No. 07-581

IN THE

Supreme Court of the United States

14 PENN PLAZA LLC and
TEMCO SERVICES INDUSTRIES, INC.,
Petitioners,

v.

STEVEN PYETT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*. The brief supports the position of Petitioners before this Court in favor of reversal.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, and other federal employment-related laws and regulations. Many of them have contracts with their employees governing some or all terms and conditions of employment. Some of these contracts have been arrived at through collective-bargaining with employee representatives, while others are products of direct dealings with unrepresented employees. Many such contracts contain provisions requiring arbitration of employment-related claims and disputes. EEAC's members thus have an ongoing interest in preserving the enforceability of agreements, whether negotiated through collective bargaining or on an individual basis, calling for arbitration of employment-related disputes.

Because of its interest in this subject, EEAC has filed *amicus curiae* briefs in several cases before this Court supporting the enforceability of arbitration agreements, including *Gilmer v. Interstate/Johnson Lane*

Corp., 500 U.S. 20 (1991), *Wright v. Universal Maritime Serv. Corp.,* 525 U.S. 70 (1998), *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000), *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), and *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). EEAC thus is familiar with the legal and public policy issues presented in this case, and is uniquely situated to brief the Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner 14 Penn Plaza LLC owns a commercial office building in New York. Pet. App. 2a. It contracts with Petitioner Temco Services Industries (Temco) for building cleaning and other services. *Id.* Respondents Steven Pyett, Thomas O'Connell, and Michael Phillips are (or were) employed by Temco at the 14 Penn Plaza building as night watchmen/porters, and were members of Local 32BJ of the Service Employees International Union (SEIU). Pet App. 3a. They were covered by a collective-bargaining agreement between SEIU and the Realty Advisory Board on Labor Relations, which is a "multi-employer bargaining association of the New York City real estate industry." *Id.*

The collective-bargaining agreement contains a provision prohibiting discrimination based on any characteristic protected by federal, state or local law and providing that all discrimination claims "shall be subject to the grievance and arbitration procedure . . . as the sole and exclusive remedy for violations." *Id.* In August 2003, 14 Penn Plaza hired Spartan Security to provide security personnel for the building and, as a result, Respondents were reassigned to different locations and positions. *Id.* They filed union griev-

ances claiming age discrimination, wrongful transfer, and denial of overtime in violation of the collective-bargaining agreement. The grievances were submitted to arbitration, but before hearing, the union decided not to pursue the age discrimination and wrongful transfer claims. An arbitrator eventually ruled against Respondents. *Id.*

While the arbitration was pending, Respondents filed administrative charges with the EEOC. After receiving a notice of dismissal and right-to-sue, they filed an action claiming they were transferred and replaced by younger workers in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq*. *Id*.

Petitioners moved to dismiss or, in the alternative, to compel arbitration, which the district court denied. Pet. App. 13a. Relying on the Second Circuit's decision in *Rogers v. New York University*, 220 F.3d 73 (2d Cir. 2000), it held that "even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable." Pet. App. 21a.

On appeal, the Second Circuit affirmed the district court's ruling and in so doing, reaffirmed its holding in *Rogers*. Pet. App. 1a. There, it concluded that this Court's decision in *Alexander v. Gardner-Denver Co*., 415 U.S. 36 (1974)—which held that arbitration of a union grievance pursuant to a collective-bargaining agreement would not bar an employee from subsequently pursuing statutory discrimination claims raised during that process in court—categorically foreclosed enforcement of collectively-bargaining arbitration provisions, regardless of the clarity of those provisions, even though that issue was not in fact decided in *Gardner-Denver* and the Court's

subsequent decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), held that individual ADEA statutory claims could be subject to binding arbitration. Pet. App. 8a.

SUMMARY OF ARGUMENT

It is now well-settled that when an *individual* agrees, as a condition of employment, to submit all employment-related disputes to arbitration, that agreement stands "upon the same footing as other contracts" and is enforceable with respect to statutory employment discrimination claims as well as other disputes. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The central question in this case is whether the same holds true when a *union* makes such an agreement on behalf of the employees it represents. Evincing a profound disregard for the strong federal policy reaffirmed repeatedly by this Court and by Congress favoring arbitration, the court below improperly held that an arbitration clause contained in a collective-bargaining agreement is *categorically* unenforceable, regardless of the circumstances.

In agreeing to binding arbitration of statutory employment claims, "a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (quoted in *Gilmer*, 500 U.S. at 26). This is true whether the agreement to arbitrate was negotiated on an individual basis or collectively on behalf of a group of employees. The decision below thus creates an inconsistency in the law by placing collectively-bargained arbitration clauses on unequal footing with those entered into between unrepresented employees and their em-

ployers, and thus deprives an entire class of workers the right to "'trade[] the procedures and opportunities for review of the courtroom for the simplicity, informality, and expedition of arbitration'" with respect to statutory discrimination claims. *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi*, 473 U.S. at 628).

Equally disturbing, the rationale articulated by the court below for imposing a categorical bar on binding arbitration of statutory claims in the collective-bargaining context rests on antiquated anti-arbitration sentiment that repeatedly has been rejected by this Court and runs counter to the strong federal policy favoring agreements to arbitrate. As the Court observed in *Gilmer*, the purpose of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." 500 U.S. at 24 (citations omitted). It reiterated this principle in *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 123 (2001), soundly rejecting "the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." *Id.* Indeed, "[t]he Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law . . . ." *Id.*

The speed with which disputes typically are resolved through arbitration far outpaces the judicial system. In arbitration, an award usually is issued within a year of the initial demand. *See* Craig Hanlon, *Reason Over Rhetoric: The Case for Enforcing Pre-*

Dispute Agreements to Arbitrate Employment Discrimination Claims, 5 Cardozo J. Conflict Resol. 1 (2003). In the employment context, this prompt resolution benefits both sides, but particularly employees, who typically can less afford a lengthy battle. In addition, employees are more likely to get their "day in court" in arbitration than they are in the judicial system; "no such guarantee exists in litigation where relatively few employees survive the procedural hurdles necessary to take a case to trial in the federal courts." *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1488 (D.C. Cir. 1997). As this Court noted in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001), there are "real benefits to the enforcement of arbitration provisions." In particular, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation . . . ." *Id.* at 123.

ARGUMENT

I. THE DECISION BELOW UNDERMINES THE LONGSTANDING FEDERAL POLICY FAVORING ARBITRATION OF EMPLOYMENT DISPUTES

A. By Improperly Refusing To Enforce An Agreement To Arbitrate Employment Disputes Simply Because It Is Contained In A Collective-Bargaining Agreement, The Court Below Displayed A Profound Misunderstanding Of This Court's Prior Decisions Governing Employment Arbitration

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, provides that an arbitration agreement "shall be valid, irrevocable, and enforceable

save upon such grounds as exist in law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has observed:

> Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

This Court repeatedly has affirmed the strong federal policy favoring arbitration, noting that the purpose of the FAA "was to reverse longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements on the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1994) (citations omitted); *see also Hall St. Assocs., LLC v. Mattel, Inc.,* ___ U.S. ___, 128 S. Ct. 1396 (2008); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002); *Green Tree Fin. Corp. v. Randolph,* 532 U.S. 105 (2000). Thus, "'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Gilmer,* 500 U.S. 20, 26 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24).

Section 4 of the FAA provides, in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4. Upon determining that the agreement to arbitrate is valid and addresses the disputed claim, the FAA requires, "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.*

In *Gilmer*, this Court held that an arbitration agreement that an individual signed, as a condition of employment, in which he pledged to submit to arbitration any dispute that might arise out of his employment or the termination thereof, was enforceable under the FAA, so as to require him to arbitrate his claim that his employer engaged in age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* In so doing, the Court made clear that as a general rule, "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 26 (citation and internal quotation omitted).[2]

Thus, "the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates

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[2] Shortly after *Gilmer*, Congress too endorsed the use of arbitration to resolve statutory employment discrimination claims. Section 118 of the Civil Rights Act of 1991 urges employers and employees alike to use out-of-court methods, including arbitration, to resolve disputes arising under each of these statutes:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Pub. L. 102-166, § 118, codified as 42 U.S.C. § 1981 note (Alternative Means of Dispute Resolution) (emphasis added).

that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citation omitted). The Court reiterated this principle in *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105 (2001), noting, "[t]he Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law . . . ." *Id.* at 123.

Even prior to *Gilmer*, this Court recognized arbitration as the preferred method of resolving workplace grievances. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *see also United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), *and United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) ("Steelworker's Trilogy"). Granting a labor union's petition to compel arbitration, the Court in *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960) concluded, for instance, that only by giving "full play" to the means chosen for settlement—arbitration—would the congressional policy in Section 203(d) of the Labor Management Relations Act ("LMRA" or "Taft-Hartley Act") be effectuated. *Id.* at 566. Likewise, in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), the Court observed that the "present federal policy is to promote industrial stabilization through the collective bargaining agreement." *Id.* at 578 (footnote omitted). It went on to remark that a "major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances

in the collective bargaining agreement," *id.*, noting that mandatory arbitration clauses were enforceable pursuant to Section 301 of the LMRA. *Id.*

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court held that a collectively-bargained mandatory arbitration provision that did not expressly reach statutory discrimination claims could not waive a covered worker's rights to a judicial forum for causes of action created by Congress—in that case, a statutory cause of action for race discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.* The court below surmised, incorrectly, that *Gardner-Denver* categorically precludes enforcement of a collectively-bargained agreement containing a clause requiring submission of statutory discrimination claims to arbitration. *Gardner-Denver* simply does not reach that issue, and merely holds that when an arbitrator has rendered a decision based on wholly contractual claims, that decision does not bar a subsequent lawsuit to enforce statutory rights under Title VII. There, the Court observed that contractual rights and statutory rights "have legally independent origins and are equally available to the aggrieved employee," 415 U.S. at 52, but stressed that the arbitrator in that case was "confined to the interpretation of the collective bargaining agreement." *Id.* at 53. Thus, *Gardner-Denver* turned on a distinction between contractual claims, which were covered by the applicable arbitration agreement, and statutory claims, which were not. *Id.* Importantly, it did not address the situation presented in this case in which the arbitration clause at issue plainly covers statutory as well as contractual discrimination claims.

The court below also misconstrued *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), in which this Court refused to bar an employee from pursuing his statutory discrimination claim in court where the arbitration clause contained in a collective-bargaining agreement did not contain a "clear and unmistakable" waiver. *Id.* at 82. Significantly, however, the Court in that case did not rule that such clauses were categorically unenforceable, deciding that it would "not reach the question." *Id.* Despite this, the court below nevertheless affirmed the district court's holding that "even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable." Pet. App. 21a.

B. The Decision Below Is Premised On A Long Outdated And Discredited Notion That Arbitration Is An Inferior Means Of Resolving Disputes

The rationale articulated by the court below for imposing a categorical bar on binding arbitration of statutory claims in the collective-bargaining context rests on antiquated anti-arbitration sentiment that repeatedly has been rejected by this Court and runs counter to the strong federal policy favoring agreements to arbitrate. In *Mitsubishi,* this Court observed, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." 473 U.S. at 626-27.

This outmoded "suspicion of arbitration" is particularly misplaced in the employment context. Arbitration of employment disputes offers significant advan-

tages to both employers and employees. As this Court noted in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001), there are "real benefits to the enforcement of arbitration provisions." In particular, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation . . . ." *Id.* The real cost advantages associated with arbitration may well be even more meaningful in the collective-bargaining context, where those covered by union contracts often are hourly employees who could be most financially impacted by having to pursue statutory claims in federal court. "Arbitration also offers employees a guarantee that there will be a hearing on the merits of their claims; no such guarantee exists in litigation where relatively few employees survive the procedural hurdles necessary to take a case to trial in the federal courts." *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1488 (D.C. Cir. 1997).

In addition, the relative speed with which arbitrations are conducted compared to litigation also benefits both parties to an employment dispute, but particularly the employee, who typically can less afford a lengthy battle. As one commentator observed:

> The time and cost of pursuing a claim through traditional methods of litigation present the most glaring and formidable obstacles to relief for employment discrimination victims. While it might not make a difference to the upper level managerial worker who can afford the services of an expensive lawyer, and who can withstand the grueling process of litigation, those employees who are less financially sound are chronically unable to attract the services of a quality lawyer. For example, experienced litigators maintain that

> good plaintiff's attorneys will accept only one in a hundred discrimination claimants who seek their help. For those claimants who are denied the services because of their financial situation, the simpler, cheaper process of arbitration is the most feasible recourse.

Craig Hanlon, *Reason Over Rhetoric: The Case for* Enforcing *Pre-Dispute Agreements to Arbitrate Employment Discrimination Claims,* 5 Cardozo J. Conflict Resol. 1 (2003).

II. UNION-REPRESENTED EMPLOYEES ARE ENTITLED TO THE SAME BENEFITS OF ARBITRATION AS ARE ENJOYED BY THEIR NONUNION COUNTERPARTS

The decision below creates an anomaly in employment law by rendering it virtually impossible for union-represented employees and their employers to exercise the same basic right that unrepresented employees and their employers have enjoyed since *Gilmer*, that is, the right to "'trade[] the procedures and opportunities for review of the courtroom for the simplicity, informality, and expedition of arbitration'" with respect to statutory discrimination claims. *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi Motors*, 473 U.S. at 628). The arbitration agreement at issue in this case generally is similar to the one in *Gilmer*, with one significant difference: while the plaintiff in *Gilmer* himself signed the document containing his agreement to arbitrate, Respondents were represented by a labor union, which negotiated and executed the arbitration clause in this case as part of a broader collective-bargaining agreement. That single distinction, however, does not logically justify

denying an entire class of workers the benefit of resolving their workplace disputes through binding arbitration.

Under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq*., a union duly selected by a majority of the employees in a unit appropriate for collective-bargaining is the exclusive representative of all the employees in such unit for the purposes of negotiating and entering into contracts with their employer governing their "rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a). Thus, when employees choose a union as their agent, they authorize it to bind them collectively and individually to agreements covering the entire gamut of the "terms and conditions of employment."

It is well-established that a procedure for resolving employment disputes is a "term or condition of employment" and thus is a mandatory subject of collective-bargaining under the NLRA. *See United Elec., Radio & Mach. Workers v. NLRB*, 409 F.2d 150 (D.C. Cir. 1969); *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943). Furthermore, this Court in *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 705 (1983), held that when employees select a union to represent them, they invest the union with the authority to waive not only statutory rights that are collective in nature, but also those, like discrimination claims, that are individual in nature.

Applying these principles, there can be no question that Respondents' union was authorized to negotiate a binding arbitration clause for the resolution of statutory discrimination claims on behalf of the collective-bargaining unit as a whole. To rule otherwise would destroy the mutuality of obligations on

which collective-bargaining depends and would unjustifiably deprive union employees of benefits that flow to nonunion employees as a result of their free access to binding arbitration to resolve their workplace disputes.[3]

As Chief Justice Burger once observed:

> The reasons for favoring arbitration are as wise as they are obvious: litigation is costly and time consuming, and, more to the point in this case, judges are less adapted to the nuances of the disputes that typically arise in shops and factories than shop stewards, business agents, managerial supervisors, and the traditional ad hoc panels of factfinders. By bringing together persons actually involved in the workplace, often assisted by a neutral arbitrator experienced in such matters, disputes are resolved more swiftly and cheaply. This mechanism promotes industrial harmony and avoids strikes and conflicts; it provides a swift, fair and inexpensive remedy.

Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981) (Burger, C.J., dissenting) (citation omitted).

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[3] A union's duty of fair representation under the NLRA provides a safeguard against any concern that an individual's rights might give way as a result of their subordination to collective interests. *See Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 705 (1983).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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