No. 15-3540

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

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 REPLY BRIEF

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INTRODUCTION

Plaintiffs hardly acknowledge, and the EEOC and AARP ignore entirely, the one place where Congress has spoken by law precisely to the question presented on this appeal. That question is whether Congress intended the 1990 OWBPA amendments to the ADEA to override the FAA and preclude parties from agreeing to arbitrate the validity of releases of ADEA claims. The answer to that question is found in the Civil Rights Act of 1991, where Congress expressly "encouraged" the use of arbitration to resolve disputes arising under all of the "provisions of Federal law amended by this title"—which included the OWBPA provisions addressing ADEA releases. Pub. L. 102-166, § 118, 105 Stat. 1071 (Nov. 21, 1991), codified at 42 U.S.C. § 1981 note. This statute is a specific, controlling statement of congressional intent that leaves no space for a contrary ruling that Congress actually intended to preclude arbitration.

Twice, moreover, the Supreme Court has declared that the 1990 OWBPA amendments do "not explicitly preclude arbitration." *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (referring to the "recent amendments" of the ADEA made by the OWBPA); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 671 & n.3 (2012). Again, Plaintiffs barely address these statements, and the EEOC and AARP ignore them entirely.

The specific provision that Plaintiffs rely on as evidence of a congressional command precluding arbitration never mentions arbitration. Instead, it refers only to

an employer carrying the burden of proof on enforcing a release in a "court of competent jurisdiction." 29 U.S.C. § 626(f)(3). Since the ADEA gives plaintiffs the right to sue in a "court of competent jurisdiction," § 626(c)(1), it is no surprise that the burden-of-proof provision echoes that phrase. Congress intended the employer to carry the burden of proof wherever suit can be brought. The question is whether that forum can include arbitration. The Supreme Court has held that it can, giving that binding interpretation to § 626(c)(1). *Gilmer*, 500 U.S. at 29. Section 626(f)(3)'s echoing of the language in § 626(c)(1) provides no basis for departing from *Gilmer*'s holding.

Plaintiffs offer no persuasive explanation why Congress would intend ADEA claims to be arbitrable, as Plaintiffs concede they are, yet prohibit releases of those claims from being decided together with them in arbitration. Citing *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998), and *Thomforde v. IBM Corp.*, 406 F.3d 500 (8th Cir. 2005), two cases that never mention arbitration, Plaintiffs imply that the validity of releases is too important an issue to be trusted to arbitrators. But the importance of those protections is utterly irrelevant to the question of whether they can be addressed in arbitration. "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985). General Mills agrees that the protections governing releases are important. That is why it so studiously provided

them and why it will ultimately be found to have fully respected the OWBPA.[1] But returning to the only point that is relevant here, the same arbitrators who can be trusted to resolve the merits of ADEA claims can also be trusted to address releases of those claims.

Finally, in *14 Penn Plaza LLC v. Pyett*, the Supreme Court held that arbitration agreements do not have to comply with the requirements governing releases of ADEA claims because the "right to a judicial forum is not the nonwaivable 'substantive' right protected by the ADEA." 556 U.S. 247, 256 (2009). Plaintiffs argue that *14 Penn Plaza* does not control this case, because here the arbitration agreements are included in the same document as the releases, which they say makes them releases. To state Plaintiffs' *non sequitur* of an argument is to refute it. Just because an arbitration agreement is included in the same document as a release of ADEA claims does not make it a release. It is still an arbitration agreement and still controlled by *14 Penn Plaza*. The district court agreed with General Mills on this point.

Since courts must reconcile statutes when possible rather than place them in conflict; since the Supreme Court has twice declared that the 1990 OWBPA amendments do not preclude arbitration and has never inferred a "congressional

[1] Several pages of the Appellees' Brief are devoted to alleged facts that are irrelevant to the threshold issue of arbitrability, but are intended to taint the Court's perception of General Mills' treatment of its former employees. (*See* Response Br. 5-8.) General Mills respectfully disagrees with Plaintiffs' allegations and expects that they will be shown to be wrong when these cases reach the merits stage in arbitration.

command" overriding the FAA from a statutory provision that does not mention arbitration; and since Congress has expressly encouraged the use of arbitration for disputes arising under all provisions of the ADEA, including the provisions addressing waivers; this Court should reverse and remand with clear instructions to grant the motion to enforce the parties' agreements and compel individual arbitrations.

ARGUMENT

I. The FAA Requires Plaintiffs' Arbitration Agreements To Be Enforced, And The ADEA Does Not Express A Contrary Congressional Command.

The legal standards governing this Court's interpretive inquiry are now undisputed. General Mills demonstrated, and Plaintiffs concede, that the FAA requires arbitration agreements to be enforced absent a "contrary congressional command." (*Compare* Opening Br. 11-13 *with* Response Br. 27, 35.) *See CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). General Mills further demonstrated (Opening Br. 12-13), and Plaintiffs do not dispute, that Congress is presumed to act consistently with its own, previously enacted laws, and courts thus must reconcile earlier and later statutes and give effect to both whenever possible. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974). This is particularly true for the FAA, which can easily be reconciled with other federal statutes granting substantive rights because, by agreeing to arbitrate, 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." *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

Under these controlling standards, the district court erred in holding that Congress intended to undo through the ADEA what it did in the FAA. The two statutes are entirely consistent—the substantive rights granted by the ADEA, including those granted by the 1990 OWBPA amendments, can be fully protected in arbitration—and hence Plaintiffs must be ordered to resolve their disputes with General Mills in individual arbitration, as they agreed they would.

A. Far from expressing an intent to preclude the arbitration of disputes arising under the ADEA's waiver provisions, Congress passed an amendment *encouraging* the use of arbitration to resolve those disputes.

The dispositive statement of Congress's intent regarding the interaction between the FAA and the ADEA is the one Congress enacted into law in 1991.

In 1991, Congress amended the civil rights laws to expressly "encourage" parties to use "alternative means of dispute resolution"—specifically including "arbitration"—to resolve disputes arising under all "provisions" of the covered laws. *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. As General Mills noted and Plaintiffs do not dispute, the waiver provisions added to the ADEA by the OWBPA are among the "provisions" covered by the 1991 amendment. (*Compare* Opening Br. 23-24 *with*

Response Br. 36-37.) Congress's expression of intent to encourage arbitration thus applies directly to the provisions at issue in this case.

This Court has repeatedly recognized that, in the 1991 amendment, "Congress encouraged the use of alternative dispute resolution, including arbitration." *EEOC v. Woodmen of the World Life Ins. Soc'y*, 479 F.3d 561, 565 (8th Cir. 2007); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997) (same). The Supreme Court has likewise held that the 1991 amendment "encourages the use of arbitration" to resolve ADEA claims. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 259 n.6 (2009). Moreover, because the 1991 amendment post-dates the waiver provisions added by the OWBPA in 1990, it shows that "Congress did not intend to preclude predispute arbitration agreements when it enacted the OWBPA." *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 12-13 (1st Cir. 1999); *see also Williams v. CIGNA Fin. Advisors*, 56 F.3d 656, 660 (5th Cir. 1995) ("There is no indication that Congress intended the OWBPA to affect agreements to arbitrate employment disputes.").

Plaintiffs argue that arbitration is "encouraged" only where it is "authorized by law" and "appropriate." (Response Br. 36.) That is true, but since the FAA authorizes arbitration, and since Congress encouraged the use of arbitration in an act amending the ADEA, Plaintiffs have no basis for arguing that the ADEA itself makes arbitration inappropriate. *See Seus v. John Nuveen & Co.*, 146 F.3d 175, 183 (3rd Cir. 1998) (interpreting the "where appropriate" clause "as a reference to the FAA").

Here, as everywhere, Plaintiffs rely on *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998), to divine a congressional intent contrary to arbitration, based on the importance of the rights governing waivers of ADEA claims. (*See* Response Br. 37.) But the importance of those rights is no reason to withhold them from arbitration. Arbitrators "are perfectly capable of protecting statutory rights." *Bailey v. Ameriquest Mortg. Co.*, 346 F.3d 821, 823 (8th Cir. 2003). As the First Circuit has explained, *Oubre* is "not particularly relevant" to the arbitration issue, and to the extent that it "has any relevance," it suggests "that the waiver provisions [in the OWBPA] refer to substantive claims" that can be presented in either "an arbitral or a judicial forum." *Rosenberg*, 170 F.3d at 13.

Plaintiffs also argue that "the specific governs the general" (Response Br. 37), but that principle cuts directly against their position. The 1991 amendments are the only place in which Congress specifically expressed its intent regarding the use of arbitration for disputes arising under the ADEA, and it "encouraged" that use. The provision Plaintiffs rely on, in contrast, does not specifically address arbitration. 29 U.S.C. § 626(f)(3). It is a general provision addressing the burden of proof for establishing the validity of a waiver, and hence, to the extent there is any conflict, § 626(f)(3) would yield on the issue of arbitration to Congress's specific statement of intent on that issue in the 1991 amendments.

B. The burden-of-proof provision in § 626(f)(3) is entirely consistent with Congress's intent to encourage the use of arbitration to resolve disputes arising under the ADEA.

There is, however, no conflict between the 1991 amendments and § 626(f)(3), because the latter provision is entirely consistent with Congress's intent to encourage the use of arbitration to resolve disputes arising under the ADEA.

Read in its statutory context and according to the plain meaning of its text, § 626(f)(3) instructs that the employer "shall have" the burden of proving the validity of a waiver wherever suit may be brought on an ADEA claim. To cement the congruity between the places where the employer will bear the burden and the places where suit may be brought, § 626(f)(3) uses the exact same phrase that § 626(c)(1) uses in setting the location for suit—"court of competent jurisdiction." The two provisions are drafted to be co-extensive. There is no location where an employee can bring suit that the employer will not bear the burden of proof on the validity of a waiver.

In *Gilmer*, the Supreme Court held that § 626(c)(1) allows ADEA claims to be brought in arbitration. 500 U.S. at 29. By echoing § 626(c)(1)'s language, § 626(f)(3) does not change the forum for suit. Instead, it binds the burden of proof to the locus of litigation and provides that the employer will carry the burden of proof on the validity of any ADEA waiver wherever suit is properly brought, including arbitration.

1. Plaintiffs cannot explain why § 626(f)(3) is the right place to look for congressional intent on arbitration.

Neither Plaintiffs nor their affiliated amici can explain why this Court should look to a burden-of-proof provision to divine Congress's intent on arbitration, instead of looking to the statute Congress enacted to address arbitration under the ADEA (the Civil Rights Act of 1991) or the provision in the ADEA that addresses the forum for litigation (§ 626(c)(1)). General Mills addressed the Civil Rights Act of 1991 above, and as to § 626(c)(1), the structure and history of the ADEA point to that provision, not § 626(f)(3), as the place to look for congressional intent on forum.

Section headings are tools "for the resolution of a doubt about the meaning of a statute." *Argus Leader Media v. U.S. Dep't of Agriculture*, 740 F.3d 1172, 1176 (8th Cir. 2014). And the headings of § 626 point to § 626(c) rather than § 626(f) as the place where Congress spoke to forum. The heading for § 626(c) indicates that it addresses the forum of litigation, listing "civil actions," "jurisdiction," "judicial relief," and "jury trial." The heading for § 626(f), in contrast, is simply "waiver," indicating that its intended purpose is to address the rules governing the validity of waivers (releases) of ADEA claims, which it does.

Given the structure and headings of § 626, it would be "strikingly out of place" for Congress to have expressed its intent on forum in § 626(f), the subsection devoted to "waivers," instead of in § 626(c), the subsection devoted to the topic of forum. *See*

CompuCredit, 132 S. Ct. at 670-71 (instructing courts to look to structure in discerning congressional intent on arbitration).

In addition, the history of § 626(f)(3) reinforces that it was directed at the burden of proof, not at the forum for suit. Before the OWBPA amendments, employees who challenged a waiver were in some jurisdictions "required to show that the waiver was not 'knowing and voluntary.'" *Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1539 (3rd Cir. 1997); *compare Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986) (employer had the burden of showing a waiver was knowing and voluntary). The purpose of § 626(f)(3) was to resolve a split of authority and place the burden on the employer. *Long*, 105 F.3d at 1539; *see also* Patrick Joseph Reston, *The Retention of Severance Benefits During Challenges of Waivers Under the Age Discrimination in Employment Act*, 27 Ind. L. Rev. 157, 166 (1993). It does just that, and it need not be interpreted to do anything more to implement Congress's intent.

In light of the structure and history of the ADEA, Plaintiffs have no plausible explanation why § 626(f) is the right place to look for congressional intent on forum.[2] Their interpretive argument therefore fails at the outset.

[2] The AARP, uniquely, compares the language of § 626(f)(3) ("court of competent jurisdiction") to § 623(f)(2) ("any civil enforcement proceeding"). (*See* AARP Br. 8-9.) But the latter provision is written differently because it refers to defenses that can be raised before the EEOC. (*See* Add. 19 n.5.) In any event, the AARP fails to address the holding that "contractually required arbitration of claims satisfies the statutory prescription of civil liability in court." *CompuCredit*, 132 S. Ct. at 671.

2. Plaintiffs cannot explain why § 626(f)(3) expresses a congressional command precluding arbitration.

Plaintiffs and their amici also interpret § 626(f)(3) incorrectly because, although they correctly emphasize the importance of text in interpreting statutes, they miss the two most important textual points when it comes to § 626(f)(3).

First, § 626(f)(3) never mentions arbitration. The Supreme Court recognized this point 25 years ago, declaring that the OWBPA amendments that added § 626(f)(3) do "not explicitly preclude arbitration." *Gilmer* , 500 U.S. at 29. It repeated the point more than 20 years later in *CompuCredit*, which specifically quoted § 626(f) and noted that *Gilmer* had said in dictum that it "did not explicitly preclude arbitration." 132 S. Ct. at 671 n.3. This Court is bound by the considered dicta of the Supreme Court. (*See* Opening Br. 15 (quoting *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 809 (8th Cir. 2013)). But all Plaintiffs say in response to *Gilmer* and *CompuCredit* is that *Gilmer*'s dictum was not "considered" because it did not specifically quote § 626(f)(3), and *Oubre* "subsequently addressed" the issue and "incorporated no exceptions or qualifications." (Response Br. 35.) *CompuCredit* refutes both of Plaintiffs' arguments.

First, it repeats and reaffirms *Gilmer*'s statement specifically in the context of a non-waiver provision, making it considered. 132 S. Ct. at 671. In addition, it does so in 2012, fourteen years after *Oubre* was decided in 1998, making it clear that *Oubre* has nothing to say about arbitration. When Congress intends to preclude arbitration, it

mentions arbitration. *See, e.g.,* 7 U.S.C. § 26(n); 18 U.S.C. § 1514A(e). Section 626(f)(3) does not mention arbitration, and in light of *Gilmer* and *CompuCredit*, there is no space for inferring an intent to preclude arbitration. *See also Seus*, 146 F.3d at 179 ("We find no such implied repealer of the FAA's provisions requiring the enforcement of agreements to arbitrate [under the OWBPA].").

Second, Plaintiffs cannot explain why the phrase "court of competent jurisdiction" in § 626(f)(3) should be given a different meaning than it holds in § 626(c)(1). In *Gilmer*, the Supreme Court held that § 626(c)(1)'s reference to a "court of competent jurisdiction" is entirely consistent with arbitration. *Gilmer*, 500 U.S. at 29. It has also held more broadly that "contractually required arbitration of claims satisfies the statutory prescription of civil liability in court." *CompuCredit*, 132 S. Ct. at 671. This Court has held that the same phrase should be given the "same meaning" throughout a statute. *Kifer v. Liberty Mut. Ins. Co.*, 777 F.2d 1325, 1333 n.9 (8th Cir. 1985). Plaintiffs cannot explain, in light of these holdings, how the reference to "court of competent jurisdiction" in § 626(f)(3) can possibly convey a congressional command precluding arbitration. Construing the phrase "court of competent jurisdiction" to allow for arbitration does not render those words "superfluous," as

Plaintiffs argue. (Response Br. 21-23; *see also* EEOC Br. 26-27.) It just gives them the same, broader meaning that the Supreme Court already held they have in § 626(c)(1).[3]

Third, because the phrase "court of competent jurisdiction" is entirely consistent with arbitration, the instruction that employers "shall" carry the burden of proof there is also entirely consistent with arbitration. Neither Plaintiffs nor their amici effectively respond to this point. Nor do they offer any response at all to the commonsense explanation of why the ADEA uses the permissive "may" to address forum and the mandatory "shall" to address the burden of proof. (*See* Opening Br. 21-22.) Congress used "may" for bringing claims and "shall" for the burden of proof because it would have been absurd to state that aggrieved persons "shall" (i.e., were *required* to) bring suit, just as it would have been absurd to state that the party enforcing an ADEA waiver only "may" have the burden of proof.

Finally, Plaintiffs and their amici make the policy argument that it would be more efficient for a court to "determine the enforceability of all 35+ Plaintiffs'

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[3] Departing from text, Plaintiffs and the EEOC cite a 1990 Senate Report stating that Congress intended "courts" to make determinations about OWBPA waivers (Response Br. 28-29; EEOC Br. 11-12, 14, 27.) But nothing in that Report even discusses, much less rejects, arbitration as an alternative, and generic references to "courts" in legislative history are even less probative of Congress's intent than they are in statutes. *See CompuCredit*, 132 S. Ct. at 670 (rejecting the argument that reference to a "court" expresses congressional intent to preclude arbitration); *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 182 (3rd Cir. 1998) ("In our judgment, however, no amount of commentary from individual legislators or committees would justify a court in reaching the result the EEOC would have us reach.").

Releases once and for all in a single proceeding" than to have the releases be decided together with the released claims in arbitration. (EEOC Br. 28; *see* Response Br. 26; AARP Br. 15.) But a policy argument cannot trump the federal command expressed in the FAA to enforce arbitration agreements. *See Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (holding that valid arbitration agreements must be enforced despite arguments that it would be "inefficient"). In addition, it would not be more efficient to adjudicate releases in court but send the claims they cover to arbitration. The EEOC's suggestion that court would be more efficient because it could yield a one-for-all ruling on the releases overlooks the fact that General Mills was required to provide different information to its former employees based on the decisional units they were a part of. *See* § 626(f)(1)(H)(i)-(ii). Arbitration, in contrast, is known for its efficiency. *See Dean Witter*, 470 U.S. at 221.

In short, nothing in the text of § 626(f)(3) expresses a congressional command precluding parties from agreeing under the FAA to resolve disputes over the enforceability of releases of ADEA claims in arbitration.

C. An arbitration agreement is not a "waiver" governed by § 626(f)(1), and including one in the same document as a waiver does not make it a waiver.

Throughout their brief, Plaintiffs implicitly make the argument that, because the same documents that contain their arbitration agreements also contain ADEA releases, the arbitration agreements must be treated as releases. (*See* Response Br. 16, 20, 23, 24, 25, 26, 28, 32, 34.) In the last section, they finally make the argument

directly and on that basis ask the Court to distinguish *14 Penn Plaza LLC v. Pyett*, which holds that the "right to a judicial forum is not the nonwaivable 'substantive' right protected by the ADEA" and thus is not subject to the requirements of § 626(f)(1). 556 U.S. 247, 256 n.5 (2009). (*See* Response Br. 46-53; AARP Br. 17-20.)

To state Plaintiffs' *non sequitur* of an argument is to refute it. Just because an arbitration agreement is included in the same document as a release of ADEA claims does not make it a release. It is still an arbitration agreement. As *14 Penn Plaza* explained, agreeing "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. To suggest that an arbitration agreement is a waiver "reveals a distorted understanding of the compromise made when an employee agrees to compulsory arbitration." *Id.* at 266. Moreover, Plaintiffs' argument is not just logically flawed, it is legally flawed as well, because "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). The district court held that Plaintiffs' attempt to apply the knowing-and-voluntary waiver requirements of § 626(f)(1) to their arbitration agreements "fails under explicit Supreme Court precedent." (Add. 16.) On this point, the district court was correct.

Plaintiffs argue that *14 Penn Plaza* is distinguishable because the arbitration agreement there was a so-called "pre-dispute" agreement that was "prospective in

nature," whereas they agreed to arbitration after their disputes with General Mills arose. (Response Br. 48.) This is a distinction without a difference. *14 Penn Plaza* held that the "right" to a jury trial is not the type of "right" whose waiver is covered by § 626(f)(1). *See* 556 U.S. at 265-66. That holding applies regardless of whether the agreement to arbitrate is executed before or after a dispute arises.

It is startling, moreover, to see the plaintiffs' bar and the EEOC argue that pre-dispute arbitration agreements are more enforceable than post-dispute agreements, since historically they have always argued the reverse. In *Rosenberg*, for example, which addressed how the 1990 OWBPA amendments affect the use of arbitration for ADEA claims, the EEOC opposed pre-dispute agreements but supported post-dispute agreements. It wrote: "The Commission supports the use of arbitration as a method of alternative dispute resolution in cases in which there is an existing dispute or claim and the parties voluntarily agree to submit the dispute to arbitration." *See* Br. of the EEOC as Amicus Curiae in Support of the Plaintiff-Appellee, *available at* 1998 WL 34299360, at *1-2 (1st Cir. May 26, 1998). The EEOC's opportunistic change of course on post-dispute agreements deprives its view of any persuasive weight.

The correct position is the one General Mills started with: There is no meaningful difference between pre- and post-dispute arbitration agreements as to their enforceability. *Rosenberg* rejected the EEOC's distinction between pre- and post-dispute agreements. 170 F.3d at 13. The Ninth Circuit has declared, "[W]e are aware of no appellate or Supreme Court authority holding that postdispute arbitration

agreements fall outside the scope of the FAA." *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1104 (9th Cir. 2007). And this Court and others have often enforced post-dispute arbitration agreements. *See, e.g., Asia Pac. Indus. Corp.*, *v. Rainforest Cafe, Inc.*, 380 F.3d 383, 385-86 (8th Cir. 2004).

For all of these reasons, Plaintiffs' distinction between pre- and post-dispute agreements provides no basis for allowing them to evade their agreement to arbitrate.

D. The Court should not give any deference to the EEOC's views on the arbitrability of disputes over ADEA waivers.

In a single sentence, Plaintiffs argue that the EEOC's interpretations of its own administrative regulations under the ADEA are "entitled to great deference." (Response Br. 17.) Plaintiffs do not, however, address any of the reasons General Mills gave for why deference is inappropriate in this case. (*See* Opening Br. 25-28.) By failing to respond to those reasons, Plaintiffs have waived the right to challenge them. *See Heerman v. Burke*, 266 F.2d 935, 940 (8th Cir. 1959) (per curiam) (the appellee "waived the procedural question as to the sufficiency of the exceptions taken" by not raising that issue in the appellee's brief). For that reason alone, the Court should hold that deference is not appropriate in this case.

The EEOC offers two arguments for deference in its amicus brief, but neither has merit. The first is that its regulations and "related interpretative materials" "fill gaps" in the ADEA and hence warrant deference under *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). (*See* EEOC Br. 20.) The EEOC never made that

argument in the district court and hence waived it. (*Cf.* Dkts. 41, 66.) In addition, it is senseless to suggest that a regulation (29 C.F.R. § 1625.22(h)) that simply parrots the language of the statute (29 U.S.C. § 626(f)(3)) fills any gap. The EEOC left the statute precisely as it found it. It has no claim to *Chevron* deference based on its regulation.

The EEOC also does not have any claim to deference based on the informal interpretation it has given its own regulation. As General Mills noted in its opening brief, courts do not defer to an agency's "convenient litigating position." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988). They also do not defer to an agency's informal interpretations when the regulation being interpreted "does little more than restate the terms of the statute itself." *Ky. Ret. Sys. v. EEOC*, 554 U.S. 135, 149 (2008). That, of course, is the situation here. Even though General Mills expressly cited and relied on *Kentucky Retirement Systems* in its brief—and even though that case denies deference to another EEOC interpretation of another EEOC regulation under the ADEA, making it directly on point—the EEOC never mentions that case in its brief. (*Compare* Opening Br. 26-27 *with* EEOC Br. 21.) The case is controlling here.

II. Because The Arbitration Agreements Are Enforceable, The Court Should Order That All Of Plaintiffs' Claims Must Be Submitted To 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. As General Mills previously noted, that means

ordering Plaintiffs to proceed with all of their claims in individual arbitrations. (*See* Opening Br. 28-29.)

A. Plaintiffs agreed to individual arbitration, and that agreement must be enforced.

Plaintiffs agreed to arbitrate individually, not collectively, and that agreement must be enforced. 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). Here, each Plaintiff[4] agreed *not* to submit to class arbitration and instead agreed to "final and binding arbitration on an individual basis and not in any form of class, collective, or representative proceeding." (Add. 23.) That agreement must be enforced. *See Am. Express v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346–49 (2011); *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). Plaintiffs do

[4] In a footnote, Plaintiffs refer to a woman named Dara Walter as a "Plaintiff." (*See* Response Br. 39 n.61.) Walter, however, is not a named Plaintiff. She is not listed in the caption of the case because she is not named in the Amended Complaint. Rather, she filed a "consent" to join this litigation only after General Mills filed its notice of appeal, when jurisdiction had transferred to this Court. (*See* Dkts. 57, 59.) In addition, regardless of whether that step made Walter part of this litigation in some way, this Court may order the Plaintiffs, all of whom concededly signed Release Agreements, to proceed with their individual arbitration proceedings. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) ("[A]n arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.").

not even cite these controlling precedents in arguing otherwise. (*Cf.* Response Br. 43-45.)

Plaintiffs' only argument in support of class arbitration is to argue that an agreement to arbitrate on an individual basis is a "waiver" and thus is not enforceable unless it meets the "knowing and voluntary" requirements of 29 U.S.C. § 626(f)(1). (Response Br. 44.) As demonstrated above, however, the Supreme Court rejected this argument in *14 Penn Plaza*, and that decision is controlling. Plaintiffs never even acknowledge *14 Penn Plaza* in this section of their brief. (*Cf.* Response Br. 43-45.)

This Court has previously held that collective-action provisions in federal statutes do not preclude parties from agreeing to individual arbitration. *See Owen*, 702 F.3d at 1052-55.[5] Specifically, *Owen* holds that class action waivers are valid and enforceable in cases brought under the Fair Labor Standards Act (FLSA) and notes that the other circuits agree. *Id.* at 1054 (collecting cases). Because the ADEA "specifically incorporates the collective action provision of the FLSA" (Response Br. 44), *Owen* controls this case. Plaintiffs' agreements to arbitrate individually are fully enforceable.

[5] Plaintiffs cite *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989) (Response Br. 44), but that case does not address arbitration because the parties had not entered into any arbitration agreement.

Plaintiffs finally ask this Court to leave the question of the enforceability of class-action waivers to "be addressed first by the district court." (Response Br. 45.) There is no reason to do that and every reason not to. The district court already provided its views on the enforceability of class-action waivers in this case (*see* Add 22 n.6), and enforceability is an issue of law that this Court would review *de novo* in any event. *See Owen*, 702 F.3d at 1052. It would hardly ensure the "efficient processing of this case" (Response Br. 43) to remand this issue to the district court, only to have that court adopt the incorrect position it expressed and require another interlocutory appeal under the FAA, *see* 9 U.S.C. § 16(a)(1). The record is fully developed, and this issue of law is ripe for the Court's decision. The Court should reverse and order the district court to grant General Mills's motion to compel arbitrations on an individual basis.

B. Plaintiffs agreed to resolve all of their ADEA claims, as well as all related issues, in arbitration.

Plaintiffs argue that, even if the Court reverses, it should not order the Plaintiffs to arbitrate the merits of their ADEA claims, because they say that those claims are "outside the scope of the arbitration clause." (Response Br. 38.) This argument is procedurally barred and is also wrong on the merits.

As an initial matter, Plaintiffs are precluded from making this argument on appeal because they (1) admitted in their complaints that their ADEA claims were within the scope of the arbitration clauses and (2) did not oppose General Mills's

motion to compel arbitration on the basis of scope. In both the Complaint and the Amended Complaint, Plaintiffs alleged that the arbitration provision "purports to waive … the right to a trial by jury on disputed issues of fact related to their *claims for age discrimination*." (A4 ¶ 8, A18 ¶ 60, A96 ¶ 8, A113 ¶ 79) (emphasis added). Plaintiffs are bound by these admissions. *See Baumann v. Zhukov*, 802 F.3d 950, 953 n.2 (8th Cir. 2015) (allegations in complaint are binding judicial admissions); *L.L. Nelson Enters., Inc. v. Cnty. of St. Louis*, 673 F.3d 799, 806 (8th Cir. 2012) (same).

Moreover, in response to General Mills's motion to compel arbitration of all claims—which specifically requested an order "dismissing this lawsuit in its entirety" (Dkt. 7 at 3)—Plaintiffs never argued that the arbitration clauses did not cover the merits of their ADEA claims. (*Cf.* Dkt. 16, 36.) Plaintiffs elide their duty of candor to this Court in stating that the district court "has not yet ruled in this case on the scope of the arbitration provision." (Response Br. 42.) It did not rule because Plaintiffs did not preserve an argument on the point. Having not raised the argument then, they have waived the ability to raise it now. *See Ames v. Nationwide Mut. Ins. Co.*, 760 F.3d 763, 771 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 947 (2015); *Satcher v. Univ. of Ark. at Pine Bluff Bd. of Trs.*, 558 F.3d 731, 735 (8th Cir. 2009).[6]

[6] The first time that Plaintiffs suggested that the merits of their ADEA claims were not covered by the arbitration agreements was in motion practice regarding a stay of proceedings after the district court had ruled on the motion to compel and General Mills had filed its notice of appeal. (*See* Dkt. 72 at 3; Dkt. 74 at 13-20; Dkt. 76 at 8.)

On the merits, the arbitration agreements do in fact cover Plaintiffs' ADEA claims. The plain terms of those agreements apply, not only to Plaintiffs' releases, but also to "*any claim covered by the release*." (Add. 23) (emphasis added). The claims covered by the release specifically include those brought under the "Age Discrimination In Employment Act." (*Id.*) The plain language of the agreements thus covers the merits of Plaintiffs' claims. Plaintiffs do not address this plain text in their brief. (*Cf.* Response Br. 39-40.)

Plaintiffs argue that, because the agreements apply to "any dispute or claim *arising out of or relating to* the above release of claims" (Add. 23), they are limited to disputes about the releases and cannot cover the underlying claims. But it requires no stretch of the English language to conclude that the underlying claims are "related to" the releases. This Court has previously remarked that the phrase "arising out of or relating to" is "the broadest language the parties could reasonably use to subject their disputes" to arbitration, *Fleet Tire Serv. v. Oliver*, 118 F.3d 619, 621 & n.2 (8th Cir. 1997). Plaintiffs argue that *Fleet Tire Service* is distinguishable because the parties there "had a contractual relationship." (Response Br. 42.) But of course Plaintiffs likewise had and have a contractual relationship with General Mills: They were all employees of General Mills, and then they all signed the Release Agreements, which are contracts, with General Mills. *Fleet Tire Service* is dispositive of the question whether Plaintiffs' arbitration agreements cover their ADEA claims. They do.

Plaintiffs finally suggest that the arbitration provision could have been written differently—such as, for example, applying to claims "arising out of or relating to the parties' (primary) employment." (Response Br.41.) But that argument reverses the applicable interpretive presumption. Courts do not ask whether an arbitration provision might have been written more broadly and then decide not to apply it if it could have. Instead, an order to arbitrate "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." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (quotation omitted); *see also Local 38N Graphic Commc'ns Conference/IBT v. St. Louis Post-Dispatch, LLC*, 638 F.3d 824, 826 (8th Cir. 2011). Plaintiffs do not cite either of these authorities or this interpretive presumption in their Response Brief.

Because the Release Agreements cover all "claims covered by the release," "including" specifically claims "arising under the Age Discrimination In Employment Act" (Add. 23), the Court should order Plaintiffs to proceed to arbitration on all of their claims and General Mills's defenses.

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, be addressed in individual arbitration proceedings.

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Respectfully submitted,

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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)(B)(ii) because the brief contains 6,317 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.

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Dated: March 4, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 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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