No. 07-

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 PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is an arbitration clause contained in a collective bargaining agreement, freely negotiated by a union and an employer, which clearly and unmistakably waives the union members' right to a judicial forum for their statutory discrimination claims, enforceable?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the only party appearing before the U.S. Court of Appeals for the Second Circuit whose name does not appear in the caption of the Petition for a Writ of Certiorari is the Pennsylvania Building Company.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state as follows:

14 Penn Plaza LLC has no parent corporation and no publicly-held corporation owns 10% or more of its stock.

Temco Services Industries, Inc. is a publicly traded company. It has no parent corporation and no publicly-held corporation owns 10% or more of its stock.

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The opinion of the United States Court of Appeals for the Second Circuit is reported at 498 F.3d 88 (2d Cir. 2007). App. 1a. The Second Circuit affirmed the decision of the United States District Court for the Southern District of New York, which is reported at 04 Civ. 7536, 2006 U.S. Dist. LEXIS 35952 (S.D.N.Y. June 1, 2006). App. 13a. The District Court explained its reasoning in its prior decision in *Granados v. Harvard Maintenance, Inc.*, which is reported at No. 05 Civ. 5489 (NRB), 2006 U.S. Dist. LEXIS 6918 (S.D.N.Y. Feb. 22, 2006). App. 23a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 1, 2007. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the application of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.* Respondents filed this action pursuant to the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621, *et seq.* The pertinent provisions of each statute are reproduced at 49a-51a and 52a-66a.

STATEMENT OF THE CASE

This case presents an issue of exceptional importance to organized labor, management, and union members: whether, to achieve all the mutual benefits that arbitration offers over litigation, a union can agree with an employer to the arbitration of its members' claims under the ADEA and other statutes. This Court has previously acknowledged that this question is undecided under its precedents. *See Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 82 (1998).

In the decision below, the Second Circuit held that no union-negotiated arbitration agreement – no matter how clear and explicit – is ever enforceable. The Fourth Circuit, however, has long held precisely the opposite, routinely enforcing such clear and unmistakable agreements. This conflict in the circuits – and between state courts and federal courts – necessitates the intervention of this Court to resolve the question.

A. Factual Background

1. For many decades, Local 32BJ of the Service Employees International Union ("Local 32BJ" or the "Union"), which represents over 85,000 employees nationwide in the building services industry, and the Realty Advisory Board on Labor Relations, Inc. (the "RAB"), the New York City real estate industry's multi-employer bargaining association, have engaged in industry-wide collective bargaining. Over this period, the parties have agreed to, and continually have revised, their Collective Bargaining Agreement for Contractors (the "CBA"). Among other provisions, the CBA prohibits

discrimination in employment – an important goal for labor, management, and employees in the "melting pot" of the New York City labor market.

Beginning in 1999, the parties agreed to a CBA provision that expressly requires employees to submit any claims of employment discrimination, including claims of age discrimination arising under federal, state, and city law, to binding arbitration under the CBA's grievance and dispute resolution procedures. The provision states:

> There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, . . . or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

App. 48a.[1]

[1] In addition to the CBA, the RAB negotiates and administers several other collective bargaining agreements with Local 32BJ and other unions, covering approximately 65,000 (Cont'd)

The bargaining parties specifically crafted this language to track this Court's requirement, set forth in *Wright*, that any waiver of rights to adjudicate statutory claims be "clear and unmistakable." It is undisputed that the CBA's waiver is clear and unmistakable in its language and intent. App. 6a, 21a, 37a-38a.

2. This arbitration provision was heavily negotiated by Local 32BJ and the RAB. As part of the bargaining leading to this clause, the Union gained sizable wage and benefit enhancements, as well as other favorable provisions. Furthermore, the arbitration provision itself was advantageous to the Union and its members. Without it, many of the Union-represented building service workers would be compelled to become pro se federal court plaintiffs to bring their discrimination claims. This would be a daunting task for any individual, but especially for the large percentage of immigrant building service workers for whom English is their second language. Similarly, those employees with the means to retain an attorney would be required to pay fees or a percentage of any award.

In contrast, under the arbitration provision, these same employees receive a skilled attorney from the Union at no cost to them, and are not required to pay any administrative fees (*i.e.*, arbitrator or forum fees),

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(Cont'd)
employees and approximately 4,000 commercial and residential buildings in the New York City area. Those agreements contain arbitration provisions that are virtually identical to the provision at issue here and similarly require the arbitration of statutory discrimination claims.

which are instead shared equally by the RAB and the Union. If, for some reason, the employee would prefer to retain private counsel, the Union permits the employee to pursue the discrimination claims in the arbitral forum with his or her attorney. App. 42a.

Arbitration of discrimination disputes is also appealing to both Local 32BJ and New York City's real estate employers because it minimizes duplication of efforts, and resolves disputes quickly, inexpensively, fairly, and effectively. Most, if not all, discrimination claims arise out of the same facts and circumstances as contractual grievances alleging CBA violations. For example, an employee asserting a claim of a discharge without just cause (a contractual claim) can also assert a claim of discriminatory discharge (a statutory claim). Consolidating the process allows one fact finder – an employment attorney serving as arbitrator – to consider the facts and circumstances that encompass both claims, and make both determinations. The ability to consolidate the actions results in economies of scale for all parties involved, and ensures consistent rulings on the related issues, while providing employees and employers with the full scope of remedies and defenses available under the anti-discrimination laws.

3. Respondents are employees and former employees of Temco Service Industries, Inc. ("Temco"), a building service and cleaning contractor. Prior to August 2003, they worked as night watchmen/porters in 14 Penn Plaza LLC's (the "Company") commercial office building located at 225 West 34th Street in New York City. They are all members of Local 32BJ, covered under the CBA with the RAB.

In or about August 2003, in an effort to improve building security in response to post-9/11 security concerns, the Company engaged Spartan Security, a unionized security services contractor, to provide trained, licensed security guards to staff the front lobby desk and the rear entrance of the building. As a result, Temco's services were no longer needed in these locations. In compliance with the CBA, Temco reassigned Respondents to equivalent duties in other locations in the building. Respondents were unhappy with these reassignments and alleged, among other things, that they violated the CBA and were based on age discrimination.

B. Proceedings Below

Local 32BJ filed a grievance about the reassignments under the CBA's dispute resolution procedures, raising both contractual and statutory claims. Prior to the arbitration hearing, the portion of the grievance alleging age discrimination was withdrawn. Respondents (accompanied by their private attorney, in addition to Union-provided counsel) did not raise their age discrimination claims at any time during the arbitration proceedings. After a four-day hearing, the arbitrator denied all their contractual claims in a 19-page opinion.

Despite the fact that their personal attorney was present for the entire arbitration hearing and could have raised their age discrimination claims before the arbitrator, Respondents instead filed a lawsuit in federal court alleging that their transfers violated federal, state,

and city laws prohibiting age discrimination.[2] The Company moved to dismiss Respondents' lawsuit or, alternatively, to compel arbitration of their claims pursuant to Sections 3 and 4 of the FAA (9 U.S.C. §§ 3 and 4), based on the clear agreement to arbitrate such claims contained in the CBA. The district court denied the motion to compel arbitration based on its own recent decision in another case, where it recognized that "the Supreme Court has not spoken clearly on this issue," but held that it was "constrained" to follow the Second Circuit's precedents and judicially void the arbitration provision. App. 39a n.7.

On appeal, the Second Circuit likewise acknowledged that this Court's precedents left unresolved the central question. Indeed, as it noted, those precedents are themselves in "tension," and other circuits have reached different conclusions. App. 6a n.3, 10a n.4. But it considered itself bound by its earlier decision in *Rogers v. New York Univ.*, 220 F.3d 73 (2d Cir.) (per curiam), *cert. denied*, 531 U.S. 1036 (2000), that held such agreements unenforceable.

Rogers involved a collective bargaining agreement that – unlike the CBA – did not clearly incorporate statutory claims. The court found that it did not meet *Wright's* "clear and unmistakable" test, and was not

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[2] Respondents filed these claims under the ADEA, the New York State Human Rights Law, N.Y. Exec. Law § 290, *et seq.*, and the New York City Administrative Code, N.Y.C. Admin. Code § 8-107. In a separate, related action, Respondents also alleged a violation of the duty of fair representation against the Union, *inter alia*, for failing to arbitrate the age discrimination claims, but subsequently withdrew that action with prejudice.

enforceable for that reason. But *Rogers* went on to hold, as an alternate ground, that even a clear arbitration provision was not "always enforceable." *Id.* at 75. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), another case in which the arbitration clause of the collective bargaining agreement between a company and a union did not cover statutory anti-discrimination claims, this Court held that the clause could not preclude later assertions of such claims in a judicial forum. From *Gardner-Denver*'s narrow holding (which *Rogers* recognized was narrowed further in later cases, *see* 220 F.3d at 75), *Rogers* inferred that *any* collective bargaining agreement clause negotiated by a union could not bar the employees' right to a judicial forum – whether the parties had deliberately negotiated such a waiver or not.

Rogers acknowledged, as did the decision below, that this blanket negation of any and all arbitration clauses did not square with later Supreme Court precedents, which "could be taken to suggest that, under certain circumstances, a union negotiated waiver of an employee's statutory right to a judicial forum might be enforceable." App. 9a-11a (quotations omitted). But neither Second Circuit decision offered any account of what those circumstances might be.

Indeed, it is clear that under the Second Circuit's holdings, there is *no* situation – however clear the language in the collective bargaining agreement – that would make such an arbitration agreement binding. Nor did either decision take serious account of this Court's ruling in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which upheld an agreement to arbitrate

entered into by an individual employee, and distinguished earlier cases that were not governed by the FAA (as this one is), and where there was no "clear and unmistakable" arbitration provision (as there is here).

Rogers noted that the Fourth Circuit had rejected its conclusion – acknowledging the conflict between the circuits. *See* 220 F.3d at 75 (citing *Austin v. Owens-Brockway Glass Container*, 78 F.3d 875, 880-86 (4th Cir.), *cert. denied*, 519 U.S. 980 (1996)). The decision below did the same, *see* App. 10a n.4, but adhered to its own view that "nothing had changed" in the law since *Rogers* was decided. *Id.* at 11a.

REASONS FOR GRANTING THE PETITION

This Court has recognized that there is an unresolved conflict in its own jurisprudence concerning the enforceability of union-negotiated arbitration agreements. An older line of precedent beginning with *Gardner-Denver* viewed arbitration unfavorably and held that an arbitration proceeding cannot preclude the assertion of statutory claims in a judicial forum. A more recent line of precedent, typified by *Gilmer*, takes a far more positive view of arbitration and holds that arbitration provisions are enforceable so long as their forum selection language is "clear and unmistakable." This uncertainty has generated a marked conflict in the federal circuits, and between federal and state courts, leading some to hold that union-negotiated arbitration clauses are *never* enforceable, and others to hold that they are enforceable if the waiver language is clear. That conflict provides a powerful reason for this Court to grant review.

The conflict also creates a host of public policy concerns. First, neither employers nor unions are able to know or predict whether their particular provision is valid, making both the bargaining and administration of multi-jurisdictional collective bargaining agreements exceedingly difficult. Second, unionized employees working in jurisdictions that do not enforce union-negotiated arbitration clauses may be induced to sign individual waivers as a condition of continued employment – effectively removing unions from the negotiation of an important term and condition of employment. In sum, for effective employer and union operations, for productive collective bargaining, and to protect the rights of employees who are union members, there must be a consistent rule of law for the entire country – and that rule only can come from this Court.

I. THERE IS A FUNDAMENTAL CONFLICT IN THE LOWER COURTS OVER THE ENFORCEABILITY OF UNION-NEGOTIATED WAIVERS OF A JUDICIAL FORUM.

There is a pressing need for this Court to clarify the circumstances under which a union-negotiated arbitration agreement may be enforced. Until now, this Court has expressly declined to answer that question. As a result, the lower federal and state courts have been forced to rely on conflicting precedents, resulting in diametrically opposite conclusions.

A. This Court Has Acknowledged An "Obvious[] . . . Tension" In Its Jurisprudence And Has Not Resolved It.

The Second Circuit held that union-negotiated arbitration agreements are not enforceable based on this Court's 1974 decision in *Gardner-Denver*. The issue, Petitioners respectfully submit, cannot be so rotely resolved – as this Court itself has acknowledged.

In *Wright*, the Court recognized that whether a collective bargaining agreement can waive employees' statutory rights to a judicial forum calls into question "two lines" of its own cases that are "obviously [in] some tension." *Wright*, 525 U.S. at 76. *Wright* deferred resolution of that question because it found the particular language in the collective bargaining agreement there too vague and unspecific to constitute a waiver of rights. *See id.* at 77, 80. Since the instant CBA was specifically drafted to track *Wright*'s "clear and unmistakable" requirement, and the district court found that it was clear and unmistakable, App. 21a, the issue is squarely presented here.

According to *Wright*, the *Gardner-Denver* line of cases concerns the preclusive effect of prior contractual arbitrations on an employee's right to litigate certain related statutory claims. In *Gardner-Denver*, the Court addressed the question of whether an employee whose grievance had been arbitrated pursuant to a general grievance and arbitration provision in a collective bargaining agreement was subsequently barred from instituting a Title VII court action. The Court held that a general contractual grievance arbitration proceeding

does not bar a subsequent related Title VII federal court action. In other words, a contract arbitration is not *res judicata* to a Title VII litigation. The Court applied this principle in later cases to permit similar post-arbitration litigation under other statutes. *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (Fair Labor Standards Act); *McDonald v. West Branch*, 466 U.S. 284 (1984) (42 U.S.C. § 1983).

Gardner-Denver dealt with a purely contractual arbitration process, where the arbitrator sat only as "the proctor of the bargain." 415 U.S. at 53. The arbitrator was not able to rely on external law, and thereby was foreclosed from adjudicating statutory employment claims. The *Gardner-Denver* Court expressed the now-rejected view that the arbitral fact-finding process is not comparable to judicial fact-finding, and that the "informal" nature of arbitrations rendered them inappropriate for the resolution of Title VII claims. *Id.* at 57-58 (citing *Wilko v. Swan*, 346 U.S. 427 (1953)). But in the thirty years since, the Court has disavowed this antiquated view of arbitral inferiority. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Gilmer*, 500 U.S. 20 (1991).

According to *Wright*, the other relevant line of cases involves individual agreements to arbitrate employment disputes. In *Gilmer*, the Court required an individual non-unionized plaintiff to arbitrate his claim under the ADEA because he had signed a securities industry registration agreement consenting to arbitrate any claims arising out of his employment. *Id.* at 35. The Court emphasized that "questions of arbitrability must be addressed with a healthy regard for the federal policy

favoring arbitration." *Id.* at 26 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr.*, 60 U.S. 1 (1983)). It held that arbitration of, and hence waiver of the right to proceed in court with respect to, statutory discrimination claims was not "inconsistent with the statutory framework and purposes of the ADEA." *Gilmer*, 500 U.S. at 27. In so doing, it rejected old-fashioned notions that arbitration suffers from tribunal bias, insufficient discovery procedures, and inadequate remedies. Specifically, the Court stated that "[w]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Id.* at 34.

In *Wright* itself, when this Court faced the question whether union-negotiated waivers of employees' rights to a judicial forum are enforceable, it acknowledged that *Gardner-Denver* and *Gilmer* are in tension – for *Gilmer* allowed waivers of rights under anti-discrimination statutes that *Gardner-Denver* had stated were unwaivable by anyone. *Wright*, 525 U.S. at 76-77. Moreover, the Court itself adverted to the change in its own receptivity to arbitration, with *Gilmer* being a prominent example. *Id.* Nonetheless, the *Wright* Court left this conflict unresolved, and decided the case before it on a different, narrower ground. *Id.*

In the absence of further guidance from this Court, the Second Circuit plainly erred in relying on *Gardner-Denver* rather than *Gilmer*. *Gilmer* drew three distinctions between itself and the *Gardner-Denver* line

of cases, all of which made it, not *Gardner-Denver*, controlling here. First and foremost, in *Gardner-Denver*, the union and the company could arbitrate only contractual grievances, as they had no agreement to arbitrate statutory claims. In fact, the arbitrator did not even have the *authority* to resolve such claims, being only a "proctor of the [collective bargaining agreement]." *Gardner-Denver*, 415 U.S. at 53. Thus, the only question presented in that case (and its progeny) was whether arbitration of the employee's *contract*-based claims would be held to preclude later *statutory* discrimination actions arising out of the same facts. *See Gilmer*, 500 U.S. at 43. Under those circumstances, *Gardner-Denver* correctly held that there was no preclusion.

Here, in stark contrast, there is an agreement that expressly requires arbitration of any and all statutory claims, and the legally-trained arbitrators are empowered (and, indeed, obligated) to decide such claims "apply[ing] appropriate law." App. 48a. The question, therefore, is one of enforceability of forum selection clauses, not preclusion.

Second, *Gilmer* emphasized the fact that unlike *Gardner-Denver*, it was decided under the FAA. *See Gilmer*, 500 U.S. at 35. The FAA was enacted to place arbitration agreements upon the same footing as other commercial contacts. To that end, it provides for stays of proceedings in federal courts when an issue is referable to arbitration, *id.* § 3, and for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement, *id.* § 4. In finding that the employee's ADEA claims should be compelled to arbitration, *Gilmer* cited to a litany of decisions by this Court holding that by agreeing

to arbitrate a statutory claim, a party does not forgo any substantive rights afforded by the statute. *Id.* This Court has since further bolstered support for arbitration of statutory discrimination claims in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), holding that agreements to arbitrate employment disputes are fully enforceable pursuant to the FAA. After *Circuit City,* it is clear that clauses like the instant one are best treated under the FAA, as the decision below understood.

Finally, as a third distinction between itself and *Gardner-Denver*, *Gilmer* explained that since the arbitration in *Gardner-Denver* arose in the context of a collective bargaining agreement, where the claimant was represented by his union, that case presented a "tension between collective representation and individual statutory rights." *Gilmer,* 500 U.S. at 35. The decision below echoed the same concern, that if "the Union refused to submit the wrongful transfer claims to arbitration because the Union had agreed to the new contract, the interests of the Union and the interests of [Respondents] are clearly in conflict." App. 11a n.5.

But the Second Circuit ignored a critical distinction between the agreement at issue in *Gardner-Denver* and the CBA: under the CBA, Respondents retained at all times the right to bring their statutory claims to arbitration on their own – without the need for Union consent. App. 42a. Hence, Respondents enjoyed the same access to the arbitration process as the non-union employees in *Gilmer,* in which arbitration was upheld. Moreover, in the thirty years since *Gardner-Denver,* other judicial protections of the individual union member

have developed. First, an employee who believes the union acted unfairly (in not processing, or improperly handling, a discrimination claim) can bring a duty of fair representation action against it. *See Marquez v. Screen Actors Guild*, 525 U.S. 33, 44 (1998); *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).[3] Similarly, in those relatively rare cases where a union member may wish to challenge the fairness of the arbitration process, courts are empowered to determine whether the process was in fact fair, and whether the decision was rendered by a neutral, unbiased adjudicator. *See Collins v. New York City Transit Auth.*, 305 F.3d 113, 119 (2d Cir. 2002). Finally, under existing law, an agreement to arbitrate statutory discrimination claims by an employee does not waive an employee's right to file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), and does not prohibit the EEOC from commencing a lawsuit in response to the charge. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

In addition to disregarding these critical distinctions, placing the instant case closer to *Gilmer* than to *Gardner-Denver*, the Second Circuit simply failed to appreciate that *Gilmer* and its progeny have undermined *Gardner-Denver*'s precedential weight. One of *Gardner-Denver*'s animating reasons for opposing arbitration agreements was its view that "there can be no prospective waiver of an employee's rights under Title VII." *Id.* at 51. *Gilmer* flatly rejected this principle, holding that arbitration of (and hence waiver of a judicial forum regarding) statutory discrimination claims was not inconsistent with the framework and purposes of the anti-discrimination laws. *See Gilmer*, 500 U.S. at 27.

[3] Indeed, Respondents brought such a claim here, but then withdrew it. *See* note 2 *supra*.

In particular, the ADEA directs the EEOC to pursue "informal methods of conciliation, conference, and persuasion" in its enforcement procedures. 29 U.S.C. § 626(b). Congress' grant of concurrent jurisdiction over ADEA claims to state and federal courts also evidences an objective of allowing multiple *fora* for resolving disputes. *Gilmer*, 500 U.S. at 30. Finally, Congress has never explicitly precluded arbitration of ADEA claims.[4] For all these reasons, arbitration of age discrimination claims is not only permissible, but encouraged.

As to union-negotiated waivers in particular, *Gardner-Denver* stated that a union cannot waive individual employee rights, but only "certain statutory rights related to collective activity," 415 U.S. at 51. That view was subsequently called into question by the Court's decision in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 706-07 (1983), which held that a union *can* waive an individual employee's right under the National Labor Relations Act to be free of discrimination based on union activity. The Court decided that as long as the union-negotiated waiver is "clear and unmistakable," it would be enforced. Not coincidentally, this is the same standard the *Wright* Court used to evaluate union-negotiated arbitration agreements.

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[4] Indeed, in further support of arbitration, Congress passed the Civil Rights Act of 1991, which provided that "the use of alternative dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under [Title VII and the ADEA]." Pub. L. 102-166, § 118, 105 Stat. 1071, 1081 (reprinted in notes to 42 U.S.C. § 1981). On its face, Section 118 evinces a clear Congressional intent to encourage arbitration of ADEA claims, not to preclude such arbitration. *See Seus v. John Nuveen & Co.*, 146 F.3d 175, 182 (3d Cir. 1998); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 54 n.4 (7th Cir. 1995).

At a more fundamental level, decisions after *Gardner-Denver* rejected its idea that the right to a judicial forum was a substantive right. As *Gilmer* held, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Gilmer*, 500 U.S. at 26. For that reason, and the others expressed above, much of the underlying motivation for *Gardner-Denver's* hostility to arbitration has simply faded away as the law has evolved over the last thirty years.

B. The Lower Federal Courts are in Irreconcilable and Acknowledged Conflict.

The decision below directly and irreconcilably conflicts with the Fourth Circuit's rulings that union-negotiated arbitration agreements *are* enforceable. The Fourth Circuit has been steadfast in its position, both pre- and post-*Wright*, applying the rationale of *Gilmer* rather than *Gardner-Denver* to collective bargaining agreements. The guidance and drafting instructions detailed in its decisions have become a primer for labor-relations practice throughout the country.

Even before *Wright*, the Fourth Circuit definitively ruled that union-negotiated waivers of an individual's right to proceed in a judicial forum for statutory discrimination claims are enforceable. In *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 519 U.S. 980 (1996), the Fourth Circuit determined that *Gardner-Denver* could not survive *Gilmer*. Reasoning that *Gilmer* "recognized that

arbitration of a statutory claim is not equal to giving up any right under a statute, [but] simply another forum in which to resolve the dispute," *id.*, the Fourth Circuit held that *Gilmer* had rejected the principal basis of *Gardner-Denver*, that "arbitration is an inappropriate forum for the resolution of [anti-discrimination] statutory [rights]. . . ." *Id.* Following *Gilmer*, *Austin* noted that there was no evidence of a Congressional intent to prohibit arbitration of these matters, and therefore no reason to block enforcement of such an agreement. *Id.* at 880-81.

The Fourth Circuit's decision was grounded in the recognition that the mechanism for resolving employment disputes is a natural and appropriate subject of collective bargaining, and one over which a union – as the exclusive bargaining representative of its membership – has "the right and duty" to negotiate. As the court observed, the right to arbitrate is as much a term and condition of employment as any other protected by statute. *Id.* at 885. Waivers of such rights are effective because they rest on the premise of fair representation through the union.

Accordingly, the Fourth Circuit drew no distinction between the individual agreement to arbitrate upheld in *Gilmer* and the union-negotiated arbitration agreement at issue in *Austin*. The court held:

> Whether the dispute arises under a contract of employment growing out of securities registration application, a simple employment contract, or a collective bargaining agreement, an agreement has yet been made to arbitrate

> the dispute. So long as the agreement is voluntary, it is valid, and we are of the opinion it should be enforced.

Id. The Fourth Circuit thus rejected the precise grounds on which the Second Circuit rested its decision. To the Second Circuit, the identity of the party negotiating the waiver is determinative of whether the waiver is valid. *Rogers*, 220 F.3d at 75. To the contrary, *Austin* announced a uniform policy – so long as the agreement to waive a judicial forum was made voluntarily, individual agreements and collectively-bargained agreements are equally valid. *Austin*, 78 F.3d at 885.

In later cases, the Fourth Circuit has fortified and elaborated on its *Austin* holding, articulating the precise circumstances under which union-negotiated arbitration clauses are enforceable. In *Carson v. Giant Food, Inc.*, 175 F.3d 325, 331 (4th Cir. 1999) (Wilkinson, J.), *cert. denied*, 540 U.S. 1074 (2000), the Fourth Circuit found two ways to meet *Wright's* "clear and unmistakable" test: one, by drafting an explicit arbitration clause whereby employees agree to submit to arbitration all federal causes of action arising out of their employment; and the other, by explicitly incorporating statutory anti-discrimination requirements elsewhere in the contract. This explicit drafting advice signals the court's continuing commitment to the enforcement of such agreements. *See, e.g., E. Associated Coal Corp. v. Massey*, 373 F.3d 530, 533 (4th Cir. 2004) ("We have consistently held that a union-negotiated CBA may waive an employee's statutory right to litigate his employment discrimination claims in a judicial forum."); *Singletary v. Enersys, Inc.*, 57 F. Appx. 161 (4th Cir. 2003);

Brown v. ABF Freight Sys., Inc., 183 F.3d 319, 321 (4th Cir. 1999) (Luttig, J.).[5]

In its most recent decision on point, *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 215 (4th Cir. 2007) (Wilkinson, J.), the Fourth Circuit went so far as to describe the method of dispute resolution as a "preeminent" term and condition of employment as to which unions were entitled to strike bargains. *Id.* at 216. It expressly rejected the idea that there was any statutory basis or precedent for inventing a rule that clear and unmistakable waivers require a "meeting of the minds" between the employer and individual union members. Indeed, it commented that to hold that Congress had placed the resolution of civil rights claims beyond the reach of arbitration "would be too much an exercise in judicial implication" – an exercise that would "change the nature of collective bargaining over conditions of employment and . . . read judicial exceptions into the National Labor Relations Act." *Id.* at 216-217. *See also Safrit v. Cone Mills Corp.*, 248 F.3d 306, 308-09 (4th Cir.), *cert. denied*, 534 U.S. 995 (2001) ("[A]n agreement to arbitrate statutory claims is part of the natural tradeoff that a union must make in exchange for other benefits.... To redact one clause from a CBA would in effect alter the agreement reached during the often-difficult collective bargaining process.").

Despite the sea change in this Court's jurisprudence in the thirty years since *Gardner-Denver*, and the Fourth Circuit's insightful and practical holdings, most other

[5] The CBA clause at issue here incorporates both concepts in evincing its clear and unmistakable waiver. App. 43a-48a.

circuits that have addressed the issue have aligned themselves with the Second Circuit – albeit while expressing uncertainty about the state of the law. *See Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 211 F.3d 1312 (D.C. Cir.) (en banc) (per curiam), *reinstating* 199 F.3d 477, 484 (D.C. Cir. 1999) ("Whatever the Supreme Court said – or more precisely, refrained from saying – in *Wright*, we do not understand the Court in *Gilmer* to have overruled *Gardner-Denver*. We therefore leave to the Court itself the prerogative of overruling its own precedent (if it will); we apply the law as it stands."), *cert. denied*, 121 S. Ct. 565 (2000); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 365 (7th Cir.) (Posner, J.) (acknowledging a "circuit split" and stating that "[o]n balance our case is closer to *Alexander*; but is enough left of *Alexander* to compel a decision in favor of plaintiff?"), *cert. denied*, 522 U.S. (1997); *Bratten v. SSI Servs., Inc.*, 185 F.3d 625 (6th Cir. 1999) (holding, anomalously, that this Court's decision in *Wright* "implicitly overruled" the Fourth Circuit's holding in *Austin*); *Albertson's Inc. v. United Food & Commercial Workers Union*, 157 F.3d 758 (9th Cir. 1998), *cert. denied*, 528 U.S. 809 (1999); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1453-54 (10th Cir. 1997) (following *Gardner-Denver*); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526 (11th Cir. 1997) (same).

The Third Circuit is a likely exception. In *Martin v. Dana Corp.*, 114 F.3d 421 (3d Cir. 1997), a divided panel agreed with *Austin* that a union-negotiated arbitration clause could supplant an individual worker's right to a judicial forum. The en banc court vacated that opinion and referred the case back to the panel to determine whether the plaintiff could arbitrate without the

assistance of the union. After determining that the agreement in that case did not grant that right, the original panel reversed its decision, ruling that the collective bargaining agreement did not bar the plaintiff's suit. *See Martin v. Dana Corp.*, 135 F.3d 765 (3d Cir. 1997), *reported in full at* 156 L.R.R.M. (BNA) 3137 (3d Cir. Dec. 16, 1997). Because the issue of the claimant's right to arbitrate without the consent of the union was "the sole issue . . . upon which [the] appeal turn[ed]," *id.* at *2, it appears that the Third Circuit would uphold the CBA here, as Local 32BJ union members have the right to bring their own attorneys into the arbitral forum. App. 42a.

In sum, the lower federal courts are in irreconcilable conflict over whether a union-negotiated arbitration clause may be enforceable. In addition to the sharp split between the positions of the Second and Fourth Circuit, other circuits have expressed deep-seated confusion regarding the enforceability of these waivers. Even courts that continue to apply *Gardner-Denver* do so while questioning its continued viability. This Court's review is needed to resolve the conflict.

C. State Courts Are In Conflict With Federal Courts.

The unsettled nature of the law has produced not only a federal circuit split, but also a split between several federal and state courts sitting in the same geographic location. Since state courts have the authority to decide federal discrimination claims, *see Gilmer* (holding that concurrent jurisdiction exists in state and federal courts to decide ADEA claims); *Yellow Freight*

Sys., Inc. v. Donnelly, 494 U.S. 820 (1990) (same for Title VII claims), this conflict raises the specter that the law could be applied in inconsistent ways – depending on whether the claim was brought in federal or state court.

In reliance on this Court's precedents, New York State courts have held under the FAA that clear and unmistakable union-negotiated agreements to arbitrate statutory discrimination claims are enforceable. *See, e.g., Garcia v. Bellmarc Prop. Mgmt.*, 745 N.Y.S.2d 113 (App. Div. 2002) (enforcing an arbitration agreement drafted by the same parties to this action and containing waiver language identical to the CBA because "*Gardner-Denver* . . . was not decided under the FAA, and does not reflect modern Federal policy favoring arbitration") (citing *Gilmer*); *Sum v. Tish[illegible] Speyer Props., Inc.*, Docket No. 11079-2005 (Sup. Ct. N.Y. Co. Dec. 2, 2005); *Lewandowski v. Collins Bldg. Servs. Inc.*, Docket No. 104657/00 (Sup. Ct. N.Y. Co. Dec. 6, 2000). These holdings place New York State courts in direct conflict with the Second Circuit.

Similarly, the Ohio State courts are in conflict with the Sixth Circuit. *Compare Minnick v. City of Middleburg Heights*, No. 81728, 2003 Ohio App. LEXIS 4569 (Ohio Ct. App. Sept. 25, 2003) (holding, in accordance with *Wright*, that clear and unmistakable union-negotiated waivers of statutory claims are enforceable), *with Bratten*, 185 F.3d 625. In California, the state courts are in conflict with the Ninth Circuit. *Compare Zavala v. Scott Bros. Dairy, Inc.*, 49 Cal. Rptr. 3d 503, 511 n. 9 (Ct. App. 2006) (acknowledging that a union may waive its members' rights to a judicial forum

for employment discrimination claims pursuant to *Wright*), *with Albertson's,* 157 F.3d 758.

To have federal and state courts sitting in the same locality apply the same law inconsistently undermines uniformity and raises the specter of forum shopping. These dangers reinforce the need for this Court's review.

II. UNCERTAINTY ABOUT THE ENFORCEABILITY OF ARBITRATION AGREEMENTS CREATES SERIOUS POLICY CONCERNS.

A. The Adverse Effect on Employers, Unions, and Unionized Employees.

Continued conflict regarding the enforceability of union-negotiated arbitration agreements hampers the day-to-day operations of businesses and labor organizations. Many of this country's industries, such as the real estate and building services industry, operate in more than one federal circuit. In particular, many of the building service companies covered under the CBA operate throughout the country, including in both New York City (Second Circuit) and Virginia (Fourth Circuit). These multi-circuit businesses must adhere to different collective bargaining obligations and employee policies in circuits whose rulings are in conflict.

Labor organizations are also compelled to alter bargaining strategies and modify practices to administer collective bargaining agreements across jurisdictions. Following the lead of corporate America, unions are

consolidating. For example, New York City-based Local 32BJ now has jurisdiction for building service employees all along the East Coast. Absent this Court establishing a uniform position for all circuits to follow, the prospect of devising a standard dispute resolution procedure for an entire region is exceedingly remote.

Further, as many current collective bargaining agreements cover employees located in more than one judicial circuit, an absence of uniformity among the circuits causes confusion within bargaining relationships. For example, the CBA covers employees in New York (Second Circuit) and New Jersey (Third Circuit). Absent this Court's guidance, the clause presently might be enforceable with respect to employees working in the latter but not the former, even though all these employees are working for the *same* employer and are represented by the *same* union.

Sound policy should support the ability of business to apply consistent practices across federal judicial circuits; the ability of labor organizations to advance consistent goals across federal judicial circuits; and the ability of labor and management to pursue mature relationships, such as the one between Local 32BJ and the RAB, whereby they can resolve employee disputes without disruption.

B. The Adverse Effect on Labor-Management Relations.

The Second Circuit's decision could prove highly detrimental to labor-management relations. In circuits that do not enforce union-negotiated waivers, an employer would seemingly be able to bypass the union as the employees' bargaining agent. Employers could require unionized employees to sign individual arbitration agreements as a condition of employment – in the same manner that non-unionized employees can be compelled to do under *Gilmer* and its progeny.

In particular, if a union cannot agree to an arbitration clause relating to statutory discrimination claims, it is well-established under labor law that such a term of employment becomes a non-mandatory subject of bargaining. *See Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477, 485 (D.C. Cir. 1999) ("[A] proposal to trade that which is not one's to give cannot be a mandatory subject of bargaining.") (citing *Brotherhood of R.R. Trainmen v. Akron & Barberton Belt R.R. Co.*, 385 F.2d 581, 603 (D.C. Cir. 1967) (holding proposal to bargain over effects of job terminations, normally a mandatory subject, non-mandatory because union "could not bargain away any part of the rights that accrued to employees under the [arbitral] Award")); *see also NLRB v. Wooster Div. of Berg-Warner Corp.*, 356 U.S. 342 (1958) (distinguishing between mandatory and non-mandatory subjects of bargaining). As with all non-mandatory subjects of bargaining, an employer would be permitted to present the arbitration agreement directly to its employees – bypassing the union. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). The employer,

therefore, may be able to require its employees to sign the arbitration agreement in exchange for continued employment. *Gilmer*, 500 U.S. 20.

Following the Second Circuit's rule could strip unionized employees of their leverage that is only available through collective bargaining. An individual agreement to arbitrate clearly would be lawful under *Gilmer*, and the concept of bypassing the union to implement such an agreement unilaterally already has been approved by the District of Columbia Circuit in the context of the Railway Labor Act. *Air Line Pilots Ass'n, Int'l*, 199 F.3d at 486. Marginalizing the union would prove highly destabilizing to labor-management relations, and would in no way serve the ultimate ends of the ADEA or other anti-discrimination statutes.

CONCLUSION

For all the aforementioned reasons, the petition for a writ of certiorari should be granted.

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