No. ____

IN THE

Supreme Court of the United States

JUAN RODRIGUEZ-DEPENA,

Petitioner,

v.

PARTS AUTHORITY, INC., MICHIGAN LOGISTICS INC., NORTHEAST LOGISTICS INC., AKA DILIGENT DELIVERY SYSTEMS,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit's precedent-setting holding that individual Fair Labor Standards Act ("FLSA") claims are arbitrable, is in conflict with this Court's decision in *Barrentine v. Arkansas-Best Freight Sys. Inc.*, 450 U.S. 728, 740 (1981), which rejected arbitration under the FLSA?

2. Whether mandatory/forced arbitration provisions which condition employment on not filing cases in court, violate the FLSA at 29 U.S.C. § 215(a)(3), which prohibits adverse employment actions for filing an FLSA claim in court?

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I. OPINIONS BELOW

The order of the Court of Appeals is reported but at *Rodriguez-Depena v. Parts Auth., Inc.,* 877 F.3d 122 (2d Cir. 2017), and is reproduced in the appendix ("App.") at App. 1-6. The Second Circuit's unpublished order denying rehearing is reproduced at App. 7-8. The district court's decision dismissing the action can be found at *Rodriguez-Depena v. Parts Auth., Inc.,* No. 15CV6463ENVVMS, 2016 WL 10932999, (E.D.N.Y. Sept. 30, 2016), and is reproduced at App. 9-16.

II. JURISDICTION

The Court of Appeals rendered its decision on December 12, 2017 (App. 1-6) and denied the December 26, 2017 petition for rehearing on January 30, 2018. (App. 7-8). This Court has jurisdiction under 28 U.S.C. § 1254(1).

III. STATUTES AND RULES INVOLVED

1. 29 U.S.C. § 207(a)(1):

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

2. 9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, **save upon such grounds as exist at law or in equity for the revocation of any contract**.

[This Court in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945) and *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946), held that contracts waiving FLSA wages/liquidated damages, even retroactively, are unenforceable. In *Barrentine v. Arkansas-Best Freight Sys., Inc.,* 450 U.S. 728, 729 (1981), this Court held that FLSA claims are nonarbitrable because FLSA wage claims "might be lost" or waived in arbitration – inherent conflict between FLSA and arbitration.]

3. 29 U.S.C. § 216(b):

> … An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated …

[This Court in *Barrentine*, 450 U.S. at 745, 740 interpreted this statutory language as Congressional intent that FLSA claims be brought in Court and not arbitration]

4. 29 U.S.C. § 215(a)(3):

> (a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person--
>
> > (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee

[A mandatory arbitration provision which conditions employment on an employee not filing a case in court, is a serious violation of 29 U.S.C. § 215(a)(3).]

IV. STATEMENT OF CASE

1. District Court Proceedings

Petitioner Juan Rodriguez-Depena ("Petitioner" or "Plaintiff"), commenced the instant action on November 11, 2015 to recover overtime wages, under the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL"). Prior to filing an answer, Defendants Michigan Logistics, Inc., Northeast Logistics, Inc., and Parts Authority, Inc. (collectively "Respondents" or "Defendants"), moved to compel arbitration.

The purported arbitration agreement requires the low-wage Petitioner to pay half the costs of the arbitrator – about $300 to $500 an hour or tens of thousands of dollars – almost certainly more than his claims are worth. In addition, Petitioner's mother tongue is Spanish, and his ability to read English is limited – the purported arbitration agreement is written in English/Legalese. Also, two of the Defendants who sought to enforce the purported arbitration agreement never signed it, and never even claimed to be bound by the purported arbitration agreement.

In opposition, Petitioner argued in major part that FLSA claims are nonarbitrable based on this Court's decision in *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981), which the Second Circuit itself previously interpreted as "finding Congressional intent that FLSA claims are non-arbitrable because of the inherent conflict between arbitration and the FLSA's purposes." See *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 850 (2d Cir. 1987). The conflict is easy to detect – the financial and non-financial costs of arbitration can result in the loss or waiver of FLSA claims, but unlike other statutory claims, FLSA claims cannot be waived in light of this Court's decisions in *Brooklyn Savings, Gangi*, and *Barrentine.* For example, the arbitrator is bound to carry out the intent of the parties and if the parties agree to pay overtime only after 60 hours a week, the arbitrator is bound or is free to honor that agreement even though the FLSA does not permit such a waiver - even retroactively, and requires overtime after 40 hours a week. (See 29 U.S.C. § 207(a)). Relatedly, high arbitration costs can prevent or deter an employee from pursuing FLSA

claims in arbitration, therefore resulting in waiver. Such waiver may not be a problem in anti-trust, age discrimination, and other statutory claims, but it would be with regard to FLSA claims, which cannot be waived by agreement or conduct under this Court's precedents. See *Barrentine, Brooklyn Savings,* and *Gangi*.

Nonetheless, the district court compelled arbitration and dismissed the case. (App. 9-16). Notably, the purported arbitration agreement required Petitioner to pay half of the arbitrator's costs – or about $300 – 500 an hour or more. Because of the financial and non-financial costs and risks of arbitration that still remained, and Petitioner's belief that his FLSA claims are nonarbitrable in light of this Court's decision in *Barrentine*. Petitioner appealed.

2. Court of Appeals Proceeding

On appeal, the Second Circuit recognized that it had never before directly addressed in an FLSA case, whether FLSA claims are arbitrable, especially in light of this Court's decision in *Barrentine*. On December 12, 2017, the Second Circuit issued a published opinion distinguishing this Court's decision in *Barrentine* and holding that FLSA claims are arbitrable. Realizing that it had said the opposite in *Genesco*, the Second Circuit stated in relevant part as follows:

> A parenthetical description of *Barrentine* in *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 844 (2d Cir. 1987), describing *Barrentine* as "finding congressional intent that Fair Labor Standards Act of 1938 claims be nonarbitrable," was written

> before the Supreme Court authoritatively explained the limited rationale of that case in *Gilmer*. The parenthetical, not even rising to the level of dictum, had no bearing on the outcome of *Genesco* and must be regarded as abrogated by *Gilmer*.

However, as the Second Circuit itself previously noted, "There is nothing in Gilmer which appears to throw anything but favorable light upon the continuing authority of Barrentine." *Tran v. Tran,* 54 F.3d 115, 117 (2d Cir. 1995). In fact, the Second Circuit failed to address the entire basis for the holding in *Barrentine* – that because FLSA claims, unlike ADEA and other statutory claims, cannot be waived – even retroactively under this Court's precedents (*Brooklyn Saving, Gangi*), FLSA claims are nonarbitrable because arbitration might result in the prohibitive loss or waiver of such FLSA claims. Significantly, Petitioner agrees with the Second Circuit's finding that Petitioner "was employed by the three defendants in 2015, all of which controlled his employment" (App. 3) – the major issue in the case was whether Petitioner was an employee or independent contractor.

On January 30, 2018, the Second Circuit denied a petition for rehearing. (App. 7-8). This constitutes the Petition for Writ of Certiorari of Petitioner Juan Rodriguez-Depena.

The national importance of the arbitration issue can hardly be overstated. In this regard, arbitration agreements are now common place across the nation and almost every district judge is confronted on a regular basis with motions to compel arbitration. This Court has also repeatedly granted certiorari in arbitration cases in the last decade or

two, and three arbitration cases have been argued and are currently pending before this Court. *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), cert. granted, No. 16-300, 2017 WL 125665 (Jan. 13, 2017), *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015), cert. granted, No. 16- 307, 2017 WL 125666 (Jan. 13, 2017) and *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), cert. granted, No. 16-285, 2017 WL 125664 (Jan. 13, 2017). On February 26, 2018, this Court also granted certiorari to review another arbitration issue – the exemption for transportation workers (like Petitioner in this case), under Section 1 of the FAA. See *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017), cert. granted, 138 S. Ct. 1164 (2018). **In deciding these pending and argued cases, this Court should be alerted not to decide the issue of the arbitrability of FLSA claims by accident or without full briefing** – the parties in those cases may have assumed or did not care whether FLSA claims were arbitrable and instead, were only interested in the class action aspect of the issue.

Moreover, the #MeToo movement sweeping the nation has highlighted the arbitration issue like never before, and specifically, the use of arbitration agreements to silence victims of workplace abuses and deny them an adequate chance to be heard. This Court should grant this petition and decide the issues of national importance presented herein.

V. REASONS FOR GRANTING PETITION

This Petition should be granted for two main reasons: 1) the Second Circuit's holding that FLSA claims are arbitrable, is in conflict with this Court's holding in *Barrentine,* that FLSA claims are nonarbitrable; and 2) the Second Circuit has decided an important question of federal law – whether mandatory/forced arbitration violates 29 U.S.C. § 215 (a)(3), that has not been, but should be, settled by this Court. U.S. Sup. Ct. R. 10(c).

1. Petition Presents An Important Question Of Federal Law – Whether FLSA claims are nonarbitrable, That Conflicts With This Court's Decision in *Barrentine*

The Second Circuit's decision is in conflict with the Supreme Court's decision in *Barrentine* which rejected arbitration under the FLSA – the only FLSA case in which this Court addressed the arbitrability of FLSA claims.

In the mid-1940s, the U.S. Supreme Court in *Brooklyn Savings* and *Gangi*, famously held that unlike other statutes, the FLSA is a uniquely protective statue that prohibits private parties from waiving - even retroactively, their wages and rights under the FLSA.

In 1959, citing *Brooklyn Savings* and *Gangi*, the legendary Judge Henry Friendly, in *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2d Cir. 1959), reiterated the uniquely protective nature of the FLSA and stated that "this [FLSA] case lies in an area where agreements and other acts that would normally have controlling legal significance are overcome by Congressional policy."

In 1981, the U.S. Supreme Court decided *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981), in which it cited *Brooklyn Savings* and *Gangi*, to invalidate arbitration under the FLSA and stated as follows:

> This Court's decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act. Thus, we have held that FLSA rights cannot be abridged by contract or otherwise waived because this would "nullify the purposes" of the statute and thwart the legislative policies it was designed to effectuate.

In 1987, the Second Circuit interpreted *Barrentine* as "finding congressional intent that Fair Labor Standards Act of 1938 claims be nonarbitrable because of conflict between arbitration and FLSA's purposes." *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 850 (2d Cir. 1987).

On August 7, 2015, the Second Circuit handed down its landmark decision in *Cheeks v. Freeport Pancake House, Inc.,* 796 F.3d 199 (2d Cir. 2015), requiring court approval of settlement/waiver and dismissals of FLSA claims with prejudice. Like the Supreme Court in *Barrentine*, *Cheeks* began its analysis with *Brooklyn Savings* and *Gangi*, and cited *Barrentine* for the proposition that the FLSA prevents private waiver of FLSA rights – even retroactively. The U.S. Department of Labor took the same position. (See App. 17-46).

Here, the Second Circuit stated as follows (App. 3):

> Statutory claims are arbitrable unless Congress "has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

As such, for the Supreme Court in *Barrentine* to find that FLSA claims are nonarbitrable, it had to find congressional intent. It did so, when in choosing between arbitration and the courts, it concluded that, "Congress **intended** to give employees broad access to the courts," *Barrentine*, 450 U.S. at 745, and that nonwaivable FLSA claims "might be lost" if submitted to arbitration. *Barrentine*, 450 U.S. at 742. In response, the Second Circuit held that the interpretation of *Barrentine* in *Genesco* "must be regarded as abrogated by *Gilmer*." (App. 4, fn 1). However, *Gilmer* is fully consistent. *Gilmer*, 500 U.S. at 26, noted that Congressional intent of nonarbitrability is present where there is 'an "inherent conflict" between arbitration and the [statute's] underlying purposes,' and as the Second Circuit noted in *Genesco*, the Supreme Court in *Barrentine*, found such an "inherent conflict between arbitration and the FLSA's purpose." The conflict is simple to detect – unlike other statutory claims, FLSA claims are nonwaivable – even retroactively, but FLSA claims might be lost and waived if submitted to arbitration – because of costs, venue, the duty of the arbitrator to follow the parties' agreement instead of the FLSA, and the high standard of review, among other reasons. For example, the purported arbitration agreement in this case requires Petitioner to pay half the costs of the

arbitrator – about $300 to $500 an hour – costs of tens or even hundreds of thousands of dollars that would force the low-wage or no-wage Petitioner to abandon his claims that are worth less than such costs, and forego arbitration in the process.

Because FLSA rights are nonwaivable – even retroactively, and ADEA rights are not, arbitration can be in conflict with the FLSA, while not being in conflict with the ADEA – a point the Second Circuit failed to address but which this Court should address – because it implicates this Court's precedents in *Brooklyn Savings*, *Gangi*, and *Barrentine*. Any change in *Barrentine* and deviation from sensible, thorough and convincing Supreme Court precedents in *Brooklyn Savings, Gangi,* and *Barrentine*, should come from the Supreme Court – an unlikely occurrence given the Supreme Court's record of adhering to its early FLSA precedents and the current public climate against arbitration and its misuse. Notably, this case is far more compelling in Petitioner's favor than *Barrentine* - unlike the plaintiffs in *Barrentine*, the Petitioner here was not protected by a union or even an attorney during his employment, and the arbitration agreement here requires Plaintiff to pay tens of thousands of dollars to arbitrate his claims – costs most people including Petitioner cannot possibly afford.

While there is an inherent conflict between the FLSA and arbitration as the Supreme Court found in *Barrentine*, we also believe that *Barrentine* found Congressional intent of nonarbitrability in the text of the FLSA. The Second Circuit responded as follows (App. 5):

> [Petitioner] contends that the FLSA precludes arbitration because it authorizes

> suit "in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). *Gilmer* rejected the argument that similar statutory language in the ADEA was a bar to arbitration of claims under that statute.

However, in so holding, the panel overlooked critical and material differences between the language in the ADEA and the FLSA. First, *Gilmer* was misunderstood in a very material way. Specifically, the ADEA was amended in 1991 through the Older Workers Benefit Protection Act ("OWBPA"), 26 U.S.C. § 626(f). These amendments which were not at play in *Gilmer*, placed significant restrictions on the waiver of ADEA rights and claims. See *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 424 (1998). The waiver of the ADEA right to a judicial forum in *Gilmer* would violate the OWBPA in many ways. Given that the FLSA is more protective than the ADEA, the waiver of the FLSA right to a judicial forum is even more invalid. (See App. 17-46 - US DOL letter brief in *Cheeks*, discussing waiver of ADEA and FLSA claims).

Second, the Supreme Court in *Gilmer*, 500 U.S. at 29, materially noted that the ADEA's language contains a requirement to exhaust administrative remedies and informal resolution procedures through the EEOC. By contrast, in holding FLSA claims to be nonarbitrable, the Supreme Court in *Barrentine*, 450 U.S. at 740, specifically noted the absence of such exhaustion requirements in the language of 29 U.S.C. § 216(b). Notably, under *Cheeks*, settlement of FLSA claims requires court approval in most cases – something not required for ADEA claims.

Third, even if the subject language in the ADEA and FLSA was the same, it does not follow that said language was used in both statutes with the same intent. Unlike the ADEA, the subject language was used in the FLSA to provide an FLSA plaintiff whose claim is usually relatively small, with a "court of his own choice, within his immediate neighborhood, and without burdensome and disproportionate expense both in money and in time." *Booth v. Montgomery Ward & Co.*, 44 F. Supp. 451, 452, 455-56 (D. Neb. 1942).

Fourth, the Second Circuit did not address that critical part of *Gilmer,* 500 U.S. at 33, which noted that inequality of bargaining power between employer and employee can be the basis for rejecting arbitration – though not always. Significantly, the basis for holding FLSA claims to be nonwaivable by agreement in *Brooklyn Saving, Gangi*, and *Cheeks* was the finding that "inequality of bargaining power, prohibits these same employees from bargaining with their employer." See *Brooklyn Savings* 324 U.S. at 708. If an employee lacks sufficient bargaining power as a matter of law to negotiate his wages under the FLSA, logically he also lacks sufficient bargaining power as a matter of law to negotiate an even more consequential, complex and expensive arbitration agreement with his employer – especially where, as here, Petitioner speaks Spanish and the arbitration agreement is written in English/Legalese.

The Second Circuit also argued that *Gilmer* limited *Barrentine* and stated as follows (App. 4):

> the Court emphasized that in Barrentine the Plaintiff was granted access to a district court to assert his statutory claim after arbitration because the basis for the

> rights that had been previously asserted was a collective bargaining agreement. See Gilmer, 500 U.S. at 35, 111 S.Ct. 1647. In light of Gilmer's explanation of the limited rationale of Barrentine, the earlier decision cannot fairly be read to preclude arbitration of an individual FLSA claim

However, the rationales or reasons set forth in *Gilmer*, for the holding in *Barrentine*, were not limited as the following shows (*Gilmer*, 500 U.S. at 35):

> *Barrentine* and *McDonald* similarly involved the issue whether arbitration under a collective-bargaining agreement precluded a subsequent statutory claim. In holding that the statutory claims there were not precluded, we noted, as in Gardner-Denver, the difference between contractual rights under a collective-bargaining agreement and individual statutory rights, the potential disparity in interests between a union and an employee, and the limited authority and power of labor arbitrators.

As excerpted above, *Gilmer* listed three reasons or rationales for the holding in *Barrentine* – the Second Circuit chose to focus only on the first reason. It is not clear why the Second Circuit did not address the other two reasons, anyone of which would be enough to rule in Petitioner's favor – this Court should address these other reasons. As to the second reason cited in *Gilmer* – the disparity in interests between union and employee might result in the loss of FLSA claims if the union chooses not to pursue the claims - but FLSA claims are

nonwaivable. The *Barrentine* Court was concerned with the loss/waiver of FLSA claims – regardless of how the loss/waiver occurs – *Brooklyn Savings* and *Gangi* upon which *Barrentine* relied, did not involve unions. Outside of the union context, FLSA claims might be lost, and even more so, because of high financial costs, the duty of the arbitrator to abide by the arbitration agreement instead of the FLSA, and the high standard of review of arbitration decisions. There is a reason why everyone wants a union job – workers are much more protected inside a union than outside a union.

Second, as to the third reason cited in *Gilmer*, an arbitrator under the FAA is bound to carry out the intent of the parties and can ignore public laws such as the FLSA even if required by the agreement to follow such laws. See *Hall Street. Associates., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 579 (2008). For example, an arbitrator can award overtime after 60 hours a week and ignore the FLSA's requirement that overtime be paid after 40 hours a week (29 U.S.C. § 207(a))– thus resulting in improper loss or waiver of FLSA claims.

Since *Barrentine*, several developments have strengthened the position that FLSA claims are nonarbitrable. One is the #MeToo movement addressed below. Another is the intensified focus on the interplay between the Federal Arbitration Act ("FAA"), and other statutes like the FLSA and NLRA which is now before this Court in *Epic Systems, Morris* and *Murphy Oil*. Specifically, as noted in *Epic Systems,* for example, we need not consider whether the FAA trumps these other statutes because the FAA at 9 U.S.C. § 2 contains a savings clause which does not require enforcement of arbitration contracts

that fail under contract defenses such as illegality and public policy. In other words, the FAA does not have any strong policy or any policy at all favoring arbitration that violates or frustrates another law such as the FLSA or NLRA.

2. Petition Presents An Important Question Of Federal Law – Whether Mandatory/Forced Arbitration Violates 29 U.S.C. 215(a)(3), That Has Not Been, But Should Be Settled By This Court

Even if this Court finds FLSA claims are arbitrable, it should at least find that pre-dispute mandatory arbitration agreements are invalid under the anti-retaliation/anti-discrimination provisions of the FLSA at 29 U.S.C. § 215(a)(3) and NYLL § 215. The FLSA at 29 U.S.C. § 215(a)(3) is clear – if you file an FLSA claim in court, you cannot be discharged or discriminated against. By contrast, under mandatory arbitration provisions, like we have here, employees will be discharged, and applicants will be discriminated against (denied employment), if they do not waive their right to file their case in court as a condition of employment. Such a mandatory, pre-dispute arbitration provision requires an applicant or employee to waive several FLSA rights, including anti-discrimination/retaliation rights under 29 U.S.C. § 215(a)(3), the FLSA right to a judicial forum under 29 U.S.C. § 216(b), and even the right to FLSA overtime and minimum wages under 29 U.S.C. §§ 206, 207, where the provisions impose high arbitration costs that would realistically deter or prevent the employee from pursuing such claims in arbitration.

In endorsing pre-dispute mandatory/forced arbitration provisions in this and other cases where employment is conditioned on waiver of FLSA and NYLL rights, the Court is endorsing agreements, policies and practices that violate the FLSA and NYLL. See *NLRB. v. LIAAC*, 870 F.3d 82, 89 (2d Cir. 2017) ("The contrary rule urged by LIAAC, that an employee can be required to comply with an unlawful policy and the employee is only protected from the unlawful policy if he or she actively organizes with other employees against it, is illogical and untenable.").

It was noteworthy to discover that the U.S. Supreme Court and lower courts had never addressed this very powerful argument. The oral arguments in *Gilmer* can help explain why[1]:

> **Justice Scalia:** This was enacted, of course, in when? When was... 1925, is that when it was passed?
>
> **Mr. Allred:** --That is correct, Your Honor.
>
> **Justice Scalia:** And the country had, or the Congress had a quite different view of what interstate commerce was in those days. I guess we did, too.
>
> **Mr. Allred:** That may well be. And the truth of the matter is, is that the Federal Arbitration Act hasn't really come into any real prominence until just recently. In fact, many of the cases that have dealt with whether... with whether or not a compulsory arbitration agreement is

[1] The audio and transcript of the Gilmer oral arguments before this Court can be found at https://www.oyez.org/cases/1990/90-18.

> enforceable has not even addressed the Federal Arbitration Act, just as the Gardner-Denver and the line of cases did.
>
> **Justice Rehnquist:** Gardner-Denver was a collective bargaining contract, wasn't it?
>
> **Mr. Allred:** That is correct, Your Honor.

The above exchange in *Gilmer* confirms that for a variety of reasons, this Court's focus on the FAA began relatively recently – around the 1980's. This Court's focus on the FAA in the context of employment statutes is even more recent – Gilmer was the first major case dealing with the FAA and a federal employment statute (ADEA). The oral argument exchanges in *Gilmer* also highlight another problem – even when the subject involves the FAA, certain issues are not raised, briefed and addressed:

> **Justice White:** Of course, we denied cert. in that case. Maybe unfortunately.
>
> **John T. Allred:** --The one that I was referring to, I think it was Potter, was that it held that the Federal Arbitration Act preempted a State law. But the question of whether or not section 1 was involved was not briefed by the parties in that case.

Indeed, it appears that the critical issue of whether mandatory/forced, pre-dispute arbitration violates 29 U.S.C. § 215(a)(3) has never been raised, briefed or addressed by this Court or any of the courts of appeals before. Borrowing from Justice White above, to deny certiorari as to this important question which impacts millions of employees and businesses nationwide, would be most *unfortunate*.

One of the reasons for the jurisprudential gap, is the fact that the leading Supreme Court arbitration cases dealt with anti-trust and other statutes and did not involve the type of anti-retaliation/anti-discrimination provisions at 29 U.S.C. § 215(a)(3) and NYLL § 215. In fact, it was only in 2011 that this Court took a very close look at certain critical aspects of 29 U.S.C. 215(a)(3). See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 131 (2011) (reiterating that 'the Act's "remedial and humanitarian ... purpose" cautions against "narrow, grudging" interpretations of its language' – specifically, the anti-discrimination/retaliation provisions of the FLSA (29 U.S.C. § 215(a)(3)). It appears that courts and attorneys were then less than meticulous in not accounting for these differences – the absence of 29 U.S.C. § 215(a)(3) equivalents in other statutes. The Supreme Court itself has just recently recognized and explained this phenomenon – the correct approach is to remedy and not to ignore. *Hamer v. Neighborhood Hous. Servs. of Chicago*, 2017 WL 5160782, at 7, 3 (U.S. Nov. 8, 2017) ('The "mandatory and jurisdictional" formulation is a characterization left over from days when we were "less than meticulous" in our use of the term "jurisdictional.""). Given that in general the arbitration cake is almost fully baked by this Court but without the essential ingredient of the 29 U.S.C. § 215(a)(3) argument and answer, and other arguments made herein, Supreme Court review is the best vehicle for correction and adjustment – lower courts do not have the authority to fix this Court's jurisprudence.

The need for action by this Court is also highlighted by the #Metoo movement and the

national focus on mandatory arbitration provisions. For example, a bi-partisan group of lawmakers in Congress are introducing a bill to limit the use of pre-dispute mandatory arbitration provisions. On December 6, 2017, the Washington Times covered the proposed new legislation and stated in relevant part as follows[2]:

> "When they were hired, they filled out paperwork … that took away their right to sue," Ms. Bustos said. "They were forced into a secret arbitration process and that meant their stories would never see the light of day."
>
> …Sen. Lindsey Graham, South Carolina Republican, said people in business want arbitration agreements because it is good for them. He called on the U.S. Chamber of Commerce to support the bill.
>
> "I'm asking the business community — for your own sake, if nothing else — help us lead America to a better business environment and a better business environment is to be able to go to work and without having to put up with a bunch of crap," Mr. Graham said.
>
> "Forced arbitration is the harasser's best friend. It keeps harassment complaints and settlements secret. It allows harassers to stay in their jobs even as victims are

[2] https://m.washingtontimes.com/news/2017/dec/6/bill-end-forced-arbitration-sexual-harassment/

pushed out or, many times, fired," said Ms. Carlson.

The legislature is scrambling to act against difficult odds because the courts have not yet acted to opine on the interplay between existing legislation (i.e. 29 U.S.C. § 215(a)(3)) and mandatory arbitration provisions – at the expense of millions of employees and businesses that need to know the answer without further delay.

Also, similar unprecedented and rapid change has occurred in the private sector. For example, Microsoft Corporation has announced that it will no longer enforce mandatory arbitration agreements in certain employment cases - "The move comes amid a growing outcry to eliminate forced arbitration agreements, which waive the right to sue or take part in class action lawsuits.[3]" Also, USA TODAY noted that, "The role that forced arbitration plays in silencing women has become a hotly debated topic with the national #MeToo outcry over sexual harassment.[4]" More recently, at least three major law firms (Skadden Arps, Orrick Herrington and Munger Tolles), have ended the use of mandatory arbitration agreements for their low wage employees[5].

3. This Court Can Choose A Middle Ground

In response to the issues presented herein, this Court can choose a middle ground. If this Court

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[3] http://money.cnn.com/2017/12/19/technology/microsoft-ends-forced-arbitration/index.html

[4] https://www.usatoday.com/story/money/2017/12/06/bipartisan-bill-would-eliminate-forced-arbitration-break-silence-sexual-harassment-cases/925226001/

[5] https://www.law360.com/articles/1027761/skadden-cites-metoo-in-nixing-forced-arbitration

holds that the FLSA right to a judicial forum can be waived - at minimum, it should require that such a waiver can be valid only if: 1) the waiver occurs after a bona fide dispute arises; 2) the employee is represented by legal counsel in connection with the waiver; and 3) the waiver is specific, clear and unmistakable. Of course, there should be no costs to bear, financial and otherwise, beyond those incurred in court. Such protections would be necessary to balance any need for binding arbitration with current FLSA precedents, the FLSA's status as a "uniquely protective statute," and the reasons therefor.

4. The Great National Importance Of The Arbitration Issues Presented And The Need For Review Are Powerfully Highlighted By The #MeToo Movement Sweeping The Country

The use and abuse of arbitration agreements has increased with great frequency across the country in all sectors of the economy. In a delivery business for example, it is not uncommon for the delivery person as well as the customer to be subject to arbitration agreements. As a result, the impact on the judiciary – both state and federal, have been great. With increasing frequency, a federal judge is called upon to decide a motion to compel arbitration at the outset of cases, as this case demonstrates. Not surprisingly, therefore, the Supreme Court has recognized the great importance of arbitration issues and has granted certiorari and decided numerous arbitration cases/issues in just the last two decades alone. In fact, the Supreme Court has three arbitration cases currently pending. (*Epic Systems, Morris, Murphy Oil*).

The already very important arbitration issues like those presented herein, have been elevated to even greater importance by the #MeToo movement that began sweeping the nation in October 2017 – following the Second Circuit's ruling in this case. After the #MeToo movement took off in October 2017, the public was outraged to learn that arbitration and related confidentiality agreements were used to perpetuate sexual harassment and other workplace abuses and to silence victims. As this case demonstrates, arbitration agreements and workplace abuses are not limited to sexual harassment – they extend to wage theft and other wage violations that prevent low-wage workers like Petitioner from affording the basic necessities of life such as food, clothing and shelter. Moreover, any arbitration ruling here, will apply across the board to all cases including those involving sexual harassment and discrimination.

Building on the #MeToo movement, more than six-hundred current and former federal law clerks sent a petition on December 7, 2017, asking Chief Justice Roberts to reexamine procedures for handling employment complaints and disputes. In his year-end report, Justice Roberts addressed the issue and stated in relevant part as follows[6]:

> I have great confidence in the men and women who comprise our judiciary," Roberts wrote. "I am sure that the overwhelming number have no tolerance for harassment and share the view that

[6] http://www.cnn.com/2017/12/31/politics/roberts-year-end-report-sexual-harassment-natural-disaster-response/index.html

> victims must have clear and immediate recourse to effective remedies.

As a low wage worker, working hard and fighting for his wages to raise his family, Plaintiff agrees with Chief Justice Roberts that "victims must have clear and immediate recourse to effective remedies."

Congress has also taken unprecedented action as covered in the following excerpt from a Wall Street Journal article printed on December 11, 2017[7]:

> Lawmakers are moving to change procedures for reporting sexual harassment on Capitol Hill and how settlements are funded, after Congress was shaken last week by more allegations of improper behavior and three resignations.
>
> Lawmakers are looking inward at their own policies in the wake of the "Me Too" movement, which has created a national outpouring of personal stories involving sexual harassment and assault in the workplace.

'In his year-end report on the state of the judiciary, Roberts said recent events "have illuminated the depth of the problem of sexual harassment in the workplace" and made clear that the "judicial branch is not immune."'[8] Justice Roberts was pointing out that the courts are learning things

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[7] https://www.wsj.com/articles/sexual-harassment-overhaul-on-capitol-hill-likely-put-off-until-next-year-1513032720

[8] https://www.cnn.com/2017/12/31/politics/roberts-year-end-report-sexual-harassment-natural-disaster-response/index.html

that they did not know or did not fully grasp before. Such new discoveries and enhanced knowledge requires reexamination of current jurisprudence which is decades old and based on understandings, assumptions, and the state of society from many years ago. The premise that an arbitral forum is adequate to protect statutory rights requires reexamination – this Court in *Barrentine* wisely and correctly held it did not.

VI. CONCLUSION

Based on the foregoing, this Honorable Court should grant this petition for writ of certiorari.

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