No. 22-1737

United States Court of Appeals for the Second Circuit

PATRICIA LODI,
Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS MACHINES CORP.,
Defendant-Appellee.

On Appeal from the United States District Court for the
Southern District of New York
Case No. 21-cv-6336 – Judge John G. Koeltl

PLAINTIFF-APPELLANT'S OPENING BRIEF AND SPECIAL APPENDIX

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Patricia Lodi hereby makes the following corporate disclosure statement pursuant to Fed. R. App. R. 26.1:

Plaintiff-Appellant is an individual and therefore has no parent corporation or shareholders.

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INTRODUCTION

This case was brought by a former IBM employee who seeks a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, that two provisions of an arbitration agreement that she entered into with IBM are not enforceable, as the provisions undermine or extinguish her ability to pursue her claims against IBM under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*[1] Upon her termination, Plaintiff entered into an arbitration agreement with IBM that released (in exchange for a small severance payment) almost all claims she may have against IBM, but not claims under the ADEA.[2] Under this

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[1] This Court has before it three other appeals which raise nearly identical issues to this case: *Chandler v. International Business Machines Corp.*, No. 22-1733; *In Re: IBM Arbitration Agreement Litig.*, No. 22-1728; and *Tavenner v. International Business Machines Corp.*, No 22-2318. Plaintiff's counsel intend to move to have these appeals all heard in tandem.

[2] Indeed, IBM's arbitration agreement could not have waived Plaintiff's ADEA claim, because IBM did not provide disclosures that would have been required under the Older Workers' Benefits Protection Act ("OWBPA"), 29 U.S.C. ¶ 626(f), in order for an employer to obtain a release of claims under the ADEA. The agreement therefore *must* permit Plaintiff to pursue her ADEA claim.

agreement, Plaintiff was permitted to pursue an ADEA claim against IBM, but it had to be brought in individual arbitration.

However, two provisions of IBM's arbitration agreement prevent Plaintiff from pursuing her ADEA claim in arbitration, a claim that she would have been able to pursue in court had she not signed the arbitration agreement. While Plaintiff has not challenged the overall enforceability of IBM's arbitration agreement, she sought a declaration holding unenforceable the two provisions in question. *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.").[3] It was proper for Plaintiff to ask the District Court to hold

[3] The District Court seemed to expect that Plaintiff was challenging the arbitration agreement as a whole and thus considered whether there was procedural unconscionability. However, Plaintiff was not challenging the agreement as a whole – she was only challenging two substantively

these provisions unenforceable [redacted]

[redacted]

[redacted].[4]

Although Plaintiff submitted a summary judgment motion with an extensive record to support her arguments, the District Court granted IBM's cross-motion to dismiss her complaint and denying her request for summary judgment. As will be explained below, the District Court's decision was rife with legal and factual errors and should be reversed.

First, Plaintiff requested that the District Court hold unenforceable the timeliness provision in the arbitration agreement by which IBM

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unconscionable provisions so that she would be allowed to able pursue her ADEA claim in arbitration.

[4] [redacted]

purported to abridge the limitations period for her to bring an ADEA claim. There can be no dispute that, if Plaintiff had been able to pursue her claim in court, it would have been timely for at least two reasons.[5]

First, Plaintiff filed a timely EEOC charge alleging age discrimination against IBM.[6] Even though Plaintiff would have been timely to file an ADEA lawsuit until at least October 29, 2021 (90 days after the EEOC issued her a Notice of Right to Sue), [redacted]

[redacted]

[redacted]. *See* [redacted], App.130-142.

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[5] As the Supreme Court explained in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), statutory claims are "are appropriate for arbitration" only "[s]o long as the prospectively litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum . . . ." (internal quotation omitted).

[6] ADEA claims are timely in court if filed 60 days or more after a timely filing with the EEOC and prior to 90 days after the issuance of a Notice of Right to Sue by the EEOC. *See* 29 U.S.C. § 626(d)(1) and (e). Plaintiff timely filed an EEOC charge, and she did not receive a Notice of Right to Sue from the EEOC until more than ***two years after*** she filed her claim in arbitration. (SOF ¶¶ 7-9, App.015-016.)

In addition to having filed a timely EEOC charge, Plaintiff also would have been able to bring her claim in court under the ADEA's "piggybacking rule", which allows individuals who did not timely submit an EEOC charge to nevertheless assert an ADEA claim in court if they can "piggyback" on someone else's timely filed classwide EEOC charge. *See Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1057-59 (2d Cir. 1990); *Holowecki v. Federal Exp. Corp.*, 440 F.3d 558, 565-70 (2d Cir. 2006). Nevertheless, IBM prevented Plaintiff from advancing her claim in arbitration, even though she would have been considered ***amply*** timely to do so in court.

The District Court incorrectly held that the timeliness provision in the arbitration agreement was enforceable even though it abridged the time Plaintiff had to initiate her ADEA claim by years.[7] According to the District Court, the ADEA's timing scheme could be waived by contract because it was not a substantive right. This conclusion is *directly at odds* with the

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[7] The District Court incorporated by reference its reasoning from its earlier decision in the *Chandler* case, *see* footnote 1, *supra*; *Chandler v. International Business Machines Corp.*, No. 21-cv-6319, 2022 WL 2473340, at *3-7 (S.D.N.Y. July 6, 2022); *see also Chandler v. International Business Machines Corp.*, No. 22-1733 (2d Cir.).

EEOC's interpretation of the statute, which was adopted by the Sixth Circuit in *Thompson v. Fresh Products, LLC*, 985 F.3d 509, 521 (6th Cir. 2021). *See also Thompson v. Fresh Products, LLC*, EEOC Brief, 2020 WL 1160190, at *19-23 (6th Cir. March 2, 2020). The District Court's reasoning placed IBM's arbitration agreement *above* other types of contracts with respect to enforceability; in so doing, the District Court simply ignored *Thompson* on the ground that it did not concern the arbitration context. In so doing, the District Court ran afoul of *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022), which made clear that arbitration agreements must be treated the same as other types of contracts with respect to enforceability. In other words, arbitration agreements are no more enforceable than any other type of contract.

Further, because the ADEA's timing scheme is a *substantive* right, it is also governed by the OWBPA, which includes a set of strict requirements that an employer must meet in order to obtain an effective waiver of any right or claim under the ADEA. *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998). IBM did not meet these requirements and thus the

arbitration agreement's purported abridgement of the ADEA's limitations period is unenforceable. At bottom, IBM's arbitration agreement impermissibly abridged the Plaintiff's right to enjoy the full limitations period that she would have had to initiate her ADEA claim in court, and in so doing, has impeded the effective vindication of Plaintiff's claim in arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

Second, Plaintiff also challenged the confidentiality provision in IBM's arbitration agreement, which IBM has aggressively wielded in order to block employees pursuing discrimination cases against IBM in arbitration from using smoking gun evidence in support of their claims that Plaintiff's counsel have obtained in other arbitration cases raising the same issues.[8] This Court has recognized the crucial importance of such pattern and practice evidence in *Hollander v. American Cyanamid Co.*, 895

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[8] During the course of these arbitrations, Plaintiff's counsel obtained [redacted] but IBM, wielding its confidentiality provision, has blocked Plaintiff's counsel from using this evidence from arbitration to arbitration. (SOF ¶¶ 16-99, App.019-039.)

F.2d 80 (2d Cir. 1990). Courts have routinely found similar confidentiality clauses in arbitration agreements unenforceable, and this Court has held that employees can challenge these provisions by developing a record showing demonstrating that they provide an unfair advantage to an employer. *See American Family Life Assurance Co. of N.Y. v. Baker*, 778 Fed. App'x. 24, 27 (2d Cir. 2019); *Guyden v. Aetna, Inc.*, 544 F.3d 376, 384-85 (2d Cir. 2008); *Lohnn v. International Business Machines Corp.*, 2022 WL 36420, at *11 (S.D.N.Y. Jan. 4, 2022). Nonetheless, the District Court refused even to consider the extensive summary judgment record that Plaintiff submitted to support her claim, instead granting IBM's Motion to Dismiss. The District Court's decision must be reversed.

Finally, the District Court erred by keeping under seal significant portions of the extensive record that Plaintiff submitted in support of her summary judgment motion, as well as wide swathes of the briefing. The District Court did not even address the sealing issue in its decision, thus

impliedly permitting the documents to remain permanently under seal.[9] As Judge Liman explained in another case ordering practically the same record to be unsealed, "[t]he Supreme Court and Second Circuit have long held that there is a presumption of immediate public access to judicial documents under both the common law and the First Amendment." *Lohnn v. International Business Machines Corp.*, 2022 WL 36420, at *6 (S.D.N.Y. Jan. 4, 2022) (citing *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2d Cir. 2006)).[10] The public's right of access attached the moment that Plaintiff filed

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[9] In *Chandler*, the District Court dismissed Plaintiff's protest of the sealing in a single sentence, stating that "[b]ecause the Confidentiality Provision is enforceable, the outstanding sealing requests . . . are granted." *Chandler*, 2022 WL 2473340, at *8. This reasoning improperly conflates the question of whether the arbitration agreement's confidentiality provision is enforceable with whether the various documents the plaintiff filed should have been made public.

[10] In *Lohnn*, IBM then sought an emergency stay from this Court of the district court's order to unseal documents virtually identical as those in this case. This Court declined to stay the district court's order. *See Lohnn v. International Business Machines Corp.*, No. 22-32, Order, Dkt. 71 (2d Cir. Feb. 8, 2022). IBM then petitioned for a rehearing *en banc*, which this Court also denied. *See Lohnn*, Order, Dkt. 90 (2d Cir. Feb. 16, 2022). While the summary judgment briefing, the plaintiff's statement of facts, and the declaration of Shannon Liss-Riordan were unsealed, the exhibits forming the record was never unsealed, because the parties settled the case prior to

her summary judgment motion in court, and there is no countervailing interest in keeping the documents under seal. *See Lugosch*, 435 F.3d at 123; *Lohnn*, 2022 WL 36420 at *9.

For all these reasons, the District Court's decision should be reversed.

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the district court's approval of the parties' proposed limited redactions. *See Lohnn v. International Business Machines Corp.*, 2022 WL 3359737, at *2-6 (S.D.N.Y. Aug. 15, 2022).

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. § 1331, because Plaintiff has brought a claim pursuant to Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 regarding her rights under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.* This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. Plaintiff timely filed a notice of appeal on August 5, 2022, App.831-832, appealing from the District Court's Order granting IBM's Motion to Dismiss and denying Plaintiff's Motion for Summary Judgment and Judgment issued on July 11, 2022, App.816-830.

STATEMENT OF THE ISSUES FOR REVIEW

(1) Whether the District Court erred by holding that IBM's arbitration agreement could abridge Plaintiff's ability to bring a claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq*., which would have been timely if filed in court, since Plaintiff timely filed an EEOC Charge alleging age discrimination against IBM, and the EEOC did not provide a Notice of Right to Sue until more than two years after Plaintiff filed her arbitration demand.

(2) Whether the District Court erred by holding that IBM's arbitration agreement could waive Plaintiff's ability to utilize the piggybacking rule under the ADEA.

(3) Whether the District Court erred by holding the confidentiality provision in IBM's arbitration agreement to be enforceable.

(4) Whether the District Court erred by keeping materials in this case under seal despite this Court's strong presumption that judicial documents must be public. *See Lugosch*, 435 F.3d at 126.

STATEMENT OF THE CASE

Plaintiff brought this lawsuit on July 26, 2021, seeking a declaratory judgment that two provisions of an arbitration agreement that she entered into with IBM are not enforceable (a timeliness provision and a confidentiality provision), as they undermine or extinguish his ability to pursue claims against IBM under the ADEA. *See* Complaint, App.001-011.

As described in Plaintiff's Motion for Summary Judgment (D. Ct. Dkt. 13) and the accompanying Statement of Material Facts (hereinafter "SOF", App.012-041), Plaintiff alleged that IBM engaged in a systemic, years-long effort to reduce its number of older workers in order to create a younger workforce; the company sought to refresh its image in order to better compete with the younger, "hipper" technology companies such as Google, Facebook, and Amazon. (SOF ¶ 3, App.014.)[11] Plaintiff alleges that she fell victim to IBM's discriminatory scheme when IBM summarily terminated her in 2017, at the age of fifty-seven (57), after seventeen years

[11] This discriminatory scheme is detailed in the Second Amended Complaint in *Rusis v. International Business Machines Corp.*, Civ. Act. No. 18-cv-08434, App.052-072.

with the company. (Compl. ¶ 7, App.003.) After Plaintiff's layoff, she signed an arbitration agreement in exchange for a modest severance payment; this agreement released almost all claims she had against IBM, with the specific exception of claims under the ADEA. The agreement allowed her to pursue claims under the ADEA but only in individual arbitration. (SOF ¶ 5, App.015.)[12]

I. Background of Classwide Allegations, and the EEOC's Reasonable Cause Finding, of Age Discrimination Against IBM

Plaintiff is not the only individual to have alleged that IBM engaged in systemic age discrimination in recent years against its older workers in an effort to build a younger workforce. In 2018, an ADEA collective action was filed against IBM, *Rusis v. International Business Machines Corp.*, Civ. Act. No. 1:18-cv-08434 (S.D.N.Y.). As a predicate to bringing the action, lead plaintiff Edvin Rusis filed a class EEOC charge on May 10, 2018. (SOF

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[12] Because IBM did not provide Plaintiff disclosures required by the OWBPA (SOF ¶ 5 n.2, App.015), the arbitration agreement could not release ADEA claims. *See Oubre*, 522 U.S. at 427.

¶ 14 n.5, App.017-018.)[13]

On October 11, 2018, Plaintiff Lodi ***also*** individually filed a timely charge with the EEOC, alleging IBM had discriminated against her on the basis of age.[14] Plaintiff was one of fifty-eight (58) former IBM employees whose charges led to a multi-year, class-wide investigation by the EEOC, which resulted in the agency issuing a Letter of Determination on August 31, 2020, finding reasonable cause to believe to believe that IBM engaged in an aggressive campaign over at least a five-year period, from 2013 through 2018, to reduce the number of its older workers and replace them with

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[13] *Rusis* named plaintiffs Henry Gerrits, Phil McGonegal, and Sally Gehring also timely filed timely classwide EEOC charges. (SOF ¶ 14 n.5, App.017-018.)

[14] Plaintiff was laid off by IBM on July 31, 2017. (SOF ¶ 9 n.3, App.015.) Both shortly before and after her layoff, she submitted several job applications for other positions that she was qualified for, the latest of which was submitted on February 28, 2018. (SOF ¶ 9 n.3, App.015.) After that date, she learned that IBM had deleted all of her pending applications from its system, meaning that it was only then that it was clear to Plaintiff that she would not be permitted to work in a different position at IBM. She filed her charge with the EEOC on October 11, 2018 (less than 300 days after she learned that IBM had deleted all of her pending applications). (SOF ¶ 9 n.3, App.015.) The EEOC treated her charge as timely. (SOF ¶ 9 n.3, App.015.)

younger workers, thereby discriminating against its older workers in violation of the ADEA. (SOF ¶¶ 49-55, App.026-027.)

II. Plaintiff's Challenge to the Arbitration Agreement's Purported Abridgement of the Time Period to File an ADEA Claim

Upon her termination, Plaintiff signed an arbitration agreement that IBM has contended limits the time she had to submit an arbitration demand to 300 days. [REDACTED], she has challenged the enforceability of the agreement's timeliness provision.[15]

Plaintiff's arbitration agreement with IBM included the following

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[15] As explained in footnote 4, *supra*, IBM has argued – [REDACTED] – that the arbitration agreement delegates questions of enforceability or validity of the agreement's terms to courts rather than arbitrators. Plaintiff attempted to arbitrate her claim before resorting her court, [REDACTED]. *See, e.g.*, *Caribe Billie v. Coverall North America*, 2022 WL 807075, at *7-14 (D. Conn. March 16, 2022) (allowing case to proceed in court, only after having compelled the case to arbitration, which ultimately could not proceed due to the plaintiff's inability to pay arbitral fees); *CellInfo, LLC v. American Tower Corporation*, 506 F. Supp. 3d 61, 71-73 (D. Mass. 2020) (denying motion to resume litigation in court, where it was not yet clear if the AAA would permit the arbitration to proceed notwithstanding the plaintiff's inability to pay arbitral fees).

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.

(SOF ¶ 13, App.017.)

After filing a timely charge with the EEOC, Plaintiff brought her case in arbitration on January 17, 2019. [redacted]

[redacted], App.130-142.)

Plaintiff then opted in to *Rusis* in order to challenge before a court the validity of the purported waiver of piggybacking in the arbitration agreement. (SOF ¶ 10, App.016.) The *Rusis* court dismissed Plaintiff (and nearly 30 other individuals raising the same challenge) due to the class action waiver in the agreement they signed, holding that they could not

bring this challenge as a part of a class action. *See Rusis v. International Business Machines Corp.*, 529 F. Supp. 3d 178, 194-97 (S.D.N.Y. March 26, 2021). Plaintiff thereafter initiated this matter in the Southern District of New York in order to bring her challenge in an individual case.

III. Plaintiff's Challenge to IBM's Aggressive Use of the Confidentiality Provision in the Arbitration Agreement

Plaintiff also challenged IBM's aggressive use of its confidentiality provision as unconscionable and therefore unenforceable.[16] IBM has aggressively invoked this provision in the dozens of arbitrations that

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[16] This provision states:

> To protect the confidentiality of proprietary information, trade secrets or other sensitive information, the parties shall maintain the confidential nature of the arbitration proceeding and the award. The parties agree that any information related to the proceeding, such as documents produced, filings, witness statements or testimony, expert reports and hearing transcripts is confidential information which shall not be disclosed, except as may be necessary to prepare for or conduct the arbitration hearing on the merits, or except as may be necessary in connection with a court application for a preliminary remedy, a judicial challenge to an award or its enforcement, or unless otherwise required by law or judicial decision by reason of this paragraph.

(SOF ¶ 16, App.019.)

Plaintiff's counsel have pursued on behalf of former employees suing the company for age discrimination and has used it to hamper the ability of former employees to prove their cases under the ADEA. Plaintiff should be permitted to arbitrate her claim, and when she does so, she should not be unduly impeded from advancing her age discrimination claim by IBM's aggressive use of its confidentiality provision. Plaintiff has put together a record that demonstrates that IBM has routinely attempted (often successfully) to stop its former employees from using *crucial* [redacted] evidence of IBM's discriminatory animus in their arbitrations and to prevent the employees from relying on key arbitral decisions.

For instance, IBM has used its confidentiality provision to block employees in arbitration from using evidence obtained in similar cases, including: [redacted]

[redacted]. (SOF ¶¶ 16-99, App.019-039.)

IV. The District Court Grants IBM's Motion to Dismiss Plaintiff's Challenges to Its Arbitration Agreement

In the court below, Plaintiff moved for summary judgment on her Declaratory Judgment Act claims, while IBM moved to dismiss them. The District Court granted IBM's motion and held Plaintiff's motion to be moot.

The District Court incorporated its decision in the *Chandler* case into its opinion in this case. In *Chandler*, the court cited three reasons for rejecting Plaintiff's argument, including its conclusion that any purported waiver of the piggybacking rule was not a waiver of a substantive right under the ADEA; relatedly, the court did not consider the piggybacking

rule to be part of the limitation law of the ADEA; and any failure on behalf of IBM to provide OWBPA disclosures did not render the timeliness provision unenforceable. Opinion at 8, App.823. The court further acknowledged the factual difference in this case that, even absent application of the piggybacking doctrine, "the plaintiff may have had more time to file her claim in federal court," as she had filed her own charge with the EEOC. Opinion at 10-11, App.825-826. With respect to piggybacking, the court noted it did not consider the doctrine applicable where Plaintiff had filed her own administrative charge. Opinion at 11, App.825.

The District Court also dismissed Plaintiff's challenge to the confidentiality provision. Opinion at 12-13, App.827-828. Without addressing the extensive record that Plaintiff submitted in support of her Motion for Summary Judgment, and instead simply incorporating and following the opinion issued in *Chandler*, the District Court held that the confidentiality provision was not unconscionable under New York law. Opinion at 12-13, App.827-828.

The Court also implicitly denied the Plaintiff's to unseal summary

judgment briefing materials, by directing the Clerk to close all pending motions related to the case, Opinion at 14, App.829.

STANDARD OF REVIEW

The Court reviews *de novo* a district court's order granting a motion to dismiss a complaint for failure to state a claim upon which relief may be granted. *Kelleher v. Fred A. Cook, Inc.*, 939 F.3d 465, 467 (2d Cir. 2019). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Likewise, the Court reviews *de novo* a district court's order denying summary judgment. *See Fisher v. Aetna Life Insurance Co.*, 32 F.4th 124, 135 (2d Cir. 2022). Summary judgment under Rule 56 is appropriate where admissible evidence in the form of affidavits, deposition transcripts, or other documentation demonstrates the absence of a genuine issue of material fact, and one party's entitlement to judgment as a matter of law. *See Viola v. Philips Med. Sys. of N. Am.*, 42 F.3d 712, 716 (2d Cir. 1994).

The Court reviews a district court's order to seal for an abuse of discretion with respect to the ultimate decision, clear error as to factual determinations, and *de novo* as to conclusions of law. *See Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 139 (2d Cir. 2016).

SUMMARY OF THE ARGUMENT

The District Court committed several key errors of law and fact in its decisions granting IBM's Motion to Dismiss and sealing the summary judgment record. As such, the District Court's decisions should be reversed.

First, the District Court incorrectly held that the timeliness provision of IBM's arbitration agreement was enforceable, even to the extent that it purports to truncate the limitations period of the ADEA. Plaintiff timely filed an EEOC charge and did not receive a Notice of Right to Sue from the EEOC until years after she submitted her arbitration demand. Thus, her claim would have been timely in court, and IBM could not render her claim untimely simply by having her sign an arbitration agreement.

Plaintiff's arbitration demand was also timely because she should have been able to make use of the piggybacking rule under the ADEA. The arbitration agreement's waiver of this rule is unenforceable, as the

ADEA limitations period is a substantive, non-waivable right. *See Thompson*, 985 F.3d at 521.

Nevertheless, the District Court held that Plaintiff's arbitration demand was untimely pursuant to the arbitration agreement's timeliness provision, because it was not submitted within 300 days of the date that she was notified of her termination. The ADEA's timing scheme, however, is a substantive, non-waivable right that cannot be abridged by contract. *See Thompson*, 985 F.3d at 521. In order to have waived Plaintiff's ability to pursue an ADEA claim, IBM would have had to provide OWBPA disclosures, which it did not do.

Second, the District Court erred in holding that IBM's aggressive use of the confidentiality provision in IBM's arbitration agreement was enforceable. The District Court did not even consider the extensive summary judgment record that Plaintiff submitted in support of her claim challenging IBM's use of this agreement. However, this Court has made clear that a confidentiality provision may be unenforceable when a plaintiff

builds a record showing it to have unduly prevented arbitration claimants from pursuing their claims. *See American Family Life Assurance Co.*, 778 Fed. App'x at 27; *Guyden*, 544 F.3d at 384-85.

Finally, the District Court wrongly allowed significant portions of the record and briefing in this matter to remain sealed, in contradiction to this Court's decision in *Lugosch*, 435 F.3d at 126.

ARGUMENT

I. Even Though Plaintiff's ADEA Claim Would Have Been Timely Had She Filed it in Court, the District Court Wrongly Held that IBM's Arbitration Agreement Could Render Her Claim Untimely

There can be no question that Plaintiff's ADEA claim would have been timely had she filed it in court. First, Plaintiff submitted her own timely EEOC charge on October 11, 2018,[17] and she then submitted an arbitration demand on January 17, 2019 (more than 60 days after filing her EEOC charge and well before 90 days after the EEOC issued her a right to sue letter). (SOF ¶¶ 8-9, App.015-016.) The EEOC deemed her EEOC charge to be timely, investigated her claim (in tandem with at least fifty-seven (57) other individuals alleging age discrimination investigation), and issued a determination on August 31, 2020, concluding that there was reasonable cause to believe that IBM had systematically discriminated against older employees on a companywide basis since 2013. (SOF ¶ 9, App.016.) It was

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[17] Under 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). 42 U.S.C. § 2000e-5(e)(1); 29 U.S.C. §§ 626(d), 633(b). Plaintiff worked in a deferral jurisdiction. (Compl. ¶ 3, App.002.)

not until July 30, 2021, that the EEOC issued Plaintiff a Right to Sue Notice. Under the ADEA, an employee who has filed an ADEA charge must wait at least 60 days before filing a court case, and in the event the EEOC issues a Notice of Right to Sue, the individual then has 90 days in order to file a court case. *See* 29 U.S.C. §§ 626(d)(1) and (e). As such, if Plaintiff could have brought her claim in court, she would have had until at least October 28, 2021, to initiate a lawsuit. (SOF ¶ 9, App.015-016.)

Second, even apart from her timely filed EEOC charge, Plaintiff should have been able to proceed in her arbitration by making use of the piggybacking rule of the ADEA. Plaintiff respectfully directs the Court to the full discussion of the piggybacking rule in the plaintiffs' brief in *In Re: IBM Arbitration Litig.*, Case. No. 22-1728, and will provide an abbreviated summary here. The piggybacking rule permits individuals to assert ADEA claims against employers even if the claims are brought outside the time to file an EEOC charge. 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*, 918 F.2d at 1057. "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, 2007) (quoting *Dargento v. Bally's Holiday Fitness Ctrs.*, 990 F. Supp. 186, 193 (W.D.N.Y. 1997), citing *Snell v. Suffolk County*, 782 F.2d. 1094, 1100-1101 (2d Cir. 1986)).[18] Importantly, a plaintiff may initiate a separate, individual action by piggybacking off charges filed by plaintiffs to 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**

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[18] Courts have found that 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). Moreover, the Second Circuit has "aligned itself with the 'broadest' interpretation of the single-filing rule." *Id.* at *6 (citing *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1058 (2d Cir. 1990)).

initiate their own."); *see also Calloway v. Partners Nat. Health Plans*, 986 F.2d 446, 450 (11th Cir. 1993). In court, Plaintiff would have been able to timely assert her claim by piggybacking on the classwide EEOC charges submitted in *Rusis*.[19]

[19] IBM is expected to argue that the timeliness provision waiving the ability to piggyback is not the reason for the inability of IBM's former employees to arbitrate their claims, because they could have demanded arbitration during the 300/180 day window. Aside from the fact that the arbitration agreement is not actually explicit as to what the deadline is for arbitration demands, these former employees were not generally aware that IBM had discriminated against them at the time of their separations, because IBM had (falsely) informed them that they were separated for legitimate reasons. Indeed, this is the very reason that Congress enacted the OWBPA, which would allow laid off employees to evaluate whether their terminations may be due to age discrimination by requiring disclosure of the ages of other employees who were terminated and retained in the same layoff. Because IBM did not provide these disclosures to its former employees, they lacked information to know that they may have a viable age discrimination claim until later when they learned of allegations that IBM was engaged in a companywide systemic effort to oust older workers. This is also the reason behind the piggybacking rule; employees may not realize they have a discrimination claim at the time of their termination, but later, when they find out that a class charge of discrimination has been filed, they may join it. *See Grayson v. K-Mart Corp.*, 79 F.3d 1086, 1103 (11th Cir. 1996) ("The principle behind the piggybacking rule is to give effect to the remedial purposes of the ADEA and to not exclude otherwise suitable plaintiffs from an ADEA class action simply because they have not performed the useless act of filing a charge.").

, App.130-142.) The effect of the arbitration agreement's timeliness provision is that her time to assert her claim against IBM under the ADEA has been abridged by more than three years.

This outcome – that Plaintiff could have proceeded with her claim in court, but was unable to do so in arbitration due to the agreement truncating the time to file by more than three years – is not permitted under *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). Under *Gilmer*, arbitration is an acceptable alternative forum in which to pursue a discrimination claim ***only so long as*** an employee can pursue his or her claims in arbitration just as she would be able to in court, without sacrificing any substantive rights. Sacrificing the right to pursue the claim at all as a result of the arbitration agreement shortening the time-period to

file the claim, constitutes sacrificing a substantive right. *See Thompson*, 985 F.3d at 521 (holding that contract provision shortening the time-period for plaintiff to file her ADEA claim to six-months, which would have resulted in plaintiff's claim being time-barred under the agreement, to be an unenforceable). IBM's timeliness provision is thus unenforceable, because it waives a substantive right by abridging the time period to file, and because it this waiver of rights under the ADEA was obtained without IBM providing OWBPA disclosures.

The District Court erred in reaching a contrary conclusion, and this Court should reverse. In dismissing Plaintiff's challenge to the timeliness provision, the District Court has placed arbitration agreement on a pedestal above other kinds of contracts and thus has run afoul of the Supreme Court's recent admonition in *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022), that courts cannot invent special rules to favor enforceability of arbitration agreements.

A. The ADEA's Timing Scheme is a Substantive Right that Cannot be Abridged by Contract

Courts have routinely found provisions of arbitration agreements or contracts shortening the time to file discrimination claims to be unenforceable. The Sixth Circuit, for example, recently held that an employer cannot contractually shorten the limitations period of the ADEA. *See Thompson*, 985 F.3d at 521. The court explained that the timing provisions contained in the ADEA "are part of the **substantive law** of the cause of action created by the ADEA" and that "the limitations period[] in the . . . ADEA give[s] rise to substantive, non-waivable rights." *Id.* (emphasis added). Moreover, the court proceeded to explain that "like Title VII, the 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.'" and "[a]ltering the time limitations surrounding these processes risks undermining the statute's uniform application and frustrating efforts to foster employer cooperation." *Id.*

In so concluding, the Sixth Circuit relied on an earlier case, *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 833 (6th Cir. 2019), where the court had held that an employer could not abrogate the limitations period for a Title VII claim by contract. As the Court reasoned, although statutes of limitations are traditionally regarded as procedural mechanisms, there are exceptions to this general rule where statutes that "create rights and remedies contain their own limitation periods." *Id.* (citing *Davis v. Mills*, 194 U.S. 451, 454 (1904)). In such instances, the statute of limitations is considered a "substantive right" that "generally is not waivable in advance by employees." *Id.* at 829. The Court noted that this conclusion aligned with Circuit precedent "disallow[ing] contractual limitations" on claims brought under other statutory schemes containing their own limitations periods, such as the Fair Labor Standards Act of 1938, 29 U.S.C. § 206(d) and the Equal Pay Act, 29 U.S.C. § 206(d). *Id.* at 830-31 ("[E]nforcing the express limitation period of Title VII not only protects the scheme Congress created with that statute; it is also conceptually in harmony with our interpretation of similar statutes."). Case law within the Second Circuit

similarly holds that limitations periods under statutes such as the FLSA are substantive rights that cannot be truncated by contract.[20] Further, this Court in *Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115, 125-26 (2010), indicated its agreement with the principles espoused in *Logan*, including in the context of evaluating the enforceability of an arbitration agreement.[21]

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[20] *See Castellanos v. Raymours Furniture Company, Inc.*, 291 F. Supp. 3d 294, 301 (E.D.N.Y. 2018) (holding that Employee Arbitration Program provision shortening time period to file FLSA claim to 180 days to be unenforceable, as it "contravene[d] congressional commands", "undermine[d] the FLSA's remedial scheme" and was unenforceable "under the effective vindication exceptions"); *Friedmann v. Raymour Furniture Co., Inc.*, 2012 WL 4976124 (E.D.N.Y. Oct. 16, 2012) (refusing to enforce a shortening of an employee's limitations period to pursue claims under the ADEA and Americans with Disabilities Act).

[21] In *Ragone*, the arbitration agreement at issue included a provision shortening the time for plaintiff to file a Title VII claim to 90-days; the defendant agreed to waive enforcement of the provision, so this Court did not rule on the provision's enforceability. *Id.* at 123. The Court however rang a "A Note of Caution", that "[h]ad the defendants attempted to enforce the arbitration agreement as originally written it is not clear that we would hold in their favor … [I]t is at least possible that Ragone would be able to demonstrate that th[is] provision[] w[as] incompatible with her ability to pursue her Title VII claims in arbitration, and therefore void under the FAA." *Id.* at 125-26.

In *Thompson*, the court extended its ruling in *Logan* to the ADEA. *See Thompson*, 985 F.3d at 521. 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. Importantly, the EEOC submitted an amicus brief in *Thompson*, also taking the position that the ADEA's limitations period is a substantive, non-waivable right that an employer cannot abridge by contract. *See Thompson*, EEOC Brief, 2020 WL 1160190, at *19-23. As the EEOC explained, "the ADEA's statutory limitations period is a substantive right and prospective waivers of its limitations period are unenforceable." *Id.* at *19. The EEOC's reasonable interpretation of the ADEA as set forth in this

amicus is entitled to deference 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.").[22]

In sum, the *Thompson* decision, which relied on the EEOC's interpretive expertise, make clear that the ADEA's limitations period is a substantive right that cannot be waived or truncated in an arbitration agreement. *Thompson* is in accord with the Court's discussion of truncating Title VII's limitations period in *Ragone*, 595 F.3d at 125-26. Indeed, given this Court's strong and expansive position in favor of the piggybacking rule, this Court should follow *Thompson*.[23] The District Court's refusal to

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[22] *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).

[23] As one court has described it, the Second Circuit has "aligned itself with the 'broadest' interpretation" of the piggybacking rule. *Cronas*, 2007 WL 2739769, at *5 (applying the piggybacking rule because the court should not "elevate form over substance" when ensuring that employees bringing discrimination claims can have their complaints heard) (citing *Tolliver*, 918 F.2d at 1057).

recognize this substantive right was an error.

B. The District Court Erred in Refusing to Follow *Thompson* and the EEOC, Taking an Unduly Narrow View of the Substantive Rights Afforded by the ADEA

In dismissing Plaintiff's claim, the District Court relied on another decision it issued shortly before the decision in the instant matter, *Chandler v. International Business Machines Corp.*, No. 21-cv-6319, 2022 WL 2473340 (S.D.N.Y. July 6, 2022). The District Court in this matter quoted the *Chandler* decision, holding that "while a waiver in an arbitration agreement of the ability to assert a party's substantive rights may be unenforceable, parties may agree to arbitration procedures that modify or limit the procedural rights that would otherwise be available to them in federal court." *See* Opinion at 9-10, App.824-825 (quoting *Chandler*, 2022 WL 2473340, at *4).[24] While the District Court stated further that "[t]he fact that the plaintiff may have had more time to file her claim in federal court had she not agreed to arbitrate her ADEA claims is immaterial," because "[p]arties may agree to

[24] The *Chandler* case raises the same argument as here regarding the purported waiver of the piggybacking rule. Here, Plaintiff also filed her own timely EEOC charge.

prosecute their claims in arbitral forums with different or more limited procedure than would be available in federal court," that proposition is simply not true in the current circumstances in light of *Thompson*, 985 F.3d at 521.

Judge Koeltl elaborated on this proposition in *Chandler*, explaining that the ADEA limitations period is not a substantive right. *See Chandler*, 2022 WL 2473340, at *4. The District Court erred in narrowly construing the ADEA as ***only*** providing the substantive right to be free from workplace age discrimination. *See id.* (citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265 (2009)). *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." This language is subject to *Gilmer* and this Court's *dicta* in *Ragone* is directly at odds with the District Court's narrow proclamation here, as this Court

has recognized that the time-period for filing an anti-discrimination claim may be construed as a substantive right.

Furthermore, the District Court's failure to grapple with the analysis in *Thompson*, under which Plaintiff contends the conclusion that the ADEA's limitations period is a substantive right, was in error. The District Court primarily distinguished *Thompson* on the ground that the court in *Thompson* was not faced with analyzing the enforceability of a waiver in an arbitration agreement. *See Chandler*, 2022 WL 2473340, at *6. It is immaterial that the Sixth Circuit was not analyzing an arbitration agreement in *Thompson*. The fact that IBM has sought to waive a substantive right in an arbitration agreement as opposed to other kinds of contracts (such as a pre-employment agreement in *Thompson*) does not immunize it from enforceability challenges. The Supreme Court recently made clear in *Morgan* that "the Federal Arbitration Act ("FAA")'s 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules." *Morgan*, 142 S. Ct. at 1713; 9 U.S.C. § 1, *et seq*. Indeed, the FAA contains "a bar on using custom-made rules, to tilt the

playing field in favor of (or against) arbitration." *Id.* at 1714. The District Court's conclusion that *Thompson*'s holding is inapplicable to arbitration agreements runs headlong into *Morgan*. 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. Furthermore, this Court's *dicta* in *Ragone* suggests that even in the arbitration context, a provision shortening the time period to file an anti-discrimination claim may be unenforceable as "incompatible with [the] ability to pursue [] Title VII claims in arbitration, and therefore void **under the FAA**." *Id.* at 125-26 (emphasis supplied).

Importantly, the District Court's quoted language from *Logan*, *see Chandler*, 2022 WL 2473340, at *6 (which it used to distinguish *Logan*), is *dicta* intended by the Sixth Circuit to distinguish its holding in *Morrison v. Circuit City Stores, Inc.,* 317 F.3d 646 (6th Cir. 2003). In *Morrison*, the Sixth Circuit found that an arbitration provision abridging the limitations period for a Title VII claim was enforceable, because it did not unduly burden the effective vindication of the plaintiff's Title VII claim in arbitration. *See*

Logan, 939 F.3d at 837-38.[25] However, in *Morrison*—unlike the case before this Court—there was no indication that the plaintiff had been burdened at all by the limitations provision of the arbitration agreement, because in fact the plaintiff had been able to actually arbitrate her claim on the merits to a final award. *Morrison*, 317 F.3d at 655. Thus, neither *Morrison* nor *Logan* runs counter to Plaintiff's position here: that where an arbitration agreement deprives a litigant of a substantive right under the ADEA, it is void under the FAA.[26]

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[25] The *Logan* court pointed out that resolving the question in *Morrison* "required carefully balancing the 'liberal policy favoring arbitration and the important goals of federal anti-discrimination statutes.'" *Logan*, 939 F.3d at 838.

[26] Even if the piggybacking rule were a procedural right, the arbitration agreement could not waive the piggybacking rule if doing so impeded the effective vindication of the Claimant's ADEA claim. Indeed, the District Court acknowledged this point. *See* Opinion at 9-10, App.824-825. The practical effect of the timeliness provision is that Plaintiff would have had *years* longer to submit her claim in court than she did in arbitration. This impact is an impermissible impediment to the effective vindication of her claim. *See Ragone*, 595 F.2d at 125 (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

Moreover, as discussed further below, *Logan* and *Morrison* are both distinguishable because these cases address a plaintiff's ability to pursue Title VII claims. Unlike Title VII, the ADEA implicates the requirements of the OWBPA, which IBM failed to comply with here despite the arbitration agreement truncating Plaintiff's ADEA limitations period by three years. IBM's failure to provide Plaintiff with OWBPA disclosures is an additional reason to hold that the timeliness provision in IBM's arbitration agreement is unenforceable.

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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.").

C. The District Court Erred in Holding that IBM's Failure to Provide Older Worker Benefits Protection Act (OWBPA) Disclosures Did Not Render the Timeliness Provision Unenforceable

Even if IBM were correct that it could abridge the ADEA's limitations period in its arbitration agreement (which it is not), IBM's argument fails for yet another reason. IBM's timeliness provision cannot waive the full limitations period (and, effectively Plaintiff's claim altogether) under the ADEA, since IBM did not provide the disclosures required under the OWBPA. Under the OWBPA, IBM is obligated to provide disclosures to Plaintiff regarding the ages of other employees selected and not selected for layoff. Its failure to do so renders any purported waiver of the limitations period in the timeliness provision unenforceable.

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 also Oubre*, 522 U.S. at 427.[27] Importantly, the EEOC has taken the position that

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[27] The OWBPA's requirements have been enforced strictly. *See, e.g.*, *Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090, 1093-96 (10th Cir. 2006)

the OWBPA protects employees from waiving rights by abridging their time to pursue their claims if they did not receive the proper disclosures:

> 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 Brief, 2020 WL 1160190, at *25. Because IBM did not provide OWBPA disclosures to Plaintiff, Plaintiff cannot have waived her statute of limitations rights by signing the arbitration agreement. To the extent the agreement purports to or is held to waive that rule, that provision is invalid.

(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).

Tellingly, the *Thompson* court even pointed to the OWBPA as an indicator that the ADEA's limitations period was a substantive right that could not be waived:

> The ADEA's waiver provision further supports the conclusion that**, as a substantive right, its self-contained limitation period may not be prospectively waived.** It provides that "[a]n individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f). A waiver may not be "knowing and voluntary" if it includes waiver of "rights or claims that may arise after the date the waiver is executed." *Id.* § 626(f)(C). The statute's strict limitations on waivers align with "the general rule in this circuit that an employee may not prospectively waive his or her rights under either Title VII or the ADEA." *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 584 (6th Cir. 1995).

Thompson, 985 F.3d at 521.[28] There is no dispute that IBM **did not make these disclosures** regarding the ages of employees selected and not

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[28] Moreover, the arbitration agreement's purported waiver of the piggybacking rule also cannot be valid because the OWBPA requires that, in order 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 timing provision of the arbitration agreement is not only incoherent, but requires the reader to have the expertise of an employment discrimination lawyer and a thorough understanding of administrative exhaustion to parse it. To even attempt to understand the statute of limitations that applies to them, the IBM employees would have to understand: (1) the administrative and

selected for layoff, in connection with Claimant's termination, and therefore Claimant cannot have waived her rights under the ADEA's timing scheme (whether in arbitration or otherwise).

The District Court, however, reasoned (more fully in *Chandler*, 2022 WL 2473340, at *5) that IBM's failure to provide OWBPA disclosures did not render the provision unenforceable, based on its conclusion that the

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court statute of limitations under the ADEA; (2) which types of claims "must first be brought before a government agency"; and (3) the deadline for filing with the administrative agency in their state. That is certainly more information than the average IBM employee has. 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 that contained 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) (invalidating a release that contained both a waiver and covenant not to as confusing, since the language of the agreement suggested that employees could not bring suit, even to test validity of waiver); *Rupert v. PPG Industries, Inc.*, 2009 WL 596014, at *38-49 (W.D. Pa. Feb. 26, 2009) (recommending invalidation of release that contained both a waiver and covenant not to sue, since it was confusing); *see also* 29 C.F.R. § 1625.22(b)(3) (2005) (the comprehensibility requirement "usually will require the limitation or elimination of technical jargon and of long, complex sentences.").

ADEA limitations period is not a substantive right, and OWBPA disclosures are only required to obtain waiver of a substantive right under the ADEA. This circular reasoning should be rejected for multiple reasons.

First, as argued herein, the time period to file under the ADEA *does* constitute a substantive right that triggers the OWBPA requirements. Even if it were possible to abridge the ADEA limitations period as IBM purports to do in its arbitration agreement (which it is not), IBM would have had to first meet the requirements of the OWBPA in order to validly do so. This failure to satisfy the OWBPA renders the timing provision unenforceable.

Second, even if the court was correct in holding that the ADEA limitations period is not a substantive right for *all* purposes, the court should have engaged in a separate analysis to determine whether it constitutes a substantive right in this specific context, sufficient to trigger the obligations of the OWBPA. As Judge Cabranes noted in his concurrence in *Vernon v. Cassadaga Valley Cent. School Dist.*, 49 F.3d 886, 892 (2d Cir. 1995), "statutes of limitations . . . govern whether an individual can vindicate a right" and thus "lie on the cusp of the procedural substantive

distinction." Statutes of limitations are therefore treated as "procedural" for some purposes, such as for choice-of-law purposes, *see Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), and as "substantive" for the purposes of the *Erie* doctrine, *see Sun Oil Co. v. Wortman*, 486 U.S. 717, 727 (1988). *See Vernon*, 49 F.3d at 892 (Cabranes, J. concurring). Therefore, while the ADEA's limitations period may be considered to be procedural for the purposes of analyzing whether a statutory amendment to it applies retroactively, it may be considered substantive for the purposes of determining whether a limitations period may be waived or truncated by contract (as argued herein), ***or for the purposes of the OWBPA***. *See Thompson*, 985 F.3d at 521. For all these reasons, IBM's failure to provide OWBPA provides an additional reason to hold the timeliness provision in IBM's arbitration agreement to be unenforceable and void under the FAA.

D. The District Court was Incorrect in Holding that the Piggybacking Rule Did Not Apply

IBM has argued that the arbitration agreement waives Plaintiff's ability to utilize the piggybacking rule. For the same reasons discussed *supra*, IBM is incorrect. These arguments are fleshed out more fully in the

plaintiffs' brief in *In Re: IBM Arbitration Agreement Litig.*, No. 22-1728 (2d Cir.), and so Plaintiff here addresses only some of the specific points raised by the District Court in this matter.

First, the District Court noted that Plaintiff could not benefit from the piggybacking rule, because she had filed her own EEOC charge, relying on *Holowecki*, 440 F.3d at 564. Opinion at 11-12, App.826-827. However, the concerns addressed by *Holowecki* are not at issue in this case.

As the court explained in *Ellis v. Costco Wholesale Corp.*, 2015 WL 2453158, at *2 (N.D. Cal. May 22, 2015), the *Holowecki* court framed its discussion by citing the concern that the Second Circuit considered in *Levy v. United States Gen. Acct'g Office*, 175 F.3d 254, 255 (2d Cir. 1999), where individuals who had received a right to sue notice on their claims but did not file suit in the 90-day window attempted to use the piggybacking rule to escape the consequences of their failure to timely file. Similarly, *Holowecki* cites to *Gitlitz v. Compagnie Nationale Air France*, 129 F.3d 554, 557-58 (11th Cir. 1997), where an individual filed an ADEA EEOC charge, failed to file suit within the 90-day limitations period after receiving a right to sue

letter, and then attempted to piggyback on another individual's charge. Thus, while *Holowecki* sought to curb misuse of the piggybacking rule as an end-run around the 90-day limit (once an employee receives their own right-to-sue letter), it did not preclude piggybacking in every instance where an individual had previously filed an EEOC charge, and certainly does not stand for the proposition that piggybacking does not permit otherwise untimely claims to proceed. Here, Plaintiff timely filed an EEOC charge and filed her arbitration demand more than two years ***before*** she received an EEOC Notice of Right to Sue, (P's SOF ¶ 9, App.015-016), meaning that she is not trying to abuse the piggybacking rule in the manner that *Holowecki* sought to prevent.

Second, the District Court noted that the piggybacking rule is merely an exception to the administrative exhaustion requirement of the ADEA rather than a part of the statute of limitations. However, this Court's discussion of the piggybacking rule in *Tolliver*, 918 F.2d at 1056-60, belies

that notion.[29] The Court began by analyzing the timing provision of the ADEA, section 7(d), by observing that "[a]s originally enacted, section 7(d) provided that a suit [under the ADEA] could not be commenced 'by any individual under this section until *the individual* has given'" of the claim to the government entity tasked with enforcement. *Id.* "In 1978, Congress amended section 7(d) to eliminate the requirement that 'the individual' bringing suit must have given the administrative notice and provided instead that suit could not be brought until 60 days after '*a charge* alleging unlawful discrimination has been filed with the Secretary'" of Labor (who was then the enforcing entity before that responsibility was transferred to the EEOC). *Id.* (citing Pub. L. No. 95–256, § 4(a), 92 Stat. 189, 190 (1978)) (emphasis supplied in *Tolliver*).

The court expressly acknowledged that the 1978 amendment was intended by Congress to limit failure to timely file notice as "most common basis for dismissal of ADEA lawsuits by private individuals" and "to make

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[29] Notably, the court in *In Re: IBM Arbitration Agreement Litig*. declined to join Judge Koeltl in this finding. *See* 2022 WL 2752618, at *7 (S.D.N.Y. July 14, 2022).

it more likely that the courts will reach the merits of the cases of aggrieved individuals....” *Id.* (quoting S. Rep. No. 493, 95th Cong., 1st Sess. 12 (1977), U.S. Code Cong. & Admin. News 1978, pp. 504, 515).[30] In other words, this Court acknowledged that piggybacking is baked into the language of the statutory provision of the ADEA that functions like a statute of limitations.[31]

The Court in *Tolliver* also acknowledged the practical impact that the piggybacking rule permits individuals to institute lawsuits outside the

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[30] The U.S. Dep’t of Labor, Age Discrimination in Employment Act of 1967, 1976 Annual Report to Congress, had reported that two-thirds of all suits filed by private litigants were dismissed on procedural grounds. *See* Thomas J. Reed, *Age Discrimination in Employment: The 1978 ADEA Amendments and The Social Impact of Aging*, 2:15 Univ. of Puget Sound L. Rev.15, 42 1978. Another empirical report showed that the most often cited reason for dividing an ADEA case prior to June of 1977 was sufficiency or insufficiency of notice. *Id.* at 44-45. An internal memorandum circulated in May of 1977 reported that the ADEA compliance regulations “were the least effective program administered by the Wage-Hour Division”. *Id*. at 43. Congressional amendments to the Act were intended to “make equitable exceptions to the” notice requirements available in court. *Id.* at 77.

[31] Since *Tolliver*, Congress has amended the ADEA, and has declined to amend the statute so as to preclude piggybacking. *See, e.g.*, Pub. L. 104-208, div. A, title I, § 101(a) [title I, § 119], Sept. 30, 1996, 110 Stat. 3009, 3009-23.

ADEA's 300 (or 180 day) window, *Tolliver*, 918 F.2d at 1059, and noted that the remedial purpose of the notice requirement is served by its application as it affords the EEOC the ability to fulfill its statutory purpose of "seek[ing] to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion[,]" by investigating the initial charge. *Id.* at 1057 (quoting 29 U.S.C. § 626(d)).

In sum, this Court expressly discussed the piggybacking rule as being a part of the timing scheme set forth in ADEA in section 7(d), and the District Court was incorrect to hold otherwise.

III. The District Court Erred by Dismissing Plaintiff's Claim for a Declaration that the Confidentiality Provision within IBM's Arbitration Agreement is Unenforceable

IBM has aggressively used the confidentiality provision in its arbitration agreement to impede its former employees from advancing their claims in arbitration under the ADEA. Particularly in an age discrimination case such as this, that relies heavily on pattern and practice evidence, employees must be able to build their cases using common evidence adduced by other employees with similar claims. *See Hollander v.*

American Cyanamid Co., 895 F.2d 80, 84-85 (2d Cir. 1990). Plaintiff has thus challenged the enforceability of the confidentiality provision because IBM has used it unfairly to obtain a strategic advantage over its former employees in dozens of arbitrations. When Plaintiff arbitrates her claim, she should have an even playing field wherein IBM cannot block her from making use of directly relevant, shocking evidence, as well as arbitral decisions that Plaintiffs' counsel has obtained.

The District Court, however, rejected Plaintiff's challenge to the confidentiality provision, incorporating its reasoning from *Chandler*, 2022 WL 2473340, at *7-8. In light of the fact that the District Court did not engage in an extensive discussion of the issue in this matter, Plaintiff incorporates by reference, and directs the Court to the plaintiff's Opening Brief in *Chandler*, No. 22-1733 (2d Cir.). Plaintiff briefly recounts the argument here.

This Court, through its decisions in *Guyden*, 544 F.3d at 384-85, and *American Family Life Assurance Co.*, 778 Fed. App'x. at 27, has made clear that although the mere presence of a confidentiality provision in an

arbitration agreement does not render it unenforceable, it may be shown to be so where arbitration proceedings demonstrate that it has unfairly advantaged one party over the other. This Court explained, "[i]f arbitration proceedings ultimately unfold, the parties are free to contest the enforceability provision as applied to them . . . ." *American Family Life Assurance Co.*, 778 Fed. App'x. at 27; *see also Guyden*, 544 F.3d at 387 (recognizing that a provision that deprived a claimant of "a meaningful opportunity to present her claim" "might well be unenforceable.") (citing *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90-91 (2000) for the proposition that where an arbitration claimant argues that a provision of the agreement is invalid because it deprives the claimant of a meaningful opportunity to present the claim, the provision must be enforced unless the record demonstrates that the concerns are well-founded); *see also Lohnn v. International Business Machines Corp.*, 2022 WL 36420, at *11 (S.D.N.Y. Jan. 4, 2022) ("[U]nless *Green Tree* and *Guyden* are to be empty letters, a plaintiff must be allowed to present a record that the effect of a challenged arbitration provision (or set of arbitration provisions) is to deprive her of a

meaningful opportunity to present her claim.”) [32]

Here, even though Plaintiff submitted an extensive evidentiary record[33] to support her claim that IBM was using its confidentiality provision to unduly preclude her (and dozens of other former IBM employees) from adequately advancing her claim in arbitration, the District Court refused to even consider the record. In so doing, the District Court

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[32] Like the Plaintiff in this matter, the plaintiff in *Lohnn* brought a declaratory judgment claim to challenge the enforceability of the confidentiality provision in IBM’s arbitration agreement. *See Lohnn*, 2022 WL 36420, at *1. After the *Lohnn* plaintiff filed a motion for summary judgment substantively identical to that filed in this matter, the *Lohnn* court directed briefing on whether the supposedly confidential material in the summary judgment record and briefing should remain under seal. *See id.* IBM argued that the *Lohnn* plaintiff’s decision to include the summary judgment record was a “ruse” to make public information that would otherwise be subject to the confidentiality provision. *See id.* at *12. *Lohnn* rejected that argument, explaining that the plaintiff submitted a record as necessary to make out her claim. *See id.* Moreover, *Lohnn* held that these documents were judicial documents subject to the presumption of public access and that they must be unsealed, subject to limited redactions. *See id.* at *17-18.

[33] This record is included in the Joint Appendix. Plaintiff also respectfully directs the Court to the Opening Brief in *Chandler*, which supplies an extensive description of the record. The record in this case is virtually identical to that which was submitted in *Chandler*.

ran afoul of both *Guyden*, 544 F.3d at 384-85, and *American Family Life Assurance Co.*, 778 Fed. App'x. at 27. In the *Chandler* brief, the plaintiff will explain that courts across the country have held that the use of confidentiality provisions in arbitration agreements by defendants to obtain an unfair advantage over plaintiffs advancing civil rights claims renders the confidentiality provisions unenforceable. Given these circumstances the New York Court of Appeal would likely follow suit. Therefore, the District Court's decision should be reversed.

IV. The District Court Erred by Allowing Portions of the Record Below to Remain Under Seal

Finally, the District Court erred in holding that certain information in the summary judgment briefing should remain under seal.[34]

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[34] While Judge Koeltl did not explicitly rule on Plaintiff's letter motion to unseal, *see* Dkt. 27, he indicated that he was adopting his reasoning in *Chandler*, 2022 WL 2473340, at *3-8, throughout his opinion in this case. Opinion at 1, 5, App.816, 820. Thus, Plaintiff only briefly addresses this argument here and directs the Court to the fuller discussion of this issue in the *Chandler* Plaintiff's Opening Brief. *See Chandler*, No. 22-1733, Opening Brief.

Indeed, another court facing this exact same situation and analyzing a virtually identical summary judgment record submitted by Plaintiff's counsel held that the record should be unsealed. *See Lohnn*, 2022 WL 36420, at *6 ("[t]he Supreme Court and Second Circuit have long held that there is a presumption of immediate public access to judicial documents under both the common law and the First Amendment.") (citing *Lugosch*, 435 F.3d at 126).[35] This right of public access, which "is said to predate the Constitution," *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("*Amodeo I*"), is "based on the need for federal courts … to have a measure of accountability and for the public to have confidence in the administration of justice," *id.* at 119 (citing *U.S. v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) ("*Amodeo II*")).

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[35] Plaintiff recognizes that the District Courts in this matter, *Chandler*, 2022 WL 2473340, at *8, and *Tavenner v. International Business Machines Corp.*, 2022 WL 4449215, at *1-9 (S.D.N.Y. Sep. 23, 2022) opted not to unseal the record. However, Judge Liman's well-reasoned decision in *Lohnn* is far more faithful to this Court's jurisprudence in *Lugosch* and *Amodeo*. *See Lohnn*, 2022 WL 36420, at *6-17.

The Second Circuit has developed a three-part framework to determine whether a document should be placed or remain under seal—and thereby protect the public's First Amendment right to access court filings. First, a court must determine whether the documents at issue are "judicial documents," defined as "a filed item that is 'relevant to the performance of the judicial function and useful in the judicial process.'" *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 139 (2d Cir. 2016) (quoting *Lugosch*, 435 F.3d at 119). In determining whether a filing constitutes a judicial document, courts consider "the 'relevance of the document's specific contents to the nature of the proceeding' and the degree to which 'access to the [document] would materially assist the public in understanding the issues before … the court, and in evaluating the fairness and integrity of the court's proceedings.'" *Bernstein*, 814 F.3d at 139 (quoting *Newsday LLC v. Cty of Nassau*, 730 F.3d 156, 166-67 (2d Cir. 2013)).

Once the court determines that the documents at issue are judicial documents, it "must determine the weight" of the presumption in favor of

public access, which is in turn "governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *Lugosch*, 435 F.3d at 119 (quoting *Amodeo II*, 71 F.3d at 1049).

Finally, the court must weigh the public's right to access against "countervailing factors," including "the danger of impairing law enforcement or judicial efficiency and the privacy interests of those resisting disclosure." *Lugosch*, 435 F.3d at 120 (quoting *Amodeo II*, 71 F.3d at 1050).

Thus, under well settled law in this Circuit, a court ruling on a motion to seal or unseal must establish a robust record documenting its findings.[36] Yet the District Court did not even attempt to explain its

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[36] The First Amendment similarly requires specific, on-the-record findings to justify depriving the public of its right to review judicial documents. *See Lugosch*, 435 F.3d at 120 ("[C]ontinued sealing of [summary judgment] documents may be justified only with specific on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim."); *see also Brown Maxwell*, 929 F.3d 41, 48 (2d Cir. 2019) (Courts must "review the document individually" and cannot rely on "generalized statements about the record as a whole.").

reasoning for shielding the summary judgment documents from the public beyond the fact that they are protected by a confidentiality provision that it found enforceable. *See Chandler*, 2022 WL 2473340 at *8 ("Because the Confidentiality Provision is enforceable, the outstanding sealing requests . . . are granted."). Leaving aside the fact that a confidentiality provision is not a sufficient countervailing interest to overcome the public's right of access to judicial documents, Judge Koeltl's two sentence ruling on this issue in *Chandler* is plainly insufficient under the framework established in *Lugosch* and its predecessors.

Moreover, the District Court's ruling on Plaintiff's motion to unseal improperly conflated two distinct legal questions: (1) whether the confidentiality provision was enforceable; and (2) whether there was a public right of access to the summary judgment motion, accompanying exhibits, and supporting memoranda of law. While the former issue was timely adjudicated when the District Court ruled on IBM's motion to dismiss, the latter should have been resolved long before that. *See Lohnn*, 29022 WL 36420 at *7 ("[T]he Second Circuit has instructed that motions to

seal (or unseal) should not linger on the docket for long."). Indeed, the Second Circuit has held that delays in the adjudication of motions to unseal both frustrate the public's ability to monitor the work of the courts and violate the public's First Amendment right of access. *See Lugosch*, 435 F.3d at 125-27 ("Each passing day [that a document or information remains under seal] may constitute a separate and cognizable infringement of the First Amendment."). Thus, the court erred in failing to address the public's right to access the summary judgment filings as distinct from the issues raised in the underlying summary judgment motion and did not do so in a timely manner. *See id.* at 119 (district court erred in keeping documents under seal pending consideration of underlying summary judgment motion). Had the District Court actually engaged in the requisite three-step analysis discussed above, it would have easily found that the summary judgment filings are judicial documents that should be unsealed for public

access. *See* Opening Brief in *In Re: IBM Arbitration Agreement Litig.*, No. 22-1728 (2d Cir.).[37]

Accordingly, the District Court's rulings on IBM's letter motions to seal should be reversed.

CONCLUSION

Although the ADEA's limitations scheme is a substantive right that cannot be abridged by contract, the District Court wrongly held that IBM could prevent Plaintiff from pursuing her claim in arbitration (when it had not provided to her the necessary OWBPA disclosures that would have been required in order for IBM to obtain a release of her ADEA claim). Not only had Plaintiff herself filed a timely EEOC charge, but the piggybacking

[37] The public's right of access attached the moment that Plaintiffs filed their summary judgment motion in court, *see Lugosch*, 435 F.3d at 123; *Lohnn*, 2022 WL 36420 at *9, and IBM is unable to point to any meaningful countervailing interest in confidentiality beyond the mere fact of including a confidentiality provision its arbitration agreement. *See Lugosch*, 435 F.3d at 126 ("[T]he mere existence of a confidentiality order says nothing about whether complete reliance on the order to avoid disclosure was reasonable.").

rule should also have allowed her to pursue her ADEA claim on the heels of a class discrimination charge that alleged a systemic violation of the law.

The District Court also erred in refusing to invalidate IBM's overly aggressive invocation of the confidentiality clause in its arbitration agreement, which it has repeatedly used in order to impede its former employees in their discrimination claims by preventing them from using highly incriminating information their counsel have obtained in other cases.

Finally, the District Court erred in allowing portions of the record below to remain under seal.

Accordingly, this Court should reverse the District Court's decision granting IBM's Motion to Dismiss.

Dated: October 12, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Palatino Linotype font.

This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), it contains 12,799 words, as determined by the word-count function of Microsoft Word 2016.

Dated: October 12, 2022

/s/ Shannon Liss-Riordan
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