UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED PARCEL SERVICE, INC.

and Case No. 06-CA-143062

ROBERT C. ATKINSON, JR.

MOTION OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

In response to the National Labor Relations Board ("the Board") inviting supplemental briefs, in Case No. 06-CA-143062, regarding what should be the standard for dismissing a charge after a binding arbitration decision, the Chamber of Commerce of the United States of America ("the Chamber") respectfully moves to file the attached brief *amicus curiae*.

The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members and the broader business community in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases involving issues of concern to the nation's business community. This is such a case. When employers and union agree to binding arbitration, both parties agree that the arbitrator's decision will establish what was the intended meaning and consequences of the contractual language. The business community at large has a substantial interest in the Board adopting a deferral standard that accepts and gives effect to what the parties have bargained.

The attached brief advocates for abandoning *Babcock & Wilcox Construction Co,* 361 NLRB 1127 (2014), refining the language of *Olin Corp.,* 268 NLRB 573 (1984), and adopting a waiver-based standard that would require dismissal of any charge relating to the discipline of a represented employee if:

1. The union has agreed to be bound and the arbitrator has upheld that discipline;
2. The employee has no viable claim that the union breached its duty or the proceedings were tainted by fraud or the arbitrator's dishonesty; and
3. The Act allows a union to waive the relevant statutory protection.

If the statutory protection cannot be waived through collective bargaining, then the Board must reach the merits. Additionally, if there is a viable claim that the union breached its duty, then the employee is not bound by the arbitrator's application of the contract. But where a union may bargain away the relevant statutory protection, the Board has no role to play after an arbitrator upheld discipline at issue in an unfair labor practice charge. A contrary result nullifies lawful bargaining. Because a union may "bargain away" its members' "economic rights" and agree to binding arbitration, *Metropolitan Edison Co.*, 460 U.S. 693, 705-06 (1983), what the union has bargained away is defined by an arbitrator applying the contract in the context of a case. As Judge Edwards has explained: "where the parties provide for final and binding arbitration of their disputes, the arbitrator's decision becomes a part of the written contract, and that contract, as construed by the arbitrator, can waive rights otherwise provided by the statute." *Deferral to Arbitration and Waiver of the Duty to Bargain*, 46 Ohio St. L.J. 23, 38 (1985).

Dated: April 29,2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was e-filed and served by e-mail on Julie R. Stern, Counsel for the General Counsel (julie.stern@nlrb.gov); Jennifer R. Asbrock, Counsel for Respondent United Parcel Service (jasbrock@ftblaw.com); and Catherine A. Highet, Counsel for Charging Party (cathy@highetlaw.com).

Dated: April 29, 2019

/s/ Marshal Babson
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BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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INTRODUCTION

The Chamber of Commerce of the United States of America (the "Chamber") submits this brief *amicus curiae*, responding to the National Labor Relations Board ("the Board") seeking supplemental briefs, in Case No. 06-CA-143062, regarding what should be the post-arbitral deferral standard. The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members and the broader business community in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases involving issues of concern to the nation's business community. This is such a case.

The Board's deferral analysis historically has attempted to answer when a statutory issue raised by a charge was resolved by an arbitrator's decision concerning a related dispute arising under a labor agreement. *Spielberg Manufacturing Co.,* 112 NLRB 1080 (1955) required: binding arbitration; an apparently fair proceeding; and a result "not clearly repugnant to the Act." *Olin Corp.,* 268 NLRB 573 (1984) required: binding arbitration over a factually parallel issue; apparent general presentment of the relevant facts at an apparently fair proceeding; and a decision "susceptible to an interpretation consistent with the Act." Most recently, *Babcock & Wilcox Construction Co,* 361 NLRB 1127 (2014) requires: an agreement to binding arbitration and also an agreement either incorporating the statutory right at issue or explicitly authorizing the arbitrator to decide the statutory issue; an apparently fair proceeding and also a showing that the arbitrator considered the statutory issue or was prevented from doing so by the opponent of deferral; and a "reasonable application of the statutory principles that would govern the Board's decision."

Although never asserting authority over the contractual, as opposed to the statutory, issue, the Board periodically has erred by mixing the two. First, about two decades after *Spielberg*, the Board began using the "clearly repugnant" standard to review the contractual interpretation of the arbitrator rather than contractual consequence imposed by the arbitrator. These decisions were consistently reversed, leading to *Olin.* Although allowing for occasional error where the arbitrator applied the contract's general discipline standard, *Olin* produced appropriately narrow review of the agreement and proceeding. After three decades, *Babcock* directed intrusion into matters that federal law commands must be left exclusively to the parties, federal courts, and the arbitrator.

The Board should abandon *Babcock*, correct a flaw of *Olin*, and adopt a waiver-based standard. Deferral analysis should accept what the arbitrator interpreted the contract to mean and ask whether a contract may have that meaning under the National Labor Relations Act ("the Act"). This approach is dictated by how unionized employment is regulated by the Act and the Labor Management Relations Act ("LMRA"). Section 9(a) of the Act vests the union with exclusive authority and broad discretion subject only to the duty of fair representation. Section 8(d) of the Act preserves to the union and employer the exclusive authority to determine jointly the language of the contract. Section 203(d) of the LMRA affirms that the parties have exclusive authority to agree who determines the intended consequences of the contractual language. Section 301 of the LMRA has been interpreted to grant courts the exclusive authority to develop the federal common law governing the determination of the intended contractual consequences. Federal common law endows the arbitrator with authority and broad discretion to determine the intended contractual consequences. And, finally, Section 10(a) of the Act preserves to the Board the jurisdiction and authority to determine whether the intended contractual consequences and meaning found by the arbitrator are permitted by the Act.

This statutory framework answers when an arbitration agreement, proceeding, and decision resolve an unfair labor practice charge challenging discipline. If the union and employer have agreed to binding arbitration over whether the contract allows that discipline, the arbitrator's decision upholding the discipline establishes that the parties intended the contract to allow that discipline. Unless the employee can show that the union breached its duty of fair representation, the proceeding establishes a contractual waiver of any statutory protection. Unless the Board finds that the statutory protection at issue cannot be waived by collective bargaining, the arbitrator's decision establishes that the employer has not violated the Act.

Simply put, the Board cannot find a violation of the Act where the statutory protection may be waived under the Act and was waived under the arbitrator's application of the contract. A contrary result nullifies lawful bargaining. Conversely, if the statutory protection cannot be waived through collective bargaining, then the Board must reach the merits. Additionally, if there is a viable claim that the union breached its duty, then the employee is not bound by the arbitrator's application of the contract. But there is nothing left for the Board to determine after the parties agreed to final and binding arbitration and the arbitrator determined that the union bargained away a statutory protection that may be bargained away under the Act. As Judge Harry Edwards has explained: "the arbitrator's decision becomes a part of the written contract, and that contract, as construed by the arbitrator, can waive rights otherwise provided by the statute." *Deferral to Arbitration and Waiver of the Duty to Bargain*, 46 Ohio St. L.J. 23, 38 (1985). Thus, where a binding arbitration decision applies the parties' contract in the context of a case, what the union has bargained away has been defined by what the arbitrator has held. The Board should accept and give effect to what the parties have bargained. That itself is a core principle of the Act.

ARGUMENT

I. Federal Labor Law Commands A Waiver-Based Standard.

Deferral analysis is not entirely a matter of discretion. While Section 10(a) of the Act preserves jurisdiction without exception, what federal law reserves to the parties, arbitrators, and courts limits the Board. "Congress determined both how much the conduct of unions and employers should be regulated and how much it should be left unregulated." *Metro. Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 751 (1985). For this reason, federal law protects what "Congress intended to be unrestricted by any governmental power to regulate." *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 141 (1976). That "interest in being free of governmental regulation [] is a right specifically conferred on employers and employees by the NLRA." *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 112 (1989). And it leaves "a zone free from all regulations, whether state or federal." *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass. IR. I., Inc.*, 507 U. S. 218, 226 (1993).

Only the union and employer together can impose contractual terms of employment. "The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937). Thus, Section 8(d) of the Act defines collective bargaining as a duty to "meet at reasonable times and confer in good faith"—including for "the negotiation of an agreement" and "any question arising thereunder"—that "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). "It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." *H. K. Porter Co. v. NLRB,* 397 U. S. 99, 107 (1970).

In addition, only the union and employer together can determine the process and forum for resolving disputes regarding the meaning of the contract. Congress considered and rejected legislation that would have required arbitration and granted the Board jurisdiction over contractual disputes. *See NLRB v. C & C Plywood Corp.*, 385 U.S. 421, n.11 (1967). Consistent with the Act's definition of collective bargaining, Section 203(d) of the LMRA affirms: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. § 173(d). Arbitration is a "matter of consent" under the Act, and it may not "imposed beyond the scope of parties' agreement." *Litton Fin. Printing Div., Inc. v. NLRB*, 501 U.S. 190, 201 (1991).

Federal common law governs labor arbitration. Congress wanted unions' "agreements not to strike," understood that employers' agreements to arbitrate were "the *quid pro quo* for an agreement not to strike," and for this reason enacted Section 301 of the LMRA, 29 U.S.C. § 185, mandating a "policy that federal courts should enforce these agreements on behalf of or against labor organizations." *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 453-55 (1957). The "philosophy" is that "the collective agreement as a valid, binding, and enforceable contract [] will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace." *Id.* at 454. Granting more than jurisdiction, Section 301 authorizes the "courts to fashion a body of federal law for the enforcement of ... collective bargaining agreements." *Id.* at 451. Thus, "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985).

As the Supreme Court has emphasized since at least the "*Steelworkers Trilogy*," the arbitrator alone determines the meaning of the contract where the parties have agreed to binding arbitration. If there is an agreement to arbitrate all questions arising under the collective bargaining agreement, the court "is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 567-68 (1960). When a party seeks to enforce the agreement, it gets a court order to arbitrate the particular grievance "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements." *United Steelworkers v. Enterprise Wheel & Car Co*., 363 U.S. 593, 596 (1960).

The arbitrator's decision is final and binding irrespective of apparent legal and factual errors by the arbitrator. The Supreme Court rejected a standard that would have asked whether the arbitrator was "applying correct principles of law," recognizing that such review "would make meaningless the provisions that the arbitrator's decision is final." *Enterprise Wheel*, 363 U.S. at 599-600. "When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's improvident, even silly, factfinding does not provide a basis for a reviewing court to refuse to enforce the award." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001). As long as the arbitrator was "even arguably construing or applying the contract and acting within the scope of his authority," that the arbitrator "committed serious error does not suffice to overturn his decision." *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

Moreover, the arbitrator plays a necessary gap-filling role that is "part of the continuous collective bargaining process." *Warrior & Gulf,* at 581-82. Although the labor agreement "covers the whole employment relationship," it provides only a "generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *Id.* at 578-79. It is an "effort to erect a system of self-government" with the grievance-arbitration machinery "at the very heart of the system of industrial self-government." *Id.* at 580-81. It thus "calls into being a new common law—the common law of a particular industry or of a particular plant." *Id.* at 580. The arbitrator, therefore, "is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop —is equally a part of the collective bargaining agreement, although not expressed in it." *Id*. at 582-83.

An unfair labor practice finding cannot be contrary to what the arbitrator applied the contract to mean. "The Board's remedial powers under Section 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself." *H. K. Porter*, 397 U.S. at 108. The Supreme Court has never suggested that the Act allows the Board to find an unfair labor practice by resolving contractual disputes, let alone to do so while overriding what an arbitrator found to be the intended contractual meaning and consequence. The Board can enforce Section 8(d) obligations without determining contractual meaning, such as requiring that a party comply with the contract as if it had been signed, *NLRB v. Strong*, 393 U.S. 357, 362 (1969), or finding a unlawful modification if the issue is not arbitrable, *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967). The Board also can find Section 8(a) violations while finding that the meaning of the contract is unlawful, *NLRB v. Magnavox Co. of Tennessee,* 415 U.S. 322 (1974), immaterial, *NLRB v. City Disposal Sys. Inc.,* 465 U.S. 822 (1984), or undetermined if the conduct at issue was not before an arbitrator, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983).

If the arbitrator applied the contract to allow the discipline at issue in a charge, the Board must accept that the employer has a right to impose that discipline under the contract. The Supreme Court has explained that the Board must follow Section 301 common law:

> We would risk the development of conflicting principles were we to defer to the Board in its interpretation of the contract, as distinct from its devising a remedy for the unfair labor practice that follows from a breach of contract. We cannot accord deference in contract interpretation here only to revert to our independent interpretation of collective-bargaining agreements in a case arising under Section 301.

Litton Fin. Printing Div., Inc., 501 U.S. at 203. And Section 301 common law commands that one "must assume that the collective-bargaining agreement itself" has the meaning applied by the arbitrator, including for contractual terms such as "just cause." *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 61 (2000). Thus, the Board is left to decide only the ultimate statutory issue—whether the protection can be waived by a union.

Such limited review is the original intent of *Spielberg* and *Olin*. In *Spielberg*, the Board explained that the quality of the arbitrator's decision is immaterial. After the parties agreed to binding arbitration to resolve a dispute over the employer's refusal to reinstate employees for their acts while picketing, it did not matter that the arbitrator "merely state[d] that the Company was justified in refusing to reinstate" because the "refusal to reinstate these employees was in accordance with an arbitration award and therefore proper." 112 NLRB at 1084, 1081, n.6. In *Olin*, the Board explained that the arbitrator's decision itself establishes the waiver. The arbitrator upheld disparate treatment of a union officer, the administrative law judge reviewed the contractual language, and the Board explained that analysis asked the wrong question. Since the "question of waiver [] is also a question of contract interpretation" and the "arbitrator's interpretation of the contract is what the parties [] bargained for," the arbitrator's decision determined what the union waived. 268 NLRB at 574-76.

Neither *Spielberg* nor *Olin* intended for "clearly repugnant to the Act" to allow review of the contractual interpretation. As the Supreme Court approvingly characterized *Spielberg* deference, it calls for review of only the "results" of the arbitrator's decision: "the Board shows deference to the arbitral award, provided the procedure was a fair one and the results were not repugnant to the Act." *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 270-71 (1964). As the Board recognized in decisions issued within a year of *Olin*, precisely because the "the grievance-arbitration process is as much a part of collective bargaining as the act of negotiating the contract," *United Techs. Corp.*, 268 NLRB 557, 559 (1984), the Board should neither "enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct," *NCR Corp.,* 271 NLRB 1212, 1213 (1984), nor "substitute its judgment for that of the arbitrator in resolving contractual issues," *Andersen Sand & Gravel Co.*, 277 NLRB 1204, 1205 (1985).

During the three decades of the *Spielberg-Olin* standard, the Board repeatedly recognized that the arbitrator's application of the contract—not the arbitrator's application of Board law or the terms of the contract—is what establishes the waiver of statutory protection. Because "mere disagreement with the arbitrator's conclusion would be an insufficient basis for the Board to decline to defer," *Smurfit-Stone Container Corp.,* 344 NLRB 658, 660 (2005), the issue is not whether "the arbitrator's analysis [] comports precisely with certain Board decisional precedent," *U.S. Postal Service*, 275 NLRB 430, 432 (1985). If the "arbitrator's decision can be susceptible to the interpretation that the arbitrator found a waiver, even if the arbitral award does not speak in those terms," *S. California Edison Co.*, 310 NLRB 1229, 1231 (1993), deferral is appropriate "even if neither the award nor the clause read in terms of the statutory standard of clear and unmistakable waiver," *Motor Convoy*, 303 NLRB 135, 136 (1991).

Nonetheless, the Board occasionally missed the statutory waiver issue and instead reviewed the contractual interpretation. During the period before the 1984 *Olin* decision, the Board applied "clearly repugnant" to the contractual interpretation and was consistently reversed, including by the Ninth Circuit in 1979, the Third Circuit in 1980, the Second Circuit in 1981, and the Fourth Circuit in 1982, and the Fifth and DC Circuits in 1983. *See Douglas Aircraft Co. v. NLRB*, 609 F.2d 352, 355 (9th Cir. 1979); *NLRB v. Pincus Bros.-Maxwell*, 620 F.2d 367, 376–77 (3d Cir. 1980); *Liquor Salesmen's Union Local 2 of State of N.Y., Distillery, Rectifying, Wine & Allied Workers' Int'l Union, AFL-CIO v. NLRB*, 664 F.2d 318, 323 (2d Cir. 1981); *NLRB v. Motor Convoy, Inc.*, 673 F.2d 734, 736 (4th Cir. 1982); *Richmond Tank Car Co. v. NLRB*, 721 F.2d 499, 502 (5th Cir. 1983); *American Freight Systems v. NLRB*, 722 F.2d 828 (D.C. Cir. 1983).

After *Olin*, the Board occasionally strayed by declining to defer without answering if a union may waive the statutory protection after discipline was upheld by the arbitrator under "just cause" standards. For example, because the arbitrator failed to address if the conduct was generally protected by the Act, the Board declined to defer after arbitrators upheld discipline for asserting a contractual right while acting as a steward, *Garland Coal & Min. Co.*, 276 NLRB 963 (1985), for the "display of controversial placards" demanding the payment of wages that was not sanctioned by the union, *110 Greenwich St. Corp.*, 319 NLRB 331, 332 (1995), and for conduct seeking to align other employees in opposition to the incumbent union leadership, *Mobil Oil Exploration & Producing, U.S., Inc.,* 325 NLRB 176 (1997). These results might ultimately be correct, because the union might not be able to waive the statutory protection at issue, but the Board's incorrect mode of analysis never reached the issue. *See Kvaerner Philadelphia Shipyard, Inc. & William Smith*, 347 NLRB 390, 394 n.5 (2006) (explaining that *Garland Coal*, *110 Greenwich*, and *Mobil Oil* turned on the failure to address whether the conduct is generally protected by the Act).

The Board should abandon "clearly repugnant" (or at least specify what must be its limited meaning). More than 60 years after *Spielberg*, it is still causing confusion. In one of the latest decisions reviewing an application of *Olin*, a three-judge panel of the D.C. Circuit arrived at two answers, two results under one of the answers, and the conclusion that the Board was wrong under both answers. *See Verizon New England Inc. v. NLRB*, 826 F.3d 480 (D.C. Cir. 2016). The Board had declined to defer to an arbitration decision applying "picketing" in the contract, because the Board concluded that the contractual interpretation was inconsistent with the meaning of that term under Board precedent. Judge Henderson read "clearly repugnant" to ask only whether the statutory protection could be waived. Judges Kavanaugh and Srinivasan read "susceptible to an interpretation consistent with the Act" and "palpably wrong" as separate paths to show clear repugnancy, with the former having the meaning articulated by Judge Henderson and the later also allowing the Board to override an egregiously wrong interpretation of the contract. And Judges Kavanaugh and Henderson formed a 2-1 majority reversing the Board.

The Board instead should adopt a waiver-based standard and defer and consequently dismiss any charge relating to the discipline of a represented employee if:

1. The union has agreed to be bound and the arbitrator has upheld that discipline;
2. The employee has no viable claim that the union breached its duty or the proceedings were tainted by fraud or the arbitrator's dishonesty; and
3. The Act allows a union to waive the statutory protection.

Such an approach properly preserves to the arbitrator what the *Steelworkers Trilogy* requires that arbitrators decide and reserves to the Board the ultimate statutory question. The contractual and statutory issues should never be mixed. Arbitrators say what the contract means; the Board decides whether it is allowed by the Act.

II. *Babcock* Cannot Be Squared With Federal Labor Law.

Where *Spielberg* and *Olin* invited occasional error, *Babcock* makes a folderol of deferral. Its heightened standard for a binding agreement assumes that an anti-discrimination statute overrides the parties' authority under the Act. The consequent heightened review of the proceeding is a misguided prioritization of individual employees that ignores the courts' authority under the LMRA and the union's authority under the Act. And the heightened standard for the decision is a misunderstanding of labor arbitration that overrides the arbitrator's authority under federal common law and thereby the parties' agreed upon system of "industrial self-government."

A. The Union's Agreement To Binding Arbitration Is Sufficient.

Babcock wants either "the specific statutory right at issue" in the contract or the parties to have "explicitly authorized the arbitrator to decide the statutory issue." 361 NLRB at 1131. The perceived need for the arbitrator to act as a Board surrogate applying the Act misapprehends the critical deference between an anti-discrimination statute and federal labor law.

The Board looked to a statute where the right to a judicial forum may be waived in a contract and the protection from discrimination may not be waived in a contract. Both rules apply to individual employment contracts and collective bargaining agreements alike. The Age Discrimination in Employment Act ("the ADEA") only allows waivers if "the individual does not waive rights or claims that may arise after the date the waiver is executed." 29 U.S.C. § 626 (f)(1)(C). But the right to a judicial forum is not such a right. Employers can enforce agreements with employees waiving the right to a judicial forum for ADEA claims. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Because the ADEA permits such agreements and represented employees are bound by their union's waivers of waivable rights, represented employees must arbitrate ADEA claims if that is what the collective bargaining agreement "clearly and unmistakably" requires." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258-59 (2009).

This should all be irrelevant to deferral analysis. In *Pyett*, there was no arbitrator deciding whether the employer had a contractual right to enforce arbitration over the ADEA claim. Because the rationale of the *Steelworkers Trilogy* applies only to the meaning of the terms of the labor agreement, a union's waiver of a judicial forum to vindicate a statutory right must be "clear and unmistakable." *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998). But unlike the ADEA right to be free from age discrimination, many Section 8(a)(3) protections from discrimination can be waived by the labor agreement. "Such waivers are valid because they rest on the premise of fair representation and presuppose that the selection of the bargaining representative remains free." *Metropolitan Edison Co.*, 460 U.S. at 705. And an arbitrator finding "just cause" under the contract establishes that the union has agreed to a contractual right to discipline. "That is because both employer and union have granted to the arbitrator the authority to interpret the meaning of their contract's language, including such words as 'just cause.'" *E. Associated Coal Corp.*, 531 U.S. at 61.

Where the statutory protection may be waived by a union, the arbitrator's decision establishes what *Babcock* demands—"the parties have, in some fashion, explicitly authorized the arbitrator to decide the unfair labor practice issue." 361 NLRB at 1137. Because a union may "bargain away" its members' "economic rights" and agree to binding arbitration, *Metropolitan Edison Co.*, 460 U.S. at 705-06, what the union has bargained away is defined by an arbitrator applying the contract in the context of a case. As Judge Edwards has explained:

> [*Metropolitan Edison*] can be read as endorsing the view that where the parties provide for final and binding arbitration of their disputes, the arbitrator's decision becomes a part of the written contract, and that contract, as construed by the arbitrator, can waive rights otherwise provided by the statute.

Deferral to Arbitration and Waiver of the Duty to Bargain, 46 Ohio St. L.J. at 38.

The *Spielberg-Olin* standard properly required that "all parties have agreed to be bound," meaning that the union and employer agreed to binding arbitration. There was no requirement that a charging-party employee agreed to be bound. *See Laborers Int'l Union of N. Am., Local No. 294*, 331 NLRB 259, 260 (2000).

B. The Decision Is Binding On The Employee Absent Breach By the Union.

Babcock imposed on the arbitrator an "actually considered the statutory issue" standard. 361 NLRB at 1333. It cannot be applied in a manner that furthers the policies of the Act, let alone that complies with Section 301 common law. Under *Babcock*, the Board tells the parties what their contract terms must mean, as the arbitrator is constrained to interpret them in a manner consistent with Board law. *Id.* at 1333. That is imposing *de facto* contractual terms, as well as setting a standard of review less deferential than a reviewing court would apply under the *Steelworkers Trilogy.* The Board can do neither. *See H. K. Porter Co. v. NLRB*, 397 U.S. at 108; *Litton Fin. Printing Div., Inc.*, 501 U.S. at 203.

The error was creating a false conflict between accepting arbitration decisions as final and binding on the one hand and protecting the statutory rights of represented employees on the other. According to *Babcock*, the Act equalizes bargaining power when the Board ensures that represented employees have statutory protections notwithstanding the decisions of their unions:

> It is the policy of the Act to ensure—that is, for the Board to ensure—that employees may engage in union and other protected concerted activities to improve their lot in the workplace without fear of retribution; otherwise, the Act's policy of encouraging collective bargaining would soon be a dead letter.

361 NLRB at 1132. To the contrary, neither encouraging collective bargaining nor equalizing bargaining power happens through direct involvement of the Board in collective bargaining. Both goals require vesting the majority union with exclusive and binding authority.

The Act is not concerned with ensuring the interests of individual represented employees. The "collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). "Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority." *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975). "It was Congress' verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands." *14 Penn Plaza LLC*, 556 U.S. at 271.

Thus, "[c]entral to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule." *Emporium Capwell Co.*, 420 U.S. at 62. "The workman is free, if he values his own bargaining position more than that of the group, to vote against representation, but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result." *J.I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944). "The obligation [to bargain] being exclusive, it exacts the negative duty to treat with no other." *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683–84 (1944). This requires "placing a nonconsenting minority under the bargaining responsibility of an agency selected by a majority of the workers." *Brooks v. NLRB*, 348 U.S. 96, 103 (1954)."The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

The union's decisions bind the represented employees, even when an employee's personal interests are harmed by the union's broad discretion. The union's duty is an "obligation to serve the interests of all members." *Vaca*, 386 U.S. at 177. "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)."Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991).

These principles all apply to the contractual grievance process. Employees who have been punished by their employers have no statutory right to participate in any proceeding to determine whether the employer had a contractual right to discipline them. They "must attempt use of the contract grievance procedure," *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965), and are "bound by terms of that agreement which govern the manner in which contractual rights may be enforced," *Vaca v. Sipes*, 386 U.S. at 184. "Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract." *Republic Steel*, 379 U.S. at 653. Although "a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion," unions may decline to pursue grievances to arbitration. *Vaca*, 386 U.S. at 191. That "settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement." *Id.*

Further, as the exclusive authority of the union extends to grievances, employees have no statutory protection when seeking to work around the union to raise a dispute with the employer. Section 9(a) of the Act explains that represented employees have no "right [] to present grievances to their employer" except if "the bargaining representative has been given opportunity to be present at such adjustment" and "the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect." 29 U.S.C. § 159(a). Thus, although the Act protects unrepresented employees who act together "in the hope that [their] action might spotlight their complaint" about working their conditions, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 15 (1962), an employer does not violate the Act by disciplining multiple represented employees for a protest about working conditions that works around the union and seeks "to confront the employer outside the grievance process," *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 76 (1975).

In short, there is no tension between protecting the binding arbitration agreement and protecting how the Act furthers the interests of represented employees. For a familiar example, the contractual grievance-arbitration process impairs the employees' ability to strike when supported by the union, and even in the absence of a no strike clause. Although courts may not enjoin a strike if "neither its causes nor the issue underlying it was subject to the settlement procedures," *Buffalo Forge Co. v. United Steelworkers of Am., AFL-CIO.*, 428 U.S. 397, 407-08 (1976), courts may enjoin strikes over arbitrable disputes even absent a no-strike clause because "a no-strike obligation, express or implied, is the quid pro quo for an undertaking by the employer to submit grievance disputes to the process of arbitration." *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 248 (1970).

Just as is in court, unions and represented employees before the Board must be bound to the arbitrator's decision that the employer had a contractual right to discipline. The union is bound unless the decision is "procured through fraud or through the arbitrator's dishonesty," *Misco*, 484 U.S. at 38–39, and the employee as well unless the union breached its duty, *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976). The employee cannot "relitigate" the finding of a contractual right to discipline without showing a breach by the union, because the "finality provision has sufficient force to surmount occasional instances of mistake." *Id.* Challenging the contractual right to discipline is thus "inextricably interdependent" on showing that the union breached its duty. *See DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 165 (1983). If such a breach is shown, the employer and union both could have separate liabilities. *See Bowen v. U.S. Postal Serv.*, 459 U.S. 212 (1983).

The "apparently fair and regular proceedings" *Spielberg-Olin* standard allows for this appropriate review, with a minor refinement to account for the separate consideration of whether the statutory protection may be waived by a union. Proceedings were not fair and regular under *Spielberg* if there was an "inherent conflict of interest" between the union and the employee, *Servair, Inc.*, 265 NLRB 181, 183 (1982), and under *Olin* if there was evidence of "an actual conflict of interest" between the disciplined employee and the union, *Tubari Ltd.*, 287 NLRB 1273, 1276 n.4 (1988). However, because the Board did not directly address the waiver issue, the decisions did not specify whether the disabling conflict was inherent to the nature of the statutory protection or based on the facts of the case. A waiver-based standard would allow the Board to reach the same outcomes but requires analyzing separately whether a conflict of interest inherent to the statutory protection is such that it may not be waived by a union, and whether the facts of the case establish a conflict of interest that amounts to the union breaching its duty.

C. The Charge Must Be Dismissed If The Protection Can Be Waived.

In justifying the "reasonably permits" standard, *Babcock* explains that the Board "will not simply assume" that the arbitrator "understood the statutory issue" where the arbitrator upheld the discharge upon finding that the contractual meaning of "just cause" included the discipline at issue. 361 NLRB at 1132. To the contrary, after a labor arbitrator has upheld discipline, the union's agreement to waive the protection has been established. The Board "must assume that the collective-bargaining agreement itself calls for" that result. *E. Associated Coal Corp.*, 531 U.S. at 61. The reasoning of *Olin* was correct:

> Certainly, were we reviewing the merits, Board Members might differ as to the standards of specificity required for contractual language waiving statutory rights and as to whether the above language meets those standards []. The question of waiver, however, is also a question of contract interpretation. An arbitrator's interpretation of the contract is what the parties here have bargained for and, we might add, **what national labor policy promotes**.

268 NLRB at 576 (emphasis supplied).

Where a union may bargain away the relevant statutory protection, the Board has no role to play after an arbitrator upheld discipline at issue in an unfair labor practice. This should not be controversial, as represented employees are not guaranteed statutory protection for concerted activity that concerns the "economic" issues decided by collective bargaining. *See Metropolitan Edison Co.*, 460 U.S. at 705. The union may bargain away protection for strikes against the employer, *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956), as well as protection for a refusal to cross a picket line, *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 80, (1953). The union also may bargain limits on "methods by which employees invoke their collectively bargained rights," *City Disposal Systems Inc.*, 465 U.S. at 837, as well as obligations such as "requiring union officials to take affirmative steps to end unlawful work stoppages," *Metropolitan Edison Co.*, 460 U.S. at 707.

Nor would this mean that the Board has no role to play. If the statutory protection cannot be waived by the union, then deferral is not appropriate. The proposed standard would thereby force the Board to confront the real issue and decide what protections are within the control of the union. For example, because Section 9(a) of the Act "guarantees employees freedom of choice and majority rule" in the selection of a bargaining representative, *Int'l Ladies' Garment Workers' Union, AFL-CIO v. NLRB*, 366 U.S. 731, 737 (1961), collective bargaining cannot limit protections where the employees' exercise of "their choice of a bargaining representative is involved—whether to have no bargaining representative, or to retain the present one, or to obtain a new one." *Magnavox Co. of Tennessee,* 415 U.S. at 325. Thus, if the arbitrator upheld discipline for engaging in such conduct, the Board must reach the merits and define what protections are preserved to the individual represented employees under *Magnavox*.

This approach properly respects the parties' agreement to arbitrate disciplinary disputes, their decision to hire their own adjudicator to resolve their disciplinary disputes, and the finality clause that is contained in most collective bargaining agreements. And that finality is not mere verbiage or boilerplate; it reflects the Congressional purpose deeply engrained in federal labor law that arbitration should be the preferred method to resolve industrial disputes.

CONCLUSION

For the foregoing reasons, the Board should overrule or abrogate *Babcock* and adopt a waiver-based deferral standard.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2019, the foregoing was e-filed and served by e-mail on: Julie R. Stern, Counsel for the General Counsel (julie.stern@nlrb.gov); Jennifer R. Asbrock, Counsel for Respondent United Parcel Service (jasbrock@ftblaw.com); and Catherine A. Highet, Counsel for Charging Party (cathy@highetlaw.com).

Dated: April 29, 2019

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