1   IN THE SUPREME COURT OF THE UNITED STATES

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3   UNITE HERE LOCAL 355,   :

4   Petitioner   :   No. 12-99

5   v.   :

6   MARTIN MULHALL, ET AL.   :

7   - - - - - - - - - - - - - - - - - x

8   Washington, D.C.

9   Wednesday, November 13, 2013

10

11   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 10:03 a.m.

14   APPEARANCES:

15   RICHARD G. McCRACKEN, ESQ., San Francisco, California;

16   on behalf of Petitioner.

17   MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,

18   Department of Justice, Washington, D.C.; for United

19   States, as amicus curiae, supporting Petitioner.

20   WILLIAM L. MESSENGER, ESQ., Springfield, Virginia; on

21   behalf of Respondents.

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1   C O N T E N T S

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

2   (10:03 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument first in Case 12-99. Unite Here Local 355 v.

5   Mulhall.

6   Mr. McCracken?

7   ORAL ARGUMENT OF RICHARD G. McCRACKEN

8   ON BEHALF OF THE PETITIONER

9   MR. McCRACKEN: Mr. Chief Justice, and may

10   it please the Court:

11   Many employers and unions find agreements

12   such as this useful to avoid conflict during organizing

13   campaigns. They are efficient. They avoid the hard

14   feelings that come in many contested organizing

15   campaigns and thereby create a good environment for

16   collective bargaining. They serve the core objectives

17   of the Labor Management Relations Act, those being

18   freedom of contracts, organizing employees for

19   collective bargaining, and labor peace.

20   JUSTICE KENNEDY: I -- I think there's

21   substantial force to that argument. But can we talk

22   just about property for a minute, just in the

23   abstract? Isn't it true that what you have might become

24   property when you trade it? If you take a picture of a

25   celebrity on a street, that-- that's your right to do so. But

1   you can't sell it. Maybe that's not quite the -- the

2   right analogy. But here, what, as-- as you point out, is

3   fairly standard in labor relations, has been turned into

4   property, arguably, by the parties.

5   Could-- Could the parties say that we'll pay you --

6   the employer say we'll pay you $100,000 to get out of

7   the recognition agreement? That would be property in an

8   economist sense. Now, it might be a violation of the

9   Labor Act.

10   MR. McCRACKEN: Yeah. That example would

11   definitely be a violation of Section 302. If the

12   employer gave the union $100,000 to not organize, that

13   would be exactly like the Ventimiglia case from 1957

14   from the Fourth Circuit.

15   JUSTICE KENNEDY: But in the abstract,

16   wouldn't that be property?

17   MR. McCRACKEN: They -- money is property.

18   We don't dispute that at all.

19   JUSTICE KENNEDY: And isn't the thing that's

20   exchanged for the money also property?

21   MR. McCRACKEN: The -- this statute focuses

22   on what is paid, lent or delivered by the employer to --

23   JUSTICE KENNEDY: I'm just talking about

24   common definition, a common agreement as to what

25   property means.

1   MR. McCRACKEN: In this case, the all -- the

2   only thing given by the union was a promise not to

3   strike, picket or boycott this business, to help supply

4   labor if the employer needed it, not to coerce or

5   threaten employees in the course of the organizing

6   effort and to -- and to arbitrate in the event that

7   there was any dispute.

8   CHIEF JUSTICE ROBERTS: And the list -- the

9   list of -- the list of employees.

10   MR. McCRACKEN: Yes. That's what the

11   employer promised to give to the union. And I was

12   describing the things the union gave in response --

13   CHIEF JUSTICE ROBERTS: Oh, I see.

14   MR. McCRACKEN: Because it was a mutual

15   agreement.

16   JUSTICE SCALIA: What -- what about support

17   of the legislation to-- to permit slot machines? Was that a

18   promise that the union made?

19   MR. McCRACKEN: It is so alleged and there's

20   no question that the union did tell the employer and the

21   other employers that it would work to pass the

22   legislation necessary for these employers to get into

23   business in the first place. Thereby serving their

24   interest and also the union's interest in having an

25   industry and workers in the industry to represent.

1   JUSTICE SCALIA: But as the case comes to

2   us, we assume that there was such a commitment by the

3   union.

4   MR. McCRACKEN: Yes, Your Honor.

5   JUSTICE SCALIA: Okay.

6   JUSTICE KENNEDY: So suppose the company

7   manufactures widgets and the union says, we'll spend

8   $100,000 advertising your widgets if you so -- if you

9   sign the recognition agreement.

10   MR. McCRACKEN: Yes. I think --

11   JUSTICE KENNEDY: Is that lawful?

12   MR. McCRACKEN: It would be lawful because

13   the union would not have received any widgets. It would

14   not have received any kind of property from the

15   employer. It would simply have promised to help the

16   employer in business, something that happens a great

17   deal in labor relations.

18   JUSTICE SCALIA: Well, there would have been

19   a quid pro quo for that, certainly. I mean, the union

20   wouldn't promise that for nothing. It would get

21   something in exchange such as, as in this case, the

22   right to go on the employer's property to -- to recruit

23   union members or -- or some other thing of value from

24   the employer, right?

25   MR. McCRACKEN: Unquestionably. And this,

1   as I say, happens a lot with --

2   JUSTICE SOTOMAYOR: So why isn't that the

3   property that Justice Kennedy referred to? They -- the

4   union paid $100,000 to get the items that the employer

5   gave them. So aren't they valued, something tangible,

6   valued for what the union paid for it?

7   MR. McCRACKEN: They are desired by the

8   union. That does not make them things of value that are

9   paid, lent and delivered by employers of the--

10   JUSTICE SOTOMAYOR: But why? Well, the --

11   the argument that Justice Scalia and Kennedy are

12   referring to it, is that the employer paid with the

13   employee list, the access to the facility, the promises

14   not to strike to get the 100,000.

15   MR. McCRACKEN: And --

16   JUSTICE SOTOMAYOR: I think that is the

17   essence of -- because the union paying money is not a

18   violation of the Act.

19   MR. McCRACKEN: The -- there's no

20   prohibition against the union paying money to an

21   employer.

22   JUSTICE SOTOMAYOR: Right.

23   MR. McCRACKEN: It's only the other way

24   around. And in this case, the union spent $100,000 of

25   time of its staff knocking on doors exercising its

1 speech and petition rights in order to get this

2 legislation passed so that the employer could get into

3 business.

4   JUSTICE SCALIA: Mr. McCracken, the

5 Respondent's brief here asserts that these kinds of

6 precertification agreements have only been common since

7 the -- the '90s. Is-- is that accurate to you?

8   MR. McCRACKEN: It is not, Justice Scalia.

9 There -- there's an article from the Cornell Industrial

10 Labor Relations Department by Eaton and Chriskey showing

11 that these agreements go back to the 1970s. Also in the

12 Sixth Circuit's -- the Dana Corporation case, you'll see

13 that there's an explanation that the neutrality

14 agreement between Dana and the UAW was first signed in

15 1976. So these go back quite a bit further.

16   Also, they really go back in a rudimentary

17 way much further than that to the Lion Dry Goods case,

18 which was a -- an agreement with a non-incumbent union

19 and department store employers in Cleveland that

20 provided, among other things, for access.

21   CHIEF JUSTICE ROBERTS: Sometimes there's a

22 conflict between two different groups that want to

23 unionize the same workforce, right?

24   MR. McCRACKEN: Yes.

25   CHIEF JUSTICE ROBERTS: How would this work

1   in that case? Let's say the employer gave -- entered in

2   an agreement like this with one union that wanted to

3   organize the same workforce but not the other.

4   MR. McCRACKEN: The NLRB has dealt with that

5   quite a few times and takes the position and has

6   required employers to give equal rights to both unions.

7   CHIEF JUSTICE ROBERTS: Doesn't that suggest

8   it's a thing of value in -- in this context?

9   MR. McCRACKEN: It's certainly not a thing

10   of value in the sense of marketability, because the one

11   union could not sell it to the second union because the

12   other union could get it free from the employer because

13   the employer must give equal rights to all comers.

14   JUSTICE KAGAN: In the typical case, how

15   important is an agreement like this to the union? How

16   much does it increase the likelihood that the union will

17   be selected as the exclusive bargaining representative?

18   MR. McCRACKEN: The same article that I

19   mentioned, Justice Kagan, shows that the differential is

20   between about -- about 67 percent success rate in NLRB

21   elections and about a 76 percent success rate under

22   these agreements.

23   CHIEF JUSTICE ROBERTS: Are the

24   agreements -- are the agreements uniform or do they have

25   varying elements?

1   MR. McCRACKEN: There are some things that

2   are quite standard.

3   CHIEF JUSTICE ROBERTS: Is -- is the card

4   check provision standard?

5   MR. McCRACKEN: It is found in most

6   agreements, neutrality somewhat less so, but still in

7   the vast majority of them.

8   JUSTICE KENNEDY: I don't -- I think this is

9   slightly different from Justice Kagan's question, can you give

10   us some indication of how often employers make these

11   agreements? That's probably a hard statistic to -- to

12   collect because there are so many variables.

13   MR. McCRACKEN: Yes. But I can -- I can

14   tell you from my experience, if I may, that these

15   agreements are prevalent in the hospitality industry

16   both in hotels and casinos, and that all of the major

17   hotel companies have entered into these and the major

18   casino companies as well.

19   JUSTICE KAGAN: Why is that?

20   JUSTICE GINSBURG: Mr. McCracken, could

21   you -- could you tell -- tell us about this particular

22   contract, because as far as I can fathom from what we

23   have it expired at least a year ago and there was --

24   there was no recognition, there was no election; is that

25   right?

1   MR. McCRACKEN: Yes, that's correct.

2   JUSTICE GINSBURG: So, are we dealing with a

3   live case considering that the -- the agreement has

4   expired?

5   MR. McCRACKEN: Justice Ginsburg, the

6   complaint in this case prays for two different forms of

7   relief. One is that the provisions of this agreement

8   not be honored. But the second is that the union never

9   demand or request or receive any of these things, that

10   is neutrality, names and addresses, or access,

11   regardless of an agreement.

12   JUSTICE GINSBURG: So what would be -- what

13   would be the relief?

14   MR. McCRACKEN: The relief -- if the-- if this case

15   went forward and was found meritorious, the relief would

16   be an injunction against the union from ever asking an

17   employer for -- this employer for neutrality or for the

18   names and addresses of employees or for any form of

19   access to the premises and not --

20   JUSTICE GINSBURG: Because -- is it on the

21   theory that it did it once, so it might do it again? Is

22   that --

23   MR. McCRACKEN: The -- I believe that the

24   theory that the plaintiff has here is that an employer

25   may never give these things, whether it's in an

1 agreement or not in an agreement, that even if -- pardon

2 me.

3   JUSTICE ALITO: Would Mr. Mulhall have to

4 face an imminent threat in order for him to have

5 standing?

6   MR. McCRACKEN: He would, Your Honor.

7   JUSTICE ALITO: And why is the threat

8 imminent at this time?

9   MR. McCRACKEN: I'm sorry?

10   JUSTICE ALITO: Why is the threat imminent

11 at this time?

12   MR. McCRACKEN: Your Honor, we -- we

13 advocated during an earlier phase of this case that

14 there was no standing.

15   JUSTICE ALITO: What-- What is your position now?

16   MR. McCRACKEN: We -- we still do not

17 believe that he has standing, because there is no

18 imminent harm here. The harm that he -- he alleges is

19 that he will be ultimately forced into a collective

20 bargaining situation that he doesn't want. However,

21 that could only occur if the union succeeded in

22 convincing a majority of his co-employees that they

23 should unionize and the employer gave recognition and

24 the collective bargaining agreement was negotiated.

25 Only -- only after -- so -- so imminence is -- is very

1 distant here.

2   JUSTICE KAGAN: Did you also raise in an

3 earlier stage an argument that he had no private right

4 of action?

5   MR. McCRACKEN: We did not.

6   JUSTICE KAGAN: That has never been

7 litigated?

8   MR. McCRACKEN: It hasn't -- it has been

9 litigated. It's been -- it's a-- a point that's been raised

10 and rejected by all the courts to consider it, largely

11 because of the Court's -- this Court's statement in

12 Atkinson versus Sinclair Refining. Now, it was dictum,

13 but it has -- it's something that has been accepted by

14 all of the courts.

15   JUSTICE GINSBURG: But not in this -- not in

16 this case. It wasn't raised in this case.

17   MR. McCRACKEN: It was not raised in this

18 case. Instead, standing was raised.

19   JUSTICE GINSBURG: And Sinclair is of a

20 certain age before this Court looked more carefully at

21 the implication of private rights of action.

22   MR. McCRACKEN: That's true, Justice

23 Ginsburg. But the Court in the DeMasse case in 1993

24 involving whether trust funds could be administered by

25 the judiciary, essentially, under Section 302(e) assumed

1   the existence of a private right of action. And the

2   Court decided that it was -- it was not proper for the

3   courts to -- to get past the point of the formation of

4   the trust and engage in trust fund administration, but

5   it was assumed that the plaintiff had a right to sue.

6   JUSTICE ALITO: Why wouldn't the right to

7   use private property in a way that otherwise wouldn't be

8   allowed constitute a thing of value? Suppose the --

9   what the employer gave the union was a lease well --

10   well below market rate on property for use as the -- as

11   a union office. Would that qualify as a thing of value?

12   MR. McCRACKEN: It would qualify both as a

13   thing of value and one that is paid, lent, or delivered

14   by the employer to the union.

15   JUSTICE ALITO: So what's the difference

16   here? There's a -- there's the use of -- there's the

17   conveyance of a certain property right. Why doesn't

18   that constitute a thing of value?

19   MR. McCRACKEN: Because the union really

20   only had a right of access, not any exclusive possession

21   of any property, and only for the very limited purpose

22   of communicating with employees about their Section 7

23   rights.

24   JUSTICE ALITO: But it's still -- it's a

25   lesser property right, but isn't it a property right?

1   What if the -- what if the employer sold to a catering

2   company the right to drive lunch trucks onto its

3   premises to sell sandwiches and coffee to the employees?

4   Wouldn't that be a property right?

5   MR. McCRACKEN: Not under Florida law, Your

6   Honor. The -- because it would only, it would-- at most, be a

7   license. No interest in real property would be given.

8   JUSTICE ALITO: All right. Well, isn't a

9   license a thing of value?

10   MR. McCRACKEN: A license may be a thing of

11 value that -- that is paid, lent or delivered. In this

12 case, there was not a license so much as there was a

13 waiver or forbearance of the employer's right to

14 exclude. The union did not receive or accept any

15 employer property. It didn't --

16   JUSTICE KENNEDY: Well, that's true of all

17 property owners. I have a right to waive my right to

18 exclude you from the property. That's -- that's

19 property -- that's a property right. And -- and it can

20 become so when I -- when I charge for it.

21   MR. McCRACKEN: Yes. It-- it is your property

22 right, but the union did not obtain your right to

23 exclude. It did not obtain that property right. It --

24 it obtained the right to be there to -- not to any

25 exclusive area, but your property right to exclude

1   remained in your hands.

2   JUSTICE SOTOMAYOR: Counsel, it's clear that

3   there's some difficulty in defining the limits of

4   property. There are some things that I think have value

5   even though they may not have market value. For

6   example, a union–- a-- an employer bribing a union steward by offering

7   him a favorable work schedule or -- or days off that are

8   a weekend or something that's valuable to the worker but

9   doesn't necessarily have an objective value.

10   The government cites Credit Suisse v.

11   Billing in its brief. When you get up on rebuttal, I

12   want to talk to you about the -- the law that has

13   developed in that case and why it doesn't apply here.

14   MR. McCRACKEN: Yes.

15   Thank you, Your Honor.

16   CHIEF JUSTICE ROBERTS: Thank you, counsel.

17   MR. McCRACKEN: May I reserve my remaining

18   time?

19   CHIEF JUSTICE ROBERTS: Yes, of course.

20   MR. McCRACKEN: Thank you very much.

21   CHIEF JUSTICE ROBERTS: Mr. Dreeben.

22   ORAL ARGUMENT OF MICHAEL R. DREEBEN,

23   FOR UNITED STATES, AS AMICUS CURIAE,

24   SUPPORTING THE PETITIONER

25   MR. DREEBEN: Mr. Chief Justice, and may it

1 please the Court:

2   Section 302 cannot be read in isolation from

3 the remainder of the labor laws. The United States does

4 not dispute that if all this Court had to look at was

5 the words "thing of value" in Section 302, the promises

6 that were at issue in this case could be viewed as

7 things of value and, with a little bit of stretching of

8 the language, could be viewed as paid, lent, or

9 delivered.

10   JUSTICE ALITO: Well, before you get too

11 much into the merits, could -- does the United States

12 have a position on whether this case satisfies Article

13 3.

14   MR. DREEBEN: We don't, Justice Alito. The

15 Eleventh Circuit did hold that Mulhall had standing and

16 there -- we raised a question of whether the case is

17 moot at the certiorari stage as a reason why this Court

18 may not want to take the case. But we have not drilled

19 deeply enough into it to have a position on that

20 question.

21   JUSTICE GINSBURG: Does the United States

22 have a position on the implication of a private right of

23 action under 302?

24   MR. DREEBEN: Justice Ginsburg, it seems to

25 have been accepted historically and, as my co-counsel

1   mentioned, it was referenced in dictum by this Court;

2   it's been accepted by the lower courts. I think if this

3   Court were looking at the language of the statute today,

4   Section 10(e) of Section 302(e) of the statute, which is

5   on page 11a of -- of our brief, gives the district

6   courts jurisdiction to hear violations of this case --

7   of this statute, and courts have assumed that private

8   parties could invoke that.

9   If the Court were looking at that afresh,

10   I'm not sure that it would reach that result. But there

11   is a lot of ink on the page with respect to it. The

12   Eleventh Circuit did not reach that issue and it doesn't

13   seem to be squarely presented here. But what is

14   squarely presented here is whether the Court should read

15   Section 302 as a freestanding provision divorced from

16   the central policy of the labor laws and the remaining

17   provisions in the labor laws.

18   Now, as Justice Sotomayor --

19   JUSTICE KENNEDY: Are you saying "thing of

20   value" means something different in 302 than it means

21   elsewhere in -- in the code?

22   MR. DREEBEN: I think --

23   JUSTICE KENNEDY: I -- I can see if there

24   was a conspiracy to extort these benefits, that the

25   government would take the position that there was a

1 crime because there was a thing of value, a thing of

2 property.

3   MR. DREEBEN: Well, under this statute, the

4 government's position is that the three terms that are

5 at issue -- "neutrality," "access," and "employee list"

6 -- are not prohibited by Section 302. Probably the best

7 way to reach that conclusion is to determine that

8 Congress did not intend that these three things be

9 viewed as things of value under the statute.

10   Certainly, read in isolation, the words

11 "thing of value" are very broad. In other statutes,

12 they cover intangibles. We would have no problem

13 treating the things here as things of value under

14 statutes or under 302 if that's the only thing that

15 existed.

16   JUSTICE SOTOMAYOR: Isn't Billing your best

17 argument, the framework of Billing?

18   MR. DREEBEN: Yes, I think it is, Justice

19 Sotomayor. What the Court has to do here, as it did in

20 the Billing case, is read multiple statutes together in

21 order to harmonize them. And just as in Billing, the

22 Court said, well, the antitrust laws literally do apply

23 here, the securities underwriting activity could violate

24 the antitrust laws.

25   The Court looked at it in light of other

 1 policies reflected in the securities laws and determined

 2 that Congress, having established an intricate framework

 3 for regulation of the very same activity in the

 4 securities laws, would not have intended the antitrust

 5 laws to come along and supplant it.

 6   And here what you have are --

 7   JUSTICE SOTOMAYOR: Some people have

 8 suggested that Billings is limited to the antitrust

 9 area.

10   MR. DREEBEN: I don't think that --

11   JUSTICE SOTOMAYOR: And how do you respond

12 to that belief and -- and how do you convince us to

13 expand the doctrine outside its traditional context?

14   MR. DREEBEN: Billing is simply an

15 application of this Court's responsibility to divine

16 Congress's intent based on language, structure, and

17 history and policy of the relevant laws. And here, all

18 of those things when read together indicate that

19 agreements by parties to set the ground rules for an

20 organizing campaign do not constitute prohibited things.

21   JUSTICE BREYER: Fine. But what is the --

22 suppose that the employer had written a check for $100,000 to

23 the union and everything else is the same. Now, you

24 ask, why did he do that? He said because they have to

25 have the money so that they can run the organizing

1   campaign along the lines that everyone wants. Is that

2   covered or not?

3   MR. DREEBEN: Yes. That would be a

4   violation.

5   JUSTICE BREYER: So then when I write the

6   opinion that says that is covered, but the access, the

7   employer lists, and the --

8   MR. DREEBEN: Neutrality.

9   JUSTICE BREYER: -- yes, and the neutrality,

10   those are not covered because. $100,000 is, but they

11   aren't because; and then what comes after the "because"?

12   MR. DREEBEN: Two things, Justice Breyer,

13   and they're both equally important. First of all,

14   the -- the provision of money is useful to the union in

15   any number of ways and gives rise to the dangers of

16   misuse.

17   JUSTICE BREYER: No, no. We specify how

18   they're going to use it. They're going to use it just

19   the way --

20   MR. DREEBEN: It can't be -- it can't be

21   restricted in that way because the origins of Section

22   302 came from --

23   JUSTICE BREYER: Okay. Okay. No. Continue

24   with the because. One, because money might be a

25   go-beyond. Okay. What's the other?

1   MR. DREEBEN: The other is that reading the

2   policies of the Act as a whole, we start from the

3   proposition, which is undisputed by Respondent and

4   reveals that his purportedly literal application of

5   Section 302 just does not wash. We start from the

6   proposition that voluntary recognition of a union is not

7   only permissible under the National Labor Relations Act,

8   it's a favored element of national labor policy. The

9   voluntary reconciliation of agreement, of disputes

10 between labor and management is what this Act drives at.

11   CHIEF JUSTICE ROBERTS: Well, if -- if

12 there --

13   MR. DREEBEN: If I could just finish this

14 one point, Mr. Chief justice, to answer Justice Breyer's

15 question.

16   (Laughter.)

17   MR. DREEBEN: The three procedures that are

18 at issue here are all procedures that are useful and

19 geared towards facilitating voluntary recognition and

20 are only useful for that purpose.

21   CHIEF JUSTICE ROBERTS: If I may?

22   MR. DREEBEN: Thank you.

23   (Laughter.)

24   CHIEF JUSTICE ROBERTS: But if you recall

25 the point you made earlier, the point is, yes, voluntary

1   agreement, but if a majority of the workforce wants to

2   be organized and represented by that union, and the

3   argument here, as I understand it, is that this

4   agreement taints that process, in particular, by

5   allowing the card check procedure that it has been

6   argued exercises coercion against employees to support

7   the union.

8   MR. DREEBEN: Well, this Court in the Gissel

9   Packing case many years ago rejected that argument. The

10 National Labors Relation Board has rejected that

11 argument. Certainly --

12   CHIEF JUSTICE ROBERTS: The argument that

13 the card check --

14   MR. DREEBEN: Card check agreements are

15 inherently coercive, yes. That has been rejected.

16   CHIEF JUSTICE ROBERTS: Well, will you --

17 will you concede that they're more coercive than a

18 secret ballot?

19   MR. DREEBEN: I don't think they're coercive

20 at all inherently. They may be --

21   CHIEF JUSTICE ROBERTS: The union organizer

22 comes up to you and says, well, here's a card. You can

23 check I want to join the union, or two, I don't want a

24 union. Which will it be? And there's a bunch of your

25 fellow workers gathered around as you fill out the card.

1   MR. DREEBEN: Well, some would argue --

2   JUSTICE SCALIA: And he's a big guy.

3   (Laughter.)

4   MR. DREEBEN: Some would argue that

5   employers also have big guys and it's very coercive to

6   have your employer in there on the factory floor

7   reminding employees daily that they're very anti-union

8   and that there are a lot of costs to joining a union.

9   And so the -- the process here is one in which, yes, the

10   parties can go to the National Labor Relations Board and

11   have an election. But this Court in the Gissel Packing

12   case, backed up by decades of Board law, has validated

13   that card check agreements are perfectly legitimate and

14   may facilitate the employees' free exercise of their

15   choice to have a union.

16   The agreement in this case doesn't recognize

17   the union. All the agreement does is establish a

18   perfectly lawful process, which Respondent concedes

19   would be a thing of value, but he then has to carve it

20   out from Section 302, a voluntary recognition agreement.

21   And the access that is given to the property, which is

22   something that employers lawfully can do -- it's their

23   property, they have the right to do it -- they provide

24   it so that the employees can get information from the

25   union about unionization. And the employee list serves

1   the same thing.

2   And these things -- access, employee list,

3   neutrality -- have been elements of Federal labor policy

4   for decades.

5   JUSTICE GINSBURG: One curious thing about

6   the Eleventh Circuit's opinion is it didn't reject.

7   It's a -- it's a curious opinion and we are at an

8   interlocutory stage. But the opinion reads: "Employers

9   and unions may set ground rules for an organizing

10   campaign even if the employer and union benefit from the

11   agreement." So that the Eleventh Circuit seemed to

12   agree that these agreements are enforceable. But it

13   said it can -- they can become illegal if used in a

14   scheme to corrupt.

15   MR. DREEBEN: All of the courts of appeals,

16   Justice Ginsburg, have concluded that ground rules

17   agreements are inherently lawful. The Eleventh Circuit

18   added a motive-based limitation on it that responded to

19   a policy that's just not reflected in the language of

20   the Act.

21   JUSTICE SCALIA: What about slot machines?

22   You -- you mentioned all of the other things promised,

23   but not -- not the promise to support legislation.

24   MR. DREEBEN: That's right. The union's

25   promises are not comprehended by Section 302. All

1 that's at issue here is whether it's a Federal crime for

2 an employer to say to a union: You guys want to

3 organize? I will let you come into my plant and address

4 the employees. In fact, better yet, we will have a

5 debate, management on one side, union on the other.

6 Come into our hall to do that. That would be a Federal

7 crime under Respondents' view.

8   Thank you.

9   CHIEF JUSTICE ROBERTS: Thank you, counsel.

10   Mr. Messenger.

11   ORAL ARGUMENT OF WILLIAM L. MESSENGER

12   ON BEHALF OF THE RESPONDENTS

13   MR. MESSENGER: Mr. Chief Justice, and may

14 it please the Court:

15   Enforcing Section 302 in this case cannot

16 conflict with the National Labor Relations Act. As

17 UNITE admits, organizing agreements such as this are

18 meant to privatize the National Labor Relations Act and

19 avoid the representational procedures. The agreement

20 here expressly requires that the employer not petition

21 for a secret ballot election, not file unfair labor

22 practices with the National Labor Relations Board, and

23 also provide assistance to the employer -- or to the

24 union, that he has no right to receive --

25   JUSTICE GINSBURG: But, Mr. Messenger, you

1   are dealing with a decision that seems to uphold

2   organizing agreements. I just read the passage and all

3   that it's saying is: Find out if in this case there was

4   some corruption involved. But it does say employers and

5   unions may set ground rules even if the employer and the

6   union benefit from the agreement.

7   So you seem to be construing the Eleventh

8   Circuit decision to say something it didn't say, to say

9   that organizing agreements violate 302.

10   MR. MESSENGER: Well, I would say two

11   things. First, the issue of course are the three

12   individual provisions, not organizing agreements as a

13   whole. The three things at issue here of course is the

14   gag clause, the use of property, and the information,

15   not the agreement.

16   But secondly, the Eleventh Circuit's opinion

17   comes from its holding that this intangible assistance

18   can't be delivered, it can only be paid, and therefore,

19   the court held you needed to show consideration for

20   payment.

21   JUSTICE GINSBURG: Where is that?

22   MR. MESSENGER: It's at the Eleventh

23   Circuit's opinion, right above the section that you just

24   read from, where the court held that it didn't believe

25   that things could be delivered, which we disagree with,

1   but they can be paid; and therefore, if consideration is

2   given, then you have a violation. And then it goes on

3   to say that consideration would show that the purposes

4   of the statute are implicated by the transaction,

5   because in that case the union is being influenced by

6   what the employer gave.

7   So the Eleventh Circuit, when it said that

8   not all ground rules agreements will violate 302 was

9   saying that if no consideration was given, there would

10 be no payment and therefore no violation in that.

11   JUSTICE GINSBURG: It says -- it says that,

12 at the end of that passage, curbing bribery and

13 extortion are implicated.

14   MR. MESSENGER: Yes.

15   JUSTICE GINSBURG: And said that's what --

16   MR. MESSENGER: If there is consideration.

17 So if the employer gives this assistance and the union

18 gives something in return -- for example, here the

19 $100,000 political campaign and agreement not to

20 strike -- then it becomes a payment, because the

21 consideration shows payment.

22   JUSTICE GINSBURG: What is your position on

23 the effect of the expiration of this agreement?

24   MR. MESSENGER: I don't believe that it

25 renders the case moot, for two reasons, the first of

1   which is that UNITE has pending a lawsuit to compel

2   arbitration in which it is alleging violations of the

3   agreement that occurred before it expired. And one of

4   the remedies the union is seeking is to have the

5   agreement extended for a longer period of time, which is

6   a remedy it received before. And that lawsuit is

7   currently pending in Federal district court. It's been

8   stayed pending these proceedings.

9   And then the second reason is UNITE

10   continues to demand this organizing assistance.

11   302(b)(1) makes it illegal for a union to demand a thing

12   of value, even if it doesn't receive it. UNITE here is

13   clearly still demanding that Mardi Gras help it organize

14   its employees, so Mulhall still has standing to seek

15   injunctive relief to stop the union from demanding those

16   things.

17   JUSTICE SCALIA: Mr. Messenger, could --

18   could all of these things that the employer gave to the

19   union be included in a finally-negotiated collective

20   bargaining agreement? Couldn't that CBA say that the

21   union shall have the ability to approach employees on

22   the site, that the union shall have access to the

23   employee list of the employer -- and what else, what's

24   the third -- and that the employer will not -- will not

25   seek to undermine the union? Could all of that be

1   included in a CBA?

2   MR. MESSENGER: The first two could because

3   the exceptions to 302 start to apply, the exceptions

4   found at 302(c). For example, access for union stewards

5   has been upheld under Section (c)(1), which allows for

6   access to union officials if by reason of their service

7   to the employer. And so giving a union steward use of

8   property to administer the contract and such has been

9   upheld. That case is BASF v -- BASF Wyandotte.

10   The information.   During collective

11   bargaining, a union has a right to information under

12   Section AEP 5 of the National Labor Relations Act.

13   Giving that information would fall under the exception

14   found at (c)(2), which provides for the release of any

15   claim that a union may have. And so the union has a

16   legal claim to that information under the NLRA, so if

17   the employer agreed to provide it or did provide it, it

18   would fall under that exception.

19   JUSTICE KAGAN: Mr. Messenger, do I

20   understand the structure of your argument to be as

21   follows: That whether before certification or

22   afterwards in a collective bargaining agreement along

23   the lines that Justice Scalia said, the only thing that

24   an employer can promise a union or agree to provide to a

25   union are things that are specifically authorized in

1 other parts of the labor law? Is that the structure of

2 your argument?

3   MR. MESSENGER: Yes, Your Honor. And

4 because in the collective bargaining, a union of course

5 is supposed to act as an employee representative and not

6 for itself, so most terms of collective bargaining

7 agreements go to the employees, not to the union itself.

8 302's whole purpose or primary purpose is precisely to

9 prevent such self-dealing.

10   JUSTICE KAGAN: You see, I would have

11 thought that the premise and the policies of the labor

12 laws are to encourage a wide variety of

13 employer/employee agreements, both things that are

14 listed in the labor laws, that are provided for in the

15 labor laws, but many things that are not; that the idea

16 is to get these parties together to reach agreements on

17 a wide variety of things that matter to them regardless

18 whether the labor law specifically refers to that.

19   MR. MESSENGER: Well, the structure --

20   JUSTICE KAGAN: It seems sort of turning the

21 whole thing on its head to say that the only things that

22 are allowed in terms of promises, whether in a

23 collective bargaining agreement or prior to that, are

24 the things that the law itself requires.

25   MR. MESSENGER: Well, I believe that is the

1   structure of Section 302. (A) and (b) are simply a

2   bright-line gift ban, and then (c) provides the

3   exceptions to it. And that sort of structure for a

4   conflict of interest statute is relatively common.

5   And so the common terms of collective

6   bargaining agreements either, A, deliver nothing to the

7   union itself but give things to employees such as wages,

8   or in the alternative, does go to the union, it has to

9   fall under one of the exceptions, and there's

10   numerous --

11   JUSTICE SOTOMAYOR: Counsel, why don't --

12   why doesn't the Billings -- Billing framework apply

13   beautifully here?

14   MR. MESSENGER: Because --

15   JUSTICE SOTOMAYOR: What it holds is that

16   where there's a regulatory framework, and here there is,

17   that produces standards of conduct, going to Justice

18   Kagan's point, that almost all of the three things that

19   you're arguing against are standards of conduct that

20   have been approved by -- have been approved by the

21   government, and when those conflict with the separate

22   Federal statute, then they are implicitly preempted,

23   essentially.

24   Why doesn't that doctrine do the work here?

25   MR. MESSENGER: Well, for two reasons, but

1   the first and most important is that Section 302 is part

2   of the labor law. It was enacted, of course, as part of

3   the Taft-Hartley Act and amended as part of the Labor

4   Management Reporting Disclosure Act. So you're not

5   talking about two different statutory schemes, as in

6   Billing, where you had the SEC law and you had the

7   antitrust law. 302 is Federal labor law. It is every

8   bit as much a Federal labor law as any provision of the

9   National Labor Relation Act.

10   JUSTICE SOTOMAYOR: But we have conflicting

11   provisions within standard statutes anyway, so why

12   doesn't the concept behind it still apply?

13   MR. MESSENGER: The concept would if there

14   was a direct conflict between the general prohibition of

15   302 and any right granted by the National Labor

16   Relations Act. But importantly here, nothing gives

17   UNITE any right to the three things it demands from

18   Mardi Gras. So enforcing 302 in this case cannot

19   conflict with the NLRA. UNITE has no right to

20   information from Mardi Gras about its nonunion

21   employees, no right to use its property, as this Court

22   held in Lechmere, and certainly no right to control its

23   communications, as 8(c) of the National Labor Relations

24   Act says that even the NLRB can't control an employee's

25   -- an employer's communications absent a threat or

1   promise of benefit.

2   So there is no conflict here.   And a

3   persuasive opinion, although obviously not binding, is

4   the Sixth Circuit's opinion in Mercy Memorial Hospital

5   where the Sixth Circuit -- in that case the general

6   counsel of the NLRB said the employer's conduct does not

7   violate the NLRA and the union brought a 302 claim

8   anyway and the Sixth Circuit said it could bring that

9   claim. 302 is meant to be independent of the National

10   Labor Relations Act because they didn't give the NLRB

11   any jurisdiction over it and doesn't preempt. And they

12   also added if it did preempt 302, 302 would be a dead

13   letter. I mean, anything Section 302 deals with will be

14   covered by the NLRA some--

15   JUSTICE BREYER: It's not covering. As I

16   understand the argument it goes back to like

17   Jurisprudence 1. Can you have -- the sign says no

18   vehicles in the park. Okay? Does that apply to a Jeep

19   used as a war memorial? Answer, no. That's been the

20   law since the twelfth century. You spilled blood in

21   the streets of Bologna, a crime, but that's not

22   applicable to the barber.

23   All right?   So, here, I think what they're

24   saying is that read this statute. You don't have to get

25   into a metaphysical argument about things of value;

1   rather, those things which play a central role in the

2   organizing campaign are things that are governed by the

3   other parts of the NLRB and to throw them in here --

4   NLRA -- and to throw them in here is going to create a

5   mess.

6   Lists, access, promises to stay neutral are

7   central to many aspects of organizing campaigns, and

8   they are no more within this statute, this part of the

9   thing than the Jeep on the pedestal is part of the no

10   vehicles in the park. Now, that's what I understand

11   roughly their argument to be, if I've got it right. And

12   what is your response?

13   MR. MESSENGER: That nothing in the National

14   Labor Relations Act gives them a right to that.

15   JUSTICE BREYER: I didn't say they had a

16   right. They didn't say they had a right.

17   MR. MESSENGER: Exactly.

18   JUSTICE BREYER: What they said was the

19   kinds of property or things of value are at issue here

20   are the kinds of things that play important roles in

21   organizing campaigns. And we needn't go further than

22   that. We don't have to talk about rights to it. We

23   don't have to talk about who said what to whom. It's

24   just that these kinds of things are organizing things,

25   and therefore they're outside the scope --

1   MR. MESSENGER: But Section --

2   JUSTICE BREYER: -- just like the Jeep on

3   the pedestal.

4   MR. MESSENGER: But Section 302 was

5   specifically amended in 1959 to apply to union

6   organizing. They added Section 8(a)(2) to extend the

7   prohibition to unions that seek to represent. Section

8   8(a)(3) applies to things given to employee committees

9   to influence employees in their right to organize or

10   bargain collectively through representatives of their

11   own choosing.

12   JUSTICE SCALIA: Yes. And I suppose -- I

13   suppose that would also -- it would also follow if --

14   if -- with no indication in the text, you simply exclude

15   organizing -- the organizing part of labor law. I guess

16   it would mean that the -- the union can cut a deal with

17   the employer that if the employer gives them a freehand

18   and -- and assists them in -- in organizing, the union

19   will promise not to -- not to seek a raise in wages or

20   not to seek insurance coverage or whatever. I guess

21   that would also be part of the organizing campaign,

22   right, so it would be okay.

23   MR. MESSENGER: Yes. An organizing

24   exemption -- an organizing exemption to Section 302

25   would tear a massive hole in the statute. It's

1   difficult to think of anything that unions value more

2   than an employer's assistance with unionizing more

3   employees into the union.

4   JUSTICE GINSBURG: Then may I ask you,

5   Mr. Messenger, to clarify, because I thought you told me

6   before that some organizing agreements are okay. Are

7   you taking the position that all organizing

8   agreements -- in other words, are you taking a position

9   in opposition to what I read from the Eleventh Circuit,

10   that organizing agreements can be valid?

11   MR. MESSENGER: Yes, because the issue, I

12   believe, with any agreement is each particular term has

13   to be looked at individually. So, for example, if the

14   issue was a particular term of a collective bargaining

15   agreement illegal, the question wouldn't be phrased, are

16   collectively bargaining agreements legal. Same thing

17   with organizing agreements. Every term is different.

18   JUSTICE GINSBURG: So you -- you do you want

19   us to say that -- that to the extent that the Eleventh

20   Circuit said, "Employers and unions may set ground rules

21   for an organizing campaign, even if the employer and

22   union benefit from the agreement," you want us to say

23   that that was wrong.

24   MR. MESSENGER: Yes. Because that, again,

25   went back to its payment holding, and Mulhall's position

1   is that the Court should overrule the lower court's

2   decision that organizing assistance cannot be delivered.

3   A list of information can, of course, be delivered,

4   so --

5   JUSTICE KAGAN: So, Mr. Messenger, just to

6   make sure I understand that, you're saying that

7   regardless of whether there was a bargain in this case,

8   forget the bargain. Let's just say that there was an

9   employer. This employer said, you know, I think that my

10 employees should have a right to listen to you and to

11 decide for themselves whether they want to be

12 represented by -- by the union, so I'm inviting the

13 union onto my premises. Just simple as that. You're

14 saying that the employer cannot do that.

15   MR. MESSENGER: That's correct.

16 Consideration, obviously, can show value, and it could

17 show towards the purpose of the statute. But 30 --

18   JUSTICE KAGAN: But we -- we don't need

19 this. I mean, you say --

20   MR. MESSENGER: Yes.

21   JUSTICE KAGAN: -- of course, this is

22 important to the union, so your argument is that it

23 falls within the statute, regardless of whether there's

24 any consideration or quid pro quo.

25   MR. MESSENGER: Exactly. Sorry.

1   JUSTICE KAGAN: I'm sorry.

2   MR. MESSENGER: Exactly. Because 302 is

3   structured not as a bribery statute that requires a quid

4   pro quo. It's a gift ban to ensure --

5   JUSTICE KAGAN: So this is to say that the

6   National Labor Relations Act prohibits employers from

7   providing access to their premises, from granting a

8   union a list of employees, or from declaring itself

9   neutral as to a union election.

10   MR. MESSENGER: Yes, with caveats. The --

11   with the first two, it could fall into exceptions in

12   other circumstances. For, again, during a collective

13   bargaining relationship, some of the exceptions start to

14   apply to the information and use of property. And going

15   towards the communications, if an employer unilaterally

16   said, I'm not going to say anything. I don't have the

17   time or money to fight the union, it can do so. But if

18   an employer contractually agrees and gives the union

19   control over its speech, then yes, a thing of value --

20   JUSTICE KENNEDY: Do you acknowledge that

21   your -- that your answer to Justice Kagan is -- is

22   contrary to years of settled practices and

23   understandings?

24   MR. MESSENGER: No, Your Honor, I don't

25   believe that it is. And if this is going back --

1   JUSTICE KENNEDY: In other words, this kind

2   of an agreement is very rare?

3   MR. MESSENGER: It's not rare now. It's

4   only become prevalent in the 1990s to go --

5   JUSTICE GINSBURG: And it has -- it has been

6   enforced under 301. So it -- it would be odd to say

7   that an agreement that is enforceable that court --

8   courts haven't enforced agreements just like this under

9   301 are criminal under 302.

10   MR. MESSENGER: The exact opposite is true.

11   Section 301 gives courts jurisdiction to enforce any

12   agreement between a labor organization and an employer.

13   302 makes it illegal for an employer to agree to deliver

14   something to a union.

15   JUSTICE GINSBURG: Have -- have courts

16   enforced agreements just like this one under 301?

17   MR. MESSENGER: Many times. However, 302

18   was not raised in those cases. So would they have

19   enforced the agreement if it was alleged that it was --

20   violated 302? That, of course, is the question before

21   this Court.

22   JUSTICE BREYER: The question is the same, I

23   think. And to go back, I thought the most clear

24   statement of your view was when you said to Justice

25   Scalia that if we don't accept your interpretation,

1   there's a hole in the statute.

2   MR. MESSENGER: Yes. And this --

3   JUSTICE BREYER: In fact, I think you said a

4   big hole.

5   MR. MESSENGER: Yes. And this would

6   actually create a larger hole --

7   JUSTICE BREYER: All right. Now --

8   MR. MESSENGER: -- because of anything

9   enforceable --

10   JUSTICE BREYER: I get the point.

11   MR. MESSENGER: I'm sorry.

12   JUSTICE BREYER: I'm focusing on the hole.

13   MR. MESSENGER: Yes.

14   JUSTICE BREYER: Now, I thought the area

15 that you're calling a hole is an area where the National

16 Labor Relations Act gives the National Labor Relations

17 Board all kinds of authority to set rules and to say

18 what is an appropriate practice and not. Am I right

19 about that?

20   MR. MESSENGER: To a degree, yes, but 302

21 always covers --

22   JUSTICE BREYER: All right. If the answer

23 is yes, and I'm sure there's some qualification, but if

24 the heart of the answer is yes, then it's the contrary

25 that creates the hole, because if we throw those things

 1 which are central to the NLRA's regulatory power into

 2 this particular provision, the NLRA loses the power to

 3 say when they're okay, when they're not okay, to make a

 4 thousand qualifications.

 5   Hence, the NLRA's regulatory provisions and

 6 this case are the Jeep on the pedestal or the barber in

 7 the street. Even though I have to tell you, in Bologna

 8 in the 18th century, despite the exception of the eighth

 9 century, it did not mention barbers specifically in the

10 statute. They had to be read in by the courts.

11   (Laughter.)

12   MR. MESSENGER: The difference, Your

13 Honor -- I can't speak for Bologna, but 302 is meant to

14 govern labor relations --

15   JUSTICE BREYER: Yes.

16   MR. MESSENGER: -- including organizing,

17 including collective bargaining. So anything that the

18 NLRB -- what do you call it? -- has coverage over, 302

19 also covers it. So, for example --

20   JUSTICE KAGAN: Mr. Messenger, suppose that

21 there was a -- a union and it was striking. And the

22 union goes to the employer and -- and they reach an

23 agreement, and the agreement is the union will stop

24 striking if the employer agrees to sit down and

25 negotiate with the union. So that's the promise that

1   the employer makes to the union. I'm going to sit down

2   and negotiate with you. And that's, obviously, a thing

3   of important value to the union. Is that also

4   prohibited?

5   MR. MESSENGER: No, because in that case,

6   there's no thing that's actually be given to the union,

7   especially if you're talking about negotiating a

8   collectively bargaining agreement, which, of course,

9   those benefits go to employees.

10   JUSTICE KAGAN: There's no thing that's

11 given to the union? I mean, I would think if your

12 argument is thing of value is anything that's of value,

13 there's nothing that's of greater value to the union

14 than an employer's agreement to negotiate.

15   MR. MESSENGER: But the question becomes

16 negotiate what? So if the question is let's negotiate

17 over employee wages, wages go to employees, there's

18 nothing there. On the other hand, if they say we will

19 negotiate over how much money we'll pay you to stop

20 striking, well, then that's illegal under 302.

21   So it just begs the question or raises the

22 question -- I'm sorry -- of what comes next after

23 that agreement to negotiate.

24   JUSTICE KAGAN: Well, I guess -- I mean,

25 we're going to negotiate about all kinds of things,

1   things -- things that unions and employers negotiate

2   about, and that's of great benefit to the union. The

3   union gets to turn around to all its employees and say:

4   Look at this, the employer is going to sit down and talk

5   with us.

6   MR. MESSENGER: I would say in that case,

7   even if it did have value, no thing is delivered to the

8   union. Because 302 --

9   JUSTICE SCALIA: Well, benefits -- benefits

10   to the employees always benefit the union. I mean,

11   that's -- you know, that's automatic, it seems to me. I

12   don't understand how you say that this is just a gift

13   statute and there doesn't have to be any, anything on

14   the other side, no quid pro quo. You say it's perfectly

15   okay if the -- if the employer allows the union to come

16   on his premises to recruit members, but it's not okay

17   for him to agree, to agree to do so?

18   MR. MESSENGER: No.

19   JUSTICE SCALIA: I don't understand what

20   that means.

21   MR. MESSENGER: No, Your Honor. It would be

22   illegal to agree or to do that. So if an employer

23   didn't agree to allow the union on its property, it just

24   did, that would still be the delivery of the use of

25   property. So that's not my position.

1   JUSTICE SCALIA: And what if the employer

2   does not oppose the union, he neither speaks against it

3   nor for it? Is that giving something of value to the

4   union?

5   MR. MESSENGER: Not if he does so

6   unilaterally. But if he agrees to do so, then the

7   control is given to the union very similar to a

8   noncompete. And the agreement -- the agreement. The

9   example I used in the brief I believe is a good one. If

10   Coca-Cola decides not to run advertising against Pepsi,

11   it hasn't given anything to Pepsi. It doesn't enter

12   into a noncompete agreement.

13   JUSTICE SCALIA: It has no meaning to say

14   you agree to something when you're not getting anything

15   in return. You can promise something without getting

16   anything in return. But to agree? I think that means,

17   you know, I won't do it in exchange for something else.

18   MR. MESSENGER: And there will be

19   consideration. So the hypothetical given of the

20   employer just doing it in exchange for nothing will

21   almost never happen, as I believe UNITE says in its

22   brief --

23   JUSTICE SCALIA: But if it did happen, you'd

24   say it would be a violation.

25   MR. MESSENGER: Yes. So if the -- for

1   example, if the employer just said to the union, here's

2   a thousand dollars, just put it on the table, that's a

3   violation. It doesn't have to go any further than that.

4   Or if the union said, Give me a thousand dollars, that's

5   illegal. The employer doesn't have to hand it over.

6   But it's very unusual to have this kind of

7   organizing agreement without a quid pro quo. Most

8   employers don't hand over their employees to the union

9   without something in exchange, either pre-negotiated

10   concessions at employee expense, such as an Adcock, or

11   an agreement not to strike or a political campaign such

12   as here.

13   JUSTICE SOTOMAYOR: You would argue that the

14   three items in dispute -- the access to property,

15   etc. -- that the consideration is the agreement to go

16   into arbitration, first of all, putting aside the

17   hundred thousand dollars.

18   MR. MESSENGER: The interest arbitration?

19   JUSTICE SOTOMAYOR: The arbitration of

20   disputes that was promised by the employer and the union

21   under this agreement.

22   MR. MESSENGER: I wouldn't call that

23   consideration. I believe the consideration was, what

24   the union gave the employer was, the

25   hundred-thousand-dollar political campaign and the

1   agreement not to strike.

2   JUSTICE SOTOMAYOR: Not to strike.

3   MR. MESSENGER: Yes, not to strike.

4   JUSTICE KAGAN: Mr. Messenger, would your

5   argument apply to the following? I'm just going to give

6   you a few kinds of different promises. A promise to

7   give a union information about the company and its

8   finances?

9   MR. MESSENGER: During collective

10   bargaining, no, because it would fall under the final

11   clause of Section (c)(2).

12   JUSTICE KAGAN: But not if not during

13   collective bargaining?

14   MR. MESSENGER: Then if that had value to

15   the union, yes.

16   JUSTICE KAGAN: I'm sure it does.

17   An agreement giving the union a role in

18   grievance procedures?

19   MR. MESSENGER: No, because the grievance

20   procedures ultimately go to the employee. So a

21   grievance over, for example, should this employee get

22   back pay doesn't deliver anything to the union.

23   JUSTICE KAGAN: Could you explain that

24   distinction to me, ultimately go to the employee? I

25   mean, I assume that everything that the union does, the

1   union is saying, well, ultimately the benefits go to the

2   employee.

3   MR. MESSENGER: Well, but 302, its very

4   structure sort of differentiates the union from the

5   employee, so the thought of what's good for the union is

6   good for the employee is somewhat rejected implicitly in

7   302, that there's a separation there. The union is

8   supposed to act as their representative --

9   JUSTICE KAGAN: But the union, on the ones

10   that you say, well, the neutrality agreements, the

11   access, that's just to the union, the union can turn

12   around and say: No, ultimately it's to the employee,

13   that we're going to represent the employees well. I mean, so

14   the line you're drawing seems quite inadministrable to

15   me.

16   MR. MESSENGER: I believe I didn't perhaps

17   explain it correctly. It's not that if the union can

18   say this is good for employees, that's exculpatory. The

19   question is who gets the thing. In other words, 302 is

20   a very literal interpretation, not mine, but just going

21   back to the text, 302 requires the --

22   JUSTICE KAGAN: Okay, so the thing--

23   MR. MESSENGER: Payment or delivery -- I'm

24   sorry.

25   JUSTICE KAGAN: No, please.

1   MR. MESSENGER: Payment or delivery. So if

2   the thing is delivered to the employee and not to the

3   union itself, it's not covered. So, for example, the

4   original legislative history, they said what about the

5   wages to the employees and the supporting Senator

6   said --

7   JUSTICE KAGAN: Yes, but my hypothetical is

8   the thing, was the union's role in grievance procedures.

9   MR. MESSENGER: Grievance procedures --

10   JUSTICE KAGAN: So the union gets it, right?

11   MR. MESSENGER: No. Because what -- I don't

12   believe that has any value intrinsically to the union.

13   A grievance procedure is simply a contractual mechanism

14   to do something else. So the question is what's -- in

15   other words, take arbitration. If you agree to

16   arbitrate something, what are they arbitrating? If

17   you're arbitrating over what the union gets, then, yes,

18   that could be illegal. But if you're arbitrating over

19   what goes to employees, the thing is delivered to the

20   employees.

21   JUSTICE KAGAN: Well, I guess I'll tell you

22   that a union that can say that it has a role in

23   grievance procedures is, that's an important thing for a

24   union to be able to tell its employees. That's of real

25   value to the union to have that.

1   MR. MESSENGER: But is the value coming from

2   the employer? Like, there the argument would be the

3   value is being given is the goodwill of employees

4   towards the union.

5   JUSTICE KAGAN: How about -- how about if a

6   company gives a union a role in company decision-making,

7   any kind, hiring, any other kind of company

8   decision-making? The company says, we want the union to

9   participate in this.

10   MR. MESSENGER: I would say probably not,

11 because what is ultimately the thing? Is it -- if they

12 gave it control perhaps over, like, you can now run the

13 auto shop and take the profits from it, then yes.

14 However, if it's merely, we'll listen to your input, what

15 exactly is being given? Because I think it's

16 important -- Mulhall is not arguing for an expansive

17 interpretation of 302.

18   The three things that are actually at issue

19 here are rather direct things given directly to the

20 union: Lists of information, use of property. So if

21 you do move more to the fringes of things that may

22 create indirect benefits to unions, that may create some

23 problems and some difficulties. But the Court need not

24 reach those here to find organizing assistance to

25 violate the statute.

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1          JUSTICE KENNEDY:        It's hard to think that

2    one really pays or lends or delivers, which is are

3    statutory words, neutrality of speech.

4          MR. MESSENGER:          It would be control.  That's

5    what pled, is you can deliver control over your

6    communications to another.  And that's done in gag

7    clauses which are common in litigation, of course; and

8    also in noncompete agreements, which are intangible

9    assets for tax purposes.  So those can -- that control

10   can be delivered to another party or paid if it is done

11   in consideration for something else.

12         JUSTICE KAGAN:          Mr. Messenger, the Excelsior

13   rule, if I understand it correctly, the NLRB says that

14   an employer absolutely has to give a list of

15   employees --

16         MR. MESSENGER:          Yes.

17         JUSTICE KAGAN:          -- to the union seven days

18   after an election is called; is that correct?

19         MR. MESSENGER:          Not exactly.  The employer

20   has to give a list to the NLRB, and then the NLRB

21   distributes it to all parties.

22         JUSTICE KAGAN:          Okay, okay.  But the union

23   gets it seven days after?

24         MR. MESSENGER:          Eventually, yes.

25         JUSTICE KAGAN:          And that's by requirement.
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1   So you're suggesting that if the employer gives it six

2   days after, that's not only not required, that's

3   forbidden?

4   MR. MESSENGER: Yes.

5   JUSTICE KAGAN: So it goes within a period

6   of 24 hours, something that no employer can do

7   voluntarily to something that has to be done.

8   MR. MESSENGER: Yes, and the reason is it's

9   not the possession of the list that's somehow wrongful.

10   It's the fact that it's given by the employer, which

11   creates the danger: What will the union give in

12   exchange. That's the danger that 302 exists to take

13   care of, not that it's necessarily wrongful per se for a

14   union to have lists of information or the use of

15   property, but what will it do in return. And unions

16   have compromised employee interests in exchange for this

17   type of assistance. They certainly have extorted

18   employers. And here UNITE is willing to conduct a

19   hundred-thousand-dollar political campaign for this

20   information.

21   So, of course, in that hypothetical they'd

22   get it the next day anyway, so it would be rather

23   unusual for it to happen. But in a case like this where

24   the union can't even request an election, that list is

25   extremely valuable to them. And as UNITE's conduct

1 shows, they value it enough to do something in exchange

2 for it.

3   JUSTICE GINSBURG: Is it -- we heard from

4 the other side that that hundred-thousand-dollar payment

5 for the ballot initiative was a benefit both because it

6 would mean that there would be many more workers

7 employed by the casino if they were allowed to go into

8 this new line of business. So that it wasn't payment to

9 the employer of something that is of benefit exclusively

10 to the employer. It was to the union's benefit too.

11   MR. MESSENGER: Yes. I mean, that's

12 probably -- that may be true. However, 302 doesn't

13 prohibit, as Mr. -- opposing counsel said, prohibit a

14 union from giving something to an employer.

15   Thank you, Mr. Chief Justice.

16   CHIEF JUSTICE ROBERTS: Thank you, counsel.

17   Mr. McCracken, you have four minutes

18 remaining.

19   REBUTTAL ARGUMENT OF RICHARD G. McCRACKEN

20   ON BEHALF OF THE PETITIONER

21   MR. McCRACKEN: Thank you. On --

22   JUSTICE SOTOMAYOR: Mr. McCracken --

23   MR. McCRACKEN: Yes.

24   JUSTICE SOTOMAYOR: If I understood the

25 circuit below, it was suggesting, like the government,

 1   that an exchange of agreements for purposes of peaceful

 2   recognition, terms that were given for that purpose were

 3   legal, but that things given for -- that were not solely

 4   for recognition, but had value outside of that, like money,

 5   would be wrong.

 6   That 100,000 is troubling to me because I

 7   think what the circuit was saying is if the 100,000

 8   bought the peaceful recognition provisions, then that's

 9   corrupt, and that is outside the exemptions that the law

10   provides. That's how I read its decision.

11   Tell me why I'm wrong about that and tell me

12   how I deal with that niggling problem I have about the

13    $100,000, because it does feel like a bribe to the

14   employer.

15   MR. McCRACKEN: And the -- reading the

16   Eleventh Circuit's decision is actually somewhat

17   difficult, because the -- it appears that the court

18   suspected that there must be something else in the

19   picture that had not been disclosed and that's why it

20   ordered the district court to find out why the two

21   parties had cooperated with each other, despite the fact

22   that no one had alleged anything else in the picture

23   besides what is before us all now.

24   The -- so it seemed that the court was

25   puzzled that an employer would agree with the union to

1   cooperate in this fashion. The cooperation --

2   JUSTICE SOTOMAYOR: I don't think it -- it

3   was puzzled by the provisions at issue. I think it was

4   puzzled by the 100,000.

5   MR. McCRACKEN: Yes. And the -- the 100,000

6   was not a cash payment to anyone, although it might have

7   been. It might have been a contribution to a political

8   action committee that had been formed to advocate for

9   this initiative. But instead, it was actually the

10   union's own exercise of its speech and petition rights

11   as it campaigned for the passage of the initiative that

12   would allow the company to get into business in the

13   first place as a casino.

14   So, if the violation turns on the union's

15   exercise of its own First Amendment rights, then there's

16   a more severe problem here than Section 302, I believe.

17   CHIEF JUSTICE ROBERTS: Well, but there was

18   a promise to exercise the First Amendment rights in a

19   particular way up to the amount of $100,000.

20   MR. McCRACKEN: Yes.

21   CHIEF JUSTICE ROBERTS: That -- that's a

22   little different.

23   MR. McCRACKEN: It's a little different, but

24   also very similar to the promises that are actually on

25   the face of the memorandum itself, because the union

1 agrees to waive its First Amendment rights to engage in

2 picketing and boycott activity, as well as the employer

3 waiving some of its rights with respect to its freedom

4 of speech.

5   So this is a case where there are multiple

6 waivers of rights, both speech rights and property

7 rights, going back and forth between the two parties for

8 a central, completely legitimate purpose, and that is,

9 the employer getting into business and the union getting

10 the opportunity to organize its employees. That's all

11 there is in this picture, is the union, like so many

12 construction unions that we know, advocating in Congress

13 for the passage of laws like the Keystone Pipeline Law.

14   Why did they do that?   They do it because

15 they want the jobs. They hope that if they help the

16 industry develop a pipeline, that their members will

17 work on those jobs. That is a combination of interests

18 funneled through the First Amendment's protection for

19 mutual effort, as the Court recognized in Pennington,

20 and, of course, the Noerr-Pennington Doctrine is one of

21 our most important constitutional protections.

22   That's all that happened in this case.   So

23 there's nothing nefarious about it.

24   What -- there is -- there are some extremely

25 damaging things that the Respondents' very simplistic

1   argument will -- would accomplish if it were adopted.

2   Justice Kagan referred to the -- the grievance

3   procedure.

4   Well, there's also arbitration in this

5   agreement, as well as in collective bargaining

6   agreements. But one searches in vain in 302(c) for any

7   exception for arbitration, even though the Court has

8   said over so many years that it is the most important

9   thing under the Labor Management Relations Act.

10   Thank you.

11   CHIEF JUSTICE ROBERTS: Thank you, counsel.

12   Counsel.

13   The case is submitted.

14   (Whereupon, at 11:03 a.m., the case in the

15   above-entitled matter was submitted.)

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