No. 83-219

In the Supreme Court of the United States

October Term, 1983

GARY McDONALD,
Petitioner,

vs.

CITY OF WEST BRANCH, MICHIGAN; PAUL LONGSTREET, CHIEF OF POLICE; BERNARD C. OLSON, CITY MANAGER; CHARLES W. JENNINGS, CITY ATTORNEY; DEMETRE J. ELLIAS, CITY ATTORNEY; UNITED STEELWORKERS OF AMERICA, DISTRICT 29,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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ADDITIONAL STATEMENT OF THE CASE

Respondents assert that McDonald's "claim in federal court was not that his constitutional right to free speech was violated by his discharge, but that he was fired for

'union activities' " (Brief for Respondents at 2), and Amicus EEAC asserts that McDonald's particular First Amendment activities are somehow less worthy of protection under Section 1983 because they involved "union activity."[1] These assertions require an additional statement of the facts to spell out the events which led to McDonald's discharge. Those facts demonstrate that Chief Longstreet fired McDonald principally to retaliate for McDonald's attempts to inform city officials of citizen complaints about sexual assaults by the Chief.

Prior to his discharge, McDonald and the other two officers in the force had received citizen complaints from a number of women claiming that Chief Longstreet was engaged in sexual misconduct or assaults. (Tr. 132-138, 287-288, 291-296). Uncertain as to the appropriate course of action, McDonald and the other officers contacted the city attorney who advised them to notify a city councilman of the complaints. (Tr. 138, 296). They then had several meetings with Councilman Arnold Dunbar during which they presented information about the complaints. (Tr. 138-139, 298-299, 388-391). As a result of these disclosures, the City Council requested an investigation by the Michigan State Police. (Tr. 393).

After the state police investigation began, Chief Longstreet told McDonald that "he would have [his] job for starting the investigation." (Tr. 150-151). The Chief threatened all three officers and blamed them for the investigation. (Tr. 316). On November 22, three days before McDonald's discharge, the officers met with the city

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1. These assertions are surprising since Respondents have repeatedly acknowledged that McDonald's suit alleged that he was fired in retaliation for exercise of his First Amendment rights to freedom of speech and association. (See pages 4-6 below.)

manager to ask that he take steps to stop the Chief's harassing and threatening them because of the investigation. (Tr. 151, 315-317, 496-497, 558-559). McDonald was their spokesman. (Tr. 151). The city manager refused to take any action. (Tr. 151, 316, 559).

The next day, McDonald arranged a meeting with the Mayor to discuss the threats and harassment. (Tr. 151-152, 317-318). One of the complaining women (Collette Morgan), McDonald, the other officers and Ms. Morgan's fiance met at the agreed time, but the Mayor did not appear. (Tr. 152, 317-318). Chief Longstreet did. He told McDonald that he had gone too far and again said he would "have his job." (Tr. 318, 154-155). He threatened Ms. Morgan. (Tr. 154-155). He threatened one of the other officers. (Tr. 155). He told McDonald that if he "didn't have anything better to do than to dig up dirt about him" he should leave. (Tr. 154-155).

Chief Longstreet has acknowledged that he knew that Ms. Morgan was "one of the young ladies I was accused of having supposedly immoral conduct with." (P. Ex. 34 at pp. 91-93 (Testimony of Chief Longstreet); Tr. 764-765). He was aware that she and the officers were there to provide information to the Mayor about her charges against him. (P. Ex. 34 at pp. 91-93 (Testimony of Chief Longstreet); Tr. 764-765).

The next day, the Chief and City Manager advised the City Council that McDonald would be fired, and he was fired the following afternoon. (Tr. 518, 698, 155; P. Ex. 8, J.A. 24, Tr. 156). Respondents acknowledge that McDonald's efforts to bring the citizens' complaints to the attention of city officials were among the reasons for his discharge. (P. Ex. 9 at ¶¶7-8, J.A. 27, Tr. 160; P. Ex. 34 at pp. 87-90, 91-94 (Testimony of Chief Longstreet)).

Thus, the record establishes a pattern of retaliation against McDonald for his efforts to bring to light complaints by members of the public that Chief Longstreet was engaged in sexual misconduct. Although in a loose sense these efforts can be called "union activities", they were not made on behalf of the Union or in McDonald's capacity as a member of the Union. Discharge for this type of First Amendment activity does not appear to be covered by the "No Discrimination Because of Union Activities" clause of the Collective Bargaining Agreement. (P. Ex. 42, §1.2, J.A. 460). That clause provides:

> "The City agrees that it will not discriminate against, interfere with, coerce or restrain employees in any way *because of their membership in, or their activity in behalf of, the Union* unless such activity is specifically prohibited by this Agreement." (emphasis added).

Thus, while it prohibits retaliation for "activity in behalf of the Union", it does not prohibit retaliation for First Amendment activity on behalf of non-employee citizens.

Respondents' assertion that McDonald's "claim in federal court was not that his constitutional right to free speech was violated by his discharge, but that he was fired for 'union activities,' " (Brief for Respondents at 2) is entirely inconsistent with the history of the case and with Respondents' previous position. Throughout the proceedings in federal court, McDonald asserted that his discharge violated his First Amendment rights and Respondents have consistently acknowledged the existence of his First Amendment claims. McDonald's complaint alleged that he was deprived of his job "for exercising his fundamental rights of freedom of speech, freedom of as-

sociation and freedom to petition for redress of grievances . . . ."[2] (Complaint ¶10, J.A. at 5). Respondents clearly understood the nature of that allegation since their answer expressly denied "the allegation that plaintiff has been deprived of his position for exercising his fundamental rights of freedom of speech, association and petition." (Answer ¶10, J.A. at 15). At the close of the trial—and without objection by Respondents—the jury was instructed that McDonald could prevail on his First Amendment claim only if he proved "that the defendants' acts or conduct deprived the plaintiff of his rights to freedom of speech or association as guaranteed by the First Amendment to the Constitution of the United States." (DTr. 219-220).[3]

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2. McDonald also alleged and introduced evidence that he had engaged in traditional union activities such as processing grievances and organizing employees and that these activities contributed to his discharge. (Complaint ¶11b, J.A. 5).

3. That instruction provided:

"In order to prove his first claim that he was discharged for exercising his First Amendment rights to freedom of speech and association, the burden is upon the plaintiff to establish the following facts by a preponderance of the evidence:

First that the defendants knowingly discharged the plaintiff without cause;

Second, that in doing so, the defendants acted under color of state or local law;

Third, that the defendants' acts or conduct deprived the plaintiff of his rights to freedom of speech or association as guaranteed by the First Amendment to the Constitution of the United States; and

Fourth, that the defendants' acts or conduct were the proximate cause of injury and consequent damage to the plaintiff." (DTr. 219-220).

Similarly, without objection by Respondents, the jury was instructed that:

"As it pertains to civil rights cases such as this one, the First Amendment of the Constitution of the United States guarantees the right of the people to peaceably as-

(Continued on following page)

Respondents' recognition of the First Amendment nature of McDonald's claims continued throughout the appellate process. Most recently, in their Brief in Opposition to Certiorari, Respondents unequivocally acknowledged:

> "In his federal suit, he complained that his discharge as a police officer was in *retaliation for expressing his First Amendment rights to freedom of speech and assembly* as well as a claim that the discharge procedure denied him due process under the Fourteenth Amendment." Op. Cert. at p. 7 (emphasis added).

Respondents made an almost identical admission in their answer brief in the Court of Appeals. (Ct. App. Ans. Brief at p. 3). At no point did Respondents suggest to the Court of Appeals that McDonald was alleging retaliation for something other than protected First Amendment activity or that his activities were entitled to a lower level of protection than other constitutionally protected rights.[4]

Footnote continued—

> semble and to petition the government for a redress of grievances. In addition it protects the right to speak one's opinions, the right to engage in political activities, and the right to support the political candidates of one's choice." (DTr. 222).

4. In their brief in the Court of Appeals, Respondents attacked the decision in favor of McDonald on only three grounds: (1) that the decision was barred by *res judicata,* (2) that there was insufficient evidence of damage, and (3) that attorneys' fees should not have been awarded against them. (Ct. App. Ans. Brief at pp. ii-iii, 32-49). At no point did Respondents suggest that there was inadequate evidence of protected First Amendment activity. Nor did they claim that McDonald's First Amendment activity was entitled to a lower level of protection because it involved "union activities."

ARGUMENT

I

The Reasons for Denying Preclusive Effect to Arbitration Are Fully Applicable to §1983 Cases in General and to This Case in Particular

The efforts of Respondents and amicus EEAC to distinguish suits under §1983 from ones under Title VII or the Fair Labor Standards Act are unfounded. As discussed in Parts II-IV of our previous brief, the three independent reasons for denying preclusive effect to arbitration awards under Title VII and the FLSA are fully applicable to §1983. First Amendment rights protected under §1983 are distinctly individual rights and this Court has consistently held that waiver of those rights may not be made a condition of public employment. Second, in enacting §1983, the 42nd Congress intended to create a broad judicial remedy for violations of Constitutional rights and gave no indication that it intended arbitration to bar resort to that remedy. Finally, the collectively bargained arbitration forum is not as well suited as state and federal courts to provide full protection to Constitutional rights.

Neither Respondents nor amicus dispute that these propositions are true as to most §1983 cases. Instead, they apparently argue that a special rule should be applied to this case because they believe that McDonald's particular First Amendment activities were ones in which the union can be presumed to have a vital interest. That argument fails for two reasons. First, McDonald was fired to retaliate for his efforts to notify public officials of citizen complaints that Chief Longstreet was involved in sexual misconduct toward women in the community.

These efforts are not the sort of activity which a union has a vital organizational interest in protecting. Therefore, the argument simply does not apply to this case. Second, even in cases in which a union could be presumed to fully share the employee's interest, that fact would be insufficient to justify giving preclusive effect to the arbitration.

Respondents and amicus make the unwarranted assumption that McDonald's First Amendment activities were necessarily of great interest to the Steelworkers Union. However, Chief Longstreet fired McDonald as part of a pattern of retaliation for McDonald's efforts to inform city officials of complaints against the Chief. These were not complaints by employees about wages or working conditions but rather complaints by *non-employee citizens* that the Chief was engaged in sexual misconduct or assaults against women in the community.[5] See Additional Statement of the Case, above.

Unlike disputes over a firing for more traditional "union activities," such a dispute is not necessarily of great importance to a union. Public-sector unions are not always concerned about how government officials treat non-employee citizens any more than private-sector unions are always concerned about how employers treat their non-employee customers. Neither public-sector nor

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5. Amicus's suggestion that McDonald's First Amendment claim is one within a labor arbitrator's special competence appears to be based on the same incorrect assumption, i.e. that McDonald alleged a firing in retaliation for traditional union activities regarding disputes over wages or working conditions. There is no reason to believe that labor arbitrators have any more specialized competence in determining the First Amendment issues involved in this case than in determining the racial discrimination issues involved in *Alexander*. There is substantial reason to believe that they have *less* competence in First Amendment issues than they have in the wage and hour issues involved in *Barrentine*.

private-sector unions necessarily want their members to reveal damaging information about management's treatment of the public. Either may want to withhold that information for any number of reasons. The union may prefer to trade non-disclosure for concessions by management at the bargaining table. It may want to avoid replacement of existing management officials with ones more hostile to the union. It may be concerned that the disclosures will have unfavorable repercussions for the union. And it may justifiably consider management's treatment of the public to be of secondary importance compared to its treatment of its employees—the only persons the union has any obligation to represent.[6]

Of course, one could hope that unions would be as concerned about violations of employees' rights to free speech as they are about their collectively bargained rights. (Similarly, in *Alexander* and *Barrentine,* one could have hoped that they would be just as concerned about employees' rights under Title VII or the FLSA). However, Congress did not leave the protection of those rights to unions but to the courts. There is ample historical justification for the fear that some unions will not fully protect the free speech rights of their members. In the private sector, Congress has recognized that unions as well as employers are sometimes guilty of "disregard of the rights of individual employees." Labor-Management Reporting and Disclosure Act of 1959 §2(b), 29 U.S.C. §401(b). Congress found it necessary to create a cause of action to protect employees against union interference

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6. Moreover, even where the interests of the employee and the union appear to correspond, the magnitude of those interests may significantly differ. The entire bargaining unit in this case had only three members. Tr. 120. The Steelworkers ceased representing the unit within a short time after McDonald was fired. DTr. 116.

with their right "to express any views, arguments or opinions." LMRDA §§101(a)(2), 102, 29 U.S.C. §§411 (a)(1), 412; *see, e.g., Stachan v. Weber,* 535 F.2d 1202 (9th Cir. 1976).

Moreover, there is no justification for giving preclusive effect to arbitration decisions even if the union and the employee could be presumed to share a common interest. As this Court made clear in *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 n.21 (1974), the ultimate determination of whether individual civil rights have been violated must be made in court.

> "But courts should ever be mindful that Congress, in enacting [the statute] thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum."

Thus, various factors may justify giving greater or lesser evidentiary weight to the arbitrator's decision. No combination of factors justifies abdication of the judicial responsibility to make the ultimate decision.

The single factor on which amicus focuses certainly would not justify that abdication. The extent to which the union and the individual employee can be presumed to share a common interest in the outcome of arbitration may be *one* factor to be considered in determining the evidentiary weight to be given the arbitrator's decision. It is certainly not the only factor and is unlikely to be the most important one. In the present case, for example, a number of facts about the arbitration merited consideration. Consideration had to be given to the fact that McDonald had not been given notice of the charge against him, that the union had refused to call a crucial witness on his behalf, that Longstreet had failed to disclose exculpatory

evidence, and that the arbitrator was not presented and did not decide the First Amendment retaliation issue. Even in determining the *evidentiary weight* to be given the arbitration decision, these factors outweigh any presumption that the union and employee shared a common interest. Yet amicus suggests using that presumption not only to determine the weight to be given the arbitration award but also to bar the introduction of any evidence at all regarding the substantive issue—whether McDonald's constitutional rights were actually violated.

II

The Decisional Law of Michigan and of This Court Would Deny Preclusive Effect to Collectively Bargained Arbitration in Subsequent §1983 Cases. Nothing in the Restatement of Judgments Suggests a Contrary Result

Amicus EEAC argues that the Restatement (Second) of Judgments (1982) (hereinafter cited as "Restatement") would suggest that the arbitration decision in this case should be given preclusive effect. This argument fails for two reasons. First, if the Restatement did suggest that result, it would be contrary to the decisional law of Michigan and this Court. Second, the Restatement does not support giving preclusive effect to arbitration in this case.

Neither amicus nor Respondents have cited a single decision of this Court or any Michigan court holding that an adverse arbitration award should bar a subsequent action to vindicate individual statutory or constitutional rights. Our research has revealed no such case. Regardless of what amicus claims that the Restatement may say, this Court has repeatedly held that prior arbitration does not preclude such actions. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine v. Arkansas Best*

Freight System, Inc., 450 U.S. 728 (1981).[7] Moreover, the State of Michigan has repeatedly refused to give preclusive effect to arbitration awards in subsequent actions to vindicate employees' statutory or constitutional rights. *Michigan Civil Rights Commission ex rel. Boyd v. Chrysler Corp.*, 64 Mich. App. 393, 235 N.W.2d 791, 797-798 (1975); *Detroit Fire Fighters Association v. City of Detroit*, 408 Mich. 663, 293 N.W.2d 278 (1980); *City of Grand Rapids*, 1975 MERC Lab Op 102 (1975).

Even *state-court* judgments can be granted no greater preclusive effect by federal courts than they are granted by the courts of the state in which they were rendered. *Haring v. Prosise*, ... U.S. ....., 103 S.Ct. 2368, 2373 n.6 (1983). As discussed in Part V.B. of our previous brief, under Michigan law an adverse arbitration decision will not preclude a subsequent action to vindicate individual statutory or constitutional rights. Amicus's attempt to disregard Michigan law in favor of its own interpretation of the Restatement is an effort to create a special federal rule of preclusion. The adoption of such a rule was unanimously rejected by this Court in *Haring*.

In fact, the Restatement does not support giving preclusive effect to arbitration in this case. The Restatement contains no mechanical rule as to whether arbitration awards should or should not be given preclusive effect. Instead, under the Restatement, the issue depends on an evaluation of how the inherent limitations of the arbitration process would affect the public policies embodied by the particular substantive legal provision. This Court has "long recognized that 'the choice of forums inevitably affects the scope of the substantive right to be vindicated.'"

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7. As Justice Rehnquist has pointed out, this Court is not bound by the views expressed in the Restatement. *Montana v. United States*, 440 U.S. 147, 164 (1979) (concurring opinion).

Alexander v. Gardner-Denver Company, 415 U.S. 36, 56 (1974) (Quoting *U.S. Bulk Carriers v. Arguelles,* 400 U.S. 351, 359-360 (1971)). Under the Restatement, resolving the issue requires:

> "consideration [of] whether extrinsic policies indicate that the second forum should nevertheless examine the matter in question anew. These policies concern the relative competence and responsibility of the two forums. . . . [S]ubstantive concerns emanate from the fact that resolution of doubtful cases can significantly affect the social impact of a particular substantive legal provision or scheme of provisions. . . . *Whether [preclusion] ought to follow can depend on concerns of a substantive nature regarding the type of controversy involved. The nature of these concerns and the weight they should be accorded are specific to the substantive area in question and cannot be defined in a useful generalization."* *Id.* at 265-266 (emphasis added).

In the context of arbitration, these substantive concerns are recognized in Sections 84(2) and 84(3)(b). These Sections deny preclusion if the statutory scheme of remedies permits the litigation or if preclusion would be incompatible with a public policy that the second forum should be free to make an independent determination of the issue. Thus, the Restatement suggests exactly the sort of analysis which this Court undertook in *Alexander* and *Barrentine,* and which we urged in Parts II-IV of our previous brief.[8]

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8. Michigan courts have undertaken a similar analysis. Concluding that considerations of public policy strongly militate in favor of "cumulative and overlapping remedies" in the field of civil rights, they have refused to permit arbitration to bar subsequent civil rights actions. *Michigan Civil Rights Commis-*

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To the extent that the Restatement provides any mechanical rules for this case, those rules require that preclusion be denied. McDonald would not be bound since he was not a party to the arbitration within the meaning of Section 34 of the Restatement. The Union—not McDonald—submitted the case to arbitration and agreed to be bound by the outcome. P. Ex. 31, J.A. 29, Tr. 763. The arbitrator recognized that there were only two parties to the arbitration, the City and the Union. P. Ex. 35, J.A. 30 at pp. 30, 44, Tr. 764-765. McDonald did not control what evidence was presented or arguments were made at arbitration. On the contrary, he strongly disagreed with crucial Union decisions about that presentation. Tr. 238, 240-243, 165-166, 701, DTr. 90-91. Unless a person has the rights of a party to control the presentation at arbitration, he is not bound by the outcome. Restatement, Section 83(2)(b) (Made applicable to arbitration by Restatement, Section 84(3)(b)). As the comment to Section 83(2) states:

> "For purposes of applying the rules of preclusion on the basis of an administrative determination [or arbitration award], the person must have the rights of a party or be represented by such a party. In some types of administrative proceeding [and arbitrations], the victim of a statutory wrong may complain to the agency [or union] but not be given initiative or control of an enforcement proceeding. In such circumstances, the agency [or the union] rather than the

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Footnote continued—

sion ex rel. Boyd v. Chrysler Corporation, 64 Mich. App. 393, 235 N.W.2d 791, 798 (1975); *see also Chrysler Corporation v. Michigan Civil Rights Commission*, 68 Mich. App. 283, 242 N.W.2d 556, 559 (1976); *Hernden v. Consumer Power Co.*, 72 Mich. App. 349, 249 N.W.2d 419, 421 (1976); *Detroit Fire Fighters Association v. City of Detroit*, 408 Mich. 663, 293 N.W.2d 278, 283 (1980); and cases discussed in Brief for Petitioner at pp. 31-36.

victim, is the party to whom the rules of res judicata apply." Restatement, Section 83, Comment c.

As Justice Rehnquist recently stated, "It is a fundamental premise of preclusion law that non-parties to a prior action are not bound by the judgment." *Ashley v. City of Jacksonville,* ..... U.S. ....., 52 U.S.L.W. 3287 (October 11, 1983) (Dissenting from denial of *certiorari*).

The Restatement would also deny preclusive effect to the arbitration because the arbitrator was not authorized to resolve McDonald's First Amendment claims or to provide the damage remedies available under Section 1983. Restatement §26. As discussed in greater detail in our original brief, the arbitrator's authority was expressly limited to interpretation and application of the collective bargaining agreement. He did not have authority to consider the First Amendment issue or to grant the full range of relief available under Section 1983. Therefore, under Section 26 of the Restatement, McDonald's claim would not be extinguished since he was "unable to rely on a certain theory of the case [and] to seek a certain remedy or form of relief" in the arbitration.[9]

III

Respondents Provide No Authority Suggesting That Michigan Courts Would Give Preclusive Effect to the Arbitration in this Case

Respondents fail to cite a single case in which any Michigan Court has ever suggested that an arbitration award under a collective bargaining agreement would bar

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9. Further reasons why the principles set forth in the Restatement would deny preclusive effect to the arbitration in this case are set forth in the *Amicus* brief of the Edwin F. Mandel Legal Aid Clinic at pages 16-20.

a subsequent suit to vindicate individual statutory or constitutional rights. In fact, Respondents acknowledge that the courts of Michigan stress that statutory and contractual remedies for violations of civil rights are independent of each other. Brief for Respondents, Part II.C. at pp. 24-25. They provide no reason to believe that a Michigan court would give preclusive effect to the arbitration decision in this case.

Respondents do suggest that Michigan public policy generally favors public-sector grievance arbitration. They argue that the Michigan Supreme Court's decision in *Detroit Fire Fighters Association v. City of Detroit*, 408 Mich. 663, 293 N.W.2d 278 (1982) (cited in Part V.B. of our previous brief) has been somehow overruled by the decision of Michigan's intermediate appellate court in *Detroit Police Officers Association v. City of Detroit*, 114 Mich. App. 275, 318 N.W.2d 650 (1982). Of course, the Michigan Court of Appeals cannot overrule the state's Supreme Court. Moreover, there is simply no inconsistency between the decisions.

Police Officers involved a jurisdictional dispute between two unions over which collective bargaining agreement covered a particular classification of employee. Each union had obtained an arbitration decision that *its* contract governed the classification. The court held that, although only the Michigan Employment Relations Commission could decide which of the two contracts applied, the arbitrator could determine whether back pay was due under the applicable contract. The Court of Appeals expressly rejected the argument that its position in any way conflicted with *Fire Fighters* stating "We do not believe that [*Fire Fighters*] requires a contrary result." 318 N.W.2d at 652 n.2.

Respondents also refer to a number of Michigan statutes which they believe support their position in various ways. However, none of these statutes deal with public-sector grievance arbitration. Respondents repeatedly rely on the Michigan Labor Mediation Act, M.C.L. §423.1 *et seq.*, M.S.A. §17.454(1). However, public-sector employers are expressly excluded from the coverage of that act. M.C.L. §423.2(f); M.S.A. §17.454(2)(f). Similarly, Respondents rely on Chapter 50 of the Michigan Revised Judicature Act ("RJA") (M.C.L. §600.501 *et seq.;* M.S.A. §27A.5001 *et seq.*) and General Court Rule ("G.C.R.") 769. However, RJA Chapter 50 is expressly *inapplicable* to collective bargaining agreements (M.C.L. §600.5001(3); M.S.A. §27A.5001(3)), and G.C.R. 769 applies only to arbitrations covered by RJA Chapter 50. G.C.R. 769.1. Finally, Respondents rely on the Compulsory Arbitration of Labor Disputes in Police and Fire Departments Act ("P.A. 312"), M.C.L. §423.231 *et seq.*, M.S.A. §17.455(31) *et seq.* However, P.A. 312 deals only with "interest" (contract formation) arbitration, and has nothing to do with grievance arbitration *Detroit Fire Fighters Association v. City of Detroit*, 408 Mich. 663, 293 N.W.2d 278, 281-282 (1980).

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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