No. 07-581

In the Supreme Court of the United States

14 PENN PLAZA LLC, ET AL., PETITIONERS

v.

STEVEN PYETT, ET AL.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The Court granted certiorari on the following question:

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

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INTEREST OF THE UNITED STATES

This case concerns the enforceability of a collective-bargaining agreement that purports to waive the rights of employees to bring claims arising under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, in a judicial forum. The Court's decision could also affect claims arising under other federal antidiscrimination statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, the Equal Pay Act of 1963 (EPA), 29 U.S.C. 206(d), and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301 *et seq*. The Equal Employment Opportunity Commission (EEOC) has authority to enforce the

ADEA and the EPA with respect to both public and private employers, and to enforce Title VII and the ADA with respect to private employers. See 29 U.S.C. 626; 29 U.S.C. 633a (2000 & Supp. V 2005) (ADEA); 29 U.S.C. 216(c) (EPA); 42 U.S.C. 2000e-5(a) (Title VII); 42 U.S.C. 12117(a) (ADA). The Attorney General has authority to enforce Title VII and the ADA against public employers, and to enforce USERRA against public and private employers. See 42 U.S.C. 2000e-5(f)(1) (Title VII); 42 U.S.C. 12117(a) (ADA); 38 U.S.C. 4323(a) (USERRA). Accordingly, the United States has a significant interest in the resolution of this case.[1]

STATEMENT

1. a. Petitioner 14 Penn Plaza LLC (the Company) owns and operates a New York City office building in which each of the three respondents worked as a night lobby watchman or night starter before July 2003. J.A. 2-5; Pet. App. 2a. Respondents were directly employed by petitioner Temco Service Industries, Inc. (Temco), which provided maintenance and cleaning services for the building. J.A. 3, 5.

Respondents allege that, in July 2003, they were reassigned to positions in the building that were "substantially less desirable," and, shortly thereafter, the Company contracted with a Temco affiliate to provide new security services and personnel at the building. J.A. 3, 6, 7, 27, 29, 30-31. Respondents were the only building

[1] The United States has participated as amicus curiae in other cases presenting the question whether a collective-bargaining agreement could waive individual employees' rights to file lawsuits raising federal discrimination claims. See *Wright* v. *Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974).

employees over the age of fifty, Pet. App. 4a, and the new night watchmen were much younger and had much less seniority at the building. J.A. 6-7, 8, 81, 88-89, 94. Respondents claim that their reassignments were motivated by age and violated the ADEA as well as state and local laws prohibiting age discrimination. J.A. 10-13.

b. Respondents are members of the Service Employees International Union, Local 32BJ (the Union). J.A. 3-5; Pet. App. 3a. They are covered by a Collective Bargaining Agreement (CBA) between the Union and the Realty Advisory Board on Labor Relations, Inc. (RAB), a multi-employer bargaining association for the New York City real-estate industry that includes petitioners. *Id.* at 3a. The CBA includes the following provision:

> 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, [certain enumerated antidiscrimination laws under New York, New York City, New Jersey, and Connecticut law], or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI [of the CBA]) as the sole and exclusive remedy for violations.

Id. at 48a.[2]

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[2] The Union's brief as amicus curiae (at 5 n.3) notes that the excerpts in the Joint Appendix and Petition Appendix are from a later version of the CBA, but that version is, in relevant part, identical to the version that applied when the events giving rise to this case occurred. See also

As in most CBAs, the Union here retains complete control over the presentation of claims on behalf of covered employees—including claims of discrimination—at both the grievance and the arbitration stages. The grievance stage involves meetings between "representative[s]" of "the Employer" and "the Union." Union Amicus Br. App. 1a (reprinting CBA Art. V.2(a)-(b)). Once a dispute proceeds from grievance to arbitration, the CBA specifically states that "[a]ll Union claims are brought by the Union alone, and no individual shall have the right to compromise or settle any claim without the written permission of the Union." Pet. App. 46a. The arbitrator is to be one of twelve labor arbitrators on a panel that is picked by the Union and the RAB, each of whose services may be terminated by the Union or the RAB upon 30 days' notice. *Id.* at 47a. The fees and expenses of the arbitrator are shared equally by the employer and the Union in most cases and borne entirely by the employer in others. *Id.* at 44a.

c. After their reassignments, respondents asked the Union to file grievances claiming that (1) petitioners violated the CBA's discrimination proscription by reassigning them to less desirable positions on account of their age; (2) petitioners violated seniority rules by failing to promote one of them to a handyman position; and (3) petitioners had failed to rotate overtime equitably in accordance with the CBA. J.A. 8, 30, 31-33. The Union exhausted the grievance procedure on all three claims and requested arbitration. J.A. 8, 33, 51.

In February 2004, soon after the initial arbitral hearing, the Union decided that it would not pursue respon-

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Resp. Br. 6, 8, 44-45 (quoting and citing version of CBA contained in the appendix used in the court of appeals).

dents' age-discrimination claim and withdrew it from the arbitration. J.A. 99. The Union's lawyer informed respondents that, because the Union had consented to the contract for new security personnel with the Temco affiliate, it could not object to respondents' reassignment as being discriminatory. J.A. 36, 83-84, 90, 96-97; Union Amicus Br. 16. In August 2005, after conducting seven additional hearings, the arbitrator denied respondents' seniority and overtime claims. J.A. 49-66.

2. In September 2004—while the arbitration was still proceeding on the other two claims and after respondents had obtained right-to-sue letters from the EEOC (J.A. 9)—respondents filed this suit against petitioners in the United States District Court for the Southern District of New York, alleging that they had been reassigned in violation of the ADEA and state and local laws prohibiting age discrimination. J.A. 10-13; Pet. App. 5a, 14a.

In November 2005, petitioners filed a motion to dismiss, or, in the alternative, to stay the proceedings and compel arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. 3, 4. Pet. App. 5a, 18a. Petitioners argued that respondents were bound by the CBA to arbitrate their statutory age-discrimination claim. *Id.* at 21a. Although the arbitration of the other two claims had already concluded, petitioners claimed that arbitration could still be conducted on the discrimination claim because they had arranged, after the fact, for an *ad hoc* substitute by securing the Union's "consent[] to the use of the Office of the Contract Arbitrator * * * created under the [CBA] * * * as the forum for [respondents'] private attorney to pursue [their] statutory age discrimination claims, as long as the parties to this lawsuit, and not the Union, pay the costs associated with the arbitra-

tion." *Id.* at 41a-42a.[3] Respondents countered that they were not bound by the union-negotiated arbitration agreement and preferred to press their discrimination claims in court. *Id.* at 21a.

The district court denied petitioners' motion to compel arbitration. Pet. App. 13a-22a. It concluded that respondents were not required to arbitrate their claim, because "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." *Id.* at 21a. Pursuant to 9 U.S.C. 16(a)(1), petitioners then brought an interlocutory appeal of the denial of their motion to compel arbitration. Pet. App. 7a.

3. The court of appeals affirmed. Pet. App. 1a-12a. Relying on prior circuit case law, it concluded that the question whether the CBA required respondents to arbitrate their discrimination claim is governed by this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), which allowed an employee to litigate his discrimination claim against his employer under Title VII, despite an arbitration provision contained in a union-negotiated CBA with the employer. Pet. App. 8a.

The court of appeals rejected petitioners' argument that *Gardner-Denver* had been overruled or superseded in relevant part by *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), or *Wright* v. *Universal Maritime Service Corp.*, 525 U.S. 70 (1998). The court deter-

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[3] Although it was not mentioned in their certiorari-stage briefs and is not in the record, petitioners claim to have lodged with the Clerk a February 2005 fax transmission from respondents' counsel declining to arbitrate respondents' age-discrimination claim. Pet. Br. 8-9 n.3. Petitioners cite nothing (either in or out of the record in this case) indicating that the Union consented to the *ad hoc* arbitration arrangement described in the text before November 2005.

mined that each of those decisions continued to recognize a distinction between arbitration agreements negotiated by an individual employee and those negotiated by a union. Pet. App. 8a-10a. In addition, the court observed that the alleged facts of this case "illustrate[]" a reason to distinguish arbitration agreements in individual contracts from those in CBAs: "If * * * the Union refused to submit the wrongful transfer claims to arbitration because the Union had agreed to the new contract [to bring in new security personnel], the interests of the Union and the interests of [respondents] are clearly in conflict." *Id.* at 11a-12a n.5 (citing *Gardner-Denver*, 415 U.S. at 58 n.19).

SUMMARY OF ARGUMENT

The court of appeals correctly held that the provisions of the CBA purporting to waive respondents' right to pursue relief in a judicial forum on their federal discrimination claim cannot be enforced.

A. In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court established that a union-negotiated mandatory-arbitration clause in a CBA cannot preclude a covered employee from pursuing a statutory employment-discrimination claim in court. Among other things, that principle accounts for the fact that there is an inherent conflict of interest between the majority of the union and the individual employees it represents, which is especially problematic in cases involving claims of discrimination. *Id.* at 51, 58 n.19. As the Court recognized in *Gardner-Denver*, union-controlled arbitration could allow the "the interests of the individual employee [to] be subordinated to the collective interests of all employees in the bargaining unit," and collectively waiving the employee's right to go to court "would defeat the

paramount congressional purpose behind Title VII." *Ibid.*

This Court has repeatedly reaffirmed *Gardner-Denver*'s conflict-of-interest rationale. See *McDonald* v. *City of West Branch*, 466 U.S. 284, 291 (1984); *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 742 (1981). And when this Court recognized in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that individual employees can be bound by pre-dispute agreements to arbitrate their statutory employment-discrimination claims, it distinguished arbitration agreements made by the individual employees themselves from those contained in union-negotiated CBAs. *Id.* at 35. That distinction is sound and it precludes unions from waiving employees' rights to bring a federal discrimination claim in a judicial forum.

B. The waiver at issue in this case suffers from an additional defect. Even assuming that a union-negotiated CBA could waive individual employees' rights to litigate their employment-discrimination claims, the employees would need at a minimum to retain the ability to control the presentation of their claims in the arbitral forum. Otherwise, the collective interests of the union would be allowed to trump not only the individuals' ability to choose a forum but also their ability to vindicate the substantive interests protected by antidiscrimination statutes. Such a waiver of substantive rights would be inconsistent with this Court's cases under the FAA, see, *e.g.*, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), as well as the text of the ADEA itself, 29 U.S.C. 626(f)(1). The CBA in this case gives the Union the exclusive discretion to decide whether to arbitrate a discrimination claim at all and thus runs afoul of that principle.

C. No statute requires an employee to arbitrate discrimination claims when he has neither agreed to arbitrate them nor has direct control of the arbitral process. In particular, neither the terms of the FAA nor this Court's FAA cases would require arbitration in the circumstances of this case, where an individual's statutory discrimination claim can be arbitrated only at the behest of a union. Nor does Section 118 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1081 (42 U.S.C. 1981 note), support arbitration in this case. Arbitration is not "appropriate," within the meaning of that provision, when, as here, it is both imposed by a CBA and then controlled by majoritarian forces within the union that may override the employees' individual interests and prevent the claim from being subjected to arbitration at all.

D. The policy concerns expressed by petitioners and their amici do not support the imposition of mandatory arbitration under the union's control in the context of this case. Contrary to petitioners' claims, the duty of fair representation cannot adequately protect employees from conflicts between their individual interests and the collective interests of their bargaining unit. See *Barrentine*, 450 U.S. at 742. Moreover, although arbitration indeed has many virtues, and an employee's decision to take advantage of its benefits must be respected, nothing in the general federal policy favoring arbitration compels the subjugation of an individual's decision whether to pursue arbitration to that of a union.

ARGUMENT

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT RESPONDENTS WERE NOT REQUIRED TO ARBITRATE THEIR FEDERAL DISCRIMINATION CLAIM

This case concerns whether, or in what circumstances, individual employees who have not personally agreed to arbitration can be compelled to give up a judicial forum for their statutory discrimination claims by a union-negotiated CBA. This Court's cases point to the conclusion that an individual employee may not be forced to give up a judicial forum for his federal discrimination claim in that manner. See *Alexander* v. *Gardner-Denver Co.*, *supra*. The attempted waiver in this case suffers from an additional defect. It not only would compel respondents to forgo a judicial forum for their federal discrimination claim, but also compel them to surrender to their union the power to determine how—and whether—their claim will be presented in the arbitral forum. Even assuming a union-negotiated CBA could waive a judicial forum for an individual's federal discrimination claim, it could not waive the individual's right to control the arbitration of that claim as well. The decision of the court of appeals should therefore be affirmed.

A. Under This Court's Precedents, Union-Negotiated Clauses Compelling Arbitration Of Statutory Discrimination Claims Are Not Enforceable Against An Individual's Private Right Of Action

This case should be disposed of under the basic principle established by this Court in *Gardner-Denver*, that a union-negotiated mandatory-arbitration clause in a CBA cannot preclude a covered employee from pursuing a statutory employment-discrimination claim in court.

See 415 U.S. at 49-50. That principle follows from the well-founded premise that *an individual's* ability to vindicate federal statutory antidiscrimination rights should not be subjugated to a union's judgment about the best *collective* interests of the employees it represents—either when the union negotiates an arbitration clause in the CBA, or when the union presents or compromises or declines to bring a particular claim through union-controlled grievance-and-arbitration machinery.

1. In *Gardner-Denver*, an employee subject to a CBA alleged that his discharge was the result of race discrimination by the employer. 415 U.S. at 38, 42. The CBA established a grievance-and-arbitration procedure and prohibited "discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry." *Id.* at 39. The union invoked the grievance-and-arbitration procedure, but the arbitrator ruled that the employee had been discharged for "just cause." *Id.* at 42-43. The employee then brought suit under Title VII, and the employer argued that the employee was bound by the arbitration procedure established under the CBA and thus precluded from seeking a judicial remedy under Title VII.

This Court held that the employee was entitled to pursue his statutory claim in court, notwithstanding the CBA's arbitration procedure. It rejected the argument that the employee had forfeited or waived his Title VII cause of action by electing and pursuing arbitration. *Gardner-Denver*, 415 U.S. at 49-51. The Court recognized that some kinds of statutory rights "are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain benefits for union members." *Id.* at 51. But it held that

the antidiscrimination protections of Title VII "stand[] on plainly different ground," because those rights "concern[] not majoritarian processes, but an individual's right to equal employment opportunities." *Ibid.* Accordingly, the Court held that the waiver of antidiscrimination rights "can form no part of the collective-bargaining process." *Ibid.*

2. *Gardner-Denver* was decided at a time when the suitability of arbitration for statutory claims was viewed with some suspicion, and this Court's decision reflects the view that arbitration was inferior to the judicial process for resolving such claims. See 415 U.S. at 57-58. As this Court has since recognized, "[t]hat mistrust of the arbitral process * * * has been undermined by [its] recent arbitration decisions," as well as by acts of Congress. *Gilmer*, 500 U.S. at 34 n.5 (quotation marks and citation omitted); see *id.* at 29 (citing 29 U.S.C. 626(b) and (c)(1)). Arbitration, including arbitration of statutory claims, is viewed much differently—and more positively—today than in the day when *Gardner-Denver* was decided. But the fact that arbitration is now recognized as a salutary development for resolving claims does not deprive *Gardner-Denver* of all precedential force with respect to the question presented.

The Court's decision in *Gardner-Denver* was also rooted in an alternative, still-legitimate concern that "[i]n 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," even though "harmony of interest between the union and the employee cannot always be presumed, especially where a claim of racial discrimination is made." 415 U.S. at 58 n.19. *Gardner-Denver* thus distinguished between "certain statutory rights related

to collective activity, such as the right to strike," which unions could waive on their members' behalf, and "an individual's right to equal employment opportunities" under Title VII, which "can form no part of the [union-controlled] collective-bargaining process since waiver of these [latter] rights would defeat the paramount congressional purpose behind Title VII." *Id.* at 51.

This Court has reaffirmed *Gardner-Denver*'s conflict-of-interest rationale in subsequent cases involving union arbitrations. In *McDonald* v. *City of West Branch*, *supra*, an employee sought to litigate a claim of racial discrimination under 42 U.S.C. 1983, despite an adverse decision in an arbitration pursued by the employee's union under a CBA. The Court explained that such circumstances present an inherent conflict between the collective interests of the union and the individual interests of the employee, because "under most collective-bargaining agreements the union controls access to the arbitrator, the strategy and tactics of how to present the case, the nature of the relief sought, and the actual presentation of the case." 466 U.S. at 291 n.10 (quotation marks and citation omitted). As the Court put it:

> [W]hen * * * the union has exclusive control over the "manner and extent to which an individual grievance is presented," *Gardner-Denver*, [415 U.S. at 58 n.19], * * * arbitration is an inadequate substitute for judicial proceedings. The union's interests 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. See *Gardner-Denver*, [415 U.S. at 58 n.19]; *Barrentine*, [450 U.S.] at 742. Thus, were an arbitration award accorded preclusive effect, an employee's

> opportunity to be compensated for a constitutional deprivation might be lost merely because it was not in the union's interest to press his claim vigorously.

Id. at 291 (footnote omitted). As *McDonald*'s citations indicate, the Court had also invoked the same rationale in *Barrentine*, in which it allowed an employee to litigate a claim for minimum wage and hour benefits under the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq*., despite having lost in an arbitration under his CBA. See 450 U.S. at 734, 742.[4]

Petitioners attempt to dispense with the *Gardner-Denver* line by suggesting that those cases involved questions about the "collateral estoppel or *res judicata* effect" of a completed arbitration, and assert that *Gardner-Denver* simply establishes a "claim preclusion" rule. Pet. Br. 36, 45. It is true that *Gardner-Denver* involved a completed arbitration and that this case does not, but that factual distinction cannot bear the weight that petitioners ask this Court to place on it. In particular, the fact that Alexander's grievance was arbitrated under the CBA in *Gardner-Denver* played no part in the distinction that the Court drew between a union's waiver of "certain statutory rights related to collective activity, such as the right to strike," and "an individual's right to equal employment opportunities." 415 U.S. at 51. Indeed, the Court made that express by stating in the next paragraph of its decision that "[t]he actual submission of petitioner's grievance to arbitration in the present case

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[4] Although the majority in *Barrentine* allowed an employee to bring statutory wage claims in court, even the dissenters recognized that a statutory guarantee of a "workplace free from *discrimination*, racial and otherwise" is a "fundamental right" that "is not and should not be subject to waiver by a collective-bargaining agreement negotiated by a union." 450 U.S. at 749 (Burger, C.J., joined by Rehnquist, J.).

does not alter the situation." *Id.* at 52. As this Court recognized in *Wright* v. *Universal Maritime Service Corp.*, 525 U.S. 70 (1998), *Gardner-Denver* held both that an employee does not forfeit his right to pursue a federal discrimination claim in court by pursuing his grievance to final arbitration under a CBA *and* that "[t]he statutory cause of action [in *Gardner-Denver*] was not waived by the union's agreement to the arbitration provision of the CBA." *Id.* at 76. The latter holding is, for the reasons discussed, on point here.

3. Petitioners put most of their stock in a line of cases exemplified by *Gilmer* v. *Interstate/Johnson Lane Corp.*, *supra*, in which this Court was receptive to the arbitration of statutory claims under contracts that had been executed by the individuals whose claims were to be arbitrated. See Pet. Br. 17-18 (citing *Gilmer*; *Green Tree Fin. Corp.-Ala.* v. *Randolph*, 531 U.S. 79 (2000); *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, *supra*). But that line of cases is distinguishable from the situation here, where a CBA purports to waive statutory rights *on behalf of* the individual (and in spite of the individual's own preference). In the *Gilmer* situation, the conflict of interest recognized in *Gardner-Denver* is not overriding because ultimately the individual himself may decide whether to agree to a waiver of his statutory rights.

Indeed, in *Wright*, this Court itself observed that there is "assuredly * * * support in the text of *Gilmer*" for a continued distinction between a waiver of federal forum rights in "union-negotiated CBAs" and a waiver of such rights in "individually executed contracts." 525 U.S. at 77; see also *Livadas* v. *Bradshaw*,

512 U.S. 107, 127 n.21 (1994) (explaining that *Gilmer* "emphasized its basic consistency with our unanimous decision in [*Gardner-Denver*]" by distinguishing *Gardner-Denver*'s reliance on, *inter alia*, "the concern that in collective-bargaining arbitration, the interests of the individual may be subordinated to the collective interests of all employees in the bargaining unit") (quotation marks and citation omitted).

4. Petitioners argue (Br. 21) that, "under well-established principles of labor law, [the CBA] is binding on [r]espondents as if they had signed it themselves." That is incorrect. The Union is empowered by the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, to bargain on behalf of employees it represents with respect to "pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. 159(a). But even in the context of *labor* rights, this Court has recognized that unions may not be permitted to bargain away the rights of individuals when the unions have a "self-interest" that differs from the interests of employees. See *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325 (1974) (explaining that a union's ability to waive employees' "rights in the economic area" does not allow it to impair the employees' choice of their bargaining representative, in part because the incumbent union has a "self-interest of its own to serve"); see also Resp. Br. 21-23; Nat'l Acad. of Arbitrators (NAA) Amicus Br. 22 n.6.

Moreover, petitioners do not cite any labor-law cases that allow unions' NLRA bargaining power to override the distinction between individual antidiscrimination rights and collective economic rights that was recognized in *Gardner-Denver*, *Barrentine*, *McDonald*, and *Gilmer*. Petitioners claim that "[t]his Court has already held that unions may waive individual * * * statutory

protections against discrimination." Pet. Br. 23; see also *id*. at 41-42. That argument, however, is based on a mistaken understanding of *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693 (1983). In *Metropolitan Edison*, this Court held that a union could waive the right of union officials *granted by the NLRA itself* to be free from antiunion discrimination if the CBA clearly and unmistakably binds union officials to take affirmative steps to end an unlawful work stoppage and they fail to do so. *Id.* at 697-698, 706, 708-709. In reaching that conclusion, the Court stressed that the "statutory protection" in question was "closely related to the economic decision a union makes when it waives its members' right to strike." *Id*. at 706, 707. In addition, the Court expressly distinguished *Gardner-Denver* as involving a statute other than the NLRA that protects an individual right, rather than "contemplat[ing] that individual rights may be waived by the union." *Id*. at 707 n.11.

The rights protected by the ADEA are by no means the kind of "rights related to collective activity, such as the right to strike," that unions may waive on their members' behalf under the rationale of this Court's prior cases. *Gardner-Denver*, 415 U.S. at 51. Allowing the Union to waive the antidiscrimination protections of the ADEA would "defeat the paramount congressional purpose behind" that statute, *ibid.*—just as it would with respect to Title VII (*Gardner-Denver*) and Section 1983 (*McDonald*). Cf. *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 412 (1988) ("[N]otwithstanding the strong policies encouraging arbitration, 'different considerations apply *where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers*.'") (quoting *Atchison, Topeka & Santa Fe Ry.* v.

Buell, 480 U.S. 557, 565 (1987)). Accordingly, the waiver at issue is not enforceable against respondents.

B. Even If A CBA Could Waive An Employee's Right To A Judicial Forum For A Statutory Discrimination Claim, The Employee Must At A Minimum Retain The Ability To Control The Presentation Of Such A Claim In The Arbitral Forum

As the court of appeals recognized (Pet. App. 11a n.5), petitioners' reading of the CBA would not only allow the Union to select a non-judicial forum for respondents' individual statutory discrimination claims, but also to determine whether or to what extent those claims will be brought at all in the non-judicial forum. Indeed, in this case, the Union-negotiated CBA prevented respondents from using the CBA's arbitral machinery to resolve their statutory claim against petitioners, and petitioners and the Union have offered only the use of an *ad hoc* extra-contractual process (which is itself seriously flawed) to arbitrate that claim. As a result, even assuming a CBA could ever waive an individual's right to a judicial forum for a federal discrimination claim (which, for the reasons discussed above, it may not), the particular waiver at issue in this case would still be unenforceable.

1. A union's pre-dispute waiver of not only the right to a judicial forum but also the right to control the presentation of a claim to an arbitral forum is effectively a prospective waiver of *substantive* rights or claims under antidiscrimination statutes, because a union may decide to pursue no remedy at all on behalf of an employee, even in an arbitral forum. *Gardner-Denver* expressed disapproval of such waivers. See 415 U.S. at 51 (holding "there can be no prospective waiver of an employee's

rights under Title VII"). And as petitioners concede, *Gilmer* reaffirmed that "substantive guarantees of federal anti-discrimination law are not waivable." Pet. Br. 37; see *Gilmer*, 500 U.S. at 28 (relying on the fact that "the prospective litigant may vindicate [his or her] statutory cause of action in the arbitral forum") (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 637).

Moreover, with respect to the specific statutory claim in this case, Congress has provided that "[a]n individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary." 29 U.S.C. 626(f)(1). Under that provision, the extensive delegation of authority to respondents' Union to decide whether their claim would even be advanced would not be valid. The combination of waiving the employees' entitlement to a judicial forum and refusing to bring their claim in a non-judicial forum is not simply a procedural decision. It effectively contracts away the employees' substantive rights under the ADEA, and the resulting waiver of their ability to bring a claim does not satisfy the statute's minimum standards for establishing that the waiver was "knowing and voluntary." Among other things, to be valid under the ADEA, such a waiver would need to be part of an agreement between "*the individual* and the employer"; it could apply only to claims that arose *before* the date of the waiver; and there would need to be "consideration" for the waiver. 29 U.S.C. 626(f)(1)(A), (C), and (D) (emphasis added). The waiver here meets none of those requirements.

2. Rather than defend the Union's refusal to carry respondents' discrimination claim to the conclusion of the CBA's grievance-and-arbitration procedure, petitioners attempt to elide the conflict of interest in this case by arguing that respondents are bound by the gen-

eral proposition that they will arbitrate claims under the CBA (including discrimination claims), but not by the specific form of arbitration dictated by the agreement itself. Thus, they insist that "*an* arbitral forum * * * remains available to [respondents]," Pet. Br. 39 (emphasis added); see also *id.* at 13, 16, 40, 41—even though that forum is not the one described in the CBA.

Even assuming that the extra-contractual, *ad hoc*, and post-dispute arbitral arrangement manufactured between the employer and the Union would qualify as an adequate arbitral forum, the post-dispute creation of such a forum cannot satisfy this Court's holding in *Wright* that any arbitration clause waiving union members' rights to litigate their statutory discrimination claims must be "clear and unmistakable" in the text of the CBA. 525 U.S. at 79-80. Indeed, in this case, the alternative arrangement not only fails to be unmistakable in the CBA; it is not even contained in the CBA. And it is *inconsistent with* the terms of the CBA, which purport to establish a different arrangement as the *only* way that disputes under the CBA will be arbitrated. See Pet. App. 45a ("The procedure *herein outlined* in respect to matters over which the Contract Arbitrator has jurisdiction shall be *the sole and exclusive method* for the determination of all such issues.") (emphases added).[5]

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[5] Even assuming that the affidavit from the Union's counsel (Pet. App. 41a-42a) could be found to reflect a written agreement on respondents' behalf, and that the Union's counsel could in such circumstances make a binding commitment on behalf of respondents, the affidavit does not by its own terms *require* respondents to arbitrate their discrimination claims, or represent that they will do so. Instead, it provides only the Union's consent to the alternative arrangement—and conditional consent at that ("as long as the parties * * * pay the costs").

Petitioners' amici do not appear to contend seriously that respondents are faced with the dilemma of choosing between entrusting control over their arbitration to the Union and accepting the extra-contractual arbitral forum offered by petitioners. The Chamber of Commerce discounts "generalized attacks on the ability of unions to be faithful agents for bargaining unit employees in the arbitration process," Amicus Br. 13 (quotation marks omitted), and it hypothesizes that, in some "cases, the union may step aside to relinquish control of the arbitration process in favor of members who are able to attract private counsel," *id.* at 12, but it never squarely addresses what should happen under the facts of this case, in which the union refused to allow the discrimination claim to be arbitrated under the processes prescribed in the contract. The Chamber does assume that a "predispute agreement[]" cannot effect a waiver under which "'the prospective litigant'" may not be able to "'vindicate [his or her] statutory cause of action in the arbitral forum.'" *Id.* at 8 (quoting *Gilmer*, 500 U.S. at 28). Yet that is of course the situation that respondents face under the terms of the CBA. See also Equal Employment Advisory Council (EEAC) Amicus Br. 5, 13.

3. Petitioners' attempt to minimize as "too speculative" the "risk" of a conflict between the collective interests of the bargaining unit and the individual interests of respondents is also unavailing. Pet. Br. 41 (quoting *Green Tree Fin. Corp.-Ala.*, 531 U.S. at 91). Indeed, the attempt is belied by the very facts of this case. The Union decided it was in the best interest of its collective membership to support the new security contract. When three individual employees alleged that the same contract led to violations of the ADEA, the Union refused to support their claims. Having agreed to the

deal, the Union believed it could not challenge that deal by pursuing respondents' ADEA allegations. The Union's lawyer specifically told respondents as much. J.A. 36, 83-84, 90-91, 96-97; Union Amicus Br. 16. The Union then refused to allow respondents' statutory claim to be arbitrated under the CBA. Consequently, the CBA did not allow for "effective[] * * * vindicat[ion]" of respondents' "statutory cause of action in the arbitral forum." *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 637).

C. No Statute Requires An Employee To Arbitrate Claims When He Has Neither Agreed To Arbitrate Nor Has Direct Control Over The Arbitration Of His Claims

1. Petitioners repeatedly assume or assert (Br. 1-3, 10, 12, 16-18, 21, 26, 30-33, 36, 37, 39, 40, 45) that the FAA applies to this case. In *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001), this Court held that the exemption of "contracts of employment" from the FAA (9 U.S.C. 1) applies only to transportation workers. In the wake of *Circuit City*, the courts of appeals remain divided on the question whether arbitration clauses in CBAs are covered by the FAA, or just by Section 301 of the Labor-Management Relations Act, 1947 (LMRA), 29 U.S.C. 185.[6] That question, which this Court declined to

[6] Compare *International Ass'n of Machinists & Aerospace Workers Local Lodge 2121* v. *Goodrich Corp.*, 410 F.3d 204, 207 n.2 (5th Cir.) (citing cases holding that the FAA does not apply to CBAs), cert. denied, 546 U.S. 1015 (2005), with *Smart* v. *International Bhd. of Elec. Workers, Local 702*, 315 F.3d 721, 724-725 (7th Cir. 2002) (holding that both the FAA and Section 301 apply to CBAs). See *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 466 (1957) (Frankfurter, J., dissenting) (agreeing with majority's implicit holding that the FAA does not apply to arbitration clauses in CBAs); *Elkouri & Elkouri: How Arbitration Work*s 49 n.11, 54 (Alan Miles Ruben ed., 6th ed. 2003)

address in *Wright*, see 525 U.S. at 77 n.1, was not addressed by the courts below and consistent with its customary practice the Court should decline to resolve the question in the first instance here. See, *e.g.*, *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999).[7]

In any event, the FAA's general policy in favor of arbitration—one refrain of petitioners' argument (Br. 12, 18)—is already paralleled by the federal policy in favor of arbitration that independently applies to CBAs under Section 301 of the LMRA, and this Court has already acknowledged that the FAA may provide "guidance" for "fashion[ing] rules of federal common law

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(noting that this Court's decision in *Circuit City* "did not address the issues relating to the application of the [FAA] in the context of a dispute arising under a collective bargaining agreement"; "[w]hether the FAA applies to arbitrations conducted under collective bargaining contracts is * * * an unanswered question").

[7] The Union's amicus brief suggests (at 3 n.2) that, because petitioners' interlocutory appeal was predicated on the denial of a motion to stay proceedings and compel arbitration under the FAA, the court of appeals must have assumed for jurisdictional purposes that CBAs are covered by the FAA. The court of appeals, however, has previously concluded that the FAA does *not* apply to suits brought under Section 301 of the LMRA, see *Coca-Cola Bottling Co.* v. *Soft Drink & Brewery Workers Union Local 812*, 242 F.3d 52, 54-56 (2d Cir. 2001), and it did not say anything to the contrary in this case. The district court's order *did* deny a motion to compel arbitration, and it was thus immediately appealable under the terms of 9 U.S.C. 16(a)(1). The court of appeals could have affirmed that denial on any of several alternative grounds (*e.g.*, because the FAA does not apply to CBAs, because the arbitration clause here is unenforceable under circuit precedent, because as a factual matter respondents did not actually agree to arbitration or did not agree to arbitration of these claims, etc.). There does not appear to be any jurisdictional significance to the order in which the court of appeals chose among such reasons for affirming the denial of the motion to compel.

* * * under the federal labor laws." *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987); see Pet. Br. 26 n.11 (acknowledging that "this Court has looked to both statutes interchangeably in describing the broad federal policy favoring arbitration"). Accordingly, regardless of whether the FAA applies to the CBA at issue, the FAA still provides guidance here.

Whether the FAA applies directly or as guidance, neither the terms of the FAA nor this Court's FAA cases would require arbitration under the circumstances of this case, where an individual's statutory claims must be arbitrated—and can *only* be arbitrated—at the behest or sufferance of his union. As this Court has explained, the FAA does not define the scope of an agreement or determine who is a party to that agreement. Instead, the FAA reinforces the terms of private contracts *between the contracting parties*. See *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002); *Mitsubishi Motors Corp.*, 473 U.S. at 628. It is therefore not surprising that this Court has not used the FAA to enforce a forum waiver granted vicariously by someone other than the party whose claim is to be heard in a non-judicial forum, and that petitioners must look beyond FAA jurisprudence to "principles of *labor law*" to argue—incorrectly—that the arbitration clause is "binding on [r]espondents as if they had signed it themselves." Pet. Br. 21 (emphasis added).[8]

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[8] As discussed above, see pp. 16-18, *supra*, the NLRA and this Court's labor-law cases do not establish any such waiver, since, *inter alia*, *Metropolitan Edison* recognized *Gardner-Denver* as establishing that, under the NLRA, unions cannot waive rights against discrimination that are granted to employees by statutes other than the NLRA.

The arbitration clause in the CBA also runs afoul of the FAA for a separate reason. This Court has repeatedly explained that, under the FAA, a party that "agree[s] to arbitrate a statutory claim * * * does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp.*, 473 U.S. at 628; accord *Preston* v. *Ferrer*, 128 S. Ct. 978, 987 (2008); *Gilmer*, 500 U.S. at 26, 29. See also Pet. Br. 13, 24, 37. That foundation of FAA jurisprudence is transparently inapplicable in a case such as this one, where the CBA requires employees to forgo not only their right to a judicial forum but also their right to determine whether their claims will be presented in the arbitral forum at all.

2. Petitioners and one of their amici also seek (Pet. Br. 20 n.8; EEAC Amicus Br. 9 n.2) support from Section 118 of the Civil Rights Act of 1991. It provides: "Where appropriate and to the extent authorized by law, the use of alternative dispute resolution, including * * * arbitration, is encouraged to resolve disputes arising under [Title VII, the ADEA, and 42 U.S.C. 1981]." Pub. L. No. 102-166, § 118, 105 Stat. 1081 (42 U.S.C. 1981 note); see also 42 U.S.C. 12212 (materially identical provision governing the ADA). Congress is presumed to be aware of this Court's cases when it legislates. See *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 792, 804 n.4 (1998) (declining to depart from "the limits of employer liability" under Title VII expressed in a prior case because Congress chose to leave those limits "intact" in the Civil Rights Act of 1991). Accordingly, when Congress enacted that statute, it had every reason to believe, based on the precedents discussed above, that

arbitration was neither "appropriate" nor "authorized by law" in the circumstances of this case.

The legislative history bears that out. As the House Judiciary Committee explained:

> The Committee emphasizes * * * that the use of alternative dispute mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of *a collective bargaining agreement* or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.*

H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 2, at 41 (1991) (emphasis added); see also H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 1, at 97 (1991) (same statement in report by House Education and Labor Committee).[9]

As Judge Posner has explained for the Seventh Circuit, arbitration "is *not* appropriate when it is not agreed to by the worker but instead is merely imposed by a collective bargaining agreement that he may have opposed." *Pryner* v. *Tractor Supply Co.*, 109 F.3d 354, 363, cert. denied, 522 U.S. 912 (1997). And arbitration

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[9] The legislative history for Section 513 of the ADA (42 U.S.C. 12212) is to the same effect: "It is the intent of the conferees that the use of these alternative dispute resolution procedures is completely voluntary. Under no condition would an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their rights under the ADA." H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 89 (1990).

is doubly inappropriate when, as here, it is both imposed and then controlled by majoritarian forces within the union that may override the employees' individual interests and refuse to arbitrate at all.

Accordingly, Section 118 cuts against petitioners' claim that respondents' age-discrimination claim had to be arbitrated and directly refutes their assertion (Br. 26-27) that "there is nothing in the ADEA's text or legislative history demonstrating that Congress distinguished between promises to arbitrate ADEA claims depending on whether individual employees agreed to them or they were agreed to in collective bargaining."[10]

D. The Policy Concerns Expressed By Petitioners And Their Amici Do Not Justify Any Different Result

Petitioners and their amici argue that the duty of fair representation will adequately protect employees from the inherent conflict between collective and individual interests. They also extol the virtues of arbitration as an efficient means of dispute resolution—even in cases involving employment discrimination—and argue that compelled arbitration in this context would foster parity between union-represented and unrepresented employees. Those policy concerns, however, do not alter the result called for by this Court's precedents and Congress's actions, as discussed above.

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[10] The provision of the ADEA defining what constitutes a "knowing and voluntary" waiver of rights under the ADEA underscores that Congress has distinguished between individual and collective waivers when the effect of a collective waiver goes beyond that of a forum-selection clause and threatens to deprive the employee of the right to bring a claim at all. As discussed above, see p. 19, *supra*, that provision expressly requires, *inter alia*, that a waiver be "part of an agreement between the individual and the employer." 29 U.S.C. 626(f)(1)(A).

1. Petitioners and amicus Chamber of Commerce claim (Pet. Br. 42; Amicus Br. 11) that the answer to the conflicts between collective and individual interests is the duty of fair representation that unions owe to represented employees. As respondents explain (Br. 38-41), however, suits to enforce the duty of fair representation are insufficient to safeguard non-labor, non-collective rights like those granted to individual employees by the federal antidiscrimination statutes. Indeed, even "hybrid" suits against both the employer and the union (not discussed by respondents) are fundamentally inadequate because an employee can obtain *none* of the benefits of a successful suit against the employer for breach of the CBA unless the union is also found to have breached its duty of fair representation.[11] NAA Amicus Br. 21. That dynamic systematically overprotects employers because the regime for enforcing the unions' duty is "highly deferential" to their judgments about what is in the general interest of represented employees. *Air Line Pilots Ass'n* v. *O'Neill*, 499 U.S. 65, 78 (1991). That is true not just when the union negotiates the terms of a CBA, but also in the labor arbitrations that serve as a continuation of the collective-bargaining process. *Id.* at 77.

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[11] A "hybrid" suit includes both a claim against the employer for breach of the CBA and a claim against the union for breach of the duty of fair representation. See *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 164-165 (1983); *Bowen* v. *USPS*, 459 U.S. 212, 218 (1983) ("[A]n employee * * * who proves that his employer violated the labor agreement and that his union breached its duty of fair representation[] may be entitled to recover damages from both the union and the employer."); see also Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law: Unionization and Collective Bargaining* § 30.10 at 1012-1013 (2d ed. 2004) (describing potential for injunctive relief against both employer and union).

Accordingly, this Court has already concluded that fair-representation suits are inadequate to protect statutory rights against discrimination. As *Barrentine* explained, a union may—"without breaching its duty of fair representation"—decide not to pursue an employee's "*meritorious*" claim in the grievance-and-arbitration process for a host of reasons owing to the collective rather than the individual good. 450 U.S. at 742 (emphasis added). Such reasons could include simple decisions about the allocation of scarce union resources or even the union's honest belief that pursuing a particular claim at a particular time might "jeopardize its strategic relationship to the company." NAA Amicus Br. 20. Nothing in the FAA or in *Gilmer* contemplates that an individual's ability to bring his statutory claim in a nonjudicial forum can permissibly be made contingent upon such judgments by others.

2. Taking their cue from this Court's decisions under the FAA, petitioners (Br. 27-30) and their amici (Chamber Amicus Br. 14-17; EEAC Amicus Br. 12-14) describe some of arbitration's comparative benefits as a method of dispute resolution. In the employment context in general, arbitration indeed has many virtues, as this Court and Congress have recognized. As respondents (Resp. Br. 25-26, 48 & n.14) and the National Academy of Arbitrators (Amicus Br. 14-16) point out, however, there is reason to believe that the form of *labor* arbitration established in the CBA may not be—as *employment* arbitration can be—optimal for the resolution of individual discrimination claims, especially when those claims are not supported by the Union.

In any event, whatever the relative policy merits of arbitration for resolving the discrimination claim in this case, federal policy in favor of arbitration is not so pa-

ternalistic as to compel it in the absence of an agreement to arbitrate by the individual himself. The decision about whether to arbitrate (and whether to use a variant of labor arbitration rather than employment arbitration) should be made by the parties, and not forced on them by a union. Many individuals may (no doubt for good reason) choose to avail themselves of an arbitral rather than judicial forum, and that choice should be respected. But nothing in the general federal policy favoring arbitration compels the subjugation of an individual's decision whether to pursue arbitration to a union.

3. The EEAC contends (Amicus Br. 14) that the court of appeals has created an "anomaly in employment law by rendering it virtually impossible for union-represented employees * * * to exercise the same basic right that unrepresented employees * * * have enjoyed since *Gilmer*" to benefit from arbitration "with respect to statutory discrimination claims." But this case is not like *Gilmer*, because the employees have not agreed to arbitrate. Unlike the employer in *Gilmer*, see 500 U.S. at 23, petitioners have not made such an agreement a condition of employment. To the contrary, as the Union has explained (Amicus Br. 11-12), petitioners' negotiating representatives abandoned an attempt to do so in 2000. They specifically sought to secure consent from respondents' union for making an agreement to arbitrate a condition of employment (with which individual employees could then have been deemed to consent by continuing to work for petitioners). When the Union did not agree, there was apparently no further effort to secure such an agreement. *Id.* at 12.[12]

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[12] Thus, despite petitioners' suggestion that employers would not need a union's consent to implement such a *Gilmer*-like arrangement

Of course, to the extent that union-represented employees do manifest their individual consent to arbitration, consistent treatment with the employee in *Gilmer* would still require them to have control, at least, over whether and how their claims are presented to the arbitral panel, and also to have some control over the panel itself. Cf. *Gilmer*, 500 U.S. at 30. Neither of those minimum conditions is satisfied here.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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directly with their union-represented employees, Pet. Br. 14, 32 (citing *Air Line Pilots Ass'n, Int'l* v. *Northwest Airlines, Inc.*, 199 F.3d 477 (D.C. Cir. 1999), adopted as opinion of en banc court, 211 F.3d 1312 (per curiam), cert. denied, 531 U.S. 1011 (2000)), the facts of this case present no occasion to determine what level of union participation, if any, is necessary to that process. See NAA Amicus Br. 26 n.8 (noting that the question is novel, the analysis is "actually rather complicated," and the NLRB has not yet addressed it).