

No.

In the Supreme Court of the United States

LONG JOHN SILVER'S, INC.,

Petitioner,

v.

ERIN COLE, ET AL.

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court held that federal statutory claims were arbitrable because “although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.” *McMahon*, 482 U.S. at 232; *Gilmer*, 500 U.S. at 32 n.4. Since then, the Second, Fourth and Eleventh Circuits have held that a federal court must confirm an arbitral award that misinterprets a federal statute unless the arbitrator intentionally misinterpreted the statute. In contrast, the District of Columbia and Fifth Circuits have held that such an award must be vacated if, regardless of the arbitrator’s willfulness, the error in interpreting the statute materially affects a party’s substantive rights.

The question presented in this case is what degree of “judicial scrutiny . . . is sufficient to ensure that arbitrators comply with the requirements of the statute.”

RULE 14.1(b) STATEMENT

Petitioner is Long John Silver's, Inc. Long John Silver's Restaurants, Inc. was listed as an appellant in the court of appeals, but that corporation has merged into Long John Silver's, Inc. and no longer exists. Respondents are Erin Cole, Nick Kaufman and Victoria McWhorter.

RULE 29.6 STATEMENT

Petitioner Long John Silver's, Inc. is a wholly owned subsidiary of Yum! Brands, Inc. Yum! Brands, Inc. is a publicly held company. No publicly held company owns 10% or more of the stock of Yum! Brands, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Long John Silver's, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix Submitted Herewith ("App.") 1a-16a) is reported at 514 F.3d 345. The opinion of the district court (App. 17a-28a) is reported at 409 F. Supp. 2d 682.

JURISDICTION

The court of appeals issued its opinion on January 28, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), provides, in pertinent part, as follows:

Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situ-

ated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

Rules 1-6 of the American Arbitration Association's Supplementary Rules for Class Arbitrations (Oct. 8, 2003) are reproduced at App. 50a-57a.

STATEMENT OF THE CASE

The present case presents an important issue regarding the review of arbitrators' interpretation and application of federal statutes. The circuits have split on this question, with the District of Columbia Circuit and the Fifth Circuit holding that a court reviewing an arbitral decision under a federal statute must ensure that the arbitrator has correctly interpreted and applied the statute, while the Fourth Circuit (in this case), the Second Circuit and Eleventh Circuit have held that courts must confirm an arbitral decision applying a federal statute – regardless of errors in interpretation or application of the statute – so long as the arbitrator's errors were not willful.

In *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court held that federal statutory claims were arbitrable. The Court explained that “by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” *McMahon*, 482 U.S. at 229-230 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); *Gilmer*,

500 U.S. at 26 (same). The Court emphasized that “although judicial scrutiny of arbitration awards necessarily is limited, *such review is sufficient to ensure that arbitrators comply with the requirements of the statute.*” *McMahon*, 482 U.S. at 232 (emphasis added); *Gilmer*, 500 U.S. at 32 n.4 (same).

Despite this Court’s clear statements in *McMahon* and *Gilmer*, several circuits (including the Fourth Circuit in this case) apply a standard of review that explicitly permits arbitral noncompliance with statutory requirements – they will not vacate an erroneous arbitral interpretation of a federal statute unless the aggrieved party can demonstrate that the arbitrator willfully misapplied the statute. In the Fourth Circuit’s words, a reviewing court is entitled to “determine only whether the arbitrator did his job – not whether he did it well, correctly, or reasonably.” App. 7a. By contrast, the District of Columbia Circuit and the Fifth Circuit have relied upon *McMahon* and *Gilmer* to hold that courts reviewing arbitral decisions applying a federal statute must ensure that the arbitrator has correctly interpreted and applied the statute. *See Cole v. Burns International Security Services*, 105 F.3d 1465, 1487 (D.C. Cir. 1997) (standard of review must be “sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law”); *Williams v. Cigna Financial Advisors Inc.*, 197 F.3d 752, 761 (5th Cir. 1999) (“The federal district courts and courts of appeals are charged with the obligation to exercise sufficient judicial scrutiny to ensure that arbitrators comply with their duties and the requirements of the statutes.”).

In this case, the arbitrator clearly misinterpreted the Fair Labor Standards Act. However, the court of

appeals never reached that issue because it applied a standard of review it characterized as “among the narrowest known to the law.” App. 7a. Under the standard applied by the court of appeals, the court must affirm an erroneous statutory interpretation unless the aggrieved party can demonstrate that the arbitrator *intentionally* misinterpreted the law.

The Fourth Circuit’s decision in this case violates the requirements of *McMahon* and *Gilmer*, undermines the fundamental basis upon which this Court held that federal statutory claims were arbitrable, and exacerbates an already serious circuit split regarding the appropriate standard of review for arbitral decisions interpreting federal statutes.

A. Respondents Institute A Class Arbitration Under The FLSA.

The named Respondents are former managers of restaurants owned by Petitioner. In December 2003, Respondents instituted an arbitration proceeding against Petitioner before the American Arbitration Association (the “AAA”), asserting claims for overtime compensation under the Fair Labor Standards Act (the “FLSA”), 29 U.S.C. §§ 201 *et seq.* The arbitration proceeding was instituted pursuant to arbitration agreements between Petitioner and Respondents providing that claims involving Respondents’ employment would be resolved by arbitration before the AAA. *See* Joint Appendix Filed with the Court of Appeals (“JA”) 84. The arbitration agreements further specified that the arbitrator would “apply the substantive law (and the law of remedies, if applicable) in the state in which the claim arose, or federal law, or both, depending on the claims asserted” (JA 84) and that the arbitrator may award “anything

[the employee] might seek through a court of law” (JA 81).

In their arbitration complaint, Respondents purported to act on behalf of all “similarly situated” employees pursuant to § 16(b) of the FLSA. JA 186. Section 16(b) permits a collective action in which FLSA plaintiffs may proceed on behalf of similarly situated employees – but only those employees who expressly consent in writing to join the action:

[An action to enforce rights under the FLSA] may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. *No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.*

29 U.S.C. § 216(b) (emphasis added). Respondents asked the arbitrator to authorize the arbitration to proceed as a collective action pursuant to § 16(b). JA 188.

More than a year later, Respondents abandoned their request for a collective action under FLSA § 16(b). Instead, they asserted that compliance with the written consent mandate of § 16(b) was unnecessary, and sought class certification under the AAA Supplementary Rules for Class Arbitrations. JA 107-108.

B. The Arbitrator Certifies An “Opt Out” Class And Refuses To Apply The Written Consent Requirement Of FLSA § 16(b).

On September 19, 2005, the arbitrator issued a Class Determination Award. App. 29a-49a. In that award, the arbitrator concluded that the written consent mandate of FLSA § 16(b) was inapplicable in arbitration and instead certified an “opt out” class pursuant to the AAA class arbitration rules. *Id.* at 35a. Under the arbitrator’s ruling, all persons within the arbitrator’s class definition are deemed to be class members (and bound by the results of the arbitration) unless they affirmatively request exclusion from the class. Such an “opt out” class has been uniformly recognized as “irreconcilable” with the written consent requirement of FLSA § 16(b). *La-Chapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir. 1975); see *Cameron-Grant v. Maxim Healthcare Services, Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003) (An FLSA collective action under § 16(b) is “a fundamentally different creature than the Rule 23 class action.”); *Dolan v. Project Constr. Corp.*, 725 F.2d 1263, 1267 (10th Cir. 1984) (“The policies behind the [29 U.S.C.] § 216(b) action are almost diametrically opposed to those involved in a Rule 23 . . . action.”).

Nonetheless, the arbitrator concluded that the written consent requirement of § 16(b) applied only in court proceedings – not in arbitration – because, he asserted, there “is no evidence of any congressional intent which would impose an opt-in provision upon a class action being privately arbitrated.” App. 34a. Characterizing the written consent requirement of § 16(b) as merely “procedural,” the arbitrator held that, solely by agreeing to arbitration, the par-

ties (including the absent class members) had surrendered their rights under § 16(b) and somehow “incorporated” the AAA class arbitration rules “into the parties’ employment agreement” (App. 35a) – although the agreements make no reference to the class rules, which did not even exist when the agreements were entered into.¹ The arbitrator explained his reasoning as follows:

Having succeeded in accomplishing a private litigation unmoored from federal procedural rules, the claim for a necessary adherence to the FLSA procedural rules is unpersuasive. Indeed, the judicial preference for the opt-out procedure is so universal that absent compelling authority requiring adherence to the opt-in procedure, there would be no inclination whatsoever to engraft that procedure upon a private arbitration. No such compelling authority has been presented.

App. 34a.

The arbitrator further concluded that the “opt out” structure he adopted was preferable to what he characterized as the “disfavored” written consent requirement – the requirement that Congress explicitly mandated in the FLSA – because the arbitrator’s

¹ The AAA class arbitration rules were adopted in October 2003, only two months before Respondents filed their arbitration complaint and years after the arbitration agreements were entered into. In general, the rules utilize standards similar to those specified in Rule 23 of the Federal Rules of Civil Procedure. The AAA class arbitration rules may be found at <http://www.adr.org/sp.asp?id=21936>, and Rules 1-6 are reproduced at App. 50a-57a. The arbitration agreements referenced the AAA’s commercial arbitration rules. JA 84.

chosen method would, in his view, further the purposes of the FLSA by certifying a larger class:

If fairness, efficiency and due process applicable to the widest appropriate class be the criteria for determination, then the Supplementary Rules as incorporated into the parties' employment agreement must prevail over the disfavored opt-in provisions espoused by Defendants. The salutary objective of the FLSA [is] advanced by the opt-out procedure.

App. 35a.

The arbitrator thus determined that – contrary to Congress's determination – the objectives of the FLSA would be better served by “opt out” class actions than by the “disfavored” written consent requirement that Congress enacted into law.

C. The District Court Upholds The Arbitrator's Ruling Without Deciding Whether It Violated The FLSA.

Petitioner timely filed an action in the United States District Court for the District of South Carolina to vacate the arbitrator's decision on the grounds that the arbitrator exceeded his powers and acted in manifest disregard of the law by certifying an “opt out” class in violation of the written consent requirement of FLSA § 16(b). JA 24-32, 35-36. Petitioner argued that this Court's decisions in *McMahon* and *Gilmer* required that judicial review be sufficient to “ensure that arbitrators comply with the requirements of the statute.” JA 23, 26.

The Secretary of Labor submitted an *amicus* letter to the district court urging the court to vacate the arbitrator's decision. As the Secretary explained, the

arbitrator's decision purported to bind absent class members without their written consent, in direct violation of § 16(b):

It was precisely this result [binding class members without their consent] that Congress intended to preclude by enacting the current section 16(b) in 1947. As evinced in the statutory language (“unless he gives his consent in writing to become a party”), and the legislative history, Congress’s clear aim was to ensure that each employee expressly consents to any collective adjudication of his or her rights under the FLSA.

JA 213. The Secretary emphasized that “an employee’s right to participate in a collective action only upon submission of one’s written consent is a substantive right [A]n employee can no more waive his right to consent to suit on his behalf than he can waive his right to the minimum wage or overtime pay.” JA 213-214. The Secretary stressed that, “[b]ecause the statutory written consent provision is substantive, . . . courts should require arbitrators to comply with it.” JA 214.

Despite Petitioner’s reliance on *McMahon* and *Gilmer*, the district court held that the appropriate standard of review was one under which a court could vacate the arbitrator’s award for legal error only if the arbitrator was “aware of the law, understood it correctly, found it applicable to the case before him, and yet chose to ignore it in propounding his decision.” App. 20a (quoting *Remmey v. Paine-Webber, Inc.*, 32 F.3d 143, 149 (4th Cir. 1994)) (internal alterations omitted). Under that standard, the district court held, an arbitrator’s error of law, even if blatantly obvious, is not a basis for vacating an

award: “That the Court may have reached a different conclusion – or even that the arbitrator may have made a serious error of law – is of no consequence.” App. 23a.

Applying this extremely deferential standard, the district court declined to vacate the arbitrator’s decision. Noting that FLSA § 16(b) refers to actions filed in “court,” the district court concluded that this reference “supplies uncertainty to the question of whether Congress intended the consent in writing requirement to govern arbitration proceedings as well as actions in court.” App. 22a. The district court also held that the arbitrator did not “disregard or ignore the statute” because he “explicitly referred to § 16(b) in his award” and considered both parties’ arguments. App. 22a. Under the standard applied by the district court, the “uncertainty” as to whether § 16(b) applies in arbitration and the arbitrator’s explicit consideration of § 16(b) required the district court to uphold the award – regardless of whether the arbitrator’s statutory interpretation was correct.

The district court unequivocally rejected Petitioner’s contention that *McMahon* and *Gilmer* required the court to review the correctness of the arbitrator’s interpretation and application of the FLSA: “The Court finds no basis in the law for Movants’ suggestion that the Court review the arbitrator’s award under a more rigorous standard, and the Court declines to undertake such a review here.” App. 19a n.1.

D. The Court of Appeals Upholds The Arbitrator's Ruling Without Deciding Whether It Violated The FLSA.

Petitioner timely appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit.

Petitioner once again relied upon this Court's decisions in *McMahon* and *Gilmer*, as well as the Fifth Circuit's decision in *Williams*, to argue that courts have a responsibility to ensure that arbitrators comply with federal statutory requirements. *See* Pet.'s 4th Cir. Brief, available at 2006 WL 2726265 *34. Under that standard, Petitioner argued, the district court was required to vacate the arbitrator's decision because the arbitrator refused to apply the written consent requirement of § 16(b) and failed to comply with the arbitration agreement's requirement that the arbitrator follow the applicable law. *Id.* at *20-*23, *47-*49.

The Secretary of Labor filed an *amicus* brief in the court of appeals supporting Petitioner and urging vacatur. The Secretary explained that the written consent requirement of § 16(b) was substantive and mandatory:

The Secretary's primary concern in this case is to establish that the [FLSA's] written consent requirement gives parties substantive rights that, under *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 26 (1991), an arbitrator must apply in arbitration. . . . The district court's decision upholds an arbitrator's explicit refusal to treat the written consent requirement as a substantive right and undercuts the useful-

ness of arbitration as a forum for resolving FLSA disputes.

2006 WL 1911678 *10.

The court of appeals affirmed without deciding whether the arbitrator erred. It avoided the necessity of deciding that issue by the standard of review it applied:

Importantly, any judicial review of an arbitration award is “extremely limited,” and is, in fact, “among the narrowest known to the law.” *U.S. Postal Serv. v. Am Postal Workers Union, AFL-CIO*, 204 F.3d 523, 527 (4th Cir. 2000) (internal quotation marks omitted). As we have consistently recognized, a reviewing court is entitled to “determine only whether the arbitrator did his job – not whether he did it well, correctly, or reasonably, but simply whether he did it.” *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int’l Union*, 76 F.3d 606, 608 (4th Cir. 1996).

App. 7a.

Although the court of appeals acknowledged that “Congress inten[ded] that the ‘opt-in’ procedure [of § 16(b)] should apply in arbitration as in court proceedings” (App. 11a), it nonetheless upheld the arbitrator’s refusal to apply § 16(b) – a refusal based solely on the fact that the parties had agreed to arbitrate. The court of appeals affirmed on the ground that Petitioner had not met its “heavy burden [of showing] that the arbitrator knowingly ignored applicable law” (App. 12a) because there was “a debatable contention” that the parties had waived their rights under § 16(b) by agreeing to arbitrate (App. 14a).

Notably, the court of appeals never purported to decide whether the arbitrator's refusal to comply with the written consent requirement of FLSA § 16(b) was correct or incorrect. Under the court of appeals' standard of review, the arbitrator's legal error was irrelevant absent a showing that the error was intentional. Although Petitioner argued that *McMahon* and *Gilmer* required that "judicial review of an arbitration award must be thorough enough to ensure that arbitrators comply with the requirements of the statute at issue" (2006 WL 2726265 *34), the court of appeals made no mention of this Court's statements in *McMahon* and *Gilmer*, nor did it attempt to reconcile them with its own explicit refusal to decide whether the arbitrator had properly interpreted and applied the FLSA.

REASONS FOR GRANTING THE PETITION

The court of appeals' failure to decide the propriety of the arbitrator's refusal to comply with the written consent requirement of FLSA § 16(b) disregards this Court's admonitions in *McMahon* and *Gilmer*, deepens an already serious circuit split, and undermines the entire basis upon which this Court held that federal statutory claims were arbitrable. The Court's expressed assumption that judicial review of arbitral decisions under federal statutes would be sufficient to ensure arbitral compliance with those statutes was a critical element of its holding that statutory claims were arbitrable. The Court should act to validate that assumption.

A. The Fourth Circuit's Decision In This Case Conflicts With This Court's Holdings In *McMahon* And *Gilmer* And, If Permitted To Stand, Will Raise Serious Questions Regarding The Arbitrability Of Statutory Claims.

The Fourth Circuit's decision in this case conflicts with this Court's decisions in *McMahon* and *Gilmer*. Those decisions held that claims under federal statutes were arbitrable. That holding was expressly premised on the stated belief that judicial review of arbitrators' interpretations of federal statutes would be sufficient to ensure that the arbitrators correctly interpreted and applied those statutes. The Fourth Circuit's decision in this case challenges that belief, since it applies a standard of review that eschews any effort to ensure that arbitrators correctly interpret and apply federal statutes.

- 1. *McMahon* and *Gilmer* premised their holdings that statutory claims were arbitrable upon the explicit assumption that judicial review would be adequate to ensure that arbitrators properly interpreted and applied federal statutes.**

Judicial review of arbitral decisions has traditionally been quite narrow. This Court's early decisions regarding the standard of review of arbitral decisions involved arbitrations under collective bargaining agreements. In that context, the Court held that judicial review of arbitral awards should be extremely limited. *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596-597 (1960).

The Court recognized that arbitration of claims under federal statutes presented an entirely different issue because such claims are not merely private affairs. When federally created rights are at issue, the public has a strong interest in ensuring that the statutes establishing those rights are properly construed and applied. Initially, the Court held that claims under federal statutes were not arbitrable at all, at least in part because the standard of review might be inadequate. In *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), the Court held that a customer's claim against a broker under § 12 of the Securities Act of 1933 was not subject to arbitration, suggesting, *inter alia*, that the standard of review of an arbitration award might be inadequate to correct legal error by the arbitrators. See 346 U.S. at 436-437 ("Power to vacate an award is limited. . . . [T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.").

Three decades later, the Court changed its view of the adequacy of arbitration to resolve disputes under federal statutes – and the adequacy of judicial review to correct arbitral misinterpretation. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), the Court held that a claim under the Sherman Act was subject to international arbitration. The Court stated that, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.* at 628. The Court acknowledged the United States' interest in the application of its law, but stated that the arbitrators

would be obliged to apply American antitrust law (*id.* at 636-637) and that “the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.” *Id.* at 638.

The Court applied the principles of *Mitsubishi* to domestic arbitration in *McMahon*, which held that claims under the Securities Exchange Act of 1934 and RICO were arbitrable. The Court again emphasized that a party’s substantive rights under the statutes would be the same in arbitration as in court. 482 U.S. at 229-230 (citing *Mitsubishi*). In response to the plaintiff’s stated concern that arbitrators might not follow the law, the Court assured the plaintiff that the courts would make certain that they did: “[A]lthough judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.” *Id.* at 232.

The principles of *Mitsubishi* and *McMahon* were reiterated in *Gilmer*, which held that claims under the Age Discrimination in Employment Act were subject to arbitration. The Court rejected *Gilmer*’s suggestion that judicial review of arbitral decisions would be inadequate, stating that judicial review would be “sufficient to ensure that arbitrators comply with the requirements of the statute at issue.” 500 U.S. at 32 n.4 (internal quotations omitted) (quoting *McMahon*).

Thus, in holding that federal statutory claims were arbitrable, the Court heavily relied upon its determination that parties would have the same rights in arbitration as in court, and its expressed belief that judicial review of arbitral decisions would be

“sufficient to ensure” that arbitrators properly interpreted and applied the statutory mandates. That assumption is now being challenged.

2. The Fourth Circuit’s decision in this case is inconsistent with *McMahon* and *Gilmer* and, if allowed to stand, will undermine the critical assumptions upon which *McMahon* and *Gilmer* were premised.

The Fourth Circuit held in this case that courts must affirm good faith arbitral misinterpretations of federal statutes because the courts may decide only “whether the arbitrator did his job – not whether he did it well, correctly or reasonably.” App. 7a. If that standard is applied, the most critical assumptions underlying this Court’s decisions in *McMahon* and *Gilmer* have proven to be false. If those assumptions are false, then the entire basis for the Court’s holding that federal statutory claims are arbitrable has been called into question.

The Court’s holding that statutory claims are arbitrable depended upon two assumptions: (1) a party who agrees to arbitrate statutory claims does not forgo his or her substantive rights under the statute, but only agrees to have those rights determined in a different forum (*McMahon*, 482 U.S. at 229-230; *Gilmer*, 500 U.S. at 26); and (2) judicial review is sufficient to ensure that arbitrators comply with the requirements of the statute (*McMahon*, 482 U.S. at 232; *Gilmer*, 500 U.S. at 32 n.4). The Court could not have reached the result it did in *McMahon* and *Gilmer* unless it believed those assumptions to be true.

But those assumptions are not true in the Fourth Circuit. *McMahon* and *Gilmer* postulated a standard

of review that is “sufficient to ensure that arbitrators comply with the requirements of the statute.” The Fourth Circuit makes no effort to ensure arbitral fidelity to federal statutes. Rather than requiring the arbitrator to comply with statutory mandates, the Fourth Circuit will permit vacatur only if the arbitrator has “knowingly ignored” applicable law. App. 12a. That standard explicitly contemplates that courts will uphold arbitrators’ misinterpretation of federal statutes, even if their misinterpretation is clear. It is obviously not sufficient – or intended – to ensure that arbitrators correctly interpret or apply federal statutes.

If the Fourth Circuit’s standard of review is allowed to stand, then the Court’s assumptions in *McMahon* and *Gilmer* were erroneous. If those assumptions are wrong, then the fundamental basis for those decisions has been undermined.

B. The Circuits Have Split On The Appropriate Standard Of Review Of Arbitral Decisions Of Claims Under Federal Statutes.

Following the Court’s decisions in *McMahon* and *Gilmer*, the circuits have fundamentally split over the appropriate standard of review of arbitral decisions interpreting and applying federal statutes. This split is at least partially due to the fact that the Court has not addressed the issue in the 17 years since *Gilmer* was decided, and has provided “virtually no guidance” to the lower courts. Calvin Sharpe, *Integrity Review of Statutory Arbitration Awards*, 54 HASTINGS L.J. 311, 335 (2003) (“[The lower courts have] entered the breach to supply content to the standards in the face of virtually no guidance from the Supreme Court.”).

In the absence of guidance by the Court, the lower courts have fashioned their own diverse – and inconsistent – doctrines. The Second, Fourth and Eleventh Circuits have utilized an extremely deferential standard of review that mandates confirmation of arbitral decisions misinterpreting federal statutes, while two other circuits – the District of Columbia and Fifth Circuits – have construed *McMahon* and *Gilmer* as requiring courts to correct such misinterpretations.

1. The Fourth, Second and Eleventh Circuits apply the same highly deferential standard to all arbitral awards, regardless of whether they involve claims under federal statutes.

At least three circuits make no effort to ensure that federal statutory rights are sufficiently protected in arbitration. These circuits review arbitral decisions involving federal statutes with the same extreme deference that they apply to arbitral decisions in other contexts, such as disputes under collective bargaining agreements or disagreements involving interpretation of commercial contracts. In this case, for example, the Fourth Circuit applied a “manifest disregard” standard of review² it described

² This Court identified “manifest disregard” as a ground for vacating an arbitral decision in *Wilko*, 346 U.S. at 436-437 (1953), and again in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). In *Hall Street Associates, LLC v. Mattel, Inc.*, No. 06-989 (March 25, 2008), the Court stated that the grounds for vacating an arbitral decision specified in § 10 of the Federal Arbitration Act (9 U.S.C. § 10) were exclusive. Slip op. at 9. Section 10 of the Federal Arbitration Act does not identify “manifest disregard” as a ground for vacatur. Although not re-

as “among the narrowest known to the law” (App. 7a), a phrase the court of appeals borrowed from its decision in *U.S. Postal Service v. American Postal Workers Union, AFL-CIO*, 204 F.3d 523, 527 (4th Cir. 2000), involving review of an arbitral decision under a collective bargaining agreement. The court of appeals simply ignored Petitioner’s argument that *McMahon* and *Gilmer* required the courts to ensure arbitral fidelity to federal statutes by applying a heightened standard of review. By contrast, the district court did address Petitioner’s argument on this point, but, despite *McMahon*’s and *Gilmer*’s clear instruction, found “no basis in the law” for Petitioner’s argument that a “more rigorous standard” should apply when reviewing arbitral interpretations of federal statutes. App. 19a n.1.

jecting “manifest disregard” as a standard of review, *Hall Street* suggested that *Wilko* used the phrase as a collective or shorthand term for the statutory grounds. Slip op. at 8. The Ninth Circuit reached the same conclusion in *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003) (*en banc*). In *Kyocera*, the Ninth Circuit held that the statutory grounds for vacatur were exclusive, but also acknowledged that arbitral awards could be vacated if the arbitrator manifestly disregarded the law or if the award was “completely irrational.” 341 F.3d at 997 (quoting *French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902, 906 (9th Cir. 1986)). *Kyocera* explained that these standards were encompassed within § 10(a)(4) of the Federal Arbitration Act, which authorizes vacatur if arbitrators “exceeded their powers.” 341 F.3d at 997. The Sixth Circuit reached a similar conclusion in *Federated Department Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862, 866 (6th Cir. 1990) (“Arbitrators do not exceed their authority unless they display a manifest disregard of the law.”). See also *Comedy Club, Inc. v. Improv West Associates*, 502 F.3d 1100 (9th Cir. 2007) (post-*Kyocera* decision partially vacating arbitral award for “manifest disregard” where arbitrator misconstrued state statute).

Similarly, the Second Circuit expressly rejected the argument that courts must be more rigorous in reviewing arbitrators' interpretation and application of public laws than their resolution of private contract disputes. In *GMS Group, LLC v. Benderson*, 326 F.3d 75 (2d Cir. 2003), the court of appeals declined to construe *McMahon* and *Gilmer* as requiring courts to ensure arbitral compliance with federal statutes. It characterized the statements in *McMahon* and *Gilmer* regarding judicial review as mere dicta, and asserted that "the Court neither implied that a more stringent standard of review should be applied to federal statutory claims, nor differentiated between federal statutory claims and common law claims." 326 F.3d at 80.

The Eleventh Circuit reached the same conclusion in *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217 (11th Cir. 2000), in which it reviewed an arbitral decision rejecting a claim under Title VII. Holding that arbitration awards "will not be reversed due to an erroneous interpretation of law by the arbitrator," the court of appeals confirmed an arbitral decision in favor of the defendant because the plaintiff did "not assert that this alleged error was intentional or that the arbitrator made a conscious decision not to follow the appropriate legal standard." 211 F.3d at 1223.

The courts have recognized that the highly deferential standard applied by the Second, Fourth and Eleventh Circuits results in confirmation of plainly erroneous decisions. As one court acknowledged: "In accordance with the Second Circuit's rulings on the subject, this court has repeatedly refused to overturn arbitral awards on the ground of manifest disregard even if the decision reached by the arbitrator is

clearly erroneous.” *Chisholm v. Kidder, Peabody Asset Management, Inc.*, 966 F. Supp. 218, 223 (S.D.N.Y. 1997).

2. The District of Columbia and Fifth Circuits apply a heightened standard of review for arbitral decisions involving federal statutes.

The District of Columbia and Fifth Circuits have taken a very different view of their responsibilities to ensure that arbitrators correctly interpret and apply federal statutes.

In *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997), the plaintiff brought a Title VII action against his employer. The district court ordered the parties to arbitrate pursuant to an arbitration provision in the employment contract. The court of appeals affirmed, and engaged in an extensive discussion of the standards applicable to that arbitration. The court of appeals “categorically reject[ed]” the suggestion that the law governing arbitration under collective bargaining agreements would apply to arbitration of federal statutory claims (*id.* at 1473), explaining that arbitrations under collective bargaining agreements occupied a unique place in the law (*id.* at 1473-1477).

After analyzing *McMahon* and *Gilmer*, the D.C. Circuit concluded that this Court’s decisions regarding arbitrability of federal statutory claims rested on two critical assumptions: (1) that a party agreeing to arbitrate statutory claims does not forgo substantive rights afforded by the statute; and (2) that judicial review is sufficient to ensure arbitral compliance with statutory requirements. “These twin assumptions regarding the arbitration of statutory claims

are valid only if judicial review under the ‘manifest disregard of the law’ standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law.” 105 F.3d at 1487. Thus, the court of appeals concluded, “the courts are empowered to review an arbitrator’s award to ensure that its resolution of public law issues is correct.” *Id.*

In *Williams v. Cigna Financial Advisors Inc.*, 197 F.3d 752 (1999), the Fifth Circuit held that review of an arbitral decision under the Age Discrimination in Employment Act must include a determination of the legal correctness of the arbitrators’ application of the statute. The Fifth Circuit noted that this Court based its decision in *Gilmer* on “crucial assumptions or predictions” – the same assumptions identified by the District of Columbia Circuit in *Cole*. 197 F.3d at 760. On this basis, the Fifth Circuit held, the assumptions enunciated in *Gilmer* demanded meaningful judicial review of arbitral awards interpreting and applying federal statutes:

The Supreme Court’s assumptions and predictions in *Gilmer* assign heavy responsibilities to arbitrators and the federal courts. . . . The federal district courts and courts of appeals are charged with the obligation to exercise sufficient judicial scrutiny to ensure that arbitrators comply with their duties and the requirements of the statutes. . . . Accordingly, the judicial review of arbitral adjudication of federal statutory employment rights under the FAA and the “manifest disregard of the law” standard “must be sufficient to ensure that arbitrators comply with the requirements of the statute” at issue. *Gilmer*, 500 U.S. at 32 n. 4 (quoting *Shear-*

son/American Express, 482 U.S. at 232); see *Cole*, 105 F.3d at 1487.

197 F.3d at 760-761.³

Some years later, the Fifth Circuit reached the same conclusion in *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294 (5th Cir. 2004), a dispute involving the FLSA. In that case, the court of appeals affirmed a district court decision compelling arbitration of an FLSA claim over the plaintiffs' objection. In response to the plaintiffs' concern that the arbitrator might not award them statutorily mandated attorney's fees, the Fifth Circuit cited *Williams* and noted that "if an arbitrator failed to award fees he or she should have under the statute [plaintiffs] would have an effective remedy in federal court." *Id.* at 299 n.1.

³ The Dunlop Commission (a commission jointly appointed by the Secretaries of Labor and Commerce) reached a similar conclusion. While favoring arbitration to resolve claims under federal employment laws, the Commission strongly recommended that arbitral decisions applying these laws be subject to judicial review for legal error:

Judicial review of arbitrator rulings must ensure that the arbitration decision reflects an appropriate understanding and interpretation of the relevant legal doctrines. While a reviewing court should defer to an arbitrator's fact findings so long as they have substantial evidentiary basis, the reviewing court's authoritative interpretation of the law should bind arbitrators as much [as] it now binds administrative agencies and lower courts.

U.S. Commission on the Future of Worker-Management Relations – Final Report 58 (1994), available at http://digitalcommons.ilr.cornell.edu/key_workplace/2.

The decisions of the District of Columbia Circuit in *Cole* and the Fifth Circuit in *Williams* and *Carter* are irreconcilable with the standards enunciated by the Fourth Circuit in this case as well as the Second and Eleventh Circuits in *GMS* and *Brown*. The Fourth, Second and Eleventh Circuits apply a standard of review that explicitly permits arbitral misinterpretation and misapplication of federal statutes. Those circuits have ignored or distinguished the Court's admonitions in *McMahon* and *Gilmer*. By contrast, the District of Columbia and Fifth Circuits regard this Court's assumptions in *McMahon* and *Gilmer* as critical elements of those decisions, and therefore insist on heightened judicial scrutiny of arbitral decisions under federal statutes.

C. The Fourth Circuit's Decision Has Encouraged – And, If Permitted To Stand, Will Continue To Encourage – Arbitral Misapplications Of Federal Statutes.

By upholding the arbitrator's erroneous refusal to apply the written consent requirement of FLSA § 16(b), the court of appeals has already encouraged further arbitral misapplications of the FLSA and other federal statutes. If permitted to stand, the Fourth Circuit's decision will result in an expansion of such misapplications because there is no effective means to correct them.

Legal error that goes uncorrected expands exponentially. That has already begun to happen with respect to the arbitrator's error in this case. After the district court refused to vacate the arbitrator's decision, at least two other arbitrators hearing unrelated FLSA claims relied on the district court's decision in this case to certify "opt out" classes in FLSA actions, asserting that the written consent require-

ment of FLSA § 16(b) does not apply in arbitration. *See* App. 58a-59a. Now that the Fourth Circuit has affirmed the district court's decision, it may fairly be expected that other arbitrators will view the Fourth Circuit's decision as a blanket permission to disregard the written consent requirement of § 16(b) in FLSA arbitrations. Under the standard of review applied in the Fourth Circuit, these decisions must all be confirmed. The result will be a fracturing of what heretofore had been an unbroken line of authority requiring the application of § 16(b) in FLSA actions and a wholesale disconnect between FLSA litigation (where the written consent requirement of § 16(b) is unquestionably mandatory) and FLSA arbitrations (where the written consent requirement of § 16(b) will be at best optional). There will thus be one law for FLSA litigation and a completely different law for FLSA arbitrations. This is an inevitable result of the court of appeals' refusal to review the arbitrator's decision for legal error.

The same problem is likely to arise in the future under other federal statutory schemes as well. Just as one plainly erroneous but uncorrectable arbitral decision interpreting the FLSA has already spawned similar erroneous decisions in other arbitrations, so too will future uncorrected erroneous arbitral decisions interpreting other federal statutes likely expand unabated by any judicial restraint.

D. The Present Case Is An Ideal Vehicle For Deciding The Question Presented Because The Result Would Be Different Under The Correct Standard Of Review.

This is a particularly appropriate case to decide the question presented because the result in this case would be different if the Fourth Circuit had ap-

plied the appropriate standard of review. Had the court of appeals reached the legal issue involved, it would have had to determine that the arbitrator misinterpreted the FLSA in a manner that (a) frustrates clear congressional policy, (b) makes the FLSA statute of limitations impossible to apply, and (c) deprives non-consenting class members of their statutory rights.

1. Congress adopted the written consent requirement for public policy purposes to carefully balance the interests of employees and employers.

The FLSA written consent requirement that the arbitrator rejected was not arbitrarily chosen, nor was it selected for convenience or ease of application. Congress enacted the written consent requirement for specific public policy purposes in a careful effort to protect the interests of both employers and employees. That policy decision may not be overruled by an arbitrator who believes that his policy choices are better suited to implement the statute than the “disfavored” policy choice (App. 35a) enacted into law by Congress.

The history of FLSA § 16(b) is well known, and has been discussed in a number of published decisions.

Congress enacted the FLSA in 1938. Among other things, the FLSA required employers to pay employees one and one-half times the employees’ hourly rate of pay for hours worked in excess of forty hours per week. 29 U.S.C. § 207.

In 1946, this Court decided *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680 (1946), which substantially expanded the scope of compensable time

under the FLSA. In the seven months following the *Mount Clemens* decision, nearly 2,000 FLSA class actions were filed against employers. *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 306 (3d Cir. 2003).

Congress responded to the torrent of litigation following *Mount Clemens* by passing the Portal-to-Portal Act, Pub. L. No. 80-49, ch. 52, reprinted in *United States Code Congressional Service* (Laws of 80th Cong., 1st Sess., 1947) at 81-87. Congress's expressed concern was that, without the Act, liability under the FLSA "would bring about the financial ruin of many employers . . . ; the credit of many employers would be seriously impaired; [and] the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged." *Id.* at 81-82.

The Portal-to-Portal Act legislatively overruled *Mount Clemens*. Congress also sought to avoid future "excessive and needless litigation and champertous practices" by prohibiting "opt out" class actions. The Portal-to-Portal Act thus added the written consent requirement now contained in § 16(b). *Id.* at 85.

Congress added the written consent requirement to § 16(b) "for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions." *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989); see also *Cameron-Grant v. Maxim Healthcare Services, Inc.*, 347 F.3d 1240, 1248 (11th Cir. 2003) (purpose of § 16(b) written consent requirement was to "prevent[] large group actions, with their vast allegations of liability, from being brought on behalf of employees who had no real involvement in, or knowledge of, the lawsuit" (citation and internal quotations omitted)).

As the Third Circuit has recognized, “mandating an opt-in class or an opt-out class is a crucial policy decision” (*De Asencio*, 342 F.3d at 311) that “profoundly affects the substantive rights of the parties to the litigation” (*id.* at 310). Congress enacted the written consent requirement “to strike a balance to maintain employees’ rights but curb the number of lawsuits.” *Id.* at 306. Thus, Congress allowed employees to sue on behalf of others similarly situated, but consciously restricted the class to individuals who expressly consented in writing to join the action. This effort to strike a balance is clearly a substantive policy decision made by Congress. As the Secretary of Labor noted in her *amicus* brief, the arbitrator’s decision to substitute his own policy preferences for those of Congress – and the courts’ refusal to vacate it – “threatens to upset the litigation balance delicately but expressly set by Congress.” 2006 WL 1911678 *19.*20.

The arbitrator attempted to justify his pursuit of his personal policy preference for a larger class of plaintiffs by characterizing Congress’s written consent requirement as merely “procedural.” This characterization was essential to the arbitrator’s holding because *McMahon* and *Gilmer* emphasize that parties do not surrender their statutory rights by agreeing to arbitrate, and the arbitrator’s determination that the parties (including the unnamed class members) had “waived” their rights under § 16(b) was based solely on the fact that the parties had agreed to arbitrate – not upon any provision of the arbitration agreement. But the written consent requirement of § 16(b) is not a mere “procedural” device to be discarded at will – it reflects a conscious policy decision by Congress designed to protect the interests

of both employers and employees, a policy decision that the arbitrator was not free to reject.

2. It is impossible to apply the FLSA statute of limitations without the written consent requirement.

The written consent requirement of § 16(b) is so embedded in the FLSA that the statute of limitations for absent class members cannot be calculated without it. The FLSA expressly provides that, “in the case of a collective or class action instituted under the Fair Labor Standards Act,” the statute of limitations for each absent class member does not cease to run when the action is filed – it ceases to run only “on the subsequent date on which [the class member’s] written consent is filed in the court in which the action was commenced.” 29 U.S.C. § 256(b).

An arbitral attempt to avoid the written consent requirement is thus impossible without ripping apart the entire fabric of the FLSA. If an arbitrator dispenses with the written consent requirement, then the arbitrator must also concoct a completely new method of calculating the statute of limitations – a method that would directly violate 29 U.S.C. § 256(b).⁴

The written consent requirement of § 16(b) is thus an integral part of the entire congressional scheme for enforcing the FLSA. It cannot be ignored

⁴ The arbitrator in this case apparently assumed that the statute of limitations for absent members of the “opt out” class he certified would cease to run at the time the original arbitration proceeding was filed. That assumption is contradicted by the unambiguous language of 29 U.S.C. § 256.

without completely upsetting the entire structure carefully designed by Congress.

3. The arbitrator’s attempt to bind non-consenting class members violates the FLSA and raises serious due process concerns.

The arbitrator’s avoidance of the written consent requirement of FLSA § 16(b) presents serious due process concerns because he purported to bind non-consenting class members, notwithstanding uniform case law stating that class members in an FLSA action cannot be bound unless they have filed written consents pursuant to § 16(b). These concerns further demonstrate why the written consent requirement of FLSA § 16(b) must apply in arbitration.

If the written consent requirement of § 16(b) means anything, it means that no purported class “representative” may represent an employee’s interests in an FLSA action unless the employee affirmatively authorizes that representation. Accordingly, the courts have uniformly held that unnamed members of an FLSA collective action are not bound by, nor may they benefit from, any determination in the action unless they file written consents. *McElmurry v. U.S. Bank N.A.*, 495 F.3d 1136, 1139 (9th Cir. 2007) (In an FLSA collective action “only those plaintiffs who expressly join the collective action are bound by its results.”); *Whalen v. W.R. Grace & Co.*, 56 F.3d 504, 506 n.3 (3d Cir. 1995) (“[U]nder § 16(b) ... no person will be bound by or may benefit from a judgment unless he or she has affirmatively ‘opted into’ the class by filing a written consent with the court.”); *LaChapelle*, 513 F.2d at 288 (“[N]o person will be bound by or may benefit from judgment unless he has affirmatively ‘opted into’ the class; that

is, given his written, filed consent.”); *Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 536 (8th Cir. 1975) (quoting *LaChapelle*); *Woods v. New York Life Ins. Co.*, 686 F.2d 578, 580 (7th Cir. 1982) (in an FLSA collective action, “the class member must opt in to be bound”). As the Secretary of Labor’s *amicus* brief noted, the written consent requirement “protects employees in a fundamental way” by ensuring that they are not bound by a decision unless they have expressly agreed to be bound. 2006 WL 1911678 *18.

In this case, the arbitrator purported to bind the absent class members – and to authorize purported representatives to act on their behalf – without their express consent, notwithstanding the unambiguous language of § 16(b) and a consistent line of judicial decisions saying that this cannot be done. This assumption of authority over non-consenting individuals implicates the “principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999). That is particularly the case here, where Congress has expressly affirmed that principle in unequivocal terms by providing that absent class members may not be parties to an action unless they expressly consent in writing.

The arbitrator has thus purported to do something that cannot be done – bind non-consenting members of the class in violation of their express statutory right not to be bound. The patently futile nature of this effort is further reason why the arbitrator’s decision is erroneous.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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