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 OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, THE ASIAN AMERICAN JUSTICE CENTER, LEGAL MOMENTUM, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, AND THE NATIONAL WOMEN'S LAW CENTER, IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law, the American Association of People with Disabilities, the Asian American Justice Center, Legal Momentum, the Mexican American Legal Defense and Educational Fund, the National Partnership for Women & Families, and the National Women's Law Center submit this Brief as *amici curiae* with the consent of the parties[1] in support of Respondents and the proposition that a labor union cannot waive through collective bargaining its members' individual rights to file a statutory anti-discrimination claim in federal district court, absent explicit individualized consent.

All *amici* represent large segments of our society who rely on our nation's civil rights laws to ensure that they are not victims of workplace discrimination. An individual's ability to seek redress in federal district court for unlawful discrimination is critical to the eradication of discrimination in the workplace. To the extent that employees without a personal choice are prevented from bringing such claims in federal court, unlawful discrimination may go without remedy. The people served by the *amici* will be directly affected by the Court's ruling in this matter.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amici, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the amici curiae's intention to file this brief. A letter from the Petitioners' counsel consenting to the filing of this brief has been filed along with this brief. A letter from the Respondents' counsel consenting to the filing of amicus briefs is on file with the clerk.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit civil rights organization that was formed in 1963 at the request of President Kennedy to involve private attorneys throughout the country in the national effort to ensure the civil rights of all Americans. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors and many of the nation's leading lawyers. Through the Lawyers' Committee and its independent local affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country. The Lawyers' Committee is interested in ensuring that the goal of civil rights legislation to eradicate discrimination is fully realized, and is concerned in this case with the potential negative impact on a plaintiff's ability to obtain relief for valid civil rights claims. To this end, the Lawyers' Committee has filed amicus briefs opposing limitations on access to relief for victims of discrimination in such cases as *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 76 (1998). The resolution of this case will have a significant effect on the extent to which the Lawyers' Committee can protect the rights of its clients.

The American Association of People with Disabilities ("AAPD") is a national membership organization working to increase the political and economic power of people with disabilities and their families. Founded on the fifth anniversary of the Americans with Disabilities Act ("ADA"), AAPD has a strong interest in full enforcement and implementation of the ADA and other civil rights laws.

The Asian American Justice Center ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education. AAJC and its Affiliates have a long-standing interest in ensuring that federal anti-discrimination rights are protected because they have a significant impact on the Asian American community – of which over 600,000 are union members – and this interest has resulted in AAJC's participation in a number of amicus briefs before the courts.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum is particularly aware of the vital importance of protecting union members' statutory remedies for employment discrimination because we often represent women in the skilled trades whose unions have responded inadequately to, or have even contributed to, discrimination women face in the field. Legal Momentum has participated as *amicus curiae* in leading cases supporting women workers including *Ledbetter v. Goodyear Tire & Rubber Co.,* 127 S. Ct. 2162 (2007), *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), and has vigorously supported the right to judicial forums for federal employment discrimination claims as *amicus curiae* in cases such as *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) and *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998).

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national Latino non-profit civil rights legal organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and community education programs, the civil rights of Latinos living in the United States. MALDEF has a strong interest in the outcome of these proceedings. MALDEF's mission includes a commitment to pursuing fair and equal employment opportunities for Latinos in the United States. MALDEF has represented Latino workers and legal interests in numerous federal employment discrimination cases.

The National Partnership for Women & Families ("National Partnership") is a non-profit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination and has filed numerous *amicus curiae* briefs in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of women and people of color in employment.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace by supporting the full enforcement of anti-discrimination laws, which includes employees' right to seek redress in court for unlawful discrimination. NWLC has prepared or participated in numerous

amicus briefs filed with the Supreme Court and the Courts of Appeals in employment discrimination cases.

SUMMARY OF ARGUMENT

Congress has sought to protect individuals from workplace bias by granting employees who are victims of invidious discrimination a right to recover against employers. Congress expects that meritorious discrimination claims will deter and ultimately eradicate employment bias from the workplace. Congress further prohibits labor unions from discriminating against employees and members, evincing its understanding that labor unions are at times responsible for or complicit in workplace discrimination. Unions and employers cannot be empowered with the exclusive ability to enforce the rights of covered employees under the Age Discrimination in Employment Act ("ADEA") and other anti-discrimination statutes. Accordingly, a mandatory grievance arbitration clause in a Collective Bargaining Agreement ("CBA") cannot waive an individual employee's right to a judicial forum to resolve a federal statutory discrimination claim.

The Court's decisions, *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), confronted and resolved under what circumstances federal statutory rights may be waived by a pre-dispute mandatory arbitration agreement contained in a CBA. In *Gardner-Denver*, the Court recognized the importance of individual control over discrimination claims, concluding that an employee's rights under a federal anti-discrimination statute cannot be waived by a CBA; instead, the employee must be permitted to pursue his or her separate remedies under CBA

grievance-arbitration clauses and under federal anti-discrimination statutes. *Gardner-Denver*, 415 U.S. at 59-60. The Court in *Gilmer* reaffirmed the importance of individual control over statutory anti-discrimination claims, holding as the natural corollary of *Gardner-Denver* that an individual can agree to arbitrate his or her own anti-discrimination claims before the dispute arises. *Gilmer*, 500 U.S. at 34-35.

To permit a CBA to effect a waiver of an individual's right to bring a discrimination claim in federal district court would not simply move venue from a judicial forum to an arbitral one; rather, it would extinguish the individual right and replace it with a collective one that could be abandoned without the individual's consent. A union has wide latitude and sometimes competing interests in exercising its representative functions, including deciding whether to pursue even a meritorious discrimination claim. A union exercises these representative functions on behalf of all members of the bargaining unit, including on behalf of bargaining unit employees who have chosen not to become union members. *See Commc'n Workers of Am. v. Beck*, 487 U.S. 735 (1988). Under the legal framework Petitioners urge, therefore, an individual employee may be left without any forum to resolve meritorious ADEA claims if the union representing his or her bargaining unit declines to arbitrate such claims. Such a result would diminish the prophylactic effect of the anti-discrimination laws, contrary to congressional intent.

The circuit courts, with just one exception, all apply *Gardner-Denver* to prevent CBAs from waiving individual rights to pursue discrimination claims in federal court. Furthermore, they have expressly followed the distinction between a union-negotiated

and an individual-negotiated arbitration clause that both Congress and the *Gardner-Denver* Court recognized as critical. Since the relevant law and policies have not significantly changed in the intervening years, the principle of *stare decisis* weighs heavily against Petitioners' efforts to undermine or overturn *Gardner-Denver*.

ARGUMENT

I. DENYING AN INDIVIDUAL'S RIGHT TO A FEDERAL FORUM TO REMEDY WORKPLACE DISCRIMINATION BY VIRTUE OF A CBA IGNORES CONGRESSIONAL INTENT AND UNDERMINES IMPORTANT PUBLIC POLICY.

The Court has long recognized the paramount importance Congress has attached to each individual's right to be free from invidious discrimination.[2] This national dedication stems from a desire to "eliminate 'the last vestiges of an unfortunate and ignominious page in this country's history.'" *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 465 (1986) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)).

To overcome this history of workplace discrimination based on characteristics such as race, sex, and age, Congress enacted the ADEA, Title VII, and other statutes which allow individuals to proceed to court

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[2] *See McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 357 (1995) (noting that the ADEA "reflects a societal condemnation of invidious bias in employment decisions" in a case brought by an individual employee); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 779 (1976) ("[A]meliorating the effects of past racial discrimination [is] a national policy objective of the 'highest priority.'").

to protect their rights against employers.[3] *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 et seq. ("FLSA"); Equal Pay Act of 1963, 29 U.S.C. § 206(d) ("EPA"); Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. ("ADEA"); Rehabilitation Act of 1973, 29 U.S.C. §§ 701 et seq.; Civil Rights Act of 1991, 42 U.S.C. §§ 1981 et seq.; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. ("Title VII"); Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. ("ADA"). By these statutory means, Congress has ensured that every person has the right to challenge unlawful workplace discrimination when faced with it.

While the main goal of workplace anti-discrimination laws was to provide redress against discriminating employers, Congress also protected employees from labor unions' discriminatory practices. Indeed, Petitioners' own brief ("Petr.'s Br.") cites numerous instances in which discrimination claims have succeeded against unions. *See* Petr.'s Br. at 42-43 n.20 (citing cases).[4] Although most labor unions fairly

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[3] *See, e.g.*, *McKennon*, 513 U.S. at 358 (observing that Title VII and the ADEA share the common purpose of eliminating workplace discrimination through individual remedial claims).

[4] *See also Burger v. Int'l Union of Elevator Constructors Local No. 2*, 498 F.3d 750 (7th Cir. 2007) (awarding back pay to an elevator mechanic who brought suit against union for retaliation based on age discrimination claim filed with the EEOC); *Alexander v. Local 496, Int'l Union of N.A.*, 177 F.3d 394, 406 (6th Cir. 1999) (finding local and international labor unions violated Title VII and § 1981 after denying membership and employment opportunities to African-American applicants on the basis of their race); *EEOC v. Shopmen's Local 832*, 112 F.3d 503, reported in full at 1997 WL 216202 (2d Cir. 1997) (affirming sexual discrimination judgment against union that failed to pursue employee's request not to be assigned in close proximity with fellow union member who raped her).

represent the interests of all of their members, some have been complicit in or even contributed to an employer's discriminatory practices. In such instances, if unions and employers were able to agree to supplant individual enforcement of anti-discrimination laws through the use of mandatory arbitration clauses in CBAs, the complicit union would then be in a position to foreclose any remedy the employee has against the employer.[5]

Even when the union did not participate in the workplace discrimination, it may not have the same incentive as the victimized employee to pursue the claim through a grievance arbitration process and may have conflicting interests based upon its collective representation. The conflict of interest is apparent in cases such as this one where, according to Respondents, the Union would not bring their ADEA claims because "the Union had consented to Spartan Security being brought into the building"; therefore, the Union felt that it could not contest Respondents' replacement as night watchmen by Spartan Security personnel. *Pyett v. Pa. Bldg. Co.*, 498 F.3d 88, 90-91 (2d Cir. 2007). Preventing employees from challenging discriminatory employment practices undermines Congress's goal of eradicating discrimination in the workplace.

Construing a grievance arbitration clause in a collective-bargaining agreement to waive individual rights to pursue discrimination claims in federal court could be used to deny the aggrieved employee

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[5] In such cases, the employee may have a claim against the union for a breach of the duty of fair representation; however, as discussed *infra* Section I.C., this does not mitigate the collective action concerns.

any avenue to seek the remedies provided under law for illegal discrimination. To permit unions and employers to play such a gate-keeping role and to contract away employees' rights to bring discrimination lawsuits would defeat the structure and purpose of the anti-discrimination statutes enacted by Congress.

A. *Gardner-Denver* Precludes Waiver Of An Individual's Right To Pursue Enforcement Of Statutory Anti-Discrimination Rights In Federal Court Through A Collective Bargaining Agreement.

Gardner-Denver examined directly and answered correctly whether, in the collective bargaining process, a union can waive its members' right under Title VII to file a discrimination claim in federal court. In determining what rights a union may waive on behalf of its members, the Court appropriately distinguished collective rights, which the union may waive, from individual rights, which cannot be waived. *Gardner-Denver*, 415 U.S. at 51. Collective rights, such as the right to strike, are those that "foster the processes of bargaining and properly may be exercised or relinquished by the union as collective bargaining agent to obtain economic benefit for union members." *Id.* On the other hand, federal anti-discrimination laws do not concern "majoritarian processes, but an individual's right to equal employment opportunity." *Id.*[6] Based on this distinction, the Court held:

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[6] Petitioners dismiss this collective bargaining analysis as dicta. Petr.'s Br. at 38. In fact, it was an integral part of the analysis, as the Court rejected the argument that the employee

> 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 [i.e., in a collective bargaining agreement], an employee's rights under Title VII are not susceptible of prospective waiver.

Gardner-Denver, 415 U.S. at 51-52 (emphasis added).[7]

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had waived his Title VII rights either through the CBA *or* through the submission of his claim to arbitration. *Gardner-Denver*, 415 U.S. at 51-52. The Court's subsequent rejection of the "mistrust of arbitration" as expressed in *Gardner-Denver*, *Gilmer*, 500 U.S. at 34 n.5, left intact the primary basis for the rule of *Gardner-Denver* prohibiting prospective waiver – concern over the protection of individual rights guaranteed under federal anti-discrimination statutes in the context of majority-ruled negotiations. *See Blakely v. US Airways, Inc.*, 23 F. Supp. 2d 560, 575 (W.D. Penn. 1998) ("Thus, most courts agree that the Court in *Gilmer* simply excised that aspect of *Alexander's* rationale which reflected untrustworthiness toward the arbitral process and that *Alexander* remains the law of the land."); *see also* William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 Emory L.J. 609, 635 (2006) ("The *Gardner-Denver* analysis rides two horses and the second horse – skepticism about the way in which majoritarian process will affect minority workers in collective bargaining – runs separate and apart from that decision's view of the arbitration process and thus remains intact."). This is precisely why *Gilmer* correctly relied upon the collective-individual distinction, *Gilmer*, 500 U.S. at 35, and why the strong majority of lower court decisions since *Gardner-Denver* and *Gilmer* have turned on exactly this distinction. *See infra* notes 10 and 20.

[7] Contrary to Petitioners' argument, *Gilmer* did not "expressly reject[] that position," *see* Petr.'s Br. at 24, n.9, 38-39, because

Here Respondents exercised their individual rights under the ADEA by filing an age discrimination suit in federal district court. Although Petitioners argue that the union waived Respondents' right to sue in federal court, *Gardner-Denver* mandates that the individual rights under federal anti-discrimination laws, such as the ADEA, cannot be a part of the collective bargaining process. Accordingly, Respondents are entitled to bring their ADEA claims in federal court.

B. Allowing Federal Anti-Discrimination Claims To Be Subject To Mandatory Binding Arbitration Under A CBA Risks Improperly Subordinating Individual Interests And Claims

In *Gardner-Denver*, the Court cautioned that a union's interests for the bargaining unit as a whole may subjugate the individual's statutory rights to be free from discrimination, thereby corrupting the structure and purpose of the statutes Congress

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Gilmer did not concern a collective bargaining agreement, but an individual employment agreement. Accordingly, this Court in *Metropolitan Edison Co. v. NLRB* distinguished a union's waiver of individual rights under Title VII from collective waiver of rights under the National Labor Relations Act ("NLRA"), where the NLRA contemplated that individual rights to be free of discrimination based upon union membership under the Act "may be waived *by the union* so long as the union does not breach its duty of good-faith representation." 460 U.S. 693, 706, n.11 (1983). This important distinction, which would have been unimportant if *Gilmer* had endorsed waiver by CBA, undermines Petitioners' extensive reliance on *Metropolitan Edison*. *See, e.g.*, Petr.'s Br. at 23-24.

enacted to eliminate discriminatory practices in the workplace.[8] The Court noted that:

> [a] further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented. . . . 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.

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[8] Judge Posner highlighted this conflict in his well-reasoned opinion in *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 362-63 (7th Cir. 1997):

> The essential conflict is between majority and minority rights. The collective bargaining agreement is the symbol and reality of a majoritarian conception of workers' rights. An agreement negotiated by the union elected by a majority of the workers in the bargaining unit binds all the members of the unit, whether they are part of the majority or for that matter even members of the union entitled to vote for union leaders – they need not be. The statutory rights at issue in these two cases are rights given to members of minority groups because of concern about the mistreatment (of which there is a long history in the labor movement, *see, e.g.*, *Steele v. Louisville & Nashville R.R.,* 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173 (1944)) of minorities by majorities. We may assume that the union will not engage in actionable discrimination against minority workers. But we may not assume that it will be highly sensitive to their special interests, which are the interests protected by Title VII and the other discrimination statutes, and will seek to vindicate those interests with maximum vigor.

See also Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and Proposed Reconciliation*, 77 B.U. L. Rev. 687, 689-92 (1997) (noting that issues of race and age discrimination "have traditionally divided unions from within" and that "[u]nion interests may diverge from those of a particular employee, especially in discrimination cases").

Gardner-Denver, 415 U.S. at 58, n.19 (citing *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Republic Steel Corp*. v. *Maddox*, 379 U.S. 650 (1965); *J.I. Case Co*. v. *NLRB*, 321 U.S. 332 (1944)).[9]

When the Court later held in *Gilmer* that an individual could agree to pre-dispute binding arbitration of an ADEA claim, the Court distinguished an individual's own agreement, which was at issue in *Gilmer*, from the collective bargaining at issue in *Gardner-Denver*. *See Gilmer*, 500 U.S. at 34 (citing *Gardner-Denver*, 415 U.S. at 58, n.19).

> [B]ecause the arbitration in [the *Gardner-Denver* line of cases] occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case.

Gilmer, 500 U.S. at 35.[10] In *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 76 (1998), the

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[9] The Court reiterated this concern in decisions following *Gardner-Denver*. *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 742 (1981) ("[E]ven if the employee's [Fair Labor Standards Act] 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."); *McDonald v. W. Branch*, 466 U.S. 284, 291 (1984) ("The union's interest 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.") (citations omitted).

[10] In the aftermath of *Gilmer* and *Wright*, the circuit courts properly focused on whether the individual chose between a judicial or arbitral forum. *Rogers v. N.Y. Univ.*, 220 F.3d 73, 75

Court was reluctant to diminish the need for continued adherence to the bright-line prohibition against the waiver of individual statutory rights through majority-governed CBAs.[11]

This bright-line rule is critical in part because under a CBA in most cases, as here, the union has the exclusive right to prosecute an arbitration claim.[12]

(2d Cir. 2000) (*per curiam*) ("Following *Gilmer's* lead, most lower courts have focused on the party negotiating the waiver of rights. When the arbitration provision has been negotiated by a union in a CBA, these courts have held that *Gardner-Denver* applies."); *Air Line Pilots Ass'n, Int'l v. Nw. Airlines, Inc.*, 199 F.3d 477, 484 (D.C. Cir. 1999), *judgment reinstated*, 211 F.3d 1312 (D.C. Cir. 2000) (en banc) ("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*."); *Jonites v. Exelon Corp.*, 522 F.3d 721, 725 (7th Cir. 2008) (Posner, J.) ("Most courts . . . have closed the question that the Supreme Court left open in [*Wright*] (the 'might' question) by holding, as we had done in *Pryner*, that while an individual worker can waive his right to a judicial remedy, a union cannot do so on his behalf.") (citing cases); *Air Line Pilots Ass'n*, 199 F.3d at 484-85 ("Absent congressional intent to the contrary, a union may not use the employees' individual statutory right to a judicial forum as a bargaining chip to be exchanged for some benefit to the group; the statutory right 'can form no part of the collective bargaining process.'").

[11] *See Wright*, 525 U.S. at 80-81 (distinguishing the holding in *Gilmer* from cases like *Gardner-Denver* prohibiting a union's waiver of the individual statutory rights of employees under collective-bargaining agreements).

[12] *See, e.g.*, *Pryner*, 109 F.3d at 362 (Posner, J.) ("Most important, the grievance and arbitration procedure can be invoked only by the union, and not by the worker. The worker has to persuade the union to prosecute his grievance and if it loses the early stages of the grievance proceedings to submit the grievance to arbitration.") (*citing Vaca v. Sipes*, 386 U.S. 171, 190-91 (1967)).

As a result, if the union decides not to file a grievance or prosecute it to conclusion, the practical effect is not simply a waiver of forum rights, but would allow the union to control and potentially waive the enforcement of individual statutory rights and remedies. This risk is not hypothetical. In this case, the union first asserted the age discrimination claims on behalf of Respondents, only to later withdraw the grievances, deciding that it could not pursue the employees' claims of discrimination because the union had consented to the employment action giving rise to the claim. JA at A396. If the CBA is read to preclude them from filing in federal court, under its terms Respondents have no right to assert their ADEA claims individually. JA at A168. In its decision below, the Second Circuit noted this risk:

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

Pyett v. Pa. Bldg. Co., 498 F.3d 88, 94 n.5 (2d Cir. 2007).[13]

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[13] Petitioners argue that the union's failure to arbitrate Respondents' age discrimination claims is irrelevant because Respondents still had the opportunity to "comply with the promise to arbitrate" by bringing their statutory claims to arbitration on their own. Petr.'s Br. at 39. However, the CBA does not provide for individual arbitration, and the employers' offer to individually arbitrate is clearly beyond the terms of that CBA. Brief for the Respondent at 41-50, 14 Penn Plaza LLC v.

Such a result is antithetical to the strictures of employment discrimination statutes and the "congressional command that each employee be free from discriminatory practices." *Gardner-Denver*, 415 U.S. at 51. Accordingly, the rights conferred by the ADEA and other anti-discrimination statutes "can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind [such laws]." *Gardner-Denver*, 415 U.S. at 51.

C. The Duty Of Fair Representation Does Not Mitigate The Collective Action Concerns At The Heart Of *Gardner-Denver*.

The duty of fair representation is designed to ensure that unions weigh differing collective concerns in a rational manner, and accordingly do not give any special consideration to individual rights to be free from discrimination. A claim for breach of this duty does not protect individuals who are discriminated against where their union rationally declines to press their claim in arbitration in light of other concerns. *See*, *e.g.*, *Robbins v. Prosser's Moving & Storage Co*., 700 F.2d 433, 442 (8th Cir. 1983) (meritorious claim insufficient to demonstrate breach in light of union's other priorities).[14]

Pyett, No. 07-581 (July 14, 2008) ("Resp't Br."). *See also* Brief of the Service Employees Int'l Union, Local 32BJ, as *Amicus Curiae* in Support of Respondents at 17-20.

[14] The deferential legal standards of the duty of fair representation, and how those standards are accordingly insufficient to protect individual employees, are well detailed in the Brief for the National Academy of Arbitrators as Amicus Curiae Supporting Respondents at 16-23, 14 Penn Plaza LLC v. Pyett, No. 07-581 (June 2008).

The requirement that a union fairly represent its constituents therefore serves a decidedly different purpose from the individual ADEA and Title VII remedies. Congress created private ADEA and Title VII remedies specifically to "spur" employers to reevaluate employment practices and eliminate discrimination as far as possible. *McKennon*, 513 U.S. at 358 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)).[15] A successful claim for breach of the duty of fair representation may affect the union's behavior; however, it does nothing to redress or prevent workplace discrimination that occurs at the hands of the employer. Moreover, the practical reality of requiring a plaintiff to initiate another round of litigation and prove both the underlying claim of discrimination and the elements of the union's breach of duty necessarily makes the enforcement of individual statutory rights more difficult.[16]

As the Court explained in *Gilmer*, arbitration of a discrimination claim can continue to serve the statute's remedial and deterrent purposes only if the *arbitral* forum allows an employee to effectively vin-

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[15] *See also Albemarle*, 422 U.S. at 417 (stating that "the primary objective of Title VII [is] a prophylactic one"); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (noting that Title VII's goal "was to achieve equality of employment opportunities and remove barriers that have operated in the past.").

[16] Even assuming *arguendo* that such a suit could provide "complete relief for statutory claims" against the employer, as the Petitioners suggest it might, Petr.'s Br. at 42 n.19, the victimized employee would have to pursue his or her claims through the formal grievance procedure, battle with the union, *and then* complete litigation against the union. Such a convoluted procedure hardly "minimizes duplicative efforts and resolves disputes quickly, less expensively, fairly, and effectively." Petr.'s Br. at 7.

dicate his or her statutory cause of action. *Gilmer*, 500 U.S. at 28. Enforcing the collective arbitral clauses at issue here, in contrast to the individual arbitration clause in *Gilmer*, would surrender to unions prospective litigants' ability to vindicate their claim and thereby contravene the congressionally designed remedial and deterrent purposes of the statutes.[17]

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[17] For similar reasons, if an anti-discrimination clause of a CBA incorporates federal statutory rights (as in the CBA currently before this Court), it should be viewed as creating only "a contractual right that is *coextensive* with the federal statutory right," *Wright*, 525 U.S. at 79 (emphasis added), and the burden should be on the employer to prove otherwise, *see, e.g.*, *Kennedy v. Superior Printing Co.*, 215 F.3d 650, 655 (6th Cir. 2000) (where employee submitted claim to arbitration under CBA that incorporated external law, "[t]he burden was on [the employer] to show that [the employee] waived his statutory rights, not merely that he arbitrated a discrimination claim under a collective agreement that also had a basis in federal law"). As demonstrated by Respondents and their local union, such a showing cannot be made here. Brief for the Respondent at 41-50, 14 Penn Plaza LLC v. Pyett, No. 07-581 (July 14, 2008); Brief for the Service Employees International Union, Local 32BJ, as Amicus Curiae Supporting Respondents at 17-20, 14 Penn Plaza LLC v. Pyett, No. 07-581 (July 14, 2008). The most that could be said is that the CBA here creates a contractual right to be free from discrimination that is coextensive with the statutory rights. *See*, *e.g.*, *Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 631-32 (6th Cir. 1999) ("Simply put, including a provision in a collective bargaining agreement that prevents discrimination against employees under a federal statute 'is not the same as requiring union members to *arbitrate* such statutory claims.'") (emphasis in original) (citations omitted); *Moore v. United Parcel Serv.*, 474 F. Supp. 2d 882, 894 (E.D. Mich. 2007) ("[A] collective-bargaining agreement that merely tracks the language of a federal statute, or references a federal statute, is not the same as explicitly waiving an individual's federal statutory right.").

II. THE PRINCIPLE OF *STARE DECISIS* SUPPORTS REAFFIRMING *GARDNER-DENVER*'S PROHIBITION OF PROSPECTIVE WAIVER OF INDIVIDUAL RIGHTS THROUGH COLLECTIVE BARGAINING AGREEMENTS.

For over three decades, *Gardner-Denver* has provided a reasonable bright line rule insuring that union members do not lose their individual right to be free from discrimination through the collective bargaining process. In light of the near uniformity in the case law,[18] considerations of *stare decisis* favor reaffirming *Gardner-Denver* and upholding the principle that a union cannot waive individual employees' statutory anti-discrimination rights in a CBA.[19] *Stare decisis* requires a party to provide a "special justification" for departing from established precedent and thereby promotes the evenhanded and consistent development of the law. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Considerations of *stare decisis* have special force in cases of statutory interpretation because "Congress remains free to alter what [the Court] ha[s] done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

The Court has traditionally been guided "by a series of prudential and pragmatic considerations" when reexamining prior holdings. *Planned Parent-*

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[18] *See infra* p. 21-22 and notes 20-21.

[19] Just recently this Court reiterated that "considerations of *stare decisis* . . . impose a considerable burden upon those who would seek a different interpretation that would necessarily unsettle many Court precedents." *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951, 1953 (2008).

hood v. Casey, 505 U.S. 833, 854 (1992). These considerations include whether the precedent has proven "unworkable," *Payne*, 501 U.S. at 827; whether there has been a change in the factual or legal bases for the original decision, *Patterson*, 491 U.S. at 173; and whether the decision itself "unsettled" the law, *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2685-86 (2007); *Cont'l T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 47-49 (1977). These considerations counsel against overruling *Gardner-Denver*.

A. *Gardner-Denver* Established a Simple, Workable Rule.

Far from having been proven "unworkable," the law under *Gardner-Denver* has been consistent and near-uniform. A precedent is "unworkable" if it is "a positive detriment to coherence and consistency in the law . . . because of [the] inherent confusion [it] create[s]." *Patterson*, 491 U.S. at 173. But *Gardner-Denver* has provided coherent guidance, as all but one of the courts of appeals have consistently applied it to prohibit the waiver of individual rights under federal anti-discrimination statutes through a CBA.[20] The circuit courts have had little difficulty understanding that *Wright* simply preserved the status quo

[20] *See, e.g.*, *Jonites v. Exelon Corp.*, 522 F.3d 721, 725 (7th Cir. 2008); *Rogers*, 220 F.3d at 75; *Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 630 (6th Cir. 1999); *Air Line Pilots Ass'n, Int'l v. Nw. Airlines, Inc.*, 199 F.3d 477, 484 (D.C. Cir. 1999), *judgment reinstated*, 211 F.3d 1312 (D.C. Cir. 2000) (en banc); *Albertson's Inc. v. United Food & Com. Workers Union*, 157 F.3d 758, 761-62 (9th Cir. 1998); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1453 (10th Cir. 1997); *vacated on other grounds*, 524 U.S. 947 (1998); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526-27 (11th Cir. 1997); *Varner v. Nat'l Super Mkts., Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996).

and the law on which employers and employees have relied since *Gardner-Denver*.[21] A precedent is not "unworkable" where, as here, "there is simply no evidence that [it] has caused or will cause uncertainty." *United States v. Int'l Bus. Mach. Corp.*, 517 U.S. 843, 856 (1996).

B. The Factual And Legal Predicates Of *Gardner-Denver* Remain Unchanged.

There has been no evolution of legal principle to erode the basis of *Gardner-Denver*, nor have any of the facts upon which it was decided changed. As this Court explained in *Patterson*, a change in background legal principles, "through either the growth of judicial doctrine or further action taken by Congress," can justify departure from an established precedent in certain circumstances. *Patterson*, 491 U.S. at 173. Here, neither a change in this Court's jurisprudence nor any act of Congress creates a basis for departing from *Gardner-Denver*.[22] While judicial wariness of

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[21] Against this weight of consistent authority, the Fourth Circuit stands alone. *See*, *e.g.*, *E. Associated Coal Corp. v. Massey*, 373 F.3d 530, 533 (4th Cir. 2004).

[22] Petitioners assert that the Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991), is a Congressional endorsement of arbitration in cases like this. It should be noted, however, that while the 1991 amendments encouraged methods of alternative dispute resolution "where appropriate," it also created the right to a jury trial in Title VII cases. As Judge Posner aptly observed, not only is majority-controlled arbitration not "appropriate" in discrimination cases, but "[i]t would be at least a mild paradox for Congress, having in another amendment that it made to Title VII in 1991 conferred a right to trial by jury for the first time, Pub. L. No. 102-166, § 102, § 1997A(c), 105 Stat. 1071, 1073 (1991), to have empowered unions, in those same amendments, to prevent workers from obtaining jury trials in these cases." *Pryner*, 109 F.3d at 363.

arbitration has waned since *Gardner-Denver*, the need to safeguard individual rights from collective decisions made by the union, a principal concern in *Gardner-Denver*, remains vital today.

Furthermore, the factual context of *Gardner-Denver* persists – "the policy against discrimination [is] of the 'highest priority'" and "harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of . . . discrimination is made." *Gardner-Denver*, 415 U.S. at 47, 58 n.19. Workplace discrimination remains and unions may not always pursue individuals' claims of discrimination. *See supra* Part I. Because this potential conflict of interest that concerned the Court in *Gardner-Denver* still exists, the principle of *stare decisis* weighs heavily in support of this Court reaffirming its absolute prohibition of union waiver of individual employees' federal forum rights.

C. *Gardner-Denver* Did Not Upset Settled Law, While Overturning *Gardner-Denver* Would Cause Severe Disruptions.

In evaluating *stare decisis*, the Court also considers whether the precedent at issue upset settled law when it was adopted.[23] Here, there is no argument that *Gardner-Denver* was inconsistent with settled expectations. By contrast, overturning *Gardner-Denver* and its prohibition on union-negotiated waivers of individual statutory rights against discrimination would severely disrupt the current state of the law. *See CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951,

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[23] *See, e.g.*, *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2685-86 (2007) (partially overturning *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), four years later, because it "unsettled a body of law").

1961 (2008) ("Principles of *stare decisis*, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends.") (citing *John R. Sand & Gravel Co. v. United States*, 552 U.S. __, 128 S. Ct. 750, 756-57 (2008)).

Moreover, *Gardner-Denver* and the circuit court cases applying its absolute prohibition have not disrupted labor negotiations. As Judge Posner stated, "we are given no reason to believe that the ability of unionized workers to enforce their statutory rights outside of the grievance machinery established by collective bargaining agreements is undermining labor relations." *Pryner*, 109 F.3d at 363. To the contrary, *Gardner-Denver's* rule that unions cannot waive employees' individual statutory rights through collective bargaining agreements simply ensures that, in the course of labor negotiations, unions do not sacrifice the essential rights of individual employees to be free from discrimination for the sake of reaching a deal.

Indeed, *Gardner-Denver* has been the law for over three decades and has been applied in a remarkably uniform manner. The strong majority of circuit courts continue to affirm that it stands for the simple proposition that unions cannot collectively preclude an individual's right to a judicial forum for statutory discrimination claims. As it remains just as contrary to congressional design to permit unions to do so today as it was the day that *Gardner-Denver* was decided, this Court has no reason to overturn its correct decision.

CONCLUSION

For the foregoing reasons, the Second Circuit's judgment upholding the denial of Petitioners' motion to compel arbitration should be affirmed.

Respectfully submitted,

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