NO. 09 - 864

IN THE

Supreme Court of the United States

KBR TECHNICAL SERVICES, INC., HALLIBURTON COMPANY D/B/A KBR KELLOGG BROWN & ROOT, KELLOGG BROWN & ROOT, LLC, KELLOGG BROWN & ROOT SERVICES, INC., KELLOGG BROWN & ROOT INTERNATIONAL, INC., KELLOGG BROWN & ROOT, INC., KBR, INC., KELLOGG BROWN & ROOT, INC., S. DE R.L., AND OVERSEAS ADMINISTRATIVE SERVICES, LTD.,

Petitioner,

v.

JAMIE LEIGH JONES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Federal Arbitration Act compel a court to interpret contractual language to find that gang rape perpetrated by co-employees of the victim in the victim's bedroom is "related to the employment" of the victim or occurred "in the workplace" of the victim?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Jamie Leigh Jones respectfully requests that this Court deny the petition for writ of certiorari in this case.

This case presents no doctrinal question about which decisions of lower courts conflict. It presents no novel doctrinal question. It presents no doctrinal question at all. Resolution of it requires simply a tedious application of fact to existing doctrine, a task the Court of Appeals faithfully performed.

Employing the tools of construction the Petitioner argues must be employed in determining the scope of an arbitration clause, the court found, in a straightforward analysis, that gang rape perpetrated by co-employees, in the victim's bedroom, outside of work hours, and away from the workplace, was not related to the victim's employment and did not occur in or about the workplace.

STATEMENT OF THE CASE

Jamie Leigh Jones was nineteen-years-old when her employer, Halliburton/KBR,[1] asked her if she would like to work in Baghdad. After asking questions about safety, and particularly about housing, and receiving adequate assurances, she said yes.

Upon arrival, her housing situation was decidedly less commodious than promised. Contrary to a

[1] For continuity, Ms. Jones refers to the Petitioners in the same way the Court of Appeals referred to them, *see* Pet. App. 2a, and will refer to them, collectively, as Petitioner.

promise of private housing to be shared only with women[2] the barracks housed primarily male employees (over 500), but had been jury-rigged to accommodate approximately 25 females.[3] Walls did not completely reach the ceilings, and men could peer over the tops into the female sleeping areas.[4] The barracks, located "some distance" from Ms. Jones's workplace,[5] was under the direct management and control of Halliburton/KBR[6] but no work was conducted there. Pet. App. 25a.

During her first days in her new home Ms. Jones constantly endured sexually explicit taunts, causing her to feel harassed and extremely unsafe.[7] Ms. Jones experienced harassing and unnerving "cat-calls" as she walked past two floors of barely clothed men on her way to the only female restroom in the building.[8] Ms. Jones complained about this to her

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[2] Jones Aff. at USCA5 613.

[3] Letter from Halliburton's counsel to EEOC at USCA5 618. *See also* EEOC Determination Letter at USCA5 615; USCA5 1005-1006 ¶ 17.

[4] USCA5 1005-06 ¶ 17; Jones Aff. at USCA5 613.

[5] "The barracks were located some distance from the actual office where Ms. Jones worked as an IT Customer Support Analyst, and there is no indication that Ms. Jones or anyone else performed any job duties whatsoever at the barracks." USCA5 1329. *See also* Halliburton/KBR Opening Br. 12, No. 08-20380 (5th Cir.) (quoting the finding that Jones's room was "some distance" from where she worked).

[6] USCA5 1005-06 ¶ 17; Jones Aff. at USCA5 613.

[7] *Id.*

[8] *Id.*

immediate supervisors and to Halliburton/KBR in Houston, Texas.[9] Halliburton/KBR knew even before Ms. Jones signed her employment contract that it had an explosive situation in its employee housing and had not acted to control it.[10] As had been true with regard to prior complaints about harassment, no actions were taken to address Ms. Jones's complaints.[11] Ms. Jones was told to "go to the spa."[12]

Halliburton/KBR reinforced the sexually abusive environment by taking retaliatory action against Ms. Jones and other female coworkers (including sending them to more dangerous locations) for reporting the abuse and by failing to discipline the actors.[13] Despite assurances that the reporting of such incidents would be handled discretely, copies of prior complaints were intentionally distributed to managers in an effort to incite retaliatory action.[14]

On July 28, 2005, the powder keg exploded. Ms. Jones was gang-raped in her bedroom by Defendant Boartz and several other Halliburton employees.[15]

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[9] *Id*. ¶ 18. *See also* e-mail correspondence requesting a transfer of housing at USCA5 663.

[10] *See, e.g.*, statement of SSG Kevin Rogers at USCA5 667-68.

[11] Surman Aff. at USCA5 587-89. *See also* USCA5 1007 ¶ 20; USCA5 1008-09 ¶ 25; USCA5 1021 ¶ 54.

[12] USCA5 1006 ¶ 18.

[13] *Id*., Lindsey Aff. at USCA5 669.

[14] *See, e.g.*, USCA5 615-16, EEOC Determination in reference to the findings related to this case, USCA5 645-47, EEOC Determination in Tracy Barkers' case.

[15] Ms. Jones's complaint in district court alleged that she was drugged and raped in her bedroom by "several

Outside of her barracks, where Boartz and company were drinking, she had been given a drink that caused symptoms consistent with it having been laced with the date rape drug, Rohypnol.[16] At this time, drinking was permitted only in non-work areas of Halliburton/KBR facilities during non-work hours.[17]

The morning after the gang rape Ms. Jones was "naked and severely bruised, with lacerations to her vagina and her anus, blood running down her leg, her breast implants were ruptured, and her pectoral muscles were torn—which would later require reconstructive surgery."[18]

After Ms. Jones received emergency medical attention, Halliburton/KBR locked her into a shipping container and denied her access to outside communication. Pet. App. 114a ¶ 20. Ms. Jones was able to convince an armed guard to allow her one phone call home. *Id*. She called her father, who in turn called his Representative in Congress, the Hon.

Halliburton/KBR" firefighters. Pet. App. 113a ¶ 19. Inexplicably, Petitioner tells the Court in the first sentence of its Petition that Ms. Jones was raped by only one other employee. Pet. i ("another employee"). *Compare* Pet. 7 (Ms. Jones alleged assault by one named and "other unidentified" perpetrators.).

[16] USCA5 1006-07 ¶ 19.

[17] Surman Aff., Halliburton Human Resources Supervisor in Baghdad during the summer of 2005, USCA5 587-89, at 588. After the rape of Ms. Jones, drinking was prohibited even in non-work areas. *Id*.

[18] Pet. App. 113-14a ¶ 19.

Ted Poe, who was able to facilitate Ms. Jones's release.[19]

Halliburton/KBR moved to compel arbitration of all claims. The employment agreement between the parties provided, in relevant part:

> You . . . agree that you will be bound by and accept as a condition of your employment the terms of the Halliburton Dispute Resolution Program which are herein incorporated by reference. You understand that the Dispute Resolution Program requires, as its last step, that any and all claims, that you might have against Employer *related to your employment*, including your termination, and any and all personal injury claim *arising in the workplace,* you have against other parent or affiliate of Employer, must be submitted to binding arbitration instead of the court system.

USCA5 1165 (emphases added). [20]

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[19] Petitioner asserts that Ms. Jones "has gone to great length to sensationalize" these facts. Pet. 8 n.3. The facts speak for themselves.

[20] Petitioner maintains that another relevant piece of the employment agreement extended coverage to places in "or about" the workplace. Pet. 4-5. The Court of Appeals, without resolving Ms. Jones's contention that this language had not been raised below, considered the additional language and found it did not alter the outcome, as "neither phrase encompasses Jones's claims." Pet. App. 25a.

The District Court found that claims of assault and battery; intentional infliction of emotional distress (related to the assault); negligent hiring, supervision and retention of the employees who committed the rape; and false imprisonment were not within the scope of the arbitration clause, noting that Ms. Jones could maintain them "without reference to her own employment;" while the rape might be related to the employment of the perpetrators, it was not related to the employment of the victim. *Jones v. Halliburton*, 625 F.Supp.2d 339, 352 (S.D. Tex. 2008).

Halliburton/KBR appealed. The Fifth Circuit affirmed. On October 19, 2009, the Fifth Circuit denied Petitioner's request for rehearing en banc. Pet. App. 65a-66a. The Petition for Writ Certiorari was timely filed.

REASONS FOR DENYING THE PETITION

The Fifth Circuit here gave primacy to the longstanding and familiar requirement of the Federal Arbitration Act that ambiguities in the scope of arbitration agreements be resolved in favor of arbitrability. The court's application of particular, and hopefully unrecurring, facts to the language of a particular contract yielded an unremarkable result that has no implications for the construction of arbitration agreements in general.

There is no conflict in the circuit courts regarding application of the rule of construction the Fifth Circuit applied here. Petitioner suggests that such a conflict exists by relying on doctrine, developed under the Labor Management Relations Act, that this Court has found to have no applicability outside

the context of construing collective bargaining agreements.

Reversal of the Fifth Circuit's decision is unlikely to change the result in this case, as intervening legislation counsels that the arbitration agreement at issue here is not enforceable.

I. The Decision Below Is a Fact-Bound, Faithful Application of Existing Doctrine.

Petitioner asserts that a doctrinal conflict exists with what it calls a "presumption of arbitrability." Pet. 13 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). But neither *Moses H. Cone* nor any subsequent case creates any general presumption of arbitrability.[21] More accurately stated, *Moses H. Cone* creates a rule of contract interpretation[22] to be applied to resolve "any *doubt* concerning the scope of arbitrable issues." *Id.* (emphasis supplied). The rule requires that doubts "should be resolved in favor of arbitration." *Id.*

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[21] There is one reference, in *First Options of Chicago, Inc. v. Kaplan*, to a presumption regarding arbitrability, but the court makes clear that the "presumption" is just a characterization of the interpretive requirement of *Moses H. Cone* described here, applicable only when an agreement is silent or ambiguous. 514 U.S. 938, 944-45 (1995).

[22] *See Volt Info. Servs., Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) ("Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit," which includes the freedom to "limit by contract the issues which they will arbitrate.").

Contract interpretation is the fundamental task of a court in interpreting arbitration agreements[23] and the rule of construction set out in *Moses H. Cone* is a gentle gloss on the common law rules that guide courts in that task. "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944. The *Moses H. Cone* rule does not even come into play when the question of whether the parties agreed to arbitrate the dispute can be resolved from the plain text of an arbitration clause.

Petitioner's assertion that "arbitration cannot be denied unless the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," Pet. 20, misstates the law of the Federal Arbitration Act. The language Petitioner relies on is based on authority under the Labor Management Relations Act. *AT&T Techs., Inc. v. Comm. Workers of Am.*, 475 U.S. 643, 650 (1986) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 (1960)); Pet. 13. Petitioner asserts that "general rules for interpreting arbitration clauses . . . are the same in the FAA and LMRA context." Pet. 13-14 n.4.

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[23] "The first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985), and in making that determination a court employs common law rules of contract interpretation. *Id.* at 62 (applying "common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it.").

Regardless of any equivalency of doctrine under the FAA and LMRA with regard to "general rules," doctrine clearly is different for purposes of deciding whether claims not involving interpretation of collective bargaining agreements (CBAs) must be arbitrated. This Court explained in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), that the language of *AT&T Technologies, Inc.* cited above

> does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts *to interpret the terms of a CBA*. *See AT & T Technologies, supra*, at 650, 106 S. Ct. 1415; *Warrior & Gulf, supra*, at 581-582, 80 S. Ct. 1347. This rationale finds support in the very text of the LMRA, which announces that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising *over the application or interpretation of an existing collective-bargaining agreement*." 29 U.S.C. § 173(d) [emphasis within quotation added by Court].

Wright, 523 U.S. at 78 (emphases in original). The court emphasized that when the issue in question does not involve adjusting disputes under a CBA, it is "not subject to a presumption of arbitrability." *Id.* at 79.

The "not susceptible of an interpretation" language from *AT&T*, language critical to Petitioner's argument regarding the existence of conflicts in the lower courts, *see* Pet. 14, 20, is simply not the law of the FAA. Applying the rule would be "quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." *Volt*, 489 U.S. at 479.

The two decisions interpreting the FAA that Petitioner cites as establishing a "presumption of arbitrability," *Mitsubishi* and *Mastrobuono*, merely apply the *Moses H. Cone* rule. Pet. 14-15. In *Mitsubishi*, this Court's affirmation said simply that in determining the scope of arbitrability, "the Court of Appeals properly resolved any *doubts* in favor of arbitrability," *Mitsubishi*, 473 U.S. at 625 n.13, thereby implementing "the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act." *Id.* at 627. *Mastrobuono* commanded merely that "due regard for the federal policy favoring arbitration" requires that "*ambiguities* as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration." 514 U.S. 52, 62 (1995) (emphasis supplied). This Court's recent explication of its decision in *Mastrobuono* illustrates use of the rule when dealing with potentially inconsistent contract terms and indicates that Petitioner's reading of *Mastrobuono* is too broad. *Preston v. Ferrer*, 552 U.S. 346, 362-63 & n.8 (2008).

In Petitioner's reckoning, *Mitsubishi* establishes a standard—that arbitration clauses requiring arbitration of matters "related to" a contract require

arbitration of all claims that "touch matters" related to the contract, Pet. 15—that is dutifully followed by six circuits, rejected by the Sixth Circuit, spurned by the 11th Circuit, and, despite being adopted by the 5th Circuit, avoided in this case when the 5th Circuit "carved out a general exclusion for claims of sexual assault." Pet. 18. The standard is not substantive in the way Petitioner asserts, and there is no conflict regarding the application of the *Moses H. Cone* rule of construction.

The Sixth Circuit case Petitioner cites as rejecting the "touch matters" formulation, *NCR Corp. v. Korala Associates, Ltd.*, 512 F.3d 807 (6th Cir. 2008), does not "reject" *Mitsubishi*; it merely interpets it and explains why Petitioner's reading of *Mitsubishi* is overbroad. *Mitsubishi* cited *Moses H. Cone* and noted that in interpreting an arbitration clause, "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." 473 U.S. at 626. One issue in *Mitsubishi* was deciding whether statutory antitrust claims were within the scope of contractual language. The Court noted that the contractual language reached

> [a]ll disputes, controversies or differences which may arise between [the parties] out of or in relation to [the specified provisions] or for the breach thereof." Contrary to Soler's suggestion, the exclusion of some areas of possible dispute from the scope of an arbitration clause does not serve to restrict the reach of an otherwise broad clause *in the areas in which it was intended to operate*. Thus, insofar as the allegations

> underlying the statutory claims touch matters covered by the enumerated articles, the Court of Appeals properly resolved any doubts in favor of arbitrability. *See* 723 F.2d at 159.

473 U.S. at 625 n.13 (emphasis added). Thus, the Court reinforced clear doctrine: even if an arbitration clause is broad, the text can dictate that some areas of dispute are beyond the scope of arbitrability; and, if it seems the parties intended arbitrability of certain class of disputes, doubts regarding arbitrability of a particular dispute within that class should be resolved in favor of arbitrability.

The Sixth Circuit in *NCR Corp.*, quoting from its own prior decision, simply rejected the idea that *Mitsubishi* announced a new standard of substantive law rather than simply applied an existing rule of contract interpretation:

> This Court, however, has explained that the "touch matters" language in *Mitsubishi Motors* should be considered in light of its narrow context:
>
> The issue the *Mitsubishi* Court addressed was whether the arbitration clause "should be read narrowly to exclude the statutory claims," *id.*, which were part of the respondent's counterclaim and included claims under the antitrust laws. *Id.* at 619-20, 105 S. Ct. 3346. The "enumerated articles" were provisions of a distribution agreement to which the arbitration provision specifically referred. *Id.* at

> 617, 105 S. Ct. 3346. [Defendant], in its brief, apparently treats the Court's statement as announcing the standard that a controversy is arbitrable if it "touches matters covered by" the arbitration clause. [Defendant] reads this passing comment out of context, and we do not believe the words have the broad impact [Defendant] would give them. *Alticor, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 411 F.3d 669, 673 (6th Cir. 2005).

NCR Corp., 512 F.3d at 813-14.

Petitioner asserts that *Hemispherx Biopharma, Inc. v. Johannesburg Consolidated Investments*, 553 F.3d 1351, 1366 (11th Cir. 2008), and the cases described there, reveal "divergence in standards across the circuits," Pet. 15, regarding how broadly to construe arbitration clauses. *Hemispherix* involved whether a fraud claim was covered by an arbitration clause that provided:

> Any dispute at any time between the parties hereto arising out of or pursuant to this Agreement or its interpretation, rectification, breach or termination shall be submitted to and be decided by arbitration in terms of the Arbitration Act, 1965, of the Republic of South Africa.

Id. at 1355. The court, invoking both the *Moses H. Cone* rule and the common law principles this Court has instructed courts to use, unremarkably found:

> In this case, it was not foreseeable at the time of the licensing agreement that the South African defendants would, some eight years later, make misrepresentations to *Hemispherx* in the course of discussing an equity investment in the latter because the investment was not contemplated by that agreement. The parties could have "performed the arbitrable contract perfectly, fulfilling all expectations under that contract," and still be embroiled in this dispute. *Gregory v. Electro-Mechanical Corp*., 83 F.3d 382, 385 (11th Cir. 1996). Therefore, even in light of the general federal policy in favor of private commercial dispute resolution, the parties' licensing agreement arbitration clause properly construed does not cover this dispute.

Id. at 1368-69 (footnote omitted).

The court described verbal formulae that courts have used to implement the *Moses H. Cone* standard, formulations that Petitioner decries as creating havoc in the lower courts,[24] but the court did "not

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[24] *Compare* verbal formulae recited at Pet. 15-17 and those cataloged by the court in *Hemispherx*, 553 F.3d at 1366-67:

> Courts have employed various verbal formulae to describe the relationship between disputes and arbitration clauses, FN16 such as "whether the tort or breach in question was an immediate, foreseeable result of the performance of contractual

believe there is a significant difference between these slightly different formulations." *Hemispherx*, 553 F.3d at 1366-67 & n.16.

II. The Court of Appeals Faithfully Applied This Court's Doctrine.

In this case, even if the agreement were ambiguous in the sense described in *Mastrobuono*, and even if there were a conflict among the circuits, resolution of the "conflict" would not change the results of the case, as the Court of Appeals faithfully applied the precedents of this Court.

The Court of Appeals characterized the arbitration agreement at issue here as broad and invoked its own precedent adopting the *Mitsubishi* "touch matters" language. Pet. App. 12a. The court reviewed decisions of other courts and synthesized them in the observation, "in most circumstances, a sexual assault is independent of an employment relationship." Pet. App. 14a. The court, citing other

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duties," *id.* at 1116; *see also Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH*, 585 F.2d 39, 46 (3d Cir. 1978); whether "an action could be maintained without reference to the contract or relationship at issue," *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 395 (6th Cir. 2003); whether the disputes have "their origin or genesis in the contract," *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd.*, 1 F.3d 639, 642 (7th Cir. 1993); or whether "the allegations underlying the claims 'touch matters' covered by the [contract]," *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987).

case law, noted that in particular circumstances sexual assault could be related to employment. Pet. App. 15a. It then set about to determine which set of circumstances was extant.

The court observed that Ms. Jones would have to prove, for purposes of establishing vicarious liability of Petitioner, "that the alleged perpetrators were acting in ways that related to *their* employment because, in assaulting Jones, they were violating company policies. But the *perpetrators'* conduct concerning company policies does not explain how *Jones* was acting in any way related to her employment by being the alleged victim of a sexual assault." Pet. App. 17a (emphases in original).

The Court noted that this case was distinct from the *Barker* case, one of the other cases in which a different employee of Petitioner had been subject to sexual assault by other employees of Petitioner, cited by Petitioner in support of its argument, Pet. 23, because "in the instant action, unlike in *Barker*, Jones has claimed Halliburton/KBR is vicariously liable for the assault." Pet. App. 17a.

The duty that Halliburton/KBR breached being owed by Halliburton/KBR to any person, and being unrelated to Ms. Jones's status as an employee, it was not difficult for the court to conclude that the rape was unrelated to Ms. Jones's employment.

III. No Policy Concerns Militate in Favor of Reviewing This Case.

Petitioner asserts that the Court should grant review due to the "rapidly increasing use of pre-dispute arbitration agreements." Pet. 27. They point to evidence indicating that, at least during the early

to mid-1990's, employers increasingly turned to arbitration agreements in an effort to reduce the costs of employment disputes, Pet. 28 & n.9, and cite this Court's recognition that arbitration may be useful in employment contract disputes, "which often involve[] smaller sums of money." Pet. 29, quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001).

Petitioner is behind the trend. Employers are actually turning away from arbitration, due to increased costs and the fact that hoped-for savings have not materialized.

Fulbright & Jaworski report that a survey of 400 corporate counsel revealed that "15 percent of respondents said their companies require arbitration of disputes in nonunion settings. That's down from last year's 22 percent." *Fulbright Survey Summary: Companies Expect Litigation to Swell in 2010*, Institute of Management and Administration, Inc., WL 10-1 Law Off. Mgmt. & Admin. Rep. 1, at *5 (summarizing Fulbright & Jaworski, *Seventh Annual Litigation Trends Survey* (2010)). Twenty-two percent in 2009 was itself down from 25% in 2008. *New Survey Shows Where Litigation Action Will Be in 2009: Fulbright & Jaworski Litigation Trends Data Released*, Institute of Management & Administration, Inc., WL 09-1 Law Off. Mgmt. & Admin. Rep. 1, at *1 (summarizing Fulbright & Jaworski, *Fifth Annual Litigation Trends Survey* (2008)). Among the reasons cited for this trend was that "arbitration can be just as expensive and time-consuming. The median cost for arbitration, $50,000, is way up from last year's median cost of $35,000. Litigation, some respondents say, offers greater discovery opportunities, greater availability of

dispositive motions, and more established rules." WL 10-1 Law Off. Mgmt. & Admin Rep. 1, at *5.

In the absence of any evidence that the parties contemplated arbitrating not only claims related to employment but also intentional rape and false imprisonment, Petitioner asserts that contracting parties "have no reason to exclude certain types of claims" from the scope of arbitrability, Pet. 29, and note that there is no reason "to think employees would generally treat sexual assault claims differently from others." *Id.* at 30. In fact, employees prefer arbitration when they have small claims that are not economically feasible to bring in court; employers prefer litigation, knowing that the chances of liability are zero absent arbitration, and routinely refuse to post-dispute arbitration of such claims. Lewis L. Maltby, *National Workrights Institute, Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements* (2003), http://www.workrights.org/current/cd_adr.pdf, at 15, cited at Pet. 31. The positions are reversed when employee claims involve intentional violent injury. Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. on Disp. Resol. 559, 567-68 (2001).

Petitioner argues that although Ms. Jones seeks her right to trial by jury, other employee victims of rape may "prefer the confidentiality of arbitration." Pet. 30 (citing Justice Department data for 1991 to 1993 that sexual assault crimes are underreported to the police). Petitioner does not explain why any such preference those other victims may have could not be accommodated by agreeing to arbitration after a dispute arises and they do not deal with the effect of

Federal Rule of Evidence 412, enacted in 1994 after the data they rely on were collected, and commonly referred to as the "rape-shield law." The principal purpose of Rule 412 is "to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives." *S.M. v. J.K.*, 262 F.3d 914, 919 (9th Cir. 2001) (internal quotations omitted). Indeed, the rule is intended to "encourage[] victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders." 1994 Advisory Committee's Note. Similar laws have been adopted in all fifty states. *See* Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763, 906 (1986) (state-by-state listing of rape-shield laws).

In sum, Petitioner's contention that arbitration may be advantageous to employees with typical small or moderate economic claims that clearly are covered by the arbitration clause at issue here cannot justify extending the scope of the arbitration agreement to encompass acts of sexual violence and causing serious physical injury.

IV. Action By This Court Will Not Change the Result in This Case as Intervening Legislation Renders the Arbitration Clause at Issue Unenforceable.

An amendment to the Department of Defense Appropriations Act, known as the Franken Amendment,[25] precludes a defense contractor that

[25] The entire text of the legislation, Pub. L. No. 111-118, 123 Stat. 3409, 3455, H.R. 3326 (2009), is:

SEC. 8116. (a) None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract for an amount in excess of $1,000,000 that is awarded more than 60 days after the effective date of this Act, unless the contractor agrees not to:

(1) enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration 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; or

(2) take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration 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.

(b) None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract awarded more than 180 days after the effective date of this Act unless the contractor certifies that it requires each covered subcontractor to agree not to enter into, and not to take any action to enforce

any provision of, any agreement as described in paragraphs (1) and (2) of subsection (a), with respect to any employee or independent contractor performing work related to such subcontract. For purposes of this subsection, a "covered subcontractor" is an entity that has a subcontract in excess of $1,000,000 on a contract subject to subsection (a).

(c) The prohibitions in this section do not apply with respect to a contractor's or subcontractor's agreements with employees or independent contractors that may not be enforced in a court of the United States.

(d) The Secretary of Defense may waive the application of subsection (a) or (b) to a particular contractor or subcontractor for the purposes of a particular contract or subcontract if the Secretary or the Deputy Secretary personally determines that the waiver is necessary to avoid harm to national security interests of the United States, and that the term of the contract or subcontract is not longer than necessary to avoid such harm. The determination shall set forth with specificity the grounds for the waiver and for the contract or subcontract term selected, and shall state any alternatives considered in lieu of a waiver and the reasons each such alternative would not avoid harm to national security interests of the United States. The Secretary of Defense shall transmit to Congress, and simultaneously make public, any determination under this subsection not less than 15 business days before the contract or subcontract addressed in the determination may be awarded.

accepts certain 2010 Defense Appropriation funds from:

> (2) tak[ing] any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration 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.

Dep't of Defense Appropriations Act, 2010, Pub. L. No. 111-118, 123 Stat. 3409, 3455, H.R. 3326, § 8116(a)(2) (2009). This Court must review the judgment in light of the "law as it now stands, not as it stood when the judgment below was entered," *Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414 (1972) (finding appeal moot because state legislature, during pendency of appeal, repealed the statute petitioner contended was unconstitutional).

Halliburton/KBR states, without explication, that this "legislation does not affect this case," Pet. 8 n.2.[26] The truth of that assertion cannot be wholly

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[26] Halliburton accurately notes that the Franken Amendment does not effect "the majority of existing arbitration agreements," that is, employment agreements in which the employer is not a defense contractor in receipt of appropriations. The Franken Amendment makes that clear by its terms.

determined from the record, but the only element of the Franken Amendment that is ambiguous is whether Halliburton/KBR is a covered entity. Halliburton/KBR's own public statements suggest strongly that it is.

The claims at issue are covered by § 8116(a)(2). Ms. Jones, an intended beneficiary of a contract between Halliburton/KBR and the United States, can enforce the prohibition. *See* 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 37:7 (4th ed.) (a contract is enforceable by a third party when the promisee's purpose is "to confer upon the beneficiary a right against the promisor"); *see also* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 17.7 (6th ed. 2009) (recognizing that an individual may be deemed a third-party beneficiary of a public contract).

On January 7, 2010, KBR reported to investors "an approximately 50 percent revenue decline from KBR's LogCAP project in 2010 from the full year 2009 levels." Press Release, KBR, KBR Announces 2010 Earnings Guidance (Jan. 7, 2010), *available at* http://investors.kbr.com/phoenix.zhtml?c=198137&p=irol-newsArticle_print&ID=1372323&highlight=. The LogCAP project "is a U.S. Army initiative that provides support from civilian contractors for military troops operating in wartime and in other contingency situations." KBR LogCAP, http://www.kbr.com/Careers/LOGCAP/ (last visited Feb. 18, 2010). KBR reported to the Securities and Exchange Commission that:

> LogCap Project. We are currently the sole service provider under our LogCAP III contract, which has been extended by the DoD through the fourth quarter

> of 2009 and we anticipate further extensions into 2010 . . . .
>
> Backlog related to the LogCAP III contract was $776 million at September 30, 2009, and $1.4 billion at December 31, 2008.

KBR Form 10-Q (Oct. 29, 2009), http://www.sec.gov/Archives/edgar/data/1357615/000114036109024015/form10_q.htm, at 30. The magnitude of Halliburton/KBR's contracting and its expectation of continued contracting strongly suggests that it is covered by the Franken Amendment.[27]

The Franken Amendment likely moots Petitioner's claim for specific enforcement of an arbitration agreement and thus further counsels against discretionary review of this case, as a ruling by this court would not finally resolve the issue or arbitrability. *See, e.g.*, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.")

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[27] *See also* Press Release, KBR, KBR Selected for Security Worldwide Environmental Restoration and Construction 2009 Contract by U.S. Air Force Center for Engineering and the Environment (Nov. 23, 2009), *available at* http://www.kbr.com/Newsroom/Press-Releases/2009/11/23/KBR-Selected-for-Security-Worldwide-Environmental-Restoration-and-Construction-2009-Contract-by-US-Air-Force-Center-for-Engineering-and-the-Environment/. As the press release notes, "The total contract value to be dispersed among participating contractors is $3 billion and has a base contract period of five years." *Id*.

CONCLUSION

Petitioner would have the Court believe that the demise of non-CBA employment arbitration will be at hand if employees are not compelled to arbitrate rape claims, whether the employees agreed to arbitration or not. Happily, there is no showing that rape claims are so numerous as to be able to work that remarkable result.

The petition for a writ of certiorari should be denied.

February 22, 2010 Respectfully submitted,

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