No. 09-09-864 JAN 19 2010

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.,
Petitioners,

v.

JAMIE LEIGH JONES,
Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent Jamie Leigh Jones filed a complaint in federal district court against her employer, seeking redress of injuries she allegedly sustained from a sexual assault by another employee in overseas employer-provided housing in which she was required to reside as a condition of her employment. Jones's employment contract required arbitration of "any and all claims that you might have against Employer related to your employment," including "any personal injury allegedly incurred in or about a Company workplace." A divided United States Court of Appeals for the Fifth Circuit narrowly construed the arbitration clause to exclude Jones's claim. The court reasoned that sexual assault claims should be deemed generally excluded from such clauses. It imported into the "related to" clause a requirement that the claim was only arbitrable if "significantly" related to employment, and rejected application of the general rule that overseas employer-provided sleeping quarters are part of the workplace. The question presented is:

Under the Federal Arbitration Act's presumption of arbitrability, which requires courts to give arbitration agreements the broadest pro-arbitration construction of which they are susceptible, may a court develop rules of exclusion to narrow standard broad arbitration clauses?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The caption names all of the parties in the United States Court of Appeals for the Fifth Circuit. In accordance with Supreme Court Rule 29.6, Petitioners make the following disclosures:

1. Halliburton Company (incorrectly named Halliburton Company d/b/a KBR Kellogg Brown & Root) is a separate public company. It does not have a parent corporation and no corporation holds 10% or more of stock in Halliburton Company.

2. Kellogg Brown & Root LLC (incorrectly named Kellogg Brown & Root, LLC) is a wholly-owned subsidiary of KBR, Inc. Capital World Investors currently owns more than 10% of KBR, Inc.'s stock.

3. Kellogg Brown & Root Services, Inc. is a wholly-owned subsidiary of KBR, Inc.

4. Kellogg Brown & Root International, Inc. is a wholly-owned subsidiary of KBR, Inc.

5. Kellogg Brown & Root, Inc. is no longer a legal entity.

6. Kellogg Brown & Root, S. de R.L. (incorrectly named Kellogg Brown & Root Inc, S. de R.L.) is a wholly-owned subsidiary of KBR, Inc.

7. KBR Technical Services, Inc. is a wholly-owned subsidiary of KBR, Inc.

8. KBR, Inc. (named as Kellogg Brown & Root (KBR), Inc. in the complaint) has no parent corporation. Capital World Investors owns 10% or more of its stock.

9. Overseas Administrative Services, Ltd. is a foreign, wholly-owned subsidiary of KBR, Inc.

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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.; Kellogg Brown & Root, Inc., S. De R.L.; KBR, Inc., and Overseas Administrative Services, Ltd. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The panel opinion of the court of appeals, dated September 15, 2009, is officially reported at 583 F.3d 228 (5th Cir. 2009) and is reproduced in the Appendix ("App.") at 1a-31a. The order of the court of appeals affirming the judgment of the United States District Court for the Southern District of Texas, also dated September 15, 2009, is reproduced at App. 32a-33a.

The memorandum and order of the United States District Court for the Southern District of Texas, dated May 9, 2008, is officially reported at 625 F. Supp. 2d 339 (S.D. Tex. 2008) and is reproduced at App. 34a-64a.

The order of the court of appeals denying panel rehearing and rehearing *en banc*, dated October 19, 2009, is not officially reported and is reproduced at App. 65a-67a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 15, 2009. The order denying panel rehearing and rehearing *en banc* was entered on

October 19, 2009. The petition is timely filed under 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 & 13.3 because it is being filed within 90 days after the denial of a timely petition for rehearing. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant statutory provision involved is section 3 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 3, which states as follows:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

STATEMENT OF THE CASE

The decision of the court below conflicts with the precedents of this Court and of the majority of other circuits, and undermines the widespread reliance interests of employers and employees (and indeed contracting parties in a wide variety of

circumstances). The standard means to ensure comprehensive arbitration of employee claims is to require that the employee submit all claims "related to" employment to arbitration. *Collins & Aikman Prods. Co. v. Building Sys., Inc.*, 58 F.3d 16, 20 (2d Cir. 1995) (noting that clauses with such language are the "paradigm" of a broad arbitration clause); Steven C. Bennett, Arbitration: Essential Concepts 78 (2007) ("Where parties intend to construct a broad arbitration provision, they should use expansive terms, such as 'all disputes arising out of or relating to' the contract."). A divided Fifth Circuit has now held, in contravention of the rule that arbitration clauses must be given the broadest pro-arbitration reading of which they are susceptible, that courts may exclude from such arbitration clauses claims that a court does not deem to have a "significant" enough relationship to employment: here, sexual assaults by fellow employees in employer-provided sleeping quarters. The end result is a fragmentation between courts and arbitrators of causes of action arising from the same factual transaction, and substantial uncertainty in the meaning and scope of standard clauses in widespread use in American commerce. This Court should intervene to resolve the conflict of authority and restore certainty to this important area of contracting.

I. Statement of Facts

KBR Technical Services, Inc. ("KBRTS") hired Jamie Leigh Jones ("Jones") as a temporary administrative employee in Houston, Texas on April 15, 2004. *Jones v. Halliburton Co.*, 625 F. Supp. 2d 339, 342-43 (S.D. Tex. 2008). App. 34a-64a. Jones subsequently sought and obtained a position at Camp

Hope, Iraq with Overseas Administrative Services, Ltd. ("OAS"), a foreign, wholly owned subsidiary of KBR. *Id.* at 35a.

On July 21, 2005, Jones executed her employment agreement with OAS. *Id.* The agreement provided Jones with the right to receive a Foreign Service bonus, work area differential, and hazard pay, as well as transportation, housing, and meals at her assignment location. *Id.* at 72a-75a. As a condition of her employment, Jones agreed to comply with any special security requirements imposed by OAS and the United States government. *Id.* at 72a. Her employment agreement with OAS also contractually bound Jones to the Halliburton Dispute Resolution Program ("DRP" or "Program"):

> You also 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 related to your employment, including your termination, and any and all personal injury claim [sic] arising in the workplace, you have against any other parent or affiliate of Employer, must be submitted to binding arbitration instead of to the court system.

Id. at 35a. The DRP contains a broad definition of the "disputes" to which the Program applies:

> "Dispute" means all legal and equitable claims, demands, and controversies, of whatever nature or kind, whether in contract, tort, under statute or regulation, or at law, between persons and entities bound by the Plan or by an agreement to resolve Disputes under the Plan, or between a person bound by the Plan and a person or entity otherwise entitled to its benefits, including, but not limited to any matters with respect to:
>
> 1. this Plan;
>
> 2. the employment...including the terms, conditions...of such employment . . . ;
>
> 3. employee benefits or incidents of employment . . . ;
>
> 4. any other matter related to the relationship between the Employee and the Company including, by way of example and without limitation, allegations of discrimination based on . . . sex . . . ; sexual harassment; . . . intentional infliction of emotional distress; . . . or

> 6. any personal injury allegedly incurred in or about a Company workplace.

Jones v. Halliburton Co., 583 F.3d 228, 231 (5th Cir. 2009). App. 1a-31a, at 3a. Under the DRP, the employer pays all administrative expenses of the arbitration program except for a $50 filing fee, and the DRP will pay up to $2,500 per year to help employees cover the cost of consulting with an attorney about their legal rights.

Pursuant to the terms of her employment contract, on February 15, 2006, Jones voluntarily filed a demand for arbitration with the American Arbitration Association ("AAA") against KBR, KBRTS, Kellogg, Brown, & Root Services, Inc., OAS, and Charles Boartz ("Boartz"). *Id.* at 37a. Jones alleged that while she worked for OAS at Camp Hope in Iraq, she was sexually harassed, drugged, and sexually assaulted in her employer-provided housing. *Id.* at 4a-5a. She brought claims for negligence, negligent undertaking, and gross negligence, and later added claims for violations of Title VII of the Civil Rights Act of 1964 and the Texas Labor Code. *Id.* Jones also filed an application for disability benefits under the Defense Base Act with the Department of Labor ("DOL"), asserting that her injuries were sustained in the course and scope of her employment with OAS. *Id.*

II. District Court Proceedings

After Jones changed her attorney, on May 16, 2007, Jones filed this lawsuit against KBRTS, OAS, KBR, Kellogg Brown & Root Services, Inc., Kellogg Brown & Root International, Inc., Kellogg Brown &

Root LLC, Kellogg, Brown & Root, Inc., and Kellogg Brown & Root, S. de R.L. (collectively, the "KBR Defendants") in the Eastern District of Texas, Beaumont Division. *Id.* at 6a, invoking the court's jurisdiction under 28 U.S.C. §§ 1331 and 1332.[1] Her complaint raised the same general allegations made in her arbitration demand.

Throughout her complaint, Jones emphasized the connections between the sexual assault and her employment. Specifically, she alleged that she was drugged and sexually assaulted in her employer-provided living quarters by Boartz and other unidentified "Halliburton/KBR firefighters." *Id.* at 113a. Jones characterized the employee living quarters as a "work environment" that was controlled by the KBR Defendants, *id.* at 116a-117a, and claimed that a hostile work environment "contributed to the eventual physical assault." *Id.* at 116a-117, 124a. She further asserted that the purported "sexual assault . . . negatively impacted the terms, conditions, and privileges associated with [her] employment." *Id.* at 115a.

Jones also alleged that "OAS and/or the other defendants" had duties under the employment contract to protect her from physical harm, including the claimed sexual assault in the employer-provided living quarters. *Id.* at 128a-129a. Moreover, Jones claimed that sexual assault was "a known and foreseeable risk" of her stationing in Iraq, but was purposely omitted from her employment contract by

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[1] Jones also named the U.S. as a defendant, but the U.S. was later voluntarily non-suited by Jones in September 2007. *Id.* at 37a n.3. Individuals Boartz and Eric Iler have been named as defendants in this lawsuit, but have not appeared.

KBR Defendants "in an active effort to conceal the very nature of the working and living environment." *Id.* at 132a, 134a-135a.

Based on these allegations, Jones asserted claims against the KBR Defendants for (1) negligence, (2) negligent undertaking, (3) sexual harassment and hostile work environment under Title VII, (4) retaliation, (5) breach of contract, (6) fraud in the inducement to enter the employment contract, (7) fraud in the inducement to enter into the arbitration agreement, (8) assault and battery, (9) intentional infliction of emotional distress, and (10) false imprisonment. *Id.* at 6a.[2]

After the case was transferred to the Southern District of Texas, Houston Division, the KBR Defendants moved to compel arbitration of Jones's claims pursuant to the FAA. *Id.* at 5a-6a.

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[2] Jones has gone to great lengths to sensationalize her allegations against the KBR Defendants in the media, before the courts, and before Congress. Her efforts culminated in an amendment to the Department of Defense Appropriations Act, 2010, which precludes a defense contractor (for certain contracts) from receiving 2010 Defense Appropriation funds if the contractor enforces an existing arbitration agreement that would require the arbitration of claims under Title VII of the Civil Rights Act of 1964 or any tort claim related to or arising out of sexual assault or harassment. *See* Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, 123 Stat. 3409, H.R. 3326, § 8116 (2009) (the Franken Amendment). The legislation does not affect this case (or the majority of existing arbitration agreements). Many, if not all, of her allegations against the KBR Defendants are demonstrably false. The KBR Defendants intend to vigorously contest Jones's allegations and show that her claims against the KBR Defendants are factually and legally untenable.

The district court issued a memorandum and order holding Jones's arbitration agreement was valid and enforceable. *Id.* at 6a. The district court ordered to arbitration the counts alleging negligence, negligent undertaking, sexual harassment and hostile work environment under Title VII, breach of contract, fraud in the inducement to enter into the employment contract, and fraud in the inducement to enter the arbitration agreement. *Id.*[3] The district court denied, however, the KBR Defendants' motion to compel arbitration of the counts alleging assault and battery, intentional infliction of emotional distress arising from the alleged assault, negligent hiring, retention, and supervision of employees allegedly involved in the assault, and false imprisonment, as it believed those counts fell outside of the scope of the arbitration provisions. *Id.*

The district court's analysis initially acknowledged that the scope of the arbitration provision in Jones's employment contract covers all claims "related to [her] employment," which is universally recognized as a broad provision with expansive reach. *Id.* at 52a. Notably, the district court found that "[t]here is no clear consensus among courts as to whether the kind of claims at issue in this case fall within the scope of a provision requiring arbitration of claims." *Id.* at 54a-55a. Nevertheless, the district court held that the counts related to the alleged assault and false imprisonment fell outside the scope of that phrase. *Id.* at 52a-55a.

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[3] Jones cannot challenge these findings at this stage. *See* 9 U.S.C. § 16(b).

The district court also was dismissive of two important facts. First, Jones's employment agreement expressly incorporated the DRP, but the district court did not consider the terms of the DRP. *Id.* at 51a-60a. Instead, the district court confined its analysis to the phrases "related to your employment" and "personal injury claims arising in the workplace." *Id.* at 52a-53a. Second, when applying for benefits under the Defense Base Act, Jones claimed that her injuries from the sexual assault were compensable on the grounds that they had arisen within the scope of her employment. *Id.* at 57a-58a. Yet, the district court declined to find that the claims were "related to Jones's employment" for purposes of the arbitration provision. *Id.* at 57a-60a.

III. Court of Appeals Proceedings

On June 2, 2008, Petitioners filed a timely appeal with the United States Court of Appeals for the Fifth Circuit challenging the district court's order partially denying the motion to compel arbitration. *See* 9 U.S.C. § 16(a)(1). On September 15, 2009, a divided Fifth Circuit issued a published opinion affirming the decision of the district court. App. 1a-31a. The majority's opinion acknowledged that "[t]he case law is divided on the arbitrability, under similar arbitration clauses, of employees' claims premised on sexual assault." *Id.* at 10a. Nonetheless, the court announced the general rule that "in most circumstances, a sexual assault is independent of an employment relationship." *Id.* at 14a. Even though Jones had recovered compensation under the Defense Base Act based on a claim that her injuries arose in the course and scope of her employment, the Fifth Circuit held that her claim could be in the course and

scope of employment but still not "related to her employment" under an arbitration agreement. *Id.* at 24a. Furthermore, the court concluded that the arbitration provisions' "scope stops at Jones' bedroom door." *Id.* at 20a.

Unlike the district court, the Fifth Circuit also assessed whether Jones's claims fell within the scope of the DRP because the DRP covers personal injuries "incurred in or about a Company workplace." *Id.* at 3a. The majority held, however, that because the injuries occurred in her employer-provided housing, and not in the area where Jones performed her work-related duties, the language of the DRP is inapplicable. *Id.* at 24a-25a. The majority noted that the employer-provided housing was separate from Jones's work area, but never considered whether the injuries occurred "in or *about* a Company workplace." *See id.* (emphasis added).

In dissent, Senior Judge Harold R. DeMoss found Jones's claims to be related to her employment with OAS. *Id.* at 28a. (DeMoss, J., dissenting). Specifically, Judge DeMoss determined "that the outer limits of the 'related to' language are not exceeded when the alleged rape and false imprisonment occurred on company-owned barracks located in a war zone and Jones was required to reside in the barracks as a condition of her employment." *Id.* at 29a. Moreover, Judge DeMoss found it persuasive, but not controlling, that Jones sought and obtained Defense Base Act benefits by invoking language substantially similar to (and even narrower than) the arbitration provisions. *Id.* at 25a. Therefore, because Jones's claims arguably fell within the scope of the arbitration provisions, Judge DeMoss

would have decided "'the question of construction in favor of arbitration.'" *Id.* at 28a.

REASONS FOR GRANTING THE PETITION

Contractual clauses requiring arbitration of any and all claims "related to" employment or incurred in or about the workplace are ubiquitous in American commerce. Under the liberal construction rules applicable under the Federal Arbitration Act (FAA), most courts (in keeping with the precedents of this Court) give such clauses their broadest permissible construction and mandate arbitration of all employment-related claims. The decision below, which adopts a narrow construction of standard arbitration language to exclude sexual assault claims by a fellow employee in employer-provided sleeping quarters, draws the Fifth Circuit into conflict with many federal courts of appeals and state supreme courts and upsets settled expectations of contracting parties. This Court's intervention to resolve the conflict and restore predictability to contracts using standard comprehensive arbitration clauses is imperative.

I. The Federal Arbitration Act Mandates That Arbitration Clauses Be Given The Broadest Construction Of Which They Are Susceptible.

The FAA was adopted "to overcome an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.14 (1985). "'[The] preeminent concern of Congress in

passing the Act was to enforce private agreements into which parties had entered,'" and thus this Court will "rigorously enforce agreements to arbitrate[.]" *Id.* (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U. S. 213, 221 (1985)).

Because the FAA declares "a national policy" in favor of arbitration, courts must apply the "'federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.'" *Id.* at 626, 627 (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); *Southland Corp. v. Keating*, 465 U. S. 1, 12 (1984). That federal substantive law commands that courts employ a presumption of arbitrability in determining which claims must be submitted to arbitration: "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25.

Under the presumption of arbitrability, "'[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause *is not susceptible of an interpretation that covers the asserted dispute.* Doubts should be resolved in favor of coverage.'" *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986) (emphasis added) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 (1960)) (interpreting arbitration clauses under the Labor Management Relations Act ("LMRA"))[4];

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[4] The general rules for interpreting arbitration clauses, including the presumption of arbitrability, are the same in both the FAA and LMRA context. *See Mitsubishi*, 473 U.S. at 626 (citing FAA and LMRA precedents on presumption of

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945 (1995) (the FAA "insist[s] upon clarity before concluding that the parties did not want to arbitrate a related matter"). The presumption applies with special force to clauses that use "broad" language. *Id.* "In such cases, '[in] the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.'" *AT&T*, 475 U.S. at 657 (quoting *Warrior & Gulf*, 363 U.S. at 584-585).

Accordingly, in *Mitsubishi*, where a "broad clause" applicable to enumerated articles of a sales agreement between auto manufacturers covered "'all disputes, controversies or differences which may arise between [the parties] out of or *in relation* to the specified provisions or for the breach thereof,'" this Court declared that "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." 473 U.S. at 624 n.13 (emphasis added and original brackets deleted). And in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995), this Court interpreted a clause requiring arbitration of "any controversy arising out of or relating to" accounts or transactions with a securities broker to include claims for punitive damages. The Court found nothing in the contract that "expresses an intent to preclude an award of punitive

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arbitrability interchangeably in FAA case); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (same); *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 77 n.1 (1998); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

damages[.]" *Id.* at 62. It noted that even if a separate choice-of-law provision created ambiguity as to the scope of the arbitration clause, "'due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.'" *Id.* (quoting *Volt Info. Servs., Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989)). It did not matter that the arbitration clause did not specifically refer to punitive damages; it was enough that the clause "appears broad enough at least to contemplate such a remedy." *Id.* at 61. Thus, this Court, applying the presumption of arbitrability, has interpreted broad clauses requiring arbitration of claims "related to" the contractual relationship to encompass all claims that "touch matters" concerning the same, unless expressly excluded.

II. The Decision Below Deepens A Significant Conflict Of Authority Over The Proper Standard For Interpreting Broad Arbitration Clauses.

Despite the clarity of this Court's precedents, a conflict of authority has developed in the federal courts of appeals and the state supreme courts. *See Hemispherx Biopharma, Inc. v. Johannesburg Consol. Investments*, 553 F.3d 1351, 1366 (11th Cir. 2008) (noting that "'[t]he case law yields no clear answer' to the question of how broadly to construe an arbitration clause," and describing divergence in standards across the circuits) (citation omitted). At least six courts faithful to this Court's precedent – the Second, Third, Seventh, Eighth, Ninth, and Tenth Circuits – have distinguished between narrow and

broad arbitration clauses (such as those providing for arbitration of all claims "arising out of" or "related to" a contract or transaction), and have construed the latter to encompass all matters that "touch matters" of the contractual relationship, unless expressly excluded. *See 3M Co. v. Amtex Sec., Inc.*, 542 F.3d 1193, 1199 (8th Cir. 2008) (FAA "requires that a district court send a claim to arbitration when presented with a broad arbitration clause like the one here as long as the underlying factual allegations simply 'touch matters covered by' the arbitration provision") (citation omitted); *Chelsea Family Pharmacy, PLLC v. Medco Health Solutions, Inc.*, 567 F.3d 1191, 1197-98 (10th Cir. 2009); *Brayman Constr. Corp. v. Home Ins. Co.*, 319 F.3d 622, 626 (3d Cir. 2003); *CK Witco Corp. v. Paper Allied Indus.*, 272 F.3d 419, 422 (7th Cir. 2001); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999); *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 846 (2d Cir. 1987).[5]

Six other courts have adopted conflicting standards. The Sixth Circuit has expressly rejected the "touch matters" standard, and has held instead that "'if an action can be maintained without reference to the contract or relationship at issue, the action is likely outside the scope of the arbitration agreement-along with the presumption in favor of

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[5] In adopting the "touch matters" standard, the Second Circuit has commented that this particular standard is no more robust than other verbal formulations it has used. *See Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 28 (1995). Reconciling its prior case law, the court held, consistently with the aforementioned courts, that broad arbitration clauses encompass all claims that do not concern "matters beyond the parties' contractual relationship." *Id.*

arbitrability and the intent of the parties.'" *NCR Corp. v. Korala Assocs., Ltd.*, 512 F.3d 807, 814 (6th Cir. 2008) (citation omitted). The First Circuit has adopted a similarly narrow test. *See Combined Energies v. CCI, Inc.*, 514 F.3d 168, 172-73 (1st Cir. 2008) (refusing to compel arbitration where agreement contained broad "arising out of" and "relating to" language because plaintiff's claims would stand "regardless of the parties' rights and responsibilities as defined by that contract").

Two other courts have adopted foreseeability limitations on broad arbitration clauses. The Eleventh Circuit, after noting the disarray in the circuits over the standards of arbitrability, has rejected the "touch matters" test. *Hemispherx*, 553 F.3d at 1367. It instead excludes claims from arbitration on the basis of the foreseeability of the claims at the time of contracting. *Id.* ("the appropriate test is whether the dispute was reasonably foreseeable to the parties when they entered into the licensing agreement"). The South Carolina Supreme Court has done likewise. *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 151 (refusing, even under a broad arbitration clause, "to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings" (emphasis added)), *cert. denied* 552 U.S. 991 (2007). Other courts, by contrast, expressly refuse to import foreseeability limitations into broad arbitration clauses. *See Masco Corp. v. Zurich Ams. Ins. Co.*, 382 F.3d 624, 627 (6th Cir. 2004) ("we have no license to write a 'foreseeability' limitation into the arbitration agreement"); *Deputy v. Lehman Bros., Inc.*, 345 F.3d

494, 513 (7th Cir. 2003); *Hilti, Inc. v. Oldach*, 392 F.2d 368, 373 (1st Cir. 1968).

Finally, two other courts – fenced in by the adoption of the "touch matters" standard by their prior precedents[6] – have adopted exceptions for certain claims related to sexual assaults by co-workers, holding by *ipse dixit* that such claims are not related to employment. In *Smith ex rel. Smith v. Captain D's, LLC*, 963 So.2d 1116 (Miss. 2007), the Supreme Court of Mississippi was confronted with an employee's claim that an employer was negligent in hiring and retaining a supervisor who, allegedly in the scope of his employment, raped her on the restaurant premises in the women's restroom. *See id.* at 1117; *id.* at 1123 (Dickinson, J., dissenting) (recounting allegations of complaint). The arbitration clause was concededly broad, encompassing "'any and all previously unasserted claims, disputes, or controversies arising out of or relating to [the employee's] application for employment, employment and/or cessation of employment.'" *Id.* at 1120. A divided Mississippi Supreme Court held, without explanation or analysis of the contract, that "we unquestionably find that a claim of sexual assault neither pertains to nor has a connection with [the plaintiff's] employment," and that the "sexual assault claim against Captain D's and its employee is clearly not within the scope of the arbitration agreement." *Id.* at 1121.

The Fifth Circuit below similarly carved out a general exclusion for claims of sexual assault: it

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[6] *See MS Credit Ctr., Inc. v. Horton*, 926 So. 2d 167, 176 (Miss. 2006); *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1068 (5th Cir.1998).

declared that "in most circumstances, a sexual assault is independent of an employment relationship." App. 14a. It applied that general presumption even to the extremely broad arbitration clause here that requires that "*any and all claims* that you might have against Employer *related to your employment* ... must be submitted to binding arbitration instead of to the court system." App. 35a (emphasis added). Furthermore, the Dispute Resolution Program, which was incorporated by reference in petitioner's employment agreement, defined "disputes" to include "*all legal and equitable claims*, demands, and controversies, of whatever nature or kind, whether in contract, tort, under statute or regulation, or some other law, between persons bound by the Plan, ... including ... *any matters with respect to ... any personal injury allegedly incurred in or about a Company workplace.*" *Id.* at 3a (emphasis added).

In adopting this general presumption of exclusion, the Fifth Circuit distinguished a contrary authority, which found arbitrable a claim arising from sexual assault at an off-site work conference. *See Forbes v. A.G. Edwards & Sons, Inc.*, No. 08-CV-552, 2009 WL 424146, at *8 (S.D.N.Y. Feb. 18, 2009)). The court found significant that "in the instant action," by contrast, "the alleged sexual assault occurred after hours, when Jones was off duty and in her bedroom." App. 15a. Moreover, according to the Fifth Circuit, an assault by a co-worker in violation of company policy was not related to the plaintiff's employment, only to the co-worker's. App. 16a-17a. Remarkably, the Fifth Circuit also found no relationship to employment even though Jones had claimed (for worker's compensation purposes) that her injuries

were sustained in the course of her employment, and had alleged in her complaint that the sexual assault was caused by (among other things) Petitioners' breach of the employment contract and of federal employment laws. *Supra* at 7-8.

The 6-2-2-2 conflict of authority is deep and mature, and invites plaintiffs to shop for favorable forums to evade arbitration. The rule of construction of standard broad arbitration clauses under the FAA is an important federal question that warrants this Court's intervention.

III. The Decision Below Directly Contravenes This Court's Rule Requiring Arbitration Clauses To Be Given The Broadest Construction Of Which They Are Susceptible.

The decision below also cannot be reconciled with this Court's precedent. This Court has held that arbitration cannot be denied unless the arbitration clause "is not *susceptible* of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *AT&T*, 475 U.S. at 650 (emphasis added).

Although the court below acknowledged that standard, App. 11a, it refused to apply it. It did not, and could not, hold that the broad language of the arbitration clause – covering "any and all claims that you might have against Employer related to your employment," including "any personal injury allegedly incurred in or about a Company workplace" *Id.* at 3a – was not susceptible of a reading that would encompass Jones's sexual assault claim.

A "claim," in legal parlance, is the assertion of "rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Restatement (Second) of Judgments* § 24 (1982). A "claim" is defined by the factual transaction, and not by the "substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff." *Id.* cmt. a; *Genesco*, 815 F.2d at 846 (court determining the arbitrability of a claim must "focus on the factual allegations in the complaint rather than the legal causes of action asserted"). Indeed, the Dispute Resolution Program covers "all legal and equitable claims, demands, and controversies, of whatever nature or kind, whether in contract, tort, under statute or regulation, or at law, between persons and entities bound by the Plan." App. 3a.

Jones's claim against Petitioners is unquestionably "related to" her employment: she seeks relief against her employer for failing to protect her from a sexual assault by a co-worker in employer-provided barracks in which the employee was required to live as a condition of her employment. The district court below, and the Fifth Circuit, were not entitled to pluck out certain tort, contractual, and Title VII theories of relief as "employment-related" and deny arbitration on the others. *See id.* at 7a-11a. Jones's claim regarding the sexual assault is the same regardless of the legal bases for relief she states, and her claim is pervaded with allegations that it was related to employment. Indeed, the very same facts regarding the sexual assault will be at issue in the negligence, Title VII, and contract counts

that have been sent to arbitration and in the tort counts that have been retained for jury trial.

The counts sent to arbitration as employment-related (like the ones retained for trial) all seek redress for injuries from the sexual assault. *See id.* at 138a. Jones's negligence count specifically includes allegations that the company failed to provide a "safe living" and a "safe working environment"; that the company negligently handled her requests to be moved to a safer environment and to have separate male and female living quarters; that the company did not follow policies related to sexual misconduct; that the company was negligent in its response to the assault; and that the sexual assault "negatively impacted the terms, conditions, and privileges associated with Jamie's employment." *Id.* at 115a. Her Title VII hostile work environment count includes the allegation that "this environment allowed, caused and/or contributed to the physical assault upon Jamie." *Id.* at 124a. Her Title VII retaliation count includes the allegation that defendants retaliated against her for the rape charges. *Id.* at 125a. Her breach of contract claim includes allegations that the company breached various express or implied warranties regarding her physical security and employee conduct. *Id.* at 128a. Thus, in all the counts of the complaint – both those sent to arbitration and those retained for jury trial – the very same issues will have to be litigated of whether a sexual assault occurred, what injuries Jones suffered from any such assault, what duties the defendants owed to protect her from the assault, and her damages therefrom. Her *entire* claim for relief for sexual assault injuries is clearly employment-related;

it is the foundation of counts that the district court held arbitrable.

Indeed, on strikingly similar facts, a federal district court found the entire sexual-assault claim of an overseas Halliburton employee to be arbitrable under this very same arbitration language. *Barker v. Halliburton Co.*, 541 F. Supp. 2d 879 (S.D. Tex. 2008). The plaintiff there alleged virtually the same counts as Jones alleged here, and (like Jones) asked for the various intentional and negligent hiring and supervision counts to be excluded from arbitration. The district court refused, stating:

> All of these claims do not merely touch on her employment, they are entirely based on her employment. Additionally, her Title VII claims alleging sexual harassment and retaliation are by definition based on her employment. Therefore, all of her extra-contractual claims fall within the scope of her employment contract and thus the arbitration provision.

Id. at 887.

The same result should have obtained here. The Fifth Circuit disagreed with *Barker* because it reasoned that the retained counts related to the perpetrator's conduct, but not Jones's. App. 17a. According to the court, Jones was not "acting in any way related to her employment by being the alleged victim of a sexual assault." *Id.* That distinction is unsound. Not only did the Fifth Circuit confuse legal theories with claims, but the test is not whether the plaintiff's conduct related to her employment. The

test under the arbitration clause is whether her *claim* did, and that point is not subject to reasonable dispute. The court of appeals simply ignored that Jones's injuries were sustained while she was in employer-provided housing in which she was required to reside by her employer, and that the same transaction giving rise to that injury also gave rise to allegations of breach of the employment contract, of duties of care an employer owed its employee, and of federal employment law.

Moreover, the fact that Jones was off-duty at the time of the assault was not dispositive; "[p]ersonal activities of a social or recreational nature must be considered as incident to the overseas employment relationship." *O'Keeffe v. Pan Am. World Airways, Inc.*, 338 F.2d 319, 322 (5th Cir. 1964). Injuries are considered to be incurred in the course and scope of employment if "the obligations or conditions of employment create the zone of special danger out of which the injury arose." *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, 506-07 (1951). Injured employees may recover (as Jones did here) for attacks by fellow employees in company housing.[7]

The Fifth Circuit assumed that it would be proper for Jones to recover Defense Base Act compensation because the sexual assault injuries were incurred in the "course and scope of employment" (as she did),

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[7] *See, e.g., John H. Kaiser Lumber Co. v. Industrial Comm'n*, 195 N.W. 329, 330 (Wis. 1923) (worker injured in attack by crazed co-worker); *Smith v. City of New York*, 411 N.Y.S.2d 424, 427 (1978) (worker injured by darts thrown by co-worker in dormitory in off-hours); *Shaw v. Dutton Berry Farm*, 632 A.2d 18, 20-21 (Vt. 1993) (farm worker stabbed in bunkhouse by roommate).

and still evade arbitration by claiming that they were not "related to" employment. App. 27a-18a. The court claimed that "the liberal construction of 'scope of employment' for purposes of workers' compensation is not necessarily the same standard to be applied when construing an arbitration provision with similar language." *Id.* at 17a. But while workers' compensation statutes and private arbitration agreements may serve different purposes, the FAA requires that the latter be given the *broadest* construction of which they are susceptible. The Fifth Circuit did not adhere to this rule when it nonsensically held that a sexual assault can be in the "course and scope of employment" and not "related to employment." The court accomplished this feat by importing into the arbitration clause the limiting requirement that the claims must be "significantly relat[ed]" to employment, *id.* at 24a, and then using that imputed and open-ended standard as a means to enforce its own presumptions (divorced from any evidence of the intent of the contracting parties) as to the arbitrability of sexual assault claim.

The Fifth Circuit also gave short shrift to the inclusion in the arbitration agreement of all disputes "*with respect to ... any personal injury allegedly incurred in or about a Company workplace.*" *Id.* at 3a. Even under the narrower workers' compensation laws, the "bunkhouse" is traditionally considered the workplace. *See* 2 Arthur Larson & Lex. K. Larson, *Larson's Workers' Compensation Law* § 24.03[1] (2009); *Holt Lumber Co. v. Industrial Comm'n* 170 N.W. 366, 367 (Wis. 1919) ("The general rule under the authorities is that when the contract of employment contemplates that the employee shall sleep upon the premises of the employer, the

employee under such circumstances is considered to be performing services growing out of and incidental to such employment during the time he is on the premises of the employer.") (citation omitted). The Fifth Circuit again contrived a narrow interpretation of this provision, reasoning that an unrelated policy preventing alcohol consumption where work was performed to demonstrate that the parties intended to have jury trials of living-quarters claims of overseas employees. App. 24a-25a.

The Fifth Circuit did not give the standard arbitration clause at issue here the broadest interpretation of which it is susceptible, absent "'only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.'" *AT&T,* 475 U.S. at 650 (quoting *Warrior & Gulf*, 363 U.S. at 584-585). In contravention of this Court's precedents, the court of appeals instead improperly applied narrowing presumptions out of hostility to arbitration of claims of this kind. This Court should grant review to vindicate its precedents.

IV. The Narrowing Standards Applied By the Fifth Circuit and Other Courts Cast Millions of Existing Employment Arbitration Provisions Into Flux

Federal circuit and state courts universally consider arbitration provisions covering all controversies "relating to" the contract, such as the provision contained in Jones's employment contract, "the paradigm of a broad clause." *Collins* 58 F.3d at 20; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967) (construing an arbitration clause with the language "[a]ny controversy or claim arising out of or relating to this Agreement" as a

broad one).[8] Indeed, when an arbitration provision covers any dispute "related to" the contract, courts recognize that the parties have chosen "the broadest language the parties could reasonably use to subject their disputes to that form of settlement, including collateral disputes that relate to the agreement containing the clause." *Fleet Tire Serv. of North Little Rock v. Oliver Rubber Co.*, 118 F.3d 619, 621 (8th Cir. 1997). The American Arbitration Association, courts, and respected treatise writers have advocated such language to ensure the arbitration clause's comprehensiveness, *see In re Petition of Kinoshita & Co.*, 287 F.2d 951, 953 (2d Cir. 1961) (advocating use of standard arbitration clause recommended by AAA to cover broad range of claims); Bennett, *supra*, at 78, and commercial enterprises have widely adopted such language in all manner of contracts (including employment contracts). Nevertheless, the narrowing standards applied by the Fifth Circuit and other courts limit the scope of intentionally broad arbitration clauses, and thus undermine the ability of employers and employees to rely on existing arbitration provisions contained in millions of employment contracts.

The rapidly increasing use of pre-dispute arbitration agreements underscores the importance

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[8] *See also American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996) (finding language "arising out of or related to" the contract to be broad and "capable of an expansive reach"); *Valentine Sugars, Inc. v. Donau Corp.*, 981 F.2d 210, 213 n.2 (5th Cir. 1993) (stating that when the arbitration clause calls for "any dispute 'relating to or arising out of' the agreement" to be submitted to arbitration, the parties "intend the clause to reach all aspects of the relationship")(citation omitted).

of this Court's review. Over the past two decades, the percentage of employers in the private sector using arbitration to resolve employment disputes rose dramatically.[9] Between 1997 and 2001, the number of employees covered by employment administration plans administered by AAA alone doubled from three to six million. *See* Hill, 58 Disp. Res. J. at 10 (citing David Lipsky & Ronald Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. Pa. J. Lab. & Emp. L. 133-59 (1998)). The rise in arbitration is largely a result of the favorable "economics of dispute resolution." *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1464 (2009). In fact, within the employment context, a key advantage of arbitration "over litigation is that the relatively high costs of litigation inhibit access to the courts by lower to mid-income range employees." *See* Alexander Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 Employee Rts & Emp. Pol'y J. 405, 419 (2007); *see also* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Pre-Dispute Employment Arbitration Agreements*, 16

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[9] *See* Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Res. J. 8, 10 (2008) (finding that percentage of employers in the private sector using employment arbitration increased from 3.6 percent in 1991 to 19 percent in 1997) (citing Peter Feuille & Denise Chachere, *Looking Fair or Being Fair: Remedial Voice Procedures in Nonunion Workplaces*, 21 J. Mgmt. 27 (1995) and U.S. General Accounting Office, Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace, Report to the Chairman, Subcommittee on Civil Service, Committee on Government Reform and Oversight, House of Representatives, GAOIGGD-97-157 (Aug. 1997)); 5 Thomas Oekmke, *Commercial Arbitration, App. A1, Commercial Arbitration Rules and Mediation Procedures* (3d ed. 2007).

Ohio St. J. on Disp. Resol. 559, 563-64, 567-68 (2001). This Court has expressly recognized the benefit of arbitration in the employment context because the fractional cost of arbitration allows employees to pursue claims against employers, "which often involve[] smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation").[10]

Contracting parties that seek comprehensive arbitration of work-related claims for principally economic reasons would have no reason to exclude certain types of claims implicitly, as the Fifth Circuit impermissibly presumed. Carving out certain types of claims simply produces more expensive (and as here) duplicative jury trials. Nor is there any reason

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[10] Cumulative empirical studies also show that approximately 62 percent of employees prevail in arbitration whereas only 43 percent of employees prevail in court. *See* National Workrights Institute, *Employment Arbitration: What Does the Data Show* (2004), www.workrights.org/current/cd-arbitration.html. Arbitrated disputes involving consumer goods and employment claims take a median time of only 104 days to resolve and require a median cost of only $870. *See* B. Ostrom & N. Kauder, *Examining the Work of State Courts*, 1999-2000, at 39), National Center for State Courts (2000) http://www.ncsconline.org/D_Research/csp/1999-2000_Files/1999-2000_Tort-Contract_Section.pdf; *see also* Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure California Dispute Resolution Institute, August 2004, http://www.mediate.com/cdri/cdri_print_Aug_6.pdf. These disputes are resolved approximately 85% faster than litigating similar claims. *See id.*

to think employees would generally treat sexual assault claims differently from others. While Jones desires a jury trial for her claims, many employees would prefer the confidentiality of arbitration to filing public court complaints and enduring public jury trials on claims of sexual assault.[11]

The Fifth Circuit's approach leaves arbitration agreements indeterminate. Contracting parties cannot know in advance what claims a court – engaging in idiosyncratic analysis not anchored in the contract itself – might deem "significant" enough in their relationship to employment. It is impossible in many circumstances, and inefficient in all circumstances, for longstanding contracts to be constantly renegotiated to create express coverage of particular claims that various courts may have deemed excluded. And such a task would never be complete, depriving the contract parties of the predictability that such standard language is intended to achieve.

The narrowing standards applied by the Fifth Circuit and other courts have produced legal uncertainty calling into question the scope of

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[11] *See, e.g.*, David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J.Crim. L. & Criminology 1194, 1221 (1997) (discussing underreporting of sexual abuse in the U.S., noting that "[s]ome rape victims are too upset, or too embarrassed at the prospect of answering a stranger's intimate questions about the incident, or so ashamed that they do not want anyone, even their friends, to know about it."); *c.f.* Bonnie S. Fisher et al., Nat'l Inst. of Justice, U.S. Dept. of Justice, The Sexual Victimization of College Women (2000) (finding that fewer than 3% of completed or attempted sexual contacts not amounting to rape, and less than 5% of completed rapes, of U.S. college women are reported to the police).

arbitration clauses contained in millions of employment contracts. This leaves the contractual rights of both employers and employees in legal limbo. Indeed, because the economics of arbitration are often favorable to employees, narrowing the scope of otherwise broad arbitration provisions may leave "the majority of employees who need arbitration to obtain justice empty handed." *See* 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 .

This Court should grant review to ensure that the plain language and intent of comprehensive arbitration contracts is honored, consistently with the traditional presumption of arbitrability established by its precedents.

CONCLUSION

This Court should grant review, and reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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