No. 23-795

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

BRIEF OF *AMICUS CURIAE* DIGNITY ALLIANCE MASSACHUSETTS & SUPPORTING PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST[1]

Dignity Alliance Massachusetts is a grass-roots, all-volunteer 501(c)(3) coalition of aging and disability service and advocacy organizations and supporters, working to secure fundamental changes in the provision of long-term services, support, and care. A coalition of more than 30 organizations, we are committed to a new vision of dignity and care for older adults and people with disabilities.

Our members have a strong interest in preserving and strengthening the rights of older adults and addressing age discrimination in any setting. As more older adults find their longevity exceeds their savings, they have a significant interest in working to maintain their independence and dignity. The U.S. Bureau of Labor Statistics reported in 2017 that 32% of people ages 65 to 69 were working, and 19% of people ages 70 to 74 were employed. The projection for 2024 is that 36% of people ages 65 to 69 will be in the labor force, a sharp increase from the 22% who were working in 1994. Consequently, we believe it is imperative to eliminate barriers, especially those based on age discrimination.

The National Employment Law Project ("NELP") is a national nonprofit organization based in New York with more than 50 years of experience advocating for the employment and labor rights of workers and the

1. No counsel for a party authored any part of this brief, and no such counsel or party contributed any money intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel contributed money towards its preparation or submission. This brief is being filed at least 10 days before the due date, providing the required notice. Sup. Ct. R. 37.2.

unemployed. NELP seeks to ensure that all employees receive the full protection of employment and labor laws, and that employers are not rewarded for skirting those basic rights. NELP's program priorities include workers' access to full remedies, including access to courts and with other coworkers, unimpeded by private waivers imposed by their employers. NELP promotes policies at the federal, state and local level to protect workers' rights, and has litigated and participated as amicus in numerous cases in state and federal appellate courts and the U.S. Supreme Court.

SUMMARY OF THE ARGUMENT

The Second Circuit determined the Age Discrimination in Employment Act's ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, remedial timing scheme (including the ADEA's use of the "single filing" or "piggybacking" rule) could be waived by contract because the ADEA's limitations period is merely a procedural right. In doing so, the Second Circuit weaponized the use of arbitration by enforcing the applicable agreement's more-restrictive limitations provision. The rest was to prevent Petitioners from pursuing their statutorily protected substantive rights under the ADEA despite the fact Petitioners's claims would have been timely had Petitioners been permitted to bring the same claims in court. In other words, the Second Circuit permitted an arbitration agreement to strip Petitioners of their substantive rights entirely by blocking **all** avenues for them to bring their ADEA claims against Respondent.

This case presents an important issue worthy of consideration given the ever-increasing prevalence of

arbitration agreements governing workplace disputes. Arbitration may be an acceptable alternative to proceeding in court on ADEA claims, but only if the employee can pursue his claim in arbitration. *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). The Second Circuit foreclosed that possibility for Petitioners. While statutes of limitations may be properly considered "procedural" under other circumstances, the issue is clearly substantive where, as here, the outcome has dispositive effects.

ARGUMENT

A. The ADEA's Administrative Charge Requirement.

Generally, the ADEA requires individuals to file an administrative charge with the Equal Employment Opportunity Commission ("EEOC") within 300 days of the date of an alleged discriminatory act (or within 180 days in non-deferral jurisdictions[2]) prior to bringing an ADEA claim. 42 U.S.C. § 2000e-5(e)(1); 29 U.S.C. § 626(d), § 633(b). The purpose of the administrative charge requirement is two-fold: to give the employer prompt notice of the complaint against it and to allow the EEOC sufficient time to attempt conciliation before an action is filed. *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1057 (2d Cir. 1990) (citing 29 U.S.C. § 626(d)); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1102–03 (11th Cir. 1996); *Kloos v. Carter-Day Co.*, 799 F.2d 397, 400 (8th Cir. 1986).

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2. 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.

While the charge filing requirement unquestionably sets a time limit, that limit is "not for the purpose of limiting [the] time for [filing] suit[.]." *Tolliver*, 918 F.2d at 1059. After an EEOC charge is filed, would-be ADEA plaintiffs must wait 60 days to initiate their claim and, if they receive a right-to-sue letter, they must do so within 90 days after receipt. *Holowecki v. Fed. Exp. Corp.*, 440 F.3d 558, 563 (2d Cir. 2006), *aff'd,* 552 U.S. 389 (2008).

B. The "Single Filing" or "Piggybacking" Rule Advances the ADEA's Remedial Purposes.

The "single filing" (or, "piggybacking") rule provides an exception to the ADEA's administrative exhaustion requirement by permitting individuals who do not file an EEOC charge to "piggyback" off another's timely filed charge so long as the claims allege the employer engaged in similar discriminatory conduct over the same period. *Tolliver*, 918 F.2d at 1057–59. This means an individual who never files an EEOC charge may still bring an ADEA claim against his employer so long as his claims fall within the scope of a previously filed charge.

Allowing employees who failed to file an EEOC charge of their own to "piggyback" off a prior charge makes perfect sense considering the remedial purposes of the ADEA. *Naton v. Bank of California*, 649 F.2d 691, 696 (9th Cir. 1981) ("The ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment."). Congress enacted the ADEA "to prohibit arbitrary age discrimination in employment." 29 U.S.C. § 621(b); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 734 (3d Cir. 1995) (the ADEA's primary purpose "is

to prohibit employers from acting upon the assumption that 'productivity and competence decline with old age.'") (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

To combat such discrimination, the ADEA provides workers with an opportunity to be "made whole" by "compensat[ing], and where appropriate, reinstat[ing], individuals who have suffered employment discrimination because of their advanced age." *Asklar v. Honeywell, Inc.*, 95 F.R.D. 419, 423 (D. Conn. 1982); *see also Palasota v. Haggar Clothing Co.*, 499 F.3d 474, 488 (5th Cir. 2007). Congress chose not only to provide damages for aggrieved individuals under the ADEA, but also with a "pre-suit" process serving the Congressional purpose of conciliation as a preferred means to rid workplaces of discrimination. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

If the employer and the EEOC are on notice of the nature and scope of the discrimination allegations from an earlier charge, however, there is no need for additional charges. Thus, the "single filing" rule gives effect to these remedial purposes by preserving otherwise viable claims simply because a worker did not file a "useless" and redundant EEOC charge. *See Horton v. Jackson Cnty. Bd. of Cnty. Comm'rs., 343 F.3d 897, 899 (7th Cir. 2003)*; *Thiessen v. Gen. Elec. Cap. Corp., 267 F.3d 1095, 1110 (10th Cir. 2001)*; *Grayson*, 79 F.3d at 1103; *EEOC v. Wilson Metal Casket Co., 24 F.3d 836, 840 (6th Cir. 1994)*. Indeed, "[i]t would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC." *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968).

The "single filing" rule further serves the remedial purpose of the ADEA by refusing to penalize workers who miss the charge filing deadline due to ignorance. *See Grayson*, 79 F.3d at 1103. Indeed, many workers may not realize they have a viable discrimination claim by the charge filing deadline and only become aware of their claim after someone else files an EEOC charge, they learn of an EEOC investigation, or hear of other workers bringing discrimination claims for similar conduct. The "single filing" rule thus preserves these workers' statutory rights and provides them with an avenue to bring their claims. Without this rule, employees would essentially be required to file their claims almost immediately, without ample time to investigate or to obtain access to relevant information, resulting in chaos for the parties, the courts, and the EEOC. *See Malarkey v. Texaco, Inc.*, 983 F.2d 1204, 1209 (2d Cir. 1993) (courts cannot create procedural barriers for plaintiffs that are contrary to the remedial purposes of the ADEA).

C. The Second Circuit's Opinion Strips Petitioners of Substantive Rights.

1. The Second Circuit Did, Wait, What?

Had Petitioners not been bound to arbitrate, Petitioners' ADEA claims against Respondent would have been timely under the "single filing" rule.[3] But because of the arbitration agreement, Petitioners couldn't bring

3. Plaintiffs in a then-pending ADEA collective action previously filed EEOC charges for similar discriminatory actions. *See Rusis v. International Business Machines Corp.*, Civ. Act. No. 1:18-cv-08434 (S.D.N.Y.).

their ADEA claims in court. And the applicable arbitration agreements contained a timing provision that is a more restrictive limitations period than the ADEA (requiring Petitioners to file an arbitration demand within 180 or 300 days of their layoff).[4]

Certain Petitioners initiated arbitration proceedings alleging ADEA violations *within* the period that would permitted in court, but after the *contractual* deadline to do so expired. These arbitrations were ultimately dismissed as untimely pursuant to the agreement's more restrictive limitations provision. Thereafter, Petitioners filed declaratory judgment actions in federal court challenging the enforceability of the arbitration agreements' timing provision,[5] which were ultimately dismissed. Petitioners timely appealed.

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4. This waiver runs afoul of the ADEA's statutory waiver requirements set forth in the Older Workers' Benefits Protection Act ("OWBPA"), 29 U.S.C. § 626(f)), which requires specific disclosures for employers to obtain a waiver of ADEA claims—a requirement Respondent did not meet. *See Estle v. Int'l Bus. Machines Corp.*, 23 F.4th 210, 214 (2d Cir. 2022). Moreover, the OWBPA prohibits the waiver of "rights or claims that may arise after the date the waiver is executed." 29 U.S.C. § 626(f)(1)(C). Logically, any agreement to shorten the limitations period for potential ADEA claims is necessarily prospective in scope. *See Adams v. Philip Morris, Inc.*, 67 F.3d 580, 584 (6th Cir. 1995) (an employee may not prospectively waive his or her rights under… the ADEA.") (citing *Alexander*, 415 U.S. at 51–52).

5. *See Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 125 (2d Cir. 2010) ("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.").

On appeal (and relevant here), the Second Circuit determined the ADEA's timing mechanism (including the "single filing" rule) was: (1) inapplicable in the arbitration context altogether; and (2) a procedural (as opposed to substantive) right that can be waived by contract.

2. The Second Circuit Ruling's Practical Effects Are Catastrophic.

The effect of this ruling is to deny Petitioners **any** avenue to pursue their ADEA claims against Respondent. Petitioners can't bring their timely ADEA claims in court because they agreed to arbitrate (even though they otherwise could have) and they can't bring their claims in arbitration because Respondent's arbitration agreement contractually limited the ADEA's remedial limitations period. But, again, arbitration is only an acceptable alternative to court if an employee can actually pursue his claim in arbitration. *Gilmer*, 500 U.S. at 28. And Petitioners can't.

The Second Circuit's finding that the ADEA's limitations period was "procedural" stripped Petitioners of their statutorily protected substantive rights under the ADEA altogether. Doing so clearly frustrates the remedial purpose of the ADEA, which provides employees aggrieved by age-based discrimination the substantive right to be made whole again. The ADEA's limitations period cannot be properly considered "procedural" when the effect is to deprive workers of the substantive rights granted to them by the ADEA.

Congress unquestionably provided Petitioners with a substantive right to bring discrimination claims against

Respondent under the ADEA. And for decades the ADEA has utilized the "single filing" rule to toll the period for would-be ADEA plaintiffs to initiate their ADEA claims against their employers. While Congress amended the ADEA many times since 1967, it has never once indicated any disagreement with the "single filing" rule. Congress legislated with knowledge of precisely how ADEA claims are handled (including knowledge of the ADEA's use of the "single filing" rule). If Congress thought "piggybacking" was a problem, it certainly could (and would) have stepped-in to curb the issue. But it didn't. Precisely because the "single filing" rule serves the ADEA's remedial purposes.

The Second Circuit's attempt to disregard these obvious truths because Petitioners sought to bring their ADEA claims in arbitration impermissibly elevates arbitration agreements over all else and creates "custom-made rules, to tilt the playing field in favor of [] arbitration" by preventing Petitioners from pursuing their ADEA claims. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713-14 (2022). But "[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." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 259, 265–66 (2009). But that's precisely what happened here, as the Second Circuit made clear employers can extinguish their employees' substantive rights through restrictive arbitration contracts.

3. Both the EEOC and the Sixth Circuit Disagree with the Second Circuit—Which Alone Makes *Certiorari* Appropriate.

Not only is the Second Circuit's decision in direct conflict with the remedial purposes of the ADEA (and its timing mechanisms), but it also created a significant circuit split and is at odds with the EEOC's interpretation of the ADEA. *See Thompson v. Fresh Prod., LLC*, 985 F.3d 509, 521 (6th Cir. 2021) (finding the ADEA's limitations period to be a substantive right that cannot be waived by contract); *Thompson v. Fresh Products, LLC*, EEOC Amicus Brief, No. 20-3060, 2020 WL 1160190, at *19-23 (6th Cir. March 2, 2020) (same).

The Sixth Circuit determined employers can't restrict the ADEA's limitations period by contract 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. That's because "[a]ltering the time limitations surrounding [the ADEA's] processes risks undermining the statute's uniform application and frustrating efforts to foster employer cooperation." *Id.* Where statutes create rights and remedies have their own timing mechanisms (as the ADEA does), limitations periods should be treated as a substantive right. *See Davis v. Mills*, 194 U.S. 451, 454 (1904); *see also Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1945).

CONCLUSION

The Court should grant *certiorari* in this matter to address whether an arbitration agreement can be used to bar employees from pursuing their substantive rights under the ADEA, when they otherwise could have pursued those claims in court (absent an arbitration agreement).

February 8, 2024

Respectfully submitted,

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