IN THE SUPREME COURT OF THE UNITED STATES

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14 PENN PLAZA LLC, ET AL. :

Petitioners :

v. : No. 07-581

STEVEN PYETT, ET AL. :

- x

Washington, D.C.

Monday, December 1, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 a.m.

APPEARANCES:

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

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

CURTIS E. GANNON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:00 a.m.)

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

Mr. Salvatore.

ORAL ARGUMENT OF PAUL SALVATORE

ON BEHALF OF THE PETITIONERS

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

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

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

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

national labor policy.

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

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

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

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

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

JUSTICE GINSBURG: But here it wasn't.

JUSTICE KENNEDY: Yes. What -- what --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. SALVATORE: It does not, Your Honor.

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

MR. SALVATORE: Absolutely, Justice Scalia.

JUSTICE SCALIA: And the issue is whether --

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

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

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

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

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

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

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

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

MR. SALVATORE: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

that language from section 46 support that?

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

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

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

MR. SALVATORE: That's correct.

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

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

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

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

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

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

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

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

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

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

MR. SALVATORE: Absolutely, Justice Scalia.

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

MR. SALVATORE: Absolutely.

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

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

bargaining representative --

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

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

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

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

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

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

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

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

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

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

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

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

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

disserved in any way.

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

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

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

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

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

very --

(Laughter.)

JUSTICE KENNEDY: -- very much for the bargain.

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

JUSTICE KENNEDY: In the hard cases.

MR. SALVATORE: Well, in --

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

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

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

MR. SALVATORE: Well, I think that --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. SALVATORE: An arbitral forum, Your Honor.

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Frederick.

ORAL ARGUMENT OF DAVID C. FREDERICK

ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

the individual's substantive rights.

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

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

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

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

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

JUSTICE SOUTER: Right.

JUSTICE ALITO: Would that mean --

JUSTICE SOUTER: Go ahead.

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

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

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

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

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

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

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

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

MR. FREDERICK: Sorry. With an ordinary --
JUSTICE BREYER: A tort suit. It says, some -- the union -- the same thing here, but we are not concerned with discrimination; we are concerned with workplace safety. Somebody is hurt as a result of machine improperly functioning, or there isn't adequate notice or so forth. Is your view the same there?
MR. FREDERICK: Well, I think that those category of cases do stand in a different position because there is less of an inherent conflict of interest. The union there --
JUSTICE BREYER: Why?
MR. FREDERICK: Well, the union is not going to be the Defendant typically in a tort case where the employer is responsible.
JUSTICE BREYER: Doesn't this allow discrimination -- doesn't this refer to discrimination by the employer?
MR. FREDERICK: It refers to discrimination, and as we cite on page 27 of our brief, there are provisions in the anti-discrimination laws that are specifically directed at union discrimination. The legislative history of these statutes indicates that discrimination by unions was one of the concerns animating Congress --

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

MR. FREDERICK: Yes. In fact --

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

MR. FREDERICK: And that's why --

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: Very helpful of you.

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

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

JUSTICE BREYER: Then I replicate my

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

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

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

(Laughter.)

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

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

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

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

JUSTICE GINSBURG: What about --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. FREDERICK: Well --

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

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

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

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

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

MR. FREDERICK: Well, I think that --

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

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

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

If the court has no further questions --

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

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

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

claims, even with the prospect of recovering fees.

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

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

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

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

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

to court because there will be fewer claims brought.

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

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

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

MR. FREDERICK: Certainly --

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Frederick.

Mr. Gannon.

ORAL ARGUMENT OF CURTIS E. GANNON

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GANNON: Because --

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

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

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

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

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

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

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

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

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

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

MR. GANNON: Absolutely, Mr. Chief Justice.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GANNON: Well --

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

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

The National Labor Relations Board which

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

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

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

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

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

Isn't that correct?

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

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

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

MR. GANNON: If the variables are --

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Salvatore, you have four minutes remaining.

REBUTTAL ARGUMENT OF PAUL SALVATORE

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

JUSTICE SCALIA: Article 7, no.

MR. SALVATORE: I'm sorry?

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

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

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

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

--

JUSTICE SCALIA: Where does that appear?

JUSTICE SOUTER: Is that written down somewhere?

JUSTICE SCALIA: Where does that appear?

MR. SALVATORE: That's -- that's the -- the agreement between the collective bargaining parties. It's not -- it's not written down beyond that -- that -- that place. The office -- that place in the contract. The office of the contract arbitrator is -- is -- is a place. It's an arbitration forum. It's like going to the American Arbitration Association.

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

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

JUSTICE GINSBURG: If the -- if the idea is that the union sees this right to the worker, then doesn't have to -- doesn't the burden go with the right

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

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

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

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

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

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

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

MR. SALVATORE: Thank you.

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