No. 83-219

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GARY MCDONALD,

Petitioner,

v.

CITY OF WEST BRANCH, MICHIGAN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND UNITED STEELWORKERS OF AMERICA, AFL-CIO, AS AMICI CURIAE SUPPORTING PETITIONER

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This brief *amici curiae* is filed with the consent of the parties. The letters granting consent have been lodged with the Clerk.

STATEMENT OF INTEREST

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 95 national and international labor unions with a

total membership of approximately 13,500,000 working men and women. United Steelworkers of America ("USWA"), an affiliate of the AFL-CIO, is a labor organization with over 1,000,000 members employed in a diversity of fields. USWA was the bargaining agent of the police officers employed by respondent City of West Branch. In that capacity, USWA negotiated the collective bargaining agreement under which petitioner's discharge grievance was arbitrated, and USWA presented that grievance to the arbitrator.

The AFL-CIO and USWA are interested in assuring that arbitration awards under labor contracts will not preclude employees from asserting their First Amendment rights in actions brought under 42 U.S.C. § 1983.[1]

SUMMARY OF ARGUMENT

1. This Court has twice decided that labor arbitration decisions are not to be accorded so broad a preclusive effect as to deny an individual the opportunity to litigate in a federal court a claim based on that individual's federal statutory rights. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine* v. *Arkansas-Best Freight*

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[1] The caption of this case lists USWA as a respondent, and the brief in opposition, at p. 1, identifies USWA as one of the parties joining the brief in opposition. USWA did not authorize that joinder, and does not subscribe to the positions stated in that brief. USWA was named as a defendant in petitioner's complaint because petitioner alleged therein that USWA had breached its state-law duty of fair representation in presenting the grievance to the arbitrator. The district court declined to exercise pendent jurisdiction over that state law claim, and the complaint against USWA was dismissed. As petitioner did not appeal that dismissal, USWA was not a party in the court of appeals and is not properly a party here. (The caption identifies USWA as "United Steelworkers of America, District 29." There is no separate legal entity by that name. District 29 is simply an administrative office of USWA.)

Systems, 450 U.S. 728 (1981). All of the considerations that underlie the conclusion reached in *Alexander* and *Barrentine* apply equally in this case, and those precedents are therefore dispositive here.

2. The rights established through collective bargaining are collective rights, and those rights are enforceable through the grievance-arbitration process by the union as the representative of the collective—not by the individual employees involved. The union has "exclusive control over the manner and extent to which an individual grievance is presented." *Alexander*, 415 U.S. at 58, n.19. To give preclusive effect in a 42 U.S.C. § 1983 case to a labor arbitrator's decision would be to deprive the plaintiff of the opportunity to litigate his own statutory claim in his own way. Moreover, the labor arbitration system, and the role of unions in processing grievances within that system, would be grossly deformed were arbitration awards to determine not only claims arising under collective agreements, but also an individual's claim arising under federal constitutional or statutory law.

3. Numerous employees, if confronted with the rule that arbitration of their contractual grievances precluded litigation of their federal constitutional claims in the courts, would choose to bypass the contractual grievance procedure. The result would be that disputes that might otherwise have been resolved within the consensual processes established at the workplace will instead be thrust precipitously into the federal courts, to the detriment of both the labor arbitration system and the judicial system.

ARGUMENT

1. Permitting a second litigation of a legal claim or a factual dispute entails substantial social costs. In our legal system the defense that a matter has been resolved in a prior adjudication is therefore normally regarded as dispositive. See, e.g., *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 466-467, n.6 (1982). For example, there is no dispute here that labor arbitration decisions are conclusive on the meaning and effect of a collective agreement. *Steelworkers* v. *Enterprise Wheel & Car Corpy.*, 363 U.S. 593 (1960). But, in certain situations granting preclusive effect to a resolution reached in an earlier proceeding entails even higher social costs; in those situations the prior adjudication defense is not honored. And, as *Kremer* recognized, 456 U.S. at 477-478, this Court has twice concluded that labor arbitration decisions are not to be accorded so broad a preclusive effect as to deny an individual the opportunity to litigate in a federal court a claim based on that individual's statutory rights. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine* v. *Arkansas-Best Freight Systems*, 450 U.S. 728 (1981). We submit that *Alexander* and *Barrentine* control this case.[2]

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[2] This case, unlike *Alexander* and *Barrentine*, involves on arbitration award rendered under a collective agreement that is not governed by federal law. But as this Court explained in *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 223 (1977), "Michigan has chosen to establish for local government units a regulatory scheme which, although not identical in every respect to the NLRA or the Railway Labor Act, is broadly modeled after federal law" (footnote omitted). Under Michigan law employees of local government units enjoy the rights to self-organization and to bargain collectively, *id.* at 223; a union selected by a majority of employees in an appropriate unit becomes the exclusive representative of all the employees in that unit, *id.* at 223-224; and a union thus selected owes a duty of fair representation to all employees in the unit, *id.* at 224. Like Michigan, most states that have adopted public employee collective bargaining laws have based those laws on the central principles of the federal labor policy. That being so, the arbitration process here has the same basic qualities as the arbitration

In *Alexander*, this Court ruled that an arbitrator's decision under a collective agreement that an employee had been discharged for just cause did not preclude that employee from obtaining *de novo* consideration in federal court of his claim that the discharge had been based on racial discrimination in violation of Title VII of the Civil Rights Act of 1964. The *Alexander* Court made it clear that in this context preclusion is inappropriate under "[w]hatever doctrinal label," expressly rejecting the doctrines of "election of remedies and waiver" and the "doctrines of *res judicata* and collateral estoppel." 415 U.S. at 49, n.10.

In *Barrentine*, the Court ruled, based on *Alexander*, that an arbitrator's decision rejecting a claim for wages under a collective agreement requiring compensation "for all time spent in [the employer's] service" (450 U.S. at 731) did not preclude the affected employees from obtaining *de novo* consideration in federal court of their claims that the failure of the employer to compensate for the time in question constituted a violation of the minimum wage provisions of the Fair Labor Standards Act.

In the instant case, the preclusion question is raised in the context of a First Amendment claim in a 42 U.S.C. § 1983 action. Here again, as in *Barrentine*, the difference in the statutory basis for the court action provides no rational ground for reaching a result different from that reached in *Alexander*. First Amendment and other rights enforceable in a § 1983 action enjoy at least the same place in the constellation of federal rights as do rights derived from Title VII or from the FLSA. "There is no suggestion in [§ 1983's] statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdic-

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processes this Court has addressed in cases under the federal labor laws. In this brief we therefore cite to such federal cases as descriptive of the basic characteristics of labor arbitration whether under federal or state labor laws.

tion." *Alexander*, 415 U.S. at 47. And, qualities peculiar to labor arbitration make that process an unsuitable one for resolving an individual's federal statutory rights. This brief is addressed to elaborating the basis for the latter point, which was a major predicate for the decisions in *Alexander* and *Barrentine*.

2. Labor arbitration is an integral part of a system for the peaceful, consensual resolution of labor disputes established by unions and employers through collective bargaining. See *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574 (1960). Labor arbitration is wholly a creature of contract, the collective agreement between the union and the employer. *Id.* at 582. In the vast majority of labor contracts, including the agreement in this case, the function of arbitration is carefully delineated: to resolve disputes arising between the union and the employer *as to the meaning or application of the contract.* By performing that function, labor arbitration facilitates the ongoing relationship between the employer and union and avoids the disruptions that result from economic warfare or from litigation in court. As this Court explained in *Warrior & Gulf*:

> The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts.
>
> > A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. . . ." Shulman, [Reason, Contract and Law in Labor Relations, 68 Harv. L. Rev. 999] at 1016. [363 U.S. at 581].

Experience has shown that labor arbitration is well-suited to perform its labor relations function. But that is not to say that labor arbitration is well-suited to performing the very different function of determining claims of individual employees based on federal statutory and constitutional rights that may arise in the workplace. In fact, labor arbitration is not suited to the latter function because of two characteristics, both of which are essential to realizing the labor relations objectives that have prompted employers and unions to opt for that system of dispute settlement.

a. Under most collective agreements, including the agreement in this case, *the parties to a labor arbitration are the employer and the union*, and not the particular employee or employees who have an interest in the arbitrator's decision. As a party, the union, not the individual employee(s) involved, controls access to the arbitrator, the strategy and tactics of how to present the case, the nature of the relief sought, and the actual presentation of the case. The union has "exclusive control over the manner and extent to which an individual grievance is presented." *Alexander*, 415 U.S. at 58, n.19. See also *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). In performing these tasks, the union's objective is not solely to further the interests of the employee(s) directly involved; rather, the union's primary objective is to further the collective interests of the members of the bargaining unit. The interests of the collective often may dictate a different approach to a given arbitration case than the interests of the individual(s) involved. As this Court stated in *Barrentine*, 450 U.S. at 742:

> Since a union's objective is to maximize [the] overall [interests] of its members, not to ensure that each employee receives the best . . . deal available, *cf. Gardner-Denver*, 415 U.S., at 58, n.19, a union balancing individual and collective interests might

> validly permit some employees' . . . benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole.

To be sure, in exercising its representative function the union is limited by its duty fairly to represent all the members of its bargaining unit. That duty—to refrain from "conduct toward a member of the collective bargaining unit [that] is arbitrary, discriminatory, or in bad faith" (*Vaca* v. *Sipes*, 386 U.S. at 190)—creates a correlative right in the individual employees in the unit. But that duty and right do not diminish the union's ability in good faith to serve the collective good at the expense of an employee or of a group of employees. See *Barrentine*, 450 U.S. at 742 (quoted *supra*, pp. 7-8). See also *Humphrey* v. *Moore*, 375 U.S. 335, 349 (1964) ("we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another"); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337-339 (1953). The rights established through collective bargaining are thus collective rights, and those rights are enforceable through the grievance-arbitration process by the union as representative of the bargaining unit as a whole.

In contrast, the rights sued on in a § 1983 action derive not from a private agreement but from the Constitution or a federal statute; those rights are individual, not collective; and, the individual is free to enforce those rights directly, without the intervention of a union. *Cf. Barrentine*, 450 U.S. at 739-740. The union's duty of fair representation therefore does not extend to the representation of employees in connection with claims based on rights conferred directly on those employees as individuals by the Constitution or a federal statute. The fair representation duty is imposed on unions to compen-

sate for "extinguish[ing] the individual employee's power to order his own relations with his employer" and "vest[ing in] unions [the] power to order the relations of employees with their employer." *NLRB* v. *Allis-Chalmers*, 388 U.S. 175, 180-181 (1967). The extent of the duty is therefore defined by the "scope" of the union's "authority . . . as exclusive bargaining agent." *Humphrey* v. *Moore*, 375 U.S. at 342. The union has not been made the *exclusive* agent—indeed it has not been made the agent at all—for employees in the vindication of the constitutional or statutory rights stated in § 1983, Title VII, or the FLSA. Those rights exist independently of the union, are enforceable independently of collective bargaining and of a collective agreement, and cannot be waived or otherwise disposed of by the union.

To give preclusive effect in a § 1983 case to an arbitrator's decision rendered in the context just described would be to deprive the plaintiff in that case of any opportunity to litigate his own statutory claim in his own way. His fate would be controlled by the choices the union had made in determining how to proceed in arbitration—choices that properly took into account the collective interests of the entire bargaining unit. Moreover, if labor arbitrations were given such a preclusive effect, the arbitration process itself would likely be freighted with extraneous conisderations. As a practical matter, the union would be obliged to take into account the fact that an arbitration would cut off an individual's constitutional or statutory rights in drawing the balance between individual and collective interests. The result would be to skew the balance against the collective interests the union has a primary obligation to vindicate.

b. Even when the union concludes that an individual employee's interests are congruent with the bargaining unit's collective interests, it is still true that labor arbitration is not a proper substitute for a judicial pro-

ceeding in determining questions of motive. Such questions are frequently at the heart of § 1983 cases; for example, the ultimate question in the instant § 1983 action is whether the respondent city, in discharging the petitioner, was motivated by the petitioner's exercise of First Amendment rights.

As this Court has recognized, labor arbitration, in order properly to serve its role in the collective bargaining system, must be "an efficient, inexpensive, and expeditious means of dispute resolution." *Alexander*, 415 U.S. at 58. The union's case in a labor arbitration is commonly prepared and presented by non-lawyers; often that is true as well on the employer's side. Indeed, many labor arbitrators are not lawyers. And, there is no meaningful discovery process in labor arbitration—the availability of such a process would transform labor arbitration into precisely the inefficient, expensive, contentious, and drawn out litigation process the parties intended to avoid. Finally, while it is contrary to our experience, a respected and experienced arbitrator has suggested that there are institutional pressures on arbitrators that push against their making a finding that an employer has engaged in conduct that might be violative of constitutional or statutory norms external to the bargaining agreement: "there is some basis for the fear that economic self-interest and the desire to be loved, which are linked with future acceptability, may distort adjudication even where there is complete harmony between the individual's interest and those of his representative." Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. Chi. L. Rev. 30, 44 (1971). That possibility cannot be totally ignored.

Each one of these factors leads to the Court's conclusion in *Alexander* that "[a]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the

final resolution of rights created by Title VII." 415 U.S. at 56. See also *Kremer*, 456 U.S. at 478. And the underlying reasoning for that conclusion, set out in *Alexander*, fits § 1983 claims as exactly as Title VII claims:

> . . . [Even] where a collective-bargaining agreement contains provisions facially similar to those of Title VII [,] . . . other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. . . . Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.
>
> Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath are often severely limited or unavailable. . . . And as this Court has recognized, "[a]rbitrators have no obligation to the court to give their reasons for an award." . . . [415 U.S. at 57-58; footnote and citations omitted]

Formal discovery and the other aspects of court litigation are not necessary to the resolution of disputes such as the meaning of a contract clause, whether a promotion was given to the senior employee, or the appropriate level of discipline for misconduct. Such cases are the grist for the labor arbitration mill. But discovery, compulsory process and other procedural devices available in

court litigation are critical in statutory or constitutional cases where the employer's *motive* is the issue.[3]

[3] This Court in *Alexander*, while recognizing that the National Labor Relations Board in some instances "defers" to arbitration awards when a claim of anti-union discrimination underpinning a § 8(a)(3) charge before the Board parallels a contractual claim already adjudicated against the employee in arbitration, 415 U.S. at 56, n.17 (citing *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955)), refused to apply a similar policy of deferral in Title VII actions, 415 U.S. at 56-60. Many of of the reasons given by this Court for rejecting deferral where there is a Title VII or an FLSA claim would seem equally applicable to § 8(a)(3) claims. To the extent *Spielberg* survives *Alexander* and *Barrentine*, that can only be because of a consideration that distinguishes § 8(a)(3) not only from Title VII and the FLSA, but from the Constitution and 42 U.S.C. § 1983 as well.

The Board has predicated its *Spielberg* rule on the view that § 8(a)(3) is one component of an integrated statutory scheme—the National Labor Relations Act, as amended by the Labor-Management Relations Act—which allows employees to opt for organization to advance their collective interests and has as its ultimate objective the achievement of collective agreements that channel disputes through the private dispute resolution mechanisms established in those agreements. The Board draws the conclusion that the totality of that statutory scheme is advanced by declining to adjudicate § 8(a)(3) charges in certain limited circumstances where the agency is satisfied that the contractual issue decided by the arbitrator is identical to the statutory issue posed by the § 8(a)(3) charges and that the collective interests pursued by the union in the arbitration coincide with the interests that § 8(a)(3) is designed to protect. See, e.g., *International Harvester Co.*, 138 NLRB 923, 925-927 (1962), *aff'd sub nom. Ramsey* v. *NLRB*, 327 F.2d 784 (7th Cir. 1964), *cert. denied*, 377 U.S. 1003 (1964); *Raytheon Co.*, 140 NLRB 883 (1963); *General American Transportation Co.*, 228 NLRB 808 (1977); *Suburban Motor Freight, Inc.*, 247 NLRB 146 (1980); *Propoco, Inc.*, 263 NLRB No. 34, 110 LRRM 1496 (1982).

Whatever the correctness of the Board's approach in § 8(a)(3) cases, that approach can have no application to cases that arise under statutes conferring individual rights that are not subject to disposition by the collective. Cf. *Barrentine*, 450 U.S. at 739. The rights vested in individuals by the Constitution or by other statutes wholly unconnected to the NLRA—such as 42 U.S.C. § 1983—are meant to be enforceable through judicial processes and there is no congressional indication of a preference for resolution of such rights through an arbitral process such as that provided for in collective agreements.

3. The considerations outlined above all lead back to the conclusion this Court has already reached in *Alexander* and *Barrentine*. A preclusion rule would deprive the individual of *his* opportunity to present his federal statutory or constitutional claim to a judge. It would inject extraneous and inappropriate considerations into the arbitration process. See p. 9, *supra*. And, as this Court pointed out in *Alexander*, it "might adversely affect the arbitration system as well as" the judicial system:

> Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less. [415 U.S. at 59].

4. The foregoing does not however mean that there is no place for consideration of a labor arbitration award in the adjudication of a § 1983 claim. The concluding insight of *Alexander*, carried forward in *Barrentine* (450 U.S. at 743-744, n.22), is equally applicable to § 1983 actions:

> The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate.[21]

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[21] We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbtiral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true

> where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Ttile VII, 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. [415 U.S. at 60 & n.21].

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals in this case should be reversed.

Respectfully submitted,

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