

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: DOLORES M. OUBRE, Petitioner v. ENTERGY  
OPERATIONS, INC.

CASE NO: 96-1291 C.J.

PLACE: Washington, D.C.

DATE: Wednesday, November 12, 1997

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'98 FEB -2 P3:32



1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	BARBARA G. HAYNIE, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	BETH S. BRINKMANN, ESQ.	
7	On behalf of the United States, as amicus curiae,	
8	supporting the Petitioner	21
9	ORAL ARGUMENT OF	
10	CARTER G. PHILLIPS, ESQ.	
11	On behalf of the Respondent	31
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		



1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 96-1291, Delores Oubre v. Entergy  
5 Operations, Inc.

6 Ms. Haynie.

7 ORAL ARGUMENT OF BARBARA G. HAYNIE

8 ON BEHALF OF THE PETITIONER

9 MS. HAYNIE: Mr. Chief Justice, and may it  
10 please the Court:

11 After 2 years of careful consideration, in  
12 response to a regulatory void, Congress enacted the Older  
13 Worker Benefit Protection Act to protect the rights of  
14 older workers who were in greater force leaving -- being  
15 forced to leave the work place.

16 The Older Worker Benefit Protection Act mandates  
17 that an older worker may not waive their rights secured  
18 under the ADEA unless such waiver is knowing and voluntary  
19 as defined by the act.

20 If an employer chooses to utilize a waiver of  
21 age discrimination rights, Congress requires an employer  
22 to provide the older worker with the requisite information  
23 and time to assess the value of the right to be waived.

24 The Fifth Circuit Court of Appeals' adoption of  
25 the common law contract principles of ratification and

1 tender-back in addressing a situation where the employer  
2 uses a waiver which is -- does not comply with the Older  
3 Worker Benefit Protection Act will in all practical  
4 purpose render the act meaningless.

5 QUESTION: What would happen in the case if the  
6 day after the release is signed, but before any money  
7 changed hands, the employer says, we've made a mistake,  
8 it's a good faith mistake, we didn't know about the ADEA,  
9 we want to rescind the release?

10 MS. HAYNIE: Well, Your Honor, pursuant to the  
11 statute there is a revocation period of 7 days after the  
12 release is signed.

13 QUESTION: No, but this is the employer.

14 MS. HAYNIE: I understand. There will be a 7-  
15 day -- that release is not effective pursuant to --

16 QUESTION: Well, let's change the hypothetical.  
17 Suppose -- I want the release to be effective.

18 MS. HAYNIE: 7 days after it.

19 The employer would not have the right to rescind  
20 the release. It is an invalid release with regard to ADEA  
21 claims if it does not comply with the statute. If they  
22 rescind the release to all other waivers, I believe the  
23 plaintiff or the older worker will have the right to  
24 proceed against the employer.

25 QUESTION: But in other words you couldn't

1 have --

2 QUESTION: -- doesn't have to rescind it.

3 QUESTION: Excuse me. You couldn't have an  
4 equitable action to rescind the release at the employer's  
5 behest? Let's assume a good faith mistake on his part.

6 MS. HAYNIE: No, sir. If the waiver does not  
7 comply with the requirements of the act, it is a void  
8 waiver pursuant to --

9 QUESTION: Well then, he wouldn't have to pay --  
10 he wouldn't have to pay any of the money, either?

11 QUESTION: Right.

12 QUESTION: If it's void, he wouldn't have to pay  
13 the money.

14 MS. HAYNIE: Well, the problem with not having  
15 to pay the money, Your Honor, is that the waiver includes,  
16 and particularly in this case, many other actions, other  
17 than a waiver of ADEA --

18 QUESTION: That's, it seems to me, one of the  
19 points, is that this might very well be valid as to  
20 everything but the ADEA.

21 MS. HAYNIE: And I believe that --

22 QUESTION: There's a lot of talk on void and  
23 voidable, but this covers so many claims that it seems to  
24 me that's something that may be more of a problem for the  
25 respondent than for you.

1 MS. HAYNIE: I believe it would be void to the  
2 ADEA claims. I believe that --

3 QUESTION: As to them, then, the employer can,  
4 on day eight, say, I'm not going to pay anything insofar  
5 as it might be attributable -- let's assume, keep the  
6 example, that he broke down the various considerations and  
7 said, with respect to this particular claim I'm not going  
8 to pay anything because it's void, because it violates the  
9 statute. That would be legally proper, I take it, on your  
10 view.

11 MS. HAYNIE: That's correct, Your Honor, that  
12 would be, and the plaintiff can go forward and pursue  
13 their age discrimination claim in court.

14 QUESTION: But in order to determine how much  
15 harm we're doing by saying these things are void from the  
16 outset I think we should be realistic and know that most  
17 of them do not assign a certain amount of money to the  
18 ADEA release and a certain amount of money to various  
19 other releases, and I doubt very much, when it's not  
20 broken out that way, whether you can say the contract is  
21 valid in part and invalid as to that one little item. I  
22 mean, this is a standard question of severability.

23 I don't know how you can rip that contract  
24 apart, especially when the ADEA claim is a very major part  
25 of the consideration. Do you know any other contract

1 that's picked apart like that where it's just partially  
2 valid and we're going to enforce all the rest of it?

3 MS. HAYNIE: Well, I think Congress has clearly  
4 spoken here that if the waiver drafted by the employer  
5 does not comply with the Older Worker Benefit Protection  
6 Act --

7 QUESTION: Right.

8 MS. HAYNIE: That waiver is nonenforceable --

9 QUESTION: Therefore that portion of the  
10 contract is bad, and I would say the whole contract is  
11 bad.

12 MS. HAYNIE: -- because I do believe the other  
13 portions of that waiver remain valid. If the employer  
14 does not break out the enumeration for each right to be  
15 waived, that's the argument to save the set-off for the  
16 remedial phase of the trial.

17 QUESTION: So all the employers who have these,  
18 have made these commitments can now simply stop paying  
19 money.

20 MS. HAYNIE: If they choose to stop paying money  
21 and have not enumerated out which moneys are going to be  
22 designated for which rights are being waived, then I  
23 believe the plaintiff has a simple right of breach of  
24 contract for all other rights that they had signed, if the  
25 money has stopped.



1 QUESTION: No, but a contract is -- you can't  
2 pick apart a contract like that. If the contract's void,  
3 it's void.

4 MS. HAYNIE: Well, I --

5 QUESTION: What do you mean, he's breached it?  
6 How much money is he supposed to pay, two-thirds of the  
7 full contract, or -- I mean, how do you decide how much?

8 MS. HAYNIE: I --

9 QUESTION: The full amount?

10 MS. HAYNIE: I agree, Your Honor, I believe  
11 that's one of the practical problems of this case, and  
12 that's why the tender back at the very beginning of a case  
13 to bar plaintiff to going into court is very prac --  
14 impractical.

15 QUESTION: What I am worried about is, you are  
16 destroying cause -- you are destroying entitlements to  
17 these payments on the part of all older workers who have  
18 been terminated, including the majority of them who do not  
19 have any ADEA claims.

20 I'm not sure you're doing them a favor. You're  
21 saying if the employer is confident enough that this  
22 worker doesn't have an ADEA claim he can just say, I'm  
23 sorry, we made a mistake.

24 MS. HAYNIE: Well, I believe that's what  
25 Congress has established --

1                   QUESTION: Well, Ms. Haynie, we aren't sure  
2 about that, because Congress did not expressly say such an  
3 agreement that fails to comply with these requirements is  
4 void, as they have done in some other legislation. They  
5 don't say that, so at common law I suppose an agreement  
6 where the employer was guilty of some kind of fraud,  
7 duress, or coercion would be voidable, wouldn't it?

8                   MS. HAYNIE: That's correct.

9                   QUESTION: Voidable at the option of the person  
10 defrauded. Maybe this contract is voidable, not void.  
11 Congress didn't say, one way or another.

12                  MS. HAYNIE: I believe the phrase, may not  
13 waive, is tantamount to announce, or proclaiming void any  
14 waivers which do not comply with the Older Worker Benefit  
15 Protection Act for those rights secured under the ADEA.

16                  QUESTION: But why? Why would Congress wanted  
17 to have done that, because what you're being told, I  
18 think, from Justice Scalia and others, is let's imagine --  
19 let's imagine that a -- that we have 100,000 workers who  
20 are quitting, and each of them has a contract, and they  
21 all promise not to bring claims, and each of them is paid  
22 \$5,000 for that promise. All right.

23                  Now, very few of them will have real ADEA  
24 claims. Very few. But suppose they're all like this,  
25 that they didn't comply with the rule exactly.

1           Now, on your theory one day every employer is  
2 going to wake up to the fact that he hasn't bought a  
3 single thing for his \$5,000, and somebody might go around  
4 and collect the lawsuits and sue everybody and get the  
5 money back, so you'd be taking from 100,000 or 90 of the  
6 100,000, \$5,000 each have to go right back.

7           On the other hand, if you're wrong, all that  
8 happens is when somebody has a good claim they have to put  
9 up a little bit of money up front, whatever the  
10 proportionate amount of the ADEA part is, which might be  
11 \$500, and the lawyer could front it for him.

12           So why would Congress want the result that you  
13 want, which would seem to put at risk hundreds of  
14 thousands of workers to have to give back the money who  
15 would have no claim -- the employer would sue them -- and  
16 at the same time to protect some lawyer from not having to  
17 put up a very little money up front.

18           Now, I'm putting it strongly, but it's exactly  
19 that practical consideration that I'm very disturbed about  
20 in terms of your position.

21           MS. HAYNIE: Your Honor, with regard to the  
22 practical --

23           QUESTION: It's not practical, it's legal, and  
24 what I'm asking is, why would Congress have wanted that  
25 result?

1 MS. HAYNIE: Congress was very clear in enacting  
2 this statute to protect the rights of older workers when  
3 negotiating with employers when they're forced out of the  
4 work place.

5 They are not arm-length negotiators. Congress  
6 put in very specific requirements an employer must meet so  
7 that an employee knows they are giving up a valuable right  
8 in exchange for that consideration.

9 If they're given adequate considera -- or  
10 information, and there is some specter of discrimination,  
11 then the employer can go -- the employee can go back to  
12 the employer and negotiate for a greater severance or say,  
13 no, I'm not going to sign this.

14 Without that knowledge, and without the time to  
15 consider it in a coercion case, then the employee is  
16 really left with no option but to take the money.

17 QUESTION: We're not talking about the same  
18 thing. What I'm talking about is, I agree with you the  
19 contract is no good. I agree with you the employee can  
20 sue. I agree with you that that provision in the contract  
21 promising not to sue is worthless. It's no good.

22 The question involved is whether, before he  
23 brings the lawsuit, he has to give back a proportionate  
24 share of the money that he's been paid for his promise not  
25 to sue. I would imagine if they're paying five or \$6,000



1 for such a promise he'd have to give \$500 back, or -- and  
2 the lawyer could put it up front.

3 MS. HAYNIE: Well --

4 QUESTION: So what is the big problem about --  
5 that you're worried about?

6 MS. HAYNIE: The problem is twofold, Your Honor.  
7 First, the monetary amount could be greater. The employee  
8 expends the money looking -- for living expenses while  
9 looking for other employment.

10 The second problem is, who is to decide what the  
11 proportionate share will be? That's going to have to be  
12 decided by a trier of fact, a judicial tribunal. That  
13 means you're in court already.

14 QUESTION: Well, can a proportionate share be  
15 determined? How do we determine the proportionate share?

16 MS. HAYNIE: The proportionate share can be  
17 determined at the end of the litigation, when a trial  
18 judge has taken into --

19 QUESTION: Well, I thought courts have routinely  
20 said they are unable to make that kind of a determination.  
21 I mean, they can't do that.

22 MS. HAYNIE: Well, if you --

23 QUESTION: You get a -- you either have to give  
24 it all back or none, as I see it. I don't see how that  
25 could possibly be made.



1 MS. HAYNIE: If you require the plaintiff to  
2 tender back all the money received, then it is the  
3 employer who receives the windfall there, because the  
4 employee has waived many other rights under that waiver.  
5 The employer can raise the defense.

6 QUESTION: But if you say the contract is void,  
7 then what you're doing is saying that the ADEA tail wags  
8 the State law dog with respect to all releases. You are  
9 saying that all State law releases, State claim releases  
10 are, I take it, void because the contract is not  
11 severable.

12 MS. HAYNIE: No, I don't believe that, Your  
13 Honor. I don't believe that. I believe Congress spoke  
14 directly and specifically to those rights secured under  
15 the ADEA.

16 QUESTION: Ms. Haynie, suppose --

17 QUESTION: Ms. Haynie, did -- maybe I  
18 misunderstood your argument, but I thought your position  
19 was, may not waive is -- leaves employer and employee  
20 without any authority, without any power to do anything  
21 with respect to the ADEA claim.

22 That being so, you construe this contract as  
23 though what may not be done wasn't done, so that the only  
24 thing that would be covered would be the non-ADEA claims.

25 Maybe you're not making that argument.

1 MS. HAYNIE: No, I am making that argument, Your  
2 Honor, that again the statute speaks specifically to ADEA  
3 claims, and those are the -- that is the waiver that is  
4 void. That is the waiver that is nonenforceable against  
5 the plaintiff who signs it.

6 All other waivers of claims can be possibly  
7 enforceable against the plaintiff, unless the plaintiff  
8 can show that it was not an involuntary waiver.

9 QUESTION: What if it was just an ADEA claim  
10 here, so that we didn't have the problem of breaking out a  
11 partial amount, and the -- would you say that the employee  
12 did not have to tender it back?

13 MS. HAYNIE: That's correct, Your Honor. If the  
14 waiver does not comply with the statute it is an  
15 ineffective waiver. It is a void waiver. The plaintiff  
16 can go forward with the lawsuit, and if there is some --

17 QUESTION: The plaintiff just gets to keep it,  
18 then?

19 MS. HAYNIE: Well, there's a concern with regard  
20 to equity amongst the parties.

21 QUESTION: Well, there's a considerable concern.

22 MS. HAYNIE: It can come at the remedial phase  
23 of the trial --

24 QUESTION: Well, but --

25 MS. HAYNIE: -- with either an offset --

1                   QUESTION: Well, supposing the plaintiff loses  
2 at the trial.

3                   MS. HAYNIE: I believe that part of the  
4 incentive in complying with the statute is a loss of that  
5 money, the severance pay, if you do not draft a valid  
6 waiver under the Older Worker Benefits Act.

7                   QUESTION: You mean --

8                   QUESTION: That's totally contrary to any  
9 concept of the law of contracts.

10                  MS. HAYNIE: Well, this is -- we're not dealing  
11 with the law of contracts.

12                  QUESTION: Well, you may be dealing with the law  
13 of contracts except as Congress has otherwise provided.  
14 You're arguing for a very expansive construction of a  
15 particular language of Congress.

16                  MS. HAYNIE: I believe, Your Honor, that it's  
17 warranted in this case. The legislative history is  
18 replete and is quite full with Congress' intent.

19                  QUESTION: We don't ordinarily get into  
20 legislative history.

21                  MS. HAYNIE: And I understand, Your Honor, but  
22 Congress' intent to occupy this entire area. In fact, the  
23 respondent has conceded that in enacting this statute  
24 there is as Federal statutory standard for knowing and  
25 voluntary. It is all-encompassing. There is no room for

1 judicial common law development here.

2 QUESTION: No, but you don't have to have  
3 judicial common law development with respect to the  
4 protections of this statute, I suppose, in order to  
5 recognize that if on a void contract there is a total  
6 failure of consideration the employer at least would have  
7 the right to bring action for the return of the  
8 consideration that he has furnished, and do you deny that  
9 he would have such an action?

10 MS. HAYNIE: Your Honor, to require the tender  
11 back would be to engraft on the statute --

12 QUESTION: I'm not talking about tender-backs.  
13 I'm simply saying, let's assume that your conclusion is  
14 correct, and we recognize it.

15 The employer says -- and by the way, we're  
16 operating here on the hypothesis that it's only the age  
17 claim that's involved. The employer says, I got nothing.  
18 There has been a total failure of consideration. I want  
19 my money back. The employer can sue for it, can't he?

20 He may have a tough time collecting it. You've  
21 pointed out, and I'm sure you're right, that in most of  
22 these cases the money has been spent, but the -- we don't  
23 have to deny the employer the cause of action to get the  
24 consider -- to get his consideration back in order to  
25 enforce this act, do we?

1 MS. HAYNIE: Well, Your Honor, there may be some  
2 State claims in restitution or unjust enrichment that the  
3 employer could bring.

4 QUESTION: That's what I'm talking about.

5 MS. HAYNIE: Certainly.

6 QUESTION: You're not denying that, are you?

7 MS. HAYNIE: No, certainly I'm not denying that.

8 QUESTION: Okay.

9 MS. HAYNIE: And to try to place the --

10 QUESTION: And you're not denying, in fact I  
11 think you suggest it, that if your client should win,  
12 quite properly if the employer has brought his claim there  
13 could be a set-off against the recovery.

14 MS. HAYNIE: That's correct, Your Honor.

15 QUESTION: Ms. Haynie, could I --

16 QUESTION: And State law might operate as well  
17 to say that it's not severable, that you can't decide how  
18 much goes to ADEA and how much consideration --

19 QUESTION: Yes, right.

20 QUESTION: -- went to these other claims.  
21 That's possible, too, isn't it?

22 MS. HAYNIE: It's possible, Your Honor, but I  
23 believe the trial court will be in the best position,  
24 after all the evidence is taken in --

25 QUESTION: Well --



1 MS. HAYNIE: -- to assess the values of this  
2 claim.

3 QUESTION: -- is that right? Ms. Haynie,  
4 suppose I sell you five tickets on horses in a horse race,  
5 okay. One of them wins. The other four don't, okay. Do  
6 you think that it's fair if the contract should be  
7 rescinded as to only one of those tickets, one of the  
8 losing ones, that you should get back 20 percent of your  
9 money?

10 MS. HAYNIE: Well, Your Honor --

11 QUESTION: I mean, that is what is called an  
12 aleatory contract, a contract that depends on future  
13 events to some extent, as does any waiver of rights. You  
14 don't know whether the person has claims that he will sue  
15 on or not.

16 When he does have one, is it fair to say, well,  
17 that claim was one-fifth of the whole contract, we'll give  
18 you one-fifth of your money back?

19 You can't do that. The one ticket for the  
20 winning horse is what the whole thing was about.

21 MS. HAYNIE: I believe that is what the trial  
22 court is going to be charged with doing.

23 If you attempt to put the parties back into the  
24 places they were before the invalid waiver was offered to  
25 the employee, you must then give Ms. Oubre her lost wages,

1 you must put her in a position again of making the  
2 decision as to whether she wants to stay with the company  
3 or leave the company, and you also must provide all the  
4 information required by the act, which the respondent has  
5 not done to date in this case.

6 QUESTION: Let me ask you a factual question.  
7 we've all been making the same assumption here, but let me  
8 just question the assumption. Is there any way of  
9 knowing, in the run-of-the-mill situation in which there  
10 is a release and the object, the obvious principal purpose  
11 of the release is the age claim, whether in those cases  
12 there tends to be a, in fact, others unrelated claims?

13 I mean, for example, in this case, was she an  
14 employee at-will, so -- or was she subject to some kind of  
15 a cause requirement so that she would have had a lost wage  
16 claim?

17 Because if most of these releases in the real  
18 world are simply releases of nothing but the age claim,  
19 then this problem that's being raised would loom smaller  
20 than it might otherwise be. How do we -- is there any way  
21 for us to know?

22 MS. HAYNIE: Well, I could tell you factually  
23 for this situation she was an at-will employee, and  
24 certainly these waivers contain -- I've never seen a  
25 waiver that just contains an ADEA waiver.

1 QUESTION: Right. I'm sure that's right.

2 MS. HAYNIE: They contain numerous other waivers  
3 with regard to Worker's Compensation.

4 QUESTION: -- be crazy not to, but in fact, do  
5 you --

6 MS. HAYNIE: All other waivers.

7 QUESTION: Is there any way for us to know  
8 whether it's really covering anything else in most cases?

9 MS. HAYNIE: I believe that the language of the  
10 waiver --

11 QUESTION: Oh, I know what the language of the  
12 waiver says, but I mean, in fact, are there any real  
13 claims -- is there any way for us to know whether there  
14 are in fact any substantial claims in most of these cases,  
15 other than the age claim?

16 MS. HAYNIE: Well, if the plaintiff brings the  
17 suit, obviously, or files her claim against -- files her  
18 claim with the EEOC, or, you know, the State regulatory  
19 agency --

20 QUESTION: This would waive title VII claims,  
21 too, I suppose.

22 This waiver, if I remember correctly, waived any  
23 and all claims. It didn't mention any specific ones.

24 MS. HAYNIE: That's correct, Your Honor.

25 QUESTION: But apart from State law claims and

1 title VII claims raised with sex discrimination, would  
2 there be anything else that might be included in that?

3 MS. HAYNIE: Well, there's Workers' Compensation  
4 claims. There could be any other causes of action that  
5 may have come up.

6 QUESTION: Thank you, Ms. Haynie.

7 Ms. Brinkmann.

8 ORAL ARGUMENT OF BETH S. BRINKMANN

9 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
10 SUPPORTING THE PETITIONER

11 MS. BRINKMANN: Mr. Chief Justice, and may it  
12 please the Court:

13 To respond to the concerns that the Court has  
14 raised, we would agree that the congressional scheme that  
15 has been established here addresses these concerns in that  
16 Congress gave the courts broad equitable authority, and  
17 the Court recognized that in McKennon, that that equitable  
18 authority is something that the district courts in ADEA  
19 cases exercised to take into account concerns of  
20 employers. That is consistent with the common law trend,  
21 also.

22 As respondent pointed out in its brief, the  
23 common law tender-back was not required in equity,  
24 generally. It was only for settlement releases, and in  
25 those cases those were -- the cases we've seen are ones

1 that only had one topic of the release, so by suing you  
2 were undoing the release.

3 But in cases like this, this is a waiver that  
4 violates a statute. At common law, that was one of the  
5 major bases for not enforcing a contract.

6 QUESTION: Well, is it void or voidable? At  
7 common law, it would have been voidable for fraud or  
8 coercion or duress, and this is a substitute for that.  
9 This is a statutory expression of conditions that have to  
10 be there to avoid any kind of coercion or fraud, isn't it?

11 MS. BRINKMANN: We believe --

12 QUESTION: So why isn't it voidable at the  
13 instance of the employee?

14 MS. BRINKMANN: Your Honor, we do believe it  
15 goes beyond that, the requires provision of information, a  
16 lot more protection than the common law. Whether --

17 QUESTION: Well, is it void?

18 MS. BRINKMANN: We believe that the waiver of  
19 the ADEA claim is void, Your Honor. At common law what  
20 they would have done with something like that, they would  
21 have applied the practice of divisibility.

22 When there was an illegal contract for gambling,  
23 or something that violated an antitrust statute, they  
24 would look and see if that statute was divisible. If it  
25 was not divisible, often illegal contracts parties were



1 left as they were.

2 There were some exceptions to that.

3 QUESTION: What is it -- is it divisible in most  
4 cases here, do you think?

5 MS. BRINKMANN: I think it may very well be. I  
6 mean, part of the thing that is even more complicated,  
7 Your Honor, much more consideration was given for the  
8 \$6,000 than an ADEA waiver.

9 Petitioner resigned from her job, in addition to  
10 waiving other claims, so there's a lot of equity, and  
11 that's exactly what courts of equities would look at, and  
12 that's why that decision was made at the remedy phase of  
13 the proceeding, where the court could take into account  
14 those equitable concerns, and we --

15 QUESTION: Ms. Brinkmann, if the void waiver  
16 leaves the parties where they were, then doesn't someone  
17 who is asserting that the waiver violates the statute by  
18 bringing a lawsuit, doesn't that person have to return --  
19 in order to be consistent in the pleading, doesn't the  
20 person have to return whatever money that person has  
21 acquired under the contract?

22 MS. BRINKMANN: Your Honor, we --

23 QUESTION: You say it's void.

24 MS. BRINKMANN: No. We believe that Congress  
25 made clear in this statute that waivers were void if they

1 did not comply with these requirements.

2 QUESTION: Right.

3 MS. BRINKMANN: And that means that that waiver  
4 violates the statute.

5 QUESTION: Right.

6 MS. BRINKMANN: So it's an illegal waiver.

7 QUESTION: Right. Therefore, if you assert that  
8 that has happened, you should return the money when you  
9 bring the lawsuit.

10 MS. BRINKMANN: No, Your Honor.

11 QUESTION: Otherwise you're being inconsistent  
12 with your theory.

13 MS. BRINKMANN: At common law a tender-back was  
14 just not that -- all -- Farnsworth, Dobbs, and all of your  
15 discussions make clear that tender-back was not that --

16 QUESTION: I don't -- I don't even care about  
17 the common law. I just care about someone who comes in  
18 and asserts that this contract is void, but wants to keep  
19 the money the person has under the contract, or at least  
20 use it to hire the lawyer to bring the lawsuit.

21 MS. BRINKMANN: The problem --

22 QUESTION: And then if you lose you keep the  
23 money, but if you win, oh, I'll cough up the money, but  
24 I'll get more.

25 MS. BRINKMANN: The problem is the statute, Your

1 Honor. It's Congress.

2 QUESTION: The Congress -- the statute says  
3 nothing about this.

4 MS. BRINKMANN: No, but --

5 QUESTION: The statute says nothing about it.

6 MS. BRINKMANN: But you are creat -- you would  
7 be creating another condition precedent to bringing suit,  
8 and Congress was very clear about what was required in  
9 that event, and it --

10 QUESTION: Where was that clarity manifested?

11 MS. BRINKMANN: We believe in --

12 QUESTION: What section of the statute?

13 MS. BRINKMANN: In 626, Your Honor.

14 It's enfolding respondent's brief in the  
15 appendix. (f)(1) makes quite clear Congress expressly  
16 said an individual may not waive any right or claim --

17 QUESTION: We know that, but you're saying that  
18 Congress made expressly clear that no tender back would be  
19 required. Where is that?

20 MS. BRINKMANN: Well, Your Honor, we believe  
21 that --

22 QUESTION: I thought you said Congress made  
23 expressly clear.

24 MS. BRINKMANN: Yes. We believe, when you look  
25 at the -- for example, (f)(3), where Congress foresaw that

1 there would be disputes among parties about the validity  
2 of these waivers, Congress specifically said the burden  
3 would be on the employer, or the person asserting the  
4 validity of the waiver. In this case it would be --

5 QUESTION: What does that have to do about  
6 tender back?

7 MS. BRINKMANN: Because tender back, Your Honor,  
8 was to put up the money to counter the presumption of the  
9 validity of the contract, and here it's to the contrary.  
10 Congress has supplanted that, and I think it's important  
11 to --

12 QUESTION: That certainly is not an express  
13 provision about tender back, is it?

14 MS. BRINKMANN: No, but Your Honor, in case --

15 QUESTION: I thought you said it was.

16 MS. BRINKMANN: No, because I think that the  
17 tender back clearly conflicts with the purposes and the  
18 construct, the mechanism which Congress created. To  
19 impose --

20 QUESTION: Ms. Brinkmann, may I ask you to  
21 address a specific point there?

22 I thought one of the strongest, if not the  
23 strongest argument for the position that you and the  
24 petitioner take is that if you require a tender back, the  
25 prohibition in the statute is a dead letter, because in

1 fact you're dealing with people who are not going to have  
2 the money to tender back, not because they went to the  
3 race track because they used it to pay the rent and buy  
4 the food.

5 Is there anything we can look at to find out  
6 whether that -- that seems to have an intuitive appeal to  
7 it. Is -- has it gotten anything more than an intuitive  
8 appeal? Are there statistics anywhere, or is there  
9 anything in the record to the effect that that is so?

10 MS. BRINKMANN: Certainly, Your Honor. In the  
11 first section of the ADEA, 621, Congress made a specific  
12 find or example that older workers are much less likely to  
13 retain and regain employment once they're terminated, so  
14 it's a specific class. The legislative history also  
15 concerns information about that.

16 Also, even where courts have applied a tender-  
17 back requirement as Judge Posner did in his opinion for  
18 the Seventh Circuit in a title VII case, he recognized  
19 that where there was a situation in which living expenses  
20 would preclude the bringing of the suit, that would not be  
21 permitted as a matter of equity.

22 He also pointed out that, you know, perhaps an  
23 offer would be sufficient, would be offset at the remedial  
24 phase.

25 QUESTION: In other words, I will -- I offer to



1 pay you back if I get the money from which I can do it.

2 MS. BRINKMANN: That's an offset remedy, and I  
3 just have to urge the Court to realize that to adopt the  
4 court of appeals approach would be to put the workers  
5 exactly back where they were before enactment of the  
6 statute.

7 QUESTION: Well, are you saying that we have to  
8 enact as a matter of Federal common law some rule about  
9 tender-back, or do we look to State law to see what the  
10 normal contract situation would be?

11 MS. BRINKMANN: No, Your Honor. We believe that  
12 Congress has spoken, has established this very specific  
13 scheme --

14 QUESTION: Well, we -- suppose we don't find an  
15 express provision in the statute governing tender-back.  
16 Do we look to the State law where the contract was  
17 created?

18 MS. BRINKMANN: No, Your Honor.

19 QUESTION: Or do we try to create some Federal  
20 legal principle to cover this?

21 MS. BRINKMANN: No, Your Honor. We believe  
22 Congress created that because to impose tender-back would  
23 be nullify the statute --

24 QUESTION: Well, where do you get the offset  
25 authority?

1 MS. BRINKMANN: The equitable authority of the  
2 court. That's clear, and this Court has, you know, agreed  
3 with that in McKennon.

4 QUESTION: Why does the court have equitable  
5 authority at the end of the case but not the beginning?

6 MS. BRINKMANN: Congress gave it remedial  
7 authority in 626(b) -- or -- yes, 626(b) of the act, and  
8 made clear all the remedies that the court could give, and  
9 it's important to realize that at this point if this  
10 worker has to make a choice of whether to have the  
11 severance pay or a waiver, that worker is exactly where  
12 they were before passage of the act.

13 QUESTION: I don't understand that. Am I  
14 missing a -- I mean, I only have one question, really, for  
15 this side of the case, and I couldn't find the answer in  
16 any brief, and it seemed so obvious I must be missing  
17 something.

18 That is, I absolutely take in your point that if  
19 the worker has to front the money sometimes they won't  
20 have it, and maybe their lawyer wouldn't give it to them.  
21 I see that as a problem. I don't think it makes the  
22 worker back at stage zero, but it could be a problem.

23 But if we agree with you, everyone's been  
24 pointing out that in all the millions of retirements  
25 contracts in the United States, every one that doesn't

1 comply with all this is void, and why won't, at some day,  
2 some clever person work out that he could go from employer  
3 to employer, buy up tens of thousands of suits, and all  
4 the people who don't have ADEA claims will have to give  
5 back several thousand dollars to their employer?

6 I mean, it's the people who don't have the claim  
7 who vastly outnumber the ones who do, who would be  
8 suddenly left high and dry, on your theory, at the mercy  
9 of whether an employer would just decide to sue him for  
10 the money back.

11 MS. BRINKMANN: Your Honor --

12 QUESTION: Now, that seems to me an obvious  
13 point, but no one mentions it, and therefore I must be  
14 missing something, so I want you to tell me what I'm  
15 missing.

16 MS. BRINKMANN: I think Your Honor is pointing  
17 out the fact that it's unclear whether a worker could even  
18 avoid this waiver if they wanted to enforce --

19 QUESTION: No. I'm talking about workers who  
20 don't -- they're happy. There are millions of them. They  
21 have their contracts and they have \$6,000 to boot, and  
22 they don't have a dream of a claim, and those workers, on  
23 your theory, it seems to me, if the provision in the  
24 contract is void, are at the mercy of any lawyer working  
25 for an employer who would ask for the money back.

1 MS. BRINKMANN: Again, Your Honor, we don't  
2 believe so. It's an illegal contract that is not  
3 enforceable even at the common law --

4 QUESTION: If it's not enforceable, why -- it's  
5 the fourth time I've said the exact -- I must be not be  
6 saying it well. Suppose it's not enforceable. It's then  
7 void. There is no such provision. Each worker is there  
8 with \$4,000 that he got. Why can't the employer just sue  
9 him to get the \$4,000 back? He was unjustly enriched.

10 MS. BRINKMANN: Your Honor, may I answer?

11 QUESTION: Yes.

12 MS. BRINKMANN: At common law there could -- we  
13 don't want to preclude that there would never be an unjust  
14 enrichment situation. Perhaps it was some egregious  
15 unjust enrichment, but at common law those would have been  
16 exceptions to the principle that illegal contracts were  
17 against public policy and the parties were left as they  
18 were.

19 QUESTION: Thank you, Ms. Brinkmann.

20 MS. BRINKMANN: Thank you, Your Honor.

21 QUESTION: Mr. Phillips, we'll hear from you.

22 ORAL ARGUMENT OF CARTER G. PHILLIPS

23 ON BEHALF OF THE RESPONDENTS

24 MR. PHILLIPS: Thank you, Mr. Chief Justice, and  
25 may it please the Court:

1           It seems to me that the bulk of the discussion  
2   that's gone on today suggests as strongly as anything that  
3   I could propose to you why it is that we would do far  
4   better to leave the common law in place, providing us with  
5   a set of guideposts that can be applied on a regular basis  
6   and on a case-by-case basis, and recognize that section  
7   626(f) is a very pointed --

8           QUESTION: Mr. Phillips, let me just raise a  
9   question that -- you know somebody's got to ask you a  
10   question about this.

11          I agree with everything in your brief about the  
12   common law, the equities, the fairness, but the statute  
13   never says anything about void or voidable, but the  
14   statute does say, an individual may not waive this claim  
15   unless the waiver complies with the statute, and in this  
16   case the waiver did not comply with the statute.

17          If they do not come up with the money to pay you  
18   in advance, is it not true you claim you would have a  
19   defense to the suit which would be a waiver?

20          MR. PHILLIPS: If they do not pay it -- no. No,  
21   no. It's not the waiver argument. What we're saying is  
22   that they've forfeited their rights as a matter of common  
23   law by their failure to comply with an independent State  
24   law duty to tender back the consideration. It doesn't  
25   revive the waiver.



1 QUESTION: What is your defense to the suit? Is  
2 it not the document that she signed?

3 MR. PHILLIPS: No. The -- it's not. It is the  
4 failure to tender back, and the failure to pay the  
5 consideration.

6 QUESTION: Why should she have to -- what in the  
7 statute compels her to tender anything back?

8 MR. PHILLIPS: Nothing in the statute compels  
9 her to tender it back. It is a bedrock principle of the  
10 common law and contract law.

11 QUESTION: You say she has not -- you say  
12 there's just no waiver issue at all, then.

13 MR. PHILLIPS: I've lost the waiver issue, Your  
14 Honor. That's right. She is perfectly available to come  
15 forward into court and bring her claim.

16 We do not fear, and I don't think any of the  
17 employers in these cases fear having these age  
18 discrimination cases go forward if that's what they want  
19 to do, but what we are concerned about, and what the  
20 common law protects, is our right to say, look, you have  
21 to put the money in. That's the consideration you have to  
22 pay as a condition of coming in.

23 That is a wholly independent legal requirement  
24 that's been embedded in the common law for 200 years.

25 QUESTION: But if she had never signed a

1 contract she wouldn't have to do that. If she'd never  
2 signed the waiver she would not have to do that.

3 MR. PHILLIPS: If we had given her money in  
4 return --

5 QUESTION: Say she signed no document  
6 whatsoever, and you just said to her, we think you've been  
7 a wonderful employee, we don't think you're going to sue  
8 us, here's a lot of money. Would she have to give that  
9 back?

10 MR. PHILLIPS: Of course she'd have to give that  
11 back. The point is, is if you want to get --

12 QUESTION: To bring an ADEA suit? Why? If she  
13 never signed a release she wouldn't have to give anything  
14 back, would she?

15 MR. PHILLIPS: As I understand the State common  
16 law --

17 QUESTION: Would you -- I'm asking you, would  
18 you have a defense to this case if she had not signed a  
19 release?

20 MR. PHILLIPS: If she had not signed the  
21 release. No. Ultimately we --

22 QUESTION: So the heart of your defense is the  
23 fact she signed a document that she has not rescinded.

24 MR. PHILLIPS: No, but that's not -- no. No,  
25 Justice Stevens. The heart of my defense is that the

1 common law recognizes an independent obligation, apart  
2 from whether the release is waived or not waived, that you  
3 must as a condition of coming to court pay back moneys  
4 that have been paid to you as a part --

5 QUESTION: If you want to avoid a release.  
6 That's what -- the payback is in order to make something  
7 that is voidable -- keep it alive.

8 MR. PHILLIPS: You can construe it that way, but  
9 that's not the way the common law views it. Common law  
10 imposes it as an independent --

11 QUESTION: I agree with you on the common law  
12 entirely. My question is, how can you get around the  
13 statutory language that says she may not waive unless you  
14 comply with the statute, and you're saying she did waive?

15 MR. PHILLIPS: I will go back to the Court's  
16 opinion in United States v. Olano, which draws a clear  
17 distinction between waiver, which is the knowing and  
18 voluntary relinquishment of a known right and the  
19 implications of that, and it's a narrow concept, and a  
20 forfeiture of your rights which arises because you don't  
21 fulfill your independent common law duties, and that's  
22 what we have here, is an independent common law duty to  
23 put forward the consideration.

24 QUESTION: But that duty would not arise unless  
25 she'd signed a waiver.

1 MR. PHILLIPS: That --

2 QUESTION: Mr. Phillips, your argument does not

3 assume that the waiver is valid.

4 MR. PHILLIPS: No.

5 QUESTION: It just assumes that the waiver was

6 signed.

7 MR. PHILLIPS: Correct.

8 QUESTION: Isn't that quite different?

9 MR. PHILLIPS: Yes. You're right. You're

10 right.

11 QUESTION: It's essential to your case that she

12 signed a piece of paper. It is not essential to your case

13 that that waiver be valid.

14 MR. PHILLIPS: That's correct. Indeed --

15 QUESTION: But it --

16 MR. PHILLIPS: Indeed, we readily concede that

17 it's an invalid waiver. It's just not void.

18 QUESTION: It's essential to your case that she

19 signed the piece of paper, and that the piece of paper has

20 the effect that Justice Stevens has been positing in his

21 question. The signature is not a mere incidental fact of

22 history. It has an operative effect.

23 MR. PHILLIPS: I understand that, Justice --

24 Your Honor, but the bottom line here, the problem with

25 that is, is how far are you going to take statutory

1 language to do damage to the common law, and basically  
2 what this Court --

3 QUESTION: Or you might pose the question, how  
4 far are you going to allow a common law process in effect  
5 to thwart the statute, and if, in fact, we are correct in  
6 the intuitive assumption that has been suggested here,  
7 that in most of these cases in which this is going to be a  
8 serious question the worker is simply not going to be in a  
9 position to make the tender, then, in fact, on your theory  
10 the statute is a dead letter.

11 MR. PHILLIPS: Well, let's step back for a  
12 second, because that is -- there is no support anywhere,  
13 empirical, that I know of, that that's true.

14 I mean, the principle of tender-back has been  
15 available for 200 years. There's not a shred of evidence  
16 anywhere --

17 QUESTION: Yes, but the statute hasn't been. I  
18 mean, we're in this position because we've got a fairly  
19 unequivocal-looking statute, and the fact that the common  
20 law may have operated without the hindrance of statute for  
21 200 years leaves us, I think, exactly where Justice  
22 Stevens is.

23 MR. PHILLIPS: Well, no, but there have been  
24 principles by which one can void or declare unenforceable  
25 contracts for 200 years, and there has been a tender-back



1 requirement that applies to that.

2 QUESTION: But the tender-back --

3 QUESTION: Well, what was the common law,  
4 though, if it was void? Was it the situation that the  
5 parties might be left where the law found them at the time  
6 it was voided?

7 MR. PHILLIPS: Yes, that is my general  
8 understanding.

9 QUESTION: So there might not be a tender-back  
10 requirement.

11 MR. PHILLIPS: Right, if it -- if --

12 QUESTION: If it were totally void.

13 MR. PHILLIPS: That's correct, if it's totally  
14 void.

15 On the other hand, there is not a shred of  
16 evidence that Congress intended to declare these totally  
17 void, for the reasons I think Justice Breyer's argument  
18 describes --

19 QUESTION: But your argument depends upon our  
20 determining that the waiver is voidable.

21 MR. PHILLIPS: That's correct, Your Honor. If  
22 it's voidable --

23 QUESTION: And if, in fact, it's void, we're  
24 faced with something else.

25 MR. PHILLIPS: That's correct.

1 QUESTION: Why --

2 QUESTION: Again --

3 MR. PHILLIPS: I agree with that, because --

4 QUESTION: In response to Justice Stevens' point  
5 that I still think we'd better get straight, if we're the  
6 trial court, you don't say that the suit cannot proceed  
7 because the money was not paid back. You say the suit was  
8 not -- cannot proceed because (a) the money was not paid  
9 back, and (b) that allows you to plead the waiver.

10 MR. PHILLIPS: That's correct.

11 QUESTION: But the statute says the individual  
12 can't waive.

13 MR. PHILLIPS: But the point of the ultimate --  
14 the significance in terms of how the law operates, and  
15 it's true in Louisiana as it is in every other State, that  
16 is, if -- you know, the fundamental principle is, you pay  
17 back as a condition.

18 It is true that I -- they -- I have both  
19 components of it, but the part that precludes you from  
20 going forward and has precluded plaintiffs from going  
21 forward for 200 years is the failure to tender back the  
22 consideration.

23 QUESTION: Mr. Phillips --

24 QUESTION: But not under Federal statutes like  
25 the FELA.

1 MR. PHILLIPS: Well, the FELA is exactly on  
2 point in my favor on this, Your Honor, because there the  
3 language of section 55 says as plainly as possible any  
4 contract or device to limit the liability of an employer  
5 is void, and it says it in so many words.

6 QUESTION: But that's significant in this case  
7 for another reason. This waiver is void only insofar as  
8 it waives FE -- ADEA claims. It doesn't purport to make  
9 the entire document void. It just says it cannot operate  
10 as a waiver of this particular cause of action. So it's  
11 void pro tanto.

12 MR. PHILLIPS: Well, that goes back to Justice  
13 Scalia's question about severability.

14 QUESTION: Your point is that the FELA language  
15 about void does not find a counterpart in the ADEA.

16 MR. PHILLIPS: Exactly. Congress had a model it  
17 could follow in this context. It had not only a statute  
18 that describes the matter as void, it also had a decision  
19 of this Court that enforced that statute in a way that  
20 eliminated the tender-back requirement, and Congress  
21 didn't follow that model here.

22 QUESTION: But there's a very good reason. It  
23 did not want to create the specter that Justice Breyer's  
24 example creates of creating everything void. It just said  
25 it's void insofar as it affects this particular claim.

1 MR. PHILLIPS: But it doesn't --

2 QUESTION: It didn't say void.

3 MR. PHILLIPS: It doesn't say that either.

4 QUESTION: It says, it shall not operate as a  
5 waiver of this narrow claim.

6 MR. PHILLIPS: Right. It seems to me Congress  
7 knows how to --

8 QUESTION: But you can't give effect to that  
9 language, as I understand your position, and still say she  
10 has to tender back.

11 MR. PHILLIPS: But Your Honor, if the position  
12 of the common law would have set aside the contract for  
13 reasons of coercion or duress or fraud or any of those  
14 other reasons, it's still, under those circumstances, no  
15 more than voidable, and so it would seem --

16 QUESTION: We have an example, Mr. Phillips of  
17 State law -- of a State law that says may not waive, do  
18 you agree that that's -- the essence of this case is for  
19 us to construe what those words mean, may not waive, and I  
20 take that to be an instruction to the employer as well as  
21 to the employee, so may I ask you to respond to the  
22 question that I put to Ms. Haynie?

23 That is, one way to look at what Congress did,  
24 these words, may not waive, is to say, well, that's a  
25 condition, that whatever else this contract does, it can't

1 do that.

2 The employer doesn't have the power to put it  
3 in, the employee doesn't have the power to agree to it, so  
4 the contract -- the employer knowing that full well, by  
5 the way -- the contract then must be construed to waive  
6 the host of other claims that are waivable, and it's  
7 enforceable to the extent that it doesn't include the one  
8 thing that Congress says thou shalt not.

9 So it's perfectly good to waive title VII, to  
10 waive a slew of other claims. Why isn't that the most  
11 sensible reading of the may-not-waive language?

12 MR. PHILLIPS: Because the language has to be --  
13 I mean, you can look at may-not-waive on its own, but the  
14 truth is, it's a part of a provision that is designed to  
15 modify a very discrete element of the common law. It  
16 eliminates the requirement and the burden on the employee  
17 to come forward and prove fraud, duress, or the other  
18 conditions that would justify setting aside a release.

19 Congress said, we're not going to put employees  
20 to that burden. We are going to eliminate that  
21 obligation. We're going to lower the burden that  
22 otherwise would exist.

23 But beyond that, Congress didn't say, and in  
24 addition to that we mean to eliminate through the  
25 language, waiver, all other forfeitures of rights.



1       give you QUESTION: No, just may not waive this one  
2 claim. MR. PHILLIPS: That's what I thought the

3 QUESTION MR. PHILLIPS: But this one claim is --

4 QUESTION: And you think they can waive -- they  
5 can waive it? that.

6 MR. PHILLIPS: No, of course not. I'm not  
7 saying -- they're not waiving by failing to tender back.  
8 That's not a waiver. That is, as this Court said in *oid*  
9 *Olano*, a forfeiture, just as she's not waiving if she *ve*  
10 fails to satisfy a statute of limitations or other *that's*  
11 restrictions on the ability to go forward.

12 The fact that she doesn't do that doesn't  
13 trigger 626 as a set of conditions on that forfeiture,  
14 even though we might colloquially describe that as a *much*  
15 waiver. That's not what Congress meant in 626.

16 QUESTION: Mr. Phillips --

17 MR. PHILLIPS: The context is very narrow and *the*  
18 specific. *invited, was --*

19 QUESTION: Mr. Phillips, I am surprised at your  
20 concession that if this contract is void the employee can  
21 keep all the money that he received. You say that that's  
22 the common law rule? I know that contracts that are void  
23 for reasons of public policy -- *ld not interpret this*

24 MR. PHILLIPS: Right.

25 QUESTION: If I hire you to murder someone and

1 give you money, I can't get my money back, or --

2 MR. PHILLIPS: That's what I thought the  
3 question --

4 QUESTION: -- if I pay you to fix prices or  
5 something like that.

6 MR. PHILLIPS: Right.

7 QUESTION: But where a contract is void because  
8 the deal between the people is not -- for example, void  
9 for want of consideration. I give you money, and you've  
10 made an illusory promise in exchange. Can I get -- that's  
11 a void con --

12 MR. PHILLIPS: No --

13 QUESTION: Can I not get my money back?

14 MR. PHILLIPS: No, I was using void in the much  
15 more stringent term.

16 QUESTION: Well, I --

17 MS. PETERSEN: Which is the one I think that the  
18 question invited, was --

19 QUESTION: Well, let me put it to you squarely.  
20 Do you -- are you concerned about the things that Justice  
21 Breyer is concerned about?

22 MR. PHILLIPS: Of course. I think those are  
23 fundamental reasons why you would not interpret this  
24 language --

25 QUESTION: Then you can't say that a void

1 contract leaves everybody where they are. It depends on  
2 the basis for the voidness.

3 MR. PHILLIPS: No, you're absolutely right. All  
4 I was answering was that as a matter of the -- there are  
5 common law rules in which a particular finding of void  
6 leaves you without any ability --

7 QUESTION: Not every void --

8 MR. PHILLIPS: No, you're right.

9 QUESTION: And this is not one of those, so in  
10 this case I take it your position -- is it your position  
11 in this case that if this Court holds that the entire  
12 waiver is void, that any employer can sue to get the  
13 entire -- in effect can sue to rescind the contract?

14 MR. PHILLIPS: I would assume that that follows  
15 quite naturally.

16 QUESTION: All right. Now --

17 MR. PHILLIPS: And frankly I haven't heard word  
18 one from the other side to counter that.

19 QUESTION: My question is -- and I don't know  
20 the answer to this. I wish I'd thought of it before  
21 argument, but my question, then, is this.

22 If I can remember back to first-year contracts I  
23 thought rescission was an equitable remedy. Wouldn't the  
24 court, if I'm right, simply say to the employer, no, you  
25 can't get the entire consideration back because they

1     waived a lot of -- if this is true, you know, they waived  
2     other things besides the age claim, so I'll give you part  
3     of it back. I will come up -- in effect, I'm going to do  
4     an intellectual -- an equitable slice here. Is that  
5     possible?

6             MR. PHILLIPS: No, that -- no, and I don't know  
7     who taught you first-year contracts, but my  
8     understanding --

9             (Laughter.)

10            QUESTION: He was very good. The pupil wasn't,  
11     but the teacher was okay.

12            (Laughter.)

13            MR. PHILLIPS: But my understanding of first  
14     year contracts is that if you come forward you have to  
15     bring back the entire consideration, and that is clearly  
16     the law --

17            QUESTION: Wait -- wait. Can I just go right  
18     into that, because my professor was Jack Dawson, who was a  
19     fabulous first-year --

20            (Laughter.)

21            QUESTION: Any failing is one of my own memory.

22            But the -- my belief -- I thought of this, is,  
23     there is no contract. We don't have to rescind it.  
24     There's a contract, but the provision at issue is void --  
25     it's not there. Forget the word void.

1 MR. PHILLIPS: I would say voidable.  
2 QUESTION: It's invalid.  
3 MR. PHILLIPS: Invalid, un --  
4 QUESTION: It's gone. Pretend it isn't there.  
5 MR. PHILLIPS: Correct.  
6 QUESTION: At that point, we have a human being  
7 called a worker who has some money that the employer paid  
8 him, and I would have guessed, because I don't remember  
9 the course that well, that he is entitled, the employer,  
10 to get back the money to the extent that the employee has  
11 been unjustly enriched, and I would think that he has been  
12 unjustly enriched only to the extent that he received  
13 money for a promise not to sue which is invalid, i.e.,  
14 only in respect to the ADEA claim.  
15 MR. PHILLIPS: He --  
16 QUESTION: And therefore, what happens all the  
17 time in unjust enrichment, we have difficult questions to  
18 look into, and therefore he wouldn't get back \$6,000 here.  
19 He would get back a proportionate share.  
20 QUESTION: No.  
21 QUESTION: The employee would have to give --  
22 why not?  
23 MR. PHILLIPS: Well, I mean, that is a rule that  
24 could have been adopted, but it is not the rule that was  
25 adopted --



1 QUESTION: Where?

2 MR. PHILLIPS: -- and I think the reason is is  
3 because these are difficult --

4 QUESTION: Which rule wasn't adopted where?

5 MR. PHILLIPS: The tender-back requirement  
6 requires you to tender back the entirety of the  
7 consideration. If you --

8 QUESTION: Entirety of consideration for what?

9 MR. PHILLIPS: For the severance that you  
10 signed.

11 QUESTION: Well, but severance only if the --

12 QUESTION: But that's on the assumption that  
13 it's voidable, and the assumption of the question is that  
14 it's void.

15 MR. PHILLIPS: Well -- no, we didn't -- no,  
16 that's not true, Your Honor.

17 QUESTION: I'd --

18 MR. PHILLIPS: The assumption was that it is  
19 unenforceable.

20 QUESTION: All right, I'll take it -- I'll go to  
21 voidable, and --

22 MR. PHILLIPS: Right.

23 (Laughter.)

24 MR. PHILLIPS: So if I'm right about the  
25 assumption that it's voidable, and I think I was right

1 about that, then the common law rule -- because voidable's  
2 one that arises all the time. You get it in fraud and  
3 coercion, et cetera. It may apply to a part of the  
4 agreement, it may apply to all of the agreement.

5 The rule of tender-back, as I understand it, and  
6 again I may not have had the greatest first-year law  
7 professor, either, but as I understood the rule is, you  
8 have to tender back the entirety of the consideration.

9 QUESTION: The entirety of the consideration  
10 for?

11 MR. PHILLIPS: For the underlying dispute  
12 between the parties.

13 QUESTION: For that portion --

14 MR. PHILLIPS: No, I don't think it is.

15 QUESTION: In other words, if he was paid  
16 \$10 million as part of a golden parachute, and the  
17 entire -- and just in that golden parachute contract,  
18 which is 48 pages long, there's only one line talking  
19 about a promise not to sue, he has to give back the whole  
20 \$4 million, or \$10 million?

21 MR. PHILLIPS: It seems like an unjust result,  
22 but as I understand the basic hornbook rule -- I'm not  
23 saying there couldn't be exceptions that would exist, but  
24 if you're looking for the hornbook rule, and the rule as  
25 it exists in Louisiana, at least in cases that don't pose

1     that question, it's pretty consistently that you bring  
2     back the entirety of the consideration, and let's be --

3             QUESTION: Mr. Phillips, I used to teach first-  
4     year contract --

5             (Laughter.)

6             MR. PHILLIPS: I must say I'm happy I --

7             QUESTION: He was not my teacher.

8             (Laughter.)

9             QUESTION: And I don't know what the rule is  
10     generally about returning the whole thing or not, but I'm  
11     sure that where a contract contains several items, and the  
12     value all of those items depends upon future  
13     contingencies, you cannot await for -- wait for one of  
14     those contingencies to occur, such as the bringing of a  
15     lawsuit, the discovery of a claim, and then say, well, you  
16     take back all the rest. Give me -- you know, I'll give  
17     you back only the money I paid for the four horses that  
18     didn't win.

19             MR. PHILLIPS: That's correct.

20             QUESTION: And the one horse that did win, I  
21     only paid 20 percent of the whole thing for that ticket.  
22     I am sure that a court would not allow that. I'm not sure  
23     you have to go as far as the general rule you're pressing  
24     on the court.

25             MR. PHILLIPS: No, and I don't mean to press

1     that rule, and I ought to step back, because it seems to  
2     me what this tells us is you ought to look to the common  
3     law, and you ought to see how the States apply these  
4     principles rather than --

5             QUESTION: I'm interested in that. Now, what  
6     are you asking -- I'm not sure how much difference it  
7     makes in this case, but just as a matter of curiosity, I  
8     wasn't clear from your brief, are you asking us to look to  
9     the law of a particular State here?

10            MR. PHILLIPS: No, although that might be a  
11     suitable vehicle for deciding this case, but as it happens  
12     the law in Louisiana is exactly the Federal common law,  
13     law rule, and so it doesn't make any difference.

14            In terms of the basic principle, is there a  
15     tender-back rule --

16            QUESTION: It's nice to know what we're doing.  
17     I mean --

18            QUESTION: May I --

19            QUESTION: Well, you don't think that Congress  
20     was enacting this law in the back -- with the backdrop of  
21     State common law --

22            MR. PHILLIPS: Oh, absolutely.

23            QUESTION: -- to several questions --

24            MR. PHILLIPS: Absolutely.

25            QUESTION: -- that it didn't cover in the

1 statute?

2 MR. PHILLIPS: Absolutely it did, but the real  
3 question is, if you --

4 QUESTION: Well, do you think -- are we really  
5 dealing here with whether we should construct some  
6 principle of Federal law to fill in a gap?

7 MR. PHILLIPS: No.

8 QUESTION: Is that what we're talking about?

9 MR. PHILLIPS: No. What we do have is a Federal  
10 question to decide where you look to the law, and my  
11 instinctive reaction is that you ought to look to the  
12 principles of State law and borrow those principles.

13 In this particular case, however, it makes no  
14 difference, because Louisiana, like the law of every  
15 other -- all 50 States, and if there were a Federal common  
16 law rule what would be the Federal common law rule --

17 QUESTION: May I ask --

18 QUESTION: And you say that under the Federal  
19 common law -- we have two cases. Case one, there's a  
20 release that says ADEA release, but it doesn't comply with  
21 the statute.

22 MR. PHILLIPS: Right.

23 QUESTION: The other case is a case like this in  
24 which, let us say, there might have been some substantial  
25 State law claims that were released as well as the ADEA



1 claim. It also is void.

2 You say the two cases are exactly the same.

3 MR. PHILLIPS: Yes. I think they should --  
4 well, they're not the same in -- with respect to being  
5 able to waive the rights, sure. That -- the statute takes  
6 care of that.

7 But with respect to the obligation to come  
8 forward and satisfy the tender-back obligation as an  
9 independent, legal obligation that the State common law  
10 and, frankly, Federal common law applies, yes, those are  
11 exactly the same.

12 QUESTION: Mr. Phillips, can I ask you another  
13 question? I also took contracts in law school by the way.

14 (Laughter.)

15 QUESTION: Supposing one reads the statute  
16 noting that it doesn't use the word void or voidable,  
17 they're simply saying that when you have a release which  
18 purports to release 19 different claims, and if one of  
19 those claims is an ADEA claim the release shall not be  
20 enforceable insofar as it purports to release that claim,  
21 because that would be a waiver -- they don't even talk  
22 about void or voidable -- why wouldn't that be a  
23 reasonable reading of this statute?

24 MR. PHILLIPS: Well, that doesn't answer the  
25 question, though. I mean, it's a perfectly reasonable

1 answer.

2 QUESTION: What question doesn't it answer?

3 MR. PHILLIPS: It doesn't answer the question  
4 whether you have an obligation to tender back as a  
5 precondition --

6 QUESTION: It says it shall not be enforceable,  
7 period, regardless of whether you're able or willing or  
8 not to tender back. Doesn't -- isn't it perfectly clear  
9 what the mean -- and isn't that a fair reading of the  
10 plain language of this statute?

11 MR. PHILLIPS: No, because that gives a meaning  
12 to the word waiver that is much broader than that term is  
13 entitled to carry.

14 QUESTION: The meaning is, it shall not be  
15 enforceable as to that narrow claim.

16 MR. PHILLIPS: That's correct.

17 QUESTION: Yes.

18 MR. PHILLIPS: But it doesn't mean --

19 QUESTION: And that's much broader than the  
20 statutory language that says you may not waive that claim.

21 MR. PHILLIPS: But all that says is -- and  
22 again, I think it's inappropriate to read that just as,  
23 may not waive. I think you have to read it against the  
24 backdrop of all of those conditions that are imposed,  
25 because all of the conditions that are imposed in

1 determining whether a waiver is voluntary and knowing are  
2 all conditions that would go to the question of coercion,  
3 duress, and all of the other --

4 QUESTION: Which, they put the employer on  
5 notice that if they want this to cut off the ADEA claim  
6 they must comply with these provisions, which your client  
7 didn't comply with.

8 MR. PHILLIPS: That's correct.

9 QUESTION: Therefore, you have a perfectly valid  
10 document as to everything except the ADEA claim.

11 MR. PHILLIPS: Right.

12 QUESTION: So I don't understand why that  
13 doesn't fit the plain language of the statute.

14 MR. PHILLIPS: Because what fits the plain  
15 language, Justice Stevens, is, in the ordinary case she  
16 has an age discrimination claim. She's not happy with the  
17 release she signed. She's got \$6,000. It is her  
18 obligation, in order to get into court in the first  
19 instance, to show fraud, coercion, duress, or some other  
20 justification for setting aside the agreement.

21 Congress stepped in -- and this is an important  
22 right. It seems to be lost sight of in this context.  
23 Congress stepped in and modified that directly, saying,  
24 first of all, you don't have to satisfy any of those  
25 requirements that ordinarily entitle a contract to be

1     respected. We're going to drop the barrier significantly,  
2     and second, we're going to impose upon the employer an  
3     ongoing obligation to prove that this was knowing and  
4     voluntary, a burden of proof that otherwise doesn't exist.

5             By doing that -- and if we don't satisfy those  
6     requirements, she is free to go into court against those  
7     common law doctrines that would clearly prevent her from  
8     going into court, and that's what Congress had in mind.

9             QUESTION: It's the last part that's not in the  
10    statute, that you're bringing in against those common law  
11    doctrines. You've just acknowledged that this modified  
12    the common law by saying you don't have those thresholds,  
13    you have a statutory threshold --

14            MS. PETERSEN: But I --

15            QUESTION: -- which your client did not comply  
16    with.

17            MR. PHILLIPS: But -- and I understand that, but  
18    then I go back to the Court's opinion in United States v.  
19    Texas, where it says, when Congress sits down and tries to  
20    modify the common law, we do not presume that Congress  
21    means to undo any broader than Congress states expressly  
22    in the language of the statute itself.

23            Therefore, it's perfectly sensible to me under  
24    United States v. Texas to say 626(f) would get her into  
25    court if there are no other legal impediments to going

1     into court, but it doesn't go that extra step and offer  
2     her an opportunity to avoid a forfeiture, a forfeiture of  
3     her right that arises as an independent common law  
4     doctrine.

5             QUESTION: But if the common law in a State were  
6     not the unreasonable position that a may-not-waive  
7     provision leaves both sides powerless, so the contract is  
8     construed, as Justice Stevens suggested, to cover  
9     everything else that could be covered to dispose of  
10    anything the parties could dispose of, but just as though  
11    it weren't there, the thing that they can't dispose of, so  
12    the common law, let's, say, in New York or New Jersey was  
13    not as you described it to be in Louisiana, could we then  
14    say that for these kinds of claims the Age Discrimination  
15    Act is going to mean one thing in one State, another thing  
16    in another State, or that there will be the Federal common  
17    law so that you'd have the same rule in all the States?

18            MR. PHILLIPS: I think the farthest you can go  
19    with Federal common law is to deal with precisely how you  
20    analyze the precise waiver, because that comes from the  
21    statute, and if you have interstices within the  
22    application of 626(f), it seems to me those you would  
23    clearly fill in by reference to --

24            QUESTION: Well now, in Hogue, which you say  
25    doesn't directly apply here because in FELA Congress said



1 it's going to be void, but nonetheless at the end of the  
2 day in Hogue the Court said we're going to require an  
3 offset at the end of the day. If the plaintiff recovers  
4 something under the FELA claim we'll offset whatever the  
5 employer already had paid.

6 Now, what about such a provision? I guess the  
7 Court was crafting some principle of Federal law there.

8 MR. PHILLIPS: Well, it seemed clearly to be  
9 crafting a principle of Federal law, and I'm not sure the  
10 approach the Court followed there would necessarily be the  
11 course they would follow here.

12 QUESTION: Maybe it should do that here --

13 MR. PHILLIPS: No.

14 QUESTION: -- and does that partially meet your  
15 concern?

16 MR. PHILLIPS: Well, obviously, as between  
17 having an opportunity to get some money back at the end of  
18 the day or not, undoubtedly my client would prefer that  
19 alternative, but the truth is, what we seek to have  
20 vindicated here is the common law rule, recognized in all  
21 50 States and as a matter of Federal common law, that you  
22 must come forward with the consideration at the outset of  
23 the litigation. That --

24 QUESTION: Mr. Phillips, to come back to Justice  
25 Ginsburg's question, what if there were different rules in

1 Louisiana and New York, would a suit in New York come out  
2 differently?

3 MR. PHILLIPS: If we're talking --

4 QUESTION: If New York did not --

5 MR. PHILLIPS: If we're talking about no tender  
6 back requirement?

7 QUESTION: No -- well, a proportionate tender-  
8 back. We'll guess at some proportion.

9 MR. PHILLIPS: Yeah, my instincts are to say  
10 there ought to be different rules in those cases, that  
11 Congress --

12 QUESTION: For different States.

13 MR. PHILLIPS: Yes, because Congress would have  
14 looked to the State --

15 QUESTION: What if New York had only adopted  
16 that rule for this statute, for an ADEA case, could it --  
17 could New York say, in ADEA cases, given the nature of  
18 this statute and what-not, we're going to adopt that rule,  
19 although in all other cases in New York we won't do it?

20 MR. PHILLIPS: I mean, they -- well -- can they  
21 adopt that rule, that question is yes. Would that be  
22 preempted, the answer to that is probably no.

23 The question is, would a Federal court be  
24 obliged to borrow that kind of a direct intrusion into the  
25 manipulation, or whether it would feel more comfortable

1 saying that interferes with a Federal policy in a way that  
2 would require us to set it aside.

3 That seems to me a tough question to answer in  
4 the abstract, but those are the legal principles that I  
5 think would apply --

6 QUESTION: I think maybe we'd get into a lot of  
7 difficult questions if we say this is governed by State-  
8 by-State law. I --

9 MR. PHILLIPS: Well, but that's true in lots of  
10 Federal statutes, Your Honor, and at least with respect to  
11 626 and the important elements of protection of Federal  
12 law that are embodied in there, I'm not saying you look to  
13 State-by-State law there. It seems to me clear the  
14 interstices of that provision, because it's designed to  
15 oust common law, you have to come in with Federal rules to  
16 do that.

17 QUESTION: Could this --

18 MR. PHILLIPS: But when you get out of that  
19 mold, then it seems to me you almost certainly in general  
20 look to State law, because that really will tell you the  
21 answer for most day-to-day primary activities --

22 QUESTION: Mr Phillips --

23 MR. PHILLIPS: -- and that's my personal  
24 preference.

25 QUESTION: Could we solve the problem this way,

1 by saying that the tender-back requirement can be looked  
2 at as essentially a remedial condition.

3 We're not going to give a remedy when the person  
4 keeps 100 percent of what, in fact, he is claiming  
5 inoperative, and therefore we're going to leave the  
6 question of what has to be, in effect, tendered and  
7 ultimately paid back to the remedy stage.

8 At the remedy stage, the Federal court does have  
9 fairly broad powers to craft a remedy without any  
10 violation of Erie, and therefore solve both the problem of  
11 state variation and the tender-back problem by saying it's  
12 going to be a remedial issue here. What's wrong with  
13 that?

14 MR. PHILLIPS: What's wrong with that is, that's  
15 not the scheme Congress adopted.

16 QUESTION: Well, it's also, what if the  
17 plaintiff loses the suit?

18 MR. PHILLIPS: That's the other side of it. You  
19 may never get anything back.

20 But the bottom line is that the tender-back rule  
21 is not a remedial rule. It is a rule that serves the ends  
22 of justice and fairness, but it does so substantively. It  
23 is a fundamental principle of contract law, it creates an  
24 independently recognized right, it is enforceable  
25 independently, and it is that right which she forfeited

1 and which justifies the dismissal of her claim, and why  
2 the judgment of the Fifth Circuit should be affirmed.

3 If there are no other questions I'll yield back  
4 my time.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
6 Phillips.

7 The case is submitted.

8 (Whereupon, at 11:02 a.m., the case in the  
9 above-entitled matter was submitted.)

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## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

DOLORES M. OUBRE, Petitioner v. ENTERGY OPERATIONS, INC.  
CASE NO: 96-1291

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Donna Marie Fedirko-----

(REPORTER)