration.

Dated: October 31, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. In accordance with to Federal Rules of Appellate Procedure 29(a)(4)(G) and 32(g)(1), I certify that this brief complies with the type-volume limitation of Second Circuit Rules 29.1(c) and 32.1(a)(4)(A) because, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 4,790 words.

2. I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, Century Schoolbook 14-point font.

Dated: October 31, 2025

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