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Testimony of Katherine Van Wezel Stone Before the Commission on the Future of Worker-Management Relations

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To The Honorable Mister Secretary, Chairman Dunlop, Members of the Commission, Fellow Panelists, Members of the Public:

I am a Professor of Law at Cornell Law School and Cornell School of Industrial and Labor Relations, where I teach courses in labor law, employment law, and labor policy. In addition, I teach contracts, and a course about the law of alternative dispute resolution as it applies in fields other than labor, including securities law disputes, antitrust, matrimonial matters, and commercial contract disputes. Over the past fifteen years, I have written numerous law review articles about the use of arbitration in our existing system of collective bargaining.

I am honored to have this opportunity to address you today on the subject of the role of alternative dispute resolution in labor and employment disputes. The question for today's hearing is found in the Mission Statement for the Commission. It is:

"What (if anything) should be done to increase the extent to which workplace problems are directly resolved by the parties themselves, rather than through recourse to litigation and regulatory bodies?"

The position I will take today is that we have already gone very
far in the direction of private resolution of employment disputes by means of extreme judicial support for and deference to private arbitration. I will argue that we have gone too far, and that the role of arbitration in labor and employment relations should be curtailed.

Recently the use of arbitration has in labor relations has expanded into a new area — the area of worker statutory rights. This has occurred in two respects. First, by means of expansive interpretations of Section 301 preemption, courts have increasingly required unionized workers to arbitrate state law statutory rights. Second, under the recent Supreme Court ruling in Gilmer v. Johnson/Interstate Lane Corp., 500 U.S. 20 (1991), nonunion workers are required to arbitrate rights that arise under federal and state employment laws when they have expressly or impliedly agreed to arbitrate employment disputes. It is my position that we should not permit workers to waive their rights under state or federal employment statutes — we should not force parties to arbitrate statutory claims, we should not presume that promises to arbitrate include promises to arbitrate statutory claims, and we should not give arbitral rulings on statutory issues preclusive effect. To do otherwise potentially nullifies any efforts we might make to legislate on behalf of workers.

In the next few minutes I will describe these new developments, explain my position and propose some legislative
solutions to what I see as the excessive reliance on arbitration in the labor and employment area.

As you all know, private arbitration is a central feature of our collective bargaining system. Beginning in the late 1950's, in a series of pivotal cases, the Supreme Court and the National Labor Relations Board developed a series of legal doctrines which have given arbitration an elevated status in our collective bargaining system. These cases made agreements to arbitrate not only judicially enforceable but enforceable on the basis of a presumption of arbitrability. In addition, they approved the use of labor injunctions in support of labor arbitration and against strikes over issues that are subject to arbitration agreements. Further, they provided that arbitral awards are enforceable with a minimum amount of judicial review. And where there are disputes that implicate rights arising under the National Labor Relations Act as well as rights arising from a collective bargaining agreement, the courts and the Labor Board give broad deference to, and preference for, arbitration over judicial or administration mechanisms for resolving them.

The cases which first proclaimed these labor law rules are well known fixtures of our collective bargaining laws. Indeed, the prominent role of arbitration is often said to be the central and defining feature of our system of collective bargaining.
Arbitration has not always been featured so prominently in our collective bargaining system. In the 1920's and 1930's, courts enforced collective bargaining agreements as ordinary contracts, and very few agreements contained provisions for arbitration. Where there were arbitration promises, parties could avoid them easily given the historical disinclination of common law courts to enforce executory agreements to arbitrate. However, under the World War II War Labor Board, arbitration became a preferred method of resolving workplace disputes, often regarded as a substitute for industrial warfare and thus an essential aspect of the wartime no-strike pledges. The War Labor Board encouraged parties to collective bargaining to include arbitration clauses in their contracts, and they accorded arbitration promises substantial deference.

After the War, Congress enacted Section 301 of the Labor Management Relations Act, which on its face appeared to give federal courts jurisdiction to hear and decide labor disputes. In the next ten years, numerous scholars and practitioners in the labor field urged the courts to interpret Section 301 in a manner that respected the special role of arbitration. Justice Douglas adopted this position in 1957, in the case of Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) where he called upon federal courts to develop a "federal common law of collective bargaining," the centerpiece of which was to be support for and deference to private arbitration.
For over decade, I have written numerous articles critical of the expansive scope of arbitration in the enforcement of collective bargaining agreements. My criticism grows out of my belief that collective bargaining agreements are contracts, and as such are entitled to judicial enforcement. We should not deprive workers of the due process protections that are available in a judicial or quasi-judicial proceeding for the protection of their contractual rights. Arbitration, with its informal processes and its limited remedies is simply not an adequate tribunal for many issues of interpretation and application of collective bargaining agreements. Even less so is it adequate for enforcement of statutory rights. My argument has several prongs.

First I argue that arbitration is often an inadequate means of enforcing rights because it does not provide the due process protections available in a public tribunal, be it a court or an administrative agency. Arbitration does not provide the usual rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath. In addition, in arbitration, there is no effective right of appeal. In short, arbitration provides workers with second-class justice.

Second, remedies in arbitration are not as effective or as generous as remedies in a judicial forum. For example, most arbitrators believe that they do not have the power to award
damages for intangible harms, or to award punitive or consequential damages. In addition, arbitrators almost never grant interest on back pay awards, even when it is issued months or years after an unjust dismissal. It is common practice for an arbitrator to award reinstatement but no back pay at all to a worker fired without just cause. In contrast, prevailing parties in unjust dismissal litigation receive jury awards in the mid to high six figures. Furthermore, most arbitrators believe that they do not have the power to order provisional relief. Thus many contract violations, such as improper job assignments or safety matters, can neither be prevented nor remedied after the fact.

Finally, arbitral decisions are invisible documents -- they do not receive media attention or public scrutiny -- they engender no public debate. Arbitrators are not public officials. They are not accountable to a larger public. And there is no legislative arena in which unpopular decisional trends can be challenged. Arbitration is a privatized forum, designed by the parties, and out of the public eye.

On many occasions the Supreme Court has recognized the procedural short-comings of arbitration and has warned that such second-class procedures will affect the outcomes of disputes. For example, the Court stated in 1956, that:

The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of
action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury...Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial. Berhnardt v.Polygraph Co. of America, 350 U.S. 198, 203 (1956).

These words were written Justice Douglas, who spearheaded the adoption of broad support for arbitration in labor cases. He wrote these words in Bernhardt v. Polygraph Co. of America, a nonlabor case arising under the Federal Arbitration Act, in 1956, one year before he wrote the controversial and path-breaking opinion in Lincoln Mills. Justice Douglas repeated these sentiments in 1974, in another nonlabor case, where he criticized judicial deference to arbitration of statutory claims. He said:

An arbitral award can be made without explication of reasons and without development of a record, so that the arbitrator's conception of our statutory requirement may be absolutely incorrect yet functionally unreviewable...The loss of the proper judicial forum carries with it the loss of substantial rights.

Similar arguments about the lack of due process in arbitration and the consequences for the outcomes of disputes have been raised by many Supreme Court Justices over the past four decades, including Justice Black in his dissent in Maddox v. Republic Steel, 379 U.S. 650, 669 (1965); by Justice Brennan in his majority opinion in McDonald v. City of West Branch, 104 S. Ct. 1799, 1803 (1984); by Justice Blackmun, in his dissent in Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 259 (1987); by Justice Reed in his majority opinion in Wilko v. Swan, 346 U.S. 427, 436 (1953); by Justice Stevens in his dissent in Mitsubishi v. Soler Chrysler-Plymouth Inc., 105 S. Ct. 3346, 3365 (1985); and by Justice Harlan in his concurrence in U.S. Bulk Carriers Inc. v. Arquelles, 400 U.S. 351, 365 (1971). Clearly then, many on the Court have recognized the procedural short-comings of arbitration and have questioned the wisdom and justice of permitting private arbitration to substitute for judicial or administrative tribunals for resolving disputes.

Because so many Justices have questioned the adequacy of arbitration over the past four decades, why has the Supreme Court repeatedly expanded the scope of arbitration in the labor context? In part the reason is the belief that labor arbitration is faster, cheaper, more flexible, and more supportive of on-going relations than is judicial resolution of disputes. However, empirical evidence of these claims is suprising sparse.
The other reason that Justice Douglas and others have enthusiastically supported the use of arbitration in the labor context while rejecting it in other contexts is that they believe arbitration plays a crucial role in the self-regulatory aspects of collective bargaining. That is, they describe collective bargaining as an exercise in workplace self-government and the unionized workplace as an autonomous microsmic democracy. In the autonomous, self-governing system, there is private rule-making in the form of collective bargaining and private rule-enforcing in the form of private arbitration. The latitude and deference accorded to the private workplace judiciary is thus justified as part of a larger strategy of promoting this conception of workplace self-government.

The promotion of a workplace that is an autonomous self-regulating democratic institution is a laudable goal. Indeed, the aspiration of workplace democracy is one which I embrace wholeheartedly and hope that this Commission will find means to further. However, we must not fall into the trap of believing that by describing the workplace as democratic, we have made it so. The description of the workplace as a self-regulating democracy which underlies judicial support for labor arbitration has had a paradoxical and counter-productive effect on workers' rights, as will become evident when we turn to the recent trends in the law of labor and employment arbitration.
In two different but parallel developments, labor and employment law has expanded the use of labor arbitration into the area of arbitration of workers' statutory rights. Both developments are matters for concern, for they threaten to nullify present and future legislative efforts to protect workers.

First, in the past ten years, there has been an increase in the preemptive scope of Section 301 of the Labor Management Relations Act. Section 301 preemption has become so extensive that, today, most efforts by unionized workers to enforce employment law rights that they have, or think they have, under state law are automatically dismissed. This development, referred to by Judge Alex Kosinski in his dissent in the Livadas case as the dubious doctrine of quasi-preemption, has the effect of depriving unionized workers of the benefits of state law employment rights and placing them at a disadvantage vis-a-vis nonunion workers, who enjoy extensive employment law rights under state law.

Section 301 pre-emption is the doctrine that says when a unionized worker attempts to exercise a state-created employment right, she cannot do so if the underlying basis of her action is enforcement of her collective bargaining agreement. Rather, any suit involving enforcement of a collective bargaining agreement is a Section 301 claim, and under established 301 doctrine, must be resolved in private arbitration.
Section 301 preemption has become a central feature of employment litigation in the past decade. Beginning in the mid-1970's, state courts and legislatures began to create extensive rights for individual employees. This explosion in employment rights included rights not to be fired abusively, rights not to be subjected to drug or lie detector tests, rights to have one's privacy protected, rights not to be defamed in job references, rights for whistle-blowers to speak out publicly about employer wrong-doing, rights to notification for plant closings, rights to be free of sexual harassment, and improved rights to be free of racial and sexual discrimination. Indeed, the 1980's was an unprecedented period in American history for the creation of individual employment rights. These rights were usually at the state level.

Given the existence of these new employment rights, the important question for a unionized worker is, what happens when she tries to take advantage of them? For example, what is the fate of a union member who sues on a state law statute barring employer drug testing or unjust dismissal? The answer is that in the great majority of cases and with very few exceptions, this union member is not permitted to sue because the suit is preempted by Section 301.

In the past ten years, courts have applied Section 301 preemption with extraordinary reach, finding all kinds of lawsuits
to be de facto efforts to enforce collective bargaining agreements, even when the worker-plaintiff made no effort at all to invoke her collective agreement.

When a suit is preempted under Section 301, there are two practical consequences. First, all claims for breach of a collective bargaining agreement must be decided in private arbitration rather than by a court, with effectively no right of judicial review. Thus once a claim is preempted under Section 301, the worker's only and final recourse is to private arbitration. As a result, unionized workers find that by virtue of the Section 301 preemption rules, they do not have access to any court to assert their state law claims.

Second and perhaps more significantly, when a claim is preempted under Section 301, the worker's state law rights are extinguished. In arbitration, the arbitrator applies the law of the collective bargaining agreement, not the external state law which the worker sought to invoke. Thus the unionized worker whose state law claim is preempted receives neither the benefit of a judicial forum nor the benefit of the substantive provisions of the state law.

In a survey of hundreds of Section 301 preemption cases decided over the past decade, I found an astonishingly simple pattern. When unionized workers attempted to exercise state
employment rights, they were not able to do so. Rather, by virtue of the pre-emption rules, the courthouse door was closed.

Let me summarize my findings. First, a great many of the developments in state employment law have been in the area of wrongful discharge. Unionized workers have been particularly disadvantaged in this area by the preemption rules. Claims by unionized workers that they have been unjustly dismissed are almost always preempted. In addition, most suits brought by unionized workers on the basis of other new state law rights are also preempted. Courts routinely preempt claims of unlawful drug testing, claims of defamation by an employer's derogatory remarks, claims that an employer conducted an unlawful search of a person or automobile, claims concerning the mishandling of health insurance, medical leave, or other medical obligations, and claims that an employer breached a promise to an employee who is in a bargaining unit. Indeed, very few cases brought by unionized workers survive dismissal for preemption, and those that do fall into a small number of narrowly-honed exceptions.

Overall, American courts in the 1980's formulated a very broad pre-emption rule for Section 301, much broader than they apply in other areas of law. In fact, the courts developed a de facto

presumption to pre-empt all cases in which a unionized worker asserts a state employment right. Furthermore, in a 1991 decision, the Ninth Circuit proposed a principle of preemption that would extend it beyond what any court has yet done. In a case called Schlacter-Jones v. General Telephone of California, 936 F.2d 435, 441 (9th Cir. 1991), the court stated that, in a unionized workplace, claims about any working conditions that were within the scope of collective bargaining would be preempted. This suggestion, if adopted by other Circuits, would effectively seal off all unionized workplaces from state employment regulation. As a result, the pre-emption doctrine has so structured the legal landscape that unorganized workers now have, in some respects, more employment rights than their unionized counterparts.

Now, one might ask, what's wrong with a broad Section 301 preemption doctrine that leaves unionized workers with their right to private arbitration? The answer is that, first, when a case is preempted under Section 301, the law converts the unionized worker's statutory claim into a claim arising under her collective bargaining agreement. The arbitrator's task is to apply the collective agreement, not the relevant statute. Thus in Section 301 arbitration, unionized workers' statutory rights are extinguished and replaced by contractual rights. This would not be a problem if unions were able to secure strong contractual protections for their members. However, after years of concession bargaining, judicial restrictions on the scope of mandatory
bargaining, and employer use of striker replacements, unions have seen their bargaining strength erode. As a result, their collective bargaining agreements have become weaker and weaker. In fact, it is precisely because employment law statutes seem to provide workers with stronger protections and better remedies than those contained in their collective bargaining agreements that unionized workers frequently bring legal actions on the basis of their statutory rights rather than rely on grievances to assert their contractual rights. Yet the law of Section 301 preemption says that in such cases, the unionized worker is out of luck. Thus judicial interpretation of Section 301 has so structured the legal landscape that unorganized workers now have, in some respects, more employment rights than their unionized counterparts. Indeed, one might hypothesize that the expansion in Section 301 preemption and the consequent application of labor arbitration to unionized workers' statutory claims has contributed to union decline.

The second legal development which has expanded arbitration into the realm of statutory employment rights concerns the use of arbitration by employers of nonunion workers. In 1991, the Supreme Court decided the case of Gilmer v. Johnson/Interstate Lane Corp., 500 U.S. 20 (1991), holding that an employee of a stock brokerage, who alleged he was fired in violation of the Age Discrimination in Employment Act, had to arbitrate his claim pursuant to an arbitration clause in a standard stock exchange registration form which he was required to file when he began work. The Gilmer
Court held that the arbitration agreement was enforceable under the Federal Arbitration Act, an Act which makes arbitration promises in contracts involving commerce "valid, irrevocable, and enforceable." 9 U.S.C. §2.

The Gilmer Court's reasoning was based on a series of recent cases in which it had applied many of the precedents about labor arbitration under Section 301 to commercial arbitration under the FAA. For example, it quoted its decision in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983), where it said that the FAA evidences a "'liberal federal policy favoring arbitration.'" Quoted in Gilmer, 111 S. Ct. at 1651. In addition, the Gilmer court referred to its holdings in Mitsubishi and McMahon that "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." Id. at 1652. It rejected plaintiff's arguments that mandated arbitration of Age Discrimination in Employment Act claims was inconsistent with the statutory framework. In response to the plaintiff's argument that the ADEA embodies important social policies which should not be determined in private tribunals, the Court noted that in recent years it had found that antitrust act claims, securities act claims, and RICO claims to be amenable to arbitration under the FAA. It quoted Mitsubishi to the effect that:

"So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and
Id at 1653, quoting Mitsubishi, 473 U.S. at 637. The Gilmer Court also rejected, without much discussion, the plaintiff's arguments that arbitration procedures were inherently inadequate to protect statutory rights.

Justice Stevens, in dissent, raised what is perhaps the most troublesome aspect of the Gilmer opinion: the fact that Section 1 of the FAA has an exclusion for contracts of employment. The majority gave short shrift to that problem, stating that because the arbitration clause originated in a contract between the plaintiff and the stock exchange, not in a contract between an employee and his immediate employer, it was not an employment contract for purposes of the FAA exclusion. In addition, the Court noted that the issue of the Section 1 exclusion had not been raised by the litigants or developed in the record. Thus, the Court said it was not obliged to address it in detail, and that it was leaving that issue "for another day." Id. at 1651-52 & n. 2.

The Gilmer dissent argued that the majority's treatment of the scope of the FAA exclusion for employment contracts was exceedingly narrow and technical. It said that Congress had excluded employment contracts from the FAA out of its concern that arbitration promises contained in employment contracts were not "truly voluntary," but might arise out of excessive inequality of bargaining power. These concerns, the dissent argued, should be
implemented by giving an expansive interpretation to the employment exclusion, and by refusing to apply the FAA to arbitration of ADEA or other employment-related statutory claims. Id. at 1659-61.

The majority in Gilmer also considered and rejected the argument that Alexander v. Gardner-Denver, 415 U.S. 36 (1974), precluded arbitration of employment discrimination claims. In the Gardner-Denver case, the Supreme Court held that an arbitration proceeding does not preclude judicial determination of an employee's Title VII claim. Justice Powell, writing for the Court, said:

[W]e have long recognized that 'the choice of forums inevitably affects the scope of the substantive right to be vindicated.'... Respondent's deferral rule is necessarily premised on the assumption that arbitral processes are commensurate with judicial processes and that Congress impliedly intended federal courts to defer to arbitral decisions on Title VII issues. We deem this supposition unlikely."


The Gilmer majority distinguished Gardner-Denver on the ground that that case involved a unionized workers' claim and an arbitration promise contained in a collective bargaining agreement, thus posing difficult issues of relationship between a collective representative and an individual right, issues which were not
present in Gilmer.

Since 1991, many lower federal courts have interpreted Gilmer expansively. Several courts have applied Gilmer and found discrimination claims arbitrable in cases in which an arbitration promise arose directly from an employment contract between an employer and an employee, rather than the third-party arbitration promise involved in Gilmer. These cases practically read the employment exclusion in Section 1 of the FAA out of existence. They resurrect an old, and formerly rejected, interpretation of that exclusion that limited its application to contracts of employment in the transportation sector. In addition, some lower courts are applying the FAA to claims involving other employment-related statues, including claims based on laws prohibiting race, sex, religion, and handicapped discrimination, and claims based on ERISA.

In addition, some lower courts have questioned the continued viability of Gardner-Denver in light of Gilmer. They suggest that the Supreme Court might soon hold that unionized workers will be required to arbitrate not only their state law employment rights, as they are presently under Section 301 preemption, but also their federal employment rights.

To the extent that the courts interpret Gilmer to require unorganized workers to arbitrate all employment-related statutory
claims, and to the extent that they extend Gilmer to unionized workers, they are taking the Supreme Court's commitment to labor arbitration far beyond its initial rationale. They are abandoning the justification for judicial deference to arbitration in the Steelworkers' Trilogy, that labor arbitrators have a special expertise in the law of the shop which they can bring to bear in the resolution of disputes. In 1980, Justice Brennan warned that arbitration may not adequately protect workers' statutory rights. As he said,

"because the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land,... many arbitrators may not be conversant with the public law considerations underlying [statutory claims]."

Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 743 (1981). In addition, if these trends continue, courts are taking employment concerns out of the public arena, and beyond public scrutiny and political accountability.

From a practical perspective, the increased reliance on arbitration to resolve the statutory claims of nonunion workers and to preclude the statutory claims of unionized workers, makes it exceedingly difficult for legislatures to enact meaningful statutes that give employees protection. For example, while Congress intended to legislate protections for workers' health in the Occupational Safety and Health Act of 1970, if provisions of the OSHA statute are found to be arbitrable under the FAA, and if
Gardner-Denver is overturned and the reasoning of Gilmer is applied to unionized workers' federal rights, then OSHA's health protections for unionized and nonunion workers will be subjected to the variable, unpredictable, and invisible outcomes of private arbitration. It will be difficult for Congress to monitor the effectiveness of its legislative efforts, or revise the legislation to treat pressing social problems.

Last month the New York Times reported that more and more employers are requiring their nonunion employees to agree to boilerplate arbitration agreements at the time of hire. Employees, who at the moment of hire, lack bargaining power and are needful of employment, frequently agree to such terms without giving them much though. However, these employees may soon learn that they have unwittingly waived all of their statutory protections under both federal and state law.

For these reasons, I urge this Commission to consider legislative proposals that would reverse these trends and restrict the excessive use of labor arbitration to resolve disputes over workers' statutory rights. My specific proposals to address these problems are that Congress to enact legislation that would

(1) state that Section 301 is not intended to preempt state or federal employment law statutes; and

(2) reaffirming a broad interpretation of the FAA's employment exclusion and expressly repudiating the result of Gilmer
Let me conclude by saying that while it might be too late in the day to advocate that we eliminate the use of arbitration to resolve disputes concerning collective bargaining agreements, it is possible to restrict its scope and reverse the new directions in the law arbitration. These new directions, I hope I have shown, will in the long run prove very costly to the welfare of American workers.

Thank you.