JAN 29 2008

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

## REPLY BRIEF


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## CORPORATE DISCLOSURE STATEMENT

Petitioners' Corporate Disclosure Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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## STATUTES AND OTHER AUTHORITIES

Nothing in Respondents' brief challenges the fundamental importance or the timeliness of the question presented by this case: Whether unions may waive their members' rights to a federal forum for their statutory discrimination claims in exchange for other benefits offered by employers. Respondents' only argument is that they believe this is not an appropriate case to decide that question, although their reasons are unclear. In fact, none of Respondents' arguments calls into question the certworthiness of this case.

## ARGUMENT

### I. It Is Undisputed That Whether Union-Negotiated Arbitration Agreements Are Enforceable Is A Critical Question.

Respondents do not dispute that whether union-negotiated arbitration agreements are enforceable is a fundamental and urgent question this Court should resolve. They do not dispute that there is a deep and irreconcilable split between the Circuits on this issue – which has lasted for more than a decade – with the Fourth Circuit repeatedly holding that such agreements are enforceable so long as the waiver language is clear and unmistakable, and the Second and some other Circuits ruling that such agreements are *never* enforceable under any circumstances. Respondents do not deny that there is an unresolved tension in this Court's own precedents – as this Court itself has recognized. And they do not question that the conflict among the lower courts has adversely affected labor relations among employers,

unions, and unionized employees, who currently must bargain against a backdrop of uncertainty about the law.[1]

There is no reason to expect that the conflict will diminish over time or that the issue will not recur. In the short time since the Second Circuit's decision below, two district courts have blocked similar arbitration agreements from taking effect. *See Selmanovic v. NYSE Group, Inc.*, No. 06 Civ. 3046, 2007 U.S. Dist. LEXIS 94963, at *24 (S.D.N.Y. Dec. 20, 2007); *Kravar v. Triangle Servs., Inc.*, 509 F. Supp. 2d 407 (S.D.N.Y. 2007) (holding that even pendent state-law discrimination claims that would be arbitrable in the New York State courts may not be the subject of a union-negotiated waiver of a federal judicial forum); *see also Manigault v. Macy's East, LLC*, 506 F. Supp. 2d 156, 160 (E.D.N.Y. 2007) (citing holding in decision below in non-collective bargaining context). As these cases demonstrate, the Second Circuit's decision continues to disrupt the legitimate expectations of parties to the collective bargaining process. Only a ruling from this Court can settle this matter.

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[1] Indeed, at oral argument before the Second Circuit, counsel for Respondents candidly remarked: "Whether or not the table is or is not set for changing the law – it is only the Supreme Court that can eat at that table." Transcribed Recording of Oral Argument Before the Second Circuit, *Pyett v. Pa. Bldg. Co.*, 06-3047-cv(L) (2d Cir. June 27, 2007).

## II. This Case Is An Excellent Vehicle To Decide Whether A Union-Negotiated Agreement To Arbitrate Statutory Claims Is Enforceable.

Unable to deny that the legal question at stake is critically important, Respondents instead claim that this case is somehow not the right vehicle for resolving that question because of its procedural history. In August 2003, Respondents filed their grievances with the Union under the collective bargaining agreement ("CBA"), alleging both statutory age discrimination and contractual violations, which grievances were submitted to arbitration. App. 4a. In February 2004, shortly after arbitration began, the Union withdrew their age discrimination claims. While the remaining claims were still pending before the arbitrator, Respondents filed the instant action in federal court alleging age discrimination. The arbitrator denied all contractual claims in August 2005. *Id.* at 5a.

Based on this chronology, Respondents assert that the mandatory arbitration requirement of the CBA was not "triggered," because at the time Respondents filed their federal complaint, the Union had already withdrawn their age discrimination claims. Although the crux of their argument is far from clear, Respondents seem to believe that the arbitration requirement is optional – if the Union chooses not to arbitrate, then its members are not bound by the provision. Thus, Respondents argue that this case is not a good vehicle for resolution of the ultimate legal question, because even if the arbitration provision is enforceable, it did not apply to them.

This argument is factually and logically flawed. First, there is no basis whatsoever for Respondents' *ipse dixit* that the mandatory arbitration provision only applies when the Union submits claims before the arbitrator. As quoted in the Petition, the CBA states: "*All such claims* [of discrimination under federal, state, and local law] shall be subject to the grievance and arbitration procedure . . . as the sole and exclusive remedy for violations." App. 48a (emphasis supplied). There is no reference in the CBA to any "trigger" before the right to a judicial forum is waived, and Respondents do not cite any contractual language in support of their bald claim. Neither court below found that the Union must submit grievances to arbitration before judicial claims are foreclosed. Indeed, Respondents' perverse reading of the CBA would undermine the very purpose of having an arbitration provision in the first place. If the effect of the Union declining to arbitrate grievances is that the employees may litigate in federal court, then a judicial forum waiver has little value. Respondents' argument, untethered to case law or contractual language, would fundamentally alter the "preeminent" term and condition of their employment. *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 215 (4th Cir. 2007) (Wilkinson, J.).[2]

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[2] If Respondents felt the Union's withdrawal of their discrimination claims was somehow unfair, the proper course of action was to file a Duty of Fair Representation claim against the Union, not to disregard their obligations pursuant to the arbitration provision. *See Marquez v. Screen Actors Guild*, 525 U.S. 33, 44 (1998); *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). In fact, Respondents did precisely that, only to later withdraw that claim with prejudice. App. 17a-18a.

Second, the possibility that there is such a "trigger" would not make this case any less certworthy. The upshot of Respondents' argument is that if this Court were to find the arbitration provision enforceable, they would still have a defense that the provision did not apply to them. But a holding by this Court as to the enforceability of such a provision would still be binding precedent for all future cases. Ordinarily, the fact that another legal defense exists at the trial level is not a reason to deny certiorari, especially where the proceeding is under the Federal Arbitration Act, which specifically contemplates the immediate appeal of a denial of a motion to compel arbitration, *see* 9 U.S.C. § 16(a)(1).

Respondents' prudential argument is particularly inappropriate in this context because the scope of an enforceable arbitration agreement is a matter in the first instance for the arbitrator, not for a court. That is, questions of procedural arbitrability are not subject to judicial review but instead are properly submitted to an arbitrator as part of the grievance/arbitration mechanism. As this Court has stated:

> "[I]n the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for a court to decide and issues of procedural arbitrability, *i.e.*, whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide."

*Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002). Out of respect for the different roles played by

judicial actors and arbitrators, this Court should address the important substantive arbitrability issue squarely presented in the instant case without regard to any arguments pertaining to procedural arbitrability that Respondents may make to an arbitrator in the course of a later arbitration proceeding.

Contrary to Respondents' suggestion, the circumstances of this case in fact make it an ideal vehicle for this Court to decide the question presented. The union-negotiated arbitration agreement at issue clearly and unmistakably waived their right to bring statutory claims in federal court. App. 6a, 21a, 37a-38a. Nevertheless, the Union allowed Respondents to use the arbitration panel to present their claims through their private attorney. App. 42a.[3] This fact considerably mitigates the tension that may exist between union interests and individual rights, *see Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 35 (1991), making this case an excellent vehicle to decide whether a union-negotiated arbitration agreement is ever enforceable.

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[3] To clarify a point in the Petition, Petitioners note that while the Union exercised sole control to determine whether any grievances should be submitted to the arbitrator initially, in this case, after withdrawing the age discrimination claims, the Union made the Office of the Contract Arbitrator available to Respondents so that they, at their own expense, could have those claims heard. Respondents declined that offer.

## CONCLUSION

For the foregoing reasons and those set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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