

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 14 PENN PLAZA LLC, ET AL., :

4 Petitioners :

5 v. : No. 07-581

6 STEVEN PYETT, ET AL. :

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8 Washington, D.C.

9 Monday, December 1, 2008

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 11:00 a.m.

14 APPEARANCES:

15 PAUL SALVATORE, ESQ., New York, N.Y.; on behalf of the

16 Petitioners.

17 DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of

18 the Respondents.

19 CURTIS E. GANNON, ESQ., Assistant to the Solicitor

20 General, Department of Justice, Washington, D.C.; on

21 behalf of the United States, as amicus curiae,

22 supporting the Respondents.

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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 9(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, the 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 SOUTER: 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
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 1 second -- are -- are, as
7 this Court has recognized, a little more complicated to
8 understand than -- than average contracts. You have to
9 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 MR. SALVATORE: A blanket ban --

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

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

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

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

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

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

25 The question is posed in generality, but we

1 are not going to decide the general question in total
2 ignorance of this case. And in this case, we've got the
3 particular collective bargaining agreement in front of
4 us, and you started to answer the question that -- that
5 I and Justice Ginsburg posed by referring to the "no
6 discrimination" clause.

7 MR. SALVATORE: Yes, Your Honor.

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

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

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

24 JUSTICE SCALIA: What does that mean? Does
25 that mean that they must go to arbitration even if the

1 union decides that, you know, this claim is -- is so
2 insignificant we don't want to take it to arbitration?

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

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

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

20 And that seems to lend some substance to the
21 -- to the point made by the other side that if we accept
22 your position here, we are accepting a position not
23 nearly -- that the designation -- a procedural
24 designation of a forum should be enforced but that, in
25 fact, total control over the assertion of a statutory

1 Federal right is also being ceded. Now, why doesn't
2 that language from section 46 support that?

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

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

14 JUSTICE SOUTER: Well, but it says "all such
15 claims." "Such claims" refers among other things to the
16 statutory right.

17 MR. SALVATORE: That's correct.

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

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

1 reading --

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

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

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

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

24 JUSTICE SCALIA: Mr. Salvatore, I -- I
25 didn't think we took this case to -- to determine the

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

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

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

14 MR. SALVATORE: Absolutely, Justice Scalia.

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

17 MR. SALVATORE: Absolutely.

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

21 MR. SALVATORE: It is, Justice Scalia. It's
22 cited in our briefing. There is a long footnote listing
23 the cases.

24 But -- but you're right, the -- the issue
25 here really is, can the union agree to this? And that

1 goes to Congress's giving the union the power under
2 section 9(a) of the National Labor Relations Act to be
3 the exclusive bargaining representative --

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

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

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

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

25 MR. SALVATORE: Well, Justice Breyer, the

1 ADEA provides not only a right to go to court after
2 you've gotten your right-to-sue letter or waited 60
3 days, but -- but it also provides multiple -- as this
4 Court recognized in Gilmer, multiple avenues that
5 Congress wants to use: Conciliation, persuasion,
6 conference --

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

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

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

25 JUSTICE GINSBURG: But the union could not

1 bargain about these anti discrimination rights. These
2 are rights given to individuals by Congress. The union
3 couldn't bargain about them the way it bargains about
4 collective rights, the way it bargains about wages and
5 hours and -- and other things. This is -- this is not a
6 bargainable right. This is a right -- Congress says you
7 as an individual have a right not to be discriminated
8 against. There's nothing that the union can bargain
9 about.

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

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

1 of the labor laws are served and the policies of the
2 ADEA and the antidiscrimination statutes are not
3 disserved in any way.

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

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

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

24 JUSTICE SCALIA: He has got an arbitration
25 instead of a lawsuit.

1 JUSTICE KENNEDY: If you would -- if you
2 would answer the question. The employer hasn't gotten
3 very --

4 (Laughter.)

5 JUSTICE KENNEDY: -- very much for the
6 bargain.

7 MR. SALVATORE: Justice Kennedy, the
8 employer has gotten arbitration and --

9 JUSTICE KENNEDY: In the hard cases.

10 MR. SALVATORE: Well, in --

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

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

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

23 MR. SALVATORE: Well, I think that the one
24 --

25 JUSTICE KENNEDY: And again, maybe that's --

1 that's a reason for us not to reach it in this case.

2 MR. SALVATORE: Well, one of the issues
3 that -- that Congress allows the bargaining parties to
4 figure out is what the scope of their collective
5 bargaining arrangement should be. That's one of the
6 hallmarks of the NLRA. So, yes, some collective
7 bargaining parties may make that choice, Justice
8 Kennedy; others may make a different choice.

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

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

22 Unions are deemed trustworthy enough to
23 bring lawsuits in the Federal courts on behalf of their
24 members. Under principles of associational standing,
25 associational standing, the members are bound by

1 their -- their union's actions. The EEOC --

2 JUSTICE GINSBURG: And nonmembers, too?

3 What about the people who -- who are not members of the
4 union, but they have to pay an equivalent amount for the
5 union's services in collective bargaining? They would
6 be bound as well? They couldn't --

7 MR. SALVATORE: Absolutely, Justice
8 Ginsburg. The -- the -- the -- and this type of service
9 is one of the core functions that an agency payer would
10 have to pay for. The LM-2 that 32B, the local, filed
11 here on behalf of 80,000 employees has two agency fee
12 payers out of 80,000. So it's not really an issue in
13 this case.

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

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

22 I -- I grasp your answer to that. But you
23 said that the employee would have the absolute right if
24 the union says, "sorry, for whatever reason we can't
25 represent you," absolute right to that arbitral forum.

1 What -- who pays then?

2 I mean, if the union is in it, then the
3 union and the employer are going to split -- split the
4 cost. But what happens when the union drops out and you
5 have the individual and the employer in this arbitral
6 forum?

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

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

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

1 MR. SALVATORE: Yes -- yes, Your Honor,
2 Justice Stevens. Gardner-Denver is -- is a case, as
3 this Court has described, that -- that didn't involve
4 the enforceability of an agreement to arbitrate. The
5 Gardner-Denver line of cases, McDonald and Barrentine
6 and Gardner-Denver, had the quite different issue as
7 this Court said in Gilmer, of whether a contract-based
8 claim precludes subsequent judicial resolution of a
9 statutory claim; and so that distinguishes the rule.
10 But factually these cases are very different as -- as
11 well.

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

24 And -- and we agree that arbitration that --
25 that resolves just a collective bargaining agreement

1 claim should not be dispositive of a statutory claim.
2 They're fish and fowl. So that Gardner-Denver is
3 correctly decided. Gardner-Denver puts out the rule for
4 -- for that situation. This is a different situation
5 that we are talking about.

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

14 JUSTICE STEVENS: But not a judicial -- not
15 a judicial forum.

16 MR. SALVATORE: An arbitral forum, Your
17 Honor.

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

25 MR. SALVATORE: That's -- that's correct.

1 That's the union counsel's affidavit. He was saying he
2 doesn't -- the union doesn't want to pick up the costs,
3 Justice Ginsburg, but the collective bargaining
4 agreement says there is two payers in the Office of the
5 Contract Arbitrator, the RAB and the union. If the
6 union is not paying, then the RAB has to pay.

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

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Mr. Frederick.

11 ORAL ARGUMENT OF DAVID C. FREDERICK

12 ON BEHALF OF THE RESPONDENTS

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

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

23 With respect to the first point, a
24 collective bargaining agreement generally gives the
25 union exclusive control over whether to bring grievances

1 on behalf of workers and how such grievances are
2 pursued. In such circumstances, which is this case, the
3 worker does not evince the requisite agreement to
4 arbitrate and control over the arbitral forum to satisfy
5 this Court's standards in *Gilmer* for effectively
6 vindicating the worker's statutory antidiscrimination
7 rights.

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

16 MR. FREDERICK: Justice Alito, I've looked
17 comprehensively through the cases. We've never found a
18 collective bargaining agreement that gives the kind of
19 interpretation that Mr. Salvatore offered in this case.
20 Now, is it theoretically possible that a collective
21 bargaining agreement would confer on individuals the
22 rights this Court said in *Gilmer* are necessary to
23 effectively vindicate that? I would acknowledge it's
24 theoretically possible, but it has to be done within the
25 confines of whether there is actual consent by the

1 individual to the arbitration, whether the individual
2 has control over the mechanisms of arbitration, and
3 whether or not the structure of the arbitral forum
4 effectively vindicates the individual's substantive
5 rights.

6 JUSTICE ALITO: But there is nothing in
7 Federal labor law that would preclude the negotiation of
8 a collective bargaining agreement like that?

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

19 JUSTICE SOUTER: But, even in a case in
20 which you don't have -- let's assume -- just assume for
21 the sake of argument that we don't have the
22 discrimination issue or the conflict issue. I
23 understood you elsewhere to be arguing that there had to
24 be the kind of knowing, intelligent, and individual
25 waiver, which I would suppose a collective bargaining

1 agreement will never include. So I thought it was
2 the -- ultimately the implication of your argument that
3 in any -- in any case in which arbitration is claimed,
4 there would have to be -- or a right to go to
5 arbitration is claimed by the employer -- there would
6 have to be, not merely the collective bargaining
7 agreement, but a specific waiver by the employee to --
8 to go ahead and do that. Is that correct?

9 MR. FREDERICK: That -- that's correct.

10 JUSTICE SOUTER: Okay.

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

20 JUSTICE SOUTER: Right.

21 JUSTICE ALITO: Would that mean --

22 JUSTICE SOUTER: Go ahead.

23 JUSTICE ALITO: Would that mean that the
24 employer could not unilaterally impose an arbitration
25 requirement on employees?

1 MR. FREDERICK: I think that would follow,
2 as that be -- would be a condition of employment that
3 could not be imposed. The Air Line --

4 CHIEF JUSTICE ROBERTS: It wouldn't be
5 unilaterally imposing, right? You would say if you're
6 going to work for me, you've got to arbitrate, and that
7 could be negotiated, theoretically, with individual
8 employee. And -- I mean, the whole point, the whole
9 benefit of collective bargaining is that that doesn't
10 happen. You say, well, the employer has a lot of
11 leverage if he wants to insist upon that, but it would
12 not -- it would be a matter for negotiation between the
13 individual and the company.

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

23 JUSTICE SOUTER: But the one thing that's
24 uniform throughout in your answer is that the collective
25 bargaining agreement alone can never subject the

1 employee to -- to mandatory arbitration?

2 MR. FREDERICK: That's -- that's how we read
3 this Court's cases --

4 JUSTICE BREYER: And it's also true -- is
5 that also true with an ordinary tort suit or any other
6 kind of suit?

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

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

14 MR. FREDERICK: Well, I think that those
15 category of cases do stand in a different position
16 because there is less of an inherent conflict of
17 interest. The union there --

18 JUSTICE BREYER: Why?

19 MR. FREDERICK: Well, the union is not going
20 to be the defendant typically in a tort case where the
21 employer is responsible.

22 JUSTICE BREYER: Doesn't this allow
23 discrimination -- doesn't this refer to discrimination
24 by the employer?

25 MR. FREDERICK: It refers to discrimination,

1 and, as we cite on page 27 of our brief, there are
2 provisions in the antidiscrimination laws that are
3 specifically directed at union discrimination. The
4 legislative history of these statutes indicates that
5 discrimination by unions was one of the concerns
6 animating Congress --

7 JUSTICE BREYER: Now, you say section 30 --
8 it doesn't say anything about union discrimination
9 particularly; it just talks about discrimination.

10 MR. FREDERICK: Yes. In fact --

11 JUSTICE BREYER: Fine. So you're saying
12 sometimes unions do discriminate?

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

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

24 So if I decide for you in this case, am I
25 also saying that they can't arbitrate ordinary tort

1 suits or contract suits or just whether or not the
2 workplace which is made of wood is filled with termites?
3 I mean, you know?

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

7 JUSTICE BREYER: Is that the only reason?
8 Because, in other words, if I think I see no more reason
9 why a union today, whatever was true 40 years ago --
10 that I see no more reason today why a union would like
11 discrimination than I can see a reason why they would
12 like a dangerous machine.

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

14 JUSTICE BREYER: If I think that, then I
15 should decide against you?

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

19 I'm not aware of tort suits being subjects
20 of collective bargaining, Justice Breyer. Nor am I
21 aware of cases in which the unions have given up
22 individuals' tort claims in situations, principally
23 because unions are not the persons against whom such
24 tort suits are brought.

25 JUSTICE SOUTER: Well, but those -- I'm

1 sorry.

2 Those examples are examples. You're getting
3 down to individual cases. I thought you drew the global
4 line in answer -- which would answer Justice Breyer's
5 question by saying the -- in the cases that we're
6 talking about here, Congress has passed a statute giving
7 a specific individual right and that individual right
8 cannot in effect be compromised except in -- except in
9 violation of that statute, and that's where we draw the
10 global line. So that when you got to torts, you'd look
11 at the individual situation rather than draw a
12 categorical line.

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

20 JUSTICE SOUTER: I agree with you, but I
21 think -- I don't want to put words in Justice Breyer's
22 mouth --

23 JUSTICE BREYER: Very helpful of you.

24 JUSTICE SOUTER: But I thought what he was
25 getting at is, if I hold for you here, am I going to

1 have to hold for you in every case in which somebody has
2 in effect a tort claim which is subject to an
3 arbitration clause?

4 MR. FREDERICK: And the answer is no. I
5 thought --

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

18 MR. FREDERICK: Well, Justice Breyer, I
19 think that your question really is getting at the theory
20 behind collective bargaining agreements and what extent
21 the union can exercise control over the individual
22 rights and circumstances of employment. That question
23 is a very complex question over which many, many --

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

1 (Laughter.)

2 MR. FREDERICK: I -- well, I think that
3 there are limits, of course, on the union's authority
4 that have been recognized in this Court's decisions, and
5 I don't think that ruling in the workers' favor in this
6 circumstance opens up any kind of Pandora's box at all,
7 because all we are arguing for is that the
8 Gardner-Denver line, which was written by this Court
9 unanimously more 30 years ago, continue to be the law of
10 the land, as the Court has reaffirmed it in cases like
11 --

12 JUSTICE ALITO: What if a collective
13 bargaining agreement requires the arbitration of
14 discrimination claims that are not based on Federal law?
15 Maybe they are based on -- they are based on State law
16 that goes further than Federal law, or maybe they are
17 based on a type of discrimination that's prohibited by
18 neither Federal nor State law. Maybe it's
19 discrimination against young people under 40. Could
20 those be -- those would still be discrimination claims
21 with the same potential for -- with a potential for a
22 conflict of interest. Could they be subjected to
23 mandatory arbitration?

24 MR. FREDERICK: I -- I think that is a
25 harder case, Justice Alito, but I think that the answer

1 under this Court's decisions in Gardner-Denver points
2 the way here, in footnote 19 of the decision. Where the
3 union controls that process and where the union is a
4 potential defendant in that circumstance, the workers'
5 individual rights cannot be subordinated --

6 JUSTICE GINSBURG: What about --

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

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

21 MR. FREDERICK: Yes, and I think that there
22 have been conditions of employment and discharge that
23 have been arbitrable, and I don't see that there is a --
24 an issue there where -- except where that intersection
25 with the statutory discrimination rights occurs. And

1 Congress has made a different policy judgment with
2 respect to individual waivers of such rights in having
3 those --

4 JUSTICE SCALIA: Why has it? Why has it? I
5 mean, let's assume that my gripe with my employer is
6 that he hasn't paid me my salary for the last two
7 months. Now, you can't take away my right to that
8 unless I voluntarily waived it. What is sacrosanct
9 about the fact that my grievance here has some
10 discrimination attached to it?

11 Your briefing talks as though it is
12 something totally apart from a mere economic right.
13 Ninety-nine percent of the time, you're talking about
14 economics. "I was fired because of discrimination." "I
15 wasn't promoted because of discrimination, and therefore
16 I lost this -- this amount of money or that amount of
17 money."

18 Why is it unthinkable that the -- that the
19 employee would have to go through the union-prescribed
20 arbitration for the fact that he wasn't paid for the
21 last three months but does not have to do it for an
22 economic injury that occurs because of discrimination?

23 MR. FREDERICK: Well, I'm not sure actually
24 in answering your hypothetical that they would
25 necessarily have to go through the union on the

1 nonpayment because of the Fair Labor Standards Act case.
2 This Court in Barrentine said that, where an FLSA claim
3 is at issue, the worker does not -- is not confined or
4 precluded after arbitrating at the union grievance
5 process from bringing an FLSA suit in court.

6 So I want to reserve, accepting all of your
7 hypothetical, Justice Scalia, but in further answer to
8 the point, I think it's important to keep in mind that
9 in the discrimination context, you're talking about more
10 than just money. Here my clients are older workers who
11 are forced into more physically strenuous positions that
12 they had gotten away from by virtue of their growth in
13 seniority at the building.

14 CHIEF JUSTICE ROBERTS: Well, isn't that
15 kind of conflict always present whenever you have
16 collective action? I mean, you may be a particularly
17 good worker and could demand a higher wage than the
18 union has negotiated, but you're still bound by the
19 collective bargaining agreement. That happens in every
20 situation where you have collective action.

21 MR. FREDERICK: Certainly, Mr. Chief
22 Justice, but where Congress has made a choice that
23 individual claims for antidiscrimination rights need to
24 be vindicated in particular ways, and where this Court's
25 --

1 CHIEF JUSTICE ROBERTS: Well, they don't
2 have to be vindicated in particular ways. The
3 individuals can agree to arbitrate these claims, and
4 they would be -- the arbitration would be binding.

5 MR. FREDERICK: Certainly, but there is
6 individual consent in that circumstance. I would like
7 to make a couple of other points before closing.
8 One is that on pages 4 to 5 in the brief in opposition
9 to cert we specifically raise the issue that the union
10 controls the arbitration, and there is no opportunity
11 for individual arbitration under this collective
12 bargaining agreement.

13 There is nothing in the provision set out in
14 the petition appendix that gives individual rights the
15 -- individuals the right to arbitrate under this
16 collective bargaining agreement. The payment provision
17 calls for 50 percent by the employer and 50 percent by
18 the employee with the employer having the sole right to
19 terminate the arbitrator for any or no reason at all.

20 JUSTICE SCALIA: You did raise that issue,
21 but you didn't say that the consequence of that issue
22 was that you win. You said the consequence of the fact
23 that that issue was involved in this case was a good
24 reason not to -- for us to accept cert. And we didn't
25 take your advice on that.

1 MR. FREDERICK: Well --

2 JUSTICE SCALIA: But it's a totally
3 different issue whether because of that question you --
4 you should -- you should win the case.

5 MR. FREDERICK: Certainly, the
6 interpretation of the collective bargaining agreement is
7 fairly included within the question presented. And as
8 this Court found in Wright in a situation where it
9 granted certiorari on the very same question here but
10 then looked at the specific provisions of the collective
11 bargaining agreement to determine that, in fact, under
12 the facts there a different rule applied for a clear and
13 unambiguous waiver.

14 All we are saying here is that under this
15 provision there is no opportunity for the individual to
16 arbitrate, and that raises a -- a problem analogous to
17 the one that is in Wright. We think that is fairly
18 included within the question presented and that the
19 Court can affirm on that basis. Certainly where the
20 Second Circuit had relied on precedent that said that
21 where the individual doesn't have a right, that it is
22 union control of arbitration, that is consistent with
23 Gardner-Denver.

24 JUSTICE SCALIA: It doesn't have to be
25 within the question presented. You -- you can sustain

1 the judgment below on any ground.

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

3 JUSTICE SCALIA: The only question is
4 whether we will -- we will agree that we should inquire
5 into new ground. That's all.

6 MR. FREDERICK: My only point is that this
7 is one of those fuzzy areas where we are not making an
8 independent, alternate ground of affirmance. I think
9 our argument is fairly included within the question
10 presented and can be affirmed on the basis of that
11 argument.

12 If the Court has no further questions --

13 JUSTICE GINSBURG: What about the argument
14 that you are -- if you win this case, you are subjecting
15 the employee to a worse situation because the employer
16 will simply say: Fine, I don't have to bargain anything
17 with the union. If you want to work in this workplace,
18 you sign an arbitration agreement that says you have no
19 access to the court, and you have to -- just like in
20 Gilmer, just like in Circuit City.

21 MR. FREDERICK: Well, Justice Ginsburg, I
22 guess I'd answer that question by saying, we will pay
23 our money and take our chances in the sense that the
24 unions here are supporting the workers where the unions
25 are acknowledging that there is this kind of conflict of

1 interest. And the question of whether or not imposing
2 arbitration on individual workers would be a condition
3 of employment, that is a question that you can safely
4 leave for another day.

5 CHIEF JUSTICE ROBERTS: Well, they may go
6 the other way. They may say: Look, we don't like to
7 arbitrate. In fact, the arbitration is a great benefit
8 to workers because it's very expensive to bring these
9 claims, even with the prospect of recovering fees.

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

14 MR. FREDERICK: Mr. Chief Justice, in fact,
15 empirically that's not correct. There is a study that
16 is cited in a footnote in one of the amicus briefs that
17 arbitration is more expensive than bringing civil
18 litigation. And it's because the -- under -- under
19 their provision if you pay 50 percent of the
20 arbitrator's costs, you can run up quite a big tab that
21 you would not have to pay --

22 CHIEF JUSTICE ROBERTS: But under my
23 scenario, the employer wouldn't have to pay for
24 arbitration. There would be -- there would be no
25 arbitration at all.

1 MR. FREDERICK: Well, under your scenario, I
2 think where the employer would control the arbitral
3 process, the arbitrator knows who is buttering his
4 bread.

5 CHIEF JUSTICE ROBERTS: No. There is no
6 arbitration. The employer says: Look, I don't think I
7 discriminate. I've got a good record. I'm not going to
8 agree to arbitrate claims. I'm going to make people go
9 to court because there will be fewer claims brought.

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

13 If the marketplace is going to help weed out
14 those claims, that's certainly the province of lawyers
15 taking these cases and clients deciding whether or not
16 to take it to litigation.

17 CHIEF JUSTICE ROBERTS: No, I mean, my point
18 is that there are benefits to employees from arbitration
19 as well.

20 MR. FREDERICK: Certainly --

21 CHIEF JUSTICE ROBERTS: But the employer may
22 not agree to it. If he doesn't have any protection, if
23 it doesn't buy him anything, if employees can still go
24 to court, what's the -- what's the point?

25 MR. FREDERICK: But that's why this Court

1 has always said that individual consent and agreement is
2 a fundamental precept of arbitration, and where that
3 agreement is absent, a worker should not be forced to
4 that route. Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Frederick.

7 Mr. Gannon.

8 ORAL ARGUMENT OF CURTIS E. GANNON

9 ON BEHALF OF THE UNITED STATES,

10 AS AMICUS CURIAE,

11 SUPPORTING THE RESPONDENTS

12 MR. GANNON: Mr. Chief Justice, and may it
13 please the Court:

14 Respondents' fundamental right to a
15 workplace free of invidious, class-based discrimination
16 is something their union had no power to barter away in
17 collective bargaining, and the union --

18 JUSTICE BREYER: I -- I just want to be sure
19 that at some point you'd answer this question, if you
20 can: I -- I -- the issue in front of us, as I see it,
21 is just what you said: When can a union require the
22 worker to accept arbitration rather than a court case in
23 an instance where the union member has not signed a
24 special waiver? That's the question, right? Okay.

25 And what I think some of us were struggling

1 for here is: If we say yes to you they can force them,
2 or no to you they can't, what's the principle?

3 Now, the easiest kind of case where you tend
4 to think they can force the worker into arbitration is
5 where the right grows out of the collective bargaining
6 agreement, period.

7 Then we have what we were talking about with
8 Justice Souter, a common law tort claim. Then we might
9 have a State law giving a claim. Then we might have a
10 Federal law like this one giving a claim.

11 And we just heard, as soon as Justice Scalia
12 thought of such a case, then the response was, which was
13 the FLSA: Oh, well, maybe we can't, you know, force the
14 worker to give that one up either.

15 So what is the line here that we are drawing
16 with this case? Is it a line that says discrimination
17 laws, Federal, are special? Federal laws are special?
18 State laws are special? Common law is special?
19 Collective bargaining, too? What is the principle?

20 MR. GANNON: Yes, Justice Breyer. This
21 Court's cases have not yet described a specific line,
22 and --

23 JUSTICE BREYER: That's why I am asking you
24 for the principle.

25 (Laughter.)

1 MR. GANNON: I think that the -- the best
2 line that we have is -- is stated in both Gardner-Denver
3 and Barrentine as contrasting statutory rights that are
4 related to collective activity, and especially economic
5 activity, are the kinds of things that are normally
6 delegated to the union. Those are the sorts of things
7 that the union can actually engage in collective
8 bargaining about. And when the union negotiates the
9 underlying right, then it makes perfect sense that the
10 labor arbitration framework that's set forth here would
11 continue to resolve disputes that are arising under --
12 out of that specific right.

13 JUSTICE SCALIA: Why -- why doesn't this
14 come within that?

15 MR. GANNON: Because --

16 JUSTICE SCALIA: Why don't many of these
17 cases, if not most of them, come within that? The union
18 negotiates the salaries for various levels, and then the
19 person says: I should be at this level. The only
20 reason I didn't get it was that I was discriminated
21 against.

22 MR. GANNON: Well, I -- I think, Justice
23 Scalia --

24 JUSTICE SCALIA: You -- you call it a
25 non-economic -- phooey, it's an economic case.

1 MR. GANNON: But I think what's important,
2 Justice Scalia, is -- is, though -- is the line that the
3 Court stated in Barrentine: That if a statute is
4 designed to give specific, minimum protections to
5 individual workers, then that's the sort of thing that
6 the union doesn't have the power to engage in collective
7 bargaining over.

8 And so your salary may well be something
9 that the union can normally bargain about. But if you
10 want to assert that the -- that the employer or the
11 union -- because both are the types -- the types of
12 entities that can be charged with discrimination under
13 title VII or the ADA or these other statutes -- the
14 reason that they gave you a lower salary was on the
15 basis of something for which you had a Federal statutory
16 protection, then -- then you have an independent
17 statutory right that the union's majoritarian
18 decisionmaking processes should not be in the process of
19 controlling.

20 JUSTICE SCALIA: It is not taking away the
21 right. The -- the union is not taking away the right.
22 It's just saying to vindicate it, you have to go through
23 arbitration instead of to the courts.

24 MR. GANNON: Yes. And the difference is
25 that the union is making the decision about where the

1 claim will be vindicated. And in this case in
2 particular, the union is going to control whether the
3 claim will actually be able to be officially vindicated.

4 CHIEF JUSTICE ROBERTS: You -- you focus on
5 the fact that Congress has given an individual right,
6 but for the many matters that you say are the subject of
7 collective bargaining, you don't need a statute. I
8 don't need a statute to negotiate with someone whether I
9 get paid \$20 an hour or \$15 an hour for a particular
10 job. And, yet, that is something that you give up when
11 you join the union, and you are subject to collective
12 bargaining.

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

14 CHIEF JUSTICE ROBERTS: Well, why isn't it
15 -- why isn't it the same with these statutory rights?
16 Why aren't they subject to collective bargaining as
17 well?

18 MR. GANNON: Well, I -- even the employer
19 here is not claiming that the underlying statutory right
20 is subject to collective bargaining. They are just
21 saying --

22 CHIEF JUSTICE ROBERTS: No. No. I am --
23 the forum -- the forum for asserting the right.

24 MR. GANNON: Well, in this instance Congress
25 gave individual employees the right to bring a civil

1 action in a judicial forum as a means of enforcing their
2 antidiscrimination claims. And although arbitration may
3 always provide an alternative forum to that, this Court
4 has repeatedly made clear that arbitration is always a
5 matter of contract. And it does not impose on the
6 employer any more than on the employee a requirement
7 that they arbitrate a claim when they --

8 CHIEF JUSTICE ROBERTS: Why would any
9 employer want to agree to arbitration under this system?
10 He gets nothing from it. You said you get to -- to
11 arbitrate except when you don't arbitrate.

12 MR. GANNON: Well, with -- Mr. Chief
13 Justice, I don't think that that's true. Since 1974,
14 this has been the law of the land, and it is been even
15 after Gilmer in every circuit except the Fourth Circuit.

16 CHIEF JUSTICE ROBERTS: That just begs the
17 question that your interpretation of Gardner-Denver is
18 correct.

19 MR. GANNON: Well, it -- it is the
20 prevailing interpretation in every circuit that has
21 considered the question since Gilmer except the Fourth
22 Circuit. And if you look at the empirical data that's
23 mentioned in some of amicus briefs, including in
24 particular the amicus brief of the National Academy of
25 Arbitrators, it is true that even when there is just a

1 labor arbitration machinery that was invalid under the
2 terms of Gardner-Denver and would not be binding on the
3 employee if the employee happens to lose in that
4 arbitration, in most of those cases when the employee
5 loses that arbitration, he does not go on to file an
6 independent case --

7 CHIEF JUSTICE ROBERTS: Your position -- so
8 your position is going to hurt most employees, because
9 assuming that the employer wants to arbitrate, the union
10 gets something in return for agreeing to that. I don't
11 know what it is, another 50 cents an hour, if you agree
12 to arbitrate all these claims. Well, you don't get that
13 anymore, because an employer is not going to agree to
14 arbitrate if it -- if the employees don't have to
15 arbitrate.

16 MR. GANNON: Well, we don't think that there
17 is any reason why the employees will not be able to make
18 agreements with the employers, as was made possible in
19 Gilmer. And so that the point is that it just can't be
20 a vicarious agreement to arbitration on behalf of the --

21 CHIEF JUSTICE ROBERTS: Well, the employees
22 have no -- no leverage. I mean, if the -- if the
23 employer wants to say, look, if you want to work here,
24 you've got to arbitrate -- I mean, the employees don't
25 have bargaining leverage. That's the whole reason you

1 have a union.

2 MR. GANNON: Well, I mean, there was an
3 argument in Gilmer that they didn't have leverage,
4 either. And the Court stressed that as long as the
5 employee has actually agreed to it, that -- and -- and
6 as long as the arbitral forum is going to be adequate to
7 provide for effective vindication of the underlying
8 statutory rights, then -- then the arbitral forum would
9 be adequate --

10 JUSTICE KENNEDY: Suppose the employer did
11 have the practice that the Chief Justice suggested, it
12 tells each employee you have to sign an arbitration
13 form, could the union in its collective bargaining
14 negotiations say that you will withdraw this form and
15 that you shall not impose this obligation?

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

20 JUSTICE KENNEDY: I'm asking your view. If
21 a case came up to it, how would that be decided --

22 MR. GANNON: Well --

23 JUSTICE KENNEDY: Because I'm concerned it's
24 the same thing the Chief Justice mentioned. I just
25 don't think the employer is going to get very much under

1 this interpretation. And that may, ultimately, hurt the
2 employee.

3 MR. GANNON: We think that as long as the
4 employees have been -- have been able to indicate
5 exactly the same level of individual agreement that was
6 upheld in Gilmer and that the arbitral forum itself is
7 going to be adequate, that that takes care of that half
8 of the question.

9 The National Labor Relations Board, which
10 has -- which would be entitled to deference on this
11 question and which has never spoken to the labor law
12 question of what role the unions might be able to play
13 in helping facilitate the agreements negotiated between
14 the employers and the individual employees, it could
15 come out in at least three different ways.

16 One of them is the arrangement outlined in
17 the ALPA D.C. Circuit decision that -- that Petitioners
18 rely upon. But, of course, that's an instance where
19 there were two completely separate agreements. The
20 employment arbitration was agreed to by the employees
21 before they are even represented by the union. It was
22 at the outset of the establishment of the employment
23 relationship, which Mr. Frederick discusses.

24 JUSTICE SOUTER: But doesn't it boil down --
25 doesn't your argument really boil down to this: That

1 the only case in which it's really going to matter is
2 the case in which the arbitration agreement contains a
3 clause that gives the union plenary authority over the
4 disposition of the claim? And I say that for this
5 reason. If -- if this is outside the subject of
6 mandatory bargaining, then the employer can impose it;
7 in effect, as a matter of individual contract.

8 If it's within the subject of mandatory
9 bargaining but it's not effective unless the employee
10 also signs at the time of the incident or at the time he
11 is hired an individual waiver, then, in fact, the only
12 case in which it's going to make any difference as to
13 whether you win or he wins is the case in which the
14 agreement has got a clause in there that gives the union
15 plenary authority to dispose of the claim.

16 Isn't that correct?

17 MR. GANNON: Well, not necessarily, Justice
18 Souter, because there are all sorts of other attributes
19 of the arbitral forum that might -- might well be
20 relevant to the question of whether it's sufficient to
21 effectively vindicate the underlying substantive rights.
22 In *Gilmer* itself, the Court specifically considered
23 whether the employee, Mr. Gilmer, would have an
24 opportunity to play a role in selecting the arbitrator.

25 In this instance, even under Petitioner's

1 view of the CBA, which we don't think is supported by
2 the text of the CBA, this -- these employees are still
3 stuck with an arbitrator who has been chosen by the
4 employer and by the union. And those are the two
5 entities that have already decided that their claim is
6 meritless.

7 JUSTICE ALITO: You're just using more
8 variables to Justice Souter's question. If those
9 variables are satisfied, what's -- what is your answer
10 to his question?

11 MR. GANNON: If the variables are --

12 JUSTICE ALITO: You're saying that this
13 might be -- this might not be true and that may not be
14 true, but suppose all of those other requirements are
15 satisfied?

16 MR. GANNON: We think that there needs to be
17 individual agreement in order to comply with Gilmer
18 because of the underlying inherent tension between the
19 collective interests of the union and the individual
20 interests of the employees, especially in
21 antidiscrimination statutes.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Salvatore, you have four minutes
24 remaining.

25 REBUTTAL ARGUMENT OF PAUL SALVATORE

1 ON BEHALF OF THE PETITIONERS

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

4 JUSTICE GINSBURG: Mr. Salvatore, would you
5 straighten out this business it seems about who pays?
6 Mr. Frederick said that 50 percent would have to be paid
7 by the employee. If the union bows out and there is
8 just the employer and the employee in the arbitration,
9 that the employee would have to pick up 50 percent. I
10 think I understood him to say that.

11 MR. SALVATORE: And I refer you, Justice
12 Ginsburg, to page 47a of the joint -- of the petition
13 appendix, which contains the mainframe arbitration
14 Article VI of this collective bargaining agreement, the
15 last paragraph --

16 JUSTICE GINSBURG: What page did you -- did
17 you reference?

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

20 JUSTICE SCALIA: Article VII, no? Article
21 VII?

22 MR. SALVATORE: I'm sorry?

23 JUSTICE SCALIA: You said Article VI. Isn't
24 it Article VII, if it's on 47a?

25 MR. SALVATORE: Article VI starts on 43a.

1 It goes all the way over to 47a of the petition
2 appendix, right before the ellipses at the bottom of the
3 page.

4 JUSTICE SCALIA: Oh, I see. Okay.

5 MR. SALVATORE: Again, VI.

6 JUSTICE SCALIA: I got you.

7 MR. SALVATORE: The costs of the Office of
8 the Contract Arbitrator shall be shared equally in a
9 manner determined by the union and the RAB. The way
10 that the parties -- the bargaining parties have
11 determined that these costs be shared is that if -- if
12 the union is not involved in a case, the employer pays.
13 And -- and so, that's -- I mean, that's right from the
14 --

15 JUSTICE SCALIA: Where does that appear?

16 JUSTICE SOUTER: Is that written down
17 somewhere?

18 JUSTICE SCALIA: Where does that appear?

19 MR. SALVATORE: That's -- that's the -- the
20 agreement between the collective bargaining parties.
21 It's not -- it's not written down beyond that -- that --
22 that place. The office -- that place in the contract.
23 The Office of the Contract Arbitrator is -- is -- is a
24 place. It's an arbitration forum. It's like going to
25 the American Arbitration Association.

1 It has hearing rooms. It -- it -- there --
2 it has administrators who assign the arbitrators. The
3 arbitrators aren't picked out of -- you know, by one
4 side or the other. Yes, they are put on the panel by --
5 by the bargaining parties, but they are picked by a case
6 administrator.

7 There are 700 arbitrations that go on in
8 this industry every year, and that's why instead of
9 going to the American Arbitration Association, these
10 parties a long time ago set up their own. A couple --

11 JUSTICE GINSBURG: If the -- if the idea is
12 that the union cedes its right to the worker, then
13 doesn't it have to -- doesn't the burden go with the
14 right as well? I mean, the -- if the union would pay,
15 you're saying that the employer will just accept that
16 the employer picks up the entire tab?

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

24 JUSTICE SOUTER: Well, they didn't turn it
25 over, did they, until the action had been brought in the

1 Federal court? I mean, they didn't -- maybe I'm wrong
2 in this, but I didn't think that on day one they -- they
3 said, oh, well, because the union doesn't want to
4 proceed with this, you're welcome to chug ahead by
5 yourself.

6 MR. SALVATORE: Let me explain that time
7 frame, Justice Souter. What happened here was the claim
8 was originally tendered by these employees to the union
9 to bring an arbitration. The union decided after the
10 first hearing day with the arbitrator that they couldn't
11 go forward for whatever reasons -- it's not in the
12 record -- and then they -- several months went by, these
13 employees filed with their counsel at the EEOC under
14 Waffle House, we did nothing and waited and the --
15 representing the employers, and then the -- the lawsuit
16 was filed.

17 At that point the record is clear that
18 demand was made on -- on the employee's counsel,
19 Mr. Kreisberg -- it's in his affidavit -- that -- that
20 he return to Arbitrator Pfeiffer to the pending
21 arbitration and continue in that forum, and he refused
22 to. That was the basis of the motion to compel.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.
24 The case is submitted.

25 MR. SALVATORE: Thank you.

1 (Whereupon, at 12:01 p.m., the case in the
2 above-entitled matter was submitted.)

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