No. 25-2173

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ALOMA HOLSTEN,

***Plaintiff-Appellee*,**

v.

BARCLAYS SERVICES LLC,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia
Case No. 3:24-cv-00844, Judge Roderick C. Young

AMICUS CURIAE BRIEF FOR METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NATIONAL WOMEN'S LAW CENTER, AMERICAN ASSOCIATION FOR JUSTICE, AND PUBLIC JUSTICE IN SUPPORT OF APPELLEE ALOMA HOLSTEN

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RULE 29(a)(4)(A) DISCLOSURE STATEMENT OF AMICI

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

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INTEREST OF AMICI CURIAE[1]

The Metropolitan Washington Employment Lawyers Association (MWELA), founded in 1991, is a professional association and is the local chapter of the National Employment Lawyers Association (NELA), a national organization of attorneys who specialize in employment law. In addition to its continuing legal education programs for its more than 400 members and bar and judicial outreach programs involving state and federal judges, MWELA also participates as *amicus curiae* in important cases in state and federal courts in the District of Columbia, Maryland, and Virginia, the three jurisdictions in which its members primarily practice.

Founded in 1985, 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. MWELA and NELA members represent workers who have experienced sexual harassment and assault in the workplace, giving them a unique interest in ensuring that the EFAA is interpreted correctly by the courts.

[1] No party's counsel authored this brief in whole or in part. No party, its counsel, or any other person contributed money intended to fund preparing or submitting this brief, other than *amici* or their members. *See* Fed. R. App. P. 29(a)(4)(E). Each party consented to the filing of this brief.

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 plaintiffs in personal injury actions, employee rights cases, consumer cases, and other civil actions, including claims for sexual harassment. Throughout its 80-year history, AAJ

has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

Public Justice is a national public interest advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting to preserve access to justice for victims of corporate and governmental misconduct. The organization maintains an Access to Justice Project, which seeks to remove procedural barriers that unduly restrict the ability of workers, consumers, and other civil litigants from seeking redress in the civil court system. To that end, Public Justice has a longstanding practice of fighting against the unlawful use of mandatory arbitration clauses that deny workers and consumers their day in court. Public Justice has specifically advocated for full implementation of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFAA") in numerous amicus briefs regarding the interpretation and scope of the Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

Passed with bipartisan support, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFAA" or "the Act"), Pub. L. No. 117-90, 136 Stat. 26 (2022) (codified at 9 U.S.C. §§ 401-402), gives survivors of sexual assault and sexual harassment the right to pursue their cases in court instead of being forced into secretive binding arbitration. Under the Act, "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 [a] sexual assault dispute or [a] sexual harassment dispute." 9 U.S.C. § 402(a).

Consistent with the EFAA, Plaintiff-Appellee Aloma Holsten sought to bring a lawsuit in court against her employer, Defendant-Appellant Barclays Services LLC, to hold it accountable for sexual harassment and retaliation she endured during her employment. To avoid her claims coming to light, Barclays boldly asks this Court to hold that this is not a sexual harassment case at all, offering a definition of sexual harassment that both the U.S. Supreme Court and this Court have resoundingly rejected. As Barclays would have it, the EFAA does not apply unless a plaintiff alleges that sexual desire motivated the harassment. Barclays's retrograde argument should find no purchase in this Court.

First, the EFAA defines a "sexual harassment dispute" as a "dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." In other words, the EFAA does not adopt its own definition of sexual harassment but instead imports the definitions from existing sexual harassment laws. Here, Ms. Holsten brings claims under Title VII, so it is Title VII that dictates the definition of sexual harassment for the purposes of the EFAA. Decades of consistent, binding precedent establish that sexual harassment under Title VII need not be motivated by sexual desire. Instead, the touchstone of sexual harassment under Title VII remains whether the defendant's conduct created a hostile work environment based on sex, and that is precisely what Ms. Holsten has alleged here. Defendants fall back on a strained reading of the EFAA's legislative history to argue that it is intended to apply only to a subset of sexual harassment. But even if that could override the plain text of the statute (it cannot), the legislative history shows that Congress intended "sexual harassment" to have a broad meaning consistent with applicable law.

Second, this Court need not decide whether the EFAA incorporates the pleading standard for claims on the merits under Federal Rule of Civil Procedure 12(b)(6) because, as the district court rightly found, Ms. Holsten has met this standard. But even if she had not, the EFAA would still apply because Congress intended the Act to apply based solely on the allegations in the complaint, not on whether they

plausibly state claims for relief. Any other rule not only would contravene the text and legislative history of the statute, but also would make no sense because it would thrust courts into a merits analysis in a case they may have no authority to hear.

The Court should affirm the district court's order denying Barclays's motion to compel arbitration.

ARGUMENT

I. The EFAA Applies to Sex-Based Harassment, Regardless Of The Motivation For The Harassment.

Under the EFAA, a "sexual harassment dispute" is simply a "dispute relating to conduct alleged to constitute sexual harassment under applicable Federal, Tribal, State law." 9 U.S.C. § 401(4). In other words, it incorporates the standards for sexual harassment from applicable laws; it does not itself create any requirement that conduct be of a "sexual nature." By incorporating applicable state or federal law, the EFAA provides a simple, workable standard based on decades of case law defining sexual harassment. By contrast, the interpretation Barclays suggests would create a wholly new and cumbersome standard that would require courts to decide in every case whether sex-based conduct was sufficiently "of a sexual nature" to constitute sexual harassment.

A. Title VII defines sexual harassment to include sex-based harassing conduct regardless of whether that conduct is sexual in nature.

Ms. Holsten brings claims under Title VII, so that is the "applicable" law that defines "sexual harassment" for the purposes of the EFAA. 9 U.S.C. § 401(4). Title VII's text and binding Supreme Court case law dictate that conduct creating a sex-based hostile work environment constitutes sexual harassment regardless of whether it consists of sexual advances, is motivated by sexual desire, or otherwise is labeled "conduct of a sexual nature."

We start with the text. Discrimination "based on sex" is the touchstone under Title VII, not sexual desire. Title VII provides it is "unlawful . . . for an employer . . . to discriminate against any individual with respect to . . . [the] terms, conditions, or privileges of employment, because of such individual's . . . sex . . ." 42 U.S.C. § 2000e-2(a)(1). There is no "conduct of a sexual nature" limitation or requirement under Title VII.

Binding Supreme Court and Fourth Circuit precedent also make clear that Title VII sexual harassment claims do not require conduct motivated by sexual desire. Since the Supreme Court first recognized harassment claims under Title VII, "disparate treatment" based on sex has been the bedrock of such claims. Title VII "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment," such that "a plaintiff may establish a violation of Title VII by proving that **discrimination based on sex** has created a hostile or

abusive work environment." *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 64, 67 (1986) (emphasis added). This was further reinforced in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), where the Supreme Court clarified that Title VII is violated "[w]hen the workplace is permeated with **discriminatory** intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Id.* at 23 (cleaned up) (emphasis added). Again, the Supreme Court did not distinguish between conduct motivated by sexual desire and other discriminatory conduct.

Then, in *Oncale v. Sundowner Offshore Servs. Inc.* 523 U.S. 75 (1998), the Supreme Court squarely answered the question whether Title VII covers only conduct motivated by sexual desire, holding that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Id.* at 80. As the Court explained, "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* Such harassment may be motivated, for example, by "general hostility to the presence of women in the workplace," rather than sexual desire, so long as the harassment is based on sex. *Id.*

In accordance with that binding Supreme Court precedent, this Court held in *Ocheltree v. Scollon Productions, Inc.*, 335 F.3d 325 (4th Cir. 2003) (en banc), that sexual desire is not required to assert a sexual harassment claim:

> **A woman may prove sex-based discrimination in the workplace even though she is not subjected to sexual advances or propositions.** A trier of fact may reasonably find discrimination, for example, when a woman is the individual target of open hostility because of her sex, or when a female victim is harassed in such sex-specific and derogatory terms as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.

Id. at 331–32 (cleaned up and citation omitted) (emphasis added). That is, "[a]n employee is harassed or otherwise discriminated against 'because of' his or her gender if, 'but for' the employee's gender, he or she would not have been the victim of the discrimination." *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 242 (4th Cir. 2000). "A work environment consumed by remarks that intimidate, ridicule, and maliciously demean the status of women can create an environment that is as hostile as an environment that contains unwanted sexual advances." *Id*; *see also Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179, 192 (4th Cir. 2000) (rejecting argument that the plaintiff's "sexual harassment claim must fail because she did not establish conduct of a 'sexual nature'" and stating that sexual harassment under Title VII "includes conduct 'because of' the victim's gender, which is broader than conduct of a 'sexual nature.'").

In the face of this binding case law, Barclays erroneously asserts (*see* Br. at 20-31) that a single sentence of *dicta* in *Bostock v. Clayton County*, 590 U.S. 644, 669 (2020), fundamentally changed the landscape of Title VII sexual harassment law. *Bostock*'s statement that "sexual harassment" is conceptually distinct from "sex discrimination," 590 U.S. at 669, did not distinguish between harassing conduct of a "sexual nature" and other sex-based harassment, but instead reinforced that both a pattern of sex-based harassment and standalone, tangible discriminatory adverse actions, *i.e.*, "sex discrimination," are actionable discrimination "based on sex." *See id.* (citing *Oncale*, 523 U.S. at 79-80). *Bostock* merely acknowledged the longstanding principle that harassment claims need not affect tangible, discrete terms and conditions of employment, but are based on the environment to which workers are subjected and can build over time. *Cf. Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002) ("Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. . . . The unlawful employment practice therefore cannot be said to occur on any particular day. It 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.") (cleaned up). As a result, *Oncale* remains binding law.

B. The EFAA's legislative history confirms that it was intended to cover all disputes related to sexual harassment, regardless of whether the harassment took the form of sexual advances.

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

Congress instead 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." *Id.* "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).

For its part, Barclays points to certain legislative hearings leading to the EFAA that primary focused on women who were subjected to sexual assault, sexual propositions, and other degrading conduct motivated by sexual desire. Br. at 14–18. But the fact that these egregious incidents of sexual misconduct were highlighted leading up to the bill's passage says nothing about its ultimate scope. Even if those incidents were part of the impetus for the EFAA, there is no evidence from the

hearings that—contrary to the plain language of the Act—Congress intended to limit the EFAA to only certain types of harassment. *See Oncale*, 523 U.S. at 79 (explaining that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed"). To the contrary, Congress rejected a narrow meaning of what constitutes a "sexual harassment dispute," instead opting for broad language to protect all victims of sexual harassment and other misconduct related to a sexual harassment dispute from forced arbitration.

Barclays also points to statutory definitions of "sexual harassment" in other federal statutes when the EFAA was passed (Br. 10, 20–21). But these definitions are of no consequence here because Holsten brings her claims under Title VII, which makes Title VII the "applicable" law from which the definition of sexual harassment is drawn. 9 U.S.C. § 401(4). That other statutes define sexual harassment differently has no bearing on the meaning of sexual harassment under Title VII.

Congress could not have been clearer: The EFAA was intended to cover sexual harassment claims as defined by existing law, not to alter that body of law. To import an eroticism requirement into the EFAA would contravene this legislative intent and undermine the care Congress took to ensure that the federal statute did not disrupt preexisting sexual harassment law. *Cf. Jam v. Int'l Fin. Corp.*, 586 U.S. 199, 209

(2019) ("According to the 'reference' canon, when a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises." (citation omitted)). In accordance with the weight of authority and the purpose of the EFAA and Title VII, this Court should hold that the EFAA does not require sexual-harassment plaintiffs to plead conduct that is erotic in nature.

C. Barclays' proposed definition of "sexual harassment dispute" would undermine Congress's goal of allowing a clear, simple process to exclude cases from the FAA.

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 Barclays 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. That would only retraumatize survivors and subvert the Act's purpose of creating a more just and workable system for them. 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.

Moreover, any test that would require sexual harassment under Title VII to be lewd or sexualized only for the purposes of the EFAA is unworkable. The determination as to whether a case proceeds in arbitration or in court is meant to be a threshold one. Yet, whether particular harassment was motivated by sexual desire or something else is not a question that can be resolved on the pleadings: courts should not "supplant[] the role of the jury" by making "factual determinations regarding Defendants' motivations." *Rasmy v. Marriott Int'l, Inc.*, 952 F.3d 379, 388 (2d. Cir. 2020). Thus, in many cases, there would need to be extensive discovery and even a jury trial to determine whether a case should even be in court in the first place. And because the denial of a motion to compel arbitration is immediately appealable, the courts of appeals would be tasked with reviewing the details of whether harassing

conduct could have been motivated by sexual desire. On the other hand, applying the well-worn tests for sexual harassment under existing law avoids the need to delve into the perpetrator's motivations before ruling on whether a case should be in court or arbitration.

II. Even if Ms. Holsten's claims do not meet a plausibility standard, the EFAA still applies.

Because the district court correctly concluded that Ms. Holsten alleged a plausible sexual harassment claim, this Court need not decide whether the EFAA imposes such a standard. But even if the Court determines that the district court erred by finding Ms. Holsten stated a plausible claim, the EFAA still applies because, on the face of the complaint, her case involves "conduct alleged to constitute sexual harassment." 9 U.S.C. § 401(4). Both the plain language and the legislative history demonstrate that nothing more is required: Congress intended the Act's application to depend solely on the allegations in the complaint.

As one court recently held, to invoke the EFAA "a plaintiff need only plead nonfrivolous claims relating to sexual assault or to conduct alleged to constitute sexual harassment, with the sufficiency of those claims to be reserved for proper merits adjudication, be it a motion to dismiss, motion for judgment on the pleadings, motion for summary judgment, or trial." *Diaz-Roa v. Hermes Law, P.C.*, 757 F. Supp. 3d 498, 533 (S.D.N.Y. 2024). The court explained that they reached this conclusion based on "(1) the text of the statute; (2) the statutory scheme; (3)

Congress' intent in enacting the EFAA; and (4) the availability of the routine safeguards against abusive litigation tactics already provided by federal statute and by the Federal Rules of Civil Procedure." *Id.* at 533-34.

Begin with the text. First, it refers to "conduct that is **alleged** to constitute sexual harassment." 9 U.S.C. § 401(4) (emphasis added); *see also* 9 U.S.C. § 402(a). The use of the word "alleged" means the focus is what the complaint says, not whether it ultimately states a claim. *See* Allege, Black's Law Dictionary (12th ed. 2024) (defining "allege" to mean "[t]o assert as true, esp. that someone has done something wrong, though no occasion for definitive proof has yet occurred"). On the other hand, if the statute had used the phrase "is" sexual harassment, it would mean "an actual fact must be established" under the applicable standard, here, a motion to dismiss. *See Coleman v. Estes Exp. Lines, Inc.*, 631 F.3d 1010, 1015 (9th Cir. 2011) (contrasting use of words "alleged" and "is"). This Court must read the statute to "give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Thus, the emphasis on allegations must mean something other than establishing a sexual harassment claim. *See Coleman*, 631 F.3d at 1015.

Supreme Court precedent further confirms this reading. In *Iqbal*, the Supreme Court explained that, when a complaint doesn't meet the plausibility standard, "it has alleged—but it has not shown—that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (citation modified). That's consistent with the

phrasing of the plausibility requirement itself: The Supreme Court requires a "plausible claim for relief," not plausible "allegations." *Id.* Thus, the EFAA's plain language shows that Congress intended it to apply to sexual harassment that is "alleged" on the face of the complaint, without regard to whether those allegations are ultimately "show[n]." *Id.*; *see Diaz-Roa*, 757 F. Supp. 3d at 535 ("[T]he EFAA speaks to 'allegations,' i.e. the content of a pleading, and not to the conclusion that those allegations plausibly state a claim for relief if the pleading is challenged under Rule 12(b)(6).").

Second, that the statute applies when there is a "sexual harassment **dispute**," 9 U.S.C. § 402(a) (emphasis added), also underscores that a plaintiff doesn't have to state a plausible claim for the EFAA to apply. The plain meaning of "dispute" is broader than a claim for relief. *See* Dispute, Black's Law Dictionary (12th ed. 2024) (defining "dispute" as "[a] conflict or controversy, esp[ecially] one that has given rise to a particular lawsuit"). And courts have concluded that, when Congress used the word "dispute" in the EFAA, it did not mean "claim." *See, e.g.*, *Memmer v. United Wholesale Mortg. LLC*, 135 F.4th 398, 408 (6th Cir. 2025) (a "dispute" under the EFAA is distinct from a "claim" and "denote[s] a controversy between the parties regarding certain kinds of conduct, conduct which may support claims under state and federal law" (emphasis added)). "'Disputes,' unlike claims, are not subject to motions to dismiss." *Diaz-Roa*, 757 F. Supp. 3d at 534. So, in using "dispute,"

"Congress elected to refer to the nature of the disagreement between the parties rather than to its legal substance in a form that is readily measured by a motion to dismiss." *Id.* Thus, "the statutory language does not require the person seeking to avoid the effect of an otherwise applicable arbitration clause to plead a claim for sexual assault or sexual harassment much less require the courts to determine that such person pleaded a claim upon which relief can be granted." *Id.*

To the extent the EFAA's language is ambiguous (and it is not), the legislative history also shows that Congress did not intend to make plaintiffs litigate the plausibility of their claims on the merits before the determination whether their case must be arbitrated. As Senator Durbin, Chair of the Judiciary Committee, explained on the Senate floor, "the bill text does not require . . . that victims have to prove a sexual assault or harassment claim before the rest of their related case can proceed in court." 168 Cong. Rec. S626 (daily ed. Feb. 10, 2022). If that statement wasn't clear enough, Congress declined to move forward with a bill introduced in the House that would have accomplished what Defendants seek. Specifically, that bill provided that, if a plaintiff's sexual assault claim were dismissed, all other claims would also be dismissed and sent to arbitration. *See Carrie's Law*, H.R. 2906, 117th Cong. § 402(b)(2)(A) (2021). The EFAA, by contrast, does not contain a dismissal mechanism, demonstrating that Congress did not intend to require a plaintiff's sexual harassment claim to survive dismissal for the case to proceed in court.

Congress's choice here makes sense. The well-established principle for federal question jurisdiction, for example, is to look to the "face" of the complaint, not whether the allegations in the complaint state a claim. *See, e.g., Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). And whether the EFAA applies, and thus whether a plaintiff's claims can proceed in court, is more like a determination whether claims should proceed in state or federal court than it is like deciding whether a complaint states a claim on the merits. As *Diaz-Roa* explained, "a motion to compel arbitration is designed to test who—a judge and jury or an arbitrator—is to decide the case on the merits," not to test whether the plaintiff has stated a claim. 757 F. Supp. 3d at 537. Indeed, the Supreme Court has emphasized that courts are "not to rule on the potential merits of the underlying claims" when deciding whether to compel arbitration. *AT & T Techs. Inc. v. Commc'ns. Workers of America*, 475 U.S. 643, 649 (1986). That's because a court lacks "adjudicative capacity" when the case is to be decided by an arbitrator, and so "should not be making substantive decisions." *Diaz-Roa*, 757 F. Supp. 3d at 538. It would thus be equally consistent with background legal principles for Congress to decide that the application of the EFAA depends on the allegations "on the face of the plaintiff's properly pleaded complaint," *Williams*, 482 U.S. at 392, not whether she has plausibly alleged a claim on the merits.

Not applying a plausibility standard makes sense as a practical matter, too. A motion to dismiss tests the sufficiency of a complaint, but it is "often not the last word on the merits of a claim." *Diaz-Roa*, 757 F. Supp. 3d at 538. If a plaintiff's claim is dismissed for failure to state a claim, they may amend their complaint, Fed. R. Civ. P. 15(a), or appeal the dismissal, 28 U.S.C. § 1291. On the other hand, a defendant ordinarily cannot appeal the denial of a motion to dismiss. Deciding plausibility in the course of deciding a motion to compel arbitration flips that on its head. If the court grants a motion to compel because a plaintiff's claims are not plausible, the plaintiff cannot appeal the court's plausibility finding. 9 U.S.C. § 16(b). But that finding will likely prevent the plaintiff from having the plausibility of her claims adjudicated in the first instance by the arbitrator, who is likely to defer to the court's finding if not find it preclusive. Moreover, as this case illustrates, when a court denies a motion to compel arbitration based on the plaintiff having stated a plausible claim, the defendant has an automatic right to appeal, thus allowing for an appeal on the merits and creating an end-run around the final judgment rule. Interpreting the EFAA to require only allegations of sexual harassment preserves the respective roles of the court and the arbitrator and avoids inundating federal courts of appeals with interlocutory disputes.

In adopting the plausibility standard, the district court cited *Magnum v. Ross Dress for Less, Inc.*, 777 F. Supp. 3d 519 (E.D.N.C. 2025), which relied on *Yost v.*

Everyrealm, Inc., 657 F. Supp. 3d 563 (S.D.N.Y. 2023). But, even within *Yost*'s district, the district courts are split. *Compare Yost*, 657 F. Supp. 3d at 582-88, *with Diaz-Roa*, 757 F. Supp. 3d at 537. For the reasons described above, *Diaz-Roa* has the more thorough and persuasive analysis. Likely for that reason, after *Diaz-Roa*, numerous courts have adopted its approach and rejected *Yost*. *See, e.g., Holland-Thielen v. Space Expl. Techs. Corp.*, 2025 WL 2190619, at *12 (C.D. Cal. July 11, 2025) (finding *Diaz-Roa* "persuasive" and collecting four cases in the Ninth Circuit that have followed it); *Thomas v. Pooh Bah Enters., Inc*., 2025 WL 2084159, at *4 (N.D. Ill. July 24, 2025) (finding *Diaz-Roa*'s reasoning "most persuasive"). Like those courts, this Court should adopt *Diaz-Roa*'s detailed and well-reasoned approach to the EFAA.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of Barclays' motion to compel arbitration.

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January 20, 2026

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January 20, 2026

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January 20, 2026

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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