No. 15-3540

In the United States Court of Appeals *for the* Eighth Circuit

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Elizabeth McLeod, et al,

Plaintiffs-Appellees,

v.

General Mills, Inc.,

Defendant-Appellant.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
Civ. No. 15-cv-494 (JRT/HB), Hon. John R. Tunheim

APPELLANT'S PRINCIPAL BRIEF AND ADDENDUM

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Plaintiffs are former employees who are alleging claims against General Mills under the Age Discrimination in Employment Act (ADEA). In response to Plaintiffs' complaint, General Mills moved to compel arbitration under Federal Arbitration Act (FAA) because all of Plaintiffs' claims are covered by both written releases and arbitration agreements. Although it has been settled for 25 years that ADEA claims may be arbitrated, *see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the district court denied the motion. It concluded that, although ADEA claims are arbitrable, ADEA releases cannot be addressed together with the claims they cover in arbitration, but must be litigated in court. Every part of the district court's analysis is incorrect. The phrase it relied on, "court of competent jurisdiction," is one that the Supreme Court has already held is consistent with arbitration. The provision it relied on, addressing the burden of proof, is part of a set of amendments to the ADEA that the Supreme Court has already held is consistent with arbitration. And the conclusion it reached, that Congress intended to preclude arbitration of ADEA releases, is flatly inconsistent with an express congressional statement, added by amendment, that encourages parties to use arbitration to resolve disputes arising under all provisions of the ADEA, including those addressing releases. *See* 42 U.S.C. § 1981 note.

This Court should reverse and remand with exceptionally clear instructions to dismiss or stay this case and order Plaintiffs to proceed in individual arbitration. General Mills respectfully requests 15 minutes of oral argument per side.

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CORPORATE DISCLOSURE STATEMENT

Appellant General Mills, Inc. ("General Mills") does not have a parent corporation, and no publicly held corporation owns 10 percent or more of its stock. *See* Fed. R. App. P. 26.1(a); Eighth Circuit Rule 26.1A.

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JURISDICTIONAL STATEMENT

The district court has original jurisdiction over this case under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(c)(1), and the federal "arising-under" jurisdictional statute, *see* 28 U.S.C. § 1331.

This Court has appellate jurisdiction under 28 U.S.C. § 1294 and 9 U.S.C. § 16(a)(1)(B). *See Unison Co. v. Juhl Energy Dev., Inc.*, 789 F.3d 816, 818 (8th Cir. 2015). General Mills timely filed a notice of appeal on November 3, 2015, from an October 23, 2015 order of the district court that denied General Mills's motion to compel arbitration under the Federal Arbitration Act.

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STATEMENT OF THE ISSUE

1. Did the district court err in holding that ADEA releases cannot be addressed together with the claims they cover in arbitration, but must be litigated in court?

Apposite statutes

- Federal Arbitration Act, 9 U.S.C. §§ 2-4.
- Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, as amended by the Older Workers Benefit Protection Act of 1990, Pub. L. 101-433, 101 Stat. 978 (Oct. 16, 1990), codified in relevant part at 29 U.S.C. § 626(f), and the Civil Rights Act of 1991, Pub. L. 102-166, § 118, 105 Stat. 1071 (Nov. 21, 1991), codified at 42 U.S.C. § 1981 note

Apposite cases

- *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012)
- *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009)
- *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)
- *Faber v. Menard, Inc.*, 367 F.3d 1048 (8th Cir. 2004)

STATEMENT OF THE CASE

Each Plaintiff in this case had his or her employment with General Mills terminated in a company restructuring that occurred in June 2012. (A94, A98-104, ¶¶ 2, 13-45.)[1] To support its former employees with their transitions, while also advancing the interest of closure, General Mills offered each Plaintiff a severance package, in exchange for signing a Release Agreement. Each Plaintiff accepted the offer in writing. The signed individual Release Agreements are part of the record (A47-A92, A153-A212), and one is reprinted by way of example in General Mills's Addendum. (*See* Add. 23-24.) For all purposes relevant to this appeal, Plaintiffs' Release Agreements are identical.

In the Release Agreements, each Plaintiff agreed to two provisions that are material here. First, each Plaintiff gave General Mills a release of all claims under the Age Discrimination in Employment Act (ADEA). The release covers "all causes of action, claims, debts or other contracts and agreements," including "all claims under federal, state, and local laws prohibiting employment discrimination, harassment, or retaliation," and "specifically includes, without limitation, claims arising under the Age Discrimination In Employment Act." (Add. 23.)

Second, each Plaintiff agreed to arbitrate on an individual basis any dispute arising out of or relating to the release, including any underlying claim of

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[1] Citations to "A_" are to General Mills, Inc.'s Separate Appendix.

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discrimination. The arbitration provision states, in pertinent part:

> [I]n the event there is any dispute or claim arising out of or relating to the above release of claims, including without limitation, any dispute about the validity or enforceability of the release or the assertion of any claim covered by the release, all such disputes or claims will be resolved exclusively through a final and binding arbitration on an individual basis and not in any form of class, collective, or representative proceeding.

(Add. 23.)

Approximately three years after the layoffs, on February 11, 2015, fourteen Plaintiffs commenced this case in federal district court against General Mills. (A1-A43.) Each of the fourteen Plaintiffs had given General Mills a release and agreed to arbitrate. (A47-92.) General Mills moved to compel arbitration and dismiss the lawsuit, arguing that the Federal Arbitration Act (FAA) required Plaintiffs to honor—and the court to enforce—their agreements to arbitrate any claims against General Mills in individual proceedings. (A44-46.) In March 2015, Plaintiffs filed an Amended Complaint that increased the total number of Plaintiffs to thirty-three but left the claims unchanged. (A93-A148.) Each of the new Plaintiffs also had given General Mills a release and agreed to arbitrate. (A153-212.) General Mills filed an updated motion addressing the Amended Complaint. (A149-152.) Plaintiffs opposed the motion, arguing that the ADEA overrode the FAA and precluded arbitration of their claims. (*See* Dkts. 10, 36.) [2]

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[2] Unless otherwise noted, citations to docket entries refer to the district court's docket. *See* Fed. R. App. P. 28(e).

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On October 23, 2015, the district court, the Honorable John R. Tunheim, issued an order denying General Mills's motion to compel arbitration. (*See* Add. 1-22.) The court recognized that the FAA expresses a "strong federal policy in favor of enforcing arbitration agreements." (Add. 9.) It acknowledged that, under the FAA, arbitration agreements must be enforced as to federal statutory claims unless the statute contains an "express 'contrary congressional command.'" (*Id.* at 14, quoting *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013).) It granted that the Supreme Court has held that the ADEA does not contain a congressional command precluding arbitration but instead allows ADEA claims to be arbitrated. (*Id.* at 14-15, citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).) Finally, it rejected Plaintiffs' argument that an arbitration agreement covering ADEA claims must comply with the provisions of the ADEA that govern whether a release of claims is "knowing and voluntary," finding that the Supreme Court "clearly held the opposite." (*Id.* at 16, citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009).)

The court nonetheless held that the ADEA contains a congressional command that precludes enforcement of Plaintiffs' arbitration agreements. Relying on a provision of the ADEA that addresses the affirmative defense of waiver, and that places the burden of proving the validity of a waiver on the party seeking to enforce it, *see* 29 U.S.C. § 626(f)(3), the court found that the language in that provision referring to a "court of competent jurisdiction" expresses a congressional intent to preclude arbitration of ADEA releases, even though arbitration is permitted for

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ADEA claims. (Add. 18-20.) The court acknowledged that the Supreme Court has "repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court." (*Id.* at 17, quoting *CompuCredit v. Greenwood*, 132 S. Ct. 665, 670-671 (2012).) But it found that, because § 626(f)(3) states that the party asserting a waiver "shall have" the burden of proof "in a court of competent jurisdiction," litigation in court is required notwithstanding the Supreme Court's holdings. (*Id.* at 18.)

On November 3, 2015, General Mills timely filed its Notice of Appeal. (A235-238.) General Mills moved to stay proceedings in the district court pending resolution of this appeal, but the district court denied the motion. (A239-244.) After the district court denied a stay, this Court granted one. (A245.)

SUMMARY OF ARGUMENT

General Mills is entitled to have this case ordered to arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, because each Plaintiff entered a valid agreement to arbitrate his or her claims under the Age Discrimination in Employment Act (ADEA), and it has been settled for 25 years that ADEA claims may be arbitrated, *see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

Every part of the analysis the district court used to deny General Mills's motion to compel arbitration is incorrect. It reasoned that although Congress intended for ADEA claims to be arbitrable, it commanded that ADEA releases cannot be addressed together with the claims they cover in arbitration, but must be litigated in

court. The only support the district court cited for this holding is 29 U.S.C. § 626(f)(3), whose sole function is to place the burden of proving the validity of a release on the party seeking to enforce it. The district court erred at the outset in looking to this peripheral provision of the ADEA to discern Congress's intent on arbitration, when the Supreme Court has already held that it would be "strikingly out of place" to find an intent to block arbitration in such a minor provision of a statute. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 670 (2012). Not just that, but the Supreme Court has already held that the primary ADEA provision creating a cause of action is entirely consistent with arbitration. *Gilmer,* 500 U.S. at 29. Given these holdings, there was no space for the district court to hold that a provision that addresses only the burden of proof for an affirmative defense could express a contrary command.

Not only did the district court look in the wrong place for evidence of congressional intent regarding arbitration, but it ignored the binding Supreme Court interpretation of the text it found. Section 626(f)(3) refers to enforcing an ADEA release in "a court of competent jurisdiction." The district court interpreted this phrase as manifesting congressional intent to preclude arbitration. But the ADEA uses the exact same phrase in § 626(c)(1), the section that creates the cause of action to enforce the ADEA, and the Supreme Court has held that the phrase in that section is consistent with arbitration. *See Gilmer*, 500 U.S. at 29. Not just that, but the Supreme Court has "repeatedly recognized that contractually required arbitration of claims

satisfies the statutory prescription of civil liability in court." *CompuCredit*, 132 S. Ct. at 671. It was error for the district court to depart from these clear holdings of the Supreme Court.

Finally, interpreting the ADEA to divorce the treatment of releases and claims, allowing ADEA claims to be arbitrated but precluding releases from being addressed in the arbitration together with the claims they cover, would introduce a measure of illogic and inefficiency into the ADEA's remedial scheme that it is impossible to believe Congress intended. No court has ever adopted this interpretation—and what sense would it make to require an affirmative defense to be decided by a court when the ADEA claims themselves must be decided by an arbitrator? To attribute such an intent to Congress would require an exceptionally clear statement. No such statement exists in § 626(f).

To the contrary, the only express statement that Congress enacted to address arbitration under the ADEA explicitly "encourage[s]" parties to use "alternative means of dispute resolution," including "arbitration." *See* Civil Rights Act of 1991, Pub. L. 102-166, § 118, 105 Stat. 1071 (Nov. 21, 1991), codified at 42 U.S.C. § 1981 note. This congressional statement of approval for arbitration does not distinguish between claims, defenses, and other rights addressed by the ADEA. Instead, it encourages the use of alternative dispute resolution to resolve all "disputes arising under the Acts or provisions of Federal law amended by this title." *Id.* Included among the "Acts" covered by this statement is the ADEA, and included among the

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"provisions of Federal law" is § 626(f)(3), governing ADEA releases. It is therefore Congress's express intent to encourage the use of arbitration for disputes relating to the enforceability of ADEA releases. The district court's contrary holding has no support in law.

This Court should reverse and remand with exceptionally clear instructions to dismiss or stay this case and order Plaintiffs to proceed in individual arbitration.

ARGUMENT

I. The District Court Erred In Failing To Enforce Plaintiffs' Binding Arbitration Agreements With General Mills.

Plaintiffs in this case all agreed, in writing, to resolve "any dispute or claim arising out of or relating to" their Age Discrimination in Employment Act (ADEA) releases and claims in individual arbitration rather than in court. (*See* A47-A92, A153-A212.) As the district court noted, "plaintiffs do not in any way challenge the validity of their arbitration agreements (e.g., that the signatures were forged or that they were forced to sign under duress)." (Add. 12.)

General Mills was therefore entitled to have this case ordered to arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16. When a valid agreement to arbitrate exists, and when it covers the claims that a plaintiff is asserting in litigation, the FAA requires courts to compel arbitration and either stay or dismiss the litigation. *See* 9 U.S.C. §§ 3-4; *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000); *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769-70 (8th Cir. 2011); *Bailey v. Ameriquest Mortg.*

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Co., 346 F.3d 821, 822 (8th Cir. 2003). The only exception is if the claims at issue are federal statutory claims and Congress has commanded that they be excluded from arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627-28 (1985); *Bailey*, 346 F.3d at 823. But for 25 years, it has been settled by the Supreme Court itself that the ADEA does not contain any command precluding arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009).

The district court, notwithstanding the Supreme Court's holdings, refused to enforce Plaintiffs' agreements based on a finding that Congress intended to treat ADEA releases differently from ADEA claims, allowing the claims to be arbitrated but not the releases of those claims. That finding ascribes an illogic to Congress that is not supported by anything in the text or structure of the ADEA, that is contradicted by decades of precedent from the Supreme Court and this Court, and that flies in the face of an express congressional amendment encouraging the use of arbitration to resolve disputes arising under all provisions of the ADEA, including those addressing releases.

This Court reviews the denial of General Mills's motion to compel arbitration *de novo*. *See Unison Co v. Juhl Energy Dev., Inc.*, 789 F.3d 816, 818-21 (8th Cir. 2015); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013). It should reverse.

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A. The statutory right to arbitrate under the FAA must be enforced absent an express, contrary statutory command.

The right to arbitrate under the FAA is a federal, statutory right that preempts all contrary state laws, and that yields only to a contrary, congressional command.

Congress enacted the FAA in 1925 "in response to widespread judicial hostility to arbitration." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308-09 (2013). Its primary substantive provision states that a written agreement "to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision requires courts—they have no discretion in the matter—to "rigorously enforce arbitration agreements according to their terms." *Italian Colors*, 133 S. Ct. at 2309; *see Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

Just as any federal statute may be limited by a subsequent federal statute, so too may the FAA be limited, and Congress may direct that particular claims cannot be decided in arbitration. *See Mitsubishi Motors*, 473 U.S. at 627-28; *Bailey*, 346 F.3d at 823.

But Congress's ability to create exceptions to the FAA does not mean that courts may infer them. Congress chose to enact the FAA, and only Congress can create exceptions to it. Courts therefore will not find an exception to the FAA unless it has been "overridden by a contrary congressional command." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012); *Shearson/American Express Inc. v. McMahon*, 482

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U.S. 220, 226 (1987). Litigants who have asked courts to infer exceptions based on supposed conflicts with other federal statutes have repeatedly been rebuffed, because arbitration is perfectly consistent with enforcing the substantive requirements of other statutes. "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628. Arbitrators, moreover, "are perfectly capable of protecting statutory rights when the parties have conferred the authority to decide statutory claims." *Bailey*, 346 F.3d at 823. Hence, there is no "inherent inconsistency between" federal anti-discrimination statutes and "enforcing agreements to arbitrate … discrimination claims." *Gilmer*, 500 U.S. at 27.

Because of the difficulty of demonstrating a congressional command to preclude arbitration absent an express provision, Plaintiffs cannot point to any case—not one decision—where either the Supreme Court or this Court has found that another federal statute implicitly created an exception to the FAA. To the contrary, the Supreme Court has repeatedly rejected such arguments and held that agreements to arbitrate federal statutory claims must be enforced. *See CompuCredit*, 132 S. Ct. at 670-73 (Credit Repair Organizations Act); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484-85 (1989) (Securities Act of 1933); *Shearson/ American Express, Inc. v. McMahon*, 482 U.S. 220, 238, 242 (1987) (Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors*, 473 U.S. at 640 (Clayton Act). These many holdings follow directly from the general

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principle that, when statutes "are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 109 (1991) (applying the "superior value" of "harmonizing different statutes" insofar as "two statutes are capable of coexistence").

B. The ADEA does not contain any express, congressional command precluding the arbitration of ADEA claims.

Applying the controlling standard, the Supreme Court, this Court, and other federal appellate courts have repeatedly held that the ADEA does not express any congressional command creating an exception to the FAA. Those holdings are controlling here.

The ADEA was enacted in 1967 to combat discrimination on the basis of age. *See* Pub. L. 90-202, 81 Stat. 602-08 (Dec. 15, 1967). It was amended in 1990 through the Older Workers Benefit Protection Act (OWBPA) to provide that releases of ADEA claims must be "knowing and voluntary" and to prescribe the conditions for finding them to be such. *See* 29 U.S.C. § 626(f)(1). The provision that the district court relied on for its holding, § 626(f)(3), was one of the provisions added by the 1990 amendments, and it places the burden of proving the validity of a release on the party seeking to enforce it.

In 1991, Congress amended the ADEA again in the Civil Rights Act of 1991, Pub. L. 102-166, § 118, 105 Stat. 1071 (Nov. 21, 1991), an amendment which is

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codified at 42 U.S.C. § 1981 note. As part of those amendments, Congress expressly endorsed the use of alternative means of dispute resolution—specifically including arbitration—for disputes arising under the ADEA:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Pub. L. 102-166, § 118, 105 Stat. 1071 (Nov. 21, 1991), codified at 42 U.S.C. § 1981 note.

In 1991, before the enactment of the amendment endorsing arbitration but after the 1990 OWBPA amendments, the Supreme Court squarely held that the ADEA does not express any congressional intent contrary to arbitration, and hence that ADEA claims can be arbitrated under the FAA. *See Gilmer*, 500 U.S. at 35. The plaintiffs in *Gilmer* argued that requiring arbitration was "inconsistent with the statutory framework and purposes of the ADEA." *Id.* at 27. But the Supreme Court found no indication "that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act." *Id.* Since *Gilmer*, both this Court and the Supreme Court have repeatedly held that "ADEA claims are arbitrable." *Faber v. Menard, Inc.*, 367 F.3d 1048, 1052 (8th Cir. 2004); *see also 14 Penn Plaza*, 556 U.S. at 258 (declaring that the ADEA "does not preclude arbitration of claims brought under the statute"); *cf. Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 537-39 (8th Cir. 2002).

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Not only have courts held that the ADEA generally is consistent with arbitration, but they have also specifically held that the 1990 OWBPA amendments to the ADEA are consistent with arbitration. In *Gilmer*, the Supreme Court noted the passage of the recent 1990 OWBPA amendments, 500 U.S. at 28 n.3, described their regulation of releases, *id.*, and found that Congress "did not explicitly preclude arbitration or other nonjudicial resolution of claims, even in [those] recent amendments." *Id.* at 29. Again in its recent decision in *CompuCredit*, the Supreme Court reiterated its finding from *Gilmer*. *See CompuCredit*, 132 S. Ct. at 671 n.3. Although the statements in *Gilmer* and *CompuCredit* were dicta, federal courts "are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . a dictum is of recent vintage and not enfeebled by any subsequent statement." *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 809 (8th Cir. 2013) (quotation omitted). Likely for that reason, every federal appellate court to consider the issue directly has held that the 1990 OWBPA amendments do not evince any intent to preclude arbitration of ADEA claims. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 12-14 (1st Cir. 1999); *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 181-82 (3rd Cir. 1998), *overruled on other grounds*, 531 U.S. 79 (2000); *Williams v. CIGNA Fin. Advisors*, 56 F.3d 656, 660-61 (5th Cir. 1995).

The Supreme Court has also categorically held that arbitration agreements are not subject to the provisions of the 1990 OWBPA amendments, which preclude

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prospective waivers of ADEA claims altogether and require that retrospective waivers or releases be "knowing and voluntary." *14 Penn Plaza*, 556 U.S. at 265-66; *see also* 29 U.S.C. § 626(f)(1). Plaintiffs in *14 Penn Plaza* argued that, because arbitration agreements waive the right to a jury trial, pre-dispute agreements are barred by § 626(f)(1), and post-dispute agreements must comply with the provisions governing ADEA releases. The Supreme Court, however, rejected those arguments, explaining that "[t]he decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance." 556 U.S. at 265-66. As the district court thus recognized, Plaintiffs' argument in this case "that their waiver of their right to proceed in court must meet the requirements of the OWBPA in Section 626(f)(1) fails under explicit Supreme Court precedent." (Add. 16.)

Finally, both the Supreme Court and other courts of appeals have recognized that the 1991 amendment to the ADEA expressly encourages the use of arbitration. In *14 Penn Plaza*, the Supreme Court held that the amendment "expresses Congress' support for alternative dispute resolution." 556 U.S. at 259 n.6. The First Circuit likewise found that "[t]he question of congressional intent in this case is resolved primarily by looking at the language Congress chose to use" in the 1991 amendment, which encourages the use of arbitration for disputes arising under all provisions of the ADEA. *Rosenberg*, 170 F.3d at 8.

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C. The district court's distinction between the treatment of ADEA claims and ADEA releases is unsupported.

Instead of following the plain force of precedent and Congress's expression of purpose in the 1991 amendment and granting General Mills's motion to compel, the district court relied on 29 U.S.C. § 626(f)(3)[3] to attribute to Congress the illogical intent to make ADEA claims arbitrable but to preclude ADEA releases from being addressed together with the claims they cover in arbitration. This holding is, quite literally, unprecedented in the 25-year history of § 626(f)(3), and every part of the district court's analysis is incorrect.

1. Clear congressional commands to preclude arbitration cannot be found in peripheral provisions of a statute.

The district court erred at the outset in believing that a congressional command precluding arbitration would appear in a peripheral provision specifying the burden of proof for an affirmative defense—which is what § 626(f)(3) is—when the Supreme Court has already held that the provision creating the cause of action to enforce the ADEA does *not* evince such an intent. In *Gilmer*, the Court held that § 626(c)(1), which creates the right of action for ADEA claims and allows suit to be brought "in

[3] The full text of 29 U.S.C. § 626(f)(3) states:

> In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in [Section 626(f)(1) or (f)(2)] have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

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any court of competent jurisdiction," does not express a congressional intent to preclude arbitration. 500 U.S. at 29. Given that the Supreme Court has held that the provision addressing the forum for claims allows for arbitration, it is impossible to conclude that a provision addressing only the burden of proof for an affirmative defense expresses a contrary congressional command.

The Supreme Court expressly rejected a similar attempt to find an intent to preclude arbitration in an "anti-waiver" provision of a statute in its *CompuCredit* decision. In that case, the plaintiffs argued that two provisions in the Credit Repair Organization Act (CROA), one addressing disclosures and another addressing waivers, evinced a congressional intent to preclude arbitration. 132 S. Ct. at 669. The disclosure provision required businesses to tell customers that they "have a right to sue a credit repair organization." *Id.* The anti-waiver provision stated that any waiver by a consumer of "any right of the consumer" under the CROA "may not be enforced by any Federal or State court or any other person." *Id.* The Supreme Court rejected the argument that these provisions barred arbitration, holding that it would be "strikingly out of place" to find an intent to block arbitration "in a section that is otherwise devoted to" the issue of notice. *Id.* at 670. The Court added that it would "take[] a considerable stretch to regard the nonwaiver provision as a 'congressional command' that the FAA shall not apply," *id.* at 671, and held that if Congress had meant to prohibit arbitration, "it would have done so in a manner less obtuse than what" plaintiffs suggested, *id.* at 672.

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In exactly the same way in this case, it would be "strikingly out of place" to find an intent to block arbitration in a section that otherwise addresses only the burden of proof—and the burden of proof, moreover, only for an affirmative defense—which is all that § 626(f)(3) does. Congress does not alter the fundamental details of a statutory scheme in "vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001). Rather, when Congress has intended to preclude arbitration, it has said so quite directly.[4] It included no such statement in the ADEA.

This Court corrected a similar interpretive error in *Unison Co.*, where it rejected the argument that a jurisdictional provision in a contract contradicted an arbitration clause. In that case, the plaintiff argued that a provision consenting "to the jurisdiction of courts of the State of Minnesota" and in the U.S. District Court was inconsistent with arbitration. 789 F.3d at 820. This Court rejected the argument, holding that "the jurisdiction clause answers a different question than does the arbitration clause." *Id.*

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[4] *See, e.g.,* 7 U.S.C. § 26(n)(2) ("[N]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."); 12 U.S.C. § 5567(d)(2) ("[N]o predispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section."); 18 U.S.C. § 1514A(e)(2) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."); *see also* The "Franken Amendment" in the Department of Defense Appropriations Act, Pub. L. No. 111-118, § 8116(a), 123 Stat. 3454-55 (Dec. 19, 2009) (preventing appropriation of funds to any federal contractor unless the contractor agrees not to require employees to arbitrate Title VII claims and specified intentional torts).

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The "arbitration clause," the Court explained, "permits a party to submit a dispute to binding arbitration," whereas the jurisdiction clause simply "identifies the agreed-upon jurisdiction" for any proceedings in court. *Id.* In the same way, § 626(f)(3) answers a different question than the permissibility of arbitration under the ADEA. It addresses which party bears the burden of proof in enforcing a release of ADEA claims, and it "does not address whether, or under what circumstances, a dispute must be litigated and resolved in court." *Unison Co.*, 789 F.3d at 820.

2. The text of the provision governing the burden of proof for releases does not express any intent to preclude arbitration.

Not only did the district court look in the wrong place for evidence of congressional intent regarding arbitration, but it ignored the binding Supreme Court interpretation of the text it found.

Section 626(f)(3) refers to enforcing an ADEA release in "a court of competent jurisdiction." The district court interpreted this phrase as manifesting congressional intent to preclude arbitration. (Add. 17.) But the ADEA uses the exact same phrase in § 626(c)(1), the section that creates the cause of action to enforce the ADEA, and the Supreme Court has held that the phrase in that section is entirely consistent with arbitration. *See Gilmer*, 500 U.S. at 29. Courts will not ascribe a different meaning to the same phrase used in the same statute. *See Kifer v. Liberty Mut. Ins. Co.*, 777 F.2d 1325, 1333 & n.9 (8th Cir. 1985). Hence, under *Gilmer*, the district court was not free to interpret "court of competent jurisdiction" in a way that disfavored arbitration.

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The district court's attempt to distinguish *Gilmer* based on the mandatory language of "shall" used in § 626(f)(3) versus the permissive language of "may" used in § 626(c)(1) is incorrect for two reasons. First, the distinction does not reach the core holding of the Supreme Court, repeated both in *Gilmer* and elsewhere, that arbitration satisfies a statutory requirement of enforcement in a "court of competent jurisdiction" because of the availability of judicial review under section 10 of the FAA, 9 U.S.C. § 10. In *Mitsubishi Motors*, the Court held that the Clayton Act did not evince an intent against arbitration because, "[h]aving permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws." *Mitsubishi Motors*, 473 U.S. at 638; *see also McMahon*, 482 U.S. at 240 (citing *Mitsubishi Motors* on this issue). Again in *CompuCredit*, the Supreme Court confirmed that "contractually required arbitration of claims satisfies the statutory prescription of civil liability in court." 132 S. Ct. at 671. Thus, regardless of whether the reference to a "court of competent jurisdiction" is mandatory or permissive, it is satisfied by arbitration.

Second, the district court erred in applying the mandatory "shall" language to the question of arbitration, when it is directed at a different issue entirely. To be specific, the "shall" in § 626(f)(3) is directed *not* at the forum for litigation, but at *who* bears the burden of proof in enforcing a waiver of ADEA claims: The party seeking to enforce the waiver "shall" bear that burden. The difference between the use of

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"may" in § 626)(c)(1) and "shall" in § 626(f)(3), moreover, is compelled by the different context of those two provisions and demonstrates no intent to preclude arbitration. Congress used "may" for bringing claims and "shall" for the burden of proof because to do otherwise would have made no sense. It would have been absurd to state that aggrieved persons "shall" (i.e., were *required* to) bring ADEA claims, just as it would have been absurd to state that the party enforcing an ADEA waiver "may" have the burden of proof. In short, the district court's basis for distinguishing *Gilmer*'s interpretation of "court of competent jurisdiction" in the ADEA is textually unfounded.

Beyond all this, the district court's textual interpretation is inconsistent with the Supreme Court's repeated holdings that statutory references to the terms "action" and "court" are "utterly commonplace" and "cannot do the heavy lifting" of expressing a congressional command precluding arbitration. *CompuCredit*, 132 S. Ct. at 670. The district court made no attempt to reconcile its decision to the holdings of *CompuCredit* and the cases it cites. Instead, it relied on two district court decisions, which interpreted "court of competent jurisdiction" in the context of contracts rather than statutes and thus are irrelevant. (*See* Add. 16.) In the context of statutes, the Supreme Court's instruction is controlling: "If the mere formulation of the cause of action in this standard fashion were sufficient to establish the 'contrary congressional command' overriding the FAA, valid arbitration agreements covering federal causes of action would be rare indeed." *CompuCredit*, 132 S. Ct. at 670 (citation omitted).

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3. Divorcing the treatment of releases and claims makes no sense and is inconsistent with the 1991 amendment encouraging the use of arbitration under the ADEA.

Finally, interpreting the ADEA to divorce the treatment of releases and claims, allowing ADEA claims to be arbitrated but precluding releases from being addressed in arbitration together with the claims they cover, would introduce a measure of illogic and inefficiency into the ADEA's remedial scheme that it is impossible to believe Congress intended. What sense would it make to require an affirmative defense to be decided by a court when the ADEA claims themselves must be decided by an arbitrator, as the Supreme Court has held in *Gilmer* and *14 Penn Plaza*? To attribute such intent to Congress would require an exceptionally clear statement. No such statement exists in § 626(f).

To the contrary, the only express statement that Congress enacted to address arbitration under the ADEA explicitly "encourage[s]" parties to use "alternative means of dispute resolution," including "arbitration." *See* Civil Rights Act of 1991, Pub. L. 102-166, § 118, 105 Stat. 1071 (Nov. 21, 1991), codified at 42 U.S.C. § 1981 note. This congressional statement of approval for arbitration—which was made after the 1990 OWBPA amendments that added § 626(f)—does not distinguish between claims, defenses, and other rights addressed by the ADEA. Instead, it encourages the use of alternative dispute resolution to resolve all "disputes arising under the Acts or provisions of Federal law amended by this title." *Id.* Included among the "Acts" amended "by this title" are the ADEA and the OWBPA, and included among the

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"provisions of Federal law" is § 626(f), governing ADEA releases. It is therefore Congress's express intent to encourage the use of arbitration for "disputes arising under" the ADEA and OWBPA relating to the enforceability of releases. The district court's contrary holding has no support in law.

Ultimately, the district court's decision can be explained only by the type of hostility to arbitration that has repeatedly led to reversals in the Supreme Court and this Court. Just this term, the Supreme Court reversed a lower court decision for failing to give "due regard . . . to the federal policy favoring arbitration." *See DirecTV, Inc. v. Imburgia*, S. Ct. Dkt. No. 14-462, at 10 (slip op. Dec. 14, 2015). Over the last decade, it has done so repeatedly. *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500 (2012); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *Buckeye Check Cashing v. Cardegna*, 546 U.S. 468 (2006).

This Court, too, has consistently and repeatedly reversed decisions denying motions to compel arbitration. *Unison Co v. Juhl Energy Dev., Inc.*, 789 F.3d 816, 818-21 (8th Cir. 2015); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052-55 (8th Cir. 2013); *Franke v. Poly-America Med. & Dental Benefits Plan*, 555 F.3d 656, 658-59 (8th Cir. 2009); *Faber v. Menard, Inc.*, 367 F.3d 1048, 1052-55 (8th Cir. 2004); *Bailey v. Ameriquest Mortg. Co.*, 346 F.3d 821, 822-24 (8th Cir. 2003) (reversing decision of Tunheim, J.); *Larry's United*

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Super, Inc. v. Werries, 253 F.3d 1083, 1085-87 (8th Cir. 2001); *accord Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 537-39 (8th Cir. 2002) (affirming order compelling arbitration).

As demonstrated above, an interpretation of § 626(f)(3) that makes it consistent with arbitration is not only available, but compelled by the text, structure, and history of the ADEA. Because § 626(f)(3) can be interpreted to be consistent with the FAA, it must be interpreted that way to give effect to both the FAA and the ADEA. The district court's contrary interpretation should be reversed.

D. The Court should not give any deference to the EEOC's views on arbitration under the ADEA.

For decades, the Equal Employment Opportunity Commission (EEOC) has refused to accede to the Supreme Court's holdings that ADEA claims are arbitrable, without ever acting to promulgate formal regulations addressing the point.[5] It has submitted amicus briefs opposing arbitration in each of the appeals addressing whether the 1990 OWBPA amendments to the ADEA preclude arbitration. Each time, its views have been given no deference. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, *Inc.*, 170 F.3d 1, 12 (1st Cir. 1999); *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 181-83 (3rd Cir. 1998); *Williams v. CIGNA Fin. Advisors*, 56 F.3d 656, 660-61 (5th

[5] *See, e.g., Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, EEOC Notice No. 915.002, July 10, 1997, *available at* www.eeoc.gov/policy/docs/mandarb.html (last visited on Jan. 6, 2016) (explicitly rejecting the holding in *Gilmer*).

Cir. 1995). In the proceedings below, the EEOC likewise submitted an amicus brief in support of Plaintiffs. (*See* Dkt. 41.) The district court did not accord any deference to the EEOC's position or even address it in the court's opinion. (*See generally* Add. 1-22.)

The EEOC's position opposing arbitration is entitled to no deference on appeal. The Supreme Court has made it clear that "[d]eference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988), and a convenient litigating position is all that the EEOC's opposition to arbitration is. Although the EEOC has authority to issue regulations to enforce the ADEA, 29 U.S.C. § 628, its regulation implementing the 1990 OWBPA amendments never mentions arbitration. It simply parrots the language the language of § 626(f)(3) and states that the party asserting the validity of a waiver "shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary." 29 C.F.R. § 1625.22(h). The one set of interpretations that the EEOC has issued of its regulations likewise does not address arbitration. *See Waivers of Rights and Claims: Tender Back of Consideration*, 65 Fed. Reg. 77,438 (Dec. 11, 2000).

Even if an agency's interpretations of its own formal regulations can ever receive deference,[6] no deference is warranted when the underlying regulation "does

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[6] In *Auer v. Robbins*, the Supreme Court held that an informal interpretation may receive deference if it interprets the issuing agency's own ambiguous formal regulations. 519 U.S. 452, 461-63 (1997). More recently, however, multiple Justices

(footnote continued)

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little more than restate the terms of the statute itself." *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). A previous claim by the EEOC for deference to its interpretation of an ADEA regulation was rejected on precisely this ground, with the Supreme Court holding that it was "not entitled to deference because, on its face, the regulation 'does little more than restate the terms of the statute itself.'" *Ky. Ret. Sys. v. EEOC*, 554 U.S. 135, 149 (2008) (citation omitted). Exactly the same is true here. The EEOC's views regarding arbitration are not entitled to deference, because its regulation addressing ADEA releases does nothing more than restate the terms of the statute and makes no reference to arbitration.

The First Circuit's opinion in *Rosenberg*, 170 F.3d 1, 12 (1st Cir. 1999), is directly on point. In *Rosenberg*, the EEOC intervened as an amicus curiae and argued, as it did below, that its views on arbitration under the OWBPA were entitled to deference. The First Circuit rejected that argument, noting:

(footnote continued from previous page)

have expressed the view that *Auer* was or may have been wrongly decided. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1210-13 (2015) (opinions of Scalia and Alito, JJ., concurring in the judgment); *Decker v. Nw. Envtl. Defense Ctr.*, 133 S. Ct. 1326, 1338-42 (2013) (opinion of Roberts, C.J, concurring, and opinion of Scalia, J., concurring in part and dissenting in part); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (citation omitted). To preserve the issue for review in the Supreme Court, General Mills expressly contends that *Auer v. Robbins* was wrongly decided and maintains that courts should give no deference to an agency's interpretations of its own formal regulations. *Cf. Perez v. Loren Cook Co.*, 803 F.3d 935, 939-43 (8th Cir. 2015) (en banc) (declining to defer to the Secretary of Labor's interpretation of its own regulations).

> We do not defer to views espoused only in the context of litigation. This is particularly true where the agency has gone through rule making and has conspicuously ignored the topic in its rules.

Id. at 12 (citation omitted). Sixteen years after *Rosenberg* was decided, nothing has changed. The EEOC still has not addressed arbitration in its regulations, yet it is still claiming deference to its litigating position. There is no basis to its claim, and the Court should expressly reject it.

II. This Court Should Reverse With Exceptionally Clear Instructions To Grant The Motion To Compel Individual Arbitration.

Because the only reason that the district court gave for denying General Mills's motion to compel arbitration is incorrect, this Court should reverse and remand with instructions to grant the motion. To prevent any possibility of misunderstanding or delay on remand, moreover, the Court should make two things clear in its mandate.

First, the Court should make it clear that Plaintiffs are being ordered to individual arbitration proceedings. "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 664 (2010). Conversely, agreements to arbitrate individually, without the availability of classwide arbitration procedures, are fully enforceable. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346–49 (2011); *Am. Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054-55 (8th Cir. 2013); *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769-70 (8th Cir. 2011). The arbitration

agreements between each Plaintiff and General Mills expressly require individual arbitration proceedings, without any possibility of class or collective proceedings. (*See* A47-A92, A153-A212.) That provision of the agreements must be enforced.

Second, the Court should make it clear that all of Plaintiffs' ADEA claims, as well as all defenses and other issues related to their claims, must be resolved in arbitration, so the entire lawsuit must be stayed or dismissed. The plain language of the arbitration provision covers not only "any dispute or claim arising out of or relating to the above release of claims," but also "any claim covered by the release." (*E.g.,* Add. 23.) One class of claims covered by the release is claims brought under the "Age Discrimination in Employment Act." (*Id.*) The phrasing "arising out of or relating to," moreover, is "the broadest language the parties could reasonably use to subject their disputes" to arbitration, *Fleet Tire Serv. of N. Little Rock v. Oliver*, 118 F.3d 619, 621 & n.2 (8th Cir. 1997), and this Court has consistently reversed interpretations of arbitration agreements that do not give effect to such broad language. *See, e.g.*, *Unison Co.*, 789 F.3d at 818-21. The plain language of the arbitration provisions thus covers all aspects of each Plaintiff's dispute with General Mills.

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CONCLUSION

General Mills respectfully requests that the Court reverse the district court's October 23, 2015 order and remand with instructions to grant General Mills's motion to compel arbitration, dismiss or stay this lawsuit, and order that all of Plaintiffs' claims, including all defenses and other issues related to their claims, be addressed in individual arbitration proceedings.

Dated: January 7, 2016

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(A) because it does not exceed 30 pages, and it also complies with Fed. R. App. P. 32(a)(7)(B) because the brief contains 7,437 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 using 14-point Garamond.

3. The brief has been scanned for viruses and it is virus free.

Dated: January 7, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2016, I electronically filed the foregoing brief and addendum with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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