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Arbitration Under Union-Negotiated Collective-Bargaining Agreements: The Need for Perspicuity When Employees Waive the Right to Pursue Discrimination Claims in Federal Court

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How clear and unmistakable should arbitration clauses be when employees waive their right to pursue discrimination claims in federal court under union-negotiated collective-bargaining agreements? The United States courts of appeals have been split on this question since the Supreme Court handed down its decisions in Wright v. Universal Maritime Service Corp. *and* 14 Penn Plaza LLC v. Pyett.[1] *In* Wright*, the Court held that waiver in union-negotiated collective-bargaining agreements must be "clear and unmistakable."*[2] *Eleven years later, in* Pyett*, the Court affirmed its clear-and-unmistakable standard for waiver of a union member's right to pursue her statutory claim through litigation.*[3] *Since* Pyett *though, the courts of appeals have diverged on their interpretation of the clear-and-unmistakable standard. But their differing interpretations are unsurprising after the Supreme Court declined to address what constituted a clear-and-unmistakable waiver.*[4]

This Article proposes that, with the issue before the Supreme Court again, the Court should resolve the circuit split by adopting what I call the "Perspicuity Rule." This Perspicuity Rule would require that collective-bargaining agreements specifically list which statutes are covered by the

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1. Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 82 (1998); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274 (2009).

2. *Wright*, 525 U.S. at 80. *Wright* adopted the clear-and-unmistakable waiver standard initially set forth in Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 694 (1983), a case involving union officials' statutory right under § 8(a)(3) of the National Labor Relations Act to be free of antiunion discrimination. *Id.*

3. *Pyett*, 556 U.S. at 274.

4. Brendan D. Cummins & Nicole M. Blissenbach, *The Law of the Land in Labor Arbitration: The Impact of* 14 Penn Plaza LLC v. Pyett, 25 A.B.A. J. LAB. & EMP. L. 159, 167 (2010) ("The Court in *Penn Plaza* declined, on procedural grounds, to address . . . what constitute[d] a clear and unmistakable waiver . . . .").

waiver to be considered clear and unmistakable. This Rule would give employees a clear, precise presentation of what federal statutory rights must be vindicated through arbitration rather than litigation. Such language would be easy for employers and unions to include in collective-bargaining agreements and is all the proposed Perspicuity Rule would require.

INTRODUCTION

Arbitration has long served as a substitute to the judicial process for resolving legal disputes in the United States.[5] Rather than submitting a claim to the court, arbitration presents the issue to an arbitrator who resolves the dispute.[6] Millions of contracts have arbitration clauses, including in the employment context.[7] These contracts commonly

5. Thomas E. Carbonneau, *Freedom and Governance in U.S. Arbitration Law*, 2 GLOB. BUS. L. REV. 59, 59 (2011). However, arbitration of employee grievances was rare before the 1930s. Stephen J. Ware, *Labor Unions, Cartelization, and Arbitration: Replacing At-Will Employment with Arbitration of Employee Grievances*, 12 PENN. ST. ARB. L. REV. 19, 37 (2020) ("[L]abor arbitration was virtually non-existent before 1900 and . . . labor grievance arbitration remained uncommon through the 1920s.").

6. DDK Hotels, LLC v. Williams-Sonoma, Inc., 6 F.4th 308, 316 (2d Cir. 2021) (noting that parties to a contract may choose through their contract to have arbitrators resolves their disputes rather than a court).

7. *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY § 1.4.1, at 9 (2015) [hereinafter ARBITRATION STUDY], https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/2HN9-TJVZ] (noting that tens of millions of consumers engage in transactions subject to arbitration clauses); *see also* Robert Barnes, *Supreme Court Rules That Companies Can Require Workers to Accept Individual Arbitration*, WASH. POST (May 21,

contain mandatory-arbitration clauses.[8] When these clauses are included in employment contracts, the parties usually agree to arbitrate instead of litigate their disputes to save time and money, but increasing costs and complexity in arbitration may impact the efficacy of arbitration.[9]

Congress and the judiciary have endorsed arbitration because of the increased efficiency and decrease in resources required to resolve issues.[10] Mandatory arbitration is ubiquitous in many types of contracts, including in the context of employment.[11] As a result, employees with discrimination claims have run up against these mandatory-arbitration clauses when pursuing their claims.[12] But the full extent of arbitration's hold on the Supreme Court was not decided until 1995, when it held that the Federal Arbitration Act's (FAA) "control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce."[13] Around the same time, the

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2018, 11:22 AM), https://www.washingtonpost.com/politics/courts_law/supreme-court-rules-that-companies-can-force-workers-into-individual-arbitration/2018/05/21/09a3a968-5cfa-11e8-a4a4-c070ef53f315_story.html [https://perma.cc/H5P5-GNJ5] ("Arbitration contracts are a growing trend.").

8. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1421 (2019) (Ginsburg, J., dissenting) ("Propelled by the Court's decisions, mandatory arbitration clauses in employment and consumer contracts have proliferated."); *see also* ARBITRATION STUDY, *supra* note 7, at 9 ("Tens of millions of consumers use consumer financial products or services that are subject to . . . arbitration clauses.").

9. Michael P. Wolf, *Give 'Em Their Day in Court: The Argument against Collective Bargaining Agreements Mandating Arbitration to Resolve Employee Statutory Claims*, 56 J. MO. BAR 263, 263 (2000) ("The explosion of employment litigation is a well-documented fact."); *see also* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1644 (2018) (Ginsberg, J., dissenting) ("[O]nly 2.1% of nonunionized companies imposed mandatory arbitration agreements on their employees in 1992, but 53.9% do today."); *but see* Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?*, 37 HOFSTRA L. REV. 71, 71–72 (2008) (discussing whether parties are fleeing arbitration).

10. *See infra* Part I for further discussion as to Congress' and the judiciary's endorsement of arbitration; *see also* Stuart M. Boyarsky, *Not What They Bargained For: Directing the Arbitration of Statutory Antidiscrimination Rights*, 18 HARV. NEGOT. L. REV. 221, 225 (2013) (footnotes omitted) ("The [National Labor Relations Act's] preference for arbitration as the method to solve labor disputes stemmed from the understanding that, were all of these abundant disputes to be litigated, industry in this country would be unable to function. Therefore, in order to promote industrial stability, arbitration was not only accepted but also favored in the collective bargaining context as a quick and efficient manner for resolving labor disputes.").

11. *See* Roger B. Jacobs, *Fits and Starts for Mandatory Arbitration*, 67 DISP. RESOL. J. 39 (2013) (noting the numerous types of disputes that invoke mandatory arbitration).

12. Wolf, *supra* note 9, at 263 ("The explosion of employment litigation is a well-documented fact."); *see also Epic Sys. Corp.*, 138 S. Ct. at 1644 (Ginsburg, J., dissenting) ("[O]nly 2.1% of nonunionized companies imposed mandatory arbitration agreements on their employees in 1992, but 53.9% do today.").

13. Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 274 (1995) (citing H.R. REP. NO. 97-542, at 13 (1982); *see also* Michael J. Hanby II, *The Future of Forced Arbitration*, 65 ADVOC. 18, 19 (2022) (discussing forced arbitration).

Supreme Court expressly endorsed arbitration in two other decisions.[14]

The Court's endorsement of arbitration eventually led it to decide that a union-negotiated collective-bargaining agreement that required employees to arbitrate statutory antidiscrimination claims was enforceable as a matter of law.[15] But just how specific should those arbitration clauses be when union members are giving up judicial forums for their federal discrimination claims?[16]

Courts of appeals disagree on what qualifies as a clear-and-unmistakable waiver. Their differing interpretations are unsurprising since the Court in *Pyett* declined to address what constituted a clear-and-unmistakable waiver.[17]

Part I of this Article will provide background information on mandatory arbitration under union-negotiated collective-bargaining agreements. Part II will then survey the circuit courts' decisions on when union-negotiated collective-bargaining agreements are sufficiently clear and unmistakable when waiving a covered employee's right to vindicate statutory antidiscrimination rights in federal court. Finally, Part III will propose that the Supreme Court solve the circuit split by adopting what I call the "Perspicuity Rule" for when a collective-bargaining agreement is sufficiently clear and unmistakable. This Perspicuity Rule would

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14. Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 481 (1989). Two years later, the Court reiterated its "strong endorsement" of arbitration in *Gilmer v. Interstate/Johnson Lane Corp.* 500 U.S. 20, 30 (1991) ("[G]eneralized attacks on arbitration 'res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,' and as such, they are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'" (citing *Rodriguez de Quijas,* 490 U.S. at 481)). For a discussion of the Court's arbitration cases in general, see Thomas E. Carbonneau, *The Rise in Judicial Hostility to Arbitration: Revisiting Hall Street Associates*, 14 CARDOZO J. CONFLICT RESOL. 593, 595–96 (2013) (footnotes omitted) ("[A]lthough the Court is preoccupied with arbitration, the justices are not students of arbitration law. While they have created a body of doctrine, their interest in arbitration is neither principled nor analytical. The Court has rarely, if ever, expressed a serious interest in the intellectual content of arbitration law; instead, the Court plays the role of craftsman, fixated on elaborating workable rules that promote recourse to arbitration.").

15. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274 (2009). For a discussion of how *Pyett* enhanced dispute resolution in the unionized workplace, see Paul Salvatore & Timothy Lockwood Kelly, *One Dozen Years of* Pyett*: A Win for Unionized Workplace Dispute Resolution*, 36 A.B.A. J. LAB. & EMP. L. 257, 258 (2022).

16. For a general discussion of employee knowledge (although not specific to unionized employees), see Jonathan H. Peyton, *What Arbitration Clause?: The "Appropriate" Standard for Measuring Notice of Binding Arbitration to an Employee*, 36 SUFFOLK U. L. REV. 745, 762 (2003) ("A common problem resulting from . . . employer-mandated arbitration is that new employees often have no idea that their employer has closed the door on their right to a judicial forum for the resolution of any statutory claim they may have, including those prescribed under Title VII and the ADA. This creates a great public policy problem, producing a situation in which employees are working under terms and conditions of which they are not even aware.").

17. Cummins & Blissenbach, *supra* note 4, at 167 ("The Court in *Penn Plaza* declined, on procedural grounds, to address . . . what constitute[d] a clear and unmistakable waiver.").

precisely establish that collective-bargaining agreements must specifically list the statutes covered by the waiver. Collective-bargaining agreements would have to name each statute in language sufficiently clear such that a reasonable person would understand what rights are being waived to arbitration. The Perspicuity Rule would give employees a clear, precise presentation of what federal statutory rights will be vindicated in an arbitral forum instead of a courtroom. Language plain to the understanding of a reasonable person would be easy for employers and unions to include in collective-bargaining agreements and is all the proposed Perspicuity Rule would require.

I. BACKGROUND

In arbitration, an arbitrator resolves a legal dispute over an employee's statutory antidiscrimination rights. The arbitrator's decision establishes the "sole and exclusive remedy" for the employee.[18] Arbitration is regulated principally by the FAA.[19] The FAA was enacted in 1925 and has since governed union and labor relations.[20] The FAA provides that a written contract with a provision calling for arbitration of a controversy arising out of that contract is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[21]

The Supreme Court has strongly endorsed arbitration.[22] In *New Prime Inc. v. Oliveira*, the Court said that Congress adopted the FAA to counteract judicial hostility to arbitration and establish "a liberal federal

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18. *Pyett*, 556 U.S. at 274. *See also* Timothy H. Howlett & Christina K. McDonald, *Mandatory Arbitration of Employment Claims: An Update*, 92 MICH. BAR J. 38, 38–9 (2013) (discussing the Supreme Court's evolving support for mandatory arbitration of employment claims); *but see* Carbonneau, *supra* note 14, at 599 (discussing the courts' rising hostility to arbitration). According to Carbonneau,"For the right, arbitration usurps the legitimate authority of the courts and law; for the left, arbitration exacerbates existing inequalities and reinforces corporate positions." *Id.*

19. Federal Arbitration Act, 9 U.S.C. § 2 (1947) ("A written provision in any . . . 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 . . ."). For a discussion on the advantages and disadvantages of arbitration compared to litigation, especially as to fairness and efficiency, correct results, and lessening adverse collateral consequences, see Charles H. Barr, *Arbitration: The Pros, the Cons, and the Best Fit*, 96 WIS. LAW. 22, 22 (2023).

20. 9 U.S.C. §§ 1–402; New Prime Inc. v. Oliveira, 139 S. Ct. 532, 543 (2019) ("Congress enacted the Arbitration Act in 1925, . . .").

21. Federal Arbitration Act, 9 U.S.C. § 2 (1947).

22. Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 481 (1989); *see also* Priyanka Kasnavia, *When Courts Turn Arbitration into Arbitrary: How FAA Precedent Inhibits Federal and State Prohibitions on Employment Discrimination*, 58 HOUS. L. REV. 1173, 1179 (2021) (explaining the Supreme Court's evolving interpretation of the FAA).

policy favoring arbitration agreements."[23] In light of the Court's support of arbitration, it remains a widely used method of alternative dispute resolution.[24] And mandatory arbitration of statutory antidiscrimination claims has replaced litigation for sixty-million Americans.[25]

Some justices, though, have written dissents noting that "mandatory individual arbitration continues to thwart 'effective access to justice' for those encountering diverse violations of their legal rights."[26] They have also questioned the costs employees must bear to vindicate their rights through individual arbitration.[27] Some companies are even reconsidering the efficacy of arbitration instead of litigation in the traditional court system.[28] In addition, members of the #MeToo movement who have advocated for expanded access to courts for sexual harassment victims asked Congress and state legislatures to step in to ensure those victims have access to courtrooms.[29] Last year, Congress responded by enacting the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, which amended the FAA to invalidate arbitration agreements for cases filed under federal, tribal, or state law for claims of sexual assault

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23. *New Prime Inc.*, 139 S. Ct. at 543 (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

24. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344–45 (2011) (discussing how parties design arbitration processes for dispute resolution); *see also* David Horton, *Arbitration about Arbitration*, 70 STAN. L. REV. 363 (2018) (noting that the Court's "interpretation of the Federal Arbitration Act (FAA) has nearly eliminated consumer and employment class actions").

25. Kathleen McCullough, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo-and Time's Up-Inspired Action against the Federal Arbitration Act*, 87 FORDHAM L. REV. 2653, 2666 (2019).

26. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1422 (2019) (Ginsberg, J., dissenting) (quoting DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 60 (Ginsberg, J., dissenting)).

27. *Lamps Plus, Inc.*, 139 S. Ct. at 1421 (Ginsberg, J., dissenting) ("Employees and consumers forced to arbitrate solo face severe impediments to the 'vindication of their rights.'"); Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1647 (Ginsburg, J., dissenting) ("Expenses entailed in mounting individual claims will often far outweigh potential recoveries."); American Exp. Co. v. Italian Colors Restaurant, 570 U.S. 228, 246 (2013) (Kagan, J., dissenting) ("[The defendant] has put [the plaintiff] to this choice: Spend way, way, way more money than your claim is worth, or relinquish your . . . rights."); *Concepcion*, 563 U.S. at 365, (Breyer, J., dissenting) ("What rational lawyer would have signed on to represent the [plaintiffs] in litigation for the possibility of fees stemming from a $30.22 [individual] claim?").

28. *See, e.g.*, Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, WALL ST. J. (June 1, 2021, 7:30 AM), https://www.wsj.com/articles/amazon-faced-75-000-arbitration-demands-now-it-says-fine-sue-us-11622547000 [https://perma.cc/Q3VY-G4LK] (noting that Amazon recently amended its terms of service to permit lawsuits after it was inundated with more than 75,000 arbitration demands from Echo users, resulting in tens of millions of dollars in filing fees that Amazon's own policies required it to pay); *see also* M. Isabelle Chaudry, *An Analysis of Legislative Attempts to Amend the Federal Arbitration Act: What Policy Changes Need to Be Implemented for #MeToo Victims*, 43 SETON HALL LEGIS. J. 215, 228 (2019) ("Access to the judicial system, whether federal or state, is a fundamental right of all Americans. That right should extend fully to persons who have been subjected to sexual harassment in the workplace.").

29. McCullough, *supra* note 25, at 2690–91 (noting that the U.S. Supreme Court is unlikely to alter its expansive reading of the FAA's applicability).

or sexual harassment.[30] But this "stunning victory for the #MeToo movement" may be limited in its application because it only applies where the FAA governs.[31] Some scholars even argue that the Court's general policy favoring arbitration "threatens democracy"[32] and that Congress should intervene further to develop a system more suitable for workers.[33]

Still, a union-negotiated collective-bargaining agreement that "clearly and unmistakably" compels employees to arbitrate their statutory antidiscrimination claims is enforceable as a matter of federal law.[34] When drafted properly, employers and unions can agree to compulsory arbitration of employment-discrimination claims.[35] But courts reach different results when considering just how clear and unmistakable a collective-bargaining agreement must be.[36]

The Supreme Court first distinguished contractual rights and statutory rights as independent from one another, even if both were concurrently violated in a single factual occurrence.[37] In 1974, in *Alexander v. Gardner-Denver Co.*, the Court said that "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory

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30. 9 U.S.C. § 402 (2022); see also Laura Farley, *Ending Forced Arbitration: Understanding the New Federal Law That Prohibits Mandatory Arbitration in Matters of Sexual Assault or Harassment*, 79 BENCH & BAR MINN. 26, 29 (2022) ("[T]he [FAA is] a meaningful step to empower survivors of sexual assault and harassment to seek accountability and justice."). For a general discussion of the new law as it relates to mandatory arbitration in cases of workplace sexual violence, see Heidi M. S. Sandomir, *The End of Forced Arbitration of Sexual Violence and the Uncertain Future*, 29 CARDOZO J. EQUAL RTS. & SOC. JUST. 111, 127–34 (2022).

31. David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J. F. 1, 1 (2022).

32. Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575, 575–76 (2020) (discussing how "the arbitration revolution vitiates collectivity and threatens democracy" and arguing that the arbitration "revolution" should be undone so that citizens can again act collectively).

33. Jeremy Wright, *Arbitration in the Workplace: The Need for Legislative Intervention*, 117 NW. U. L. REV. ONLINE 1, 1 (2022) ("[T]he uninhibited expansion of arbitration to employment contexts has been a net negative for American workers.").

34. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274 (2009).

35. *See* Howlett & McDonald, *supra* note 18, at 41 ("In short, as long as arbitration agreements are drafted properly, employers and employees can agree to mandatory arbitration of employment claims . . . .").

36. *See* Salvatore & Kelly, *supra* note 15, at 285 (contrasting "a more liberal view of the 'clear and unmistakable' standard" in the Second, Fourth, Fifth, and Eighth Circuits with the Third Circuit, which found a collective-bargain agreement satisfied *Wright*'s "clear and unmistakable" standard when it used broad and nonspecific language waiving "*any* right to institute or maintain *any* private lawsuit alleging employment discrimination in *any* state or federal court" (quoting Darrington v. Milton Hershey Sch., 958 F.3d 188, 195 (3d Cir. 2020))).

37. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 59–60 (1974) ("We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII.").

employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII."[38] So, when a union employee submitted a grievance to the arbitral forum, the purpose was merely to vindicate the employee's contractual rights—not both contractual and statutory rights at the same time in arbitration.[39] "The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence," the Court said in *Gardner-Denver*.[40]

Similarly, in 1981 in *Barrentine v. Arkansas-Best Freight System, Inc.*, the Court also permitted an employee to pursue a claim in federal court in addition to—or instead of—binding arbitration.[41] Citing *Gardner-Denver*, the Court reiterated that an arbitrator's authority flows from, and is limited by, the collective-bargaining agreement.[42] The Court said the arbitrator "has no general authority to invoke public laws that conflict with the bargain between the parties."[43] Instead, the Court said that the arbitrator's task was limited to interpreting the meaning of the collective-bargaining agreement to give effect to the parties' collective intent.[44] Like in *Gardner-Denver*, the *Barrentine* Court held that congressional antidiscrimination statutes are aimed at protecting *individual* employees; the collective-bargaining agreements are intended to protect the employees *as a whole*.[45] Finally, the Court noted that the relief arbitrators may grant is often not the same as the reflief available to federal judges.[46] "[A]rbitrators very often are powerless to grant the aggrieved employees as broad a range of relief."[47]

But seventeen years later, the Court's attitude toward arbitration in federal discrimination claims changed in its second major case on this

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38. *Id.*

39. *Id.* at 49–50 ("In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress.").

40. *Id.* at 50. For a discussion about whether employers can use mandatory arbitration to disadvantage their employees, see Jean R. Sternlight, *Steps Need to Be Taken to Prevent Unfairness to Employees, Consumers*, 5 DISP. RESOL. MAG. 5, 5–7 (1998) (explaining some of the disadvantages of mandatory arbitration agreements such as the lack of publicity, jury trials, right of appeals, and resolution by biased negotiators).

41. Barrentine v. Ark.-Best Freight Sys., 450 U.S. 728, 729 (1981).

42. *Id.* at 744.

43. *Id.*

44. *Id.*

45. *Id.* at 739.

46. *Id.* at 745.

47. *Id.* ("Under the FLSA, courts can award actual and liquidated damages, reasonable attorney's fees, and costs. 29 U. S. C. § 216 (b). An arbitrator, by contrast, can award only that compensation authorized by the wage provision of the collective-bargaining agreement.").

area, *Gilmer v. Interstate Johnson/Lane Corp*.[48] In *Gilmer*, the Court held that a claim under the Age Discrimination in Employment Act of 1967 (ADEA) can be subjected to compulsory arbitration.[49] The dissent argued that arbitration's inability to offer class-wide injunctive relief in the same way a court can is a strong argument that arbitration is an inappropriate forum for ADEA and Title VII claims.[50] The majority dismissed Justice Stevens's concern that "compulsory arbitration conflicts with the congressional purpose animating the ADEA."[51] Instead, the Court held that the plaintiff in Gilmer had not shown "that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act."[52]

In fact, since 2000, the Supreme Court has handed down several decisions supporting arbitration under the FAA.[53] And in only one of them, *New Prime, Inc. v. Oliveira*, did the Court reject a claim for arbitration.[54] In support of its pro-arbitration decisions, the Court has noted Congress's desire to counteract judicial hostility to arbitration and to set out "a liberal federal policy favoring arbitration agreements" when

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48. *See* Wolf, *supra* note 9, at 264 (2000) (explaining the historical background and development in the Court's attitude toward arbitration in employer-employee disputes).

49. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 20 (1991).

50. *Id.* at 41–42 (Stevens, J., dissenting) ("The ADEA, like Title VII of the Civil Rights Act of 1964, authorizes courts to award broad, class-based injunctive relief to achieve the purposes of the Act. . . . Because commercial arbitration is typically limited to a specific dispute between the particular parties and because the available remedies in arbitral forums generally do not provide for class-wide injunctive relief . . . I would conclude that an essential purpose of the ADEA is frustrated by compulsory arbitration of employment discrimination claims.").

51. *Id.* at 41 (Stevens, J., dissenting); *but see id.* at 28 ("An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action.").

52. *Id.* at 35.

53. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001) (holding that the FAA applies to most employment contracts, except those of transportation workers engaged in interstate commerce); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 447 (2003) (holding that it was for an arbitrator, not a court, to decide whether a contract's silence on class arbitration meant it was permissible); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (upholding the enforceability of arbitration agreements that waive the right to class actions, even if state law finds such waivers unconscionable); American Express Co. v. Italian Colors Rest., 570 U.S. 228, 236–39 (2013) (holding that an arbitration agreement was enforceable even if the cost of pursuing individual arbitration would exceed potential recovery); Epic Sys. Corp. v. Lewis, 200 L. Ed. 2d 889 (May 21, 2018) (holding that arbitration agreements requiring individualized proceedings "must be enforced as written," notwithstanding any conflict with the National Labor Relations Act's protection of concerted activities); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1422 (2019) (holding that that an ambiguous arbitration agreement could not be interpreted to allow class arbitration because "[c]lass arbitration is not only markedly different from the 'traditional individualized arbitration' contemplated by the FAA, it also undermines the most important benefits of that familiar form of arbitration").

54. New Prime, Inc. v. Oliveira, 139 S. Ct. 532, 537 (2019) (holding that a court's authority to compel arbitration under the FAA does not encompass all private contracts, "no matter how emphatically [the parties] may express a preference for arbitration").

it adopted the FAA.[55] In fact, the Court has held that the FAA establishes a liberal policy favoring arbitration, as well as the principle that arbitration is a matter of contract.[56] "[O]ur cases place it beyond dispute that the FAA was designed to promote arbitration. They have repeatedly described the Act as 'embod[ying] [a] national policy favoring arbitration . . . .'"[57]

The Court's continuing deference to arbitration agreements should cause unions and their members to consider carefully whether the arbitral forum is appropriate for some or all of their statutory antidiscrimination claims.[58] Disputes arising under an employment agreement providing for mandatory arbitration may include all disputes governed by Employee Retirement Income Security Act of 1974 (ERISA), the Civil Rights Act of 1964 (Title VII), the ADEA, the Americans with Disabilities Act of 1990 (ADA), and all state and local antidiscrimination laws and ordinances.[59]

The key case is *Wright v. Universal Maritime Service Corp.*, where the Supreme Court established the current clear-and-unmistakable waiver standard for union-negotiated collective-bargaining agreements.[60] There, the Court held that a union-negotiated waiver of employees' rights to pursue employment-discrimination claims in a federal judicial forum must be "clear and unmistakable."[61]

In *Wright*, a longshoreman was subject to a collective-bargaining

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55. *See id*. at 543 ("This Court has said that Congress adopted the Arbitration Act in an effort to counteract judicial hostility to arbitration and establish 'a liberal federal policy favoring arbitration agreements.") (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24(1983)).

56. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (discussing previous decisions in which the Court has found that there is a liberal federal policy favoring arbitration, and that arbitration agreements should be taken as contracts).

57. *Id.* at 345–46 (second alteration in original) (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)).

58. Howlett & McDonald, *supra* note 18, at 38 ("The Court's increasing deference to arbitration agreements requires that lawyers and their clients evaluate the advantages and disadvantages of mandatory arbitration agreements.").

59. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461; Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–e-17; Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634; Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213, 42 U.S.C. § 1981; *see also* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 255 (2009) (concerning the National Labor Relations Act); Barrentine v. Arkansas–Best Freight Sys., Inc., 450 U.S. 728 (1981) (concerning the Fair Labor Standards Act).

60. Wright v. Universal Mar. Serv. Corp., 525 U.S. 70 (1998). At least one state supreme court adopted *Wright*'s clear-and-unmistakable waiver standard in the context of an intentional tort by an employer where a union-negotiated collective-bargaining agreement was silent as to intentional torts. *See* Sinley v. Safety Controls Tech., Inc., No. 2020-1158, 2022 WL 17170294, ¶ 23 (Ohio 2022).

61. *Wright*, 525 U.S. at 82 (requiring a "clear and unmistakable waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination").

agreement with an arbitration clause.[62] After the longshoreman was denied employment following the resolution of a permanent disability benefits claim for injuries sustained on the job, he sued, alleging discrimination in violation of the ADA.[63] The district court dismissed the case because the longshoreman did not follow the arbitration procedure established in the collective-bargaining agreement.[64] The Fourth Circuit affirmed.[65] At issue before the Supreme Court was whether a general arbitration clause in a collective-bargaining agreement required the longshoreman to use the arbitration procedure instead of a federal court for the alleged violation of the ADA.[66] The Court held that it did not, finding that the collective-bargaining agreement lacked a clear-and-unmistakable waiver of the union members' right to a judicial forum for federal claims of employment discrimination.[67] The general arbitration clause in the longshoreman's collective-bargaining agreement did not require the employee to use the arbitration procedure for an alleged violation of the ADA.[68]

Then, in *Pyett*, the Supreme Court held that a union-negotiated collective-bargaining agreement that "clearly and unmistakably" required employees to arbitrate age discrimination claims was enforceable under federal law.[69] The Court said that the ADEA did not prohibit the arbitration of claims brought under the federal antidiscrimination law.[70] The collective-bargaining agreement in *Pyett* required union members to present all claims of employment discrimination to arbitration under the agreement's dispute resolution and grievance processes.[71]

When union members who had been night lobby watchmen were reassigned to work as night porters and light-duty cleaners—causing a loss of income and, they claimed, emotional distress—they filed a grievance alleging discrimination because of their age.[72] But the union

62. *Id.* at 72.
63. *Id.* at 74.
64. *Id.* at 75; Wright v. Universal Mar. Serv., Inc., No. CIV.A.2:96-0165-18AJ, 1996 WL 942484, at *1 (D.S.C. Sept. 27, 1996).
65. *Wright*, 525 U.S. at 75.; Wright v. Universal Mar. Serv. Corp., 121 F.3d 702 (4th Cir. 1997).
66. *Wright*, 525 U.S. at 72.
67. *Id.* at 82.
68. *Id.* at 81.
69. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274 (2009). Some scholars see *Pyett* as a win for labor-management relations. Salvatore & Kelly, *supra* note 15, at 258 ("*Pyett* helps to ease the administrative load of an already overburdened judicial system, where employment claims often crowd the docket. *Pyett* has thus proven to be a win for all stakeholders in day-to-day labor-management relations.").
70. *Pyett*, 556 U.S. at 251.
71. *Id.* at 251.
72. *Id.* at 252–53.

withdrew the age-discrimination claim because it had consented to the reassignments, so the union reasoned that it could not then object to them.[73] The union members later sued in U.S. District Court for the Southern District of New York for federal age-discrimination statutory violations and related state-law claims.[74] At issue was whether the collective-bargaining agreement's provision requiring arbitration of age-discrimination statutory claims was enforceable.[75] The Court held that it was.[76] Specifically, the Court said that "a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law."[77] Thus, in *Pyett* the Court "widen[ed] arbitration's range of application and g[ave] it unchecked availability."[78] But the Court observed that "[t]he decision to resolve [statutory claims relating to employment discrimination] by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance."[79]

II. CIRCUIT COURT DECISIONS

Several federal circuits have decided cases about what qualifies as a clear waiver of statutory rights in a union-negotiated collective-bargaining agreement.[80] Most have interpreted the clear-and-unmistakable standard to mean the agreement must specifically reference either the statutes or mention statutory causes of action, even if more generally.[81]

A. First Circuit: "Something Closer to Specific Enumeration"

In the First Circuit, the waiver must explicitly mention the rights under the relevant statute.[82] In *Quint v. A.E. Staley Manufacturing Co.*, the First

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73. *Id.* at 253.
74. *Id.* at 253–54.
75. *Id.* at 251.
76. *Id.*
77. *Id.* at 274.
78. Thomas E. Carbonneau, *Shattering the Barrier of Inarbitrability*, 22 AM. REV. INT'L ARB. 573, 609 (2011)*Pyett*, 556 U.S. at 274.
79. *Pyett*, 556 U.S. at 264; *see also* Thomas J. Stipanowich, *The Third Arbitration Trilogy:* Stolt-Nielsen*,* Rent-A-Center*,* Conception *and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 330 (2011) (noting that modern Court decisions like *Pyett* "rigorously adhere to the concept of arbitration as a facially acceptable substitute for a public tribunal.").
80. *See* Hammond v. Dep't of Transp. & Pub. Facilities, 107 P.3d 871, 877–78 (Alaska 2005) (providing an analysis of the approaches taken in the First, Second, Fourth, and Sixth Circuits).
81. *See* Lawrence v. Sol G. Atlas Realty Co., Inc., 841 F.3d 81, 84 (2d Cir. 2016) (summarizing cases in the First, Fourth, Fifth, and Sixth Circuits).
82. *See* Quint v. A.E. Staley Mfg. Co., 172 F.3d 1, 9 (1st Cir. 1999) (explaining the resolution of the circuit split regarding clear-and-unmistakeable waiver).

Circuit found no clear-and-unmistakable waiver when the agreement did not "explicitly mention[] employee rights under [the relevant statute] or any other federal anti-discrimination statute."[83] And in *Cavallaro v. UMass Memorial Healthcare, Inc.*, the First Circuit said that the clear-and-unmistakable waiver standard required "something closer to specific enumeration of the statutory claims to be arbitrated."[84]

Cavallaro involved a potential class-action suit against a hospital, alleging hospital employees (both union and nonunion) were not paid for work done during meal breaks, before or after shifts, or during training sessions.[85] At issue in *Cavallaro* was a "broadly-phrased grievance and arbitration provision" in the collective-bargaining agreement.[86] There, the appellate court found that a "broadly-worded arbitration clause" like one encompassing "any dispute concerning or arising out of the terms and/or conditions of [the agreement], or dispute involving the interpretation or application of [the agreement]," was insufficient.[87] Instead, a contractual provision nearer to a "specific enumeration of the statutory claims to be arbitrated" is necessary.[88] Interestingly, the First Circuit noted that "[t]he law in this realm is still evolving and it is not easy to tell in what direction the Supreme Court may go."[89] The court noted that deciding which forum is appropriate in a case involving regulatory and collective-bargaining agreement issues "could be handled in a variety of ways and some tensions exist in Supreme Court precedent."[90] In *Cavallaro*, the First Circuit essentially asked the Supreme Court to provide lower courts with more guidance.[91]

B. Second Circuit: Wright *Is "Exacting Standard"*

In a decision later abrogated in part by *Pyett*, the Second Circuit held in *Rogers v. New York University* that an agreement containing both a nondiscrimination provision and a general arbitration clause, but incorporating nothing explicitly, was not clear and unmistakable.[92] The

83. *Id.*
84. Cavallaro v. UMass Mem'l Healthcare, Inc., 678 F.3d 1, 7 n.7 (1st Cir. 2012).
85. *Id.* at 2.
86. *Id.* at 6.
87. *Id.* at 7 n.7.
88. *Id.*
89. *Id.* at 7.
90. *Id.*
91. *Id.* ("Until the Supreme Court provides more guidance, the panel is bound by existing circuit precedent.").
92. Rogers v. N.Y. Univ., 220 F.3d 73, 76–77 (2d Cir. 2000), *abrogated by* 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009); *see also* Eric D. Randall, *Arbitrating Discrimination Claims*, 11ADA 41 (1999) (noting that the arbitration clause in this contract "'was very general,' providing only for arbitration of matters under dispute and there was no provision 'explicitly incorporate statutory anti-discrimination requirements.'").

problem was that the collective-bargaining agreement did not have a "provision whereby employees *explicitly* agree to submit all federal claims to arbitration."[93] "Moreover," the court said, "the CBA [collective-bargaining agreement] does not satisfactorily incorporate federal antidiscrimination law both because reference to such law is too broad and because the CBA does not explicitly make compliance with that law a contractual commitment that is subject to the arbitration provision."[94] In *Rogers*, a former employee sued New York University under the Family and Medical Leave Act (FMLA) and the ADA.[95] The appellate court held that the arbitration provision did not have a sufficiently clear-and-unmistakable waiver of the employee's right to a federal forum for statutory claims.[96]

In *Lawrence v. Sol G. Atlas Realty Co.*, the Second Circuit relied on its earlier decision in *Rogers*.[97] In *Lawrence*, a Black employee of West Indian descent sued his employer for racial and national-origin discrimination under Title VII and retaliation under Title VII, § 1981, of the Fair Labor Standards Act (FLSA), along with state-law claims.[98] The general "No Discrimination" provision in the collective-bargaining agreement in *Lawrence* did not meet the clear-and-unmistakable waiver standard in *Wright*, which the court called an "exacting standard."[99] While the agreement's antidiscrimination provision prohibited discrimination because of "any characteristic protected by law," and compelled arbitration of "[a]ny disputes under [that] provision," such generalities were insufficient.[100] One plausible interpretation of that provision was that it covered only contractual disputes.[101] Instead, for a collective-bargaining agreement's mandatory-arbitration provision to cover employees' statutory rights, their inclusion "must be unmistakable, so that the wording is not susceptible to a contrary reading."[102]

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93. *Rogers*, 220 F.3d at 77 (emphasis added).
94. *Id.*
95. *Id.* at 73.
96. *Id.* at 76–77.
97. *See* Lawrence v. Sol G. Atlas Realty Co., Inc., 841 F.3d 81, 84 (2d Cir. 2016) ("Our holding in *Rogers* finds support among our sister circuits, which have likewise interpreted the 'clear and unmistakable' standard to require specific references in the CBA [collective-bargaining agreement] either to the statutes in question or to statutory causes of action generally.").
98. *Id.* at 81.
99. *Id.* at 84.
100. *Id.* (alterations in original).
101. *See id.* at 85 ("The 'No Discrimination' provision may plausibly be interpreted to require arbitration of contractual disputes only. It makes no mention of 'claims' or 'causes of action.' It cites no statutes. It refers to disputes under 'this provision,' not under statutes. The references to 'law' do no more than define the characteristics on which discrimination is contractually forbidden under the CBA [collective-bargaining agreement]. They do not suggest that statutory discrimination claims based on those characteristics are subject to arbitration.").
102. *Id.* at 83.

Once a clear-and-unmistakable waiver is found in a union-negotiated collective-bargaining agreement, courts within the Second Circuit have "repeatedly concluded that . . . individual employees are required to arbitrate their claims."[103] But the Second Circuit has consistently held that general arbitration clauses "fall[] far short of a specific agreement to submit all federal claims to arbitration."[104] In *Fernandez v. Windmill Distributing Co.*, for example, a district court held that a broad provision requiring arbitration for "all disputes" was not enough for mandatory arbitration.[105] In that case, the court said the agreement lacked reference to any specific antidiscrimination statute that would be subject to exclusive arbitration.[106] Therefore, it did not mandate arbitration of a delivery driver's statutory claims under the FMLA against a beer distributor after the driver injured his back lifting a keg of beer.[107]

C. Third Circuit: "Very General" Arbitration Clauses Insufficient

In the Third Circuit, the waiver must be clear and explicitly stated.[108] If a collective-bargaining agreement explicitly states an employee's duty to resolve both statutory and contractual rights through a grievance process, an arbitration clause is enforceable.[109]

In *Darrington v. Milton Hershey School*, the Third Circuit noted that the clear-and-unmistakable waiver standard in *Wright* is "the most exacting standard possible."[110] In *Darrington*, though, the court held that

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103. Favors v. Triangle Servs., Inc., 207 F. Supp. 3d 197, 204 (E.D.N.Y. 2016) (citing Jenkins v. Collins Bldg. Servs., No. 10 Civ. 6305, 2013 WL 8112381, at *3 (S.D.N.Y. Oct. 17, 2013)); *see also* Okuma v. Crotona Park West Hous. Dev. Fund Corp., No. 14 Civ. 239, 2014 U.S. Dist. LEXIS 143444, at *15–16 (S.D.N.Y. Sept. 29, 2014) (finding that a collective-bargaining agreement does not prevent the addressed plaintiff from vindicating their statutory rights).

104. *See* Alderman v. 21 Club Inc., 733 F. Supp. 2d 461, 468–70 (S.D.N.Y. 2010) ("Arbitration clauses that cover 'any dispute concerning the interpretation, application, or claimed violation of a specific term or provision' of the collective bargaining agreement do not contain the requisite 'clear and unmistakable' waiver because 'the degree of generality [in the arbitration provision] falls far short of a specific agreement to submit all federal claims to arbitration.'") (citing Rogers v. N.Y. Univ., 220 F.3d 73, 76 (2d Cir. 2000)); *see also* Viruet v. Port Jervis City Sch. Dist., No. 11-cv-1211, 2013 WL 4083229, at *6 (S.D.N.Y. Aug. 13, 2013) (involving a collective-bargaining agreement that did not state that claims made pursuant to Title VII were subject to its grievance procedures); Quintanilla v. Suffolk Paving Corp., No. 09-cv-331, 2011 U.S. Dist. LEXIS 34193, at *3 (E.D.N.Y. Feb. 10, 2011) (denying defendant's motion to dismiss arguing that arbitration is required).

105. *See* Fernandez v. Windmill Distrib. Co., 159 F. Supp. 3d 351, 356, 360 (S.D.N.Y. 2016) (discussing how collective-bargaining agreements whose arbitration provisions that do not fit the clear-and-unmistakeable standard will not waive statutory rights).

106. *Id.*

107. *Id.*

108. *See generally* Darrington v. Milton Hershey Sch., 958 F.3d 188 (3d Cir. 2020).

109. *Id.* at 196 n.1 (citing Vega v. New Forest Home Cemetary, LLC, 856 F.3d 1130, 1134 (7th Cir. 2017)).

110. *Id.* at 193.

the arbitration clause at issue waived an employee's right to a judicial forum.[111] In that case, plaintiffs sued their former employer for religious discrimination and retaliation in violation of Title VII.[112]

Like the First Circuit in *Cavallaro*, the Third Circuit in *Darrington* observed that "[t]he Supreme Court and this Court have not defined the contours of the clear-and-unmistakable-waiver standard."[113] Still, the court said that the clear-and-unmistakable waiver standard safeguards against "very general" arbitration clauses insufficient to "waive a judicial forum for vindication of statutory rights."[114] Instead, a clear-and-unmistakable waiver of "statutory antidiscrimination claims [must] be 'explicitly stated' in the collective-bargaining agreement."[115]

D. Fourth Circuit: "Broad, General Language" Lacks Enough Clarity

In the Fourth Circuit, general waivers of all disputes are allowed, so long as statutory provisions are merely incorporated somewhere in the collective-bargaining agreement.[116] In two cases decided in 1999, the Fourth Circuit did not find sufficiently clear-and-unmistakable language in two collective-bargaining agreements.[117] Each agreement was either too broad or lacked clear-and-unmistakable language.[118]

In *Carson v. Giant Food, Inc.*, the Fourth Circuit held that "[b]road, general language" lacks enough clarity for waiver in a collective-bargaining agreement.[119] In that context, the contract "must be particularly clear" about the parties' intent to arbitrate statutory

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111. *Id.* at 188.

112. *Id.*

113. *Compare* Cavallaro v. UMass Mem'l Healthcare, Inc., 678 F.3d 1, 7 (1st Cir. 2012), *with Darrington*, 958 F.3d at 191.

114. Darrington, 958 F.3d at 193 (citing *Wright* v. Universal Mar. Serv. Corp., 525 U.S. 70, 80 (1998)).

115. *Id.* (alteration in original) (citing 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 258 (2009)).

116. *See* Carson v. Giant Food, Inc., 175 F.3d 325, 331–32 (4th Cir. 1999) (quotation marks omitted) (explaining that the "requisite degree of clarity can be achieved by two different approaches," either: (1) "the CBA [collective-bargaining agreement] must contain a clear and unmistakable provision under which the employees agree to submit to arbitration all federal causes of action arising out of their employment"; or (2) it "must include an explicit incorporation of statutory antidiscrimination requirements").

117. *See* Brown v. ABF Freight Sys., Inc., 183 F.3d 319, 21 (4th Cir. 1999) ("[W]e will not find an intent to arbitrate statutory claims absent a 'clear and unmistakable' waiver . . . ."); *Carson*, 175 F.3d at 325 ("Thus, broad arbitration clauses that generally commit all interpretive dispures 'relating to' or 'arising out of' the agreement do not satisfy the clear and unmistakable test".

118. *See Brown,* 183 F.3d at 320 ("Because we conclude that the collective-bargaining agreement in question does not clearly and unmistakably require the arbitration of statutory discrimination claims, we reverse the judgment of the district court."); *Carson*, 175 F.3d at 327 ("[T]he CBAs do not clearly and unmistakably provide that an arbitrator is to decicde which claims the parties agreed to arbitrate.").

119. *Carson*, 175 F.3d at 331.

discrimination claims.[120] The court said that "clear and unmistakable" does not encompass general language that may ordinarily be interpreted to require arbitration under principles of contract interpretation.[121] Instead, the contract must "plainly specify" the intent to put the matter before an arbitrator who will determine the merits of federal statutory discrimination claims.[122]

In *Brown v. ABF Freight Systems, Inc.*, an employee pursued a claim under the ADA.[123] There, the employee argued that the union-negotiated collective-bargaining agreement did not waive his right to sue in federal court.[124] In fact, he claimed that the union was "powerless to effectuate such a prospective waiver on his behalf"—an argument the court said was "squarely foreclose[d]" by its caselaw.[125] The Fourth Circuit agreed.[126] Specifically, the court held that the agreement did not waive the employee's right to a federal judicial forum for his ADA claim in sufficiently clear-and-unmistakable language.[127] Citing *Carson*, the court said that the clear-and-unmistakable waiver requirement can be satisfied in either of two ways.[128] One way is to show the parties' intent to arbitrate via an "explicit arbitration clause" under which the union agrees to present all statutory employment-discrimination claims in an arbitral forum.[129] If an arbitration clause is "not so clear," employees may still have to arbitrate their federal claims if "another provision, like a nondiscrimination clause, makes it *unmistakably clear* that the discrimination statutes at issue are part of the agreement."[130] Like the provision in *Carson*, though, the one in *Brown* was a standard provision calling for arbitration of "all grievances or questions of interpretation arising under [the]Agreement."[131] Since it referred "only to grievances arising under the Agreement," the court said it could not be interpreted to compel arbitration of those grievances "arising out of alleged *statutory violations*."[132] The collective-bargaining agreement's broad, nonspecific arbitration clause also failed the second test set out in *Carson* because it did not make it "unmistakably clear" that federal statutory claims were

120. *Id.* (quoting Wright v. Universal Maritime Svc. Corp., 525 U.S. 70 (1998)).
121. *Id.* at 332.
122. *Id.*
123. *Brown*, 183 F.3d at 319.
124. *Id.* at 318, 321.
125. *Id.*
126. *Id.* at 319.
127. *Id.* at 323.
128. *Id.* at 321 (*citing* Carson v. Giant Food, Inc., 175 F.3d 325*,* 331 (4th Cir. 1999)).
129. *Id.*
130. *Id.* (*citing Carson*, 175 F.3d at 331).
131. *Id.* at 320–22.
132. *Id.* (emphasis added).

specifically incorporated.[133]

Finally, the employer in *Brown* sought to invoke a "catch-all . . . clause" under which the union and employer agreed generally not to "engage in any other discriminatory acts prohibited by law."[134] Such generality did not explicitly incorporate federal statutory discrimination law as the court outlined in *Carson*.[135] "There is a significant difference, and we believe a legally dispositive one, between an agreement not to commit discriminatory acts that are prohibited by law and an agreement to incorporate, in toto, the antidiscrimination statutes that prohibit those acts," the court said.[136] Instead, explicitly incorporating relevant federal antidiscrimination statutes requires more than "a simple agreement not to engage in acts violative of that statute."[137] In fact, the court said that the agreement in *Brown* would need to be "significantly *more* explicit than the vague reference to acts prohibited by 'law'" that was present in that case.[138] Instead, "the parties must make 'unmistakably clear'" that they intend to encompass the discrimination statutes in their entirety.[139]

But the Fourth Circuit found such intent in *Safrit v. Cone Mills Corp.*, where a collective-bargaining agreement had a clear-and-unmistakable waiver of an employee's statutory right to a federal forum on a Title VII sex-discrimination claim against the employer.[140] Of the agreement in *Safrit*, the court said that "it is hard to imagine a waiver that would be more definite or absolute."[141] There, the collective-bargaining agreement provided that the employer and union members would "'abide by all the requirements of Title VII' and that '[u]nresolved grievances arising under this Section are the proper subjects for arbitration.'"[142] The agreement married the pact not to violate federal antidiscrimination laws with an understanding that grievances arising under that same section were "the proper subjects for arbitration."[143]

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133. *Id*. at 322.

134. *Id.*

135. *See id.* ("We believe that where a party seeks to base its claim of waiver of the right to a federal forum on a claim of 'explicit incorporation'. . . , of the relevant federal antidiscrimination statute into the terms of the CBA, a simple agreement not to engage in acts violative of that statute (which, it bears noting, would be significantly *more* explicit than the vague reference to acts prohibited by 'law' that we have before us) will not suffice." (citing Universal Maritime Svc. Corp., 525 U.S. 70, 80 (1998))).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* (quoting Carson v. Giant Food, Inc., 175 F.3d 325, 331 (4th Cir. 1999)).

140. Safrit v. Cone Mills Corp., 248 F.3d 306, 306–09 (4th Cir. 2001).

141. *Id.* at 308.

142. *Id.* (alteration in original) (citing the collective-bargaining agreement at issue in the case).

143. *Id.* at 307 ("Section XX of the CBA [collective-bargaining agreement] specifically stated

In *Jose Aleman v. Chugach Support Services, Inc.*, two union members brought claims against their employer for racial discrimination in contracts and employment discrimination based upon race and national origin.[144] In *Aleman*, the employees argued that the mandatory-arbitration provision in their union-negotiated collective-bargaining agreement should not bind them because they did not understand English well, and they were not given a Spanish translation, so they did not appreciate the terms of the agreement when it was adopted.[145] While the Fourth Circuit has held that collective-bargaining agreements must "eliminate any doubt that a waiver of a federal forum was intended," the employees' novel duty-of-translation theory sought to impose a new requirement on employers that was "without basis in law."[146] And since individual provisions of a collective-bargaining agreement need not be accepted by individual union members, it bound all unionized employees once agreed to.[147]

E. Fifth Circuit: General References to Federal Statute Insufficient

In *Ibarra v. United Parcel Service*, the Fifth Circuit held that a collective-bargaining agreement did not clearly and unmistakably waive an employee's right to pursue a Title VII claim in a judicial forum where arbitration was compelled for "any controversy, complaint, misunderstanding or dispute arising as to interpretation, application or observance of any of the provisions of this Agreement."[148] In that case, a UPS driver brought a Title VII sex-discrimination claim after she was fired following a traffic accident.[149] Because the grievance process established under the collective-bargaining agreement did not clearly and

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that the company and the union 'agree that they will not discriminate against any employee with regard to race, color, religion, age, sex, national origin or disability. . . . The parties further agreed [sic] that they will abide by all the requirements of Title VII of the Civil Rights Act of 1964.' Section XX further noted, 'Unresolved grievances arising under this Section are the proper subjects for arbitration.'").

144. Aleman v. Chugach Support Servs., Inc., 485 F.3d 206, 208–09 (4th Cir. 2007).

145. *Id.* at 214 ("They have stated in affidavits that their 'ability to speak and read English is limited' and 'very limited,' respectively, and that each has 'a very limited ability to read English as compared to Spanish,' although neither plaintiff suggested in his affidavit or complaint that he could not read or understand the arbitration provision as written.").

146. *Id.* at 216.

147. *Id.* at 215 ("Acceptance by individual union members of individual provisions is not required, because the formation of a collective-bargaining unit 'extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees,' with the result that 'only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances.'").

148. Ibarra v. United Parcel Serv., 695 F.3d 354, 356–57 (5th Cir. 2012) (citing the collective-bargaining agreement at issue).

149. *Id.* at 354.

unmistakably waive the driver's right to pursue her sex-discrimination claim in federal court, she did not have to submit her Title VII claim to the grievance process.[150]

The provision at issue in *Ibarra* mentioned no specific state or federal statute, and it had no express waiver of a judicial forum for Title VII claims.[151] The court also said "[t]he distinctly separate nature of . . . contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence."[152] Thus,

> when an arbitration agreement commits claims or disputes to arbitration that are *similar* to or even substantially duplicative of the rights secured under a statute or constitution, the arbitration agreement does not eliminate the plaintiff's right to seek judicial relief for violations of those statutory or constitutional rights, even if parallel with an arbitration claim.[153]

The Fifth Circuit noted that other circuits had also required either the naming of specific statutes in the collective-bargaining agreement, or an explicit reference to statutory claims within the arbitration clause itself.[154] The Fifth Circuit also noted in *Ibarra* that *Pyett* "drained force from *Gardner-Denver*'s statements suggesting that arbitral procedures [were] inadequate to address statutory discrimination claims."[155]

After *Ibarra*, the Fifth Circuit held that general references to a federal antidiscrimination statute were not sufficiently clear and unmistakable to deny a judicial forum for claims arising under that statute.[156] The court in *Gilbert v. Donahoe* said the collective-bargaining agreement's provision fell somewhere between the one considered by the Supreme Court in *Pyett* and those it found insufficiently clear and unmistakable.[157] Like the dispute-resolution provisions at issue in *Ibarra*, *Wright*, *Gardner-Denver*, and *Barrentine*, the *Gilbert* provision did not explicitly

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150. *Id.* at 360.

151. *Id.* at 357.

152. *Id.* at 358 n.23 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 50 (1974)); *see also* Amalgamated Transit Union v. New Orleans Reg'l Transit Auth., 600 F. Supp. 3d 656, 662–63 (E.D. La. 2022) (discussing the Fifth Circuit's treatment of the separate nature of contractual and statutory violations based on the same incident).

153. Edinburg United Police Officers Ass'n v. City of Edinburg, No. 20-137, 2020 WL 5642197, at *4 (S.D. Tex. Sept. 22, 2020) (citing Mathews v. Denver Newspaper Agency LLP, 649 F.3d 1199, 1205–06 (10th Cir. 2011)).

154. *Ibarra*, 695 F.3d at 359–60 ("[C]ourts have concluded that for a waiver of an employee's right to a judicial forum for statutory discrimination claims to be clear and unmistakable, the CBA [collective-bargaining agreement] must, at the very least, identify the specific statutes the agreement purports to incorporate or include an arbitration clause that explicitly refers to statutory claims.").

155. *Id.* at 356.

156. Gilbert v. Donahoe, 751 F.3d 303, 310 (5th Cir. 2014).

157. *Id.*

refer to specific statutory claims.[158] Unlike in those cases, though, separate clauses in the collective-bargaining agreement specifically mentioned the federal antidiscrimination statutes.[159] However, they were not in the grievance provision, and the court held that a reference in the employee manual to the FLSA did not signify incorporation into the collective-bargaining agreement.[160]

F. Sixth Circuit: Statutory Provision Must Be Specifically Mentioned

In another pre-*Pyett* case, *Bratten v. SSI Services, Inc.*, the Sixth Circuit held that a specific statutory reference in a collective-bargaining agreement was necessary under *Wright*.[161] In *Bratten*, the agreement's arbitration provision did not prevent a federal court's jurisdiction to hear an employee's lawsuit for disability discrimination in violation of the ADA.[162] Noting its decision in *Penny v. United Parcel Service* two years earlier, the Sixth Circuit confirmed it had joined the "overwhelming majority" of circuit courts.[163] The court said that employees working under collective-bargaining agreements with mandatory-arbitration clauses still retained the right to a federal courtroom for statutory employment-discrimination claims.[164] While *Pyett* abrogated that holding, the circuit court's position that a statutory provision must be specifically mentioned in a union-negotiated collective-bargaining agreement is instructive as to what constitutes a clear-and-unmistakable waiver.[165] The Sixth Circuit said that post-*Wright* (but pre-*Pyett*) courts seemed to agree that a collective-bargaining agreement must specifically mention the statute "for it to even approach *Wright*'s 'clear and unmistakable' standard."[166] Thus, a very general arbitration clause is insufficient.[167]

III. PROPOSAL

The circuits have adopted sufficiently different approaches to *Wright*'s clear-and-unmistakable standard that the Supreme Court should step in

158. *Id.*
159. *Id.*
160. *Id.*
161. Bratten v. SSI Servs., Inc., 185 F.3d 625, 631 (6th Cir. 1999).
162. *Id.* at 632.
163. *Bratten*, 185 F.3d at 630 (*citing* Penny v. United Parcel Serv., 128 F.3d 408, 413 (6th Cir. 1997)).
164. *Id.*
165. *Id.* at 631 ("Were we to assume *arguendo* that a 'clear and unmistakable' waiver of the covered employees' rights to a judicial forum to litigate federal statutory claims could be enforceable, we are convinced that the CBA [collective-bargaining agreement] here would fail to reach this demanding standard . . . .").
166. *Id.*
167. *Id.*

and settle the circuit split. Some lower courts have allowed alternative methods that involved less than an *explicit* reference to a federal discrimination statute, along with an unquestionable duty that claims under that specific statute be arbitrated. Others want something more explicit. These varying approaches should be resolved. Because of the important rights at stake, the Supreme Court should establish definitively that nothing short of explicit reference, coupled with an unquestionable duty to arbitrate, is clear and unmistakable enough for waiver.

This Article proposes that the Court resolve the circuit split by adopting a new "Perspicuity Rule" for when a collective-bargaining agreement is sufficiently clear and unmistakable. The Perspicuity Rule would dictate that collective-bargaining agreements must specifically list which statutes are covered under an arbitration clause or provision by naming them in language sufficiently clear such that a reasonable person would understand what rights are being waived to arbitration. The Perspicuity Rule would give employees a clear, precise presentation of what federal statutory rights will be vindicated in an arbitral forum instead of a courtroom. Plain language would be easy for employers and unions to include in collective-bargaining agreements and is all that the proposed Perspicuity Rule would require. Broad, general language would not be sufficiently explicit to meet the Perspicuity Rule's requirements.[168]

When an employee's statutory rights are at issue, courts should be hesitant to find waiver where one is not specifically mentioned in the agreement by reference to the statute itself. In fact, there is some evidence that Congress may not have intended for the FAA to apply to arbitration agreements between employees and employers in the first place.[169] But in light of the Court's recent decisions, such mandatory-arbitration clauses in union-negotiated collective-bargaining agreements are here to stay. Therefore, the Court should adopt a uniform rule requiring such agreements to specifically list the statutes covered by the arbitration agreements.[170] Such a requirement ensures that all union

168. *See* Carson v. Giant Food, Inc., 175 F.3d 325, 331–32 (4th Cir. 1999) ("Broad, general language is not sufficient to meet the level of clarity required to effect a waiver in a [collective-bargaining agreement]. In the collective bargaining context, the parties 'must be particularly clear' about their intent to arbitrate statutory discrimination claims.").

169. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 40 (1991) (Stevens, J., dissenting) ("Given that the FAA specifically was intended to exclude arbitration agreements between employees and employers."). In his dissent, Justice Stevens noted evidence that the legislative drafters at the American Bar Association and members of the Senate Judiciary Committee intended the FAA to apply to disputes between merchants. *Id.* at 39.

170. For a treatment of the impact that administrative and managerial considerations have had on the Court's decisions since *Gilmer*, see Thomas E. Carbonneau, *The Revolution in Law through*

members have an occasion to understand what an agreement encompasses—either during their employment, or when voting to ratify a new union-negotiated collective-bargaining agreement. Unionized employees need not have "actual awareness" of the arbitrability of their statutory employment claims, merely an opportunity to know.[171] One arbitrator noted that "[m]andatory arbitral agreements in labor law disputes are generally viewed more favorably than similar agreements in employment law because labor agreements generally result from arm's length negotiations, with the members' interests represented by their union representatives."[172] But, the arbitrator acknowledged, "employees with union representation sometimes also have little choice as well."[173] The Perspicuity Rule would give union members the information they need to decide whether to accept or reject a union-negotiated collective-bargaining agreement that has a mandatory-arbitration clause.[174]

If the Supreme Court does not act, Congress could still step in. In fact, several bills that would curtail mandatory arbitration of statutory rights have been introduced since *Pyett*.[175] One such legislative proposal was introduced in March 2018, but did not receive a committee hearing.[176] As drafted, the bill would have prohibited any arbitration provision that had "the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom."[177] While that bill may go farther than needed to protect employees' rights, at a minimum union members should have

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Arbitration, 56 CLEV. ST. L. REV. 233, 234–35 (2008).

> Practicability has emerged as the dominant force in the definition and implementation of law. Instrumental beliefs with historical foundations have virtually disappeared as the legal system countenances exclusively the necessity of operational efficacy. American law and citizenship have undergone a drastic transformation as a result of the judicial re-evaluation of arbitration.

Id.

171. For a discussion of the "unresolved question" of the appropriate standard for finding waiver of a judicial forum in a pre-dispute arbitration agreement, see Jonathan H. Peyton, *What Arbitration Clause?: The "Appropriate" Standard for Measuring Notice of Binding Arbitration to an Employee*, 36 SUFFOLK U. L. REV. 745, 752 (2003).

172. Roger B. Jacobs, *Fits and Starts for Mandatory Arbitration*, DISP. RESOL. J. 39, 53 (2013) (footnotes omitted).

173. *Id.*

174. Peyton, *supra* note 171, at 763 (arguing for a similar position in order to protect "employees' rights under Title VII, the ADA, and similar statutes.").

175. *See*, *e.g.*, Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013); Arbitration Fairness Act of 2015, H.R. 2087, 114th Cong. (2015); Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017); Arbitration Fairness Act of 2018, S. 2591, 115th Cong. (2018) (detailing the various legislative policies that have been implemented over the past decade regarding mandatory arbitration on matters of statutory rights).

176. Arbitration Fairness Act of 2018, 115 S. 2591, 115th Cong. (2018).

177. *Id.*

an opportunity to know what federal statutory rights are covered by a union-negotiated collective-bargaining agreement.

CONCLUSION

The Supreme Court should adopt a strict reading of its clear-and-unmistakable condition by requiring collective-bargaining agreements to specifically list which statutes are covered by the waiver. The Court should adopt a Perspicuity Rule that requires collective-bargaining agreements to specifically list which statutes are covered by naming them in language sufficiently clear that a reasonable person could understand what rights are being waived to arbitration.

Such straightforward language in collective-bargaining agreements would make sure union-represented employees know which statutory discrimination claims are subject to mandatory arbitration, and which are not. The rights protected by federal discrimination statutes are too important not to be specifically listed in a union-negotiated collective-bargaining agreement's arbitration clause.