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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 *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., IN SUPPORT OF RESPONDENTS

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July 15, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Can an arbitration clause in a collective bargaining agreement waive the right of individual bargaining unit workers—including workers who are not union members—to a judicial forum for their statutory discrimination claims?

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BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., IN SUPPORT OF RESPONDENTS

This *amicus curiae* brief for the National Right to Work Legal Defense Foundation, Inc. ("Foundation"), is filed pursuant to Supreme Court Rule 37.3(a) with the written consent of all parties.[1] This brief supports

[1] Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, the Foundation affirms that no counsel for any party authored this brief in whole or in part, and that no such counsel or party made a monetary contribution intended to fund the preparation or

the position of Respondents that the decision of the court of appeals should be affirmed.

INTEREST OF *AMICUS CURIAE*

The Foundation is a charitable legal aid organization formed in 1968 to protect the right to work, freedoms of association, speech and religion, and other fundamental liberties of ordinary men and women from infringement by compulsory unionism arrangements, such as exclusive representation and mandatory union fee requirements.

This Court has decided twelve cases that Foundation attorneys have litigated for workers, including *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998). In *Miller*, the Court ruled that nonmembers of unions who do not personally agree to union-established arbitration procedures cannot be required to use those procedures before challenging in federal court the amount of their compulsory fees for collective bargaining purposes. Foundation attorneys also represent the nonmember state workers in *Locke v. Karass*, 498 F.3d 49 (1st Cir. 2007), *cert. granted*, 128 S. Ct. 1224 (U.S. Feb. 19, 2008) (No. 07-610), in which the Court will hear oral argument on October 6, 2008.

Since its founding in 1968, the Foundation has aided more than 200,000 nonunion employees in vindicating their constitutional and civil rights against unions and employers through the courts under statutes such as 42 U.S.C. § 1983 and Title VII

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submission of this brief. No person other than the *amicus curiae* and its counsel made such a monetary contribution (the Foundation has no members).

of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17. Reversal of the court of appeals' decision in this case would enable a union to deny such workers access to the courts for claims against their employers, despite the inevitable conflict, inherent in exclusive representation, between the interests of non-members and their unwanted monopoly bargaining agent.

The Question Presented, as stated by Petitioners ("the Employers"), misleadingly refers only to "union members' right to a judicial forum for their statutory discrimination claims." (Pet'rs' Br. at i.) Moreover, Respondents ("the Employees") "are all members of Local 32BJ," the union in this case. (*Id*. at 8.) Respondents' opposition to the Petition for Certiorari thus understandably did not—and their brief on the merits likely may not—argue that union waiver of a judicial forum for statutory claims is particularly inappropriate for nonmembers subjected to exclusive representation. The Foundation, therefore, files this brief to bring to the Court's attention that "relevant [argument] not already brought to its attention by the parties," Sup. Ct. R. 37.1

SUMMARY OF ARGUMENT

It is "black letter" law that an individual cannot be required to submit to arbitration any dispute that he or she has not voluntary agreed so to submit.

The only exception to this fundamental rule is that an exclusive bargaining agent may agree in a collective bargaining agreement that bargaining unit employees must arbitrate contractual grievances arising from that agreement. This Court correctly held in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36

(1974), *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), and *McDonald v. City of West Branch*, 466 U.S. 284 (1984), that this exception does not extend to waiver of a judicial forum for individual workers' statutory discrimination claims, because the interests of a government-imposed monopoly bargaining agent do not necessarily coincide with, and often are adverse to, the interests of individual workers and minority groups of workers. That disparity of interests is particularly acute in the case of nonmembers, members who did not choose that agent, and workers who have been coerced or tricked into membership.

Moreover, that a labor contract containing an arbitration provision might possibly be submitted to a vote of the union membership does not satisfy the principle that individuals must voluntarily agree to submit their claims to arbitration. Such a vote is not required by law. Even when a proposed contract is submitted to the union membership for a ratification vote, not all members vote, some members vote "no," nonmembers almost always are denied a vote, and union officials have no obligation to disclose before the vote that the agreement contains a binding arbitration provision for statutory claims.

ARGUMENT

I. A Government-Imposed Monopoly Bargaining Agent's Waiver of a Judicial Forum for Individual Statutory Claims Is Inconsistent with the Voluntary Nature of Arbitration.

It is a fundamental legal principle that "a party cannot be required to submit to arbitration any dispute which ***he*** has not agreed so to submit."

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) (emphasis added); *accord, e.g.*, *Miller*, 523 U.S. at 867; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *AT&T Techs., Inc. v. Communications Workers*, 475 U.S. 643, 648-49 (1986); *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 374 (1974). An individual's agreement to arbitrate can be in a commercial contract to which he is party, *e.g.*, a securities registration application, *see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991), or in the union-member contract to which one agrees by joining a union, *see Neal v. System Bd. of Adjustment*, 348 F.2d 722, 726 (8th Cir. 1965).[2]

But, the *sine qua non* of such an agreement is that it be voluntary: "presumably an employee may waive his cause of action under [a civil rights statute] as part of a ***voluntary***" agreement. *Gardner-Denver*, 415 U.S. at 52 (emphasis added); *see also Gilmer*, 500 U.S. at 33 ("[t]here is no indication in this case . . . that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause . . . .").

The only recognized exception to the principle that a party must personally and voluntarily agree to submit to arbitration is that an exclusive bargaining representative may agree in a collective-bargaining agreement that represented employees must arbitrate ***contractual*** grievances under that agreement.

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[2] However, requirements that union members exhaust internal union remedies are limited both by statute and this Court's decisions. *See* 29 U.S.C. § 411(a)(4) (1988); *Clayton v. Auto Workers*, 451 U.S. 679 (1981).

See Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965). The Employers would here extend that narrow exception to employees' statutory discrimination claims.

However, a union is exclusive representative only "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a). It is not exclusive representative for all employment-related purposes, including enforcement of statutes protecting workers from discrimination in employment. *See National Treasury Employees Union v. FLRA*, 800 F.2d 1165 (D.C. Cir. 1986) (opinion by Bork, J.) (union is exclusive representative and has duty of fair representation only for "a grievance or other procedure growing out of a collective bargaining agreement," and not for "a statutory procedure to challenge a removal action").

Thus, as this Court held in *Gardner-Denver*:

> a union may waive certain statutory rights related to collective activity, such as the right to strike. . . . These 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. ***Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. . . . 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.

415 U.S. at 51 (emphasis added) (citations omitted); *see McDonald v. City of West Branch*, 466 U.S. 284, 292 n.12 (1984) (arbitration clause of collective agreement cannot preclude judicial action under 42 U.S.C. § 1983 because that "would gravely undermine the effectiveness of § 1983").[3]

The Employers argue that *Gardner-Denver* merely stated dicta when it said that Title VII rights "can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII," 415 U.S. at 51. (Pet'rs' Br. at 38.) To the contrary, that was a necessary holding of the Court, because had the union in that case been able to waive the employee's Title VII cause of action in the bargaining agreement, the employee would have been bound to the result of the arbitration.

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[3] The Employers over-broadly contend that *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), "held that unions may waive individual statutory rights of their members," (Pet'rs' Br. at 23). That case only holds that a union may waive certain ***economic*** rights protected by the National Labor Relations Act ("NLRA"): "a union may bargain away its members' economic rights, but it may not surrender rights that impair the employees' choice of their bargaining representative." *Id*. at 705-06; *see also id.* at 706 n.11 (distinguishing *Gardner-Denver* on the basis that the latter case found union waiver of the right at issue to be inconsistent with a statute other than the NLRA). The rights waived in *Metropolitan Edison* were not even the rights of members, but the rights of union ***officials*** that are "closely related to the economic decision a union makes when it waives its members' right to strike." *Id*. at 706.

In *Wright v. Universal Maritime Service Corp*., the Court would later find no waiver because an agreement did not clearly require arbitration of statutory claims. 525 U.S. 70, 81-82 (1998). Although the agreement in *Gardner-Denver* also did not clearly require arbitration of statutory claims, *see* 415 U.S. at 39-42, the Court did not decide that case on that basis. Rather, unlike the Court in *Wright*, the *Gardner-Denver* Court unanimously held that the "statutory cause of action was not waived by the union's agreement to the arbitration provision of the CBA, since 'there can be no prospective waiver of an employee's rights under Title VII.'" *Wright*, 525 U.S. at 76 (quoting 415 U.S. at 51 as "the ***holding*** of *Gardner-Denver*") (emphasis added).[4]

Gilmer did not repudiate that holding. Rather, "*Gilmer* emphasized its basic consistency with [the Court's] unanimous decision in [*Gardner-Denver*]. *Livadas v. Bradshaw*, 512 U.S. 107, 126 n.21 (1994).

Indeed, "that federal forum rights cannot be waived in union-negotiated CBAs even if they can be waived in individually executed contracts" is "a distinction that assuredly finds ***support*** in the text of *Gilmer*." *Wright*, 525 U.S. at 77 (emphasis added). This distinction exists because, "in the context of a collective-bargaining agreement," an "important concern" is "the tension between collective representation and individual statutory rights, a concern not applicable to" individual contracts. *Gilmer*, 500 U.S. at 35.

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[4] *See also Wright*, 525 U.S. at 80 ("*Gardner-Denver*'s seemingly absolute prohibition of union waiver of employees' federal forum rights").

The source of that tension is, as *Gilmer* recognized, "the potential disparity in interests between a union and an employee," *id.*, that always inheres in the monopolistic system of exclusive representation the federal labor statutes impose on workers.

Under exclusive representation, the bargaining agent chosen at one point in time by a majority of the employees in a bargaining unit, either through an election or signing union authorization cards, represents not only its voluntary members, but "***all*** the employees in such unit." 29 U.S.C. § 159(a) (emphasis added); *see* 45 U.S.C. § 152, Fourth.

That means that the bargaining agent represents not just voluntary union members, but also: unit workers who voted against union representation or refused to sign union cards; workers who have refused to join or resigned from membership (non-members);[5] workers who were not even in the unit when the union was chosen and thus had no say in choosing their bargaining representative; workers who otherwise would not, but have joined the union because that is the only way that they can have any say over the determination of their terms and conditions of employment,[6] and workers who have joined the union because they were misled by an agreement that on its face requires "membership" or

[5] *See*, *e.g.*, *Communications Workers v. Beck*, 487 U.S. 735, 739 (1988).

[6] *See*, *e.g.*, *Kidwell v. Transportation Commc'ns Int'l*, 946 F.2d 283, 294-97 (4th Cir. 1991) (employees must join union to be able to vote for negotiating team and on contract ratification).

"membership in good standing" as a condition of employment.[7]

Consequently, in "arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Gardner-Denver*, 415 U.S. at 58 n.19. Indeed, the interests of a minority group of employees may be subordinated to the interests of the majority. *See*, *e.g.*, *Emporium Capwell Co. v. Western Addition Comty. Org.*, 420 U.S. 50, 62 (1975).

"Moreover, harmony of interest between the union and the individual employee cannot always be presumed . . . ." *Gardner-Denver*, 415 U.S. at 58 n.19. "The union's interests and those of the individual employee are not always identical or even compatible." *McDonald*, 466 U.S. at 289. That is particularly true where nonmembers are concerned. *See*, *e.g.*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977).

The Employers argue that the "duty of fair representation protects the employees." (Pet'rs' Br. at 42.) However, *Gardner-Denver* and *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), explicitly rejected that argument. A "breach of the union's duty of fair representation may prove difficult to establish." *Gardner-Denver*, 415 U.S. at 58 n.19. Moreover, "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

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[7] *See*, *e.g.*, *Marquez v. Screen Actors Guild*, 525 U.S. 33, 52-53 (1998) (Kennedy & Thomas, JJ., concurring).

arbition," or not support the claim at all. *Barrentine*, 450 U.S. at 742.[8]

In sum, because the interests of individual employees do not necessarily coincide with the interests of their government-imposed monopoly bargaining agent, and may well be adverse, this Court should follow *Gardner-Denver, Barrentine,* and *McDonald* and hold that a union may not waive the right of employees it represents to pursue a judicial forum for vindication of their statutory civil rights.

II. It Cannot Be Assumed That Individual Employees Have Voluntarily Ratified a Collective Bargaining Agreement Provision Waiving a Judicial Forum for Their Statutory Claims.

The Employers repeatedly assert that the applicable collective bargaining agreement was "voted upon and ratified by the union membership." (*E.g.*, Pet'rs' Br. at 3-4.) If true, that, however, is insufficient to provide the voluntary individual assent to binding participation that is the touchstone of arbitration, *see supra* pp. 4-5, either in this case or generally.

The record here does not reflect whether the Employees voted on ratification of the applicable col-

[8] The Brief *Amicus Curiae* of the National Academy of Arbitrators ("NAA") in Support of Respondents throughly and persuasively shows that this Court correctly concluded in *Gardner-Denver* and *Barrentine* that the vindication of an individual's, or a minority's, statutory civil rights should not depend upon the exercise of a majority union's duty of fair representation. (NAA Br. at 16-23.) Mindful of Supreme Court Rule 37.1's admonition against repetition, we endorse the NAA's argument on this point.

lective bargaining agreement, or how they voted if they did. The Employers do not even cite record evidence that the contract was submitted to a vote of the union membership. Moreover, even if the Employees did vote on the contract, that does not mean that they voted for ratification. Not voting on, or voting against, ratification of a contract that purports to require arbitration of statutory claims cannot possibly be construed as a voluntary individual agreement to arbitrate.

More important, nonmember employees in a bargaining unit are almost never permitted to vote on ratification of the contract that determines their terms and conditions of employment. Nonmembers have absolutely no right to do so, because contract ratification is an "internal union matter." *E.g.*, *Kidwell v. Transportation Commc'ns Int'l*, 946 F.2d 283, 294-97 (4th Cir. 1991) (under Railway Labor Act, citing *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958)); *Standard Fittings Co. v. NLRB*, 845 F.2d 1311, 1318-19 (5th Cir. 1988) (citing *NLRB v. Financial Inst. Employees*, 475 U.S. 192, 205 (1986)).

Indeed, there is no guarantee that even union members can vote on ratification of a collective bargaining agreement.

Employees who are hired and join a union after its contract has been ratified obviously have no "opportunity to consent (or not) to a promise to arbitrate statutory discrimination claims," (Pet'rs' Br. at 45). Moreover, union members have no statutory right to vote on ratification of collective bargaining agreements, and contracts are often ratified solely by union officials. Under the NLRA, "a vote of the

membership [i]s not necessary to the formation of a collective-bargaining agreement," because

> [a] union is not obligated to obtain ratification of any collective-bargaining agreement that it negotiates on behalf of employees it represents. Rather, as the designated representative, the union is free to negotiate and make binding agreements, with or without the formal consent or ratification of the unit employees.

International Longshoreman's Ass'n, Local 1575, 332 N.L.R.B. 1336, 1336 (2000) (citation omitted) (citing several cases).

The Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(1), also "does not require that union members be given the opportunity to ratify collective bargaining agreements negotiated by their bargaining representatives." *Ackley v. Western Conference of Teamsters*, 958 F.2d 1463, 1476 (9th Cir. 1992); *accord*, *e.g.*, *Cleveland Orchestra Comm. v. Cleveland Fed'n of Musicians*, 303 F.2d 229, 232-34 (6th Cir. 1962). Nor, if a union allows a ratification vote, does the LMRDA "require union leaders to make a full disclosure of all of the terms and provisions of a collective bargaining agreement prior to submitting the agreement to the union membership for ratification." *Ackley*, 958 F.2d at 1466.

Thus, almost always, nonmembers cannot be said to have voluntarily ratified a collective bargaining agreement relegating them to binding arbitration of their statutory claims. In many cases, that is also true of union members, because they were not in the unit when the contract was ratified, or because union

officials did not submit the proposed contract to a membership vote or, in allowing a vote, did not disclose to members the provision requiring arbitration.

CONCLUSION

The Second Circuit correctly held that *Gilmer* and *Wright* are consistent with *Gardner-Denver*, *Barrentine*, and *McDonald*. The judgment below should be affirmed.

Respectfully submitted,

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