

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

AMICI CURIAE BRIEF OF NATIONAL EMPLOYMENT LAWYERS
ASSOCIATION, AARP, AND AMERICAN ASSOCIATION FOR JUSTICE
IN SUPPORT OF RESPONDENTS

STEFANO G. MOSCATO	KATHLEEN PHAIR BARNARD
NATIONAL EMPLOYMENT	<i>Counsel of Record</i>
LAWYERS ASSOCIATION	SCHWERIN, CAMPELL, BARNARD
44 Montgomery Street	& IGLITZIN
Suite 2080	18 W. Mercer Street, Suite 400
San Francisco, CA 94104	Seattle, WA 98119
(415) 296-7629	(206) 285-2828

Counsel for Amicus Curiae
National Employment Lawyers Association

LAURIE A. McCANN	JEFFREY L. NEEDLE
DEBORAH ZUCKERMAN	119 1st Ave. South
AARP FOUNDATION LITIGATION	Suite 200
MELVIN R. RADOWITZ	Seattle, WA 98104
AARP	(206) 447-1450
601 E Street, NW	<i>Counsel for Amicus Curiae</i>
Washington, DC 20049	<i>American Association</i>
(202) 434-2060	<i>for Justice</i>

Counsel for Amicus Curiae
AARP

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CITED AUTHORITIES	iii
INTEREST OF AMICUS	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. SUBSTANTIVE FEDERAL LABOR LAW, NOT THE FEDERAL ARBITRATION ACT, GOVERNS WHETHER A COLLECTIVE BARGAINING AGREEMENT MAY CONSTITUTE A WAIVER OF BARGAINING UNIT MEMBERS' RIGHTS TO SELECT A JUDICIAL FORUM FOR STATUTORY CLAIMS.	6
II. A UNION'S AUTHORITY TO ACT FOR UNIT MEMBERS EXISTS ONLY FOR COLLECTIVE BARGAINING PURPOSES AND DOES NOT INCLUDE THE POWER TO WAIVE UNIT MEMBERS' RIGHTS TO SELECT A JUDICIAL FORUM FOR ADJUDICATING CIVIL RIGHTS CLAIMS OR VIOLATION OF MINIMUM EMPLOYMENT STANDARDS.	13

Contents

	<i>Page</i>
A. A Collective Bargaining Representative's Authority Extends Only To Collective Bargaining Purposes And Is Constrained By Statutory Purposes	16
B. Congress Intended That Fundamental Civil Rights And Statutory Minimum Employment Standards Would Not Be Undercut By Collective Bargaining, Including By Adjudication In Collective Bargaining Arbitration.	24
C. Giving Preclusive Effect To a CBA Arbitration Provision Would Undercut This Court's Existing Jurisprudence In Several Areas Where Labor Statutes Intersect With Employment Regulation.	27
D. Inherent Characteristics Of The Collective Bargaining Grievance And Arbitration Process Make That Forum Inadequate To Insure The Enforcement Of Statutory Rights. ...	31
CONCLUSION	36
APPENDIX — RELEVANT STATUTES	1a

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases:	
<i>Acuff v. United Papermakers and Paperworkers, AFL-CIO</i> , 404 F.2d 169 (5th Cir. 1968) <i>cert. denied</i> , 394 U.S. 987 (1969)	9
<i>Adamo v. Hotel Workers' Union</i> , 655 F. Supp. 1129 (E.D. Mich. 1987)	32
<i>Adams v. Florida Power Co.</i> , 535 U.S. 228 (2002)	2
<i>Alexander v. Gardner-Denver Co.</i> , 415 U.S. 36 (1974)	<i>passim</i>
<i>Allis-Chalmers Corp. v. Lueck</i> , 471 U.S. 202 (1967)	30
<i>Arcuri v. Trump Taj Mahal Ass'n</i> , 154 F.R.D. 97 (D.N.J. 1994)	33
<i>Arnold v. Air Midwest, Inc.</i> , 100 F.3d 857 (10th Cir. 1996)	32, 34
<i>Atchison, Topeka and Santa Fe Ry. Co. v. Buell</i> , 480 U.S. 557 (1987)	29
<i>Atkinson v. Sinclair</i> , 370 U.S. 238 (1962)	34

Cited Authorities

	<i>Page</i>
<i>Barrentine v. Arkansas-Best Freight System, Inc.</i> , 450 U.S. 728 (1981)	<i>passim</i>
<i>Best v. Rome</i> , 858 F. Supp. 271 (D. Mass. 1994), <i>aff'd</i> , 47 F.3d 1156 (1 st Cir. 1995)	34
<i>Boys Markets, Inc. v. Retail Clerk's Union</i> , 398 U.S. 235 (1970)	14
<i>Breda v. Scott</i> , 1 F.3d 908 (9th Cir. 1993)	34
<i>Brown v. ABF Freight Sys., Inc.</i> , 183 F.3d 319 (4th Cir. 1999)	11
<i>Carmona v. Southwest Airlines</i> , 2008 WL 2747467 (5th Cir. July 16, 2008)	30
<i>Circuit City v. Adams</i> , 532 U.S. 105 (2001)	2, 9, 10, 11
<i>City of Los Angeles v. Manhart</i> , 435 U.S. 702 (1978)	16
<i>Consolidated Coal Co. v. Bucyrus-Erie Co.</i> , 432 N.E.2d 250 (Ill. 1982)	33
<i>EEOC v. Wafflehouse</i> , 534 U.S. 279 (2002) ...	2, 4, 16
<i>Electrical Workers (UE) Local 205 v. General Elec. Co.</i> , 233 F.2d 85, 98-100 (1st Cir. 1956), <i>aff'd on § 301 grounds</i> , 353 U.S. 547 (1957)	8-9

Cited Authorities

	<i>Page</i>
<i>Emporium Capwell Co. v. Western Addition Community Org.</i> , 420 U.S. 50 (1975)	20, 26
<i>Ford Motor Co. v. Huffman</i> , 345 U.S. 330 (1953)	34, 35
<i>Fort Halifax Packing Co. v. Coyne</i> , 482 U.S. 1 (1987)	30
<i>Frank Briscoe Inc. v. NLRB</i> , 637 F.2d 946 (3 rd Cir. 1981)	26
<i>General Motors Corp.</i> , 211 NLRB 986 (1974), <i>enforced in relevant part</i> , 512 F.2d 447 (6th Cir. 1975)	24
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991)	2, 3, 4, 29
<i>Griesemer v. Retail Store Employees Union, Local 1393</i> , 482 F. Supp. 312 (E.D. Pa. 1980)	32
<i>Hines v. Anchor Motor Freight, Inc.</i> , 424 U.S. 554 (1976)	34
<i>H.K. Porter Co. v. NLRB</i> , 397 U.S. 99 (1970) ...	15
<i>Hoover Motor Exp. Co. v. Teamsters Local 327</i> , 217 F.2d 49 (6 th Cir. 1954)	9

Cited Authorities

	<i>Page</i>
<i>IBEW Local 323 v. Coral Electric Co.</i> , 104 F.R.D. 88 (S.D. Fla. 1985)	33
<i>J.I. Case Co. v. NLRB</i> , 322 U.S. 334 (1944)	9
<i>Kentucky River Retirement Systems v. EEOC</i> , 128 S.Ct. 2361 (2008)	2
<i>Lewittes & Sons v. United Furniture Workers of America, C.I.O.</i> , 95 F. Supp. 851 (D.C.N.Y. 1951)	9
<i>Lingle v. Norge Div. of Magic Chef, Inc.</i> , 486 U.S. 399 (1988)	30
<i>Livadas v. Bradshaw</i> , 512 U.S. 107 (1994)	29
<i>Local 174, Teamsters v. Lucas Flour</i> , 369 U.S. 95 (1962)	21, 22
<i>Longshoremen (ILWU) v. Pacific Maritime Ass'n.</i> , 441 F.2d 1061 (9 th Cir. 1971), <i>cert. denied</i> , 404 U.S. 1016 (1972)	33
<i>Mastro Plastics Corp. v. NLRB</i> , 350 U.S. 270 (1956)	<i>passim</i>
<i>McDonald v. City of West Branch, Michigan</i> , 466 U.S. 284 (1984)	28, 31

Cited Authorities

	<i>Page</i>
<i>Meacham v. Knolls Atomic Power Laboratory</i> , 128 S.Ct. 2395 (2008)	2
<i>Metropolitan Edison Co. v. NLRB</i> , 460 U.S. 693 (1983)	21, 23
<i>Metropolitan Life Ins. Co. v. Massachusetts</i> , 471 U.S. 724 (1985)	30
<i>NLRB v. Advanced Architectural Metals, Inc.</i> , 351 NLRB No. 80 (2007)	22
<i>NLRB v. Allis-Chalmers Mfg. Co.</i> , 388 U.S. 175 (1967)	16, 17, 22
<i>NLRB v. Insurance Agents</i> , 361 U.S. 477 (1960)	15
<i>NLRB v. Magnavox Co.</i> , 415 U.S. 322 (1974)	20, 23, 24
<i>NLRB v. Wooster Div. of Borg-Warner Corp.</i> , 356 U.S. 342 (1958)	18
<i>Patterson v. McLean Credit Union</i> , 491 U.S. 164 (1989)	4
<i>Peterson v. Kennedy</i> , 771 F. 2d 1244 (9th Cir. 1985), <i>cert. denied</i> , 475 U.S. 1122 (1986)	32, 34

Cited Authorities

	<i>Page</i>
<i>Pyett v. Pennsylvania Bldg. Co.</i> , 498 F.3d 88 (2nd Cir. 2007), cert. granted, 128 S.Ct. 1223 (2008)	12
<i>Smith v. City of Jackson</i> , 544 U.S. 228 (2005)	2
<i>Smith v. Evening News Ass'n</i> , 371 U.S. 195 (1962)	25
<i>Steele v. Louisville & N.R. Co.</i> , 323 U.S. 192 (1944)	17, 35
<i>Teamsters v. Oliver</i> , 358 U.S. 283 (1959)	17
<i>Textile Workers v. Lincoln Mills of Ala.</i> , 353 U.S. 448 (1957)	<i>passim</i>
<i>United Steelworkers v. American Manufacturing Co.</i> , 363 U.S. 564 (1960)	11
<i>United Steelworkers v. Enterprise Wheel & Car Corp.</i> , 363 U.S. 593 (1960)	11
<i>United Steelworkers v. Warrior & Gulf Navigating Co.</i> , 363 U.S. 574 (1960)	11
<i>Upjohn v. United States</i> , 449 U.S. 383 (1981) ..	33

Cited Authorities

	<i>Page</i>
<i>Wilson v. Kellogg, Brown & Root</i> , 525 F.3d 370 (4th Cir. 2008)	11
<i>Wright v. Universal Maritime Service Corp.</i> , 525 U.S. 70 (1998)	<i>passim</i>
Statutes and Rules:	
9 U.S.C. § 1	7
29 U.S.C. § 141(b)	7, 12, 23
29 U.S.C. §§ 141-144, 167, 172-187	16
29 U.S.C. § 151	12, 20, 23, 24
29 U.S.C. §§ 151-163	16
29 U.S.C. § 157	19
29 U.S.C. § 158(d)	18
29 U.S.C. § 159 (a)	18
29 U.S.C. § 173(d)	7
29 U.S.C. § 185	6, 7

Cited Authorities

	<i>Page</i>
29 U.S.C. 401 <i>et seq.</i>	16
42 U.S.C. § 1983	28
National Labor Relations Act of 1935 (“NLRA”), 49 Stat. 449 (1935)	16
Model Rule 1.2	34
Model Rule 1.13 cmt. 2 (2003)	32, 33

Other Authorities:

David E. Feller, <i>Taft And Hartley Vindicated: The Curious History Of Review Of Labor Arbitration Awards</i> , 19 Berkeley J. Emp. & Lab. L. 296 (1998)	10
William B. Gould, <i>Kissing Cousins?: The Federal Arbitration Act And Modern Labor Arbitration</i> , 55 EMORY L.J. 609 (2006)	10
Kelsey-Hayes Co., 2007 WL 4233188 (N.L.R.B.G.C. 2007)	26

INTEREST OF AMICUS¹

The National Employment Lawyers Association (“NELA”) is the only professional membership organization in the country comprised of lawyers who regularly represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are representing and have represented hundreds of thousands of individual employees who have suffered violations of their statutory rights in employment. NELA strives to ensure the rights of employees to the protections afforded by statutes setting minimum standards for employment.

The American Association for Justice (“AAJ”) is a voluntary, nation-wide association of trial lawyers who primarily represent plaintiffs in personal injury, civil rights, employment rights, and consumer litigation. AAJ’s 50,000 attorney members are committed to the preservation of access to the courts and to the right of trial by jury. Those fundamental individual rights may be waived, AAJ believes, only by a knowing and voluntary choice by the individual affected.

American Association of Retired Persons (“AARP”) is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs

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

and interests of older Americans. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. More than half of AARP's nearly 40 million members are in the work force and are protected by the Age Discrimination in Employment Act (ADEA), Title VII, the Americans with Disabilities Act, as well as by other federal and state work place civil rights laws. Vigorous enforcement of these laws is of paramount importance to AARP, its working members, and the millions of other workers of all ages who rely on them to deter and remedy illegal employment discrimination.

Amici, thus, have a strong interest in ensuring that the goals of the are fully realized. NELA and AARP have filed numerous *amicus curiae* briefs before the United States Supreme Court and the federal appellate courts regarding the proper interpretation of the ADEA, *see, e.g., Kentucky River Retirement Systems v. EEOC*, 128 S.Ct. 2361 (2008); *Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395 (2008); *Smith v. City of Jackson*, 544 U.S. 228 (2005); *Adams v. Florida Power Co.*, 535 U.S. 228 (2002), and regarding arbitration of claims arising under statutes governing employment, *see, e.g., EEOC v. Wafflehouse*, 534 U.S. 279 (2002); *Circuit City v. Adams*, 532 U.S. 105 (2001); *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

Amici's particular interest here is to ensure that the necessary boundary between collective bargaining and the adjudication of civil rights and other statutory

minimum employment standards which this Court acknowledged in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), is maintained. That boundary is necessary in accomplishing congressional purposes inherent in both statutory arenas, and essential to the preservation of fundamental civil rights and the minimum employment standards set by federal and state statutes.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court held that an arbitration award obtained by a union through collectively bargained arbitration did not have preclusive effect on a bargaining unit member's individual right to a judicial forum for adjudicating his right under Title VII of the Civil Rights Act of 1964 to be free from race discrimination. In *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 76-77 (1998), the Court noted "some tension" between the decision in *Gardner-Denver* and *Gilmer*, 500 U.S. 20 (holding that an individual non-union securities broker's agreement to arbitrate "any controversy" in a securities dealer's registration application required the broker to arbitrate his claim of age discrimination).

Whatever *Gilmer* may have said about an individual's prospective agreement to waive his right to a judicial forum, *Gardner-Denver* held specifically that unions may not prospectively waive their unit members' access to judicial forums for statutory claims through a

collective bargaining agreement.² The Court relied on longstanding statutory interpretation embedded in decades of this Court’s jurisprudence that continues as sound law today. Nothing in the developing interpretation of the Federal Arbitration Act (“FAA”) “ha[s] removed or weakened the conceptual underpinnings from” the long line of cases in which *Gardner-Denver* is simply a mid-point; nor has the recent interpretation of the FAA in the non-union setting “rendered the decision [in *Gardner-Denver* and its progeny] irreconcilable with competing legal doctrines or policies. . . .” *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).

Although in *Gilmer*, 500 U.S. at 26, the Court explained that an individual’s waiver of a judicial forum is not a waiver of “substantive rights afforded by the [applicable] statute,” that holding does not imply that the decision to waive that forum can be exercised by anyone other than the individual. Individual employees are not parties to collective bargaining agreements. “It goes without saying that a contract cannot bind a nonparty.” *EEOC v Wafflehouse*, 534 U.S. 279, 294 (2002). Significantly, individual choice in a decision to execute that waiver is not negated by unions’ statutory representational status as collective bargaining agents, as is explained below.

2. In *Wright*, 525 U.S. at 77, the Court acknowledged this distinction between the holding in *Gilmer* and *Alexander’s* holding that “federal forum rights cannot be waived in union-negotiated CBAs even if they can be waived in individually executed contracts—a distinction that [the Court observed] assuredly finds support in the text of *Gilmer*, see 500 U.S., at 26, 35.”

In *Gardner-Denver*, as here, the collective bargaining context is dispositive. *Gardner-Denver* accurately reflected, and continues to reflect, the law governing the limits on unions' ability to act for their bargaining unit members and Congress' intent that civil rights and minimum employment standards be adjudicated in a manner that does not compromise those important personal civil rights and minimum employment standards. In the collective bargaining grievance and arbitration process the claimant does not decide whether, or how far to pursue the claim. And, if the claim is pursued, the union advocate is not acting solely in the employee's interest and is accountable only to the union. Submitting statutory civil rights and minimum employment standards claims to such a process is inconsistent with maintaining substantive civil and statutory rights.

ARGUMENT**I. SUBSTANTIVE FEDERAL LABOR LAW, NOT THE FEDERAL ARBITRATION ACT, GOVERNS WHETHER A COLLECTIVE BARGAINING AGREEMENT MAY CONSTITUTE A WAIVER OF BARGAINING UNIT MEMBERS' RIGHTS TO SELECT A JUDICIAL FORUM FOR STATUTORY CLAIMS.**

Petitioners rely primarily on the FAA, 9 U.S.C. §§ 1-16, to contend that their employees are bound by an agreement Petitioners made, not with their employees, but with the union representing the employees' bargaining unit for purposes of collective bargaining. This reliance is misplaced. It is not at all clear that the FAA applies in this controversy, but certainly federal labor statutes do. *See Wright*, 525 U.S. at 77, n.1 (declining to decide the applicability of the FAA to a collective bargaining arbitration agreement because the employer did not rely on the FAA). *Amici* submit that this Court's previous decisions foreclose application of the FAA here, and even if the FAA does apply, it simply provides a jurisdictional overlay to Section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185 ("§ 301"), and the substantive law developed by the federal courts under that statute.

In *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957), the union brought suit under § 301, seeking an order compelling arbitration under a collective bargaining agreement, contending that § 301 alone was sufficient to provide the Court with jurisdiction and the

power to issue the desired order. As an alternative argument, the union asserted that § 2 of the FAA could also provide jurisdiction for suits to compel labor arbitration agreements. As part of that alternative argument, the union argued that a collective bargaining agreement is not a “contract of employment” within the meaning of the exclusion in § 1 of the FAA, or that, if it were a contract of employment, the exclusion is limited to transportation workers.³ *See* Brief of Petitioners Textile Workers, 1957 WL 87026 (U.S.), *passim*. The Court did not explicitly address either alternative argument. Instead, the Court stated that “the starting point of our inquiry is § 301 of the Labor Management Relations Act of 1947. . . .” Agreeing with the union’s principal argument, the Court ended where it started, holding that § 301 provided the authority to compel the arbitration the union sought. *Lincoln Mills*, 353 U.S. at 449, 454-57.

“Plainly, [§ 301(a)] supplies the basis upon which the federal district courts may take jurisdiction and apply the procedural rule of § 301(b)” to provide injunctive relief compelling arbitration. *Lincoln Mills*, 353 U.S. at 451-52.⁴ In § 301 the “Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes. . . .” *Id.*, 353 U.S. at 456. Congress enacted those sanctions to achieve the overarching goals of federal statutory labor policy: encouraging collective bargaining and providing effective methods for resolving labor disputes without the resort to economic weapons during the term of the resulting collective bargaining agreement. *Id.* at 453-54. *See also* 29 U.S.C. §§ 141(b), 173(d). Thus,

3. *See* Appendix (“App.”). at 1 for text of 9 U.S.C. § 1.

4. *See* App. at 3-4 for text of 29 U.S.C. § 185.

“the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws.” *Id.* at 456.

Justice Frankfurter, in dissent, rightly noted the majority’s implied rejection “of the availability of the [FAA] to enforce arbitration clauses in collective-bargaining agreements in the silent treatment given that Act by the Court’s opinion.” *Id.* at 466 (Frankfurter, J., dissenting). Although Justice Frankfurter surmised that the majority had based its decision on the exemption for employment contracts in § 1 of the FAA, *id.*, the majority certainly did not state that ground for its holding. The exemption for employment contracts (however broadly or narrowly it may have been understood by various lower courts at the time) was an unlikely basis for the majority’s failure to rely on the FAA. In a previous decision, the Court had explained that collective bargaining agreements were not contracts of employment:

Collective bargaining between employer and . . . a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone.⁵

5. Indeed, many lower court rulings at that time, although interpreting the exemption to apply to all individual employment contracts, did not interpret that term to apply to collective bargaining agreements. *See, e.g., Electrical Workers (UE) Local 205 v. General Elec. Co.*, 233 F.2d 85, 98-100 (1st Cir.

J.I. Case Co. v. NLRB, 322 U.S. 334-35 (1944) (holding that CBAs are negotiated regulatory systems similar to trade agreements); *See also Acuff v. United Papermakers and Paperworkers, AFL-CIO*, 404 F.2d 169, 172 (5th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969) (denying employee grievant's intervention motion seeking to vacate a collective bargaining arbitration award because the right to arbitration is an incident not of the employment relationship but of the collective bargaining relationship).

Lincoln Mills' reliance on § 301 was premised on Congress' clear intent to place suits to enforce agreements to arbitrate, which are part and parcel of the labor peace bought by collective bargaining grievance arbitration agreements, squarely within the ambit of the LMRA and the broader National Labor Relations Act, as amended by the LMRA. That statutory scheme superseded the FAA's application, if any, to collective bargaining arbitration agreements.⁶ As one of the authors of the union's brief in *Lincoln Mills* explains, although lower courts had rightly held that

(Cont'd)

1956), *aff'd on § 301 grounds*, 353 U.S. 547 (1957) (court of appeals' decision in a *Lincoln Mills* companion case decided the same day). *Hoover Motor Exp. Co. v. Teamsters Local 327*, 217 F.2d 49, 52-53 (6th Cir. 1954); *Lewittes & Sons v. United Furniture Workers of America, C.I.O.*, 95 F. Supp. 851, 855-56 (D.C.N.Y. 1951).

6. This reading of *Lincoln Mills* is consistent with the intent of Congress, expressed in the FAA as enacted in 1925, to avoid unsettling arbitration systems, including labor arbitration, had already been, or were about to be, put into place. *Circuit City v. Adams*, 532 U.S. at 120-121.

collective bargaining agreements were not contracts of employment and thus (as understood at the time) not exempted from the FAA, the Court did not choose to apply the FAA to collective bargaining arbitration agreements. Rather, in order to achieve the goals of federal labor statutes, the Court “rest[ed] the enforcement of the promise to arbitrate, and the enforcement of awards once made, on federal labor policy,” under § 301. *See* David E. Feller, *Taft And Hartley Vindicated: The Curious History Of Review Of Labor Arbitration Awards*, 19 Berkeley J. Emp. & Lab. L. 296, 300-301, and 306, n. 23. (1998).

Perhaps because the rejection of the FAA was only implicit in comparison to *Lincoln Mills*' explicit holding that § 301 applied, there has been ongoing “division and doubt” as to whether the FAA applies to collective bargaining arbitrations. William B. Gould, *Kissing Cousins?: The Federal Arbitration Act And Modern Labor Arbitration*, 55 EMORY L.J. 609, 639 (2006) (describing cases). That division and doubt continues, perhaps encouraged by an exchange between the majority and dissenting opinions in *Circuit City*, which held that the FAA applied to individually executed arbitration agreements in employment contracts outside the transportation industry. The dissenting Justices referred to legislative history and this Court's previous decision in *Lincoln Mills* as support for the proposition that the FAA does not apply to arbitration agreements in employment contracts. *Circuit City*, 532 U.S. at 130-131 (Stevens, J., dissenting). In response, the majority opinion rejected reliance on legislative history, but did not assert that the Act applied to collective bargaining agreements to arbitrate, which of course was not at issue. *See id.*, 532 U.S. at 119-121.

Because collective bargaining agreements are not contracts of employment, *Circuit City's* holding that the FAA extends to all contracts of employment outside the transportation industry does not undercut the holding of *Lincoln Mills*, which is not dependent on any particular reading of the exemption, but rather is firmly grounded in effectuating federal labor policy through § 301 and the substantive law developed under it.⁷ The current dispute presents the Court with an opportunity to end the division and doubt apparently remaining after *Lincoln Mills*.⁸ It should answer the question left open in *Wright* by holding that the FAA has no application where, as here, the question presented concerns the effect of arbitration provisions contained in collective bargaining agreements. Those agreements are governed

7. Three years after the decision in *Lincoln Mills*, in the famous “*Steelworkers Trilogy*,” the Court explained in greater detail that collective bargaining agreements are a feature of an integrated statutory design implementing Congress’ policy goals concerning labor-management relations, and labor arbitration agreements must be governed by the LMRA to give effect to that policy. *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigating Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.* 363 U.S. 593 (1960).

8. Regardless of whether the courts hold that the FAA applies in any way to collective bargaining arbitration agreements, there is universal consensus that the substantive law developed under § 301 also applies. *See Wright*, 525 U.S. at 77, n.1, 79-80 (holding that if a union could waive an individual bargaining unit member’s statutory right originating outside the NLRA, the “clear and unmistakable” standard developed in § 301 jurisprudence would apply). *See also, e.g., Brown v. ABF Freight Sys., Inc.*, 183 F.3d 319 (4th Cir. 1999); *Wilson v. Kellogg, Brown & Root*, 525 F.3d 370, 381-82 (4th Cir. 2008).

by federal labor statutes designed to facilitate ongoing negotiation between management and unions advancing the collective interests of workers. The goal of those statutes is not resolution of individual statutory claims, but rather meaningful collective bargaining and the peaceful resolution of conflicts in collective bargaining relationships. *See Mastro Plastics*, 350 U.S. at 280 (*citing* 29 U.S.C. § 141(b) (LMRA declaration of policy) and 29 U.S.C. § 151 (NLRA declaration of policy)).⁹

The congressional policy applicable here has nothing to do with the FAA's enforcement of an individual's prospective agreement to waive the right to a judicial forum for resolution of any statutory claims arising out of employment. If those were the facts of this case, the relevant inquiry would be whether under governing New York law the Petitioners' agreement with their employees to arbitrate statutory claims was valid and therefore enforceable by resort to the FAA. But, of course, here the only agreement is between a union and management and is embodied in a collective bargaining agreement, and state law is preempted by § 301.

9. Indeed, contrary to the assertion of Petitioners and *amici* supporting them, the Second Circuit's decision below was not premised on judicial skepticism concerning arbitration that the Congress intended the FAA to extinguish. Its decision was based on the understanding that, despite the long and successful history of collective bargaining arbitration, that forum is not appropriate for individual claims arising from statutes external to the federal labor arena. Federal labor policy allows unions to compromise individual claims in pursuit of collective bargaining goals, a key to the success of labor arbitration, and precisely the characteristic that makes it unsuitable for claims arising from statutes outside the NLRA. *Pyett v. Pennsylvania Bldg. Co.*, 498 F.3d 88, 94 n.5 (2nd Cir. 2007), *cert. granted*, 128 S. Ct. 1223 (2008).

Here, the Court must decide whether the right of a collective bargaining representative to act on behalf of its bargaining unit includes the ability to foreclose an individual employee's right to pursue a violation of fundamental civil rights and legislated minimum employment standards in a judicial forum. The answer to that question lies in this Court's previous decisions concerning the authority of unions to act for their members and the intent of Congress to insulate civil rights and statutory minimum standards from diminution by collective bargaining, including by the grievance and arbitration process under collective bargaining agreements.

II. A UNION'S AUTHORITY TO ACT FOR UNIT MEMBERS EXISTS ONLY FOR COLLECTIVE BARGAINING PURPOSES AND DOES NOT INCLUDE THE POWER TO WAIVE UNIT MEMBERS' RIGHTS TO SELECT A JUDICIAL FORUM FOR ADJUDICATING CIVIL RIGHTS CLAIMS OR VIOLATION OF MINIMUM EMPLOYMENT STANDARDS.

In *Gardner-Denver*, the Court had been asked, in essence, to rule that a collective bargaining agreement could waive a bargaining unit member's right to enforce his substantive statutory right to be free from discrimination and replace it with a contractual non-discrimination provision, enforcement of which would be in the union's control through the collective bargaining process. The Court rejected that request, for two reasons that remain vital to interpretation of the statutes involved. First, the Court recognized that unions do not have the authority under the NLRA to

waive bargaining unit members' statutory rights outside the NLRA arena. Secondly, even if the NLRA provided authority for unions to execute such waivers, accommodation of the NLRA to Title VII would prohibit such waivers.

The Court acknowledged “that a union may waive certain statutory rights related to collective activity, such as the right to strike.” *Gardner-Denver*, 415 U.S. at 51, *citing Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956), and *Boys Markets, Inc. v. Retail Clerk’s Union*, 398 U.S. 235 (1970). However, the Court noted a dispositive distinction between NLRA rights that a union may waive and statutory rights arising outside federal labor relations statutes, concerning which unions have no representative status. Rights that unions are authorized to waive, Congress “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 51. In contrast, rights conferred by civil rights and minimum employment standard statutes are not the means to a collective bargaining end. Congress intended by those enactments to achieve equality of opportunity and minimally decent employment conditions that would not be diluted by collective bargaining. Therefore, although the Court recognized that contractual provisions concerning those same subjects were mandatory subjects of bargaining and enforceable in their own right, they were simply complementary to statutory rights. *Id.*

The concern that the collective bargaining context was inherently incompatible with the adjudication of rights originating in law was the gravamen of the holding in *Gardner-Denver*:

Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. *In these circumstances*, an employee's rights under Title VII are not susceptible of prospective waiver.

415 U.S. at 51-52 (emphasis added). *Gardner-Denver* accurately described the grievance and arbitration process under a collective bargaining agreement as simply an extension of the continuous negotiation and compromise that is characteristic of labor relations. Federal labor policy encourages negotiated and negotiable standards in order to achieve peaceful resolution of labor disputes. *See also H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (government is to regulate only the process, and not the substance, of collective bargaining); *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960) (Congress "intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences").

However, that process is not, as has been repeatedly recognized by this Court, suitable for effective

enforcement of civil rights or statutory minimum standards that may not be undercut by collective bargaining or left for enforcement by a representative not acting solely in the interest of the individual claimant.¹⁰

A. A Collective Bargaining Representative’s Authority Extends Only To Collective Bargaining Purposes And Is Constrained By Statutory Purposes.

Determining the reach and effect of agreements to arbitrate contained in collective bargaining agreements requires recognition that those agreements are only one of many interwoven attributes in a complex statutory scheme reflecting “the manifest purpose of the Congress to fashion a coherent national labor policy.” *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180-81 (1967) (internal quotation omitted).¹¹ Examination of

10. Of course, because these civil rights and minimum employment standards embody important social policy, many of them are also enforceable by administrative agencies empowered by Congress or the states to enforce their standards. *See, e.g., Wafflehouse*, 534 U.S. 279. Moreover, because individual access to the courts to enforce these important rights implicates individually centered rights, *City of Los Angeles v. Manhart*, 435 U.S. 702, 708 (1978), and the individual’s right to petition the court and have a jury trial, any waiver of those rights must be voluntary, knowing, clear and unmistakable.

11. The applicable statutory scheme here is the National Labor Relations Act of 1935 (“NLRA”), 49 Stat. 449 (1935), 29 U.S.C. §§ 151-163, as amended and supplemented in 1947 by the LMRA, 29 U.S.C. §§ 141-144, 167, 172-187, and in 1959 by the Labor-Management Reporting and Disclosure Act of 1959 (“LMRDA”), 29 U.S.C. § 401 *et seq.*

those interwoven attributes reveals that a union's authority to act on bargaining unit members' behalf is limited to actions in furtherance of collective interests and contained within the statutory labor relations arena.

The federal policy favoring collective bargaining and industrial self-government is

[p]redicated on the assumption that individual workers have little, if any, bargaining power, and that 'by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions[.]'

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 735 (1981) (quoting *Allis-Chalmers*, 388 U.S. at 180). Once the unit of employees has selected a union as a collective bargaining representative, that representative acts as the legislative and executive branches of a government would in determining the collective bargaining goals and priorities, and in negotiating, executing and administering a collective bargaining agreement. *Allis-Chalmers*, 388 U.S. at 180, quoting *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944). The result of collective bargaining is not a contract reflecting the legal obligations of the parties; it is the parties' "own charter for the ordering of industrial relations" and the means "to minimize industrial strife" during its term. *Teamsters v. Oliver*, 358 U.S. 283, 295 (1959).

Unions may bind their unit members to the outcomes reached by the union in both negotiating and administrating the collective bargaining agreement because that is necessary to the successful operation of the federal policy requiring one voice for employees vis-à-vis their employer concerning wages, hours and working conditions. The source of unions' power to act on behalf of their bargaining units is found in 29 U.S.C. § 159 (a), which states that they "shall be the exclusive representatives of all the employees in such unit *for the purposes of collective bargaining* in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ." (emphasis added). Collective bargaining is "the mutual obligation of the employer and the representative of the employees to . . . confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party. . . ." 29 U.S.C. § 158(d).¹²

Collective bargaining then includes negotiation over the mandatory subjects of wages, hours and conditions of employment. Other terms of employment may constitute permissive subjects of bargaining, but neither side can obligate the other to negotiate concerning them. Still other subjects are deemed illegal subjects of bargaining. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). Thus, the scope of a union's authority to bind its members is limited to agreements with their employer concerning mandatory or permissive subjects.

12. See App. at 2-3 for text of these statutes.

Permissive subjects of bargaining include a union's agreement to waive certain rights that inhere in the federal labor laws themselves. In order to achieve its collective bargaining goals a union may negotiate away, for the term of the collective bargaining agreement, even statutory rights or obligations that form the rules of the collective bargaining game. There are, however, two significant caveats to a union's ability to waive its unit members' statutory rights: First, the union's authority does not extend to rules that ensure that employees have a free choice in forming or selecting their union. Secondly, the union's authority does not extend to statutory rights that are not part of the collective bargaining game. The distinction between what rights a union may waive and those over which unions have no power is dependent upon the legislative purpose for the right's existence.

In order to achieve its goals, a union does have the authority to trade away certain rights belonging to individual bargaining unit members under the statutory rules of the collective bargaining game. But that authority is limited to certain very specific situations, and even then only where those rights relate to the collective activity inherent in federal labor laws. A union may be authorized to waive the rights of unit members to engage in concerted activity for collective bargaining purposes, which are statutory rights belonging to the individual employee under Section 7 of the NLRA, as amended, 29 U.S.C. § 157.¹³ Section 7 rights differ significantly from statutory rights outside the federal labor statutes. Section 7 rights are a means to an end,

13. *See* App. at 1-2.

not the end itself. Congress enacted § 7 rights to further the ability of employees to act concertedly in choosing and supporting a bargaining representative that will reflect their collective power in negotiating with the employer. They are “protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife ‘by encouraging the practice and procedure of collective bargaining.’ 29 U.S.C. § 151.” *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 62 (1975). Therefore, because the union controls collective bargaining for its members, in most circumstances it controls whether to waive § 7 rights.

Because § 7 rights are ordinarily exercised as tools to reach an economic result through collective bargaining, the union may limit or waive those rights for the duration of a collective bargaining agreement in trade for concessions by management. The legitimacy of waivers for economic purposes “rest[s] on ‘the premise of fair representation’ and presuppose[s] that the selection of the bargaining representative ‘remains free.’” *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974), citing *Mastro Plastics Corp.*, 350 U.S. at 280. The quintessential trade is the ubiquitous no-strike clause for the equally ubiquitous grievance and arbitration process for resolving contractual disputes. *See, e.g., Magnavox*, 415 U.S. at 358 (a union may reach an agreement as to wages and other employment benefits and waive the right to strike during the time of the agreement as the quid pro quo for the grievance and arbitration procedure to resolve disputes about the meaning and application of the agreement) (citing *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455);

Local 174, Teamsters v. Lucas Flour, 369 U.S. 95 (1962)) (contract provision establishing that a dispute shall be settled exclusively and finally by compulsory arbitration makes clear that the union may not strike over such a dispute because waiver is implied in the unique conjunction between arbitration and no-strike clauses).

Similarly, a union may agree that the employer may discipline union representatives more harshly than other employees for failing to take affirmative steps to end an unlawful work stoppage. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705-06 (1983). Unions may execute such waivers of the right to be free from discipline because of concerted activities because they are closely related to the original economic decision to waive the right to strike and to the concomitant peaceful resolution of contractual disputes during the term of the collective bargaining agreement.¹⁴ *See, e.g., Energy*

14. Petitioners, and *amici* in their support, rely on *Metropolitan Edison* as authority for Local 32BJ's ability to waive Respondents' access to a judicial forum for their ADEA claims. This facile comparison completely misses key distinctions. First, in *Metropolitan Edison*, the right in question was the quintessential economic § 7 right to strike. Here, the Respondents' rights accrue under the ADEA, not the NLRA, and are therefore not within the union's arsenal of collective bargaining weapons. Second, there, the union's right to execute a waiver of its own leaders' § 7 rights not to be disciplined more severely than other employees who violated a no-strike agreement was premised on the fact that the waiver was made to "secure the integrity" of the contractual "[n]o-strike provisions [so] central to national labor policy." *Metropolitan Edison*, 460 U.S. at 707. The union's waiver in that case must also be understood in light of the ability of the union to discipline

(Cont'd)

Co-op., 290 NLRB 635 (1988) (holding that a union's ability to waive statutory rights is limited to rights closely associated with economic warfare rights, like the right to strike, here the right to receive benefits while on strike).

However, sometimes employees exercise their § 7 right to strike, not as a tool of economic warfare in support of contract negotiations, but to protest unfair labor practices by their employer. Because the right to resort to economic warfare in response to unfair labor practices is not the quid pro quo for arbitration of contractual violations, the National Labor Relations Board and the courts will not find a waiver unless it is clear and unmistakable that the union intended the waiver to extend to unfair labor practice strikes. *See, e.g., Mastro Plastics*, 350 U.S. 270 (1956); *Lucas Flour*, 369 U.S. 95; *NLRB v. Advanced Architectural Metals, Inc.*, 351 NLRB No. 80 (2007).

Although a union may waive statutorily protected economic rights of its members, such as the right to strike during a contract term or the right to refuse to

(Cont'd)

its own members for violating the union's promise not to strike, *see Allis-Chalmers*, 388 U.S. 175. Here, even if unions could waive non-NLRA rights, there is no nexus between the purported waiver of judicial forum for statutory claims and the union's ability to waive the Respondents' right to strike or any other § 7 right that a union might legitimately waive. Finally, an individual employee's ability to choose the forum for adjudicating civil rights is necessary to enforcement of those statutory schemes and may not be compromised by collective bargaining. *See infra* Parts II. B & C.

cross a picket line, “it may not surrender rights that impair the employees’ choice of their bargaining representative.” *Metropolitan Edison Co.*, 460 U.S. 693, 705-06. That would undermine the purposes of the NLRA, which are “(1) to protect the right of employees to be free to take concerted action as provided in §§ 7 and 8(a), and (2) to substitute collective bargaining for economic warfare in securing satisfactory wages, hours of work and employment conditions.” *Mastro Plastics*, 350 U.S. at 284. For example, the right to distribute literature at the workplace supportive or critical of the incumbent union is only indirectly related to placing pressure on an employer, but it is crucial to a unit member’s statutory right to have a say in the selection of his or her union. A union may not waive this right by negotiating a collective bargaining agreement provision that precludes employees from soliciting support or criticism of the union and distributing literature about the union in the workplace. *Magnavox*, 415 U.S. at 325. Thus, while federal labor policy encourages collective bargaining, it must be balanced with the policy of “protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . .” *Mastro Plastics*, 350 U.S. at 280, quoting 29 U.S.C. § 151 and citing 29 U.S.C. § 141(b). The Court explained that the “two policies are complementary [and] depend for their foundation upon assurance of ‘full freedom of association’.” *Mastro Plastics*, 350 U.S. at 280, quoting 29 U.S. C. § 141(b).

When the right to choice of representative is at issue, “it is difficult to assume that the incumbent union has no self-interest of its own to serve by perpetuating

itself as the bargaining representative.” *Magnavox*, 415 U.S. at 325. Allowing the union with such self-interest to secure a contractual waiver of the bargaining unit’s right to solicitation would “seriously dilute § 7 [which] protects ‘the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.’ 29 U.S.C. § 151.” *Magnavox*, 415 U.S. at 325-26. *Accord*, *General Motors Corp.*, 211 NLRB 986 (1974), *enforced in relevant part*, 512 F.2d 447 (6th Cir. 1975); *Ford Motor Co.*, 233 NLRB 698 (1977).

Therefore, even in the case of individual rights which are part and parcel of the pursuit of collective advantage, a union’s ability to waive statutory rights does not extend to those rights in which the right of the individual bargaining unit member is necessary to the successful operation of the statutory scheme, and especially in cases where the individual’s right is exercised in furtherance of an interest that may diverge from the union’s interests.

B. Congress Intended That Fundamental Civil Rights And Statutory Minimum Employment Standards Would Not Be Undercut By Collective Bargaining, Including By Adjudication In Collective Bargaining Arbitration.

Here, the collective bargaining agreement seeks to incorporate the statutory commandments of the federal and state discrimination and other employment statutes and submit them for arguably preclusive grievance negotiation, which may or may not end in arbitration, depending solely upon the union’s decision whether to

submit the statutory claim to arbitration. While the union's agreement to submit discrimination or other statutory claims to the grievance process and potentially to arbitration is enforceable as a contractual matter, the agreement cannot be read to preclude individual unit members from asserting their contractual rights in court. Individual employees are not parties to collective bargaining agreements. *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962)

And, as explained above, a collective bargaining representative's powers are limited to collective bargaining purposes, and the statutory rights it may waive are limited to those that arise from federal labor statutes, and then only where those rights exist as tools for collective action. *See also Gardner-Denver*, 415 U.S. at 51-52. There is no authority for the proposition that unions may effectively waive statutory rights of bargaining unit members arising outside of the NLRA (or other labor relations statutes such as the RLA). Nor is there any authority outside of the Fourth Circuit that would allow those statutory minimums to be less directly, but just as surely undercut by submitting them to the grievance and arbitration processes under collective bargaining agreements. Congress and the states' legislatures did not enact federal or state discrimination laws and minimum employment standards as instruments for use in collective bargaining. Those legislative bodies intended that statutory employment standards would not be undercut by collective bargaining, either by direct waiver of the substantive right, or by submitting them to a process of negotiation not in the control of the employee claimant.

Certainly Local 32BJ could waive Respondents' rights to picket to reinforce a demand to bargain concerning age discrimination because picketing is a tool of economic warfare in the control of the certified bargaining representative, but could not waive Respondents' rights to access a judicial forum to adjudicate an ADEA claim. *See Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 62 (1975) (union had authority to waive right of bargaining unit members to engage in picketing intended to compel the employer to negotiate with the employees concerning race discrimination). Local 32BJ cannot prohibit pursuit of those discrimination claims independent of the collective bargaining context because its representational status does not encompass those claims. *Cf. Frank Briscoe Inc. v NLRB*, 637 F.2d 946, 950 (3rd Cir. 1981) (concerted activity of filing charges of discrimination with the EEOC in order to end discriminatory employment practices is protected under § 7 because it does not violate the principle of exclusive representation).¹⁵

15. This Court has yet to hold that employers may require employees, as a condition of employment, to agree to arbitrate future statutory claims. However, if an employer can lawfully condition employment on the employee's agreement to waive access to a judicial forum, it may need to bargain with the union concerning imposing that condition, and should it succeed in bargaining, it still would have to get the individual employee's agreement to obtain the waiver. *See Kelsey-Hayes Co.*, 2007 WL 4233188 (N.L.R.B.G.C. 2007) Memorandum GC 05-03, at 8-9 (2005); Brief of AFL-CIO and Change to Win; Brief of National Academy of Arbitrators at 26, n. 8. However, this case does not present the Court with that question.

C. Giving Preclusive Effect To a CBA Arbitration Provision Would Undercut This Court's Existing Jurisprudence In Several Areas Where Labor Statutes Intersect With Employment Regulation.

Gardner-Denver's still vital holding that Title VII claims should not be preclusively submitted to the "majoritarian process" of collective bargaining has been followed in several subsequent decisions of this Court concerning other minimum employment standards, all reiterating as a basis for their holdings that those standards are not suitable for sole enforcement through a process not controlled by the employee, but rather embedded in a continuous process of negotiation and compromise controlled by unions. *Barrentine*, 450 U.S. at 734, held that Fair Labor Standard Act ("FLSA") claims could not be precluded by a previous collective bargaining arbitration, precisely because that arbitration process was characterized by the union's ability to compromise statutory standards in furtherance of collective bargaining goals. That type of process did not serve the policies behind the FLSA:

In contrast to the Labor Management Relations Act, which was designed to minimize industrial strife and to improve working conditions by encouraging employees to promote their interests collectively, the FLSA was designed to give *specific minimum protections to individual workers* and to ensure that each employee covered by the Act would receive "[a] fair day's pay for a fair day's work' . . ." (emphasis added)

Barrentine, 450 U.S. at 739 (citations omitted). Because of the likelihood that those specific minimum protections would be undermined in the grievance process, the Court noted that “[n]ot all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining,” including FLSA claims. *Barrentine*, 450 U.S. at 737.

Similarly, in *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 291 (1984), the Court held that employees may pursue First Amendment claims, brought under 42 U.S.C. § 1983, in a judicial forum and refused to give preclusive effect to a collective bargaining arbitration award. Again a significant basis of the Court’s holding was the fact that the individual employee did not control the presentation of the grievance in arbitration:

[W]hen, as is usually the case, . . . the union has exclusive control over the “manner and extent to which an individual grievance is presented,” *Gardner-Denver, supra*, at 58, n. 19, there is an additional reason why arbitration is an inadequate substitute for judicial proceedings. The union’s interests and those of the individual employee are not always identical or even compatible. As a result, the union may present the employee’s grievance less vigorously, or make different strategic choices, than would the employee. *See Gardner-Denver, supra*, at 58, n. 19; *Barrentine, supra*, 450 U.S., at 742. Thus, 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.

Again, in *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), the fact that an injury was caused by conduct possibly subject to arbitration under the RLA did not deprive a railroad employee of the right to bring an action in court under the Federal Employers' Liability Act. The Court noted that the RLA contained elaborate grievance arbitration (minor dispute) procedures and that the plaintiff's union had taken "preliminary though abortive steps in that direction," concerning the injury. *Buell*, 480 U.S. at 564. However, once again the basis for the Court's holding was "that notwithstanding the strong policies encouraging [labor] 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 at 737.

This Court's cases concerning § 301 preemption provide further support for holding that protection of minimum statutory employment standards must be insulated from the majoritarian processes inherent in collective bargaining, which places a priority on the collective interests as perceived by the bargaining representative. In *Livadas v. Bradshaw*, 512 U.S. 107, 121-22 (1994), the Court reviewed, in light of *Gilmer*, its previous cases concerning whether a collective bargaining agreement could preempt a state minimum

employment standard claim. The Court observed, that “[w]ithin its proper sphere, § 301 has been accorded unusual pre-emptive power.” *Id.* at 122, n. 16. However, the Court reiterated that rights under civil rights and minimum employment standard statutes could be brought in court despite similar obligations imposed on the employer in a collective bargaining agreement. The Court

underscored the point that § 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law . . . [and] stressed that it is the legal character of a claim, as ‘independent’ of rights under the collective-bargaining agreement, . . . (and not whether a grievance arising from ‘precisely the same set of facts’ could be pursued) . . . that decides whether a state cause of action may go forward.

Id. at 123 (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1967) and *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 410 (1988)). *See also*, *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (state court cause of action for enforcement of governmentally required minimum working protections is in no way inconsistent with the collective bargaining process under the NLRA); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (same). *Cf.*, *Carmona v. Southwest Airlines*, 2008 WL 2747467 at *4-*6 (5th Cir. July 16, 2008) (RLA minor dispute provisions do not preclude claim under the Americans with Disabilities Act or Title VII sex discrimination claim).

This Court has long held that legislated minimum employment standards “take precedence over conflicting provisions in a collectively bargained” agreement that undercut them. *Barrentine*, 450 U.S. at 740-41 (collecting cases in which this Court held that collective bargaining agreements could not waive FLSA standards). Although the substantive standards and remedies of the ADEA are incorporated by reference in the agreement here, the nature of the process itself just as surely undercut the substance of those ADEA claims as if those standards and remedies were not so incorporated.

D. Inherent Characteristics Of The Collective Bargaining Grievance And Arbitration Process Make That Forum Inadequate To Insure The Enforcement Of Statutory Rights.

The Respondents and the *amicus* National Academy of Arbitrators, as well as other *amici*, have well delineated the unique aspects of collective bargaining arbitration that distinguish it from other arbitral processes that may provide an adequate forum for statutory claims. *Amici* AFL-CIO, Change to Win, and SEIU Local 32BJ readily acknowledge that because a union must take the interests of all members into account, a union’s interest in contract enforcement is “not always identical or even compatible” with those of the individual member grievant. *McDonald*, 466 U.S. at 291. Other *amici* have also clearly shown that the duty of fair representation does not require a union to utilize legal representation in grievance arbitration. Moreover, *amici* herein believe it is important to add that even where the union has an attorney, the grievant

is not thereby given any more say or control over the process, and has no recourse or remedy if representation does not meet attorney competency standards. Thus, while the rule that the union is the client in grievance arbitrations is consistent with the policies that animate federal labor statutes, it is not consistent with the imperatives of enforcement of civil rights and minimum employment standards legislation.

Grievants in collective bargaining arbitrations are not entitled to the union's attorney's loyalty, competence, or confidentiality. Those duties run to the union only. In matters relating to the collective bargaining process, the union is the client, not the member. *See, e.g., Arnold v. Air Midwest, Inc.*, 100 F.3d 857, 862-63 (10th Cir. 1996); *Peterson v. Kennedy*, 771 F.2d 1244, 1258-59 (9th Cir. 1985), *cert denied*, 475 U.S. 1122 (1986). Any differences between the union and bargaining unit member grievant, even if a union member, are irrelevant to the duty of loyalty and therefore fail to implicate local rules similar to Model Rules of Professional Responsibility ("Model Rules") 1.7 or 1.9. *Adamo v. Hotel Workers' Union*, 655 F. Supp. 1129, 1129-30 (E.D. Mich. 1987) (rejecting attempt to disqualify union attorney in duty of fair representation case, on the ground that the attorney previously handled the employee's grievance); *Griesemer v. Retail Store Employees Union, Local 1393*, 482 F. Supp. 312, 314-15 (E.D. Pa. 1980) (same).

The attorney representing the union in the matter can disclose communications with the grievant to union officers over the objection of the grievant. Model Rule 1.13 & cmt. This is so even if there were an agreement

with the grievant creating an attorney-client relationship between them, as that would make the union and the grievant joint clients and neither could assert the privilege against the other. *IBEW Local 323 v. Coral Electric Co.*, 104 F.R.D. 88, 89 (S.D. Fla. 1985). Nor can it be assumed in most situations that attorney communications with the grievant are privileged against disclosure to employers or others. *Compare Upjohn v. United States*, 449 U.S. 383, 394-95 (1981) (holding that corporations may choose to protect as privileged communications from low level employees to the corporation's lawyers) *with Consolidated Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 257 (Ill. 1982) (rejecting the *Upjohn* approach and permitting protection only of the communications of the "control group," i.e., those high level employees who control the entity).

In contrast, in most instances the attorney-client privilege may be asserted against even a union member grievant seeking to discover attorney communications with union officers because the union itself is the holder of the privilege which must be protected even against the grievant. Model Rule 1.13 cmt. 2 (2003). *See, e.g., Arcuri v. Trump Taj Mahal Ass'n*, 154 F.R.D. 97 (D.N.J. 1994).

The union, as explained by several *amici*, ordinarily will not allow the grievant to make those decisions about handling the case that typically are the client's decisions. *See e.g., Longshoremen (ILWU) v. Pacific Maritime Ass'n.*, 441 F.2d 1061 (9th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972) (holding union may unilaterally reject an offer of settlement over grievant's

objection); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-339 (1953) (unions may settle even a meritorious grievance, even if the basis of the decision is union finances). Thus, resolution of the claim is completely outside the control of the grievant, who does not have the authority that the attorney's client would have regarding settlement, which may occur against his or her wishes. *See* Model Rule 1.2.

The union's attorney owes no duty of zealous representation to the grievant. *Barrentine*, 450 U.S. at 729 (“[E]ven 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.”) Nor does the attorney owe a duty of competence to the grievant. *See, e.g., Peterson v. Kennedy*, 771 F.2d at 1255 (“[plaintiff’s] malpractice claim against the union attorney was ‘subsumed’ in and precluded by the breach of duty [of fair representation] claim asserted against the union.”). Grievants may not bring malpractice suits against the attorney that handled the arbitration because he or she is not grievant’s attorney and § 301, as enforced in *Atkinson v. Sinclair*, 370 U.S. 238 (1962), immunizes union agents from damage claims, an immunity that extends to union attorneys. *Peterson*, 771 F.2d at 1255-56. *See also Arnold*, 100 F.3d 857; *Breda v. Scott*, 1 F.3d 908 (9th Cir. 1993) (rule applies whether attorney was inside or outside counsel); *Best v. Rome*, 858 F. Supp. 271 (D. Mass. 1994), *aff’d*, 47 F.3d 1156 (1st Cir. 1995). And, as other *amici* have pointed out, the duty of fair representation provides no recourse for less than competent representation. *See Hines v. Anchor Motor Freight, Inc.* 424 U.S. 554, 557-61 (1976)

(holding that union which allegedly failed to investigate and present evidence of political conflict between union leadership and discharged grievants had not breached its duty of fair representation).

For ordinary contractual grievances the limits on a union's liability for actions taken in the course of its representation are well grounded in the collective bargaining mechanism and policy. However, the basis for the lenient standards of the duty of fair representation does not extend to actions taken by employers in violation of civil rights or minimum standards statutes. Yet, the consequence of restricting those claims to the collective bargaining grievance and arbitration process would provide that same shield for employers. This outcome is not called for by federal labor policy. *Huffman*, 345 U.S. at 337 (the duty of fair representation under the NLRA arises from the union's "statutory obligation to represent all members of an appropriate unit"); *Steele*, 323 U.S. at 201 (the duty of fair representation under the RLA arises, not from the collective bargaining agreement, but from the union's status as exclusive bargaining representative.) An arbitration scheme that prevents suits against employers for violation of statutory rights unless the employee can prove the union breached its duty of fair representation in managing the grievance is certainly inconsistent with Congress' intent that those statutes be vigorously enforced. See Brief of Amicus National Academy of Arbitrators at pages 27-28.

CONCLUSION

Surely, foreclosing Respondents' ADEA claims simply because their union and employer saw fit to incorporate statutory standards for discrimination grievances into their contract is not consistent with the long lines of labor and employment cases that have maintained the boundary between contractual rights and statutory rights. That boundary between collectively bargained provisions and public law is necessary to the operation of both federal labor policy and federal and state social welfare legislation. The limits on unions' authority to waive unit members' rights arising under statutes, the independent character of legislated standards, and the harm that inadequate adjudication could cause to the substantive rights involved, remain the same. A ruling that the ADEA claims here are foreclosed would cast considerable doubt upon this Court's holdings both before and after *Gardner-Denver* and would send ripples of confusion throughout all the lines of cases that concern the intersection of federal labor statutes with federal and state statutory regulation of employment. The congressional policies inherent in federal labor law and in civil rights and statutory employment regulation remain the same and therefore *stare decisis* considerations require the conclusion that the Court of Appeals be affirmed.

Respectfully submitted,

STEFANO G. MOSCATO
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION
44 Montgomery Street
Suite 2080
San Francisco, CA 94104
(415) 296-7629

KATHLEEN PHAIR BARNARD
Counsel of Record
SCHWERIN, CAMPBELL,
BARNARD & IGLITZIN
18 W. Mercer Street
Suite 400
Seattle, WA 98119
(206) 285-2828

Counsel for Amicus Curiae
National Employment Lawyers Association

LAURIE A. McCANN
DEBORAH ZUCKERMAN
AARP FOUNDATION
LITIGATION
MELVIN R. RADOWITZ
AARP
601 E Street, NW
Washington, DC 20049
(202) 434-2060

JEFFREY L. NEEDLE
119 1st Ave. South
Suite 200
Seattle, WA 98104
(206) 447-1450

Counsel for Amicus Curiae
American Association
for Justice

Counsel for Amicus Curiae
AARP

APPENDIX — RELEVANT STATUTES

9 U.S.C. § 1

“Maritime transactions”, as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; “commerce”, as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 2

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Appendix

29 U.S.C. § 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a)(3) of this title.

29 U.S.C. § 158. Unfair labor practices

It shall be an unfair labor practice for a labor organization or its agents—

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159 (a) of this title;

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with

Appendix

respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession

29 U.S.C § 159. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

Appendix

29 U.S.C. § 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Appendix

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization

(1) in the district in which such organization maintains its principal office, or

(2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an “agent” of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.