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

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT AND IN SUPPORT OF REVERSAL

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January 14, 2016

CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Rule 26.1 and Eighth Circuit Local Rule 26.1A, *Amici Curiae* Equal Employment Advisory Council and Chamber of Commerce of the United States of America make the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

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FEDERAL RULE 29(c)(5) STATEMENT

No counsel for a party authored this brief in whole or in part;

No party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief; and

No person other than *amici curiae*, their members, or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

The Equal Employment Advisory Council and the Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae* with the consent of the parties. The brief urges the Court to reverse the district court's ruling below and thus supports the position of Defendant-Appellant General Mills, Inc.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents

300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.

All of EEAC's members, as well as many of the Chamber's members, are employers subject to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, and other equal employment statutes and regulations, are strongly committed to equal employment opportunity, and seek to establish and enforce internal policies that are consistent with federal employment nondiscrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using a variety of tools, including arbitration and other forms of Alternative Dispute Resolution (ADR). Many of them have adopted company-wide policies requiring the use of binding arbitration to resolve all employment-related disputes. EEAC's and the Chamber's

members thus have a strong interest in the extent to which such contractual commitments to arbitrate are enforceable.

The district court below ruled incorrectly that the ADEA, as amended by the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 979 (1990), establishes a non-waivable right to sue in federal court to challenge the validity of releases of ADEA claims. The decision below is contrary to the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, as well as the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), among others, and jeopardizes numerous lawful and valid arbitration agreements, to the detriment of both employers and employees.

Because of their interest in the application of the nation's equal employment laws, *amici* have filed briefs as *amicus curiae* in cases before the U.S. Supreme Court, this Court, and others involving the proper construction and interpretation of the ADEA and other federal employment laws. Thus, they have an interest in, and a familiarity with, the issues and policy concerns involved in this case.

Amici seek to assist the Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case.

Accordingly, this brief brings to the attention of the Court relevant matters that have not already been brought to its attention by the parties. Because of their experience in these matters, *amici* are well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

As part of a corporate restructuring plan, Defendant-Appellant General Mills, Inc. (General Mills) terminated the employment of approximately 850 people, including the plaintiffs in this case, in June 2012. *McLeod v. General Mills, Inc.*, __ F. Supp.3d __, 2015 WL 6445672, at *1 (D. Minn. Oct. 23, 2015), *appeal filed*, (8th Cir. Nov. 3, 2015). In exchange for a severance package, the plaintiffs signed a binding arbitration agreement and general release agreement. *Id.* Nevertheless, the plaintiffs brought suit against General Mills claiming that their terminations violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq*. *Id.*

General Mills moved to dismiss the suit and compel arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16. *Id.* The court below, however, denied the motion, concluding that language in the

Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 979 (1990), specifically 29 U.S.C. § 626(f)(3), precluded arbitration. *Id.* This appeal followed.

SUMMARY OF ARGUMENT

The district court below ruled incorrectly that the burden of proof clause of the Older Workers Benefit Protection Act, which refers to "a court of competent jurisdiction," 29 U.S.C. § 626(f)(3), precludes enforcement of an arbitration agreement as to releases of age discrimination claims brought under the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* The ruling below contradicts the Federal Arbitration Act, 9 U.S.C. §§ 1-16, which "requires that [courts] rigorously enforce agreements to arbitrate." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (citation omitted). It likewise contravenes the U.S. Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which held that arbitration agreements are enforceable as to statutory employment discrimination claims, *id.* at 23, and noted that "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by statute; it only submits to their

resolution in an arbitral, rather than a judicial, forum.'" *Id.* at 26 (quoting *Mitsubishi*, 473 U.S. at 628 (1985)). In so doing, the decision below also conflicts with numerous subsequent decisions of the Supreme Court, *e.g.*, *CompuCredit Corp. v. Greenwood,* 132 S. Ct. 665 (2012) and *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), as well as a number of decisions of this Court, *e.g.*, *Owen v. Bristol Care, Inc.,* 702 F.3d 1050 (8th Cir. 2013), and *Patterson v. Tenet Healthcare, Inc.,* 113 F.3d 832 (8th Cir. 1997).

The Supreme Court in *Gilmer* addressed and rejected the contention that OWBPA precludes the enforcement of arbitration agreements, and confirmed that conclusion in *14 Penn Plaza.* Following *Gilmer*, several circuit courts of appeals have ruled that OWBPA does not render an arbitration agreement unenforceable as to such claims. *See Williams v. CIGNA Fin. Advisors, Inc.*, 56 F.3d 656 (5th Cir. 1995); *Seus v. John Nuveen & Co.,* 146 F.3d 175 (3d Cir. 1998), *overruled on other grounds*, *Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79 (2000); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 170 F.3d 1 (1st Cir. 1999); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005). Moreover, the Supreme Court in *CompuCredit* squarely rejected

the contention that the use of the word "court" and related language in a statute's description of the rights it confers precludes arbitration. 132 S. Ct. at 670. Indeed, far from prohibiting arbitration, Congress has actually encouraged the use of arbitration to resolve employment disputes, including those arising under the ADEA. *EEOC v. Woodmen of World Life Ins. Soc'y*, 479 F.3d 561, 565 (8th Cir. 2007). The Equal Employment Opportunity Commission's position, expressed in an *amicus curiae* brief below, is contrary to that authority and is not entitled to any deference from this Court.

A ruling by this Court that OWBPA precludes arbitration of releases of ADEA claims would have far-reaching, negative effects for both employers and employees. The Supreme Court has acknowledged the many significant benefits of arbitration, particularly in the employment context, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001), principally the considerable reduction that arbitration provides in the time and expense required to resolve employment disputes.

Accordingly, the decision below should be reversed.

ARGUMENT

I. OWBPA's Burden of Proof Provision Does Not Override the Federal Arbitration Act's Presumption in Favor of Arbitration

A. The Federal Arbitration Act establishes a presumption of enforceability of arbitration agreements

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, provides that a written agreement to arbitrate "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. Its provisions manifest a "liberal federal policy favoring arbitration agreements." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (citation omitted); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013) (citations omitted). "Its purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted). *See also Patterson v. Tenet Healthcare, Inc.,* 113 F.3d 832, 837 (8th Cir. 1997) (quoting *Gilmer*).

Accordingly, Congress directed courts through the FAA to interpret written arbitration agreements with "a healthy regard for the federal policy favoring arbitration[, and] any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (citation omitted); *McNamara v. Yellow Transp., Inc.*, 570 F.3d 950, 957 (8th Cir. 2009) (citation omitted). Indeed, "'[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that [courts] rigorously enforce agreements to arbitrate.'" *Mitsubishi,* 473 U.S. 614, 625-26 (1985) (citation omitted).

The sole exception to that general rule is the final provision of Section 2 of the FAA, which allows an arbitration agreement to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has observed, "Section 2 requires courts to enforce arbitration agreements according to their terms. As a result, there must be a 'contrary congressional command' for another statute to override the FAA's mandate." *Owen,* 702 F.3d at 1052 (citations omitted); *see also AT&T*

Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011). Accordingly, Section 2 does not permit attacks on arbitration agreements solely because they *are* arbitration agreements, *i.e.*, that they require the parties to submit a dispute to arbitration rather than litigating in court. *See DirecTV, Inc. v. Imburgia,* 136 S. Ct. 463 (2015).

The presumption in favor of arbitrability applies to agreements to arbitrate statutory claims, including statutory employment discrimination claims. In *Gilmer,* the Supreme Court ruled that a claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, "can be subjected to compulsory arbitration pursuant to an arbitration agreement ...." 500 U.S. at 23. Thus, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 26 (noting that the burden is on the party seeking to avoid arbitration "to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims") (citation omitted); *see also Owen*, 702 F.3d at 1052 (citations omitted).

In ruling that ADEA claims are subject to arbitration despite the statutory provision affording a jury trial, the Court in *Gilmer* explained

that " '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628 (1985)). *See also Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 482-83 (1989) (noting that arbitration agreements are a specialized kind of forum selection clause); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 259 (2009) (pointing out that "the agreement to arbitrate ADEA claims is not the waiver of a 'substantive right' as that term is employed in the ADEA"). *Cf. EEOC v. Woodmen of World Life Ins. Soc'y*, 479 F.3d 561, 570 (8th Cir. 2007) (holding that statutory right to intervene in EEOC lawsuit is a procedural right that may be waived by an agreement to arbitrate).

This Court is in accord. *Owen* involved the federal Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, which governs federal wage and hour claims and whose remedial scheme the ADEA incorporates by reference. 29 U.S.C. § 626(b). Applying *Gilmer* and *Concepcion*, this Court in *Owen* concluded that "the FLSA contains no 'contrary congressional command' as required to override the FAA." 702 F.3d at 1052.

Thus, as the Supreme Court has ruled repeatedly, the Federal Arbitration Act establishes a strong presumption in favor of the enforceability of arbitration agreements, which can be overcome only by a clear congressional command prohibiting arbitration.

B. OWBPA contains no congressional command precluding arbitration

As part of its ruling in *Gilmer*, the Supreme Court addressed and disposed of the contention that the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 979 (1990),[1] constitutes a clear congressional command barring arbitration of OWBPA claims. The Court stated specifically in *Gilmer* that "Congress ... did not explicitly preclude arbitration or other nonjudicial resolution of claims, even in its recent amendments to the ADEA." 500 U.S. at 29. The "recent amendments" to which the Court referred were those made by OWBPA seven months before *Gilmer* was decided. *Id.* at 28 n.3. Indeed, in *14 Penn Plaza*, the Court reconfirmed that interpretation, rejecting an OWBPA-based argument against enforcement of an arbitration

[1] As the Court explained in *Gilmer*, the OWBPA "amended the ADEA to provide that '[a]n individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary.' Congress also specified certain conditions that must be met in order for a waiver to be knowing and voluntary." 500 U.S. at 28 n.3 (citations omitted).

agreement. 556 U.S. at 259-60. *See also CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 671 n.3 (2012) ("*Gilmer* noted that the ADEA had been amended after conclusion of the arbitration agreement in that case to preclude waiver of 'rights or claims that may arise after the date the waiver is executed.' 29 U.S.C. § 626(f)(1)(C). The Court accordingly stated that this provision 'did not explicitly preclude arbitration or other nonjudicial resolution of claims,' 500 U.S. at 29").

Following *Gilmer*, several circuit courts of appeals have ruled that OWBPA does not preclude enforcement of an arbitration agreement. *See Williams v. CIGNA Fin. Advisors, Inc.*, 56 F.3d 656, 660 (5th Cir. 1995) (holding that "the OWBPA protects against the waiver of a right or claim, not against the waiver of a judicial forum"); *Seus v. John Nuveen & Co.,* 146 F.3d 175, 182 (3d Cir. 1998) (concluding that "the ADEA, as amended by the OWBPA, still reflects no Congressional intent to except from the FAA predispute agreements to arbitrate ADEA claims"), *overruled on other grounds by Green Tree Fin. Corp. v. Randolph,* 531 U.S. 79 (2000); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 170 F.3d 1, 4 (1st Cir. 1999) (stating, "we hold as a matter of law that application of pre-dispute arbitration agreements

to federal claims arising under Title VII and the ADEA is not precluded by the Older Workers Benefit Protection Act ("OWBPA") amendments to the ADEA ..."). *See also Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1373 n.15 (11th Cir. 2005) (rejecting claim that OWBPA requires any waiver of rights under the Act to be knowing and voluntary, and noting that "the OWBPA protects against the waiver of a right or claim, not against the waiver of a judicial forum") (quoting *Williams v. CIGNA).*

Contrary to the holding of the district court below, OWBPA's burden of proof provision, which refers to "a court of competent jurisdiction," 29 U.S.C. § 626(f)(3), does not overcome either the FAA's presumption in favor of arbitration or the Supreme Court's statement that OWBPA permits the enforcement of arbitration agreements. First, the Court in *Gilmer* addressed the phrase "court of competent jurisdiction" as used in the ADEA in another context, and found it to be *supportive* of arbitration:

> [A]rbitration is consistent with Congress' grant of concurrent jurisdiction over ADEA claims to state and federal courts, see 29 U.S.C. § 626(c)(1) (allowing suits to be brought "*in any court of competent jurisdiction*"), because arbitration agreements, "like the provision for concurrent jurisdiction, serve to advance the objective of allowing [claimants] a

> broader right to select the forum for resolving disputes, whether it be judicial or otherwise."

500 U.S. at 29 (citation omitted) (emphasis added).

Second, the Supreme Court in *CompuCredit* squarely rejected the contention that the use of the word "court," and related language, precludes arbitration. As a general matter, the Court observed that "[i]t is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action, including the relief available, in the context of a court suit." 132 S. Ct. at 670. The Court then explained, "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. But that is not the law." *Id.* (citation omitted). Indeed, the Court held in *CompuCredit* that merely prescribing a judicial forum does not defeat arbitration even when the statute in question contains a no-waiver clause. Citing *Gilmer*, the Court said:

> But if a cause-of-action provision mentioning judicial enforcement does not create a right to initial judicial enforcement, the waiver of initial judicial enforcement is not the waiver of a "right of the consumer[.]" It takes a

> considerable stretch to regard the nonwaiver provision as a "congressional command" that the FAA shall not apply.

Id. at 671 (citation and footnote omitted).

Moreover, Congress has not only left untouched the FAA's policy favoring arbitration, but has specifically affirmed it in the context of employment. *EEOC v. Woodmen of World Life Ins. Soc'y*, 479 F.3d 561, 565 (8th Cir. 2007). In the Civil Rights Act of 1991 (CRA), which postdated both OWBPA and *Gilmer*, Congress stated, "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including arbitration, is *encouraged* to resolve disputes arising under the Acts or provisions of Federal law amended by this title." Pub. L. No. 102–166, § 118, 105 Stat. 1071, 1081 (1991) (emphasis added).

This provision states that it applies to the statutes amended by the CRA, which in turn amended the ADEA, which had already been amended by OWBPA.[2] Indeed, when the CRA became law, *Gilmer* was six months old, and the leading case on arbitration of statutory claims. Therefore, under *Gilmer*, arbitration of such claims is "authorized by

[2] Section 115 of Pub. L. No. 102-166 amended Section 7(e) of the ADEA, 29 U.S.C. § 626(e), to change the time for filing an ADEA civil action.

law" within the meaning of the CRA. Indeed, far from expressing a "contrary congressional command," Congress has encouraged the arbitration of employment claims, including those brought under the ADEA.[3]

According to the EEOC, § 626(f)(3) requires any employer seeking to defend the validity of an OWBPA release to waive arbitration and raise the matter exclusively in court. That view is irreconcilable with Supreme Court FAA jurisprudence and Eighth Circuit precedent, however. Such an interpretation also would produce absurd results, requiring employers to move to compel arbitration of claims subject to a valid agreement to arbitrate, but simultaneously to defend in court any contention that an OWBPA waiver does not comply with the statute's "knowing and voluntary" technical requirements.

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[3] Not incidentally, Congress *does* know how to preclude the mandatory arbitration of employment-related claims when it chooses to do so. In the Fiscal Year 2010 Department of Defense (DOD) funding bill, Congress included a provision providing major federal contractors must "agree[] not to … require[], as a condition of employment, that [an] employee or independent contractor agree to resolve through arbitration any claim" under Title VII of the Civil Rights Act of 1964 or any of various enumerated torts. Pub. L. No. 111-118, § 8116, 123 Stat. 3455 (2009). Notably, Congress included no such clear statement in OWBPA.

In reality, the employer likely would be forced to forgo arbitration entirely, thereby losing all of the benefits – cost savings and procedural efficiency included – underlying the decision to select arbitration in the first place.

At bottom, the EEOC's reading of OWBPA is not based on any clear congressional command barring arbitration at all but, rather, is based on an undefended and unsupportable premise that arbitration is insufficient to protect the rights created by OWBPA. That reasoning reflects precisely the sort of hostility towards arbitration that the FAA directs courts to reject.

C. The EEOC's position to the contrary is not entitled to deference

Before the court below, the EEOC submitted a brief *amicus curiae* contending that its regulations interpreting OWBPA preclude arbitration, and persuaded the court to defer to its position under *Auer v. Robbins*, 519 U.S. 452 (1997).[4] The agency's new and incorrect interpretation of its regulations, and by implication of OWBPA, is not entitled to *any* measure of deference, much less *Auer* deference.

[4] We address this issue because we presume that the EEOC will do likewise before this Court.

While the Supreme Court in *Auer* granted deference to an agency's interpretation of its own regulations, *Auer* deference has no place here. First, *Auer* deference is far from absolute and, in fact, "does not apply in all cases." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012). In particular, *Auer* deference is not appropriate when the agency's position is "plainly erroneous or inconsistent with the regulation." *Id.* (quoting *Auer*, 519 U.S. at 461).

The EEOC's position is both erroneous *and* inconsistent with its regulations. First, those regulations do not even address the question at issue in this case. Second, if they did, they would conflict with *Gilmer*, *CompuCredit*, and similar cases discussed above requiring arbitration despite statutory provisions establishing judicial remedies.

In enacting the ADEA, Congress conferred the EEOC with "statutory authority to issue regulations." *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 395 (2008). As the Supreme Court observed in *Holowecki*, "when an agency invokes its authority to issue regulations, which then interpret ambiguous statutory terms, the courts defer to its reasonable interpretations." *Id.* In addition, "Just as we defer to an agency's reasonable interpretations of the statute when it issues regulations in

the first instance, the agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force." *Id.* at 397 (citations omitted). Unlike in *Holowecki*, however, here, *amicus* EEOC's interpretation of OWBPA in this case is not based on any regulation speaking to a non-waivable right (of employees) or obligation (on the employer's part) to proceed in court, rather than in arbitration.

In fact, the EEOC's regulations interpreting OWBPA, codified at 29 C.F.R. §§ 1625.22-.23, do not address arbitration at all. Nowhere do the regulations even mention, much less preclude, enforcement of an arbitration agreement. While the "burden of proof" provision at § 1625.22(h) restates the "court of competent jurisdiction" language from 29 U.S.C. § 626(f)(3), it does not in any way rule out enforcement of an arbitration agreement, as discussed above. Nothing else in the EEOC's regulations even comes close to an interpretation of OWBPA as applying to an arbitration agreement, much less prohibiting enforcement. Thus, the EEOC's position that OWBPA precludes arbitration is not entitled to deference, especially where, as here, "the agency has gone through rule making and has conspicuously ignored

the topic in its rules." *Rosenberg*, 170 F.3d at 12 (noting that the EEOC's OWBPA regulations "include no discussion of the definition of 'right' or 'claim,' and do not say that 'waivers' mean arbitration clauses) (citation and footnote omitted).[5]

Furthermore, in condemning the arbitration agreement in this case as directly conflicting with the statute, the EEOC cites an out-of-context, partial statement in the Preamble to its OWBPA regulations – which read in context actually conflicts with its position. In describing that covenants not to sue are "equivalents of ADEA waivers and therefore subject to EEOC regulation," 65 Fed. Reg. 77,438, 77,443 (Dec. 11, 2000), the Preamble explains:

> Employers therefore must take precautions in drafting covenants not to sue so that employees understand that the covenants do not affect their right to test the knowing and voluntary nature of the agreements in court under the OWBPA. By investing "court[s] of competent jurisdiction" with the authority to resolve "any dispute that may arise

[5] Indeed, even the EEOC's 1997 anti-arbitration policy statement, which greatly reflects the "longstanding judicial hostility to arbitration agreements" that Congress sought to reverse with the FAA, *see Gilmer*, 500 U.S. at 24, never mentions OWBPA as a justification for the refusal to enforce an arbitration agreement. EEOC Compl. Man., *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment* (July 10, 1997), *available at* http://www.eeoc.gov/policy/docs/mandarb.html (last visited January 14, 2016).

> over * * * the validity of a waiver," Congress manifested in the plain language of the statute its intention to permit an employee who signed an ADEA waiver, [sic] to sue his or her employer upon the belief that the waiver did not comply with the OWBPA. Thus, any provision in a waiver agreement that would cause an employee to believe that he or she could not seek a judicial determination of the validity of the waiver misrepresents the rights and obligations of the parties to the agreement. Such a misrepresentation conflicts with the OWBPA requirement that a valid waiver agreement must be "written in a manner calculated to be understood" by the employee "or by the average individual eligible to participate."

Id. at 77,443-44 (citation and footnote omitted). The agency concludes by confirming:

> Accordingly, paragraph (b) of the final rule will state:
>
> No ADEA waiver agreement, covenant not to sue, or other equivalent arrangement may impose any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge the agreement.

Id. at 77,444. In other words, the regulation provides that employees may challenge the validity of a waiver, but is silent as to *where* such a challenge may be brought.

The EEOC appears to assume the foregoing provisions bar arbitration agreements because arbitration agreements are a type of "limitation adversely affecting any individual's right to challenge the

agreement." *Id.* However, as described above, that hostile view of arbitration was rejected by Congress in the FAA.

Moreover, the Supreme Court has ruled that an arbitration agreement does not waive substantive rights; it merely assigns their adjudication to an arbitral forum. *Gilmer*, 500 U.S. at 26. The EEOC's view that OWBPA confers an unwaivable right to bring claims in court contravenes that important pronouncement and thus is untenable under Supreme Court precedent.[6]

Accordingly, neither OWBPA nor the EEOC's regulations interpreting OWBPA apply to arbitration clauses or preclude their enforcement, and the EEOC's contention to the contrary is entitled to

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[6] Indeed, because Congress through the FAA has "directly spoken to the question at issue … that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (footnote omitted). Moreover, even if the text of the statute were arguably ambiguous when read in isolation, the EEOC's position still is not entitled to deference, because the agency's view is not "based on a permissible construction of the statute," *id.* at 843 (footnote omitted) when read in light of the Supreme Court's FAA jurisprudence, beginning with *Gilmer*. Nor would it be entitled to "respect" under *Skidmore v. Swift*, 323 U.S. 134, 140 (1944), given that *Skidmore* deference depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade," *id.*, all of which are lacking in this case. *See also Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015).

no deference whatsoever. The FAA requires that arbitration agreements be enforced according to their terms, and OWBPA does not mandate otherwise.

II. The Decision Below Imperils Substantially All Employment-Related Arbitration Agreements, Defeating the Mutual Benefits They Offer to Employers and Employees Alike

Were this Court to hold that OWBPA precludes enforcement of an arbitration agreement that covers a release of ADEA claims, such a ruling would place in jeopardy any employment-related arbitration agreement applicable to any ADEA-protected individual, i.e., any person over the age of 40. The court below substantially underestimated the impact of its ruling, describing its holding as applicable to "the narrow circumstances of cases like this one." *McLeod v. General Mills, Inc.*, __ F. Supp.3d __, 2015 WL 6445672, at *9 (D. Minn. Oct. 23, 2015), *appeal filed*, (8th Cir. Nov. 3, 2015).

This case hardly presents narrow circumstances. Notably, the number of ADEA-protected individuals in the labor force has grown significantly over the last decade, and is projected to outpace the labor force participation of younger workers in the coming years. U.S. Bureau of Labor Statistics (BLS), Monthly Labor Review, *Labor Force*

projections to 2024: the labor force is growing, but slowly, at 1 (Dec. 2015), *available at* http://www.bls.gov/opub/mlr/2015/article/pdf/labor-force-projections-to-2024.pdf (last visited Jan. 14, 2016).

As the BLS observed recently:

> In contrast to the declining trend of the youth labor force, the number of workers 55 years and older in the labor force grew from 15.5 million in 1994 to 23.0 million in 2004. Then, in 2014, their number climbed to 33.9 million, nearly 11 million more than in 2004. The group's share of the total labor force also increased, from 11.9 percent in 1994, to 15.6 percent in 2004, to 21.7 percent in 2014. The 55-years-and-older age group is projected to increase its number in the labor force to 40.6 million in 2024, and its share is expected to reach nearly 25 percent that year.

Id. at 24. Thus, ADEA plaintiffs subject to a valid arbitration agreement, who also signed a valid release agreement, would have every incentive to assert an OWBPA violation in every case so as to get around the agreement and into court. Since employment-related arbitration agreements typically are comprehensive, covering all or nearly all claims, the ruling in this case will affect every such arbitration agreement within this Court's jurisdiction. *See CIGNA*, 56 F.3d at 661 (noting that if the court were to apply OWBPA to arbitration agreements, "we would in effect be holding that employers and employees could never enforce a pre-dispute agreement to

arbitrate"). As a result, employers who are considering reductions in force or other restructuring will have to figure the cost of potentially having to litigate, rather than arbitrate, the validity of releases into the overall cost of the endeavor, effectively making less money available to terminated employees in severance packages.

As the Supreme Court has observed, "we 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,* 473 U.S. at 626-27. The Supreme Court has said repeatedly that "'[i]n bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.'" *Concepcion*, 563 U.S. at 348 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 685 (2010)). "Although those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of

arbitration.'" *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi*, 473 U.S. at 628).

The outmoded hostility to arbitration agreements is particularly misplaced in the employment context, where individual arbitration offers significant advantages to both employers and employees. Indeed, there are "real benefits to the enforcement of arbitration provisions ... [in] the employment context." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001).

In particular, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Id.* at 123. Arbitration offers lower-level employees an opportunity to bring forth claims that would not be economically viable to pursue in court. "The empirical evidence suggests that arbitration may be a more accessible forum than court for lower income employees and consumers with small claims." Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. Mich. J.L. Reform 813, 840 (2008). As one commentator has observed:

> The time and cost of pursuing a claim through traditional methods of litigation present the most glaring and formidable obstacles to relief for employment discrimination victims. While it might not make a difference to the upper level managerial worker who can afford the services of an expensive lawyer, and who can withstand the grueling process of litigation, those employees who are less financially sound are chronically unable to attract the services of a quality lawyer. For example, experienced litigators maintain that good plaintiff's attorneys will accept only one in a hundred discrimination claimants who seek their help. For those claimants who are denied the services because of their financial situation, the simpler, cheaper process of arbitration is the most feasible recourse.

Craig Hanlon, *Reason Over Rhetoric: The Case for Enforcing Pre-Dispute Agreements to Arbitrate Employment Discrimination Claims,* 5 Cardozo J. Conflict Resol. 2 (2003). Indeed, parties generally favor arbitration precisely because of the economics of dispute resolution. *14 Penn Plaza*, 129 S. Ct. at 1464.

The relative speed with which arbitrations are conducted compared to litigation also benefits both parties to an employment dispute, but particularly the employee, who typically can less afford a lengthy battle.

> Most employees simply cannot afford to pay the attorney's fees and costs that it takes to litigate a case for several years. Even when an employee is able to engage an attorney on a contingency fee basis ... the employee nonetheless often must pay for litigation expenses, and put working and personal life on hold until the litigation is complete.

Richard A. Bales, *Compulsory Arbitration: The Grand Experiment in Employment* (Cornell Univ. Press, 1997) at 153-54. Similarly:

> The vast majority of ordinary, lower-and middle-income employees (essentially, those making less than $ 60,000 a year) cannot get access to the courts to vindicate their contractual and statutory rights. Most lawyers will not find their cases worth the time and expense. Their only practical hope is the generally cheaper, faster, and more informal process of arbitration. If that is so-called mandatory arbitration, so be it. There is no viable alternative.

Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J. L. Reform 783, 810 (2008). Thus, as a practical matter, "[a]rbitration thus provides access to a forum for adjudicating employment disputes for employees whom the litigation system has failed." Bales, *supra*, at 159 (footnote omitted).

Given that the primary purpose of employment arbitration agreements is to resolve employment disputes quickly and inexpensively, the decision below significantly undercuts the strong federal policy, as embodied in the FAA and repeatedly endorsed by the Supreme Court, this Court, and others, favoring private arbitration of employment disputes.

CONCLUSION

For the foregoing reasons, the *amici curiae* Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully submit that the decision of the court of appeals should be reversed.

Respectfully submitted,

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January 14, 2016

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