No. 23-

IN THE
Supreme Court of the United States

GREGORY ABELAR *et al.*,

Petitioners,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented in this Petition is whether an arbitration agreement can be used to bar an employee from pursuing a claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, when that employee would have been able to pursue that claim in court.

The ADEA includes a comprehensive timing scheme setting forth the time individuals have to file a charge of discrimination. 42 U.S.C. § 2000e-5(e)(1); 29 U.S.C. §§ 626(d), 633(b). Under that scheme, individuals have either 180 or 300 days to file a charge first with the Equal Employment Opportunity Commission ("EEOC"), after which they may proceed in court. However, if similar charges of discrimination have already been filed with the EEOC, an individual need not meet this time limit but instead can file a claim in court much later (even years later, after learning that he or she may have been the victim of discrimination, based upon an EEOC investigation or claims brought forward by other employees).

The Second Circuit below erroneously held that an arbitration agreement can undermine this scheme, thus preventing employees from pursuing claims of age discrimination that would have been timely in court.

In so holding, the Second Circuit diverged from the Sixth Circuit, which has held that the comprehensive timing scheme for asserting an ADEA claim before the EEOC and in court is a substantive right that cannot be waived by contract. *See Thompson v. Fresh Products, LLC*, 985 F.3d 509, 521 (6th Cir. 2021). In contrast,

the Second Circuit held that this timing scheme is a procedural right that can be waived. The Second Circuit's conclusion violates this Court's pronouncement in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) , that arbitration is an acceptable alternative to court action so long as an employee can pursue claims in arbitration that could have been pursued in court.

Petitioners thus ask the Court to correct the Second Circuit's erroneous conclusion that an arbitration agreement can take away a right to pursue an age discrimination claim that could have been pursued in court and thereby resolve this significant circuit split.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Gregory Abelar, William Abt, Brian Brown, Brian Burgoyne, Mark Carlton, William Chastka, Phillip Corbett, Denise Cote, Michael Davis, Mario DiFelice, Joseph Duffin, Brian Flannery, Fred Gianniny, Om Goeckermann, Mark Guerinot, Deborah Kamienski, Douglas Lee, Colleen Leigh, Stephen Mandel, Mark McHugh, Sandy Plotzker, Alexander Saldarriaga, Richard Ulnick, Mark Vornhagen, James Warren, Dean Wilson, Patricia Lodi, Deborah Tavenner, and William Chandler were the plaintiffs in the district court cases at issue in this Petition and the appellants in the court of appeals.

Respondent International Business Machines Corp. ("IBM") was the defendants in the district court cases and the appellees in the court of appeals.

RELATED PROCEEDINGS

This case arises out of the following proceedings[1]:

- *In Re: IBM Arbitration Agreement Litig.*, Civ. Act. No. 1:21-cv-06296-JMF (S.D.N.Y.) (judgment entered July 14, 2022)[2]
- *Lodi v. International Business Machines Corp.*, Civ. Act. No. 1:21-cv-06336-JGK (S.D.N.Y.) (judgment entered July 11, 2022)
- *Tavenner v. International Business Machines Corp.*, Civ. Act. No. 1:21-cv-06345-KMK (S.D.N.Y.) (judgment entered Sept. 23, 2022)

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1. The four appeals at issue in this Petition for Writ of Certiorari are *In Re: IBM Arbitration Agreement Litig.*, No. 22-1728 (2d Cir.) (a consolidation of twenty-six cases), *Lodi v. International Business Machines Corp.*, No. 22-1737 (2d Cir.) , *Tavenner v. International Business Machines Corp.*, No. 22-2318 (2d Cir.), and *Chandler v. International Business Machines Corp.*, No. 22-1733 (2d Cir.). Because these appeals raised closely related issues, the Second Circuit opted to hear argument in the appeals in tandem. As such, Petitioners submit a single Petition pursuant to S. Ct. R. 12.4.

2. Twenty-six (26) cases before the United States District Court for the Southern District of New York were consolidated into *In Re: IBM Arbitration Agreement Litig.*, including the following case numbers: 21-cv-6296; 21-cv-6297; 21-cv-6308; 21-cv-6310; 21-cv-6312; 21-cv-6314; 21-cv-6320; 21-cv-6322; 21-cv-6323; 21-cv-6325; 21-cv-6326; 21-cv-6331; 21-cv-6332; 21-cv-6337; 21-cv-6340; 21-cv-6341; 21-cv-6344; 21-cv-6349; 21-cv-6351; 21-cv-6353; 21-cv-6355; 21-cv-6375; 21-cv-6377; 21-cv-6380; and 21-cv-6384.

- *Chandler v. International Business Machines Corp.*, Civ. Act. No. 1:21-cv-06319-JGK (S.D.N.Y.) (judgment entered July 6, 2022)

- *In Re: IBM Arbitration Agreement Litigation*, No. 22-1728 (2d Cir.) (judgment entered Aug. 4, 2023, petition for reh'g *en banc* denied Sept. 22, 2023)

- *Lodi v. International Business Machines Corp.*, No. 22-1737 (2d Cir.) (judgment entered Aug. 4, 2023, petition for reh'g *en banc* denied Sept. 22, 2023)

- *Tavenner v. International Business Machines Corp.*, No. 22-2318 (2d Cir.) (judgment entered Aug. 4, 2023, petition for reh'g *en banc* denied Sept. 22, 2023)

- *Chandler v. International Business Machines Corp.*, No. 22-1733 (2d Cir.) (judgment entered Aug. 4, 2023, petition for reh'g *en banc* denied Oct. 12, 2023)

There are no other related proceedings within the meaning of this Court's Rule 14.1(b)(iii).

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INTRODUCTION

This case involves issues of exceptional importance concerning the interplay between the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.* , and the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.* The Second Circuit's opinion in this matter permits employers to undermine employees' ability to pursue ADEA claims in arbitration that they could have pursued in court, running afoul of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

Petitioners in this matter are twenty-nine (29) former IBM employees, who sought declaratory judgments pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, that the timing provision in their arbitration agreements with IBM is unenforceable because it effectively extinguished their ability to arbitrate their age discrimination claims against IBM (without meeting the statutory requirements for a waiver of their ADEA claims, as set forth in the Older Workers' Benefits Protection Act ("OWBPA"), 29 U.S.C. § 626(f)).[1]

Upon their terminations, Petitioners entered into arbitration agreements with IBM that released (in exchange for a small severance payment) almost all claims they may have against IBM, but expressly excluded claims under the ADEA. Under this agreement, these employees were permitted to pursue ADEA claims against IBM, but

1. The OWBPA requires specific disclosures in order for an employer to obtain a waiver of ADEA claims. This Court has made clear that this disclosure requirement is strict. *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998) .

only through individual arbitrations. However, Petitioners were ultimately blocked from pursuing their claims in arbitration based upon IBM's argument that their claims were untimely in arbitration.

Although Petitioners would have been timely to pursue their claims in court, they were unable to do so in arbitration due to the timing provision in IBM's arbitration agreement. Petitioners thus sought below declarations that this provision is unenforceable. *See Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115, 125-26 (2d Cir. 2010) ("[T]he appropriate remedy when a court is faced with a plainly unconscionable provision of an arbitration agreement – one which by itself would actually preclude a plaintiff from pursuing her statutory rights – is to sever the improper provision of the arbitration agreement, rather than void the entire agreement."). The district courts and the Second Circuit rejected Petitioners' arguments for such declarations and agreed with IBM's argument that the arbitration agreement could eliminate their claims.

This matter raises a particularly important question, in light of the growing proliferation of arbitration agreements in recent years, as caselaw has expanded their use by employers. This Court's foundational ruling in *Gilmer* established that arbitration is an acceptable alternative to court proceedings for discrimination claims (in that case, particularly, as here, an age discrimination claim under the ADEA), only so long as an employee can actually pursue the claim in arbitration. *See Gilmer*, 500 U.S. at 28 (upholding arbitration as an alternative to court only "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the

arbitral forum . . . ."). The Second Circuit's ruling provides a clear roadmap for employers to avoid the mandate of *Gilmer* – and write arbitration agreements that effectively insulate them from having to defend against claims of discrimination altogether.

Here, Petitioners could have pursued their claims in court (absent their arbitration agreements), as their claims clearly would have been timely, but they were barred from pursuing their claims in arbitration. They were thus not able to effectively vindicate their rights under the ADEA in arbitration.[2]

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2. IBM argues that the employees could have pursued their claims in arbitration if they had only brought their claims sooner. This argument overlooks the fact that the timing scheme set forth in the ADEA, and as developed through the courts, recognizes that employees will often not know that they may have been victims of discrimination until much later than the 180/300 day limitations period – until they learn of an EEOC investigation or other employees pursuing similar claims. This timing scheme in court serves the reasonable function of not encouraging employees to file discrimination claims as soon as they are terminated or laid off without knowing, or having reason to know, that their terminations were the result of discrimination. Eliminating this rule would open the floodgates, requiring employees to file such claims immediately, before they have had time to do much if any investigation – and could place increased burdens on the courts, as well as the EEOC, to process such claims.

IBM's argument, and the Second Circuit's decision below, adopts such a result – but for arbitration only, not court actions. This Court has often made clear, most recently in *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022) , that arbitration contracts are not any more enforceable than any other contracts. A rule that could not be upheld in court cannot be upheld through use of an arbitration agreement.

What is more, the Second Circuit's decision created a clear circuit split with the Sixth Circuit. In *Thompson v. Fresh Products, LLC*, 985 F.3d 509, 521 (6th Cir. 2021), the Sixth Circuit held that the ADEA's limitations period is a ***substantive*** right that cannot be abridged by contract. *Thompson* reached its conclusion following the interpretive expertise of the EEOC, which took this position in an amicus brief.[3] The Second Circuit, on the other hand, held in this matter that the ADEA's limitations period is a mere ***procedural*** right that can be waived.

The practical import of the substantive/procedural split between the Sixth Circuit and the Second Circuit is not only that substantive rights cannot be waived by contract while procedural rights can. It is also that substantive rights trigger the additional protections from waiver under a federal statute, the OWBPA,[4] whereas procedural rights do not. *See Estle v. International Business Machines Corp.*, 23 F.4th 210, 214 (2d Cir. 2022). IBM used its arbitration agreement to obtain a waiver of rights under the ADEA, without providing Petitioners with disclosures required by the OWBPA in order to obtain such a waiver (and IBM expressly informed the employees that they could still bring claims under the

3. The EEOC's amicus brief can be found at *Thompson v. Fresh Products, LLC*, EEOC Amicus brief Brief, 2020 WL 1160190, at *19-23 (6th Cir. March 2, 2020) .

4. The OWBPA requires employers to provide employees over the age of 40 and subject to mass layoffs the ages of employees who were and were not laid off, to give the employees some indication whether they may have been a victim of age discrimination. As noted these disclosures are required in order for an employer to obtain a valid waiver of rights under the ADEA. *See Oubre*, 522 U.S. at 427 .

ADEA in arbitration, by excluding the ADEA from the release). Under *Thompson*, the ADEA's limitations period is substantive, and it cannot be waived through an arbitration agreement (particularly where the OWBPA would not allow such a waiver). However, the Second Circuit held that the limitations period was a procedural right, which could be waived (and the OWBPA could be ignored).

The Second Circuit spent two sentences dismissing *Thompson*, reasoning that *Thompson* did not concern the arbitration context. App. 15a. In drawing this distinction, the Second Circuit ran headlong into this Court's pronouncement in *Morgan*, 142 S. Ct. at 1713 , that courts cannot create special rules to hold arbitration agreements enforceable when other kinds of contracts would not be.

The Second Circuit's decision stands to impact not only Petitioners in this case, but also hundreds of former IBM employees who find themselves in the same position as Petitioners, as well as countless employees who will unquestionably have their rights stripped from them if the Second Circuit's decision is allowed to stand. The Court should grant *certiorari* to curb this misuse of arbitration agreements by employers to extinguish statutory rights through arbitration and to resolve this significant split between the Sixth and Second Circuits.

OPINIONS BELOW

The Second Circuit's opinion in *In Re: IBM Arbitration Agreement Litig.*, is reported at 76 F.4th 74 (2d Cir. 2023), and reproduced at App. 1a. The Second Circuit's opinion in *Lodi*, 2023 WL 4983125 (2d Cir. Aug. 4, 2023),

is reproduced at App. 23a. The Second Circuit's opinion in *Tavenner*, 2023 WL 4984758 (2d Cir. Aug. 4, 2023), is reproduced at App. 25a. The Second Circuit's opinion in *Chandler*, 2023 WL 4987407 (2d Cir. Aug. 4, 2023), is reproduced at App. 27a.

The district court's opinion and order in *In Re: IBM Arbitration Agreement Litig.*, 2022 WL 2752618 (S.D.N.Y. July 14, 2022), is reproduced at App. 29a. The district court's memorandum opinion and order in *Lodi*, 2022 WL 2669199 (S.D.N.Y. July 11, 2022), is reproduced at App. 64a. The district court's opinion and order in *Tavenner*, 2022 WL 4449215 (S.D.N.Y. Sept. 23, 2022), is reproduced at App. 79a. The district court's opinion in *Chandler*, 2022 WL 2473340 (S.D.N.Y. July 6, 2022), is reproduced at App. 126a.

JURISDICTION

The Second Circuit issued its opinions and judgments in *In Re: IBM Arbitration Agreement Litig.*, *Lodi*, *Tavenner*, and *Chandler*, on August 4, 2023. App. 1a, 23a, 25a, 27a. It denied Petitioners' timely petitions for rehearing *en banc* in *In Re: IBM Arbitration Agreement Litig.*, *Lodi*, and *Tavenner* on September 22, 2023, App. 126a, 128a, 130a, and in *Chandler* on October 12, 2023. App. 132a. On December 15, 2023, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to January 22, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 626 of the Age Discrimination in Employment Act, 29 U.S.C. § 626, reproduced at App. 134a.

STATEMENT

I. Statutory Background

A. The ADEA's Limitations Period

Pursuant to the ADEA, individuals are required to file a charge with the EEOC within 300 days of the date of the alleged discriminatory act (or within 180 days in non-deferral jurisdictions[5]). 42 U.S.C. § 2000e-5(e)(1); 29 U.S.C. §§ 626(d), 633(b). After a charge has been filed, the EEOC commences an investigation, and the plaintiff may initiate a lawsuit after at least sixty (60) days have passed from the filing of the charge. *See Holowecki v. Federal Exp. Corp.*, 440 F.3d 558, 562 (2d Cir. 2006); 29 U.S.C. § 626(d). If, after investigating the charge, the EEOC issues a notice of right to sue to the plaintiff, the plaintiff must file his or her lawsuit within 90 days of the receipt of the letter. *See Holowecki*, 440 F.3d at 563; 29 U.S.C. § 626(e).

The statutory period to file an EEOC charge alleging age discrimination can be tolled by the filing of a classwide

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5. The non-deferral jurisdictions are Alabama, Arkansas, Georgia, Mississippi, and North Carolina, as well as the territories American Samoa, Guam, Wake Island, and the Commonwealth of the Northern Mariana Islands. *See* Individual Field Office Webpages, *available at http://www.eeoc.gov/field/*.

EEOC charge (or an EEOC charge that can reasonably be understood to state a claim of discrimination that would affect other similarly situated individuals) under a rule referred to as the "piggybacking" or "single filing" rule. The piggybacking rule permits individuals to assert ADEA claims against employers in court even if their claims are brought outside the time limit to file an EEOC charge (180 or 300 days). Under the rule, a plaintiff can "piggyback" off of an earlier, timely-filed EEOC charge alleging that the employer engaged in a similar course of discrimination. *See Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1057-59 (2d Cir. 1990). "Thus, a plaintiff who has never filed an EEOC charge, and therefore has never given notice of her discrimination complaint to either the employer or the EEOC, can still litigate her claims so long as they fall 'within the scope' of the timely filed claims." *Cronas v. Willis Group Holdings Ltd.*, 2007 WL 2739769, at *3 (S.D.N.Y. Sept. 17, 2008).[6] An important reason for the piggybacking rule is that employees may not realize they have a discrimination claim at the time of their termination, but only later, when they find out that a class charge of discrimination has been filed, or that the EEOC has investigated their employer for discrimination, they may then want to pursue a claim. *See Grayson v. K-Mart Corp.*, 79 F.3d 1086, 1103 (11th Cir. 1996). Without this rule, employees would be required or at least incentivized to bring claims quickly, without knowing if they have any

6. The administrative prerequisites of discrimination statutes such as the ADEA and Title VII "must be interpreted liberally to effectuate [their] purpose of eradicating employment discrimination," and courts must look to "fairness, and not excessive technicality" in addressing such issues. *Cronas v. Willis Group Holdings Ltd.*, 2007 WL 2739769, at *2 (S.D.N.Y. Sept. 17, 2007).

real basis for such a claim. This rule therefore ameliorates inefficiency and administrative burden resulting from unnecessary filings, both at the EEOC and in the courts. *See id.*

Importantly, an employee may initiate a separate, individual action by piggybacking off charges filed by employees in a separate action. *Tolliver*, 918 F.2d at 1057 ("[t]he purpose of the charge filing requirement is fully served by an administrative claim that alerts the EEOC to the nature and scope of the grievance, regardless of whether those with a similar grievance elect to join a preexisting suit **or initiate their own.**"); *see also Calloway v. Partners Nat. Health Plans*, 986 F.2d 446, 450 (11th Cir. 1993).[7]

Both the Sixth Circuit and the EEOC have taken the position that the ADEA's limitations period is a substantive right that cannot be abridged by contract. *See Thompson*, 985 F.3d at 521; *Thompson*, EEOC Amicus Brief, 2020 WL 1160190, at *19-23. Relying on the EEOC's expertise, the Sixth Circuit held that an employer cannot contractually shorten the limitations period of the ADEA because the timing provisions contained in the ADEA "are part of the **substantive law** of the cause of action created by the ADEA." *Thompson*, 985 F.3d at 521.

7. The Second Circuit's decision in *Tolliver* to apply the piggybacking rule to the ADEA context and individual actions is in line with sister Circuit Court precedents. *See Grayson v. K Mart Corp.*, 79 F.3d 1086, 1103 (11th Cir. 1996); *Howlett v. Holiday Inns, Inc.,* 49 F.3d 189, 194 (6th Cir. 1995); *cf. Anson v. Univ. of Tex. Health Sci. Ctr. at Hous.*, 962 F.2d 539, 541 (5th Cir. 1992).

The Sixth Circuit noted that application of the rule against enforcing contractual limitations on the ADEA time period furthers the underlying purpose of the notice provision: "[T]he ADEA emphasizes the importance of the pre-suit cooperative process, outlining the EEOC's obligation upon receiving a charge to 'seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.'" 29 U.S.C. § 626(d)(2). Altering the time limitations surrounding these processes risks undermining the statute's uniform application and frustrating efforts to foster employer cooperation." *Id.* at 521.[8]

B. The Older Workers' Benefits Protection Act

The ADEA includes a provision called the Older Workers' Benefits Protection Act ("OWBPA"), 29 U.S.C. § 626(f). The OWBPA mandates strict requirements that employers must meet in order to obtain a valid waiver from an employee of "any right or claim" under the ADEA. *See* 29 U.S.C. § 626 (f)(1)(H); 29 C.F.R. § 1625.22(f); *see*

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8. The EEOC submitted an amicus brief in *Thompson*, also taking the position that "the ADEA's statutory limitations period is a substantive right and prospective waivers of its limitations period are unenforceable." *See Thompson*, EEOC Brief, 2020 WL 1160190, at *19-23. The EEOC's reasonable interpretation of the ADEA as set forth in this amicus is entitled to deference. *See EEOC v. Comm. Office Prods. Co.*, 486 U.S. 107, 115 (1988) ("[I]t is axiomatic that the EEOC's interpretation of [the ADEA], for which it has primary enforcement responsibility, need . . . only be reasonable to be entitled to deference."); *see also Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)); *Jones v. American Postal Workers Union*, 192 F.3d 417, 427 (4th Cir. 1999).

also Oubre, 522 U.S. at 427.[9] In order for such a waiver to be valid, it must be "knowing and voluntary." 29 U.S.C. § 626(f)(1).

The OWBPA includes a disclosure requirement, stating that "if a waiver is requested in connection with . . . [a]n employment termination program offered to a group or class of employees" the employer must provide disclosures to the employee of:

> (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
>
> (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

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9. The OWBPA's requirements have been enforced strictly. *See, e.g.*, *Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090, 1093-96 (10th Cir. 2006) (finding waiver invalid where OWBPA disclosures did not include entire decisional unit); *Loksen v. Columbia Univ.*, 2013 WL 5549780, at *7-8 (S.D.N.Y. Oct. 14, 2013) (finding substantial compliance not enough; omission of even one person from group of 17 considered, although probably immaterial, invalidated waiver); *Butcher v. Gerber Prods. Co.,* 8 F. Supp. 2d 307, 314 (S.D.N.Y. 1998) (holding that releases that did not contain all the elements listed in 29 U.S.C.S. § 626(f)(1)(A)-(H) of the OWBPA, were invalid and because employers were required to comply with the OWBPA upon their first notification to employees, their later correspondence could not cure the earlier deficiencies).

29 U.S.C. § 626(f)(1)(H).[10]

The OWBPA was enacted out of Congress' concern that employers would obtain waivers from employees of their rights under the ADEA without ever knowing that they had a potential claim for age discrimination. The Senate Committee on Labor and Human Resources explained that, in layoffs, employees are often not aware "that age may have played a role in the employer's decision or that the program may be designed to remove older workers from the labor force." S. Rep. 101-79, at 9 (1989). Likewise, "[o]lder workers too often learn of these group termination programs in an atmosphere of surprise and uncertainty," where they have no way to know their employers' motives. *Id.* at 21.

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10. Moreover, the arbitration agreement's purported waiver of the piggybacking is further invalid because OWBPA requires that, for a waiver to be valid, it must be "a part of an agreement between the individual and the employer that is **calculated to be understood by such individual, or by the average individual eligible to participate.**" 29 U.S.C. § 626(f)(1(A) (emphasis added). The OWBPA's requirement that the language of the waiver be calculated to be understood by the employee has been strictly construed by numerous courts, including against IBM. *See Syverson v. International Business Machines Corp.,*472 F.3d 1072, 1082-87 (9th Cir. 2007) (invalidating a waiver containing both a release and a covenant not to sue because average individuals might be confused and think that they could still bring an action under the ADEA); *Thomforde v. International Business Machines Corp.*, 406 F.3d 500, 503-05 (8th Cir. 2005) (same); *Bogacz v. MTD Products, Inc.,* 694 F. Supp. 2d 400, 404-11 (W.D. Pa. 2010); *Rupert v. PPG Industries, Inc.,* 2009 WL 596014, at *38-49 (W.D. Pa. Feb. 26, 2009); *see also* 29 C.F.R. § 1625.22(b)(3) (2005) (comprehensibility requirement "usually will require the limitation or elimination of technical jargon and of long, complex sentences.").

II. Factual and Procedural Background

Petitioners are twenty-nine (29) former employees of IBM, who sought declaratory judgments that two provisions of IBM's arbitration agreement are not enforceable (the timeliness provision at issue here and a confidentiality provision[11]), as they undermine or extinguish their ability to pursue ADEA claims against IBM.[12] (App. 1a-4a, 24a, 26a, 28a; *In Re: IBM* Appellants' Second Circuit Appendix (hereinafter "*In Re: IBM* App.") at App.001-010.[13]) As will be explained below, even though Petitioners would have been timely in pursuing their ADEA claims in court, they were barred from pursuing those claims in arbitration by virtue of the arbitration agreement's timeliness provision. (*In Re: IBM* App.001-010.)

A. Petitioners' Arbitration Agreements

Petitioners alleged that IBM engaged in a systemic, years-long effort to reduce its number of older workers to

11. Petitioners also challenged the confidentiality provision of IBM's agreement below but are asking this Court to review only their challenge to the timeliness provision.

12. These 29 employees are a subset of a much larger group of hundreds of employees who have attempted to pursue their ADEA claims against IBM in arbitration and were prevented from doing so based on the arbitration agreement's timeliness provision.

13. For ease of reading, Petitioners cite to the appendix submitted in *In Re: IBM Arbitration Agreement Litig.* rather than the appendices submitted in all four appeals before the Second Circuit. The appendices in *Lodi*, *Tavenner*, and *Chandler* are materially similar to that in *In Re: IBM Arbitration Agreement Litig.*, and Petitioners will note any relevant differences.

create a younger workforce. (App. 1a; *In Re: IBM* App.019-020.) Further, they alleged that they fell victim to IBM's discriminatory scheme when IBM terminated them on the basis of age. (App. 4a; *In Re: IBM* App.003.) Petitioners were not alone in making these allegations. The EEOC engaged in a wide-ranging multi-year investigation of age discrimination at IBM. (*In Re: IBM* App.032-033.) As part of that investigation, the EEOC consolidated claims of age discrimination brought by 58 employees[14] who alleged they were separated from IBM because of their age. (*In Re: IBM* App.032-033.) On August 31, 2020, the EEOC issued a determination finding reasonable cause to believe that IBM engaged in classwide age discrimination, on the basis of "top-down messaging from [IBM's] highest ranks directing managers to engage in an aggressive approach to significantly reduce the headcount of older workers to make room for Early Professional Hires" and evidence that "it was primarily older workers . . . in the total potential pool of those considered for layoff." (*In Re: IBM* App.032-033.)[15]

14. Petitioner Lodi was one of the charging parties in this investigation. (*Lodi* Appellants' Second Circuit Appendix (hereinafter "*Lodi* App.") at App.015-016.)

15. Following the EEOC investigation and claims brought by some individuals (who were terminated later in the IBM layoffs and thus were able to bring claims quickly in arbitration – within the 180/300 day deadlines), shocking evidence came to light substantiating these claims. Such evidence included executives and managers disparagingly referring to older workers as "dinobabies" who needed to be made "extinct", and other explicit evidence supporting claims of widespread age discrimination in layoffs. *See* Noam Scheiber, *Making 'Dinobabies' Extinct: IBM's Push for a Younger Workforce*, N.Y. Times, (Feb. 12, 2022), https://www.nytimes.com/2022/02/12/business/economy/ibm-age-

After their layoffs, Petitioners signed agreements in exchange for a modest severance payment; these agreements released most claims that Petitioners may have against IBM, with the specific exception of claims under the ADEA. (App. 1a-2a; *In Re: IBM* App.020.) The agreements allowed Petitioners to pursue claims under the ADEA but only in individual arbitration. (App. 1a-2a; *In Re: IBM* App.020.) The agreements also included the following provision:

> To initiate arbitration, you must submit a written demand for arbitration to the IBM Arbitration Coordinator no later than the expiration of the statute of limitations (deadline for filing) that the law prescribes for the claim that you are making or, if the claim is one which must first be brought before a government agency, no later than the deadline for the filing of such a claim. If the demand for arbitration is not timely submitted, the claim shall be deemed waived. The filing of a charge or complaint with a government agency or the presentation of a concern though the IBM Open Door Program shall not substitute for or extend the time for submitting a demand for arbitration.

(App. 2a.) IBM did not provide the disclosures required by the OWBPA to Petitioners with their agreements, which would have allowed IBM to obtain a waiver of their ADEA claims. (*In Re: IBM* App.020.)

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discrimination.html (Feb 12, 2022); Robert Weisman, *Disparaging e-mails suggest IBM's top executives sought to shed older workers*, Bos. Globe, (Feb. 14, 2022, 4:20 p.m.) https://www.bostonglobe.com/2022/02/14/metro/disparaging-emails-suggest-ibms-top-executives-sought-shed-older-workers/.

B. Petitioners' Efforts to Arbitrate their ADEA Claims

Twenty-seven of the Petitioners sought to bring ADEA claims against IBM in arbitration.[16] (App. 4a, 24a, 26a, 28a; *In Re: IBM* App.020.) In each case, the arbitrator dismissed their claims under the above-quoted "timeliness provision" of IBM's arbitration agreement because they had not filed their arbitration demand within 180 or 300 days of their layoff. (App. 4a, 24a, 26a, 28a; *In Re: IBM* App.021.) Petitioners argued that their claims were nevertheless timely under the ADEA's piggybacking rule, because they could piggyback on the earlier-filed EEOC charges[17] filed by the plaintiffs in a then-pending ADEA collective action, *Rusis v. International Business Machines Corp.*, Civ. Act. No. 1:18-cv-08434 (S.D.N.Y.). There is no question that their claims would have been recognized as timely filed if they were in court, based on the piggybacking rule. (*In Re: IBM* App.021.) However, the arbitrators rejected those arguments and dismissed

16. The two other Petitioners in this appeal, Brian Flannery and Phillip Corbett, sought a declaration in court first rather than going straight to arbitration. (App. 4a; App. 4a, 24a, 26a, 28a; *In Re: IBM* App.021.)

17. As a predicate to bringing the action, Edvin Rusis filed a class EEOC charge on May 10, 2018, alleging that IBM engaged in a companywide discriminatory scheme of laying off its older workers. (*In Re: IBM* App.023.) Other named plaintiffs in that action, Henry Gerrits, Phil McGonegal, and Sally Gehring, also timely filed timely classwide EEOC charges. (*In Re: IBM* App.023.) Ms. Gehring was one of fifty-eight former IBM employees whose charge led to the EEOC finding that there was reasonable cause to believe that IBM engaged in age discrimination, described at p. 14 *supra*. (*In Re: IBM* App.032-033.)

their arbitration claims as untimely. (App. 4a; *In Re: IBM* App.021.)[18]

C. Petitioners' Efforts to Challenge the Timeliness Provision in Court

Following these rulings by the arbitrators in most (but not all) of their cases, Petitioners initiated individual declaratory judgment actions in the Southern District of New York, challenging the agreements' timeliness and confidentiality provisions.[19] (App. 5a, 24a, 26a, 28a; *In*

18. Notably, Petitioner Lodi did not even need to rely on the piggybacking rule since she herself timely filed an EEOC charge. (*Lodi* Appellants' Second Circuit Appendix (hereinafter "*Lodi* App.") at App.015-016.) The EEOC investigated her charge over a period of several years, and in the meantime, she also initiated an arbitration against IBM. (*Lodi* App.015-016.) Even though she had timely filed an EEOC charge (well before 90 days before the EEOC's dismissal of her claim), the arbitrator deemed her arbitration untimely. (*Lodi* App.015-016.)

Thus, even though Petitioner Lodi had filed her arbitration demand ***more than two years*** before she received her Notice of Right to sue from the EEOC, it was nevertheless deemed untimely because the arbitrator agreed with IBM that the arbitration agreement required the demand to be submitted within 300 days of the date that Petitioner Lodi was informed of her termination. (*Lodi* App.015-016.)

19. Before Petitioners initiated individual actions, they opted into the *Rusis* collective action (with the exception of Petitioners Flannery and Kamienski) in order to challenge the arbitration agreement's timing provision (with the intent of arbitrating their claims after obtaining such a ruling). (App. 4a; *In Re: IBM* App.021-022.) However, the *Rusis* court dismissed Petitioners' claims from the case without prejudice on the ground that their agreements contained a class action waiver. *See* App. 4a; *Rusis v. International Business Machines Corp.*, 529 F. Supp. 3d 178, 193-

Re: IBM App.022.) Judge Jesse M. Furman consolidated 26 of those cases into the *In Re: IBM Arbitration Litig.* matter. *See In Re: IBM Arbitration Agreement Litig.*, Civ. Act. No. 1:21-cv-06296-JMF (S.D.N.Y.). Three other cases remained unconsolidated, including *Lodi v. International Business Machines Corp.*, Civ. Act. No. 1:21-cv-06336-JGK (S.D.N.Y.); *Tavenner v. International Business Machines Corp.*, Civ. Act. No. 1:21-cv-06345-KMK (S.D.N.Y.); and *Chandler v. International Business Machines Corp.*, Civ. Act. No. 1:21-cv-06319-JGK (S.D.N.Y.).

In each of those cases, Petitioners moved for summary judgment, while IBM moved to dismiss. The respective district courts granted IBM's motions to dismiss (without addressing Petitioners' motions for summary judgment). (App. 5a-6a, 29a-125a.)

Petitioners timely appealed, and the Second Circuit Panel heard argument in all four cases in tandem. (App. 1a-28a.) The Panel issued its substantive opinion in *In Re: IBM Arbitration Agreement Litig.* (App. 1a-22a) and issued summary orders adopting that reasoning in *Lodi* (App. 23a-24a), *Tavenner* (App. 25a-26a), and *Chandler* (App. 27a-28a). The Panel concluded that the piggybacking rule was *per se* inapplicable in the arbitration context and that the piggybacking rule was not a substantive right but instead a procedural right that could be waived in an arbitration agreement.[20] (App. 12a-15a.)

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97 (S.D.N.Y. 2021). They later initiated individual actions, which were consolidated into the *In Re IBM Arbitration Litig.* matter.

20. This aspect of the Panel's decision pertained to Petitioners Corbett and Flannery. With respect to the other 24 Petitioners in *In Re: IBM Arbitration Agreement Litig.* who had already

Petitioners in each of the four cases submitted timely petitions for rehearing *en banc*. The Second Circuit denied those petitions in *In Re: IBM Arbitration Agreement Litig.*, *Lodi*, and *Tavenner* on September 22, 2023. (App. 126a-130a.) The Second Circuit denied the petition in *Chandler* on October 12, 2023. (App. 132a.)

REASONS FOR GRANTING THE PETITION

This case involves issues of exceptional importance concerning the interaction of the ADEA and the FAA. The Second Circuit's opinion below permits employers to deploy arbitration agreements to prevent claimants from vindicating otherwise viable age discrimination claims, running afoul of *Gilmer*, 500 U.S. at 28. *Gilmer* makes clear that arbitration is an acceptable alternative forum ***only so long as*** an employee can pursue their claims in arbitration just as they could in court, without sacrificing any substantive rights. IBM – now with the Second Circuit's blessing – has been able to use arbitration agreements to curtail the ability of hundreds of former employees to pursue ADEA claims against it (even individually, in arbitration).[21]

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obtained final awards dismissing their claims, the Panel affirmed the District Court's decision declining to exercise jurisdiction under the Declaratory Judgment Act. (App. 12a.) The district court erred in assuming that there was no practical likelihood that those 24 Petitioners could reopen their claim in arbitration, should they prevail in this appeal.

21. In more recent decisions, this Court has upheld arbitration agreements precluding class actions, finding the class action to be a procedural mechanism for bringing some claims. *See, e.g., Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1621-30 (2018) ; *Estle*, 23 F.4th at 214. However, these cases assumed that the claims could

The practical effect of the timeliness provision in IBM's arbitration agreement is that Petitioners would have had *years* longer to submit their claims in court than they had in arbitration. This provision thus stood as an impermissible impediment to the effective vindication of their claims.[22] Moreover, in holding that the ADEA's timing scheme was merely a procedural right, the Second Circuit's decision created a significant split with the Sixth Circuit's decision in *Thompson*, 985 F.3d at 521, which held that the ADEA's timing scheme is a substantive right. The Second Circuit's decision likewise served to elevate IBM's arbitration agreement over other kinds of contracts with respect to enforceability, in contravention of *Morgan*, 142 S. Ct. at 1713.

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still be brought individually in arbitration. That is exactly what Petitioners attempted to do but were blocked from doing so.

22. *See Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115, 125 (2d Cir. 2010) (explaining that "if certain terms of an arbitration agreement served to act 'as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy"); *Greer v. Sterling Jewelers, Inc.*, 2018 WL 3388086, at *6-7 (E.D. Cal. July 10, 2018) (finding arbitration agreement's one-year statute of limitation to bring a Fair Employment & Housing Act claim to be unconscionable, where the FEHA statute provides litigants with one year to file such a claim with the state administrative agency *plus* one additional year from the administrative claim being processed to file a civil claim); *Newton v. American Debt Services, Inc.*, 854 F.Supp.2d 712, 732-33 (N.D. Cal. 2012) (finding arbitration clause as a whole unconscionable and therefore unenforceable; "[T]he shortened statute of limitations has the practical effect of limiting a customer's ability to bring a claim in arbitration by requiring a customer to give up their statutorily-mandated statute of limitations and risk losing their claim forever if they did not bring a claim within one year.").

I. This Case Presents an Important Issue Which is Likely to Recur and Over Which There is a Clear Circuit Split

The fundamental legal error of the Second Circuit's holding is its conclusion that the ADEA's timing scheme (which includes the piggybacking rule) is not a substantive right. This conclusion is *directly at odds* with the Sixth Circuit in *Thompson*, 985 F.3d at 521, as well as the EEOC's interpretation of the ADEA.

The arbitrators in Petitioners' cases held that their arbitration demands were untimely even though those individuals would indisputably would have been timely to proceed in court if not for the arbitration agreement. The Second Circuit condoned the conclusion that Petitioners could be barred from pursuing claims in arbitration that they would have been able to pursue in court.[23]

The Second Circuit rejected Petitioners' contention that the ADEA's timing scheme is a substantive right.

23. Petitioner Lodi's case was especially egregious. As explained in note 20 *supra*, her limitations period was abridged by more than two years *even though she timely filed an EEOC charge.* (*Lodi* App.015-016.) The EEOC investigated her claim, found reasonable cause to believe that IBM had discriminated against her (and many others), unsuccessfully attempted to conciliate her claim, and issued a Notice of Right to Sue. (*Lodi* App.015-016.) Then, when she did bring her claim in arbitration, and even though she submitted her arbitration demand more than two years *before* receiving the Notice of Right to Sue (which should have set her deadline to bring a claim for 90 days after receiving that notice), the arbitrator in her case nevertheless adopted IBM's argument and held that her claim was untimely. (*Lodi* App.015-017.)

In so doing, it created a clear circuit split with the Sixth Circuit in *Thompson* (as well as diverging from the EEOC's interpretation of the ADEA). Both the Sixth Circuit and the EEOC found that the ADEA's timing scheme is a substantive right that cannot be abridged by contract. *See Thompson*, 985 F.3d at 521; *Thompson*, EEOC Brief, 2020 WL 1160190, at *19-23. As the Sixth Circuit explained, "[a]ltering the time limitations surrounding [the ADEA's] processes risks undermining the statute's uniform application and frustrating efforts to foster employer cooperation." *Thompson*, 985 F.3d at 521.

The Second Circuit simply brushed off *Thompson* because it "did not involve an arbitration agreement or the FAA." (App. 15a.) While it is true that *Thompson* did not address an arbitration agreement,[24] that distinction does not impact whether or not the ADEA's timing scheme is a substantive right. According to the Second Circuit, an arbitration agreement is free to abridge the ADEA limitations period, even though other kinds of contracts cannot. But this conclusion runs afoul of this Court's decision in *Morgan*, 142 S. Ct. at 1713 , where the Court held that arbitration agreements cannot be elevated over other kinds of contracts.

In *Morgan*, the Court explained that "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules." *Morgan*, 142 S.Ct. at 1713. Indeed, the FAA

24. In *Thompson* the employer required its employee to sign an agreement stating that any employment-related claims that arose against the employer would bound by a six-month limitations period. *Thompson*, 985 F.3d at 515.

contains "a bar on using custom-made rules, to tilt the playing field in favor of (or against) arbitration." *Id.* at 1714. IBM's arbitration agreement is no different from the pre-employment contract at issue in *Thompson* – in either case, the ADEA's limitations period is a substantive right that cannot be abridged by contract.

The Second Circuit also opined that Petitioners' argument that the piggybacking rule is a substantive right is foreclosed by *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 259, 265-66 (2009). But *14 Penn Plaza* says nothing about whether the ADEA's timing scheme is a substantive or a procedural right – it merely held that the right to a judicial forum (as opposed to an arbitral forum) is a procedural right. *See id. 14 Penn Plaza* does not declare the right to be free from workplace age discrimination to be the ***only*** substantive right (to the exclusion of all others) provided under the ADEA; the cited portion of the case simply stands for the now widely accepted rule 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." *See id.*

The inclusion of the OWBPA in the ADEA serves to strengthen the argument that the ADEA's timing scheme is a substantive right, as the EEOC itself has recognized:

> The ADEA does have one other arguably relevant provision with no analogue in Title VII: 29 U.S.C. § 626(f) . . ., which expressly governs waivers of "rights or claims under this chapter." However, § 626(f), read together with *Logan*'s holding that a statutory limitation period is a substantive right, only strengthens

> the argument against construing the ADEA's limitations period as prospectively waivable.

Thompson, EEOC Amicus Brief, 2020 WL 1160190, at *25. The Sixth Circuit agreed. *Thompson*, 985 F.3d at 521.

Here, Petitioners could not have waived their right to enjoy the full ADEA limitations period – and thus pursue their claims at all - because IBM did not provide the OWBPA disclosures necessary to render such a waiver "knowing and voluntary." As the Second Circuit held in *Estle*, 23 F.4th at 214, where – as here – an employer seeks to obtain a waiver of a substantive right under the ADEA, the employer must first satisfy the strict requirements of OWBPA, which IBM did not do.

The Second Circuit, however, also wrote off the applicability of the OWBPA, again because it did not believe that the piggybacking rule was a substantive right.[25] Under *Estle*, 23 F.4th at 214, "[t]he phrase 'right or claim' as used in § 626(f)(1) is limited to substantive rights and does not include procedural ones," and as such, the Second Circuit concluded that the OWBPA was not at play.[26] (App. 13a-15a.) In holding that the ADEA limitations

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25. The Second Circuit appeared not even to recognize that Petitioner Lodi's claim did not even need to rely on the piggybacking rule.

26. The Second Circuit concluded further that the piggybacking rule is judge-made and is not found in the text of the ADEA but did not explain why that matters. For decades, courts have read the piggybacking rule into the ADEA's timing scheme. Indeed, since the Second Circuit adopted the piggybacking rule in *Tolliver*, 918 F.2d at 1057-59, Congress has amended the ADEA but has not precluded piggybacking. *See, e.g.*, Pub. L. 104–208,

period was a procedural right rather than a substantive right, the Second Circuit completely discounted the well-reasoned conclusion of the Sixth Circuit in *Thompson* and the interpretation of the ADEA by the EEOC.

Under the guise of following the FAA, the Second Circuit bent over backward to permit IBM's improper use of its arbitration agreement to eliminate dozens of employees' substantive ADEA claims (and effectively hundreds of other employees who filed their claims in arbitration and are awaiting the final outcome of this appeal). *Certiorari* is warranted to correct the Second Circuit's misapprehension and to resolve the split between the Second and Sixth Circuits.

II. The Second Circuit Exceeded the Bounds of the FAA in Holding that the Piggybacking Rule Does Not Apply in Arbitration

The Second Circuit's decision is also fundamentally flawed in that it created an extreme rule out of whole cloth that the piggybacking rule is *per se* inapplicable in the context of arbitration. This rule is completely unsupported by law and unduly impedes the right of parties to contract for the application of the piggybacking rule in an arbitration agreement. In its decision, the Second Circuit relies on only the Eleventh Circuit's decision in *Smith v. International Business Machines Corp.*, 2023 WL 3244583 (11th Cir. May 4, 2023) , but *Smith* too appears to have made up this rule out of whole cloth.

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div. A, title I, § 101(a) [title I, § 119], Sept. 30, 1996, 110 Stat. 3009, 3009–23.

Ironically, *Smith* invoked the proposition set forth in *Stolt-Nielsen v. AnimalFeeds International Corp.*, 559 U.S. 662, 683 (2010) , that "[p]arties are generally free to structure their arbitration agreements as they see fit" and to agree on "rules under which any arbitration will proceed." *Smith*, 2023 WL 3244583, at *6. But the Second Circuit's conclusion that the piggybacking rule can ***never*** apply in arbitration goes so far that it actually would impede parties who expressly wished to contract for the ADEA's timing scheme in whole from doing so.[27] The Second Circuit has, in effect, invented an arbitration-specific rule to impede the ability of Petitioners to pursue their ADEA cases, thus running afoul of this Court's admonition that under the FAA, "federal policy is about treating arbitration contracts like all others . . . ." *Morgan* , 142 S. Ct. at 1714.[28]

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27. The Second Circuit's extreme position would also require reversal of many arbitration awards that have applied the piggybacking rule. *See, e.g.*, *In the Matter of Arbitration Between: [Claimant], Claimant, v. [Respondent] (Food and Kindred Products), Respondent*, 2018 WL 1933357 (Arb. Frank Abramson Feb. 27, 2018), and *In the Matter of Arbitration Between: [Claimant], Claimant, and [Respondent] (Services, Not Elsewhere Classified)*, 2017 WL 6943558, at *4 (Arb. Linda F. Close, AAA Dec. 15, 2017) ("The Arbitrator now rules that Claimant had a right, under the single-filing rule, to proceed as she did.") .

28. Moreover, the EEOC charge-filing process is relevant to arbitration notwithstanding that the arbitration agreement, like here, can waive the administrative exhaustion requirement. Courts have held that employers do not waive their right to arbitrate by participating in EEOC investigations, *see e.g.*, *Marie v. Allied Home Mortgage*, 402 F.3d 1 (1st Cir. 2005) , reasoning that the purpose of the EEOC investigation is to determine whether there are grounds to conclude that discrimination may have occurred. As the First

Certiorari is urgently needed because the Second Circuit overstepped the boundaries of the FAA by adopting a rule that would, ironically, limit the ability of parties to freely contract for the application of the piggybacking rule.

III. The Second Circuit Wrongly Held that the Piggybacking Doctrine Does Not Operate to Extend a Limitations Period

Finally, *certiorari* is warranted because the Second Circuit also bafflingly concluded that the piggybacking rule has nothing to do with the ADEA limitations period. According to the Second Circuit, "[a]ll that the piggybacking rule does is functionally waive the administrative-exhaustion requirement – it does not extend the 300-daydeadline to file an EEOC charge." (App. 13a.)

The Second Circuit blinded itself to the practical ramifications of the piggybacking rule. Outside of the arbitration context, plaintiffs do *not* have to bring discrimination claims within the deadline for filing an EEOC charge (either 300 days or 180 days in non-deferral jurisdictions). Instead, they are allowed to piggyback on previously filed class claims and file court actions even years after their EEOC charge filing period has run.[29]

Circuit stated: "We will not force an employer to make a wasteful, preemptive decision to arbitrate." *Id.* The same should hold true for employees.

29. Numerous courts have recognized that the piggybacking rule is both an administrative exhaustion doctrine ***and*** a limitations doctrine. *See, e.g.*, *Leal v. Wal-Mart Stores, Inc.*, 2016 WL 2610020,

This approach allows employees who may not have any reason to know at the time of their termination that they had a viable discrimination claim to still pursue such a claim, if they learn later – through a filing by other employees or a determination by the EEOC – that they may have been the victim of discrimination.[30]

The Second Circuit's failure to recognize this point serves to minimize the degree to which Petitioners' ability to pursue their age discrimination claims was impeded. IBM's attempt to use the arbitration agreement to shut down ADEA claims that the Petitioners would have been able to pursue in court does not allow for "effective vindication" of their claims, as required by *Gilmer*.

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at *5 (E.D. La. May 6, 2016) (noting that where an individual has filed a timely classwide EEOC charge, the piggybacking rule "tolls the statute of limitations" for the individuals in the scope of the charge); *Catlin v. Wal-Mart Stores, Inc.*, 123 F. Supp. 3d 1123, 1131 (D. Minn. 2015) (same); *Allen v. Sears Roebuck and Co.*, 2010 WL 259069, at *2 (E.D. Mich. Jan. 20, 2010) (same); *Holowecki v. Federal Express Corp.*, 2002 WL 31260266, at *3 (S.D.N.Y. Oct. 9, 2002) (same); *Shannon v. Hess Oil Virgin Islands Corp.*, 100 F.R.D. 327, 333 (D.V.I. 1983) (where the piggybacking rule acts to excuse plaintiffs' exhaustion requirements, "it would be illogical not to excuse [the plaintiffs] from the limitations period set forth therein").

30. As noted, here, employees would not have any reason to know they were chosen for layoff based on their age until learning of the investigations by the EEOC and claims brought by other employees. By the time the evidence of executives calling older employees "dinobabies" who needed to be made "extinct" was uncovered, *see* note 17 *supra*, the limitations period would have long run for most employees with viable age discrimination claims.

The legislative history of OWBPA evinces Congress's concern about this very problem. As explained *supra*, Congress was motivated to pass the OWBPA explicitly due to concerns "that age may have played a role in the employer's decision or that the program may be designed to remove older workers from the labor force." S. Rep. 101-79, at 9 (1989). The piggybacking rule serves as a safeguard against unscrupulous employers dodging liability simply because the 300 or 180 days have run. Here, Petitioners have been denied that safeguard, simply by having signed an arbitration agreement that they were told would allow them to still pursue claims for age discrimination (and did not include the OWBPA disclosures that would allow IBM to obtain releases of their ADEA claims). Petitioners have not enjoyed a genuinely "fair opportunity" to advance their claims in arbitration.

CONCLUSION

This Court should grant the petition for *certiorari*. This Court in *Gilmer*, 500 U.S. at 28, made clear that arbitration is only an acceptable alternative to court if individuals can pursue the statutory claims in arbitration that they could pursue in court. Petitioners' ADEA claims were barred in arbitration even though they would have been timely in court. The disagreement between the Sixth Circuit and the Second Circuit as to whether the ADEA's timing scheme is a substantive or procedural right presents an important circuit split that this Court needs to resolve.

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