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P R O C E E D I N G S

(11:00 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 07-581, 14 Penn Plaza LLC v. Pyett.

Mr. Salvatore.

ORAL ARGUMENT OF PAUL SALVATORE
ON BEHALF OF THE PETITIONERS

MR. SALVATORE: Thank you, Mr. Chief Justice, and may it please the Court:

There are three reasons why this Court should reverse the Second Circuit's blanket ban on collectively bargained, arbitral forum -- forum selection clauses.

First, the Second Circuit ignored section (a) of the National Labor Relations Act, by which Congress empowered unions to bargain on behalf of their employees over anything germane to the working environment, including methods of workplace dispute resolution.

The forum in which an ADEA claim is heard falls squarely in that authority. Indeed, forbidding unions from bargaining about the procedural right to an arbitral forum will carve a judicial exception into the labor law permitting employers to bypass the union and deal directly with their employees, defeating Congress's

1 national labor policy.

2 Second, the Second Circuit failed to
3 consider Congress's strong endorsement of workplace
4 arbitration contained in both the FAA and section 301.

5 Third, the Second Circuit erroneously and
6 exclusively relied on Alexander versus Gardner-Denver.
7 Gardner-Denver is a case about claim preclusion, not
8 about enforcing an agreement to arbitrate a statutory
9 claim.

10 JUSTICE SOUTER: Mr. Salvatore, you take the
11 position that the only thing that is at stake here is
12 simply, in effect, a selection of the arbitral forum.

13 What do you -- what do you say to the
14 argument that, in fact, the -- under -- under the
15 collective bargaining agreement the employee is subject
16 not merely to the right of the union to choose the
17 arbitral forum, but, in fact, to -- to assert any claim
18 at all? What -- what is your answer to that?

19 MR. SALVATORE: Your Honor, in -- in our
20 collective bargaining agreement, the collective
21 bargaining agreement here, the -- the union -- the
22 employee tenders the claim to the union. And in the
23 majority of cases the -- the employee and the union's
24 interests will be aligned, and the --

25 JUSTICE GINSBURG: But here it wasn't.

1 JUSTICE KENNEDY: Yes. What -- what --

2 JUSTICE GINSBURG: Here we are dealing with
3 claims that the union said: Sorry, we are not going to
4 process these claims because we have some tension since
5 the younger workers that replaced you, we also represent
6 them.

7 So you are proposing, as far as I understand
8 it, a situation where these workers would have no
9 individual right at all if the union says: We -- we
10 won't represent you.

11 MR. SALVATORE: No, Your Honor. The -- the
12 clause requires all claims to be arbitrated, and "all
13 claims" means that the individuals then have to go to
14 arbitration with their private counsel in this case and
15 -- and have their claims heard in the arbitral forum.
16 So that no one is denying --

17 JUSTICE GINSBURG: Where does -- where does
18 the contract say anything about the -- the individual
19 succeeding to whatever arrangement there is between the
20 union and the employer?

21 MR. SALVATORE: Your Honor, I'm looking at
22 the petition appendix.

23 JUSTICE GINSBURG: I thought that only --
24 only the union can invoke the arbitration clause, not an
25 individual.

1 MR. SALVATORE: No, Your Honor. That's --
2 that's not the -- the way the contract reads. I'm
3 looking at the petition appendix page 48a, which is the
4 "no discrimination" clause.

5 And just -- just as a quick prelude to --
6 before I -- I go through that language, I just want to
7 -- to note that this argument that these employees were
8 not bound to go individually to arbitration was never
9 raised below.

10 The Second Circuit did not consider it.
11 Indeed, the Second Circuit found that the clause covered
12 these employees, and -- and this only came up in the
13 Respondents' brief in this Court after cert was granted,
14 the red brief.

15 So that this -- this argument is one that
16 the factual premises for were never considered below in
17 the district court or in -- in the court of appeals.

18 CHIEF JUSTICE ROBERTS: Just so I'm clear --

19 JUSTICE KENNEDY: I don't -- I don't wish to
20 delay your reading, but -- but as -- as part of the
21 decision we have to make, don't we have to have in the
22 background the consideration of the -- that the -- the
23 potentiality that the union might do just what it did
24 here, and that would help, it seems to me, inform our
25 decision on the question that you are presenting.

1 Now, whether or not it's properly raised
2 here, I do agree with you it comes rather late. But
3 isn't it a factor that we must necessarily consider?

4 MR. SALVATORE: Yes, Your Honor. And --
5 and, indeed, the collective bargaining agreements --and
6 we'll look at the language in one second -- are -- are,
7 as this Court has recognized, a little more complicated
8 to understand than -- than average contracts. You have
9 to look at the practice and the custom.

10 The practice here for this union has been to
11 turn over claims to the individuals. We've had this
12 clause in place for nine years. The New York courts
13 have enforced it repeatedly and -- and --

14 JUSTICE SCALIA: Is this included in the
15 question presented anyway?

16 MR. SALVATORE: It was -- it was not, Your
17 Honor.

18 JUSTICE SCALIA: Does it have anything to do
19 with the way the Second Circuit resolved this case?

20 MR. SALVATORE: It does not, Your Honor.

21 JUSTICE SCALIA: The Second Circuit simply
22 said you could not deprive an individual of the right to
23 a court trial.

24 MR. SALVATORE: Absolutely, Justice Scalia.

25 JUSTICE SCALIA: And the issue is whether --

1 now, if -- if we held that you can require the
2 individual to go to arbitration, in some later case we
3 could confront the question of whether, if the union is
4 in exclusive control of the arbitration and the -- the
5 individual will -- will not get a fair arbitrated deal,
6 that would invalidate it.

7 But it has nothing to do with the question
8 presented: Is an arbitration clause which clearly and
9 unmistakably waives the union member's right to a
10 judicial forum enforceable.

11 MR. SALVATORE: Absolutely, Justice Scalia.
12 That is my argument with respect to why this does not
13 need to be taken up now.

14 JUSTICE SCALIA: I -- I hate to get into
15 this, you know, 9 years history of dealings between the
16 union and -- and the employees.

17 MR. SALVATORE: There is no factual record,
18 Your Honor, for it in the record at all. And --

19 JUSTICE SOUTER: Well, there is at least
20 some. The collective bargaining agreement is in here.
21 And if we are deciding anything at all, we are going to
22 decide whether in this case the -- the Second Circuit
23 was correct.

24 The question is posed in generalities, but
25 we are not going to decide the general question in total

1 ignorance of this case. And in this case we've got the
2 particular collective bargaining agreement in front of
3 us, and you started to answer the question that -- that
4 I and Justice Ginsburg posed by referring to the "no
5 discrimination" clause.

6 MR. SALVATORE: Yes, Your Honor.

7 JUSTICE SOUTER: And will -- will you go on
8 to that?

9 MR. SALVATORE: I will. The clause is -- I
10 am looking at petition appendix 48a, the "no
11 discrimination" clause. This is the -- the clause at
12 issue in this case. It covers any present or future
13 employee. It goes on to state the -- the types of
14 protected characteristics that are covered by this
15 clause as well as the -- the relevant statutes
16 incorporating statutory law, public law, in the -- in
17 the clause.

18 And then in the second-to-last sentence five
19 lines up from the bottom it states: "All such claims
20 shall be subject to the grievance and arbitration
21 procedure, Articles 5 and 6, as the sole and exclusive
22 remedy for violations."

23 JUSTICE SCALIA: What does that mean? Does
24 that mean that they must go to arbitration even if the
25 union decides that, you know, this claim is -- is so

1 insignificant we don't want to take it to arbitration?

2 MR. SALVATORE: What this means, Justice
3 Scalia, is that these individuals cannot go to court.
4 They have to go either through the union, as has been
5 the practice here, or the union will turn the claim over
6 to them and let them go by themselves.

7 JUSTICE SOUTER: Where did we get this
8 phrase -- where do we get the language "or the union
9 will turn over to them"? The only thing that I can see
10 in here that addresses that is on page 46a. And the --
11 the clause there reads: "All union claims are brought
12 by the union alone, and no individual shall have the
13 right to compromise or settle any claim without the
14 written permission of the union."

15 There is -- there is a lot of gray area in
16 that, but the one thing that seems clear is that the
17 union has total control over any claim, including an
18 arbitration claim.

19 And that seems to lend some substance to the
20 -- to the point made by the other side that if we accept
21 your position here, we are accepting a position not
22 nearly as far -- that the designation -- a procedural
23 designation of a forum should be enforced but that, in
24 fact, total control over the assertion of a statutory
25 Federal right is also being ceded. Now, why doesn't

1 that language from section 46 support that?

2 MR. SALVATORE: Your Honor, it does not
3 support it for the -- for the following reason. The --
4 the section 30 clause on page 48a. The "no
5 discrimination" clause, was added in 1999. It was added
6 after the Court's decision in Wright. It was added to
7 comply with Wright. That's an undisputed fact.

8 It -- it was added as a separate section
9 with a separate arbitration promise because "all claims"
10 is broader than "union claims." "Union claims" was
11 something that goes back for 75 years, but before we put
12 in section 30 --

13 JUSTICE SOUTER: Well, then, "all such
14 claims" -- "such claims" refers among other things to
15 the statutory right.

16 MR. SALVATORE: That's correct.

17 JUSTICE SOUTER: And if the statutory right
18 is the appropriate section of an arbitration agreement
19 and the union has ultimate control of the arbitration
20 agreement, then it follows that the union has got
21 ultimate control over the assertion of the statutory
22 right.

23 MR. SALVATORE: No, Your Honor, not unless
24 -- not if the union turns that over. The employee's
25 reading --

1 JUSTICE SOUTER: Where -- where is the
2 guarantee that the -- if the union says, we don't want
3 to touch this, as in this case, that the employee has
4 the right either to arbitrate or, for that matter, to
5 sue? Where do you find that?

6 MR. SALVATORE: Your Honor, that -- that
7 right is -- is described from this language, "all such
8 claims." There is another route. What Articles 4, 5,
9 and 6 describe is that -- that the -- you must go to the
10 office of the contract arbitrator, and it doesn't
11 specify whether you go with the union or you go by
12 yourself.

13 JUSTICE ALITO: Has any court decided this
14 issue of the interpretation of the collective bargaining
15 agreement in this particular.

16 MR. SALVATORE: No court has decided this
17 very issue like this, Justice Alito. But what the New
18 York courts have said is in interpreting this clause
19 over the last nine years, that they compel the
20 individual union member to go to arbitration when they
21 have brought claims in court in violation of this
22 clause.

23 JUSTICE SCALIA: Mr. Salvatore, I -- I
24 didn't think we took this case to -- to determine the
25 specific meaning as to this issue of this -- of this

1 particular contract, which is not an issue of national
2 importance. Why -- why must we decide the case here?

3 Could we not simply decide that the Second
4 Circuit was either correct, in which case the case would
5 be over, or incorrect to say that you -- that you -- you
6 cannot -- you cannot in a collective bargaining
7 agreement have the union responsible for arbitration of
8 Title VII claims? Why couldn't we just decide that?

9 And then if there is any issue of whether
10 such concession to the union deprives an individual of
11 even the right to arbitration, that can -- that can be
12 decided on remand by the Second Circuit, couldn't it?

13 MR. SALVATORE: Absolutely, Justice Scalia.

14 JUSTICE SCALIA: And the Second Circuit
15 could look into all of these details.

16 MR. SALVATORE: Absolutely.

17 JUSTICE SCALIA: And inquire into the New
18 York law that you're talking about now and that I don't
19 recall being in any of the briefing.

20 MR. SALVATORE: Justice Scalia, as cited in
21 our briefing, there is a long footnote listing the
22 cases. But -- but you're right, the -- the issue here
23 really is can the union agree to this? And that goes to
24 Congress's giving the union the power under section 9(a)
25 of the National Labor Relations Act to be the exclusive

1 bargaining representative --

2 JUSTICE BREYER: I ask you -- let me ask you
3 a naive question possibly that may -- may reflect a
4 misunderstanding. But my understanding is that suppose
5 you are -- you are an employee. You believe your
6 employer discriminated against you, say, on gender
7 grounds. You have to go to the EEOC.

8 Now, the EEOC looks into it and very often
9 what they do is they don't really resolve it. They just
10 give you a letter that gives you a right to sue.

11 So here Congress was so worried about this
12 kind of thing that they said our specialized agency, you
13 know, won't be the bottom line. People will go there
14 and then they have a right to sue later.

15 Now, that's how Congress felt about this
16 particular statute. Why would they want the union to be
17 the bottom line when, in fact, the employee himself
18 hasn't agreed? I mean, the employee might agree in the
19 first place. He might say I'm going to take that
20 letter, I'm not going to bring my suit. That's up to
21 him or her. But here the employee wants to bring her
22 suit, just like the EEOC letter.

23 MR. SALVATORE: Well, Justice Breyer, the
24 ADEA provides not only a right to go to court after
25 you've gotten your right-to-sue letter or waited 60

1 days, but -- but it also provides multiple, as this
2 court recognized in Gilmer, multiple avenues that
3 Congress wants to use: Conciliation, persuasion,
4 conference --

5 JUSTICE BREYER: Exactly. That's my point,
6 is that the statute as a whole reflects a considerable
7 effort not to let this employee get cut off at the pass
8 and an employee who is reasonably determined to get to
9 court probably can do it. It's not definite. The EEOC
10 doesn't have to give them a letter giving them a right
11 to sue, but probably can do it.

12 And if that's a situation where you have
13 this whole expert thing cut in, it seems to me there is
14 a parallel here that Congress then wouldn't want the
15 union and the employer together to be able to cut that
16 right to sue off, at least not very easily.

17 MR. SALVATORE: Justice Breyer, you have
18 competing policies here because you have the policies of
19 the labor laws which say that unions should have a -- a
20 broad portfolio of -- of topics to bargain about. This
21 Court has said that anything germane to the working
22 environment, dispute resolution mechanisms --

23 JUSTICE GINSBURG: But the union could not
24 bargain about these anti-discrimination rights. These
25 are rights given to individuals by Congress. The union

1 couldn't bargain about them the way it bargains about
2 collective rights, the way it bargains about wages and
3 hours and -- and other things. This is, this is not a
4 bargainable right. This is a right Congress says you as
5 an individual have a right not to be discriminated
6 against. This is nothing that the union can bargain
7 about.

8 MR. SALVATORE: Justice Ginsburg, I agree to
9 the degree we're talking about -- you're talking about
10 substantive rights. What we are talking about here is a
11 procedural switch. As this Court has approved in
12 *Gilmer*, what we are talking about is moving the forum
13 from the judicial one to the -- to the arbitral one.
14 And here in the -- the scheme of a collective bargaining
15 agreement where arbitration is the preferred remedy and
16 has been used for many, many years very successfully in
17 the -- in the -- by those parties.

18 It's -- it's taking employment arbitration
19 and putting it in the collective bargaining context.
20 And -- and there is, unions do this in many different
21 ways. Unions bargain about substantive rights. We are
22 not talking about substantive rights here, though. We
23 are talking about procedural rights. And the policies
24 of the labor laws are served and the policies of the
25 ADEA and the anti-discrimination statutes are not

1 disserved in any way.

2 JUSTICE SCALIA: Mr. Salvatore, would you --
3 would you object to or oppose a ruling that said -- that
4 says yes, the -- the right can be subjected to union
5 arbitration, but if the union chooses not to arbitrate
6 it the individual must have the right to arbitrate it on
7 his own?

8 MR. SALVATORE: That's -- that's the
9 practice under this agreement, Your Honor. We would --
10 we would wholeheartedly endorse that -- that rule
11 because, that's the practice here. And there is -- when
12 you're talking about statutory rights, why would the
13 union want to interfere with the ability of the employee
14 to get a forum if their interests are not aligned? This
15 goes to the tension that this Court has -- has
16 recognized in its prior cases.

17 JUSTICE KENNEDY: Well, that -- that means
18 that if there is a totally frivolous claim and the
19 employer -- pardon me, the union says we are not going
20 to arbitrate, the -- the employee still has the right to
21 then proceed? The employer hasn't gotten very much.

22 JUSTICE SCALIA: He has got an arbitration
23 instead of a lawsuit.

24 JUSTICE KENNEDY: If you would -- if you
25 would answer the question. The employer hasn't gotten

1 very --

2 (Laughter.)

3 JUSTICE KENNEDY: -- very much for the
4 bargain.

5 MR. SALVATORE: Justice Kennedy, the
6 employer has gotten arbitration and --

7 JUSTICE KENNEDY: In the hard cases.

8 MR. SALVATORE: Well, in --

9 JUSTICE KENNEDY: But it hasn't got the
10 ability to have the union help them weed out frivolous
11 claims.

12 MR. SALVATORE: Well that's true. The
13 union -- the union wouldn't play that function, except
14 that we have in this industry, the real estate industry
15 in New York City, a longstanding relationship that --
16 that goes back decades. And -- and -- so it's a mature
17 collective bargaining arrange -- arrangement.

18 JUSTICE KENNEDY: Well, I'm -- I'm -- I'm
19 not sure that employers nationwide would -- would --
20 would accept -- would accept that view.

21 MR. SALVATORE: Well, I think that --

22 JUSTICE KENNEDY: And again, maybe that's --
23 that's a reason for us not to reach it in this case.

24 MR. SALVATORE: Well, one of the issues
25 that -- that Congress allows the bargaining parties to

1 figure out is what the scope of their collective
2 bargaining arrangement should be. That's one of the
3 hallmarks of the NRLA. So, yes, some collective
4 bargaining parties may make that choice, Justice
5 Kennedy; others may make a different choice.

6 What is the alternative here? The
7 alternative is that employers can bypass the union.
8 They can just go around the union and -- and have
9 individual Gilmer agreements signed up. That's what the
10 D.C. Circuit said en banc in -- in -- in the ALPA Pilots
11 case.

12 And indeed, the -- the union in that case
13 was arguing the position that we are arguing here, that
14 this is a mandatory subject of bargaining, and this is
15 right in the union's portfolio of -- of what they should
16 be using to -- to bargain with the employer because it's
17 a procedural right and there are no substantive outcomes
18 that are diminished in any way whatsoever.

19 Unions are deemed trustworthy enough to
20 bring lawsuits in the federal courts on behalf of their
21 members. Under principles of associational standing,
22 associational standing, the members are bound by
23 their -- their union's actions.

24 JUSTICE GINSBURG: And nonmembers, too?
25 What about the people who -- who are not members of the

1 union, but they have to pay an equivalent amount for the
2 union's services in collective bargaining? They would
3 be bound as well? They couldn't --

4 MR. SALVATORE: Absolutely, Justice
5 Ginsburg. The -- the -- the -- and this type of service
6 is one of the core functions that an agency payer would
7 have to pay for. The LM2 that 32B, the local, filed
8 here on behalf of 80,000 employees has two agency fee
9 payers out of 80,000. So it's not really an issue in
10 this case.

11 But that's what unions are for. When
12 Congress makes them the exclusive bargaining
13 representative you're -- you're in for it one way or the
14 other. You're -- you're -- either you're in or you're
15 out. And if you're in, then you have to go along with
16 the -- the -- the entire collective bargaining deal that
17 is made --

18 JUSTICE GINSBURG: You said -- the -- fine.

19 I -- I grasp your answer to that. But you
20 said that the employee would have the absolute right if
21 the union says, "sorry, for whatever reason we can't
22 represent you," absolute right to that arbitral forum.
23 What -- who pays then?

24 I mean, if the union is in it, then the
25 union and the employer are going to split -- split the

1 cost. But what happens when the union drops out and you
2 have the individual and the employer in this arbitral
3 forum?

4 MR. SALVATORE: In -- in this situation the
5 employer pays. That's the only -- the Office of the
6 Contract Arbitrator is an -- essentially a mini-
7 American Arbitration Association that these parties have
8 set up, and the -- the RAB, which is the multi- employer
9 organization that represents all the real estate
10 employers in -- in New York, they pay for the
11 arbitration, because the union in this case has said we
12 are not going to pay.

13 As you point out rightly, if the union is
14 not involved, they -- they shouldn't pay. So there is
15 no cost to the employee for that arbitration and -- and
16 as Justice Edwards said in the D.C. Circuit Kohl case,
17 that -- that that procedure is -- is a fair one, to have
18 the employer pick up the -- the costs given -- given the
19 -- the balance between the -- the two of them.

20 JUSTICE STEVENS: Mr. Salvatore, are you
21 going to get to your explanation about Gardner-Denver
22 before you're all through?

23 MR. SALVATORE: Yes -- yes, Your Honor,
24 Justice Stevens. Gardner-Denver is -- is a case, as
25 this Court has described, that -- that didn't involve

1 the enforceability of an agreement to arbitrate. The
2 Gardner-Denver line of cases, McDonald and Barrentine
3 and Gardner-Denver, had the quite different issue as
4 this Court said in Gilmer, of whether a contract-based
5 claim precludes subsequent judicial resolution of a
6 statutory claim; and so that distinguishes the rule.
7 But factually these cases are very different as -- as
8 well.

9 Mr. Alexander in Alexander v.
10 Gardner-Denver, the contract there, the collective
11 bargaining agreement, had a plain vanilla arbitration
12 clause. It didn't have a clause like the one we looked
13 at page, petition appendix 48a, that incorporated all
14 the -- the statutes and gave the arbitrator the power to
15 sit and -- and to apply those statutes and apply the law
16 under those statutes and apply the remedies that derive
17 from those statutes. In that case, the arbitrator sat
18 as the proctor of the bargain between the collective
19 bargaining parties, and didn't have that broad
20 authority, as this Court has -- has recognized.

21 And -- and we agree that arbitration that --
22 that resolves just a collective bargaining agreement
23 claim should not be dispositive of a statutory claim.
24 They're fish and fowl. So that Gardner-Denver is
25 correctly decided. Gardner-Denver puts out the rule for

1 -- for that situation. This is a different situation
2 that we are talking about.

3 And -- and here, unlike in Gardner-Denver,
4 where Mr. Alexander would have had no access to the --
5 to have his Title VII claim heard if this Court had
6 affirmed the Tenth Circuit, he -- the door to the
7 courthouse would have been shut in that case for
8 Mr. Alexander -- here we are trying to move to compel
9 arbitration so that there is a forum, and -- and that
10 these individuals -- these employees --

11 JUSTICE STEVENS: But not a judicial -- not
12 a judicial forum.

13 MR. SALVATORE: An arbitral forum, Your
14 Honor.

15 JUSTICE GINSBURG: Mr. Salvatore, would you
16 just clarify something for me? I thought that the union
17 ceded its rights to the employees and said that they
18 could use this collective bargaining agreement's
19 arbitral regime so long as they paid for it. But you
20 tell me they don't have to pay anything; the employer
21 pays everything.

22 MR. SALVATORE: That's -- that's correct.
23 That's the union counsel's affidavit. He was saying he
24 doesn't -- the union doesn't want to pick up the costs,
25 Justice Ginsburg, but the collective bargaining

1 agreement says there is two payers in the Office of the
2 Contract Arbitrator, the RAB and the union. If the
3 union is not paying, then the RAB has to pay.

4 Mr. Chief Justice, I'd like to reserve the
5 rest of my time for rebuttal, please.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Mr. Frederick.

8 ORAL ARGUMENT OF DAVID C. FREDERICK

9 ON BEHALF OF THE RESPONDENTS

10 MR. FREDERICK: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 The Second Circuit's judgment should be
13 affirmed for three reasons. First, a collective
14 bargaining agreement gives the union exclusive control
15 over workers' grievances. Second, unions have inherent
16 conflicts of interest with respect to individual
17 statutory anti-discrimination rights; and third, unions
18 lack authority to serve as gatekeepers of individual
19 workers' substantive ADEA rights.

20 With respect to the first point, a
21 collective bargaining agreement generally gives the
22 union exclusive control over whether to bring grievances
23 on behalf of workers and how such grievances are
24 pursued. In such circumstances -- which is this case,
25 the workers have not advanced the requisite agreement to

1 arbitrate, and control over the arbitral forum to
2 satisfy this Court's standards in *Gilmer* for effectively
3 vindicating the workers' statutory anti-discrimination
4 rights.

5 JUSTICE ALITO: Under your first point, are
6 you saying it's impossible for there to be a collective
7 bargaining agreement that reads the way Mr. Salvatore
8 reads this collective bargaining agreement; a collective
9 bargaining agreement which says that the union's -- that
10 the grievance must be arbitrated, and it will be done
11 either by the union, or if the union declines to pursue
12 it, by the individual employee?

13 MR. FREDERICK: Justice Alito, I've looked
14 comprehensively through the cases. We've never found a
15 collective bargaining agreement that gives the kind of
16 interpretation that Mr. Salvatore offered in this case.
17 Now, is it theoretically possible that a collective
18 bargaining agreement would confer on individuals the
19 rights this Court said in *Gilmer* are necessary to
20 vindicate that? I would acknowledge it's theoretically
21 possible, but it has to be done within the confines of
22 whether there is actual consent by the individual to the
23 arbitration, whether the individual has control over the
24 mechanisms of arbitration, and whether or not the
25 structure of the arbitral forum effectively vindicates

1 the individual's substantive rights.

2 JUSTICE ALITO: But there is nothing in
3 Federal labor law that would preclude the negotiation of
4 a collective bargaining agreement like that.

5 MR. FREDERICK: Nothing except this Court's
6 case in Magnavox where the Court said that the union may
7 not bargain away an individual's rights where there
8 would be a conflict between the union's interests and
9 the individual's. Here, because this is a
10 discrimination claim, unions are often brought as
11 defendants in such claims, particularly in circumstances
12 as here, where the union agreed to the conditions that
13 gave rise to the discrimination on the basis of age by
14 these workers.

15 JUSTICE SOUTER: Even in a case in which you
16 don't have -- assume -- just assume for the sake of
17 argument that we don't have the discrimination issue or
18 the conflict issue. I understood you elsewhere to be
19 arguing that there had to be the kind of knowing,
20 intelligent and individual waiver, which I would suppose
21 a collective bargaining agreement will never include.
22 So I thought it was the -- ultimately the implication of
23 your argument that in any -- in any case in which
24 arbitration is claimed, there would have to be -- or a
25 right to go to arbitration is claimed by the employer --

1 there would have to be, not merely the collective
2 bargaining agreement, but a specific waiver by the
3 employee to -- to go ahead and do that. Is that right?

4 MR. FREDERICK: That -- that's correct. And
5 that's why I think the Gilmer point is -- is essential
6 here, Justice Souter and Justice Alito. Because in
7 Gilmer there was individual consent; there needs to be
8 such individual consent under the ADEA waiver itself,
9 and knowing and individual waiver is necessary before
10 the person can waive the substantive ADEA rights. That
11 would need to be part of the hypothetical collective
12 bargaining agreement that I was positing with Justice
13 Alito.

14 JUSTICE SOUTER: Right.

15 JUSTICE ALITO: Would that mean --

16 JUSTICE SOUTER: Go ahead.

17 JUSTICE ALITO: Would that mean that the
18 employer could not unilaterally impose an arbitration
19 requirement on employees?

20 MR. FREDERICK: I think that would follow,
21 as that would be a condition of employment that could
22 not be imposed. The airline --

23 CHIEF JUSTICE ROBERTS: It wouldn't be
24 unilaterally imposing, right? He would say if you're
25 going to work for me, you've got to arbitrate, and that

1 could be negotiated theoretically, and with individual
2 employee. And -- I mean, the whole point, the whole
3 benefit of collective bargaining is that that doesn't
4 happen. You say, well, the employer has a lot of
5 leverage if he wants to insist upon that, but it would
6 not -- it would be a matter for negotiation between the
7 individual and the company.

8 MR. FREDERICK: That's correct, Mr. Chief
9 Justice, but there are two different points at which the
10 condition of employment arose. I understood the
11 questions on this side to be after the agreement had
12 taken place and the worker was already on the work site.
13 Under your hypothetical, if an employee gains entrance
14 to the work force and is asked, "will you sign this,"
15 there is individual consent in that circumstance. That
16 is the fact situation in the Air Line Pilots case.

17 JUSTICE SOUTER: But the one thing that's
18 uniform throughout in your answer is that the collective
19 bargaining agreement alone can never subject the
20 employee to -- to mandatory arbitration?

21 MR. FREDERICK: That's -- that's how we read
22 this Court's statutory --

23 JUSTICE BREYER: Is also true -- is that
24 also true with an ordinary tort or any other kind of
25 suit?

1 MR. FREDERICK: Sorry. With an ordinary --

2 JUSTICE BREYER: A tort suit. It says, some
3 -- the union -- the same thing here, but we are not
4 concerned with discrimination; we are concerned with
5 workplace safety. Somebody is hurt as a result of
6 machine improperly functioning, or there isn't adequate
7 notice or so forth. Is your view the same there?

8 MR. FREDERICK: Well, I think that those
9 category of cases do stand in a different position
10 because there is less of an inherent conflict of
11 interest. The union there --

12 JUSTICE BREYER: Why?

13 MR. FREDERICK: Well, the union is not going
14 to be the Defendant typically in a tort case where the
15 employer is responsible.

16 JUSTICE BREYER: Doesn't this allow
17 discrimination -- doesn't this refer to discrimination
18 by the employer?

19 MR. FREDERICK: It refers to discrimination,
20 and as we cite on page 27 of our brief, there are
21 provisions in the anti-discrimination laws that are
22 specifically directed at union discrimination. The
23 legislative history of these statutes indicates that
24 discrimination by unions was one of the concerns
25 animating Congress --

1 JUSTICE BREYER: Now, you say section 30
2 doesn't say anything about union discrimination
3 particularly; it just talks about discrimination.

4 MR. FREDERICK: Yes. In fact --

5 JUSTICE BREYER: Fine. So you think
6 sometimes unions do discriminate?

7 MR. FREDERICK: And that's why --

8 JUSTICE BREYER: All right. And sometimes
9 unions also would rather have the more effective machine
10 or sometimes unions feel their workers are stupid not to
11 read the machine label properly or -- I mean, I can
12 replicate anything you might think. We can think of
13 tort suits, the two of us, which could put unions and
14 employees on opposite shores, just as we can think of
15 discrimination suits. Most unions don't want
16 discrimination. I mean, most of the time. And most
17 unions don't want dangerous machines most of the time.

18 So if I decide for you in this case, am I
19 also saying that they can't arbitrate ordinary tort
20 suits or contract suits or just whether or not the
21 workplace which is made of wood is filled with termites?
22 I mean, you know?

23 MR. FREDERICK: I think, Justice Breyer,
24 that the discrimination cases do stand in a different
25 category because of the inherent conflict of the --

1 JUSTICE BREYER: That's the only reason?
2 Because, in other words, if I think I see no more reason
3 why a union today, whatever was true 40 years ago, that
4 I see no more reason today why a union would like
5 discrimination, then I can see a reason why they would
6 like a dangerous machine?

7 MR. FREDERICK: I don't think Congress --

8 JUSTICE BREYER: If I think that, then I
9 should decide against you?

10 MR. FREDERICK: Well, no, because there are
11 two other reasons: The exclusive control over the
12 machinery and the union serving as the gatekeeper.

13 I'm not aware of tort suits being subjects
14 of collective bargaining, Justice Breyer. Nor am I
15 aware of cases in which the unions have given up
16 individuals' tort claims in situations, principally
17 because unions are not the persons against whom such
18 tort suits are brought.

19 JUSTICE SOUTER: Well, but those -- I'm
20 sorry.

21 Those examples are examples. You're getting
22 down to individual cases. I thought you drew the global
23 line in answer -- which would answer Justice Breyer's
24 question by saying the -- in the cases that we're
25 talking about here, Congress has passed a statute giving

1 a specific individual right and that individual right
2 cannot in effect be compromised except in -- except in
3 violation of that statute, and that's where we draw the
4 global line so that when you got to torts, you'd look at
5 the individual situation rather than draw a categorical
6 line.

7 MR. FREDERICK: Yes, you would, but the
8 principles this Court has applied in looking at that
9 broad line, I'm trying to suggest that there might be
10 situations in which those principles, where the union is
11 serving as the gatekeeper, thereby not allowing a person
12 to vindicate his individual rights in the tort context,
13 to be not --

14 JUSTICE SOUTER: I agree with you, but I
15 think -- I don't want to put words in Justice Breyer's
16 mouth --

17 JUSTICE BREYER: Very helpful of you.

18 JUSTICE SOUTER: But I thought what he was
19 getting at is, if I hold for you here, am I going to
20 have to hold for you in every case in which somebody has
21 in effect a tort claim which is subject to an
22 arbitration clause?

23 MR. FREDERICK: And the answer is no. I
24 thought --

25 JUSTICE BREYER: Then I replicate my

1 question because what I'm thinking is simply that there
2 are thousands, maybe tens of thousands, kinds of claims
3 that people go to arbitration over. And what I'm
4 wondering here is if you win here, what is the set of
5 such claims that I have now said that a union, through a
6 collective bargaining contract, can force the employee
7 against his will to go to arbitration over? I don't
8 have a feeling for that from the briefs. I don't have a
9 feeling that you want to say that discrimination claims
10 are special in that regard, that there's no line in that
11 regard, or that there's some other line.

12 MR. FREDERICK: Well, Justice Breyer, I
13 think that your question really is getting at the theory
14 behind collective bargaining agreements and what extent
15 the union can exercise control over the individual
16 rights and circumstances of employment. That question
17 is a very complex question over which many, many --

18 JUSTICE BREYER: Well, can you give me a
19 hint as to the principle?

20 (Laughter.)

21 MR. FREDERICK: I -- well, I think that
22 there are limits, of course, on the union's authority
23 that have been recognized in this Court's decisions, and
24 I don't think that ruling in the workers' favor in this
25 circumstance opens up any kind of Pandora's box at all,

1 because all we are arguing for is that the
2 Gardner-Denver line, which was written by this Court
3 unanimously more 30 years ago, continue to be the law of
4 the land, as the Court has reaffirmed --

5 JUSTICE ALITO: What if a collective
6 bargaining agreement requires the arbitration of
7 discrimination claims that are not based on Federal law?
8 Maybe they are based on -- they are based on State law
9 that goes further than Federal law, or maybe they are
10 based on a type of discrimination that's prohibited
11 neither by Federal or State law. Maybe it's
12 discrimination against young people under 40. Could
13 those be -- those would still be discrimination claims
14 with the same potential for -- with a potential for a
15 conflict of interest. Could they be subjected to
16 mandatory arbitration?

17 MR. FREDERICK: I -- I think that is a
18 harder case, Justice Alito, but I think that the answer
19 under this Court's decisions in Gardner-Denver points
20 the way here, in footnote 19 of the decision. Where the
21 union controls that process and where the union is a
22 potential defendant in that circumstance, the workers'
23 individual rights cannot be subordinated --

24 JUSTICE GINSBURG: What about --

25 MR. FREDERICK: -- to the union's control.

1 JUSTICE GINSBURG: -- if it's not a
2 statutory right; it's just a wrongful discharge? One
3 practical problem is so often these are overlapping
4 claims. You can say, "I was discriminated against
5 before because of my age. I was arbitrarily
6 discriminated against. It was a wrongful discharge. It
7 was a discharge without just cause." Usually, there's
8 multiple claims that can be made, and some of them would
9 be bargainable, I mean, would come under the union -- I
10 mean if it was just a question of the worker says, "I
11 was discharged without just cause," no Title 7 or
12 anything else, that would come under the arbitration
13 clause, wouldn't it?

14 MR. FREDERICK: Yes, and I think that there
15 have been conditions of employment and discharge that
16 have been arbitrable, and I don't see that there is a --
17 an issue there where -- except where that intersection
18 with the statutory discrimination rights occurs. And
19 Congress has made a different policy judgment with
20 respect to individual waivers of such rights in --

21 JUSTICE SCALIA: Why has it? Why has it? I
22 mean, let's assume that my gripe with my employer is
23 that he hasn't paid me my salary for the last two
24 months. Now, you can't take away my right to that
25 unless I voluntarily waived it. What is sacrosanct

1 about the fact that my grievance here has some
2 discrimination attached to it?

3 Your briefing talks as though it is
4 something totally apart from a mere economic right.
5 Ninety-nine percent of the time, you're talking about
6 economics. "I was fired because of discrimination." "I
7 wasn't promoted because of discrimination and therefore
8 I lost this -- this amount of money or that amount of
9 money."

10 Why is it unthinkable that the -- that the
11 employee would have to go through the union-prescribed
12 arbitration for the fact that he wasn't paid for the
13 last three months but does not have to do it for an
14 economic injury that occurs because of discrimination?

15 MR. FREDERICK: Well, I'm not sure actually
16 in answering your hypothetical that they would
17 necessarily have to go through the union on the
18 nonpayment because of the Fair Labor Standards Act case.
19 This Court in Barrentine said that, where an FLSA claim
20 is at issue, the worker does not -- is not confined or
21 precluded after arbitrating at the union grievance
22 process from bringing an FLSA suit in court.

23 So I want to reserve, accepting all of your
24 hypothetical, Justice Scalia, but in further answer to
25 the point, I think it's important to keep in mind that

1 in the discrimination context, you're talking about more
2 than just money. Here my clients are older workers who
3 are forced into more physically strenuous positions that
4 they had gotten away from by virtue of their growth in
5 seniority at the building.

6 CHIEF JUSTICE ROBERTS: Well, isn't that
7 kind of conflict always present whenever you have
8 collective action? I mean, you may be a particularly
9 good worker and could demand a higher wage than the
10 union has negotiated, but you're still bound by the
11 collective bargaining agreement. That happens in every
12 situation where you have collective action.

13 MR. FREDERICK: Certainly, Mr. Chief
14 Justice, but where Congress has made a choice that
15 individual claims for individual anti-discrimination
16 rights need to be vindicated in particular ways, and
17 where this Court's --

18 CHIEF JUSTICE ROBERTS: Well, they don't
19 have to be vindicated in particular ways. The
20 individuals can agree to arbitrate these claims, and
21 they would be -- the arbitration would be binding.

22 MR. FREDERICK: Certainly, but there is
23 individual consent in that circumstance. I would like
24 to make a couple of other points before closing.
25 One is that on pages 4 to 5 in the brief in opposition

1 to cert we specifically raise the issue that the union
2 controls the arbitration, and there is no opportunity
3 for individual arbitration under this collective
4 bargaining agreement.

5 There is nothing in the provision set out in
6 the petition appendix that gives individual rights, the
7 individuals the right to arbitrate under this collective
8 bargaining agreement. The payment provision calls for
9 50 percent by the employer and 50 percent by the
10 employee with the employer having the sole right to
11 terminate the arbitrator for any or no reason at all.

12 JUSTICE SCALIA: You did raise that issue,
13 but you didn't say that the consequence of that issue
14 was that you win. You said the consequence of the fact
15 that that issue was involved in this case was a good
16 reason not to -- for us to accept cert. And we didn't
17 take your advice on that.

18 MR. FREDERICK: Well --

19 JUSTICE SCALIA: But it's a totally
20 different issue whether because of that question you --
21 you should -- you should win the case.

22 MR. FREDERICK: Certainly, the
23 interpretation of the collective bargaining agreement is
24 fairly included within the question presented. And as
25 this Court found in Wright in a situation where it

1 granted certiorari on the very same question here but
2 then looked at the specific provisions of the collective
3 bargaining agreement to determine that, in fact, under
4 the facts there a different rule applied for a clear and
5 unambiguous waiver.

6 All we are saying here is that under this
7 provision there is no opportunity for the individual to
8 arbitrate, and that raises a -- a problem analogous to
9 the one that is in Wright. We think that is fairly
10 included within the question presented, and that the
11 Court can affirm on that basis, certainly where the
12 Second Circuit had relied on precedent that said that
13 where the individual doesn't have a right, that it is
14 union control of arbitration. That is consistent with
15 Gardner-Denver.

16 JUSTICE SCALIA: It doesn't have to be
17 within the question presented. You -- you can sustain
18 the judgment below on any ground.

19 MR. FREDERICK: Well, I think that --

20 JUSTICE SCALIA: The only question is
21 whether we will -- we will agree that we should inquire
22 into new ground. That's all.

23 MR. FREDERICK: My only point is that this
24 is one of these fuzzy areas where we are not making
25 independent, alternate ground of affirmance. I think

1 our argument is fairly included within the question
2 presented and can be affirmed on the basis of that
3 argument.

4 If the court has no further questions --

5 JUSTICE GINSBURG: What about the argument
6 that you are -- if you win this case, you are subjecting
7 the employee to a worse situation because the employer
8 will simply say: Fine, I don't have to bargain anything
9 with the union. If you want to work in this workplace,
10 you sign an arbitration agreement that says you have no
11 access to the court, and you have to -- just like in
12 Gilmer, just like in Circuit City.

13 MR. FREDERICK: Well, Justice Ginsburg, I
14 guess I would answer that question by saying we will pay
15 our money and take our chances in the sense that the
16 unions here are supporting the workers where the unions
17 are acknowledging that there is this kind of conflict of
18 interest, and the question of whether or not imposing
19 arbitration on the individual workers would be a
20 condition of employment. That is a question that you
21 can safely leave for another day.

22 CHIEF JUSTICE ROBERTS: Well, they may go
23 the other way. They may say: Look, we don't like to
24 arbitrate. In fact, the arbitration is of great benefit
25 to workers, but it is very expensive to bring these

1 claims, even with the prospect of recovering fees.

2 Most of them like the idea that the union is
3 going to stand up for them and take it to management,
4 but they could say: Look, we don't want it. If -- if
5 you are discriminated against, you know, sue us.

6 MR. FREDERICK: Mr. Chief Justice, in fact,
7 empirically that is not correct. There is a study that
8 is cited in a footnote in one of the amicus briefs that
9 arbitration is more expensive than bringing civil
10 litigation. And it is because the -- under -- under
11 their provision if you pay 50 percent of the
12 arbitrator's costs, you can run up quite a big tab that
13 you would not have to pay --

14 CHIEF JUSTICE ROBERTS: But under my
15 scenario, the employer wouldn't have to pay for
16 arbitration. There would be -- there would be no
17 arbitration at all.

18 MR. FREDERICK: Well, under your scenario, I
19 think where the employer would control the arbitral
20 process, the arbitrator knows who is buttering his
21 bread.

22 CHIEF JUSTICE ROBERTS: No. There is no
23 arbitration. The employer says: Look, I don't think I
24 discriminate. I've got a good record. I'm not going to
25 agree to arbitrate claims. I'm going to make people go

1 to court because there will be fewer claims brought.

2 MR. FREDERICK: And -- and that has been the
3 law for 30 years, and we think it should continue to be
4 the law, Mr. Chief Justice.

5 If the marketplace is going to help weed out
6 those claims, that's certainly the province of lawyers
7 taking these cases and clients deciding whether or not
8 to tell everybody to --

9 CHIEF JUSTICE ROBERTS: But the point is
10 there are benefits to employees from arbitration as
11 well.

12 MR. FREDERICK: Certainly --

13 CHIEF JUSTICE ROBERTS: The employer may not
14 agree to it. If he doesn't have any protection, if it
15 doesn't buy him anything, if employees can still go to
16 court, what's the -- what's the point?

17 MR. FREDERICK: That's why this Court has
18 always said that individual consent and agreement is a
19 fundamental precept of arbitration. Where that
20 agreement is absent, a worker should not be forced.
21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 Mr. Frederick.

24 Mr. Gannon.

25 ORAL ARGUMENT OF CURTIS E. GANNON

1 ON BEHALF OF THE UNITED STATES,
2 AS AMICUS CURIAE,
3 SUPPORTING THE RESPONDENTS

4 MR. GANNON: Mr. Chief Justice, and may it
5 please the Court: Respondents' fundamental right to a
6 workplace free of invidious, class-based discrimination
7 is something their union has no power to barter away in
8 collective bargaining, and the union --

9 JUSTICE BREYER: I -- I just want to be sure
10 that at some point you answer this question, if you can.

11 I -- I -- the -- the issue in front of us,
12 as I see it, is just what you said: When can a union
13 require the worker to accept arbitration rather than a
14 court case in an instance where the union member has not
15 signed a special waiver? That's the question, right?
16 Okay.

17 And what I think some of us were struggling
18 for here is: If we say yes to you they can force them,
19 or no to you they can't, what's the principle?

20 Now, the easiest kind of case where you tend
21 to think they can force the worker into arbitration is
22 where the right grows out of the collective bargaining
23 agreement, period.

24 Then we have what we were talking about with
25 Justice Souter, a common law tort claim. Then we might

1 have a State law giving a claim. Then we might have a
2 Federal law like this one giving a claim.

3 And we just heard -- I would assume if
4 Justice Scalia thought of such a case, then the response
5 was, which was the FSLA: Oh, well, maybe we can't, you
6 know, force the worker to give that one up either.

7 So what is the line here that we are drawing
8 with this case? Is it a line that says discrimination
9 laws, Federal or special? Federal laws are special?
10 State laws are special? Common law is special?
11 Collective bargaining, too? What is the principle?

12 MR. GANNON: Yes, Justice Breyer. This
13 Court's cases have not yet described a specific law, and
14 --

15 JUSTICE BREYER: That's why I am asking you
16 for the principle.

17 MR. GANNON: I think that the -- the best
18 line that we have is -- is stated in both Gardner-Denver
19 and Barrentine as contrasting statutory rights that are
20 related to collective activity, and especially economic
21 activity, are the kinds of things that are normally
22 delegated to the union. Those are the sorts of things
23 that the union can actually engage in collective
24 bargaining about. And when the union negotiates the
25 underlying right, then it makes perfect sense that the

1 labor arbitration framework that's set forth here would
2 continue to resolve disputes that are arising under --
3 out of that specific right.

4 JUSTICE SCALIA: Why -- why doesn't this
5 come within that?

6 MR. GANNON: Because --

7 JUSTICE SCALIA: Why don't many of these
8 cases, if not most of them, come within that? The union
9 negotiates the salaries for various levels, and then the
10 person says: I should be at this level. The only
11 reason I didn't get it was that I was discriminated
12 against.

13 MR. GANNON: Well, I -- I think, Justice
14 Scalia --

15 JUSTICE SCALIA: You -- you call it a
16 non-economic theory. Phooey, it's an economic case.

17 MR. GANNON: But I think what's important,
18 Justice Scalia, is -- is, though -- is the line that the
19 Court stated in Barrentine: That if a statute is
20 designed to give specific, minimum protection to
21 individual workers, then that's the sort of thing that
22 the union doesn't have the power to engage in collective
23 bargaining over.

24 And so your salary may well be something
25 that the union can normally bargain about. But if you

1 want to assert that the -- that the employer or the
2 union -- because both are the types -- the types of
3 entities that can be charged with discrimination under
4 Title VII or the ADA or these other statutes -- the
5 reason that they gave you a lower salary was on the
6 basis of something for which you had a Federal statutory
7 protection, then -- then you have an independent
8 statutory right that the union's majoritarian
9 decisionmaking processes should not be in the process of
10 controlling --

11 JUSTICE SCALIA: It is not taking away the
12 right. The -- the union is not taking away the right.
13 It's just saying to vindicate it, you have to go to
14 arbitration instead of to the courts.

15 MR. GANNON: Yes. And the difference is
16 that the union is making the decision about where the
17 claim will be vindicated. And in this case in
18 particular, the union is going to control whether the
19 claim will actually be able to be officially vindicated.

20 CHIEF JUSTICE ROBERTS: You have -- you have
21 focused on the fact that Congress has given individual
22 rights. But for the many matters that you say are the
23 subject of collective bargaining, you don't need a
24 statute. I don't need a statute to negotiate with
25 someone whether I get paid \$20 an hour or \$15 an hour

1 for a particular job. And, yet, that is something that
2 you give up when you join the union, and you are subject
3 to collective bargaining.

4 MR. GANNON: Absolutely, Mr. Chief Justice.

5 CHIEF JUSTICE ROBERTS: Well, why isn't it
6 -- why isn't it the same with these statutory rights?
7 Why aren't they subject to collective bargaining as
8 well?

9 MR. GANNON: Well, I -- even the employer
10 here is not claiming that the underlying statutory right
11 is subject to collective bargaining. They are just
12 saying --

13 CHIEF JUSTICE ROBERTS: No. No. I am --
14 the -- the forum for asserting the right.

15 MR. GANNON: Well, in this instance Congress
16 gave individual employees the right to bring a civil
17 action in a judicial forum as a means of enforcing their
18 antidiscrimination claims. And although arbitration may
19 always provide an alternative forum for that, this Court
20 has repeatedly made clear that arbitration is always a
21 matter of contract. And it does not impose on the
22 employer any more than on the employee a requirement
23 that they arbitrate a claim when they --

24 CHIEF JUSTICE ROBERTS: Why would any
25 employer want to agree to arbitration under this system?

1 He gets nothing from it. You said you get the ben -- to
2 arbitrate except when you don't arbitrate.

3 MR. GANNON: Well, Mr. Chief Justice, I
4 don't think that that's true. Since 1974, this has been
5 the law of the land, and it's been even after Gilmer in
6 every circuit --

7 CHIEF JUSTICE ROBERTS: That just begs the
8 question that your interpretation of Gardner-Denver is
9 correct.

10 MR. GANNON: Well, it -- it is the
11 prevailing interpretation in every circuit that has
12 considered the question since Gilmer except the Fourth
13 Circuit. And if you look at the empirical data that's
14 mentioned in some of amicus briefs, including the
15 particular amicus brief of the National Academy of
16 Arbitrators, it is true that even when there is just a
17 labor arbitration machinery that was invalid under the
18 terms of Gardner-Denver and would not be binding on the
19 employee if the employee happens to lose in that
20 arbitration, in most of those cases when the employee
21 loses that arbitration, he does not go on to file an
22 independent case in federal court.

23 CHIEF JUSTICE ROBERTS: Your position -- so
24 their position is going to hurt most employees, because
25 assuming that the employer wants to arbitrate, the union

1 gets something in return for agreeing to that. I don't
2 know what it is, another 50 cents an hour, if you agree
3 to arbitrate all these claims. Well, you don't get that
4 anymore, because and employer is not going to agree to
5 arbitrate if it -- if the employees don't have to
6 arbitrate.

7 MR. GANNON: Well, we don't think that there
8 is any reason why the employees will not be able to make
9 a grievance with the employers, as was made possible in
10 Gilmer. And so that the point is that it just can't be
11 a vicarious agreement to arbitration on behalf of the
12 individual.

13 CHIEF JUSTICE ROBERTS: Well, the employees
14 have no -- no leverage. I mean, if the -- if the
15 employer wants to say, look, if you want to work here,
16 look, you got to arbitrate -- I mean, the employees
17 don't have bargaining leverage. That's the whole reason
18 you have a union.

19 MR. GANNON: Well, there was an argument in
20 Gilmer that they didn't have leverage, either. And the
21 Court stressed that as long as the employee has actually
22 agreed to it, that -- and -- and as long as the arbitral
23 forum is going to be adequate to provide for effective
24 vindication of the underlying statutory rights, then --
25 then the arbitral forum would be adequate.

1 JUSTICE KENNEDY: Suppose the employer did
2 have the practice that the Chief Justice suggested, it
3 tells each employee you have to sign an arbitration
4 form, could the union in its collective bargaining
5 negotiations say that you will withdraw this forum and
6 that you shall not impose this obligation?

7 MR. GANNON: Well, that's -- as
8 Mr. Frederick mentioned and is as discussed in several
9 of the briefs, that's an undecided question of labor
10 law. The National Labor Relations Board --

11 JUSTICE KENNEDY: I'm asking in your view if
12 it came up to it, how would that be decided --

13 MR. GANNON: Well --

14 JUSTICE KENNEDY: Because I'm concerned it's
15 the same thing as the Chief Justice mentioned, I just
16 don't think the employer is going to get very much under
17 this interpretation. And that may, ultimately, hurt the
18 employee.

19 MR. GANNON: We think that as long as the
20 employee have been -- have been able to indicate exactly
21 the same level of individual agreements that was upheld
22 in Gilmer and that the arbitral forum itself is going to
23 be adequate, that that takes care of that half of the
24 question.

25 The National Labor Relations Board which

1 has -- which would be entitled to deference on this
2 question and which has never spoken to the labor law
3 question of what role the unions might be able to play
4 in helping facilitate the agreements negotiated between
5 the employers and the individual employees, it could
6 come out in at least three different ways.

7 One of them is the arrangement outlined in
8 the Abbott D.C. Circuit decision that -- that
9 Petitioners rely upon. But, of course, that's an
10 instance where there were two completely separate
11 agreements that the employment arbitration was agreed to
12 by the employees before they are even represented by the
13 union. It was at the outset of the establishment of the
14 employment relationship, which Mr. Frederick discusses.

15 JUSTICE SOUTER: But doesn't it boil down --
16 doesn't your argument really boil down to this: That
17 the only case in which it's really going to matter is
18 the case in which the arbitration agreement contains a
19 clause that gives the union plenary authority over the
20 disposition of the claim? And I say that for this
21 reason. If -- if this is outside the subject of
22 mandatory bargaining, then the employer can impose it;
23 in effect, as a matter of individual contract.

24 If it's within the subject of mandatory
25 bargaining but it's not effective unless the employee

1 also signs at the time of the incident or at the time he
2 is hired an individual waiver, then, in fact, the only
3 case in which it's going to make any difference as to
4 whether you win or he wins is the case in which the
5 agreement has got a clause in there that gives the union
6 plenary authority to dispose of the claim.

7 Isn't that correct?

8 MR. GANNON: Well, not necessarily, Justice
9 Souter, because there are all sorts of other attributes
10 of the arbitral forum that might -- might well be
11 relevant to the question of whether it's sufficient to
12 effectively been -- rights. In Gilmer itself, the Court
13 specifically considered whether the employee,
14 Mr. Gilmer, would have an opportunity to play a role in
15 selecting the arbitrator.

16 In this instance, even under Petitioner's
17 view of the CBA, which we don't think is supported by
18 the text of the CBA, this -- these employees are still
19 stuck with an arbitrator who has been chosen by the
20 employer and by the union. And those are the two
21 entities that have already decided that their claim is
22 meritless.

23 JUSTICE ALITO: -- more variables of Justice
24 Souter's question, if those variables are satisfied,
25 what's -- what is your answer to his question?

1 MR. GANNON: If the variables are --

2 JUSTICE ALITO: You're saying that this
3 might -- this might not be true and that may not be
4 true, but suppose all of those other requirements are
5 satisfied?

6 MR. GANNON: We think that there needs to be
7 individual agreement in order to comply with Gilmer
8 because of the underlying inherent tension between the
9 collective interest of the union and the individual
10 interests of the employees, especially in
11 anti-discrimination statutes.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Mr. Salvatore, you have four minutes
14 remaining.

15 REBUTTAL ARGUMENT OF PAUL SALVATORE

16 ON BEHALF OF THE PETITIONERS

17 MR. SALVATORE: Thank you, Mr. Chief
18 Justice. A couple of quick points in response.

19 JUSTICE GINSBURG: Mr. Salvatore, would you
20 straighten out this business it seems about who pays?
21 Mr. Frederick said that 50 percent would have to be paid
22 by the employee. If the union bows out and there is
23 just the employer and the employee in the arbitration,
24 that employee would have to pick up 50 percent. I think
25 I understood him to say that.

1 MR. SALVATORE: And I refer you, Justice
2 Ginsburg, to page 47a of the joint -- of the petition
3 appendix, which contains the main frame arbitration
4 Article 6 of this collective bargaining agreement, the
5 last paragraph --

6 JUSTICE GINSBURG: What page did you -- did
7 you reference?

8 MR. SALVATORE: 47a of the petition
9 appendix, the last paragraph on that page.

10 JUSTICE SCALIA: Article 7, no.

11 MR. SALVATORE: I'm sorry?

12 JUSTICE SCALIA: You said Article 6. Isn't
13 it Article 7, if it's on 47a?

14 MR. SALVATORE: Article 6 starts on 43a. It
15 goes all the way over to 47a of the petition appendix,
16 right after the ellipses at the bottom of the page.

17 JUSTICE SCALIA: Oh, I see. Okay, so you
18 are on 6. I got you.

19 MR. SALVATORE: The cost of the office of
20 the contract arbitrator shall be shared equally in a
21 manner determined by the union and the RAB. The way
22 that the parties -- the bargaining parties have
23 determined that these costs be shared is that if -- if
24 the union is not involved in a case, the employer pays.
25 And -- and so, that's -- I mean, that's right from the

1 --

2 JUSTICE SCALIA: Where does that appear?

3 JUSTICE SOUTER: Is that written down

4 somewhere?

5 JUSTICE SCALIA: Where does that appear?

6 MR. SALVATORE: That's -- that's the -- the

7 agreement between the collective bargaining parties.

8 It's not -- it's not written down beyond that -- that --

9 that place. The office -- that place in the contract.

10 The office of the contract arbitrator is -- is -- is a

11 place. It's an arbitration forum. It's like going to

12 the American Arbitration Association.

13 It has hearing rooms. It -- it -- there --

14 it has administrators who assign the arbitrators. The

15 arbitrators aren't picked out of -- you know, by one

16 side or the other. Yes, they are put on the panel by --

17 by the bargaining parties, but they are picked by a case

18 administrator.

19 There's 700 arbitrations that go on in this

20 industry every year and that's why instead of going to

21 the American Arbitration Association, these parties a

22 long time ago set up their own. A couple --

23 JUSTICE GINSBURG: If the -- if the idea is

24 that the union sees this right to the worker, then

25 doesn't have to -- doesn't the burden go with the right

1 as well? I mean, the -- if the union would pay, you're
2 saying that the employer will just accept that the
3 employer picks up the entire tab?

4 MR. SALVATORE: Yes, Justice Ginsburg. And
5 there are -- are several points. First, there is no
6 conflict here in this case. The union did the right
7 thing. It turned the claim over to the individual
8 employees with their private counsel and let them go
9 arbitrate it themselves. They refused. This isn't a
10 Magnavox situation. The union is not --

11 JUSTICE SOUTER: I mean, they didn't turn it
12 over, did they, until the action had been brought in the
13 Federal court? I mean, they didn't -- maybe I'm wrong
14 in this, but I didn't think that on day one they -- they
15 said, oh, well, because the union doesn't want to
16 proceed with this, you're welcome to chug ahead by
17 yourself.

18 MR. SALVATORE: Let me explain that time
19 frame, Justice Souter. What happened here was the claim
20 was originally tendered by these employees to the union
21 to bring an arbitration. The union decided after the
22 first hearing day with the arbitrator that they couldn't
23 go forward for whatever reasons -- it's not in the
24 record -- and then they, several months went by, these
25 employees filed with their counsel at the EEOC under

1 Waffle House, we did nothing and waited and the --
2 representing the employers, and then the -- the lawsuit
3 was filed.

4 At that point the record is clear that
5 demand was made on -- on the employee's counsel,
6 Mr. Kreisberg -- it's in his affidavit -- that -- that
7 he returned to Arbitrator Pfeiffer to the pending
8 arbitration and continue in that forum, and he refused
9 to. That was the basis of the motion to compel.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 The case is submitted.

12 MR. SALVATORE: Thank you.

13 (Whereupon, at 12:00 p.m., the case in the
14 above-entitled matter was submitted.)

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A	<p>advice 38:17</p> <p>affidavit 23:23 57:6</p> <p>affirm 39:11</p> <p>affirmance 39:25</p> <p>affirmed 23:6 24:13 40:2</p> <p>age 26:13 35:5</p> <p>agency 14:12 20:6,8</p> <p>ago 31:3 34:3 55:22</p> <p>agree 7:2 13:23 14:18 16:8 22:21 32:14 37:20 39:21 41:25 42:14 47:25 49:2,4</p> <p>agreed 14:18 26:12 49:22 51:11</p> <p>agreeing 49:1</p> <p>agreement 4:8 4:15,20,21 8:20 9:2 11:18 11:20 12:15 13:7 16:15 17:9 22:1,11 22:22 24:1,14 24:21,25 25:7 25:8,9,15,18 26:4,21 27:2 27:12 28:11,19 34:6 37:11 38:4,8,23 39:3 40:10 42:18,20 43:23 49:11 51:18 52:5 53:7 54:4 55:7</p> <p>agreements 7:5 19:9 33:14 50:21 51:4,11</p> <p>agreement's 23:18</p> <p>ahead 27:3,16 56:16</p>	<p>Air 28:16</p> <p>airline 27:22</p> <p>AL 1:3,6</p> <p>Alexander 4:6 22:9,9 23:4,8</p> <p>aligned 4:24 17:14</p> <p>Alito 12:13,17 25:5,13 26:2 27:6,13,15,17 34:5,18 52:23 53:2</p> <p>allow 29:16</p> <p>allowing 32:11</p> <p>allows 18:25</p> <p>ALPA 19:10</p> <p>alternate 39:25</p> <p>alternative 19:6 19:7 47:19</p> <p>American 21:7 55:12,21</p> <p>amicus 1:21 2:8 41:8 43:2 48:14,15</p> <p>amount 20:1 36:8,8</p> <p>analogous 39:8</p> <p>animating 29:25</p> <p>answer 4:18 9:3 17:25 20:19 28:18 31:23,23 32:23 34:18 36:24 40:14 43:10 52:25</p> <p>answering 36:16</p> <p>antidiscrimin... 47:18</p> <p>anti-discrimin... 15:24 16:25 24:17 25:3 29:21 37:15 53:11</p> <p>anymore 49:4</p> <p>anyway 7:15</p> <p>apart 36:4</p> <p>appeals 6:17</p> <p>appear 55:2,5</p>	<p>APPEARAN... 1:14</p> <p>appendix 5:22 6:3 9:10 22:13 38:6 54:3,9,15</p> <p>applied 32:8 39:4</p> <p>apply 22:15,15 22:16</p> <p>appropriate 11:18</p> <p>approved 16:11</p> <p>arbitrable 35:16</p> <p>arbitral 3:12,23 4:12,17 5:15 16:13 20:22 21:2 23:13,19 25:1,25 41:19 49:22,25 50:22 52:10</p> <p>arbitrarily 35:5</p> <p>arbitrate 4:8 12:4 17:5,6,20 22:1 25:1 27:25 30:19 37:20 38:7 39:8 40:24 41:25 47:23 48:2,2,25 49:3 49:5,6,16 56:9</p> <p>arbitrated 5:12 8:5 25:10</p> <p>arbitrating 36:21</p> <p>arbitration 4:4 5:14,24 6:8 8:2 8:4,8 9:20,24 10:1,18 11:9 11:18,19 12:20 13:7,11 16:15 16:18 17:5,22 18:6 21:7,11 21:15 22:11,21 23:9 25:23,24 26:24,25 27:18 28:20 32:22 33:3,7 34:6,16</p>	<p>35:12 36:12 37:21 38:2,3 39:14 40:10,19 40:24 41:9,16 41:17,23 42:10 42:19 43:13,21 45:1 46:14 47:18,20,25 48:17,20,21 49:11 50:3 51:11,18 53:23 54:3 55:11,12 55:21 56:21 57:8</p> <p>arbitrations 55:19</p> <p>arbitrator 12:10 21:6 22:14,17 24:2 38:11 41:20 52:15,19 54:20 55:10 56:22 57:7</p> <p>arbitrators 48:16 55:14,15</p> <p>arbitrator's 41:12</p> <p>area 10:15</p> <p>areas 39:24</p> <p>arguing 19:13 19:13 26:19 34:1</p> <p>argument 1:12 2:2,10 3:3,6 4:14 6:7,15 8:12 24:8 26:17,23 40:1 40:3,5 42:25 49:19 51:16 53:15</p> <p>arising 45:2</p> <p>arose 28:10</p> <p>arrange 18:17</p> <p>arrangement 5:19 18:17 19:2 51:7</p> <p>Article 54:4,10 54:12,13,14</p>
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