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Hon. Patricia Guerrero, Chief Justice
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Ramirez v. Law Offices of Adam Zolonz*
Case No. S293079
Amicus Curiae Letter urging Grant of Review

Dear Chief Justice Guerrero:

This amicus curiae letter on behalf of the Civil Justice Association of California (CJAC) is filed in support of the defendants' petition for review. The petition raises important questions about how the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFAA) should be interpreted in California courts. As more employees insert sexual harassment allegations into their lawsuits in attempts to avoid arbitration, California courts will increasingly be called upon to determine the extent to which the EFAA allows for such gamesmanship. Rather than leaving it to each trial judge to choose among varying standards, this Court should grant review to set a uniform standard in California.

Interest of Amicus Curiae

CJAC's members collectively employ many thousands of people in California and hundreds of thousands nationally. Like many employers, most of CJAC's members have elected to resolve disputes with their employees over employment matters through binding arbitration. Thus, they have an interest in how the Federal Arbitration Act (to which the EFAA is an amendment) is interpreted in California courts. The question raised by the petition for review is important to all California employers who have arbitration agreements with their employees.

The EFAA

Congress enacted the EFAA to give “victims of sexual violence and harassment” a choice as to where their claims are heard. Congress was concerned that forcing employees who had been “raped, assaulted, or harassed at work” to pursue their claims in secret in arbitration prevented them from sharing their stories and allowed employers to cover up misconduct. (H.R.Rep. No. 117-234, 2d Sess., pp. 3-6 (2022) [available at www.congress.gov/committee-report/117th-congress/house-report/234/1].)

To implement that policy, the EFAA amended the Federal Arbitration Act (FAA) to provide that, “at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute,... no predispute arbitration agreement or predispute joint-action waiver 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.” (9 U.S.C. § 402(a).) The applicability of the EFAA is to be determined under federal law by a court, not an arbitrator. (9 U.S.C. § 402(b).)

Why the Court Should Grant Review

Although the FAA is a federal statute on which the U.S. Supreme Court has the last word, “[s]tate courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act.” (*Nitro-Lift Techs., L.L.C. v. Howard* (2012) 568 U.S. 17, 17. See also Note, *State Courts and the Federalization of Arbitration Law* (2021) 134 Harv. L. Rev. 1184.) State courts have a vital role in the application and development of federal law. (See *Howlett v. Rose* (1990) 496 U.S. 356, 367 (“Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum—although both might well be true—but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature”).)

The Court should embrace that role in this case and grant review for two reasons. First, it should examine whether the broad view of the EFAA taken by the Court of Appeal is consistent with the strong federal and state public policy in favor of arbitration. (*Preston v. Ferrer* (2008) 552 U.S. 346, 349 (the FAA “establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution”); *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 (“the Legislature has expressed a ‘strong public policy in favor of arbitration as a speedy

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and relatively inexpensive means of dispute resolution”), quoting *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 322.) That policy requires courts to take a narrow view of any exceptions to the broad reach of the FAA. (See, for example, *Circuit City Stores v. Adams* (2001) 532 U.S. 105, 118 (the exclusion in section 1 of the FAA for contracts of employment should be afforded a “narrow construction”).) Does the Court of Appeal’s interpretation of the EFAA to allow a mere allegation of harassment defeat arbitration of unrelated causes of action fly in the face of that policy?

Second, the Court of Appeal opinion also would invalidate the accepted procedure for dealing with a complaint that alleges both arbitrable and non-arbitrable causes of action. The U.S. Supreme Court has explained that the FAA “has been interpreted to require that if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation.” (*KPMG LLP v. Cocchi* (2011) 565 U.S. 18, 19. See also *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 966 (“case law establishes that a stay of proceedings as to any inarbitrable claims is appropriate until arbitration of any arbitrable claims is concluded”).) Does the Court of Appeal’s ruling that both non-arbitrable and arbitrable claims must be tried in court offend that principle?

Conclusion

Whether the EFAA permits a party to avoid arbitration of any claim against his or her employer by including conclusory harassment allegations with causes of action that have nothing to do with harassment is a question that California courts will have to confront again and again. This Court should grant review to give those courts clear guidance on how the EFAA should be applied to such cases.

Very truly yours,



Calvin House, Partner
for Gutierrez, Preciado & House, LLP