No. 07-581

IN THE
Supreme Court of the United States

14 PENN PLAZA LLC AND
TEMCO SERVICE INDUSTRIES, INC.,
Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL,
AND MICHAEL PHILLIPS,
Respondents.

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

BRIEF FOR RESPONDENTS

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July 14, 2008

QUESTION PRESENTED

Whether a provision in a collective bargaining agreement creating an arbitration process for the union and the employer precludes an employee from bringing a lawsuit alleging a violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, when the union controls access to the arbitration and refuses to bring the employee's grievance in arbitration.

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INTRODUCTION

This case arises from an interlocutory appeal of a motion to compel arbitration. The collective bargaining agreement ("CBA") between petitioners and the union, the Service Employees International Union, Local 32BJ ("Local 32BJ"), creates an arbitration process for resolving disputes between petitioners and Local 32BJ. The arbitration provision does not give respondents any individual contractual right to invoke the arbitration provision. Although respondents requested that Local 32BJ arbitrate their statutory discrimination claims against petitioners, Local 32BJ refused to bring their claims to the arbitrator for resolution. In denying petitioners' motion to compel arbitration, both courts below followed *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and held that Local 32BJ could not prospectively waive respondents' litigation rights under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.*

This Court should affirm the judgment below for either of two independent reasons. First, the Court has long held that arbitration under a collective bargaining agreement does not preclude an employee's assertion in litigation of individual statutory antidiscrimination claims. *See Gardner-Denver*, *supra.* The concerns that guided the Court in that unanimous decision – the union's control over the arbitration process and inherent conflicts of interest between the union's collective interests and the employee's individual rights – continue to dictate the same result. Union control over the process strips individual employees not only of their right to choose a forum, but also (as in this case) of their substantive rights guaranteed by statute. Those rationales gain

special force in this particular statutory context, because Congress specified certain requirements in the ADEA before a waiver of statutory rights could be found. As a matter of law, the power of unions should not extend to waivers of individual, non-economic rights protected by statute.

Second, even if a union *could* waive a litigant's individual statutory rights to bring a discrimination lawsuit and force such claims to be brought in arbitration, this Court made clear in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), that any such waiver would be deemed contractually insufficient unless the reference to the statutory rights was clear and unmistakable; there would be no presumption of arbitrability. Although the CBA at issue in this case references the ADEA, it suffers from a different, yet related, type of contractual insufficiency: no provision in the CBA enables respondents to arbitrate under the agreement. The CBA provides that Local 32BJ decides whether to bring the claims and whether to compromise them, and Local 32BJ has rejected respondents' claims without bringing them to arbitration. Absent any arbitration right, there is no arbitration provision to support a motion to compel arbitration. On the facts of this case, therefore, even if Local 32BJ could have lawfully waived respondents' rights to pursue their individual statutory ADEA claims in court, it has not done so in this CBA.

STATEMENT

1. a. Congress enacted the ADEA more than 40 years ago to eradicate "arbitrary age discrimination in employment" and "to promote employment of older persons." 29 U.S.C. § 621(b). The statute prohibits employers and unions from discriminating against persons over the age of 40 with respect to any term, condition, or privilege of employment. *Id.* § 623.

The statute expressly provides individuals with overlapping remedies and various forums in which to obtain relief for their age discrimination claims. *Id.* § 626(b)-(d). Under the congressional scheme, an ADEA claimant first submits his claim to the state human rights organization, if one exists. *Id.* § 633(b). When the state proceedings terminate, the claimant may file a charge with the Equal Employment Opportunity Commission ("EEOC"). *Id.* § 626(d). The EEOC is authorized to investigate and attempt to conciliate charges of discrimination and to bring civil actions against employers or unions. *Id.* § 626(b). After any EEOC action has concluded, the individual may choose to proceed in federal or state court. *Id.* § 626(d)-(e). The individual is statutorily entitled to a trial by jury on his claims. *Id.* § 626(c)(2). Under the statute, any waiver of an individual's right to pursue a judicial remedy must be made by the affected individual and be "knowing and voluntary." *Id.* § 623(f).

b. The National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, and the Labor Management Relations Act, 1947 ("LMRA"), 29 U.S.C. § 141 *et seq.*, create a system for the resolution of "industrial disputes" via collective bargaining between unions and employers. *See id.* § 151. Congress passed the NLRA in 1935 to curtail strikes and "other forms of

industrial strife or unrest," which were "burdening or obstructing commerce." *Id.* Increasing union power and strikes led Congress in 1947 to pass the LMRA, which amended parts of the NLRA and placed greater restrictions on the activities of unions. *See* Abner J. Mikva, *The Changing Role of the Wagner Act in the American Labor Movement*, 38 Stan. L. Rev. 1123, 1127 (1986). The goal of both statutes was to provide for industrial self-governance by unions and employers. As Congress explained in enacting the NLRA:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151. Under the NLRA, as amended by the LMRA, workers give up their right to bargain individually over their wages and working conditions to unions in exchange for the benefit of "organiz[ing] and bargain[ing] collectively" through "[r]epresentatives designated or selected . . . by the majority of the employees in a unit." *Id.* §§ 151, 159(a). Unions' bargaining power under the statute, however, does not extend beyond workers' economic interests. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705 (1983) ("a union may bargain away its members' economic rights"); 20 *Williston on Contracts* § 55:30, at

121 (4th ed. 2001) ("A distinction has been drawn between a union having the power to waive statutory rights related to collective activity, but not statutory rights that are of a personal, and not merely economic, nature."). In fashioning that system, Congress provided for unions to exercise majority rule on behalf of all employees, but provided no statutory guarantee that a union would act in any individual worker's best interests.

2. a. In July 2003, respondents Steven Pyett and Thomas O'Connell were employed by Temco Service Industries, Inc. as night watchmen in a commercial office building in New York City owned by Pennsylvania Building and 14 Penn Plaza LLC (together, with Temco, "petitioners"). *See* JA2-4. Respondent Michael Phillips was employed by petitioners as a night starter in that same building. *See* JA4-5. At that time, respondents were the only building employees over 50 years old. *See* JA3-5.

In August 2003, petitioners hired Spartan Security, an affiliate of Temco that contracts for security services, to provide security personnel for the office building. *See* JA6. Local 32BJ consented to petitioners' use of Spartan as a subcontractor. *See* Pet. App. 4a. Spartan brought in new employees, displacing respondents from their positions and replacing them with much younger workers. As a result, respondents were reassigned to less desirable positions. *See* JA6-8. Specifically, Pyett and O'Connell were reassigned from the position of night watchman to that of night porter, and Phillips was reassigned from a night starter to a light duty cleaner. *See id.* Those reassignments forced respondents to engage in greater physical activities than their health permitted, as well as resulted in a diminution in prestige

in their employment positions. *See* JA82, 89, 94-95. As pleaded in the complaint, respondents' reassignments also led them to be denied overtime and to suffer a substantial loss of income and emotional distress. *See* JA10-11.

As members of Local 32BJ, respondents were covered by the collective bargaining agreement ("CBA") between Local 32BJ and petitioners as members of the Realty Advisory Board on Labor Relations ("RAB"). *See* CA App. A160-61. The "parties" to the CBA are Local 32BJ and petitioners. The CBA consists primarily of provisions applying to the parties to the agreement. Certain terms of the CBA expressly apply to the employees represented by Local 32BJ and provide that these employees agree to be bound by its terms.[1]

Among the CBA's "general provisions" is a section prohibiting "discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to . . . the [ADEA]" and state age discrimination laws in New York, New Jersey, and Connecticut. *See id.* at A207-08 (CBA Art. XIV ¶ 30). The CBA also provides that "[a]ll such claims shall be subject to the grievance and arbitration procedure . . . as the sole and exclusive remedy for violations." *Id.* at A208.

According to Local 32BJ, which describes the negotiating history of the CBA in its *amicus* brief (at 10-14), in 2000 the RAB made the following proposal for language to be included in the 2000 Apartment

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[1] *See*, *e.g.*, CA App. A176-82 (specifying minimum hourly wage), A183-85 (delineating working hours and overtime), A190-91 (specifying holidays).

Building Agreement between the RAB and the Union:

> "No Discrimination:
>
> > "(a) Amend Article XVII, Section 23 [no discrimination clause] to conform to the language of the 1999 Commercial Agreement.
> >
> > "(b) Add fourth paragraph to Article IV [the management rights clause] indicating that nothing in this Agreement shall be construed to prevent the Employer from requiring, as a condition of employment, that employees are required to submit all claims of discrimination in employment to the Arbitration process under this Agreement."

See Local 32BJ Br. 11 (brackets in original). As Local 32BJ explains, it agreed to paragraph (a) of the RAB proposal, but specifically rejected paragraph (b)'s provision that would allow employers such as petitioners to insist, as a condition of employment, "that employees are required to submit all claims of discrimination in employment to the Arbitration process under this Agreement." *See id.* at 11-12. The RAB subsequently withdrew that proposal and did not seek to include that provision in any subsequent negotiations over the CBAs for commercial buildings and cleaning contracting members, including the CBA at issue in this case or its precursors. *See id.* at 14. Thus, the CBA applicable here does not contain the particularized provision permitting the employer to require employees to submit their claims for discrimination to arbitration. As a consequence, none of the respondents has entered into an agreement consenting to binding arbitration of their statutory discrimination claims.

In contrast, the CBA in this case creates binding procedures for resolving disputes between Local 32BJ and petitioners. *See* CA App. A167-69 (CBA Art. VI). Under those procedures, "[a]ll Union claims are brought by the Union alone, and no individual shall have the right to compromise or settle any claim without the written permission of the Union." *Id.* at A168 (¶ 7). Further, Local 32BJ can appear at the arbitration without the grievant, and the arbitrator has the power to "decide the case based upon the evidence at the hearing." *Id.*

The CBA outlines the selection and compensation of arbitrators. Pursuant to the agreement, arbitrators employed by the Office of the Contract Arbitrator-Building Service Industry serve as contract arbitrators for all arbitrations brought under the agreement. *See id.* at A168-69. The costs of contract arbitration, including the fee of the arbitrator and counsel fees, "shall be borne fifty percent (50%) by the Employer and fifty percent (50%) by the Union" (except in limited circumstances when the employer must bear all costs). *Id.* at A167 (¶ 2).

The CBA further provides that, "[u]pon thirty (30) days written notice to each other, either the Union or the RAB may terminate the services of any Arbitrator on the panel." *Id.* at A169 (¶ 7). "Successor or additional Arbitrators shall be appointed by mutual agreement of the Union and the RAB." *Id.* If the parties – i.e., Local 32BJ and the RAB – are unable to agree on a successor arbitrator, "then the Chairman of the New York State Employment Relations Board shall appoint a successor after consultation with the parties." *Id.* The CBA requires that the costs of the Office of the Contractor Arbitrator be borne equally by Local 32BJ and the RAB. *See id.* The CBA

nowhere empowers any individual employee with the authority to engage in the selection of an arbitrator or otherwise to participate in the process of selecting arbitrators in the Office of the Contract Arbitrator.

Pursuant to those procedures, in August 2003 Local 32BJ filed a grievance on behalf of respondents alleging that respondents' reassignments violated the terms of the CBA. Initially, Local 32BJ's grievance alleged, among other claims, that petitioners had violated the provision of the CBA prohibiting discrimination against employees on the basis of their age. *See* JA8. After exhausting the preliminary steps of the grievance procedure,[2] Local 32BJ submitted respondents' claims, including age discrimination, to arbitration. By letter dated February 23, 2004, however, Local 32BJ subsequently reversed that position, decided not to pursue respondents' age discrimination claims, and withdrew the claims from the pending arbitration. *See* JA8, 99.[3]

b. Thereafter, in May 2004, respondents filed complaints of age discrimination against petitioners with the New York District Office of the EEOC. *See* JA9. Respondents alleged that they were wrongly transferred and denied overtime on the basis of their age, in violation of the antidiscrimination provisions of the ADEA, the New York State Human Rights Law, N.Y. Exec. Law § 290 *et seq.*, and the New

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[2] Under the CBA, before an arbitration commences, Local 32BJ and petitioners are required "[t]o endeavor to adjust without arbitration any issue between the parties which under this Agreement the parties are obligated to submit to the Arbitrator." CA App. A166 (CBA Art. V ¶ 1(b)). If this grievance procedure fails to achieve a resolution, the claim is submitted to arbitration.

[3] On August 10, 2005, respondents' remaining claims were denied by the arbitrator. *See* JA49-66.

York City Administrative Code, N.Y.C. Admin. Code § 8-107. Between June 2004 and August 2004, the EEOC issued right-to-sue letters to all three respondents. *See* JA9.

In September 2004, respondents re-filed their claims in the United States District Court for the Southern District of New York. Five months later, in February 2005, petitioners offered to provide an alternative arbitral forum for respondents to arbitrate their ADEA claims with petitioners, using the same arbitrators specified under the CBA. *See* Pet. Br. 8. Local 32BJ consented to use of the Office of the Contract Arbitrator "as the forum for [respondents'] private attorney to pursue [respondents'] statutory age discrimination claims, as long as the parties to this lawsuit, and not the Union, pay the costs associated with the arbitration." Pet. App. 42a. Petitioners moved in the district court to dismiss the action for failure to state a claim and, in the alternative, to compel arbitration pursuant to 9 U.S.C. §§ 3 and 4. *See id.* at 5a. The district court denied both motions. With respect to the motion to compel arbitration, the district court relied principally on its recent case of *Granados v. Harvard Maintenance, Inc.*, No. 05 Civ. 5489 (NRB), 2006 WL 435731, at *4-*6 (S.D.N.Y. Feb. 22, 2006), which in turn relied on the Second Circuit's holdings in *Fayer v. Town of Middlebury*, 258 F.3d 117 (2d Cir. 2001), and *Rogers v. New York University*, 220 F.3d 73 (2d Cir. 2000). In those cases, the Second Circuit reaffirmed that, under this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), "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, and it rejected the

contention that *Gardner-Denver* had been overruled by *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998).

c. Petitioners brought an interlocutory appeal of the district court's denial of their motion to compel arbitration. The court of appeals affirmed the district court's decision and rejected petitioners' request to enforce the arbitration clauses in the CBA against respondents. *See* Pet. App. 8a-11a. In so ruling, the court reaffirmed its holdings in *Fayer* and *Rogers*. In *Rogers*, the Second Circuit had concluded that *Gardner-Denver*, not *Gilmer*, applies to collective bargaining agreements and that, under *Gardner-Denver*, arbitration provisions in collective bargaining agreements "by which employees purport to waive their right to a federal forum with respect to statutory claims" are not enforceable. 220 F.3d at 75. The court below deemed its precedent to rest solidly on this Court's decisions in upholding two important propositions. The first is that *Gardner-Denver* "still governed arbitration provisions in CBAs, notwithstanding the Supreme Court's holding in *Gilmer* that an employee who agreed to waive his individual right to a federal forum could be compelled to arbitrate an age discrimination claim." Pet. App. 8a (citing *Rogers*). The second is that "the language of the waiver" must be "'clear and unmistakable'" in applying to parties to the agreement. *Id.* at 8a-9a (quoting *Wright*, 525 U.S. at 80). The court then concluded that "[n]one of the other Supreme Court cases on which [petitioners] rely casts doubt on our holding in *Rogers*." *Id.* at 10a (citing *Metropolitan Edison*; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001)).

SUMMARY OF ARGUMENT

This Court has repeatedly held that a union-controlled arbitration does not preclude an individual employee from pursuing his statutory antidiscrimination claims in court. These decisions properly recognize that, in a union-controlled arbitration process, an employee is unable to vindicate his individual, substantive statutory antidiscrimination rights.

This Court's holding in *Alexander v. Gardner-Denver-Co.*, 415 U.S. 36 (1974), that a union cannot waive an employee's right to a judicial forum under the federal antidiscrimination statutes, applies directly to this case. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court reiterated the concern expressed in *Gardner-Denver* that allowing the union to waive this right would substitute the union's interests for the employee's antidiscrimination rights.

These decisions are consistent with the limited legal powers conferred on unions by federal statute. Although a union is authorized to waive employees' collective rights in order to further self-governance between the employer and the union, the union's waiver authority does not extend to employees' individual, non-economic rights under the federal antidiscrimination statutes. A union is obligated to further the collective interest of its bargaining unit, and this obligation necessarily takes precedence over, and often conflicts with, the individual interests and rights of its employees. Because the federal antidiscrimination statutes protect "not majoritarian processes, but an individual's right to equal employment opportunities," *Gardner-Denver*, 415 U.S. at 51, the vindication of that right can only be committed to arbitration by the aggrieved individual, and not

by the union in a collective bargaining agreement. Moreover, labor arbitration's focus on the "law of the shop" is ill-suited to resolve statutory discrimination claims.

The ADEA's express requirement that any waiver of an employee's right to litigate be made by the affected individual, *see* 29 U.S.C. § 626(f)(1), precludes the union from waiving an employee's ADEA rights. Because the rights afforded under the ADEA and other antidiscrimination statutes are important public rights that devolve on employees as individuals, not as members of a collective bargaining unit, the union cannot deprive employees of their ability to vindicate those rights individually and in court, with the right to a jury trial, through a collective bargaining agreement. Allowing union waiver would subjugate employees' antidiscrimination rights to the collective interest of the union. The potential for the employee to establish a duty-of-fair-representation claim is a poor substitute for the rights and remedies available to that employee under federal antidiscrimination law.

Assuming that it were somehow legally possible for a union to waive an individual's right to pursue a judicial forum for his or her ADEA claims, arbitration could not be compelled in this case because the respondents cannot "effectively . . . vindicate" their rights in arbitration under the CBA. *Gilmer*, 500 U.S. at 28. Petitioners seek to compel respondents to arbitrate with them, but such arbitration is not provided for in the CBA at issue in this case. Respondents have no right to invoke the CBA's arbitration provision and no power to exercise any control over a CBA arbitration. Thus, there is no arbitral forum to compel under the CBA.

ARGUMENT

I. AN ARBITRATION PROVISION IN A COLLECTIVE BARGAINING AGREEMENT CANNOT PRECLUDE AN EMPLOYEE FROM PURSUING A JUDICIAL REMEDY UNDER A FEDERAL ANTIDISCRIMINATION STATUTE

A. *Gardner-Denver* Held That A Union-Controlled Arbitration Does Not Preclude An Individual Employee From Litigating A Statutory Antidiscrimination Claim

1. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court unanimously held that the existence of an arbitration provision in a collective bargaining agreement does not obviate the right of individual employees to litigate claims under federal antidiscrimination law:

> [T]he federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under [federal antidiscrimination law].

Id. at 59-60. That holding controls this case.

In *Gardner-Denver*, this Court confronted facts analogous to those at issue here. Both cases involved employees who suffered adverse employment actions that they alleged constituted discrimination in violation of a federal antidiscrimination statute. The employees were each covered by a collective bargaining agreement between the union and the employer that contained an arbitration provision that could be

invoked by the union. The employees did not consent to the agreement, nor did they have any control over arbitration under the agreement. In both cases, the union arbitrated (at least some of) the employees' claims. This Court's unanimous conclusion in *Gardner-Denver* that an arbitration provision in a collective bargaining agreement does not preclude an employee from litigating his discrimination claims applies with equal force here.

The *Gardner-Denver* Court rested its holding in part on the inadequacy of the labor arbitration process in resolving an individual employee's statutory discrimination claims. *Id.* at 57-58. As the Court explained, "[a] further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented." *Id.* at 58 n.19. The Court also reasoned that, in a union-controlled arbitration process brought pursuant to a collective bargaining agreement, "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Id.* "[H]armony of interest between the union and the individual employee cannot always be presumed, especially where" a claim of "discrimination is made." *Id.* That combination of union control over the process and inherent conflict of interest with respect to discrimination claims provided the foundation for the Court's holding that arbitration under a collective bargaining agreement could not preclude an individual employee's right to bring a lawsuit in court to vindicate a statutory discrimination claim.

2. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court expressly relied on the union's control over the arbitration process in distinguishing between a waiver of litigation through a

contractual arbitration clause in an individual's agreement and a purported waiver in a collective bargaining agreement. The *Gilmer* Court relied on *Gardner-Denver* for the proposition that "in collective-bargaining arbitration 'the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit.'" *Id.* at 34 (quoting *Gardner-Denver*, 415 U.S. at 58 n.19). As the *Gilmer* Court elaborated, the "arbitration in [the *Gardner-Denver* line of] cases occurred in the context of a collective-bargaining agreement," with the claimants "represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable" in *Gilmer*. *Id.* at 35.

In *Gilmer*, in stark contrast to both *Gardner-Denver* and this case, the issue was whether an arbitration agreement knowingly and voluntarily consented to by a sophisticated person in an individual employment contract could bar that employee from later seeking judicial relief of his statutory ADEA claims. The plaintiff in *Gilmer* was a representative at a securities firm, not represented by a union. He signed a New York Stock Exchange registration agreement that contained an express arbitration provision covering "[a]ny controversy . . . arising out of [his] employment or termination." *See id.* at 23 (first alteration in original). Subsequently, he was terminated and sought to proceed in court on a claim that his termination violated the ADEA. This Court held that the employee had waived his right to litigate his discrimination claims by entering into the arbitration agreement. *See id.* at 35.

The legal context in *Gilmer* is completely different from that presented here. *Gilmer* did not involve a collective bargaining agreement; it involved a contract between the employee and the employer under which the employee could arbitrate his claims. The *Gilmer* Court explicitly distinguished *Gardner-Denver* on precisely such grounds, including "the potential disparity in interests between a union and an employee." *Id.* The Court explained that "[a]n important concern [motivating the decision in *Gardner-Denver*] was the tension between collective representation and individual statutory rights," which was a concern not applicable in the *Gilmer* case. *Id.* Recognition of the conflict between the union's interests and the employee's was key to the *Gardner-Denver* decision because allowing the union to waive an employee's right to a judicial forum would substitute the interests of the union for those of the employee.

The *Gilmer* Court devoted an entire section of its opinion to explaining why *Gardner-Denver* was distinguishable – distinctions that underscore why this case is properly governed by *Gardner-Denver*, not *Gilmer*. *See* 500 U.S. at 33-35. Union control over the forum, therefore, is a principle recognized in both *Gardner-Denver* and *Gilmer* as a reason to distinguish between waiver of individual statutory rights in the collective bargaining context, which is not permissible, and an agreement to arbitrate statutory claims in the individual contract context, which is permissible.

3. Not long after *Gilmer*, the Court again recognized the distinction between an individual's ability to waive his litigation rights through an arbitration agreement and the power of a union to waive

employees' litigation rights in a collective bargaining agreement in which the union retains control of the employees' access to arbitration. In *Livadas v. Bradshaw,* 512 U.S. 107 (1994), the Court distinguished *Gilmer* from *Gardner-Denver* on the ground that collective bargaining arbitration may lead to the subordination of the individual employee's rights to those of the "'collective interests of all employees in the bargaining unit.'" *Id.* at 127 n.21 (quoting *Gardner-Denver*, 415 U.S. at 58 n.19). The *Livadas* Court stressed that "*Gilmer* emphasized its basic consistency with our unanimous decision" in *Gardner-Denver*. *Id.* Accordingly, in *Livadas*, the Court relied in part on *Gardner-Denver* in rejecting the argument that employees would be held to the "benefit of their bargain" in a collective bargaining agreement to arbitrate a claim under 42 U.S.C. § 1983 that an administrative interpretation of a state law improperly denied them payment of wages and benefits upon the termination of their employment. *Id.* at 127-28.

Wright v. Universal Maritime Service Corp., 525 U.S. 70 (1998), confirms the continued vitality of *Gardner-Denver* and its underlying principles.[4] In *Wright*, this Court noted that *Gardner-Denver* held that "an employee does not forfeit his right to a judicial forum for claimed discriminatory discharge in violation of Title VII of the Civil Rights Act of 1964 if 'he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-

[4] Just last Term, the Court quoted *Gardner-Denver*'s holding that "'legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination.'" *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1961 (2008) (quoting *Gardner-Denver*, 415 U.S. at 47).

bargaining agreement.'" *Id.* at 75-76 (quoting *Gardner-Denver*, 415 U.S. at 49) (citation omitted). Although the Court recognized that arguments had been made suggesting tension between *Gardner-Denver* and the holding in *Gilmer* that an *individual* employee can waive a right to pursue a statutory age discrimination claim in court under an arbitration clause, the Court had no occasion to disturb *Gardner-Denver* as valid precedent. *Id.* at 76-77.[5] Instead, this Court declined to apply a presumption of arbitrability to collective bargaining agreements purporting to waive individual statutory litigation rights and held that any attempt to waive individual statutory litigation rights in a collective bargaining agreement must be clear and unmistakable. On the facts presented, the Court concluded that a general arbitration clause in a collective bargaining agreement did not waive an employee's right to bring a claim under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.* The Court deemed general language that the parties intended that "no provision or part of this Agreement shall be violative of any Federal or State Law" to be insufficiently clear to provide for the prospective waiver of an ADA claim. *See* 525 U.S. at 73, 80-82. Finally, the Court emphasized that it was not deciding whether such a waiver, even if clear and unmistakable, would be enforceable. *See id.* at 77.

Stare decisis dictates that this Court adhere to its longstanding precedent and reaffirm the continuing validity of *Gardner-Denver* in this case. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). Congress has been free to amend the NLRA

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[5] In Part II, *infra* pp. 41-46, we explain why, like *Wright*, this case also does not involve a valid union waiver of an employee's rights to pursue litigation of an ADEA claim.

or the federal antidiscrimination statutes if it disapproved of the *Gardner-Denver* rule and wished to give unions the authority to waive individual statutory rights, but it has not done so. "*[S]tare decisis* in respect to statutory interpretation has 'special force,'" because "'Congress remains free to alter what we have done.'" *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 756 (2008) (quoting *Patterson*, 491 U.S. at 172-73). *See also*, *e.g.*, *CBOCS West*, 128 S. Ct. at 1961 ("Principles of *stare decisis* . . . demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends.").

B. Collective Bargaining Agreements Are Quintessentially Majoritarian Contracts That Are Not Designed To Divest Employees Of The Right To Bring Individual Discrimination Claims

Even if this Court were to re-examine the principles underlying *Gardner-Denver* anew, the core holding of that case still rests on a solid statutory and doctrinal footing. Because of the limited legal powers conferred on unions by statute and the overriding concern that majoritarian impulses may thwart individual rights, a union-based arbitration of an employee's antidiscrimination rights does not preclude that employee from bringing an ADEA suit in court.

1. A union has only limited powers to bargain over collective rights and may not prospectively waive a worker's individual, non-economic rights

A foundational principle undergirding the *Gardner-Denver* rule is that a union generally does not have

the power to force arbitration of employees' individual rights. A union is authorized in the circumstances set out in federal statutes to waive employees' *collective* and economic rights under the NLRA and the LMRA as the exclusive agent on behalf of employees in contractual negotiations with the employer. But this Court's cases hold that those authorizations do not extend to employees' individual, non-economic rights, such as those under the federal antidiscrimination statutes.[6]

In the course of "reach[ing] an agreement as to wages and other employment benefits," the union can bargain away employees' rights "in the economic area" as a "*quid pro quo*" for more favorable wages, hours, or other terms and conditions of employment. *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974). For instance, a union may waive an employee's contractual right under the NLRA "to strike during the contract term, and his right to refuse to cross a lawful picket line." *NLRB v. Allis-Chalmers Mfg.*

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[6] Employers may be free to bargain with individual employees, rather than the union, with respect to an arbitration clause. The D.C. Circuit recently rejected a union's claim that the employer could not lawfully require trainees to consent to the arbitration requirement without first bargaining with the union. *See Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477, 484 (D.C. Cir. 1999) ("We see a clear rule of law emerging from *Gardner-Denver* and *Gilmer*: Unless the Congress has precluded his doing so, an individual may prospectively waive his own statutory right to a judicial forum, but his union may not prospectively waive that right for him."), *aff'd on reh'g en banc*, 211 F.3d 1312 (D.C. Cir. 2000) (per curiam). In this case, when Local 32BJ rejected the RAB's proposal to include a provision under which the employer could require individual employees to submit to arbitration as a condition of employment, the RAB backed down and no such provision was included in the CBA at issue here. *See supra* pp. 6-7.

Co., 388 U.S. 175, 180 (1967) (footnote omitted). Such "rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members." *Gardner-Denver*, 415 U.S. at 52. Likewise, a union may require its officials to take affirmative steps to end unlawful work stoppages.[7]

The union lacks the authority, however, to waive employees' individual, non-economic statutory rights, including their rights under federal antidiscrimination statutes. *See Gardner-Denver*, 415 U.S. at 52; *see also Magnavox*, 415 U.S. at 327 (Stewart, J., concurring in part and dissenting in part) ("[The union's waiver] authority cannot extend to rights with respect to which the union and the individual employees have essentially conflicting interests."). As this Court stated in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), the "rights petitioners seek to assert in [a statutory] action are independent of the collective-bargaining process. They devolve on petitioners as individual workers,

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[7] Petitioners cite (at 23) *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), for the proposition that the union can waive an employee's right to be free from discrimination. But that case involved differential sanctions in response to an unauthorized work stoppage depending on union leadership status, which the Court equated with economic rights protected by the NLRA, not individual rights protected under antidiscrimination statutes. Moreover, even in a case involving union waiver of economic rights derived from labor protection statutes, the Court made clear that a waiver of individual rights must be "clear and unmistakable." In *Metropolitan Edison*, as in *Wright*, the Court concluded that the union's actions were insufficiently clear to constitute a waiver of the individual rights.

not as members of a collective organization. They are not waivable." *Id.* at 745.

In *McDonald v. City of West Branch*, 466 U.S. 284 (1984), the Court explained the rationale underlying that principle. It noted that an arbitral award under a collectively bargained grievance proceeding cannot have preclusive effect because "the union has exclusive control over the 'manner and extent to which an individual grievance is presented,'" *id.* at 291 (quoting *Gardner-Denver*, 415 U.S. at 58 n.19), and therefore "[t]he union's interests and those of the individual employee are not always identical or even compatible," *id.* Thus, "even if the employee's claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration." *Barrentine*, 450 U.S. at 742.

The Court subsequently has invoked those precedents to confirm that an employer may not rest on a collective bargaining agreement's grievance processes to deny an individual worker the right to obtain individualized compensation under a federal statute. *See Atchison, T. & S.F. Ry. Co. v. Buell*, 480 U.S. 557, 564-65 (1987). As the Court there explained, "notwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.'" *Id.* at 565 (quoting *Barrentine*, 450 U.S. at 737).

Accordingly, "were an arbitration award accorded preclusive effect, an employee's opportunity to be compensated for a constitutional deprivation might be lost merely because it was not in the union's interest to press his claim vigorously." *McDonald*, 466

U.S. at 291. Thus, any arbitration provision agreed to between a union and an employer is unenforceable with respect to such individually asserted statutory antidiscrimination rights.

2. The purpose of labor arbitration is to avoid industrial strife, not to resolve individual rights claims

This Court has long recognized that the differing purposes and objectives of labor arbitration and commercial arbitration support different rules regarding a person's waiver of rights to litigate claims in court. Unlike commercial arbitration, labor arbitration is not "the substitute for litigation"; instead, it "is the substitute for industrial strife" and "has quite different functions from arbitration under an ordinary commercial agreement." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). The primary goals of labor arbitration are the furtherance of the parties' "common goal of uninterrupted production under the agreement," *id.* at 582, and "industrial peace" through an agreement to arbitrate "grievance disputes," disputes between the union and the employer over the application of the collective bargaining agreement, *see Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 453-55 (1957). *See also United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987) (grievance procedures are commonly designed "to settle disputes between union and employer with respect to the interpretation and application of the [collective bargaining] agreement"). Labor arbitration is thus part of a private system of workplace self-governance, not a substitute forum to litigate statutory claims. And labor arbitrators act with the aim of furthering "industrial peace," not of protecting individual

employees. Consequently, even though unions must be authorized to waive employees' collective rights to further the goal of self-governance, they are not authorized to waive employees' rights to litigate statutory claims because such waiver does not further that goal.

3. The labor arbitration process is not well-suited to resolving statutory discrimination claims

Labor arbitration between the union and the employer is ill-suited to resolve individual employees' antidiscrimination claims because it is designed for – and well-adapted to – resolving issues concerning the agreement, not deciding public law claims. Labor arbitrators apply the "law of the shop" in resolving disputes. *Warrior & Gulf Navigation*, 363 U.S. at 582. In arbitrating a grievance, "[t]he labor arbitrator performs functions which are not normal to the courts" (or to employment arbitration), and "the considerations which help him fashion judgments may indeed be foreign to the competence of courts." *Id.* at 581. Labor arbitrators consider "such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, [and their] judgment whether tensions will be heightened or diminished." *Id.* at 582. These factors are essential to furthering workplace self-governance, but may be at best irrelevant – and often antithetical – to the protection of employees' individual rights.

Labor arbitrators generally are ill-equipped to resolve discrimination claims. The arbitrators frequently come from the industry and are often not

law-trained.[8] Labor arbitrators are selected based on their familiarity with "the practices of the industry and the shop," *id.* at 581-82, and are experts in applying such practices and interpreting collective bargaining agreements to resolve disciplinary and contractual issues. As this Court has recognized, arbitrators who specialize in "'the law of the shop, not the law of the land,'" may not be "conversant with the public law considerations underlying [a federal statute]." *Barrentine*, 450 U.S. at 743 (quoting *Gardner-Denver*, 415 U.S. at 57). Further, labor arbitrators are chosen by and paid by the union and the employer, and their retention is dependent on their continuing acceptability to both the union and the employer. Because employees have no voice in the selection of the arbitrator or stake in his payment, structural incentives favor the union and the employer in grievances involving employees' individual rights.

4. Union control over the labor arbitration process creates inherent conflicts of interest

A union may not waive employees' individual, non-economic rights because its obligation is to the bargaining unit as a whole. A union is obliged to represent fairly *all* employees, not to represent *individual* employees' interests. The union might logically choose to target its resources towards the bargaining unit's collective concerns, rather than an individual's anti-discrimination rights. That structural dynamic be-

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[8] A 2000 survey of labor arbitrators reported that 39% did not have law degrees. *See* Michel Picher et al., *The Arbitration Profession in Transition: A Survey of the National Academy of Arbitrators* 12 (2000), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1000&context=icrpubs.

tween the protection of employees' individual rights and the advancement of the union's interests creates a conflict of interest. A union may not, for instance, waive employees' rights to solicit and distribute literature advocating support for or opposition to an incumbent union. *See NLRB v. Magnavox*, *supra*.

Precluding a union from waiving employees' rights to a judicial remedy under antidiscrimination statutes also prevents conflict-of-interest concerns between employees' antidiscrimination rights and the union's collective responsibilities to the bargaining unit. As this Court has recognized, under arbitration "an employee's opportunity to be compensated for a constitutional deprivation might be lost merely because it was not in the union's interest to press his claim vigorously." *McDonald*, 466 U.S. at 291. Or the union may "present the employee's grievance less vigorously, or make different strategic choices, than would the employee." *Id.* The union may have a disincentive to press employees' antidiscrimination claims because it wishes to preserve its bargaining power for issues in the collective interest (e.g., higher wages, greater benefits). In some instances, the union might even be a party to discrimination, making the potential for conflicts of interest particularly acute. The union may, for instance, discriminate against older workers to aid younger workers who are not otherwise protected by pension coverage. Or the union may want to promote entry into the union of younger members at the expense of older members. The possibility of discrimination by the union is explicitly recognized under and protected by the antidiscrimination statutes. *See*, *e.g.*, 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 2000e-2(c) (Title VII).

5. The CBA and arbitration proceedings in this case demonstrate Local 32BJ's conflict of interest and illustrate why unions cannot waive employees' ADEA litigation rights

The foregoing principles apply with full force on the facts of this case. The dispute arose when petitioners retained an affiliated security services contractor, Spartan Security, to provide security for the building. Spartan Security brought in its own personnel and reassigned respondents – the only members of the unit over the age of 50 – from their night watchmen and night starter duties to less desirable positions as night porters and light duty cleaners within the building. *See* Pet. App. 4a. Importantly, "'since the Union had consented to Spartan Security being brought into the building,' the Union could not contest their replacement as night watchmen by personnel of Spartan Security." *Id.* at 4a-5a (quoting JA84 (¶ 18), 90 (¶ 16), 96 (¶ 15)). Local 32BJ thus had a conflict of interest in representing the specific complaint brought by respondents.[9]

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[9] Respondents believe that they have meritorious claims under the ADEA. Local 32BJ's determination not to pursue those claims on the grounds that it perceived they lacked merit (*see* Local 32BJ Br. 2-3) is legally irrelevant because even in *Gardner-Denver* the arbitrator's outright denial of the employees' claims did not waive their right to litigate the same claims. Local 32BJ's decision as to the merit of respondents' claims cannot eliminate respondents' rights to vindicate those claims in some forum. Petitioners implicitly accept that respondents have a right to *some* forum to vindicate their ADEA claims by their insistence that these claims be arbitrated by respondents even though Local 32BJ refused to proceed on the claims.

The CBA arbitration process gave Local 32BJ absolute control over respondents' claims of discrimination, notwithstanding this conflict of interest. Under the CBA, Local 32BJ and not the employee makes the decision to trigger the grievance process and represents the employee in the bringing of the grievance. Local 32BJ compensates the arbitrator, and the process is set up as a contracted-for scheme between Local 32BJ and petitioners. Local 32BJ decides whether to compromise an employee's ADEA claims or withdraw them from the arbitration. *See* CA App. A167-69 (CBA Art. VI).

Local 32BJ was understandably hesitant to challenge the results of a contractual provision to which it agreed. As the court below noted,

> [t]he case before us illustrates why the Supreme Court may be reluctant to treat arbitration provisions in CBAs the same as arbitration provisions in individual contracts. If, as [respondents] allege, the Union refused to submit the wrongful transfer claims to arbitration because the Union had agreed to the new contract, the interests of the Union and the interests of [respondents] are clearly in conflict.

Pet. App. 11a-12a n.5 (citing *Gardner-Denver*, 415 U.S. at 58 n.19). The collectively bargained-for grievance process, therefore, ensured that the union's interest would dominate individual statutory claims, in precisely the context in which those interests were in direct conflict.

It is anomalous to think that a union, which might itself be engaging in discriminatory acts or complicit in an employer's wrongful actions, would be empowered to bind individuals to arbitration agreements that put the union in sole control of any

dispute that might arise out of those discriminatory acts. In such a case, employees would be precluded from vindicating their rights at all under the collective bargaining agreement – let alone "'effectively . . . vindicat[ing]'" those rights. *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).[10] That conclusion is doubly true when a claim on behalf of the aggrieved employees is not even brought in the collective bargaining agreement arbitration forum, as was the case here. *Cf. Vaca v. Sipes*, 386 U.S. 171, 185-86 (1967) (holding that it would be a "great injustice" to leave the employee without a federal forum after the union refused to process a contractual grievance).

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[10] Had Local 32BJ actually arbitrated respondents' claims, the agreement would still likely have prevented respondents from "effectively vindicating" their rights. The agreement gives Local 32BJ complete control over "the manner and extent to which an individual grievance is presented." *Gardner-Denver*, 415 U.S. at 58 n.19; *see* CA App. A168 (CBA Art. VI, ¶ 7). Local 32BJ decides whether to pursue the grievance beyond the first step, whether to demand arbitration, and how vigorously to pursue the employee's claim. These decisions will be – and should be, consistent with Local 32BJ's statutory role – influenced by Local 32BJ's assessment of the interests of the majority of employees. *See Barrentine*, 450 U.S. at 742. The employee is not a party to the dispute and thus has a voice and the ability to vindicate his rights only to the extent permitted by Local 32BJ.

C. The ADEA Embodies A Clear Preference For Parallel And Overlapping Processes And Remedies, And That Preference Should Not Be Altered Except By Individuals Acting On Their Own Behalf

1. Congress imposed strict waiver requirements on ADEA rights, which would be undermined if unions were permitted to waive employees' judicial forum rights in collective bargaining agreements

Even if there were not labor-law specific reasons supporting the *Gardner-Denver* holding, the text of the ADEA makes clear that the waiver of "any right or claim" under the statute is disfavored. 29 U.S.C. § 626(f)(1). *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998) ("The [statute] implements Congress' policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its word.").

It is beyond dispute that only an individual employee, not the union, can waive his rights under the ADEA. The ADEA requires that any waiver be made by the affected "individual," that it be "knowing and voluntary," and that the individual receive consideration. 29 U.S.C. § 626(f)(1). A union's denial of individual employees' right to any forum in which to pursue their statutory antidiscrimination rights functions as a prospective waiver of the employees' substantive rights, contrary to Congress's clear intent.

Moreover, the legislative history of the statute makes clear that Congress intended to encourage arbitration only where an individual voluntarily waived his right to proceed in court. In Section 118

of the Civil Rights Act of 1991 ("1991 Act"), Congress addressed the issue of arbitration with respect to the ADEA, Title VII, and the ADA. *See* Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (reprinted at 42 U.S.C. § 1981 note). Congress stated that it "encouraged" the "use of alternative means of dispute resolution" such as arbitration, but only "[w]here appropriate and to the extent authorized by law." *Id.* The Committee report expressly emphasized that "any agreement to submit disputed issues to arbitration . . . in the context of a collective bargaining agreement . . . does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in [*Gardner-Denver*]." H.R. Rep. No. 102-40, pt. 1, at 97 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 635.

2. Precluding waiver by unions of individual employees' right to a judicial forum to vindicate statutory antidiscrimination rights comports with Congress's purposes in enacting the ADEA

Allowing unions to waive an employee's right to a judicial forum to vindicate an *individual* right to be free from discrimination – without providing a clear alternative for the employee and without the employee's consent – would contravene the policies behind the federal antidiscrimination laws. These statutes are "designed to provide minimum substantive guarantees to individual workers." *Barrentine*, 450 U.S. at 737. They create individual rights that exist separate and apart from the collective bargaining process. These rights are not "terms" or "conditions of employment." 29 U.S.C. § 159(a). As such,

a union should not be permitted to bargain away such rights through the "'majoritarian process[].'" *Barrentine*, 450 U.S. at 737-38 (quoting *Gardner-Denver*, 415 U.S. at 51).

First, antidiscrimination rights should not be waivable by unions because such rights devolve on employees as individuals, not as members of a collective bargaining unit. As the Court explained in *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), antidiscrimination law's "focus on the individual is unambiguous." *Id.* at 708. "[T]he basic policy . . . requires that we focus on fairness to individuals rather than fairness to classes." *Id.* at 709. Similarly, in *Connecticut v. Teal*, 457 U.S. 440 (1982), the Court recognized that the "principal focus" of federal antidiscrimination law is "the protection of the individual employee." *Id.* at 453, 455.[11] The text of the ADEA makes clear that statute's focus on protecting "individuals": it is unlawful "to deprive any *individual* of employment opportunities," 29 U.S.C. § 623(a)(2) (emphasis added), or "to fail or refuse to hire or to discharge any *individual* or otherwise discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* age," *id.* § 623(a)(1) (emphases added).

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[11] *Teal* and *Manhart* are Title VII cases, but this Court has observed that the substantive provisions of the ADEA are "derived *in haec verba* from Title VII" and that Title VII precedents apply "with equal force" to ADEA claimants. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (internal quotation marks omitted); *see Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979).

Because Congress intended for antidiscrimination statutes to protect individuals, only individual employees – not their unions – should be able to waive the right to a judicial remedy. Union-negotiated arbitration agreements preclude individual consent in two important ways: *Ex ante*, the individual employee's consent is not obtained as a condition of the arbitration agreement; *ex post*, after a dispute has arisen, union-negotiated arbitration clauses give the union, rather than the claimant, control over the individual's claim. That lack of individual consent contravenes the individual right provided under the statutes.

Second, antidiscrimination rights may not be waived by unions because they are important *public* rights. *See McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995) (observing that Congress enacted the ADEA and other antidiscrimination statutes as part "of a wider statutory scheme to protect employees in the workplace nationwide"). As such, they contrast with the terms and conditions of employment (e.g., wages), which are essentially private, contractual rights between employees and employers. Indeed, in adopting the antidiscrimination statutes, Congress emphasized that discrimination in the workplace is a serious public concern. *See*, *e.g.*, *EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983). While Congress did not go so far as to make the right to be free from discrimination non-waivable, there is no indication that it intended for employees to be deprived of the ability to vindicate this right in court through a non-consensual process, which gives the union, not the individual employee, the power to pursue (or not pursue) the claim.

The Court rejected a similar argument in *Gardner-Denver* in part on policy grounds that apply with equal force to this case. The ADEA shares with Title VII "common substantive features and also a common purpose: 'the elimination of discrimination in the workplace.'" *McKennon*, 513 U.S. at 358 (quoting *Oscar Mayer*, 441 U.S. at 756). Like the Title VII right to be protected from discrimination on account of race, color, religion, sex, or national origin, the right under the ADEA to be protected from age discrimination is an individual right, not a collective right granted to workers as a whole and thus not subject to majoritarian decision-making by the union. *See Gardner-Denver*, 415 U.S. at 51-52; *Barrentine*, 450 U.S. at 735-37. Allowing Local 32BJ to waive respondents' right to a judicial remedy under the ADEA "would defeat the paramount congressional purpose" behind the statute. *Gardner-Denver*, 415 U.S. at 51.

3. The right to a jury trial for discrimination claims should not be subject to forfeiture absent a clear and express individual waiver

Unions cannot waive an employee's right to a jury trial for their discrimination claims. The right to a jury trial is a fundamental right guaranteed by the Seventh Amendment. Although this right is waivable by a person individually, courts should "indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937); *see also Ohio Bell Tel. Co. v. Public Utils. Comm'n*, 301 U.S. 292, 307 (1937) ("We do not presume acquiescence in the loss of fundamental rights."). To overcome the "heavy burden against . . . waiver," *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972) (Douglas,

J., concurring), it must be shown that the waiver was "voluntary, knowing, and intelligently made," *id.* at 185 (majority).

The right to a jury trial is an integral part of Congress's intent to provide "parallel or overlapping remedies against discrimination" under the anti-discrimination statutes. *Gardner-Denver*, 415 U.S. at 47-48. The ADEA contains an express provision conferring the right to a jury trial. *See* 29 U.S.C. § 626(c)(2); *see also Lorillard v. Pons*, 434 U.S. 575, 582-83 (1978) (holding that, even before that provision was added later that year, the ADEA provided a right to a jury trial). In the ADEA, Congress went beyond the scope of the Seventh Amendment, expressly conferring on plaintiffs the right to a trial by jury in cases seeking equitable, as well as legal, relief. *See* 29 U.S.C. § 626(c)(2). Congress amended Title VII in 1991 to provide an express right to a trial by jury when the claimant seeks compensatory and punitive damages. *See* 1991 Act § 102, 105 Stat. 1073 (codified at 42 U.S.C. § 1981a(c)(1)). The legislative history of the 1991 Act confirms Congress's desire "[t]o protect the rights of all persons under the Seventh Amendment" to a jury trial for discrimination claims. *See* H.R. Rep. No. 102-40, pt. 2, at 29 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 723.[12]

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[12] *See also* 137 Cong. Rec. 14,416 (1991) (statement of Rep. Schiff) ("[T]he right to trial by jury as a general concept in our society was considered so important by the framers of the Constitution that they included it in the Bill of Rights, in the seventh amendment."); *id.* at 28,448-49 (statement of Sen. Mikulski) (noting that "the Constitution has been waived too long and one too many times for American women" and that, "if a serial killer can have a right to a jury trial, . . . certainly a woman who cannot get a job has a right to a jury trial if she is discriminated against").

Taken together, the fundamental nature of the right to trial by jury and the express and expansive statutory recognition of the jury right in the discrimination context compel the conclusion that the right to a trial by jury for statutory discrimination claims cannot be waived except by the knowing and voluntary agreement of the individual employee.

4. The ADEA provision in this CBA serves valid collective antidiscrimination purposes and need not be construed as a waiver of respondents' individual ADEA rights

A collective bargaining agreement provision for resolving statutory discrimination claims in arbitration between the union and the employer – as in the CBA at issue here – serves the purpose of providing for arbitration of collective discrimination claims without affecting individual employees' ability to vindicate their right to be free from discrimination. For instance, Local 32BJ could challenge the employer's imposition of a mandatory retirement age requirement under the ADEA or a policy that disparately impacted minority employees under Title VII. The availability of arbitration in such circumstances would allow Local 32BJ to seek a quick and collective resolution of the claim – and the elimination of the offending policies or practices – without foreclosing individual employees from seeking recourse to the judicial forum.

D. The Duty Of Fair Representation Is Insufficient To Safeguard Employees' Antidiscrimination Rights When Any Vindication Of Those Rights Is Left To Arbitration By The Union

Although in certain circumstances an employee can bring a suit against the union for not adequately representing his individual interests when his challenge to an adverse employment decision has not been vindicated in a collective bargaining agreement grievance process, that remedy is a poor substitute for the employee's ability to bring a statutory claim directly against the employer. Petitioners' reliance (at 42-43) on a breach of the duty of fair representation as an appropriate remedy for respondents is therefore misplaced.

1. A duty-of-fair-representation claim does not directly target the discriminatory wrongdoer

In a case such as this one, the employee brings an ADEA claim because of an adverse employment action made by the employer. A duty-of-fair-representation claim, on the other hand, targets the union for its failure adequately to represent the employee's interests. Such a claim does not directly target the wrongdoer – the employer – for having discriminated against the individual employee. The employee thus does not have the litigation benefit of discovery against the employer and the full panoply of rights and tools that come from the litigation process. The remedies available to the employee in a duty-of-fair-representation case are also limited. Under the ADEA, the remedies are substantial, including back pay, front pay, equitable relief (including reinstatement or promotion to a position),

attorney's fees, and, if the discrimination is willful, liquidated damages. *See*, *e.g.*, 29 U.S.C. § 626(b) (ADEA remedies); 42 U.S.C. § 2000e-5(g), (k) (Title VII remedies); 42 U.S.C. § 12117(a) (ADA, adopting Title VII remedies). Punitive and compensatory damages are also available under Title VII and the ADA. *See* 42 U.S.C. § 1981a(b). Although a union may be liable in damages for the economic losses sustained by the employee from the employer's actions, the union does not have control over the workforce. Thus, no remedy against the union is able to match the injunctive remedies provided in the statute, such as adjusting pay going forward, reinstatement to a prior position, or promotion to a position that would be deserved but for the discrimination. Success on a claim for breach of the duty of fair representation, therefore, provides an incomplete remedial scheme for an employee who alleges harm from an employer's violation of his statutory anti-discrimination rights.

2. A duty-of-fair-representation claim imposes procedural hurdles that a victim of discrimination does not face outside the collective bargaining agreement context

An employee bringing a claim against the union for breaching the duty of fair representation also faces significant hurdles not present in a claim directly against the wrongdoing employer. As the Court noted in *Gardner-Denver*, "a breach of the union's duty of fair representation may prove difficult to establish." 415 U.S. at 58 n.19. Congress specifically recognized the duty of fair representation's shortfall in protecting individual rights by making anti-discrimination protections applicable against unions.

See id. (citing 42 U.S.C. § 2000e-2(c) (applying Title VII to unions)); 29 U.S.C. § 623(c) (ADEA, making age discrimination by unions unlawful).

Even when those difficulties can be surmounted, the duty of fair representation is insufficient to protect the rights of individual employees. That duty only requires the union not to act "arbitrar[il]y, discriminator[il]y, or in bad faith" toward a member of the bargaining unit. *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998); *accord United Steelworkers v. Rawson*, 495 U.S. 362, 372-73 (1990). A union might, without breaching its duty of fair representation, reasonably and in good faith decide not to pursue a meritorious claim in arbitration. A union might, for instance, believe that the claim is unlikely to succeed; that the claim has been adequately remedied by the employer; or that the union might benefit by targeting its resources to pursue other claims perceived to be in the collective interest. *See Barrentine*, 450 U.S. at 742 ("[A] union balancing individual and collective interests might validly permit some employees' statutorily granted . . . benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole.").

To prevail on a claim that the union breached the duty of fair representation, the employee must overcome a "highly deferential" standard of review that favors the union. *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991). Courts do not generally second-guess a union's judgment about whether to bring a claim. Indeed, a "union's conduct can be classified as arbitrary only when it is irrational, when it is without a rational basis or explanation." *Marquez*, 525 U.S. at 46. As long as the union has

some good-faith reason – however weak – for not bringing a claim, the employee will be unable to establish a breach even if his individual rights are effectively stymied. Even negligence in representing an employee is not enough to breach the duty of fair representation. *See Rawson*, 495 U.S. at 372-73. As the Seventh Circuit has observed, a "contract/[duty-of-fair-representation] suit does not get to first base unless the worker shows that the union has abandoned him to the wolves." *Pease v. Production Workers Union*, 386 F.3d 819, 823 (7th Cir. 2004) (Easterbrook, J.).

II. ON THE FACTS OF THIS CASE, RESPONDENTS ARE NOT SUBJECT TO ANY VALID ARBITRATION AGREEMENT

Even if it were *legally* possible for a union to waive an individual employee's right to bring a lawsuit to vindicate an ADEA claim, it would still be necessary for the collective bargaining agreement *contractually* to provide an arbitral forum for the employee. Arbitration cannot be compelled when an arbitration procedure fails to permit the person effectively to vindicate his rights.

Accordingly, this case presents a lack of contractual sufficiency analogous to the type addressed in *Wright*, where this Court rejected a claim that the union waived an employee's right to bring a statutory discrimination claim on the ground that the collective bargaining agreement failed to clearly and unmistakably incorporate such a waiver. *See* 525 U.S. at 80-82. Notwithstanding that the ADEA is specifically referenced in the CBA here, that form of notice is insufficient to constitute a clear and unmistakable waiver of respondents' individual litigation rights because the CBA does not create an alternative forum

in which respondents can individually pursue those statutory claims. Respondents here are not authorized or empowered to bring an arbitration to vindicate their individual claims, and therefore the contract is insufficient in conferring a procedural remedy for respondents that would support Local 32BJ's purporting to waive their individual rights. An employee cannot be bound to arbitrate by an agreement that does not provide him the right to arbitrate.

Nor does petitioners' suggested alternative form of arbitration provide a basis for sustaining a motion to compel, because that proposed arbitration is outside the CBA and unsupported by any binding written agreement. Because the specific provisions of the CBA fully support the Second Circuit's judgment not to compel arbitration, that ruling should be affirmed.

A. For The Federal Arbitration Act To Compel Arbitration, The Arbitration Provision Must Enable Both Parties To "Effectively Vindicate" Their Rights

Even if the Court were to reject our submission that a union cannot lawfully waive employees' rights to a judicial forum for resolving their claims under federal antidiscrimination statutes by entering into a collective bargaining agreement with an arbitration provision, such a waiver is enforceable under applicable Federal Arbitration Act ("FAA") case law only if the employee "'*effectively* may vindicate [his or her] statutory cause of action in the arbitral forum.'" *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi Motors*, 473 U.S. at 637) (emphasis added; alteration in original); *see also Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000).

One precondition to determining the effective vindication of rights is whether a consensual process

exists. Both sides must consent to arbitration before it may be compelled. *See Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989) ("[a]rbitration . . . is a matter of consent, not coercion"); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that [an arbitration] contract cannot bind a nonparty."); *see also Barrentine*, 450 U.S. at 744 ("An arbitrator's power is both derived from, and limited by, the collective-bargaining agreement.").

In applying those general FAA principles to collective bargaining agreements,[13] for a union-bargained arbitration clause to be enforceable against an individual employee, several requisites must be satisfied. At a minimum, the employee's claim would have to be pursued in arbitration in a manner enabling the employee to vindicate his statutory rights. If the union decided not to pursue an employee's claim, then arbitration cannot provide an alternate viable forum. The employee also must be able to retain some control of the case and to obtain the same or similar relief to what Congress provided in the statute. As *Gardner-Denver* recognized, "the union's exclusive control over the manner and extent to which an individual grievance is presented" creates the potential for "the interests of the individual employee [to] be subordinated to the collective interests of all employees in the bargaining unit." 415 U.S. at 58 n.19. Ensuring that the individual has at least some control over whether and how to bring his claims is

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[13] The Court has never held that the FAA does apply to collective bargaining agreements, *see Wright*, 525 U.S. at 77 n.1 (declining to decide whether the FAA applies), and need not decide this issue in this case if it agrees with respondents that they have no right to arbitrate under the CBA.

vital to allowing the individual to vindicate his individual rights under the antidiscrimination statutes.

B. The CBA At Issue Confers No Requirement Of Arbitration Or Right To Arbitrate On Individual Employees

1. The CBA in this case fails to meet basic preconditions supporting a motion to compel arbitration at several, fundamental levels. *First*, by its plain terms, the arbitration provision in the CBA empowers the arbitrator "to decide all differences arising between *the parties* as to interpretation, application or performance of any part of this Agreement and such other issues as *the parties* are expressly required to arbitrate before him under the terms of this Agreement." CA App. A167 (CBA Art. VI ¶ 1). The "parties" to the arbitration provision in this CBA are Local 32BJ and petitioners (through the RAB). *See* JA47. Individual employees do not have a right to invoke the arbitration provisions of this CBA. *See* Local 32BJ Br. 6 ("While Local 32BJ has the right to request arbitration of grievances on its side, the individual employee-grievants have no such right.").

Second, not only does the employee have no right to invoke the CBA's arbitration provision, the employee also has no power to exercise any control over a CBA arbitration. The CBA specifies that "[a]ll Union claims are brought by the Union alone" and that "no individual [may] compromise or settle any claim without the written permission of the Union." CA App. A168 (CBA Art. VI ¶ 7). The CBA further provides that the individual employee who is the grievant does not need to be present at the hearing, so long as Local 32BJ "appears at [the] arbitration." *Id.* And Local 32BJ has the power to compromise a claim, even over the employee-grievant's objection,

by settling the claim or agreeing to dismiss or withdraw it. *See* Local 32BJ Br. 7. Through its complete control over the arbitration process under the CBA, Local 32BJ has denied any ADEA remedial process to respondents. Without a provision enabling employees individually to arbitrate their ADEA claims, the Court could decide this case on the basis that, before a waiver of an individual's statutory anti-discrimination rights may be effectuated by a union, the union must at a minimum provide an arbitral forum for the employee to vindicate those rights. This CBA does not contain any such provision – individual employees have no power to invoke this CBA's arbitration provision without Local 32BJ's consent and Local 32BJ's control over the litigation. When, as here, Local 32BJ refuses to take respondents' claims to CBA arbitration, there is no arbitration to compel.

Third, the requirement for payment of costs associated with the arbitration provides further support that the individual employees in this case are not required to arbitrate or intended to be subject to the arbitration provision. The agreement provides that all expenses "shall be borne fifty percent (50%) by the Employer and fifty percent (50%) by the Union" (except in limited circumstances when the employer pays all expenses). CA App. A167 (CBA Art. VI ¶ 2). If the CBA contemplated that employees would be subject to arbitration, or able to invoke the arbitration provision, it would have included specific language governing how the arbitration's costs would be allocated between the employee and Local 32BJ or employer, but the CBA is silent on that point.

By its plain terms, therefore, the CBA does not provide procedures for an arbitration initiated or

pursued by anyone other than the two "parties" – Local 32BJ and petitioners. The Court should not "override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *Waffle House*, 534 U.S. at 294. Because the CBA in this case is insufficient to constitute a "waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination," this Court can affirm the Second Circuit's judgment without reaching the question whether "such a waiver would be enforceable." *Wright*, 525 U.S. at 82.

2. That reading is faithful to the drafting history of this CBA. As Local 32BJ explains, in 2000 the RAB sought to include a provision permitting the employer to require, "as a condition of employment, that employees are required to submit all claims of discrimination in employment to the Arbitration process under this Agreement." *See* Local 32BJ Br. 11. When Local 32BJ rejected inclusion of that provision, the RAB backed down and made no effort in subsequent negotiations to include that proposal in later CBAs, such as the one at issue here. *See id.* at 12, 14. That drafting history could not be clearer that both Local 32BJ and petitioners understood that individuals would *not* be "required to submit all claims of discrimination in employment to the Arbitration process under this Agreement."

In this case, Local 32BJ exercised its powers under the CBA by refusing to bring respondents' ADEA claims to arbitration, as even petitioners concede. *See* Pet. Br. 8; *see also* JA99. That action reflected the inherent conflict of interest identified by this Court in *Gardner-Denver*, because Local 32BJ had

agreed with petitioners to allow Spartan Security to devise a new employment scheme at the building where respondents work, thus enabling petitioners to displace respondents from their positions and to move them to less favorable positions. *See* JA83-84, 90, 96. Through Local 32BJ's control over the CBA arbitration process and its denial of arbitration to respondents, respondents had no arbitration that could be compelled.

C. Petitioners' Alternative Suggestion Of Arbitration Does Not Warrant Reversal Of The Second Circuit's Judgment

In their brief, petitioners appear to recognize that the CBA itself does not support their motion to compel arbitration. They instead make much of their offer in February 2005 to provide an alternative form of arbitration. *See* Pet. Br. 3, 8, 10, 13, 16, 39-40. That offer was made one year after Local 32BJ refused to pursue respondents' ADEA claims in arbitration under the CBA, more than eight months after respondents filed this lawsuit, and after six (of eight total) arbitration hearings between Local 32BJ and petitioners had already been held.

1. Importantly, that offer of arbitration was not made pursuant to any provision of the CBA, but rather as an attempt to induce arbitration between two litigants. To be sure, Local 32BJ "consent[ed] to [respondents'] use of the Office of Contract Arbitrator (OCA), created under the Collective Bargaining Agreement . . . , as the forum for [respondents'] private attorney to pursue [respondents'] statutory age discrimination claims." Pet. App. 42a. That offer, however, merely gave respondents an option to arbitrate their claims in the same place and with the same arbitrator that Local 32BJ could have used – but did

not use – to pursue respondents' age discrimination claims under the CBA. Local 32BJ did not offer to bring respondents' claims in arbitration or to fund that arbitration. Nor did it suggest any basis in the CBA for such arbitration. Rather, Local 32BJ merely offered to accommodate a request by petitioners if respondents also found that proposal agreeable.

2. The suggested use of the Office of the Contract Arbitrator not only was completely outside the confines of the CBA, but also was fundamentally disadvantageous to respondents. *First*, the arbitrator "suggested" by petitioners had already observed Local 32BJ withdraw respondents' ADEA claims – an action that necessarily would prejudice him against respondents in any subsequent arbitration on those very claims. *Second*, petitioners and Local 32BJ pay the salary of the arbitrator and have the power to remove him for any reason. *See* Local 32BJ Br. 9 ("[e]ither Local 32BJ or the [RAB] may strike an arbitrator from the panel at any time for any reason"). Individual employees do not have such powers. Thus, respondents would be stuck in an arbitration over which their adversary had the ultimate power over the decision-maker. That is hardly the kind of level playing field that adequately protects a person's rights. *Third*, the arbitration would have been at considerable cost to respondents. Local 32BJ specifically offered the Office of the Contract Arbitrator only "as long as the parties to this lawsuit, and not the Union, pay the costs associated with the arbitration." Pet. App. 42a. Those costs would have been significantly higher for respondents than litigation in court.[14]

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[14] The proposed arbitration would have imposed significant additional and unnecessary costs on respondents in light of

3. Finally, the arbitration proposed by petitioners cannot be deemed "mandatory" in any sense that would sustain a motion to compel arbitration under the FAA. Petitioners' proposal was no different than if two litigants decided that, instead of litigating in court, they would engage an arbitrator with the American Arbitration Association without any written contract requiring them to arbitrate. Because the offer was not arbitration under the terms of the CBA and was not mandatory under any other written agreement, it was insufficient to trigger any purported waiver of respondents' rights to litigate their statutory claims.

Certainly, respondents could have voluntarily entered into a side agreement to arbitrate their dispute with petitioners, but nothing *required* them to accept petitioners' offer of alternative arbitration – certainly not the CBA, which contains no provision sanctioning, requiring, or facilitating any such alternative arbitration. Although petitioners seek (at 10) to compel arbitration on the grounds that some *alternative* arbitral forum is available to respondents, that alternative forum is *not* arbitration under the CBA or under any written agreement cognizable under the FAA. *See* 9 U.S.C. § 4 (authorizing party aggrieved by "the alleged failure, neglect, or refusal of another to arbitrate under a *written* agreement for arbi-

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Local 32BJ's clear position that respondents must pay for half of the costs associated with petitioners' suggested arbitration process. *See* Pet. App. 42a. Total fees and costs in an average arbitration may range from $4,350 to $11,625, compared to filing fees of $221 in a typical urban state court and $210 in the New York County Supreme Court. *See* Public Citizen's Congress Watch, *The Costs of Arbitration* 40-42 (Apr. 2002), *available at* http://www.citizen.org/documents/ACF110A.PDF; http://www.nycourts.gov/supctmanh/case_commencement.htm.

tration" to petition for order directing arbitration) (emphasis added).

The suggestion of any such form of alternative arbitration not provided for under the CBA, therefore, cannot be a basis for a motion to compel arbitration. To hold otherwise would allow an employer to support a motion to compel arbitration by the mere expedient of having written a letter to an employee offering to arbitrate a dispute once the employee filed a lawsuit. Petitioners offer no support for that extraordinary proposition.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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July 14, 2008