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SUPREME COURT
OF THE STATE OF WASHINGTON

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LAWRENCE HILL, ADAM WISE, and ROBERT MILLER,
on behalf of themselves and all persons similarly situated, Petitioners,

v.

GARDA CL NORTHWEST, INC., Respondent.

**RESPONDENT'S BRIEF IN ANSWER
TO BRIEF OF AMICI CURIAE**

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I. INTRODUCTION

On October 29, 2012, the Washington Employment Lawyers Association (“WELA”), Washington State Labor Council (“WSLC”), and the Service Employees International Union Local 925, Local 6, Healthcare 775NW, and Healthcare 1199NW (“SEIU”) (collectively “Amici”) filed a motion pursuant to RAP 10.6 seeking permission to file an amici curiae brief in this matter. The Court granted Amici’s motion on November 16, 2012. Pursuant to RAP 10.1(e), Respondent Garda CL Northwest, Inc. (“Garda” or “the Company”) hereby submits this brief in answer to Amici’s brief.

II. ARGUMENT

Amici argue in their brief that (1) the Court of Appeals’ decision concerns an issue of substantial public interest; (2) the collective bargaining agreements (“CBAs”) at issue do not clearly and unmistakably waive employees’ right to a judicial forum; (3) even if the CBAs do clearly and unmistakably waive employees’ right, the waiver is unenforceable because employees are denied substantive statutory protections; and (4) if employees’ claims are actionable only under the CBAs, they should be allowed to pursue a class grievance. All of Amici’s arguments are without merit.

A. THIS CASE DOES NOT CONCERN AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

Amici first argue that this case involves an issue of substantial public interest because it “presents several core questions . . . which, because they have been answered erroneously by the Court of Appeals, will seriously negatively affect the lives of working people of Washington.” (Amici’s Br. 2). Amici’s conclusory and overgeneralized assertion cannot be reconciled with how this Court has interpreted and applied the phrase “substantial public interest” in other cases.

For example, in *State v. Watson*, 155 Wn.2d 574, 122 P.3d 903 (2005), this Court was asked to decide whether the Court of Appeals erred in holding that a county prosecutor’s ex parte contact with all judges in the county did not affect the sentencing decision of the judge in the case at bar.¹ The Court found that an issue of “substantial public interest” was raised and therefore granted review pursuant to RAP 13.4(b)(4) because “the Court of Appeals’ holding, while affecting parties to th[e] proceeding, also ha[d] the potential to affect every [drug offender] sentencing proceeding in Pierce County after November 26, 2001” *Id.* at 577.

Likewise, in *Marriage of Ortiz*, 108 Wn.2d 643, 740 P.2d 843 (1987), this Court was called to decide whether the Court of Appeals erred

¹The prosecutor’s ex parte contact consisted of a memorandum announcing that, as a matter of general policy, his office would no longer recommend drug offender alternative sentencing. *Watson*, 155 Wn.2d at 575-576.

by retroactively applying Washington Supreme Court precedent to invalidate an escalation clause in a child support decree. Although the Court of Appeals' decision obviously affected the rights of the custodial and non-custodial parents in that case, it also stood to affect the rights of all other parents who were parties to child support decrees with similar escalation clauses. *Id.* at 644. Thus, this Court granted review on the basis that the Court of Appeals' decision raise an issue of substantial public interest. *Id.* at 646.

In *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 796, 225 P.3d 213 (2009), this Court declined to review the factual question of whether a plaintiff agreed to arbitrate a dispute and the legal question of whether, if it did agree to arbitrate, it was legally bound by that agreement. According to the Court, "These are not questions of continuing and substantial public interest . . ." *Id.* at 796.² This is consistent with the long-standing notion that judicial review of private arbitration awards "is extremely limited." *Morrell v. Wedbush Morgan Sec.*, 143 Wn. App. 473, 481, 178 P.3d 387 (2008) (citations omitted).

Here, unlike *Watson* and *Marriage of Ortiz* and like *Satomi*, the Court of Appeals' decision in no way affects the public interest. This case

²While the *Satomi* Court addressed the issue of whether a "substantial public interest" was raised in the context of an otherwise moot case, the rationale supporting the Court's finding equally applies in the context of RAP 13.4(b)(4).

does not involve public officials nor the retroactivity of binding precedent. The CBAs at issue were entered into between private unions representing private employees working for a private employer. Moreover, the questions answered by the Court of Appeals – whether Garda waived its contractual right to compel arbitration and, if not, whether the employees waived their right to a judicial forum – were purely of a private concern, and resolution of them only affects the parties in this case.

Consequently, this Court should not be called upon for further review of the lower court’s decision under the guise that a “substantial public interest” is involved.

B. PETITIONERS CLEARLY AND UNMISTAKABLY WAIVED THEIR RIGHT TO A JUDICIAL FORUM.

Amici next argue that Petitioners did not “clearly and unmistakably” waive their right to a judicial forum because the arbitration provision in their CBAs does not expressly name the statutory causes of action subject to arbitration or indicate that arbitration is the exclusive forum. (Amici’s Br. 2-7). Amici’s arguments are based on an incorrect and illogical reading of binding precedent.

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1. The CBAs need not name the specific statutory causes of action subject to waiver to be enforceable.

Amici mistakenly read *14 Penn Plaza v. Pyett*, 556 U.S. 247, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009), as requiring that a mandatory arbitration provision list every statutory cause of action for which waiver of a judicial forum is intended in order for the waiver to be deemed clear and unmistakable. *14 Penn Plaza* imposes no such requirement.

In *14 Penn Plaza*, the Supreme Court concluded that union-represented employees waived the right to pursue claims under the Age Discrimination in Employment Act (“ADEA”) because the arbitration provision in their collective bargaining agreement provided that statutory claims, including those arising under the ADEA, were subject to mandatory arbitration. *Id.* at 251. In reaching this holding, the Court sharply distinguished cases such as *Alexander v. Gardner-Denver*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974), in which the agreement at issue encompassed employees’ statutory rights but provided for binding arbitration only for disputes arising out of the agreement.

The *Gardner-Denver* collective bargaining agreement, for example, specifically prohibited discrimination and provided that any disputes “as to the meaning and application” of the agreement were subject to mandatory arbitration. *Gardner-Denver*, 415 U.S. at 39-40.

Importantly, the *14 Penn Plaza* Court observed, “The [*Gardner-Denver*] employee’s collective-bargaining agreement did not mandate arbitration of statutory antidiscrimination claims.” *14 Penn Plaza*, 556 U.S. at 266. In contrast, the arbitration provision at issue in *14 Penn Plaza* “expressly cover[ed] both statutory and contractual discrimination claims.” *Id.* at 1470. Thus, unlike the employees in *Gardner-Denver*, the employees in *14 Penn Plaza* were not foregoing their substantive rights afforded by statute; they were merely agreeing to submit claims based on those rights to resolution in an arbitral, rather than a judicial, forum.

Contrary to Amici’s reading of the case, the *14 Penn Plaza* Court did not find waiver because the arbitration provision specifically identified the ADEA; rather, the Court found waiver because the agreement went beyond where the agreement in *Gardner-Denver* went – it expressly provided that statutory claims were subject to arbitration.

The instant case falls squarely in line with *14 Penn Plaza*. The CBAs expressly cover Petitioners’ statutory wage claims and mandate that arbitration is the ensuing step following an unsatisfactory grievance response by the Company. *See* CP 142-143, 206-207, 229-230 (defining grievance as including “any claim under any . . . state . . . law, statute or regulation . . . or any other claim related to the employment relationship”). In other words, like the agreement in *14 Penn Plaza*, the CBAs clearly

require that employees' statutory claims be arbitrated.³ That there is no specific reference to the Washington statute governing wage and hour laws in Petitioners' CBAs is of absolutely no consequence given this express requirement.

To read *14 Penn Plaza* as Amici suggest would lead to the illogical conclusion that if an employer wants to require its employees to submit all statutory claims to binding arbitration, it must expressly identify every conceivable statute on which employees might bring claims. *14 Penn Plaza* in no way imposes such an impractical and onerous burden on employers.

Moreover, such a strained construction of *14 Penn Plaza* ignores numerous other cases in which courts have enforced arbitration agreements as to statutory causes of action that are not specifically enumerated therein so long as those causes of action lie within the parameters of the types of claims the parties agreed to arbitrate. *See, e.g., Betkowski v. Kelley Foods of Alabama, Inc.*, 697 F. Supp. 2d 1296 (M.D. Ala. 2010) (compelling arbitration of plaintiff's ADEA claim where arbitration agreement covered "all disputes" involving plaintiff's employment or termination); *Koridze v. Fannie Mae Corp.*, 593 F. Supp.

³Notably, the *14 Penn Plaza* agreement not only provided that ADEA claims be arbitrated, but also claims arising under "any other similar laws, rules, or regulations." *14 Penn Plaza*, 556 U.S. at 250.

2d 863, 867 (E.D. Va. 2009) (finding parties agreed to arbitrate plaintiff's Title VII claims where agreement provided for arbitration of any dispute relating to or in connection with plaintiff's performance); *Maddox v. USA Healthcare-Adams, LLC*, 350 F. Supp. 2d 968, 975 (M.D. Ala. 2004) (granting motion to compel arbitration of ADEA and ADA claims where arbitration agreement applied to "all claims and disputes" between plaintiff and defendant).

In a lengthy footnote, Amici cite a myriad of post-*14 Penn Plaza* cases that they claim support Petitioners' position. (Amici's Br. 5, fn. 5). The arbitration provisions in all the cases cited by Amici, however, are plainly distinguishable from the one in Petitioners' CBAs and in *14 Penn Plaza* because they do not expressly cover statutory claims. *See Ibarra v. United Parcel Serv.*, 695 F.3d 354, 356-357 (5th Cir. 2012) (no waiver of judicial forum for Title VII claim where arbitration provision only covered "any controversy, complaint, misunderstanding or dispute arising at to interpretation, application or observance of any of the provisions of this Agreement"); *Cavallaro v. UMass Mem. Healthcare, Inc.*, 678 F.3d 1, 7, n.7 (1st Cir. 2012) ("A broadly-worded arbitration clause such as one covering 'any dispute concerning or arising out of the terms and/or conditions of [the CBA], or dispute involving the interpretation or application of [the CBA]' will not suffice."); *Powell v. Anheuser-Busch*

Inc., 457 F. App'x 679, 680 (9th Cir. 2011) (no waiver of judicial forum for California Fair Employment and Housing Act claim where agreement “recognizes [employer’s] duty to comply with FEHA” but fails to contain “any arbitration procedures governing the arbitration of [employee’s] statutory claim . . .”) (unpublished opinion); *Harrell v. Kellogg Co.*, Civil Action No. 11-7361, 2012 U.S. Dist. LEXIS 128970, *8 (E.D. Pa. Sept. 11, 2012) (no waiver of judicial forum for 42 U.S.C. § 1981 claim where grievances only defined to include “disputes or disagreements concerning interpretation and application of the provisions of this Agreement”); *Martinez v. J. Fletcher Creamer & Son, Inc.*, Case No. CV 10-0968 PSG (FMOx), 2010 U.S. Dist. LEXIS 93448, *2 (C.D. Cal. Aug. 13, 2010) (no waiver of judicial forum for FLSA and state wage claims where grievance procedure only existed for “enforcing all the terms and provisions contained in [the] Agreement”); *Peterson v. New Castle Corp.*, 2:11-cv-00764-R CJ-CWH, 2011 U.S. Dist. LEXIS 124734, *8 (D. Nev. Oct. 27, 2011) (no waiver of judicial forum for Title VII claims where agreement provided that “[a] grievance shall be defined as a dispute regarding the interpretation and application of the provisions of this Agreement.”).

Accordingly, Amici’s misreading of *14 Penn Plaza* does not support Petitioners’ case and should be disregarded.

2. The CBAs need not indicate that arbitration is the sole and exclusive forum for the resolution of statutory claims.

Amici next argue that the Court of Appeals erred in relying on *Minter v. Pierce Transit*, 68 Wn. App. 528, 843 P.2d 1128 (1993), *rev. den.*, 121 Wn.2d 1023 (1993), which cites *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 13 L. Ed. 2d 580, 85 S. Ct. 614 (1965), to support its conclusion that arbitration is Petitioners' exclusive remedy in this case. (Amici's Br. 4, fns. 3, 7). Once again, Amici misread binding precedent.

Contrary to Amici's suggestion, the Court of Appeals did not apply the presumption of *arbitrability* to determine whether Petitioners clearly and unmistakably waived the right to pursue their statutory wage claims in court; rather, the Court applied the presumption of *exclusivity* to determine whether the grievance/arbitration procedure constituted Petitioners' exclusive remedy in this case.

As Amici point out, the Court in *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 79, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998), declined to apply the presumption of arbitrability to the question of whether matters that go beyond the interpretation and application of contract terms are subject to arbitration. However, the *Wright* Court did not disturb the principle espoused in *Republic Steel* (as cited in *Minter*) that "where a collective bargaining agreement has provisions for grievances, unless the

contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf.” *Minter*, 68 Wn. App. at 531.

Thus, Amici have yet again advanced an argument grounded in a misreading of Supreme Court precedent.

C. PETITIONERS ARE NOT DEPRIVED OF SUBSTANTIVE STATUTORY RIGHTS.

Amici next argue that because “the union does not file grievances, let alone arbitrate them,” reading the CBAs to preclude Petitioners’ access to court “works a waiver of the substantive protections of the state statutes, contrary to federal law.” (Amici’s Br. 7). Amici’s argument is not supported by the facts or law.

As Garda explained in its Answer to Petition for Review, the legitimacy of Petitioners’ unions is not properly before the Court, and there is no evidence in the record addressing the issue even if it were. (Pet’rs’ Br. 11-12). The Supreme Court has long recognized that the National Labor Relations Board (“NLRB”) exercises primary jurisdiction to decide whether certain activity violates the National Labor Relations Act (“NLRA”), including whether a union is an employer-dominated union in violation of Section 8(a)(2) of the NLRA. *See San Diego Unions v. Garmon*, 359 U.S. 236, 245, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959).

Thus, if Petitioners wish to challenge the validity of their unions, the proper avenue for relief is through the NLRB.

Second, Amici, like Petitioners, unpersuasively rely on *Brown v. Services for the Underserved*, 12-CV-317, 2012 U.S. Dist. LEXIS 106207, at *5 (E.D.N.Y. July 31, 2012), and similar cases for the proposition that a contractual waiver is unenforceable if the union can prevent the employees from pursuing arbitration.⁴ (Amici's Br. 8). As explained in Garda's Answer to Petition for Review, *Brown* undermines, rather than supports, Petitioners' position. The additional cases cited by Amici likewise undermine Amici's theory.

In *Brown* and the other cases cited by Amici, unionized employees suffered alleged discrimination, attempted to pursue grievances under their respective collective bargaining agreement's grievance/arbitration procedure, and were refused the right to grieve their dispute by their union. Thus, the court in each case found that the arbitration provision was unenforceable because it acted as a substantive waiver of the employees' statutory rights. The dispositive factor in every one of those cases, however, does not exist in the case at bar.

⁴The additional cases cited by Amici include *de Souza Silva v. Pioneer Janitorial Servs., Inc.*, 777 F. Supp. 2d 198 (D. Mass. 2011); *Morris v. Temco Serv. Indus., Inc.*, 09 Civ. 6194 (WHP), 2010 U.S. Dist. LEXIS 84885 (S.D.N.Y. Aug. 12, 2010); and *Kravar v. Triangle Servs., Inc.*, 1:06-cv-07858-RJH, 2009 U.S. Dist. LEXIS 42944 (S.D.N.Y. May 19, 2009). (Amici's Br. 8).

In the cases relied on by Petitioners and Amici, the courts concluded the arbitration provisions denied employees of their substantive rights because the unions in fact declined to pursue their claims through the grievance process. As explained in Garda's Answer to Petition for Review, in *Brown* the court explained: "I thus conclude that the CBA's arbitration provision is unenforceable – at least as against Brown – because it gave the Union exclusive authority to decide whether to pursue Brown's discrimination claims, *and the Union in fact denied Brown the opportunity to pursue those claims.*" *Id.* at *5 (emphasis added). (Pet'rs' Br. 13).

Similarly, in *de Souza Silva*, the court explained, "[W]here, as here, the union is the sole entity with authority to proceed to arbitration and it elected not to do so, the CBA provision constitutes an impermissible waiver of the employee's statutory anti-discrimination rights." 777 F. Supp. 2d at 204; *see also Morris*, 2010 U.S. Dist. LEXIS 84885, *12-13 ("[The employee] requested the Union to take action on her behalf. As an individual union member, she did not have an unfettered right to demand arbitration of a discrimination claim under the CBA – instead, she had to rely on the Union to arbitrate her grievances.") (internal quotations omitted); *Kravar*, 2009 U.S. Dist. LEXIS 42944, *8 (finding no valid waiver where only union could pursue arbitration and employee "told her

union representative . . . that she wanted to arbitrate her disability claims” and the union representative “laughed and told [her] that [she] could not do so because the union was most likely to dismiss [her] complaint.”).

Here, unlike in the cases relied on by Amici, there is no evidence that Petitioners attempted to utilize the grievance procedure, let alone that their unions refused to pursue those claims in arbitration. CP 67, 79. Thus Amici’s reliance on those cases, like Petitioners’ reliance on *Brown*, is misdirected and of no consequence.

D. THE PARTIES DID NOT AGREE TO CLASS ARBITRATION.

As a final matter, Amici argue that if Petitioners’ claims are actionable only under the CBAs, they should be permitted to arbitrate as a class because the right to pursue common grievances as a class is a common labor arbitration practice and is protected by the NLRA. (Amici’s Br. 9-10). These are the exact same arguments advanced by Petitioners in their Petition for Review, and they fail for the exact same reasons set forth in Garda’s Answer thereto. (Pet’rs’ Br. 18-20).

Without completely rehashing Garda’s response to Petitioners’ arguments, it is sufficient to point out that *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752, 179 L. Ed. 2d 742 (2011), squarely forecloses any argument that a common practice of class grievances in the labor context suggests that the parties in this case agreed to do so.

Moreover, as referenced in Garda’s Answer to Petition for Review, *D.R. Horton*, 357 NLRB No. 184, slip op. (2012), is not binding on this Court, and even if it were, it completely undercuts Amici’s theory. In that case, the waiver at issue arose in the context of an individual employment agreement, which the Board plainly distinguished from waivers arising in collective bargaining agreements: “[F]or purposes of examining whether a waiver of Section 7 rights is unlawful, an arbitration clause freely and collectively bargained between a union and an employer does not stand on the same footing as an employment policy . . . imposed on individual employees by the employer as a condition of employment.” *D.R. Horton*, 357 NLRB at 10.

Accordingly, Amici have offered no convincing arguments to support Petitioners’ position that the Court of Appeals erred in refusing to order class arbitration.

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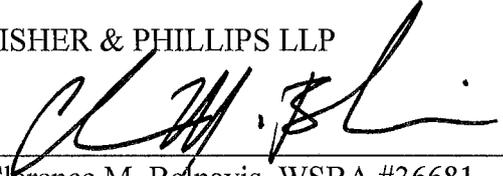
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IV. CONCLUSION

For these reasons, the Court should not be persuaded by Amici's brief.

Respectfully Submitted,

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A handwritten signature in black ink, appearing to read 'C.M. Belnavis', written over a horizontal line.

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CERTIFICATE OF SERVICE

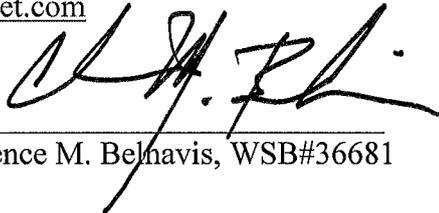
I hereby certify under penalty of perjury of the laws of the State of Washington that on this 14th day of December 2012, I caused a true and correct copy of:

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