06-3047

In the

United States Court of Appeals

for the

Second Circuit

STEVEN PYETT, THOMAS O'CONNELL,
and MICHAEL PHILLIPS,
Plaintiffs-Appellees,

– against –

PENNSYLVANIA BUILDING COMPANY,
14 PENN PLAZA LLC, and
TEMCO SERVICE INDUSTRIES, INC.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS FOR REVERSAL OF THE DISTRICT COURT DECISION

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No.: 06-3047

STEVEN PYETT, THOMAS O'CONNELL, and MICHAEL PHILLIPS

Plaintiffs-Appellees,

v.

PENNSYLVANIA BUILDING CO., 14 PENN PLAZA LLC, and TEMCO SERVICE INDUSTRIES, INC.

Defendants-Appellants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 28 of the Federal Rules of Appellate Procedure, the undersigned counsel of record for *amicus curiae* the Chamber of Commerce of the United States of America, by their attorneys of record, certify that (i) there are no parent corporations; and (ii) no publicly held corporation owns 10% or more of its stock.

Dated: October 2, 2006

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* is being filed on behalf of the Chamber of Commerce of the United States of America. Both appellants and appellees have consented to the filing of this brief; a copy of their written consents will be filed with the court.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size and from every industry sector, and region of the country. The Chamber advocates the interests of the business community in courts across the nation in part by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses.

The Chamber has long been interested in promoting a fair employment dispute resolution system that avoids the unnecessary costs, distractions, delays and strategic behaviors characteristic of the civil litigation process. The courts are not well designed to handle employment disputes, and the court system, while it may aid a few litigants whose level of compensation attracts high-powered private counsel, poorly serves the vast majority of employees and their employers.

Over time, the U.S. Supreme Court has come to share a similar diagnosis of the poor institutional fit between employment disputes and the court system, and has signaled a receptivity to enforcing predispute arbitration agreements between employers and employees – whether they involve claims under an employment contract or under federal or state anti-discrimination and other statutes. The Chamber has been actively involved in encouraging the Supreme Court to take these steps, and is proud of its record as *amicus curiae* in support of the pro-arbitration position adopted in such landmark cases as *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991), and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

Responding to the Supreme Court's marked receptivity to employment arbitration, many of the Chamber's members have established in-house dispute resolution systems culminating in final, binding arbitration. The empirical studies conducted to date fairly uniformly applaud this effort of U.S. employers to provide a fair alternative to the court system. Contrary to the fears expressed by some in the plaintiff bar, these in-house processes have been found to do as good if not a better job than the courts in providing an accessible, prompt mode of redress for many employment disputes.[*]

[*] *See, e.g.*, Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 2003/2004 Dispute Res. J. 44; David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1558 (2005).

The instant case illustrates one area, however, where these salutary new developments have not fully taken hold – the arbitration of statutory employment claims in the union-represented sector. Unions represent about 12% of U.S. workers, and a substantial number of the Chamber's members are signatories to collective bargaining agreements covering segments of their workforce. Because of over-readings of the Supreme Court's holding in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), there is considerable legal uncertainty over the enforceability of "clear and unmistakable" provisions in these agreements that authorize arbitrators to resolve not only contractual claims but also various statutory claims, including employment discrimination claims. Thus, even where unions are willing and able to represent their members in arbitration over the full range of their disputes, uncertainty over enforceability of any resulting award, and fear of liability or exposure to unfair-representation litigation on the union's part, prevents the promise of *Gilmer* and its progeny from being realized in the union-represented sector.

We further suggest that a decision precluding enforcement of collectively-bargained-arbitration agreements covering statutory claims may lead to unfortunate consequences for labor relations. If employers cannot negotiate binding agreements with labor unions, no matter how clear the agreement is and irrespective of the fairness of the arbitration procedures, they may well deal

directly with their employees to negotiate predispute arbitration agreements permitted under *Gilmer*.

Because we believe that our members and their employees will be adversely affected by the district court decision – which erroneously established a *per se* rule barring enforcement of clear and unmistakable union-negotiated waivers of the right to pursue employment claims in court rather than in arbitration – *amicus* has filed this brief in support of reversal of the decision below.

STATEMENT OF THE ISSUE

Whether the District Court properly ruled that "even a "clear and unmistakable" union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable"?

SUMMARY OF ARGUMENT

Union-negotiated agreements to arbitrate statutory claims that waive an employee's right to a judicial forum for such claims and adhere to the standards promulgated by the Supreme Court in *Wright v. Universal Maritime Serv. Corp.,* 525 U.S. 70 (1998) and this Court in *Rogers v. New York University,* 220 F.3d 73 (2d Cir.), *cert. denied*, 531 U.S. 1036 (2000), should be enforced. In contrast to the general arbitration clauses used in both of those cases, the collective bargaining agreement in the instant case expressly authorizes the arbitration of statutory claims and requires the arbitrator to resolve discrimination claims in accordance with the statutory employment laws; in short, it embodies a "clear and unmistakable" waiver of an employee's right to a judicial forum with respect to statutory claims. Mindful of the concerns raised in both *Wright* and *Rogers,* the agreement "explicitly make[s] compliance with [federal and state employment discrimination] law a contractual commitment that is subject to the arbitration provision[.]" *Rogers,* 220 F.3d at 77. There can be no question in this case that the arbitrator does not sit to deal only with contract violations or of the intent of both the employer and their employees' statutory exclusive bargaining agent to submit the full range of employment disputes to arbitration, whether they raise merely contractual claims or also assert claims under federal or state employment laws. In this case, the only waiver involved is the procedural right to a judicial

forum instead of arbitration; the arbitrator is obligated to ensure against waiver of any statutory rights. The Court should treat the part of its rationale based on the lack of a sufficiently clear union waiver in *Rogers* (what it deemed "Reason #2) as the dispositive ground for the decision in that case, and following the letter and spirit of the Supreme Court's decision in *Wright* to enforce union-negotiated waivers of the right to a judicial forum in favor of arbitration when they are properly drafted and negotiated as instructed in *Wright* and *Rogers*.

The Supreme Court's 1974 decision in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), does not create a *per se* rule barring union-negotiated waivers of the right to a judicial forum instead of arbitration. The Court was dealing with situations where an attempt was made to use a purely contractual arbitration process, where the arbitrator sits only as "the proctor of the bargain," *Gardner-Denver*, 415 U.S. at 53, and may not rely on external law, to foreclose the adjudication of statutory employment claims. Neither the facts of *Gardner-Denver* nor the two cases often cited as its progeny dealt with situations where, as here, obligations under statutory employment laws are express contractual commitments and arbitrators have been given explicit authority to decide statutory claims in accordance with those laws. The current legal landscape is vastly different from the one that existed in 1974. Disavowing its earlier skepticism of arbitral competence to decide statutory issues, the Court has developed a robust

jurisprudence under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. ("FAA"), establishing a presumption of arbitrability encompassing nearly all employment disputes, whether sounding in contract, tort, employment discrimination or other statutory law. Although substantive rights can never be waived in predispute arbitration agreements, the Court has made clear that the purely procedural right to a judicial forum instead of arbitration can be waived, thus rejecting a critical underpinning of *Gardner-Denver*: that prospective waivers of the right to a judicial forum are inherently suspect. Subsequent decisions, among them *Wright, Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), have highlighted that a wide range of statutory employment claims properly fall within the purview of an arbitrator given the authority to resolve such disputes.

Although there may be occasions where unions will not act as faithful agents of their members in the arbitration process, neither the FAA-based presumption of arbitrability, the presumption of regularity that attaches to the union's obligations as the statutory exclusive bargaining agent nor the union's statutory duty to fairly represent its members' interests supports a contrary presumption that the interests of labor union and represented employees will inevitably diverge. In most cases, the union and the member have entirely congruent interests. In the relatively few cases where union members question the fairness of the arbitration process, they

should have to demonstrate an evidentiary basis for their claim of bias, which the courts will be able to evaluate, as they do now in cases like *Collins v. New York City Transit Auth.*, 305 F.3d 113 (2d Cir. 2002), when considering the enforcement of any award or the introduction of an award into evidence.

Finally, strong public policy considerations support enforceability. Chief among these are the considerations of judicial efficiency, employer decision-making efficiency, employees' access to competent counsel, and the labor relations costs inhering in the potential for employers, under current law, to bypass unions and negotiate directly with employees predispute arbitration agreements permitted under *Gilmer* – if union-negotiated waivers of the right to a judicial forum are deemed unenforceable. Taken together, these considerations weigh heavily toward the practical conclusion that union-negotiated waivers of the right to a judicial forum in favor of arbitration are beneficial to all involved and should therefore be enforced as a matter of sound public policy.

ARGUMENT

I. THIS COURT IN *ROGERS* LEFT OPEN THE QUESTION WHETHER UNION-NEGOTIATED WAIVERS OF THE RIGHT TO GO TO COURT RATHER THAN ARBITRATION ARE *PER SE* UNENFORCEABLE.

The District Court below ruled that because of "binding Second Circuit precedent" "even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable." The ruling is, of course, based on this Court's decision in *Rogers v. New York University*, 220 F.3d 73 (2d Cir.), *cert. denied*, 531 U.S. 1036 (2000). The *Rogers* Court offered two grounds for not staying the law suit in that case. "Reason #1" embraced a broad reading of the Supreme Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and its progeny as establishing the proposition that because "[t]he arbitration provision in the instant case, by which employees purport to waive their right to a federal forum with respect to statutory claims, is contained in a union-negotiated [collective bargaining agreement] ("CBA")," *Gardner-Denver* in some sense required that "such provisions are not enforceable." 220 F.3d at 75. However, this Court also felt it necessary to add a second ground (termed "Reason #2"), in light of the more recent Supreme Court decision in *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998), which the panel acknowledged "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." 220 F.3d at 75 (*citing Wright*, 525 U.S. at 80-81). The Court's "Reason #2" went to the failure of the CBA in *Rogers* to provide a sufficiently "clear and unmistakable" union-negotiated waiver of the right to go to court rather than arbitration with respect to the plaintiff's Family and Medical Leave Act of 1993 ("FMLA") claim:

> The instant Agreement contains both a general arbitration clause and a nondiscrimination provision. However, neither incorporates anything explicitly. Furthermore, while the Agreement's "leave of absence" clause does create contractual rights coextensive with the FMLA, the collective bargaining agreement does not specifically make compliance with the FMLA a contractual commitment that is subject to the arbitration clause… *[T]he CBA does not satisfactorily incorporate federal antidiscrimination law both because reference to such law is too broad and because the CBA does not explicitly make compliance with that law a contractual commitment that is subject to the arbitration provision.* 220 F.3d at 76-77 (emphasis added).

In the instant case, by contrast, we have a "clear and unmistakable" union-negotiated waiver of the right to a judicial forum for employees' statutory claims. Here, in addition to the usual grievance and arbitration clauses (Arts. V-VI), *see* Joint Appendix ("JA") A166-169, the CBA contains a separate "No Discrimination" clause (Art. XIV, ¶ 30), *id*. A207-208, tailored to meet the Supreme Court's concern in *Wright* and this Court's concern in *Rogers*:

30. NO DISCRIMINATION.

> 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, New Jersey Law Against Discrimination, New Jersey Conscientious Employee Protection Act, Connecticut Fair Employer Practices Act, 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 decision based upon claims of discrimination.* (Emphasis added).

This is plainly a clause that "explicitly make[s] compliance with that [federal and state employment discrimination] law a contractual commitment that is subject to the arbitration provision[.]" *Rogers*, 220 F.3d at 77. It is not subject to the criticism offered in *Rogers*, where "[t]he arbitration clause … is broad and general. It encompasses 'any dispute concerning the interpretation, application, or claimed violation of a specific term or provision of this Agreement.' This degree of generality falls far short of a specific agreement to submit all federal claims to arbitration." *Id.* at 76. Similarly, the agreement's nondiscrimination clause in that

case was found deficient in failing to make compliance with the law "a contractual commitment that is subject to the arbitration provision." *Id.* at 77.[1]

The Chamber has gone on at some length comparing the CBA provisions in *Rogers* with those involved in the present case because we believe, having taken such care to elaborate a second, entirely sufficient ground for the result, the Court intended to remain open to reconsidering its *Gardner-Denver* ground in an appropriate case.[2] The absence of a "clear and unmistakable" union-negotiated waiver was no more a mere technicality in *Rogers* than it was for the Supreme Court in *Wright* because it goes to whether the union and its represented employees had fair notice of what was agreed to in the collective bargaining agreement. The "clear and unmistakable" waiver requirement also enhances the integrity of any negotiated waiver of the right to a judicial forum, ensuring that the submission of statutory employment claims to arbitration reflects a deliberate decision on the union's part. In this case, the language of the "No Discrimination" clause, with its

[1] The full text of the "No Discrimination" clause in *Rogers* read as follows: "There shall be no discrimination as defined by applicable Federal, New York State, and New York city laws, against any present or future employee by reason of race, creed, color, national origin, sex, sexual orientation, age, physical or mental disability, membership or nonmembership in the Union, by either the Employer or the Union." Br. for Defendant-Appellant, *Rogers*, 220 F.3d at 74. Aside from the failure to specify which laws were being referred to, the clause itself did not provide for the arbitration of claims arising under those laws. The Court's decisions prior to *Rogers* involved even narrower clauses. *See Fayer v. Town of Middlebury*, 258 F.3d 117, 123 (2d Cir. 2001) ("This clause is even narrower than the arbitration clause that was at issue in *Wright*…."); *Tho Dinh Tran v. Dinh Truong Tran*, 54 F.3d 115, 116 n.2 (2d Cir. 1995). *cert. denied*, 517 U.S. 1133 (1996).

[2] *See generally* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dictum* (James Madison Lecture, NYU School of Law, Oct. 18, 2005).

express empowering of the arbitrator to "apply appropriate law" in resolving discrimination claims, makes clear that the parties intended to submit these claims to arbitration and authorized the arbitrator to ensure that the only waiver that occurs concerns the procedural right to a judicial forum, not a waiver of any substantive right under the applicable law.

Notwithstanding *Rogers*, the Court should be open to a plenary consideration of whether *Gardner-Denver*, on its own terms and in light of changes in the legal landscape over 30-plus years, should be read as establishing a *per se* rule barring enforcement of "clear and unmistakable" union-negotiated waivers of the right of individual employees to go to court rather than arbitration over their statutory employment claims.

II. *GARDNER-DENVER* DOES NOT APPLY TO SITUATIONS WHERE OBLIGATIONS UNDER STATUTORY EMPLOYMENT LAWS ARE EXPRESS CONTRACTUAL COMMITMENTS AND ARBITRATORS HAVE BEEN GIVEN EXPLICIT AUTHORITY TO DECIDE STATUTORY CLAIMS IN ACCORDANCE WITH THOSE LAWS.

We turn now to the *Gardner-Denver* ground, or "Reason #1", given in this Court's decision in *Rogers*. The Court seemingly derived from *Gardner-Denver* a "rule" that union-negotiated waivers of individual employees' right to a judicial forum for their statutory claims can never be enforceable. We acknowledge that some of the Supreme Court's language in *Gardner-Denver* and its progeny can be

read to support this ostensible rule. However, as illustrated by the high court's reliance on *Wilko v. Swan*, 346 U.S. 427 (1953), in *Gardner-Denver*, 415 U.S. at 52, 58, the Supreme Court's 1974 decision was written during an earlier period when the Court was quite skeptical of the competence of private arbitrators to decide statutory claims. *Wilko* was subsequently overruled in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), and the Supreme Court has significantly altered its view of arbitral competence, ruling that a wide range of statutory claims fall within the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. ("FAA")'s presumption of arbitrability. *See, e.g.*, *Gilmer*, 500 U.S. at 24-26 (recounting this history). The Supreme Court has also rejected a critical underpinning of *Gardner-Denver*: that "an employee's rights under Title VII [and by extension, other federal employment statutes] are not susceptible of prospective waiver." 415 U.S. at 51-52. For, indeed, *Gilmer*, which involved the arbitrability of claims under the Age Discrimination in Employment Act, and *Circuit City*, which involved the arbitrability of claims under the Americans with Disabilities Act, could not be clearer on the distinction between the right to a judicial forum, which can be waived in favor of arbitration, and the substantive rights embodied in these laws, which cannot be waived by predispute agreements: "So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and

deterrent function." *Gilmer*, 500 U.S. at 28 (internal quotation omitted). *Circuit City* also read the FAA to cover the employment disputes of almost all U.S. workers, excluding only transportation workers.

It is because of this change in the governing legal landscape that, we believe, when the issue of *Gardner-Denver's* vitality came before the Supreme Court in *Wright*, the Justices did not simply reject out of hand the potential enforceability of union-negotiated waivers of the right to a judicial forum by invoking *Gardner-Denver*. Rather, they found "it unnecessary to resolve the question of the validity of a union-negotiated waiver, since it is apparent to us, on the facts and arguments presented here, that no such waiver has occurred." 525 U.S. at 77 (after noting the arguments on both sides concerning how best to resolve the tension between *Gardner-Denver* and the FAA line of cases). *Wright* is best understood as signaling the Court's receptivity to enforcing properly tailored union-negotiated waivers of the right to a judicial forum in favor of arbitration. This change in the legal environment also explains why this Court felt it necessary to emphasize the lack of a sufficiently clear union waiver in *Rogers* and argues for treating that "Reason #2" as the dispositive ground for its decision in that case.

Turning to *Gardner-Denver* itself, we believe the decision should not be read as dealing with situations where obligations under statutory employment laws are express contractual commitments and arbitrators have been given explicit

authority to decide employees' statutory claims in accordance with those laws. As the *Gilmer* Court observed, *Gardner-Denver* and its progeny "did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims." 500 U.S. at 35. In the instant case, not only does the CBA provide expressly for the arbitration of the claims arising under the specified federal and state employment statutes but also the arbitrator, a trained lawyer, has been given explicit authority – and shoulders an obligation – to "apply appropriate law in rendering decisions based upon claims of discrimination." (JA 207-208).

The argument rejected in *Gardner-Denver* contained an element of unfair surprise – an attempt to use a purely contractual process to foreclose consideration of an employee's statutory claim. Harrell Alexander, Sr., with his union's assistance, presented his discharge grievance to the arbitrator but the arbitrator had not been given authority to consider, and did not consider, his racial discrimination claim under Title VII. The *Gardner-Denver* Court pointedly noted that labor arbitrators, unless they have been given such authority, sit merely as creatures of the collective bargaining agreement:

> As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance

> with the "industrial law of the shop" and the various needs and desires of the parties. *The arbitrator, however, has no general authority to invoke the public laws that conflict with the bargain between the parties.… If an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation," rather than an interpretation of the collective-bargaining agreement, the arbitrator has "exceeded the scope of the submission," and the award will not be enforced.* Thus, the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII. *Gardner-Denver*, 415 U.S. at 53 (emphasis added) (*quoting United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

The critical importance of granting the arbitrator explicit authority to resolve statutory claims explains in large part the Supreme Court's insistence in *Wright* on a "clear and unmistakable" union-negotiated waiver of the right to a judicial forum as well as this Court's requirement in *Rogers* that the CBA "explicitly make compliance with that [statutory employment] law a contractual commitment that is subject to the arbitration provision." 220 F.3d at 77. In *Gardner-Denver* and two decisions often cited as its progeny,[3] the arbitrator could act only as a conventional labor arbitrator. Absent the "contractual commitment" required in *Rogers*, the

[3] *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 743 (1981) ("Although an arbitrator may be competent to resolve many preliminary factual questions …, he may lack the competence to decide the ultimate legal issue whether an employee's right to a minimum wage or to overtime pay under the statute [Fair Labor Standards Act] has been violated."); *McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984) ("[B]ecause an arbitrator's authority derives solely from the contract, . . . an arbitrator may not have the authority to enforce §1983.") (citation omitted).

arbitrator only has authority to resolve contractual issues. But where such a commitment is present, as it is here, the arbitrator is empowered to decide the case in accordance with the "appropriate law" (JA 96), will be legally trained,[4] and will understand his or her charge is to vindicate the substantive rights involved.

It is possible that where unions represent grievants in the arbitration proceedings, there may arise a "tension between collective representation and individual statutory rights[.]" *Gilmer*, 500 U.S. at 35. But it is not consistent with the FAA-based presumption of arbitrability, the presumption of regularity labor unions enjoy as the exclusive statutory bargaining agent for represented employees, or a union's legal duty to fairly represent its members to presume that there will inevitably be a conflict between the labor union and the represented employee. In many cases, there is no plausible basis for assuming the actual or likely presence of a conflict because the employee's statutory claim merely adds another helpful, supplementary legal theory to what is, in essence, a challenge to the factual basis for a disciplinary action. In other cases, as may be true here, the claim of older workers to be free of age discrimination dovetails with the union's longstanding, deeply entrenched interest in protecting the seniority of long-service employees.[5] In yet other cases, the union may step aside to relinquish control of the arbitration

[4] Another concern of *Gardner-Denver* and its progeny. *See Gardner-Denver*, 415 U.S. at 57 n.18; *Barrentine*, 450 U.S. at 743 & n.2; *McDonald*, 466 U.S. at 290 & n.9.

[5] *See generally* Bruce E. Kaufman & Jorge Martinez-Vasquez, *Monopoly, Efficient Contract, and Median Voter Models of Union Wage Determination: A Critical Comparison*, 11 J. Lab. Res. 401 (1990) (importance of seniority principle to union decision-making).

process in favor of members who are able to attract private counsel. In those relatively few cases where a union member may wish to challenge the fairness of the arbitration process in the particular circumstances, courts are well-equipped, as they now have to be in reviewing any award or even allowing an award into evidence, to determine whether the process was fair and if a decision has been rendered by an "independent, neutral, and unbiased adjudicator that had the power to prevent the termination" or provide other sought-for relief. *Collins v. New York City Transit Auth.*, 305 F.3d 113, 119 (2d Cir. 2002).

The Supreme Court has not allowed mere speculative concerns to derail arbitration agreements. The plaintiff in *Gilmer*, for example, argued that arbitration panels in the securities industry were likely to be biased, that pre-hearing discovery was likely to be deficient, that arbitrators do not often issue written opinions, that appellate review of awards was likely to be ineffective, and that individuals lack sufficient bargaining power to negotiate appropriate arbitration agreements with their employers. The Court's response was to reject these "generalized attacks on arbitration," *Gilmer*, 500 U.S. at 30, in favor of awaiting "resolution [of claims of unfairness] in specific cases." *Id*. at 33. We believe the same approach is warranted here concerning any "generalized attacks" on the ability of unions to be faithful agents for their members in the course of an arbitration of statutory claims.

But even if, for the sake of argument, the Court believes there is warrant for a deeper concern, the better approach would be not to bar enforcement of union-negotiated waivers of the right to a judicial forum as a *per se* rule but, rather, to send the case to arbitration while retaining the ability to review any award for conformity with the standards outlined by this Court in *Collins*. Admittedly, a deferral or exhaustion approach was rejected in *Gardner-Denver* and its progeny but that was in a context where the arbitrator sat simply as "the proctor of the bargain," not a case, as here, where individual statutory employment claims are expressly arbitrable and the arbitrator has been given explicit authority to apply statutory law in deciding those claims. Here, deferral or exhaustion is not likely to be an exercise in futility, and a stay of litigation pending arbitration is affirmatively authorized by the FAA § 3.[6]

III. STRONG POLICY CONSIDERATIONS SUPPORT THE ENFORCEABILITY OF UNION-NEGOTIATED WAIVERS OF THE RIGHT TO A JUDICIAL FORUM INSTEAD OF ARBITRATION.

We also believe there are strong policy reasons to decide the question left open in both *Wright* and *Rogers* in a manner which allows labor unions to negotiate binding waivers of the right to a judicial forum in favor of arbitration on

[6] Section 3 provides: "If any suit or proceeding be brought into any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement providing the applicant is not in default in such proceeding with such arbitration." 9 U.S.C. § 3.

behalf of their members. The first consideration from the standpoint of the affected employees urges that the theoretical ideal should not be the enemy of the achievable good. For most non-managerial, non-supervisory employees – that is, employees potentially eligible for union representation under the National Labor Relations Act[7] – a private law suit with representation by competent private counsel is a largely illusory opportunity.[8] For the vast majority of claims likely to be asserted by the members of the labor union in this case – who work principally in janitorial positions for commercial office buildings – arbitration with the assistance of able union counsel is a decidedly superior mode of redress than a likely *pro se* civil action in the federal courts. The empirical evidence to date also indicates that employees fare at least as well, if not better, in arbitration relative to their prospects in litigation.[9]

Internal processes culminating in final, binding arbitration are distinctly preferable for many employment disputes because the relative speed and

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[7] *See* 29 U.S.C. §152(11) (supervisor exclusion); *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267 (1974) (managerial employee exclusion).

[8] *See* Samuel Estreicher, *Beyond Cadillacs and Rickshaws: Towards A Culture of Citizen Service*, 1 N.Y.U. J. Law & Bus. 323, 326-27 (2005): "The existing data are fragmentary but revealing. In 1991, John Donohue found that plaintiff lawyers are not likely to take an employment discrimination case, regardless of merit, unless the employee earned more than $400 a week. William Howard's 1995 article reports the results of a survey of 321 plaintiff lawyers, all members of the National Employment Lawyers Association, the plaintiff employment bar association. Howard found that these lawyers required a retainer of at least $3,000-$3,600. Lewis Maltby reports a 1995 study of plaintiff lawyers finding that these lawyers would not take a case unless the employee had at least $60,000 in back pay damages."

[9] *See, e.g.,* Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 2003/2004, Disp. Resol. J. 44.

informality of grievance arbitration permit a resolution to be obtained before the employment relationship has been severed and hence the employee retains a good prospect of continuing his career with the company despite his grievance.

The second consideration is one of efficiency both from the standpoint of employers and the courts. From the employer's perspective, it is difficult to manage an internal dispute system where some employees, because they are represented by labor unions, essentially are able to bypass internal processes culminating in arbitration before a neutral decision-maker while other employees, because they are not so represented, are subject to predispute arbitration agreements. This both complicates the work of internal human resources personnel and undermines the company and employee-wide interest in the uniform application of internal policies and procedures.

There is also an efficiency loss from the perspective of the courts because many of the cases that will end up in court, typically in the form of *pro se* filings, could have been readily resolved in the internal grievance and arbitration process. Internal resolutions are cases that never show up in agency or court dockets. Most cases involve fact-specific issues of who did what, to whom, when, where, and why. Such cases are grist for the grievance and arbitration process where they are likely to receive a fair hearing, especially because the arbitrator may be particularly sensitive to emerging patterns. The vast majority of these claims are not suitable

for the litigation process where they will, for sheer lack of representation if no other reason, inevitably receive short shrift.

Another important policy consideration is from the labor relations standpoint. Many of the Chambers' members have some segment of their workforce represented by labor unions for collective bargaining purposes. The essence of collective bargaining is mutual commitment to the process and to the outcomes of that process. It is corrosive of a good working relationship between employer and union if express agreements to submit all disputes to the grievance and arbitration process can be circumvented where some employees either find counsel or sue on their own to pursue their law suits. These cases can no longer be handled by the company's non-lawyer labor relations or human resources personnel. Moreover, the position and credibility of the employees' statutory bargaining agent is seriously undermined where such bypassing of the process is permitted.

In the final analysis, if this Court were to hold that, despite the sea-change in legal developments since its issuance in 1974, *Gardner-Denver*'s dictum still precludes enforcement of "clear and unmistakable" union-negotiated waivers of the right to go to court rather than arbitration over statutory employment claims, many employers will seriously consider negotiating predispute arbitration agreements directly with union-represented employees and bypassing the union. This approach, while hardly ideal given the inevitable overlap and redundancy

with collectively bargained processes, is available under existing law and may be attractive to employers faced with the prospect of having to undergo wasteful litigation with those grievants who already can challenge company actions on the very same statutory claims through the grievance and arbitration procedure. This alternative will leave represented employees with predispute arbitration agreements similar to that present in this case but without the bargaining leverage and competent representation available through their union.

CONCLUSION

For the reasons stated above, *Amicus Curae,* Chamber of Commerce of the United States of America, respectfully requests that the Court reverse the District Court's denial of appellants Motion to Compel Arbitration.

Dated: October 2, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. The undersigned counsel certifies that this brief complies with the type-volume limitation set forth in Fed.R.App.P. 32(a)(7)(B) and Fed.R.App.P. 29(d) because the brief contains 5,022 words, excluding the corporate disclosure statement, table of contents and table of authorities.

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared on a proportionally spaced type style using Microsoft Word in 14 point font Times New Roman type style.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STEVEN PYETT, THOMAS O'CONNELL, and MICHAEL PHILLIPS, Plaintiffs-Appellees, against PENNSYLVANIA BUILDING COMPANY 14 PENN PLAZA LLC, and TEMCO SERVICE INDUSTRIES, INC. Defendants-Appellants.	:	06-3047 **CERTIFICATE OF E-MAILING**

I, Todd Geremia, an attorney admitted to practice in the State of New York, hereby certify that on October 2, 2006, I caused to be emailed a copy of the Brief for the Chamber of Commerce of the United States Of America as *Amicus Curiae* in Portable Document Format (PDF) to briefs@ca2.uscourts.gov. The attorneys for Plaintiffs-Appellees, co-Defendant-Appellants Pennsylvania Building Company and 14 Penn Plaza LLC, and co-Defendant-Appellants Temco Service Industries, Inc., were carbon copied on the e-mails at JKreisberg@kmlaw.net, brauch@proskauer.com and HarryEsq@aol.com, respectively.

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ANTI-VIRUS CERTIFICATION FORM

CASE NAME: Steven Pyett, Thomas O'Connell, and Michael Phillips
Plaintiffs-Appellees,

v.

Pennsylvania Building Company, 14 Penn Plaza LLC, and Temco Service Industries, Inc.
Defendants-Appellants.

DOCKET NO.: 06-3047

I, Todd Geremia, certify that I have scanned for viruses the PDF version of the Brief for the Chamber of Commerce of the United States Of America as *Amicus Curiae* that was submitted in this case as an email attachment to <briefs@ca2.uscourts.gov> and that no viruses were detected.

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Dated: October 2, 2006

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CERTIFICATE OF SERVICE

I, Todd Geremia, Esq., hereby certify that I caused to be served, by UPS Overnight delivery, a copy of the Brief for the Chamber of Commerce of the United States Of America as *Amicus Curiae* in the matter of Pyett et. al v. Pennsylvania Building Co., 14 Penn Plaza LLC, and Temco Service Industries, Inc., 06-3047, on this 2nd day of October, 2006 upon:

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