

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - x

RENT-A-CENTER, WEST, INC., :

Petitioner :

v. : No. 09-497

ANTONIO JACKSON. :

- - - - - x

Washington, D.C.

Monday, April 26, 2010

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:02 a.m.

APPEARANCES:

ROBERT F. FRIEDMAN, ESQ., Dallas, Texas; on behalf of
Petitioner.

IAN E. SILVERBERG, ESQ., Reno, Nevada; on behalf of
Respondent.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	ROBERT F. FRIEDMAN, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	IAN E. SILVERBERG, ESQ.	
7	On behalf of the Respondent	26
8	REBUTTAL ARGUMENT OF	
9	ROBERT F. FRIEDMAN, ESQ.	
10	On behalf of the Petitioner	54
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 09-497, Rent-A-Center West v. Jackson.

Mr. Friedman.

ORAL ARGUMENT OF ROBERT F. FRIEDMAN

ON BEHALF OF THE PETITIONER

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

The agreement between Antonio Jackson and Rent-A-Center should be enforced as written. There is no statutory impediment to the enforcement of the clear and unmistakable agreement that gives the arbitrator exclusive authority to decide Jackson's challenge to enforceability, nor is there any language in the Federal Arbitration Act that would prohibit the court from making the determination -- prohibit the arbitrator from making the determination of Jackson's challenge to unconscionability.

Through frequent holdings of this Court going back 50 years to the Steelworkers' trilogy, this Court has plainly recognized that parties may delegate issues as to scope and validity to the arbitrator in the first instance. The district court and --

1 CHIEF JUSTICE ROBERTS: But not to the
2 question of which parties have agreed to arbitrate?

3 MR. FRIEDMAN: I'm sorry, Your Honor?

4 CHIEF JUSTICE ROBERTS: Not the question of
5 which parties have agreed to arbitrate?

6 MR. FRIEDMAN: Which parties can be,
7 potentially scope issues and which parties potentially
8 as well. In this case, the issue is enforceability.
9 And through the holdings of First Options, Howsam, and
10 Bazzle, going back to previous decisions, this Court has
11 held that parties through clear and unmistakable
12 delegation can give that to the arbitrator in the first
13 instance.

14 JUSTICE GINSBURG: But if -- if fraud in the
15 inducement, I take it, is considered -- even if you have
16 a very broad arbitration clause, as we do here, fraud in
17 the inducement is considered a question for the Court,
18 not the arbitrator's; is that right?

19 MR. FRIEDMAN: That's correct, Justice
20 Ginsburg.

21 JUSTICE GINSBURG: So why should
22 unconscionability be treated differently?

23 MR. FRIEDMAN: Justice Ginsburg, fraud in
24 the inducement pursuant to Prima Paint goes to the
25 making of the agreement, and under section 4 the court

1 retains decisions over the making of the agreement.
2 Unconscionability is a post-formation attack. It does
3 not go to the very limited inquiry that is anticipated
4 under section 4 of --

5 JUSTICE KENNEDY: Why is it post-formation?
6 Arguably, the -- one of the parties has such a strong
7 hand that it forces the other party just to decide.
8 It's almost like -- duress would certainly be for the
9 Court, would it not, if there's a formation issue like
10 Justice Ginsburg indicated?

11 MR. FRIEDMAN: In some instances,
12 Justice Kennedy, duress could be; for example, a gun to
13 somebody's head. But procedural unconscionability does
14 not go to the same issues of making. And in fact, under
15 Nevada law and this State's laws --

16 JUSTICE KENNEDY: I'm not sure what
17 procedural unconscionability, but this is -- as Justice
18 Ginsburg indicates, it's not clear to me why this isn't
19 a formation issue.

20 MR. FRIEDMAN: Formation is a very basic
21 existential analysis. It goes to mutual assent. Did
22 the parties sign the agreements and indicate the desire
23 to be bound by the agreement?

24 JUSTICE SCALIA: I guess you could argue
25 that on its face the agreement is so one-sided, so

1 unconscionable, that one of the parties must have been
2 coerced into signing it. I guess you could make that
3 argument, can't -- couldn't you?

4 MR. FRIEDMAN: Justice Scalia, you could
5 make that argument.

6 JUSTICE SCALIA: Has -- has that argument
7 been made here?

8 MR. FRIEDMAN: There was an argument made
9 that it was one-sided, but it was the same type of
10 argument that pertains --

11 JUSTICE SCALIA: Was the argument made that
12 because it was so unconscionable, the employee must have
13 been coerced into making it?

14 MR. FRIEDMAN: No, Justice Scalia. That
15 argument was not --

16 JUSTICE SCALIA: I didn't think it -- it had
17 been made.

18 MR. FRIEDMAN: Getting back to
19 Justice Ginsburg's question about making --

20 JUSTICE STEVENS: I'm a little puzzled.
21 What was the argument that was made? Why was it
22 unconscionable, if not for that reason?

23 MR. FRIEDMAN: Justice Stevens, the argument
24 was that there was unequal bargaining power because
25 Mr. Jackson was the putative employee and Rent-A-Center

1 was the employer. He also complained about a couple of
2 the provisions in the agreement, one pertaining to
3 discovery, one pertaining to an alleged fee-splitting
4 provision in the agreement. He did not complain as to
5 the terms that Justice Scalia just referred to.

6 With respect to making, it is a very limited
7 inquiry and section 4 is the provision in the Federal
8 Arbitration Act that gives the court the power to
9 enforce the arbitration agreement. Once the court is
10 satisfied that the making is not an issue and the making
11 is a very basic issue, the court, pursuant to the plain
12 language of section 4, must submit the dispute to
13 arbitration.

14 JUSTICE SOTOMAYOR: You have --

15 MR. FRIEDMAN: Now, in some instances the
16 courts will make decisions as to attacks such as
17 unconscionability, but in this --

18 JUSTICE SOTOMAYOR: Counsel, is your problem
19 with unconscionability being, as described by the Chief
20 Justice or Justice Scalia, being forced to or coerced
21 into signing something? That's okay for the courts, but
22 this type of argument that goes to the unfairness of the
23 process, that's for the arbitrator; is that your
24 position?

25 MR. FRIEDMAN: That's right, Justice

1 Sotomayor.

2 JUSTICE SOTOMAYOR: So why -- isn't that an
3 unwieldy rule? Isn't your quarrel with what the court
4 defined as permissible unconscionability as a legal
5 matter, as opposed to trying to parse out what
6 unconscionability means otherwise?

7 MR. FRIEDMAN: Well, Justice Sotomayor,
8 unconscionability and fairness attacks go to
9 post-formation issues that -- that are --

10 JUSTICE SOTOMAYOR: We just gave you one
11 that didn't: If someone was forced into signing the
12 agreement in an unconscionable way.

13 MR. FRIEDMAN: But, Justice Sotomayor, if
14 for example it's fraud in the inducement, such as in
15 Prima Paint, that does go to the section 4. It does go
16 to the making of the agreement because there would not
17 be mutual assent if somebody was forced to enter into
18 the agreement.

19 In contrast, unconscionability, and
20 certainly the allegations we've seen here against the
21 agreement, go to post-formation complaints, complaints
22 about the fairness of the agreement. They do not go to
23 the actual very limited making of the agreement.

24 CHIEF JUSTICE ROBERTS: But I suppose that
25 the substance of the agreement -- maybe this is just the

1 same question as Justice Scalia's. Suppose the
2 substance of the agreement is evidence, or could be
3 evidence on the unconscionability at formation?

4 MR. FRIEDMAN: Well --

5 CHIEF JUSTICE ROBERTS: And that is for the
6 court?

7 MR. FRIEDMAN: If -- if there is something
8 in the agreement that would indicate that there was not
9 mutual assent, as in somebody put a gun to somebody's
10 head, somebody forced them to do it, that would be for
11 the court.

12 CHIEF JUSTICE ROBERTS: No, the point is --
13 it's not that. It would be the -- the provisions are so
14 one-sided that you may assume from that that the
15 formation was not voluntary.

16 MR. FRIEDMAN: No, Mr. Chief Justice.
17 Attacks on the fairness and simply pointing to
18 provisions and saying, Well, these are very unfair; it
19 must be an indication of it being forced, no, that would
20 be for the arbitrator to decide, because it is simply an
21 attack on the fairness and their speculation as to why
22 somebody entered -- and in this agreement --

23 JUSTICE SCALIA: I don't agree with that. I
24 mean, if -- if the argument is made -- I gather it
25 wasn't made here, but if the argument is made that this

1 agreement was not voluntary, and the evidence of that
2 involuntariness is how outrageously unfair it is -- now,
3 I'm not sure that that's enough evidence. You may need
4 some other stuff as well to -- to persuade a court.

5 But if that is the argument, that the
6 one-sidedness is evidence that the agreement was not
7 voluntary, I don't see how that's for the arbitrator.

8 MR. FRIEDMAN: Justice Scalia, under the
9 section 4 analysis in the making there needs to be some
10 evidence that it was forced, the gun to the head
11 example. Simply pointing to the language in the
12 agreement as evidence of that would not be enough. That
13 is an attack on the language of the agreement after it's
14 been formed.

15 The section 4 analysis is very, very limited
16 and it goes to these most basic elements. So the
17 language of the agreement, while certainly the party
18 opposing it will have the opportunity to make the
19 argument it's unconscionable, but that would be for the
20 arbitrator --

21 JUSTICE SCALIA: You don't think that could
22 be used along with other evidence? I think all you are
23 saying is that it is not in and of itself enough, that
24 every unfair agreement is not a coerced agreement.

25 MR. FRIEDMAN: It certainly would not in and

1 of itself be enough --

2 JUSTICE SCALIA: But you could use it as
3 evidence if there is other evidence supporting that.
4 Couldn't you?

5 MR. FRIEDMAN: Your Honor, you would have to
6 look at the objective manifestation of mutual assent.
7 For example, in this agreement --

8 JUSTICE SCALIA: I think you can answer that
9 yes or no. Can you use that in addition to other
10 evidence to show that the agreement was not voluntary?

11 MR. FRIEDMAN: Justice Scalia, I don't think
12 so. I think you would have to look to what transpired
13 at the time the agreement was actually entered into and
14 was made.

15 JUSTICE STEVENS: And that's no matter how
16 one-sided? I mean, suppose the agreement provided that
17 the employee shall pay all the costs of arbitration no
18 matter who wins and also at the end of the arbitration
19 shall pay a penalty if it fails to -- it seems to me you
20 could have a really one-sided -- that would not be
21 admissible on the issue?

22 MR. FRIEDMAN: Justice Stevens, if there is
23 an issue about arbitral access, as in there is a block
24 at the door, you cannot get a ticket for the show,
25 because of some impediment in getting to arbitration in

1 the first place, under the Court's principles announced
2 in Randolph and in First Options you must have access to
3 the arbitrator. So in your example, if there is
4 something prohibiting access to the arbitrator that
5 would be a different story.

6 Getting back to Justice Scalia's question
7 about --

8 JUSTICE GINSBURG: What about the specific
9 examples he gave, that the -- just take that the -- that
10 the employee must bear all the costs of the arbitration,
11 win or lose, that's the provision. Would that provision
12 be enough to make the issue one for the Court rather
13 than the arbitrator?

14 MR. FRIEDMAN: Justice Ginsburg, if it's
15 simply a complaint about the fairness, it would not be.
16 If the parties --

17 JUSTICE GINSBURG: But is it? We don't need
18 the "if." Tell me whether you think a provision saying
19 the employee under any and all circumstances pays all
20 costs, would that provision make this question of
21 unconscionability one for the court rather than the
22 arbitrator?

23 MR. FRIEDMAN: It could, Justice Ginsburg.
24 It would not be a question of arbitrability if the party
25 opposing arbitration can meet the very heavy burden

1 established in Randolph to show that the fees would
2 be -- would prohibit them from actually getting to
3 arbitration. It would not be simply an attack as we saw
4 here, with no evidence, that we think a term is unfair.

5 The party opposing arbitration would have to
6 meet their burden. They would have to put evidence in.
7 And for example, in Randolph the Court stated that in
8 certain instances Mrs. Randolph could have put evidence
9 in and had she put evidence in, which she did not, much
10 as in this case, if she had met her burden to show that
11 she could not have access to arbitration -- in other
12 words, if arbitration is an illusory remedy -- that
13 could be for the court to decide, because, after all,
14 even in the First Options decision, the anticipation is
15 you have a clear and unmistakably delegation that the
16 arbitrator will make a decision and implicit in that
17 that there is an arbitrator to make that decision.

18 JUSTICE BREYER: Yes, that's true. The
19 thing I was wondering in this case is there's a -- a
20 dispute that's about racial discrimination and so forth.
21 There is a clause and the clause says this is
22 arbitrable, but that is being disputed because the
23 plaintiff in the case says that's an unconscionable
24 provision so it doesn't really apply. And then you say,
25 but now that dispute is referred to the arbitrator to

1 just read the language. But the plaintiff says that
2 that language, too, is unconscionable and as long as
3 that language is unconscionable, then how is it clear
4 and unmistakable that they, he, agreed to do it, because
5 an unconscionable provision is not a provision?

6 So if we apply First Options -- I mean, it's
7 complicated because of the language; it's not
8 complicated once you think it out, and -- I hope. But
9 just applying it very literally, it would seem to say
10 that you do not have clear and unmistakable evidence
11 that they agreed to submit this kind of dispute to
12 arbitration for the reason that what you point to is
13 itself according to them a product of unconscionability.
14 How do you -- how do you respond to that?

15 MR. FRIEDMAN: Justice Breyer, under section
16 4, which is the enforcement mechanism, the court is
17 limited to make decisions about the making. Once the
18 making issue is not an issue -- and it has never been an
19 issue in this case; there has never been an allegation
20 that the making has been affected -- the court at that
21 point should enforce the agreement pursuant to its
22 terms.

23 JUSTICE BREYER: Well, the making itself
24 could be, but I think that's a harder question,
25 whether -- certainly if the person says, you see my

1 signature there; that's not mine; that's Joe Banana's,
2 who tries to imitate me, there is no contract and, no
3 matter what it says, it doesn't go to the arbitrator,
4 all right?

5 Now, we can argue about whether it is or is
6 not analogous to that when he claims it's
7 unconscionable. There's a very good argument it is
8 analogous. There's a very good argument it is like
9 fraud in the inducement, and there are some arguments
10 the other way.

11 But First Options I think cuts through that,
12 by saying, whether that's true or not, unless it's clear
13 and unmistakable that they wanted this matter, the
14 matter of whether the arbitration clause itself is
15 unconscionable referred to the arbitrator, whether or
16 not they wanted that referred to the arbitrator has to
17 be clear and unmistakable. And they are claiming no,
18 because the lack -- the provision that says that is
19 itself a product of unconscionability. That's to repeat
20 my question. But, having repeated the question, why
21 isn't that the simplest, most direct and four-sentence
22 ground for deciding this case?

23 MR. FRIEDMAN: Justice Breyer, Jackson did
24 not ever complain that the arbitrability provision, the
25 clear and unmistakable delegation provision, was

1 unconscionable.

2 JUSTICE BREYER: He is not saying that this
3 whole arbitration clause is unconscionable?

4 MR. FRIEDMAN: He is complaining that
5 generally it's unconscionable.

6 JUSTICE BREYER: Well, all right. So he's
7 complaining the whole clause is unconscionable, and
8 that's part of the clause.

9 MR. FRIEDMAN: Justice Breyer this is really
10 very similar to First Options, in which the party said:
11 I'm not party to the agreement; the scope does not
12 cover --

13 JUSTICE BREYER: I mean, in First Options we
14 said it was not clear and unmistakable.

15 MR. FRIEDMAN: The Court said it was not,
16 but in First Options the Court set out the rules.

17 JUSTICE BREYER: And the rules were what I
18 just described.

19 MR. FRIEDMAN: The rule is -- in this case
20 there is language that has never been contested and that
21 language clearly and unmistakably says that the
22 arbitrator has exclusive authority. That language has
23 never been attacked.

24 And as to the issue of unconscionability,
25 pursuant to section 4, which gives the court the

1 authority to send the arbitration to the arbitrator, the
2 court should do exactly that. It should send it to the
3 arbitrator once the making issue is satisfied and then
4 the arbitrator can make the decision.

5 CHIEF JUSTICE ROBERTS: So your position is
6 that the arbitrator gets to decide questions of
7 unconscionability, but the court gets to decide whether
8 the arbitrator can do that?

9 MR. FRIEDMAN: In some instances, Justice
10 Roberts, Mr. Chief Justice, that is correct. The court
11 must decide whether the agreement is made. The court
12 must also decide whether there was a clear and
13 unmistakable delegation. So under First Options and the
14 cases that interpret it and the cases before it, the
15 court must make the initial determination of whether
16 there is a clear and unmistakably delegation.

17 JUSTICE KENNEDY: Well, do you understand --
18 and we can ask the Respondent. As you understand
19 Jackson's case, is he saying that part of the clause,
20 part of the arbitration clause, is unconscionable, that
21 the whole clause is unconscionable or that the whole
22 contract is unconscionable?

23 MR. FRIEDMAN: He has made generalized --

24 JUSTICE KENNEDY: Because the complaint is a
25 bare bones complaint and I don't know if there is

1 anything in the pleadings that reflects what his answer
2 to that question would be.

3 MR. FRIEDMAN: Justice Kennedy, he has
4 attacked certain provisions specifically of the
5 agreement. He is arguing about the discovery provision.
6 He is arguing about the fees provision and he is arguing
7 about certain terms excluding claims, that bilaterally
8 exclude claims. So he has attacked about three
9 provisions of the agreement specifically.

10 JUSTICE GINSBURG: But all of the
11 arbitration agreement, not the employment contract as a
12 whole.

13 MR. FRIEDMAN: Justice Ginsburg, it is a
14 stand-alone four-page arbitration agreement.

15 JUSTICE BREYER: So let's go back to that.
16 Maybe the other way is simpler. You say you agree that
17 if my defense to this contract which you are trying to
18 enforce against me or which gives me a right to sue you,
19 look at the argument, you put up this four-page
20 document, and I say: Look, that is not my signature;
21 that is the signature of Joe Bananas. We agree that's
22 for the Court.

23 MR. FRIEDMAN: We agree.

24 JUSTICE BREYER: Okay. Now, we agree it's
25 for the court if my defense is, what he did is he got me

1 drunk, told me a bunch of lies, and I signed it. I
2 grant it's my signature, but look at how squiggly it is.
3 And my will was not a free one because I was under the
4 influence of alcohol and lies.

5 MR. FRIEDMAN: We agree, same.

6 JUSTICE BREYER: Okay. Same, okay. Now, he
7 says the reason that I did not sign this contract, I
8 agree it's my signature, I agree it is not squiggly, but
9 still my will was overborne. What was it overborne by?
10 It was overborne by those very situations that lead
11 courts to label contracts unconscionable. The reason we
12 don't enforce unconscionable contract is because the
13 person who was the victim had no free will, he did not
14 sign it of his own accord, and that doesn't -- there is
15 no other reason and that's the basic reason, and
16 therefore assimilate it to the other two. What's your
17 response?

18 MR. FRIEDMAN: No, Justice Breyer, that
19 would be a very different situation. That would be
20 allegations of procedural unconscionability, unequal
21 bargaining power, and in fact --

22 JUSTICE SCALIA: Do you agree that a
23 contract cannot be unconscionable unless it was coerced,
24 that a finding of unconscionability is the same as a
25 finding of coercion? You don't agree with that?

1 MR. FRIEDMAN: No, there could be other
2 types of unconscionability.

3 JUSTICE BREYER: Yes, but that's what I want
4 the answer to. I know you don't agree with it. What I
5 want is a list of reasons why.

6 MR. FRIEDMAN: With respect to procedural
7 unconscionability, issues of unequal economic bargaining
8 power, which is essentially what we have here, those are
9 non-issues that cannot be addressed by the arbitrator.
10 And in fact under Nevada law, Justice Breyer, an
11 allegation of procedural unconscionability, no matter
12 how procedural --

13 JUSTICE BREYER: I'm not interested in
14 arbitration law. I am interested in contract law, and I
15 want to know why as a general matter of contract law an
16 allegation of unconscionability, defense of
17 unconscionability, is why is it not enough like the
18 coercion defense or the inducement defense or the "I was
19 in Alaska" defense? Isn't it enough like that that they
20 should be treated alike? And now you're going to say no
21 and I want to know why not.

22 MR. FRIEDMAN: It does not rise to the same
23 level as something that's fraudulent or something that
24 is forced with a gun to your head.

25 CHIEF JUSTICE ROBERTS: I would have thought

1 the answer to your, the answer to your answer, would be,
2 well then, -- you are more likely to win on that
3 question. Obviously you are going to lose on the gun to
4 the head, but if it is simply the economic inequality or
5 whatever, under the State law you are probably going to
6 prevail, and they will say there is a valid contract. I
7 thought the -- your -- your whole point was simply it's
8 all or nothing.

9 The courts get to decide is there a valid
10 contract or is there not. And once they decide there
11 is, then everything else about unconscionability of
12 particular clauses is for the arbitrator.

13 MR. FRIEDMAN: Mr. Chief Justice, most
14 everything is for the arbitrator, and I want to
15 distinguish between unconscionability, as Justice Breyer
16 is referring to, and access issues and issues that go to
17 the making, because there is a very bright line. Making
18 issues go to the actual formation, mutual assent, and
19 there is obviously no mutual assent if you have a gun to
20 your head.

21 But issues such as, well, this is unfair, I
22 may have to do this, speculation is simply not enough
23 to -- to pertain to the making of the agreement, nor is
24 an issue about an impossibly burdensome access to the
25 arbitration.

1 CHIEF JUSTICE ROBERTS: Can you --

2 JUSTICE GINSBURG: Mr. Friedman, this
3 contract is -- is unusual in that, as Judge Hall said,
4 it was more employee-friendly than most. It had a
5 clause -- it had a provision for back-end review with
6 the court. The review -- at the end of the line there
7 was to be court review, and as the parties said, it
8 should be just like review of a district court decision,
9 a much -- much more focused review than would be in the
10 case of an arbitration agreement.

11 Now, that clause comes out because of our
12 decision in Hall. That leaves the -- the arbitration
13 agreement in -- in an imbalance. There was court review
14 assured at the back end, so why isn't it reasonable to
15 say the parties contemplated vigorous court review; if
16 it can't be had at the back end, it should be had at the
17 front end?

18 MR. FRIEDMAN: Justice Ginsburg, there will
19 be court review at the end pursuant to section 10. As a
20 result of Hall Street, section 10 is now the exclusive
21 basis on the tail end --

22 JUSTICE GINSBURG: B ut it was very limited
23 review. But the parties to this agreement put in a
24 clause that provided for the standard review, not the
25 very limited review that the Arbitration Act calls for.

1 MR. FRIEDMAN: That's correct,
2 Justice Ginsburg. But by operation of law and because
3 of this Court's decision in Hall Street, now the parties
4 will receive the section 10 review, much as they would
5 in the First Options case.

6 JUSTICE SCALIA: Once again, has this
7 argument been made here? I thought that the only basis
8 was unconscionability. I suppose you could have made
9 the argument that the contract is void because one of
10 its essential provisions has been rendered unlawful and,
11 therefore -- and is not severable, and therefore the
12 whole contract fails. I suppose you could make that
13 argument. That hasn't been made.

14 MR. FRIEDMAN: Justice Scalia, that's
15 absolutely correct. There has been no argument, in
16 fact, at no time -- and it would have -- the proper
17 place would have been the district court -- was any
18 evidence ever put into the record --

19 JUSTICE GINSBURG: How could it be in the
20 district court? We didn't decide Hall Street until
21 after the district court was finished in this case.

22 MR. FRIEDMAN: But, Justice Ginsburg, at the
23 district court no evidence of any sort attacking any
24 provision. The only attacks here on the provisions are
25 the arguments that were made by my colleague in the

1 brief --

2 JUSTICE GINSBURG: I thought you were
3 making, in answer to Justice Scalia, the question -- he
4 said, well, they didn't raise it? They didn't raise
5 that with this provision out, it was an essential
6 provision, so the contract was void. They had no reason
7 to make that in the district court because Hall Street
8 was not yet decided.

9 MR. FRIEDMAN: Justice Ginsburg, my point
10 simply is they put in no evidence of any sort attacking
11 anything --

12 JUSTICE SCALIA: Can they make it here now?
13 Can they make -- I mean, even if they had -- you know,
14 even if there was no reason to make it in the district
15 court, isn't the law --

16 MR. FRIEDMAN: I -- I --

17 JUSTICE SCALIA: -- that since they didn't
18 have an opportunity to make it in the district court,
19 they can make it in the Supreme Court?

20 MR. FRIEDMAN: Justice Scalia, they could
21 make that argument before the arbitrator and the
22 arbitrator could make that decision. Under the clear
23 and unmistakable delegation, that issue, like other
24 issues, should be decided by the arbitrator.

25 Nobody is contesting -- at least certainly

1 nobody contested prior to us getting to the Supreme
2 Court -- both the district court and the Ninth Circuit
3 held that the language was clear and unmistakable.
4 There was never any contest to that issue until we got
5 here, and because of the clear and unmistakable language
6 and because the agreement does not implicate the making,
7 we ask the Court to enforce the terms of the agreement
8 as written and pursuant to Bazzle and Howsam. In
9 particular in Bazzle the Court recognized that issues as
10 to scope and issues as to validity can go to the
11 arbitrator in the first instance.

12 Here there can be no doubt, and certainly
13 there was no doubt at the district court level and Ninth
14 Circuit, that the parties clearly and unmistakably gave
15 the arbitrator exclusive authority, and we are asking
16 the Court to give effect to that language.

17 The -- the -- the primary purpose of the
18 Federal Arbitration Act is to enforce arbitration
19 agreements pursuant to their terms. Here there's no
20 real dispute about what the terms are. Under section 4,
21 a limited inquiry, once we have satisfied section 4 the
22 court should proceed to send us to the arbitrator.

23 Nobody is arguing that Mr. Jackson can't
24 make these challenges once he gets to arbitration. In
25 fact, he certainly can. And the arbitrator will make

1 that decision. And the arbitrator may decide that it's
2 unconscionable, in which case he will send it down. Or
3 he may decide -- or he or she may decide that it is not
4 unconscionable, or he or she may decide that certain
5 terms are problematic and to sever those.

6 At this point, if there is no other
7 questions I would like to reserve my remaining my time.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. Silverberg.

10 ORAL ARGUMENT OF IAN E. SILVERBERG

11 ON BEHALF OF THE RESPONDENT

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

14 The Petitioner would have the Court adopt a
15 rule whereby agreements to arbitrate are presumed
16 enforceable before their validity has been determined by
17 a court under section 2 of the Federal Arbitration Act.
18 They would have people like Mr. Jackson waive their
19 right to go to court through the use of a clause
20 delegating this judicial function to the arbitrator.

21 JUSTICE SOTOMAYOR: Could you describe for
22 us what is unconscionable about this contract? What is
23 your claim of unconscionability? He says it's not
24 arbitration per se; it's just certain of the provisions
25 here; if you change the provisions I'm happy with

1 arbitration.

2 Is that your position?

3 MR. SILVERBERG: Yes, Your Honor, that --
4 that what is unconscionable about this is it's unusually
5 one-sided in that the issues that are most important to
6 Mr. Jackson, such as his racial discrimination case, he
7 is required to arbitrate, but those issues that might be
8 most important to the Petitioner, such as trade secrets
9 and unfair competition, they are not bound to arbitrate.

10 CHIEF JUSTICE ROBERTS: I would have thought
11 the issue would be -- it's odd to say, I think, that if
12 you have ten provisions, some are unconscionable and
13 some are not. The issue would be whether there is
14 unconscionability in the making of the whole contract.
15 In other words, it's the same question I asked your
16 friend: Why isn't it all or nothing? If it was -- if
17 there was no unconscionability in the making, then the
18 arbitrator decides. If there was unconscionability in
19 the making, then -- then the arbitrator doesn't decide
20 anything. Questions 1 through 10, not simply, you know,
21 1, 8, and 9.

22 MR. SILVERBERG: If I understand Your
23 Honor's question, the -- the threshold determination
24 must first be made by the court under section 2 as to
25 whether there is unconscionability either of the entire

1 agreement or any of the provisions. It would then,
2 assuming that were found, that some provisions were in
3 fact unconscionable, it would be on State law to
4 determine whether or not the entire agreement gets
5 thrown out --

6 CHIEF JUSTICE ROBERTS: No, my point is that
7 once you get past that Gateway question of whether the
8 formation of the contract was not unconscionable, then
9 claims that particular provisions were unconscionable
10 are by definition for the arbitrator to decide.

11 MR. SILVERBERG: No, we would disagree with
12 that. And here's why, Your Honor, and I think this goes
13 to something that Justice Sotomayor asked, which is it
14 creates a very difficult rule to deal with. The
15 Petitioners here, one, they have made a huge concession,
16 we believe, in their reply brief by saying that if there
17 is an illusory remedy, that that is a section of
18 unconscionability that the court can hear and must hear.
19 But all these other --

20 JUSTICE GINSBURG: Why is that -- why is
21 that a big concession, because I thought, as the First
22 Circuit said, now, if argument is the -- the contract is
23 illusory, that goes to the court, but here the only
24 claim is unconscionability, that's a question of
25 fairness, it doesn't go to the court.

1 MR. SILVERBERG: The -- the reason it's a
2 concession is because that's not their original position
3 and that's not the question that they presented to this
4 Court.

5 JUSTICE GINSBURG: But if they -- if they
6 made that concession, so what, under the First Circuit's
7 reading?

8 MR. SILVERBERG: The First Circuit, Your
9 Honor, we believe did not interpret this correctly.
10 They have, we believe, carved out a section of
11 unconscionability law at the exclusion of all other
12 unconscionability law.

13 We know that States and Federal courts have
14 routinely applied State unconscionability law, and they
15 would have a rule whereby all this jurisprudence of the
16 States delineating unconscionability law would in
17 essence be preempted.

18 JUSTICE SCALIA: Is that -- is that right?
19 Is the arbitrator free to decide unconscionability in a
20 vacuum without taking into account State law at all?
21 And doesn't he get reviewed afterwards by the State
22 court on the basis of a much more lenient standard
23 than -- than if the court decided it de novo. But can
24 he really disregard State law regarding
25 unconscionability?

1 MR. SILVERBERG: Well, the problem is, Your
2 Honor, and if I understand Your Honor's question
3 correctly, that determination must of course be made by
4 the court, because the arbitrator doesn't have any
5 authority to do anything until the requirements of
6 section 2 are met. And I hope I am understanding Your
7 Honor's question.

8 JUSTICE SCALIA: No -- I mean, you -- I
9 thought you were saying that if we allow this to go to
10 the arbitrator, the arbitrator can simply disregard the
11 question of unconscionability.

12 MR. SILVERBERG: That's in essence --

13 JUSTICE SCALIA: And that's not my
14 understanding. My understanding is that he's -- he is
15 obliged to take account of State law regarding
16 unconscionability, but it's going to be his call, as it
17 would be the district judge's call if this had gone to
18 court, whether in fact this is unconscionable.
19 Afterwards there will be court review. And if he has
20 totally disregarded all State law regarding
21 unconscionability, wouldn't -- wouldn't you have a basis
22 to set aside the -- the arbitration?

23 MR. SILVERBERG: Respectfully, I -- I
24 disagree with that, and here's why, Your Honor: the
25 back-end review, presumably it would be, I believe,

1 under section 10(a)(4) that he exceeded his authority.
2 And once the arbitrator is empanelled under the
3 Federal -- under section 2, once he is authorized to
4 make any decisions at all, including the issue that the
5 Petitioner would have him decide of unconscionability
6 and arbitrability, it would be impossible for anyone to
7 say he has exceeded his authority.

8 JUSTICE SCALIA: That doesn't mean -- does
9 that mean he can disregard -- let's assume the contract
10 is a contract to maim. I mean, it -- you know, it's --
11 it's like -- it's a Shylock contract, okay? He's going
12 to be able to exact a pound of flesh. Now, there are
13 State laws which invalidate contracts to maim. Do you
14 think that the arbitrator can ignore that, and say,
15 well, you know, I don't really think it's so bad, a
16 pound of flesh sounds reasonable to me?

17 MR. SILVERBERG: I think the concern is,
18 Your Honor, and it's hard to draw the line --

19 JUSTICE SCALIA: Can he ignore the State
20 law?

21 MR. SILVERBERG: I think there is no
22 adequate review if he chooses to without the court's
23 review of --

24 JUSTICE SCALIA: Is that right? You don't
25 think a State court would in the blink of an eye set

1 aside an arbitration that allowed a -- a pound of flesh?

2 MR. SILVERBERG: Your Honor, I would hope
3 they would. But I -- in reading the narrow review of
4 section 9, 10, and 11, I don't think we have that
5 guarantee.

6 JUSTICE SCALIA: I think you have a
7 misunderstanding of the law, then, if that's what you
8 believe. I -- I think there is no doubt what would
9 happen in that case.

10 JUSTICE BREYER: What is -- I'm not sure
11 about what you are arguing now is my -- as I came into
12 this, I thought there were three situations. Situation
13 1 is common in labor arbitration. It's an arbitration
14 agreement that says wages, hours and working conditions
15 disputes will be arbitrated, and we have a question
16 about whether a particular dispute is or is not fall
17 within the definition.

18 MR. SILVERBERG: Right.

19 JUSTICE BREYER: As to that one, we assume
20 that the parties intended the question of arbitrability
21 to be arbitrated; we assume it. Normally that's the
22 rule. It's the scope of the arbitration agreement.
23 That's a little hard to distinguish, but sometimes
24 that's not the argument. The argument could be: Well,
25 there are four different provisions in the arbitration

1 section and we think one of them is void because it's,
2 say, unconscionable, but the others are okay. Now that
3 one, I mean, normally, you could if it's clear enough
4 say I want that one to go to arbitration.

5 And the third one is that you have a
6 contract and it's an arbitration contract and it's on
7 four separate pieces of paper, and what you are saying
8 is, I was in Alaska, or the equivalent, and maybe
9 unconscionability is the equivalent. On that one I'm
10 with you.

11 I don't see how you can submit -- agree to
12 submit that to the arbitrator, because there is no
13 agreement, or at least no valid one, at least no valid
14 one under State law.

15 But what are you arguing? That this is that
16 case or this is the other case I just mentioned, that
17 middle case where you have ten provisions and you are
18 saying that this one over here is unconscionable but
19 that one isn't; and -- but I did sign a valid
20 arbitration agreement, I agree with that, it's just that
21 certain provisions of it are invalid because they are
22 unfair. What are you arguing in this case?

23 MR. SILVERBERG: That -- Your Honor, it
24 would be the second one. That there are --

25 JUSTICE BREYER: Well, the second one, I

1 don't see how you get there, because if it's the second
2 one you concede that there is an arbitration agreement
3 that is valid. And if you concede that there is a valid
4 arbitration agreement between you and your client, and
5 you are arguing over the scope of different provisions
6 or whether certain provisions within it are valid or
7 invalid, why can't you submit that to an arbitrator if
8 it is clear enough?

9 MR. SILVERBERG: But we don't concede that,
10 Your Honor. That's the whole point, is that the court
11 must make that threshold provision.

12 JUSTICE BREYER: As to each provision? As
13 to each bit of -- why?

14 MR. SILVERBERG: Because that's the mandate
15 of section 2. The arbitrator derives his authority --

16 JUSTICE BREYER: But suppose you and your --
17 your client, rather, your client and the other side have
18 absolutely agreed, clear as could be, under the
19 arbitration agreement: We want arbitrated too whether
20 the provision that these words are contained in is
21 unconscionable. Can't they agree to that?

22 MR. SILVERBERG: Your Honor, the parties are
23 -- don't necessarily have to take every issue to court,
24 but should a party challenge that issue as
25 unconscionable, that door should remain open.

1 This case is not so much -- it is about our
2 case here, but there is a bigger picture here.

3 JUSTICE BREYER: Okay. Let me say it more
4 easily. We have agreement number one, four pages, and
5 within it is a question of -- which just looks like this
6 one. Agreement number two: The two parties agree that
7 if any dispute should arise as to whether any words in
8 agreement number one are unconscionable, they will go to
9 the arbitrator. Agreement number two is concededly
10 valid. Now, do you want to say that agreement number
11 one, those words have to be decided by the court?

12 MR. SILVERBERG: Your Honor, it is our
13 position that -- that the threshold determination as to
14 the validity of the contract --

15 JUSTICE BREYER: Right, but if you are going
16 to say -- then I think if you are going to say yes to
17 that, then it is contrary to First Options, I think.
18 I'm not sure, but I don't see why not.

19 MR. SILVERBERG: Well, Your Honor, I think
20 that what Your Honor is describing is the first part of
21 First Options that looked -- and that's what the
22 Petitioner would like to rely on, is objective contract
23 language. But then the Court adds the entire other
24 section which says we don't presume that parties intend
25 to arbitrate certain matters and -- because we are not

1 yet at that scope -- but we want clear and unmistakable
2 language, not just objective language in the contract.

3 And there's an important reason for that,
4 because it's impossible to draw the line. You are
5 carving out certain issues of unconscionability --

6 JUSTICE KENNEDY: After this -- after this
7 suit was filed and both parties are going up the steps
8 to the court, could the attorneys and the parties stop
9 and say, let's arbitrate this issue of
10 unconscionability, and pick an arbitrator? Could they
11 do that?

12 MR. SILVERBERG: They -- I think the answer
13 there would be yes, but the door needs to be open in
14 case there is a challenge, Your Honor. Certainly
15 nobody is required to go to court.

16 JUSTICE KENNEDY: No, then -- then the --
17 then the employee loses. He says: Oh, you have to have
18 an open door; this was -- this was not properly before
19 the arbitrator.

20 MR. SILVERBERG: I think if Your Honor is
21 asking --

22 JUSTICE KENNEDY: Because if -- you see, if
23 you say yes, that they can arbitrate this, then the
24 question is why can't they do it when the contract's
25 signed?

1 MR. SILVERBERG: Again, Your Honor --

2 JUSTICE KENNEDY: Let's assume that the
3 answer to my question is yes, they can put that to an
4 arbitrator. If that's so, how can you prevail in this
5 case if the agreement clearly comprehends submission of
6 this issue to the arbitrator?

7 MR. SILVERBERG: Well, we don't concede that
8 it clearly does that. We -- what our position is --

9 JUSTICE KENNEDY: I'm -- I'm asking, assume
10 you do?

11 MR. SILVERBERG: I don't think that gets us
12 around the requirements of section 2, Your Honor, that
13 says the court and the doors to the court must always
14 remain open. But I hope I am understanding your
15 question.

16 CHIEF JUSTICE ROBERTS: I thought --

17 JUSTICE GINSBURG: Mr. Silverberg, the
18 section 2 on which you place much emphasis just says
19 that agreements are enforceable save on such grounds as
20 exist in law or equity for revocation of a contract.
21 But the section 2 doesn't say any -- anything about who
22 decides that question.

23 MR. SILVERBERG: That's true, Your Honor,
24 the -- but the logical reading of that statute would
25 indicate that these three elements, a writing, in

1 interstate commerce, and not revocable at law and
2 equity, would have to be met before the arbitrator has
3 any authority to do anything.

4 And as Your Honor mentioned in the -- in the
5 Doctor's Associates case, there are certain issues that
6 are certainly involved, and unconscionability is one of
7 those issues that can be presented to the court without
8 violating section 2, as well as fraud and duress I
9 believe were the other ones that the Court had -- had
10 delineated in that case.

11 JUSTICE BREYER: I read your -- I promise
12 you I will go back to First Options, which I thought was
13 of gem-like clarity --

14 (Laughter.)

15 JUSTICE BREYER: And I am apparently the
16 only one in the world --

17 MR. SILVERBERG: That's because it was well
18 argued.

19 JUSTICE BREYER: -- the only one in the
20 world who thinks that.

21 JUSTICE SCALIA: You wrote that, didn't you?
22 Didn't you write that opinion?

23 JUSTICE BREYER: I will go back to that and
24 look at it. But the -- looking at your response to
25 their motion to arbitrate --

1 MR. SILVERBERG: Yes.

2 JUSTICE BREYER: -- it seemed to me that you
3 said here that -- that because of your -- your position,
4 your client's position, that the whole thing is
5 unconscionable. You didn't say that?

6 MR. SILVERBERG: Well, we said that -- it
7 was certainly my position that the entire agreement was
8 unconscionable based on Nevada law, and that it was so
9 incredibly one-sided, and also the limited discovery
10 provisions, and also because, frankly, we are not
11 looking to treat this anything other than like we would
12 ordinary contract law that also strikes one-sided
13 provisions in -- for example, in Nevada, the Fick case
14 which would strike down a one-sided prenuptial
15 agreement, or lease agreements that have one-sided
16 attorney fee provisions are routinely struck down as
17 one-sided. So --

18 JUSTICE KENNEDY: But which is the stronger
19 case for arbitration? Case one, you attack the
20 arbitration clause only, part of the arbitration
21 contract only, as being unconscionable. Case two, you
22 attack the whole agreement as being unconscionable. Do
23 those both stand on the same footing or is one a
24 stronger case for submission to the court than the
25 other.

1 MR. SILVERBERG: I think this Court has made
2 clear in the separability cases that challenges to the
3 contract as a whole would go to the arbitrator to
4 decide. We have here, as the Petitioner --

5 JUSTICE KENNEDY: I find that somewhat
6 paradoxical, but I -- I agree that that -- that that's
7 the law.

8 MR. SILVERBERG: So the stronger one would
9 be an -- as this case, which we believe is very
10 strong --

11 JUSTICE KENNEDY: So if you do go to the
12 State court, suppose the State court says: I can't
13 really decide this question about the one clause unless
14 I determine the conscionability or the unconscionability
15 of the entire contract, and I now proceed to do that.

16 Do you have to wait and say: Stop, you
17 can't do that?

18 MR. SILVERBERG: I think that is what
19 sections 3 and 4 contemplate, is for -- and they have
20 been in existence since the passage of the act -- for
21 parties to come in and make their case as to whether or
22 not the FAA would apply or not apply.

23 JUSTICE KENNEDY: But suppose the State
24 court judge says that he has to look at the whole
25 contract. Do you say: Oh, I'm sorry to bother you; we

1 have to go back to the arbitrator now?

2 MR. SILVERBERG: That's not the situation in
3 this case, but assuming it were --

4 JUSTICE KENNEDY: What's your -- no, it's a
5 hypothetical case.

6 MR. SILVERBERG: I understand.

7 JUSTICE KENNEDY: What would your position
8 be in the hypothetical case representing your client?

9 MR. SILVERBERG: Representing my client, who
10 is Mr. Jackson, I would want the Court to look at the
11 whole thing, but if I were in the Petitioner's shoes I
12 think I would have an argument that, based on this
13 Court's precedent --

14 JUSTICE KENNEDY: And what do you think the
15 judge should decide as between those two possibilities?

16 MR. SILVERBERG: If it's an attack on the
17 contract as a whole it should go to the arbitrator. I
18 think that's clear from many of the Court's cases,
19 whereas if the attack is to the arbitration clause
20 itself, that is something for the court to decide and
21 determine.

22 JUSTICE SOTOMAYOR: Counsel, I think I heard
23 Justice Kennedy's question to be -- let's not confuse
24 the contract as a whole. There is only one contract
25 here.

1 MR. SILVERBERG: Correct.

2 JUSTICE SOTOMAYOR: It's an agreement to
3 arbitrate.

4 MR. SILVERBERG: Yes, Your Honor.

5 JUSTICE SOTOMAYOR: So an attack on the --
6 as I think Justice Breyer noted, you -- an argument that
7 it's one-sided goes to the entire arbitration agreement.
8 I don't want to arbitrate because that's not what I
9 chose to do freely. Correct?

10 MR. SILVERBERG: Correct.

11 JUSTICE SOTOMAYOR: That, you say, is for
12 the court.

13 MR. SILVERBERG: Yes, Your Honor.

14 JUSTICE SOTOMAYOR: The difference here is
15 that there are provisions within how the arbitration is
16 going to be held that, standing alone, you think are
17 unconscionable, even though the agreement to arbitrate
18 is not. Am I correct in understanding your allegations?

19 MR. SILVERBERG: No, Your Honor.
20 Respectfully, it is our position that both are present.
21 There are certain elements of the arbitration agreement
22 that are unconscionable and under Nevada law, which
23 would render the entire arbitration agreement
24 unconscionable.

25 JUSTICE SOTOMAYOR: You see, that's what I'm

1 confused by, because when I first asked you this
2 question, you said: I would be happy to arbitrate if
3 the Court struck the discovery provision and, I guess,
4 the fees provision. Which answer are you giving me?

5 MR. SILVERBERG: I am giving you the one I
6 just gave you, I think, Your Honor, which is we have got
7 both certain provisions that are unconscionable, that
8 under Nevada law render the entire agreement
9 unconscionable, and that's what the Court is to rely on.

10 JUSTICE SOTOMAYOR: Now, let's assume --
11 that -- now I understand that part of your argument.
12 But let's assume that that wasn't Nevada law, that
13 Nevada law would say severability works and there is an
14 agreement to arbitrate, and all we have to or could do
15 is strike the unfair provisions.

16 Let's assume that situation. Who decides
17 whether to strike the unfair provisions?

18 MR. SILVERBERG: That would be the court
19 under our position, Your Honor, and that --

20 CHIEF JUSTICE ROBERTS: No, that can't be
21 right. The -- how can you say there's no problem
22 agreeing to arbitrate, no imbalance in bargaining
23 authority whatever, but then say, Oh, but these
24 procedures are unconscionable?

25 It seems to me that the procedures are

1 there, and the party, the employee, whatever, can look
2 at those. And if he says: Well, that's unconscionable,
3 you don't sign the agreement as a whole. But once you
4 are -- in for a penny, in for a pound. If you agree to
5 arbitrate, then it's at least for the arbitrator to
6 decide particular provisions, whether they are
7 unconscionable.

8 I know you are arguing in the alternative.
9 But the one argument that we get to pick out the
10 provisions we don't like and say those are
11 unconscionable, but the agreement as a whole is not,
12 that seems to me illogical.

13 MR. SILVERBERG: Your Honor, that is our
14 position. I hope I am understanding your question. But
15 this is a matter of State law as to which provisions
16 would render the entire agreement unconscionable. And I
17 think that body of unconscionability law is not so
18 varied that we would have unwieldy results. I think
19 State --

20 CHIEF JUSTICE ROBERTS: Well, it's a matter
21 -- it may be a matter of State law, but the open
22 question is who gets to decide it.

23 MR. SILVERBERG: Right.

24 CHIEF JUSTICE ROBERTS: Arbitrators decide
25 matters of State law all the time.

1 MR. SILVERBERG: Certainly they do.
2 Certainly they do. But before they have that authority
3 to even do that, the requirements, again, of section 2
4 have to be met. And that is our position in this
5 matter.

6 JUSTICE SCALIA: Let's assume Nevada law
7 says you cannot -- you cannot fire somebody for coming
8 in late to work any fewer than ten times, all right?
9 And an individual is fired. He goes to arbitration, or
10 at least the company tries to take him to arbitration on
11 it. And he says, no, because I was fired in violation
12 of Nevada law.

13 Now, is it your position that that -- that
14 that case would have to go immediately to court and
15 could not submit to the arbitrator the issue of whether
16 indeed he was fired for coming less than ten times, and
17 indeed whether if he was coming in less than ten times,
18 that would be an invalid basis for a dismissal?

19 MR. SILVERBERG: No, Your Honor, and here's
20 why. I think Your Honor has described a situation
21 similar to -- I believe that was the Green Tree
22 situation, where there was an allegation that the entire
23 contract was illegal, the usurious contract. But there
24 was no question as to the making of the agreement to
25 arbitrate.

1 So in Your Honor's hypothetical, if there is
2 no dispute as to the arbitration agreement being subject
3 to a grounds of revocation at law or at equity as
4 defined in section 2, then I would -- I would concede
5 that that was something that would go to the arbitrator,
6 Your Honor.

7 JUSTICE SCALIA: Well, your -- your position
8 seems to be that unconscionability is the same as
9 coercion in the making of the agreement. And I don't
10 know that that's true.

11 MR. SILVERBERG: Well, Your Honor,
12 respectfully, in Doctor's Associates, I think the Court
13 spoke very clearly that fraud, duress, and
14 unconscionability are there and are part of something
15 that can be raised under section 2. And also the
16 court's hold in Prima Paint, where --

17 JUSTICE SCALIA: No, I don't care what we
18 said in dictum. It doesn't seem to me that
19 unconscionability is the same as duress or the same as
20 fraud, to --

21 MR. SILVERBERG: Oh -- oh, I'm sorry.

22 JUSTICE SCALIA: -- that you can be a stupid
23 person who voluntarily signs an unconscionable contract.
24 Now, the courts may protect you because you are stupid,
25 but you haven't been coerced. Is there no distinction

1 between unconscionability and coercion?

2 MR. SILVERBERG: Not under section 2, Your
3 Honor. I think the -- the definition that the
4 Petitioner would have this Court adopt, that narrow view
5 of making -- again, something that Justice Sotomayor
6 brought up -- would create a rule where certain
7 unconscionability challenges went to the court and other
8 unconscionability challenges didn't go to the court.

9 JUSTICE SCALIA: Why is that? Why is that?
10 I would say all unconscionability challenges, if you
11 have an agreement that is as clear as this one, would go
12 to the arbitrator. Which ones would have to go to
13 court?

14 MR. SILVERBERG: All of them should go to
15 the court, Your Honor. Based on this Court's holding
16 both in Doctor's Associates and Prima Paint, in that
17 both fraud in the inducement, like in Prima Paint, and
18 unconscionability envision a situation where you have
19 got a formed contract that people can choose to opt out
20 of. I may be subject to a contract that was induced by
21 fraud but I may like the benefit of that bargain. So I
22 may be able to go ahead with that.

23 Same with an unconscionability challenge.
24 We have got an agreement that was made that -- that the
25 innocent party can decide to opt out of. And I think

1 that is very consistent with this Court's holding and
2 with what the various State courts have been doing in
3 reliance on those rulings.

4 JUSTICE BREYER: But not every contract. I
5 mean, I will take that argument. I would like to know
6 about that argument. I would like to know what really
7 is the underlying, which I have never looked up.

8 What is the underlying rationale in contract
9 law of setting aside contracts as unconscionable? Why
10 do courts do it? What's the theory? I would like to
11 know that.

12 MR. SILVERBERG: My understanding is that
13 it's so unfair that it couldn't really be said that a
14 party assented to -- to that. And I think that's --

15 JUSTICE BREYER: That's what I wonder, that
16 last part, is it that the basic theory is, we want to
17 protect a group of people by voluntarily entered into
18 contracts by giving them the right to opt out, or is it
19 that we don't think that they really meant to do it?

20 MR. SILVERBERG: It's the latter, Your
21 Honor. I think if they really --

22 JUSTICE BREYER: Okay, then on that
23 question, or any other question, is, I would imagine,
24 where we have agreement one, and the argument is maybe
25 agreement one was unconscionable. And then we enter

1 into agreement two, and the parties in agreement two
2 agree to -- to arbitrate their unconscionability dispute
3 in agreement one, and there is nothing wrong with
4 agreement two, I would think that's then the question of
5 unconscionability is for the arbitrator?

6 MR. SILVERBERG: If I understand the
7 question --

8 JUSTICE BREYER: You said "all," and I just
9 don't think you meant all. But maybe you did. That's
10 why I asked the question.

11 MR. SILVERBERG: I -- I think that the safe
12 thing to do is to keep the door open to people,
13 especially in situations like this, where there is such
14 unequal bargaining power, where people are presented
15 with nonnegotiable --

16 JUSTICE STEVENS: May I ask this kind of
17 elementary question?

18 MR. SILVERBERG: Yes, Your Honor.

19 JUSTICE STEVENS: Are there cases out there
20 that hold that an agreement are can be partially
21 unconscionable, that it is unconscionable for some
22 clauses but not in its -- in its entirety?

23 MR. SILVERBERG: Certainly. And I think
24 that would be matter of State law, again, to determine
25 when there --

1 JUSTICE STEVENS: But there are cases
2 that -- that just drawing that distinction?

3 MR. SILVERBERG: I'm sorry?

4 JUSTICE STEVENS: There are cases that's
5 drawing that very elementary distinction?

6 MR. SILVERBERG: I believe so, Your Honor.
7 I think in Nevada you would -- if we had maybe just one
8 unconscionable clause, that the court might sever and
9 send the rest to the -- and validate the rest of the
10 arbitration agreement. But then when certain -- any
11 number of clauses, depending on State law, would make
12 the entire agreement to arbitrate unconscionable.

13 CHIEF JUSTICE ROBERTS: Does it make a
14 difference in response to Justice Stevens' hypothetical
15 that there is a provision saying the arbitrator will
16 decide the conscionability of all clauses? The
17 arbitrator may decide that clauses two and eight are
18 unconscionable, but if there is an agreement and it's
19 not unconscionable that the arbitrator will decide, the
20 arbitrator decides all of them, right?

21 MR. SILVERBERG: If the agreement -- I think
22 I understand your question. If the agreement to
23 arbitrate itself is not --

24 CHIEF JUSTICE ROBERTS: Right.

25 MR. SILVERBERG: -- there is no

1 unconscionability challenge to that, and there is no
2 other fraud in the inducement or any other thing that
3 the court has mentioned it would go to the broader view
4 of making the grounds for revocation, if those grounds
5 for revocation are not present, then I believe the
6 arbitrator would be empowered to make those decisions,
7 Your Honor.

8 CHIEF JUSTICE ROBERTS: Can I ask you just a
9 follow-up on Justice Breyer's hypothetical to you where
10 he had the first agreement and then the issue to the
11 second? You said you have got to leave the door open.
12 The door open on the second agreement or on the first
13 agreement?

14 MR. SILVERBERG: I think the door should be
15 open on all the agreements, because until that door is
16 open under Section 2 -- as long as that door is open
17 under Section 2, then we don't have a concern about
18 parties making the terms of arbitration so onerous or
19 burdensome that they would not be able to access the
20 arbitral forum. And that's really a huge concern in --
21 in not just in this case, but in the bigger picture,
22 courts must remain open to protect people.

23 I would venture to say that there are many
24 people in this room who are subject to arbitration
25 agreements and they don't even know --

1 JUSTICE GINSBURG: Mr. Silverberg --

2 MR. SILVERBERG: Yes, Your Honor.

3 JUSTICE GINSBURG: -- on that, underlying
4 your whole case I think is the notion that this is an
5 adhesion contract, it's a take it or leave it contract,
6 very common in consumer, credit card agreements, in
7 employment contracts, that one party has no say except
8 to sign or not to sign. Are all those contracts subject
9 to the unconscionability argument that you are making or
10 only some of them? And if only some, which ones?

11 MR. SILVERBERG: I would suggest, Your
12 Honor, that they all are subject to that. And then we
13 look to State law to determine, whether, for example, in
14 Nevada if you have great procedural unconscionability
15 they have the sliding scale approach based on the D.R.
16 Horton case, which we have briefed, where you would
17 require less of a showing of substantive
18 unconscionability.

19 JUSTICE SCALIA: Not much use signing an
20 arbitration agreement then, not much for the employer,
21 he is going to end up in court anyway, every one of them
22 will be thought of as unconscionable, so what is the
23 use?

24 MR. SILVERBERG: Well, Your Honor --

25 JUSTICE SCALIA: Kiss good-bye to

1 arbitration.

2 MR. SILVERBERG: Not at all, Your Honor,
3 that door's been open under Section 3 and 4 since the
4 inception of the act. We are advocating that status quo
5 be maintained here, Your Honor, and there is no reason
6 to suggest that there would be some rush to court on
7 this. Courts are quite capable to do this in a summary
8 fashion.

9 If a party comes before the court with a
10 baseless unconscionability challenge, I would imagine
11 not only will the court dispose of it quickly, but if an
12 attorney makes a routine practice of bringing baseless
13 motions to the court, he will have his own issues to
14 deal with. So, I don't -- I -- I disagree that there
15 will be some floodgates or that this will in any way --
16 to the contrary --

17 JUSTICE SCALIA: The amici certainly claimed
18 the contrary, Chamber of Commerce claims that this is
19 what is happening and that it has been a snowballing
20 effect.

21 MR. SILVERBERG: We disagree with them, and
22 Your Honor, and I would cite that we have some of the
23 most prestigious arbitrators in this country that have
24 joined our position in recognized the court's vital role
25 in maintaining the fairness of the arbitration process

1 so the public can trust it and so the weaker parties to
2 these agreements can be protected, because should that
3 disappear, there would be nothing to stop stronger
4 parties from again sending Mr. Jackson, who lives in
5 Reno, to Minnesota to arbitrate his claim.

6 JUSTICE GINSBURG: Well, this -- but this
7 clause is not of that kind, and you have singled out
8 three things that made it unconscionable. One, the fee
9 provision, the splitting fees, that the court rejected.
10 So the only two left is the one-sided aspect of it and
11 the limited discovery.

12 It seems to me that the limited discovery
13 clause, that that was quite common to say, we are not --
14 we don't want to get involved in the massive discovery
15 you can get in a -- in a civil proceeding. Is there
16 something unusual about limiting discovery to documents?

17 MR. SILVERBERG: There -- there is something
18 unusual. They have gone well beyond the AAA and limited
19 discovery to one deposition and one expert, which in an
20 employment case is very difficult.

21 Thank you, Your Honor.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

25 REBUTTAL ARGUMENT OF ROBERT T. FRIEDMAN

1 ON BEHALF OF THE PETITIONER

2 MR. FRIEDMAN: Thank you, Mr. Chief Justice.

3 I am hearing terms like "safe thing to do."

4 And in response to, I think it was a question from
5 Justice Scalia, I am hearing my colleague state that
6 there is concern that the arbitrator is not going to
7 apply State law.

8 This is merely distrust of arbitrators.
9 This Court has rejected this bias of arbitrators cannot
10 make these decisions. And, in fact, this Court and many
11 others have sent very, very complicated issues to the
12 arbitrator to sign. There is no reason to believe that
13 an arbitrator, as well as a judge, cannot decide State
14 law issues of unconscionability, and the arbitrator will
15 have the discretion and the ability to either strike the
16 entire arbitration agreement or strike certain clauses
17 that he or she sees fit.

18 Furthermore, this type of speculation, this
19 fear as to what the arbitrator may do, that was rejected
20 in this Court's decisions in Vimar and PacifiCare, where
21 the Court stated, we are going to enforce this, and the
22 arbitrator may do something wrong, may do something
23 right, but at the tail end there will be an ability
24 under Section 10 to address it. There is no difference
25 there.

1 Additionally, this -- this announces of
2 unconscionability -- I want to reiterate
3 unconscionability is based on a policy decision that --
4 that attacks an agreement that unquestionably has
5 already been --

6 JUSTICE BREYER: All right. What is the
7 one-sentence answer, one sentence, to the thing, this is
8 a very interesting case, lots of stuff in it that we
9 needn't reach because irrespective of everything else,
10 they, in their reply, the district court and the court
11 of appeals all said these whole four pages, the whole
12 four pages were unconscionable, so none of it is
13 enforceable, and all we have to decide is whether that's
14 an issue for the court. And the answer to that not
15 being an issue for the court is what, in a sentence or
16 two?

17 MR. FRIEDMAN: Justice Breyer, I'm sorry,
18 can I ask you --

19 JUSTICE BREYER: They said, look, there is a
20 four-page document. They said this four-page document
21 is unconscionable, the product of unconscionability and,
22 therefore, don't enforce it. That's their claim, that
23 issue is at least is for the court, because there is no
24 valid agreement here at all if that's right.

25 MR. FRIEDMAN: No, Justice Breyer, the

1 determination of unconscionability is for the
2 arbitrator. The -- the limited role of the court goes
3 only to the making, not to the issue of
4 unconscionability. So the court --

5 JUSTICE SOTOMAYOR: The problem -- I -- I
6 keep going back to my initial question to you, is you
7 want to parse out what making is from unconscionability,
8 and you want us to say, well, if it's too onerous a fee
9 for arbitration, that goes to the making, because you
10 are depriving the party of -- of an arbitration forum.
11 If it's discovery, that doesn't go to the depriving them
12 of anything because the arbitrator could give them more
13 discovery if he or she chose. Am I correct, this is
14 your argument?

15 MR. FRIEDMAN: No, Justice Sotomayor, our
16 argument about the onerous fee -- and it would have to
17 be evidence put in by the party opposing counsel -- by
18 the party opposing arbitration, that there was an actual
19 barrier, an impossibly burdensome barrier so it does not
20 come under making it would be under a -- a Randolph
21 standard or under a First Options standard.

22 There is two areas that we agree are for the
23 court. One is to determine whether or not there is an
24 issue with the making of the agreement. The other one
25 if it's challenged is to determine whether or not there

1 is indeed access to arbitration.

2 The First Circuit in *Auwah* applied this test
3 very neatly in a very reasonable manner and applied both
4 *First Options* and *Randolph*, harmonized those cases, and
5 made a determination that unconscionability is for the
6 arbitrator based on a clear and unmistakable delegation.
7 But issues as to whether or not --

8 JUSTICE SCALIA: If there is no access to
9 arbitration there is no way that you can leave that
10 issue to the arbitrator, is there?

11 MR. FRIEDMAN: Exactly, Justice Scalia.

12 JUSTICE SCALIA: Because you don't get to
13 the arbitrator.

14 MR. FRIEDMAN: Exactly, Justice Scalia. It
15 fails the *First Options* test. There can't be an ability
16 under *First Options* for the arbitrator to make a
17 decision if there is no access to the arbitrator. So
18 those are the two tests. In -- in this case what I
19 think I am hearing is my colleague is saying that the
20 arbitrator can decide nothing; the arbitrator should
21 decide nothing, notwithstanding this Court's regular
22 holdings sending very, very complicated matters to the
23 arbitrator. In this case, the arbitrator can absolutely
24 decide these issues of unconscionability as well as a
25 judge can.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 Mr. Friedman, Mr. Silverberg.

4 The case is submitted.

5 (Whereupon, at 11:03 a.m., the case in the
6 above-entitled matter was submitted.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

A				
AAA 54:18	agreement 3:11	allowed 32:1	arbitrated 32:15	49:5 50:15,17
ability 55:15,23	3:14 4:25 5:1	alternative 44:8	32:21 34:19	50:19,20 51:6
58:15	5:23,25 7:2,4,9	amici 53:17	arbitration 3:17	55:6,12,13,14
able 31:12 47:22	8:12,16,18,21	analogous 15:6	4:16 7:8,9,13	55:19,22 57:2
51:19	8:22,23,25 9:2	15:8	11:17,18,25	57:12 58:6,10
above-entitled	9:8,22 10:1,6	analysis 5:21	12:10,25 13:3	58:13,16,17,20
1:11 59:6	10:12,13,17,24	10:9,15	13:5,11,12	58:20,23,23
absolutely 23:15	10:24 11:7,10	announced 12:1	14:12 15:14	arbitrators
34:18 58:23	11:13,16 14:21	announces 56:1	16:3 17:1,20	44:24 53:23
access 11:23	16:11 17:11	answer 11:8	18:11,14 20:14	55:8,9
12:2,4 13:11	18:5,9,11,14	18:1 20:4 21:1	21:25 22:10,12	arbitrator's
21:16,24 51:19	21:23 22:10,13	21:1,1 24:3	22:25 25:18,18	4:18
58:1,8,17	22:23 25:6,7	36:12 37:3	25:24 26:17,24	areas 57:22
accord 19:14	28:1,4 32:14	43:4 56:7,14	27:1 30:22	Arguably 5:6
account 29:20	32:22 33:13,20	anticipated 5:3	32:1,13,13,22	argue 5:24 15:5
30:15	34:2,4,19 35:4	anticipation	32:25 33:4,6	argued 38:18
act 3:17 7:8	35:6,8,9,10	13:14	33:20 34:2,4	arguing 18:5,6,6
22:25 25:18	37:5 39:7,15	Antonio 1:6	34:19 39:19,20	25:23 32:11
26:17 40:20	39:22 42:2,7	3:11	39:20 41:19	33:15,22 34:5
53:4	42:17,21,23	anyway 52:21	42:7,15,21,23	44:8
actual 8:23	43:8,14 44:3	apparently	45:9,10 46:2	argument 1:12
21:18 57:18	44:11,16 45:24	38:15	50:10 51:18,24	2:2,5,8 3:4,7
addition 11:9	46:2,9 47:11	appeals 56:11	52:20 53:1,25	6:3,5,6,8,10,11
Additionally	47:24 48:24,25	APPEARAN...	55:16 57:9,10	6:15,21,23
56:1	49:1,1,3,4,20	1:14	57:18 58:1,9	7:22 9:24,25
address 55:24	50:10,12,18,21	applied 29:14	arbitrator 3:14	10:5,19 15:7,8
addressed 20:9	50:22 51:10,12	58:2,3	3:18,24 4:12	18:19 23:7,9
adds 35:23	51:13 52:20	apply 13:24 14:6	7:23 9:20 10:7	23:13,15 24:21
adequate 31:22	55:16 56:4,24	40:22,22 55:7	10:20 12:3,4	26:10 28:22
adhesion 52:5	57:24	applying 14:9	12:13,22 13:16	32:24,24 41:12
admissible	agreements 5:22	approach 52:15	13:17,25 15:3	42:6 43:11
11:21	25:19 26:15	April 1:9	15:15,16 16:22	44:9 48:5,6,24
adopt 26:14	37:19 39:15	arbitrability	17:1,3,4,6,8	52:9 54:25
47:4	51:15,25 52:6	12:24 15:24	20:9 21:12,14	57:14,16
advocating 53:4	54:2	31:6 32:20	24:21,22,24	arguments 15:9
agree 9:23 18:16	ahead 47:22	arbitrable 13:22	25:11,15,22,25	23:25
18:21,23,24	Alaska 20:19	arbitral 11:23	26:1,20 27:18	aside 30:22 32:1
19:5,8,8,22,25	33:8	51:20	27:19 28:10	48:9
20:4 33:11,20	alcohol 19:4	arbitrate 4:2,5	29:19 30:4,10	asked 27:15
34:21 35:6	alike 20:20	26:15 27:7,9	30:10 31:2,14	28:13 43:1
40:6 44:4 49:2	allegation 14:19	35:25 36:9,23	33:12 34:7,15	49:10
57:22	20:11,16 45:22	38:25 42:3,8	35:9 36:10,19	asking 25:15
agreed 4:2,5	allegations 8:20	42:17 43:2,14	37:4,6 38:2	36:21 37:9
14:4,11 34:18	19:20 42:18	43:22 44:5	40:3 41:1,17	aspect 54:10
agreeing 43:22	alleged 7:3	45:25 49:2	44:5 45:15	assent 5:21 8:17
	allow 30:9	50:12,23 54:5	46:5 47:12	9:9 11:6 21:18

<p>21:19 assented 48:14 assimilate 19:16 Associates 38:5 46:12 47:16 assume 9:14 31:9 32:19,21 37:2,9 43:10 43:12,16 45:6 assuming 28:2 41:3 assured 22:14 attack 5:2 9:21 10:13 13:3 39:19,22 41:16 41:19 42:5 attacked 16:23 18:4,8 attacking 23:23 24:10 attacks 7:16 8:8 9:17 23:24 56:4 attorney 39:16 53:12 attorneys 36:8 authority 3:15 16:22 17:1 25:15 30:5 31:1,7 34:15 38:3 43:23 45:2 authorized 31:3 Awuah 58:2 a.m 1:13 3:2 59:5</p> <hr/> <p style="text-align: center;">B</p> <p>B 22:22 back 3:22 4:10 6:18 12:6 18:15 22:14,16 38:12,23 41:1 57:6 back-end 22:5 30:25 bad 31:15</p>	<p>Bananas 18:21 Banana's 15:1 bare 17:25 bargain 47:21 bargaining 6:24 19:21 20:7 43:22 49:14 barrier 57:19,19 based 39:8 41:12 47:15 52:15 56:3 58:6 baseless 53:10 53:12 basic 5:20 7:11 10:16 19:15 48:16 basis 22:21 23:7 29:22 30:21 45:18 Bazzle 4:10 25:8 25:9 bear 12:10 behalf 1:15,17 2:4,7,10 3:8 26:11 55:1 believe 28:16 29:9,10 30:25 32:8 38:9 40:9 45:21 50:6 51:5 55:12 benefit 47:21 beyond 54:18 bias 55:9 big 28:21 bigger 35:2 51:21 bilaterally 18:7 bit 34:13 blink 31:25 block 11:23 body 44:17 bones 17:25 bother 40:25 bound 5:23 27:9 Breyer 13:18</p>	<p>14:15,23 15:23 16:2,6,9,13,17 18:15,24 19:6 19:18 20:3,10 20:13 21:15 32:10,19 33:25 34:12,16 35:3 35:15 38:11,15 38:19,23 39:2 42:6 48:4,15 48:22 49:8 56:6,17,19,25 Breyer's 51:9 brief 24:1 28:16 briefed 52:16 bright 21:17 bringing 53:12 broad 4:16 broader 51:3 brought 47:6 bunch 19:1 burden 12:25 13:6,10 burdensome 21:24 51:19 57:19</p> <hr/> <p style="text-align: center;">C</p> <p>C 2:1 3:1 call 30:16,17 calls 22:25 capable 53:7 card 52:6 care 46:17 carved 29:10 carving 36:5 case 3:4 4:8 13:10,19,23 14:19 15:22 16:19 17:19 22:10 23:5,21 26:2 27:6 32:9 33:16,16,17,22 35:1,2 36:14 37:5 38:5,10 39:13,19,19,21 39:24 40:9,21</p>	<p>41:3,5,8 45:14 51:21 52:4,16 54:20 56:8 58:18,23 59:4 59:5 cases 17:14,14 40:2 41:18 49:19 50:1,4 58:4 certain 13:8 18:4,7 26:4,24 33:21 34:6 35:25 36:5 38:5 42:21 43:7 47:6 50:10 55:16 certainly 5:8 8:20 10:17,25 14:25 24:25 25:12,25 36:14 38:6 39:7 45:1 45:2 49:23 53:17 challenge 3:15 3:19 34:24 36:14 47:23 51:1 53:10 challenged 57:25 challenges 25:24 40:2 47:7,8,10 Chamber 53:18 change 26:25 Chief 3:3,9 4:1,4 7:19 8:24 9:5 9:12,16 17:5 17:10 20:25 21:13 22:1 26:8,13 27:10 28:6 37:16 43:20 44:20,24 50:13,24 51:8 54:22 55:2 59:2 choose 47:19 chooses 31:22</p>	<p>chose 42:9 57:13 Circuit 25:2,14 28:22 29:8 58:2 Circuit's 29:6 circumstances 12:19 cite 53:22 civil 54:15 claim 26:23 28:24 54:5 56:22 claimed 53:17 claiming 15:17 claims 15:6 18:7 18:8 28:9 53:18 clarity 38:13 clause 4:16 13:21,21 15:14 16:3,7,8 17:19 17:20,21 22:5 22:11,24 26:19 39:20 40:13 41:19 50:8 54:7,13 clauses 21:12 49:22 50:11,16 50:17 55:16 clear 3:13 4:11 5:18 13:15 14:3,10 15:12 15:17,25 16:14 17:12,16 24:22 25:3,5 33:3 34:8,18 36:1 40:2 41:18 47:11 58:6 clearly 16:21 25:14 37:5,8 46:13 client 34:4,17,17 41:8,9 client's 39:4 coerced 6:2,13 7:20 10:24</p>
--	---	---	---	--

<p>19:23 46:25 coercion 19:25 20:18 46:9 47:1 colleague 23:25 55:5 58:19 come 40:21 57:20 comes 22:11 53:9 coming 45:7,16 45:17 commerce 38:1 53:18 common 32:13 52:6 54:13 company 45:10 competition 27:9 complain 7:4 15:24 complained 7:1 complaining 16:4,7 complaint 12:15 17:24,25 complaints 8:21 8:21 complicated 14:7,8 55:11 58:22 comprehends 37:5 concede 34:2,3,9 37:7 46:4 concededly 35:9 concern 31:17 51:17,20 55:6 concession 28:15,21 29:2 29:6 conditions 32:14 confuse 41:23 confused 43:1 conscionability 40:14 50:16</p>	<p>considered 4:15 4:17 consistent 48:1 consumer 52:6 contained 34:20 contemplate 40:19 contemplated 22:15 contest 25:4 contested 16:20 25:1 contesting 24:25 contract 15:2 17:22 18:11,17 19:7,12,23 20:14,15 21:6 21:10 22:3 23:9,12 24:6 26:22 27:14 28:8,22 31:9 31:10,11 33:6 33:6 35:14,22 36:2 37:20 39:12,21 40:3 40:15,25 41:17 41:24,24 45:23 45:23 46:23 47:19,20 48:4 48:8 52:5,5 contracts 19:11 31:13 48:9,18 52:7,8 contract's 36:24 contrary 35:17 53:16,18 contrast 8:19 correct 4:19 17:10 23:1,15 42:1,9,10,18 57:13 correctly 29:9 30:3 costs 11:17 12:10,20 counsel 7:18</p>	<p>26:8 41:22 54:22 57:17 country 53:23 couple 7:1 course 30:3 court 1:1,12 3:10,17,21,23 3:25 4:10,17 4:25 5:9 7:8,9 7:11 8:3 9:6,11 10:4 12:12,21 13:7,13 14:16 14:20 16:15,16 16:25 17:2,7 17:10,11,15 18:22,25 22:6 22:7,8,13,15 22:19 23:17,20 23:21,23 24:7 24:15,18,19 25:2,2,7,9,13 25:16,22 26:13 26:14,17,19 27:24 28:18,23 28:25 29:4,22 29:23 30:4,18 30:19 31:25 34:10,23 35:11 35:23 36:8,15 37:13,13 38:7 38:9 39:24 40:1,12,12,24 41:10,20 42:12 43:3,9,18 45:14 46:12 47:4,7,8,13,15 50:8 51:3 52:21 53:6,9 53:11,13 54:9 55:9,10,21 56:10,10,14,15 56:23 57:2,4 57:23 courts 7:16,21 19:11 21:9 29:13 46:24</p>	<p>48:2,10 51:22 53:7 court's 12:1 23:3 31:22 41:13,18 46:16 47:15 48:1 53:24 55:20 58:21 cover 16:12 create 47:6 creates 28:14 credit 52:6 cuts 15:11</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 Dallas 1:15 de 29:23 deal 28:14 53:14 decide 3:15 5:7 9:20 13:13 17:6,7,11,12 21:9,10 23:20 26:1,3,3,4 27:19 28:10 29:19 31:5 40:4,13 41:15 41:20 44:6,22 44:24 47:25 50:16,17,19 55:13 56:13 58:20,21,24 decided 24:8,24 29:23 35:11 decides 27:18 37:22 43:16 50:20 deciding 15:22 decision 13:14 13:16,17 17:4 22:8,12 23:3 24:22 26:1 56:3 58:17 decisions 4:10 5:1 7:16 14:17 31:4 51:6 55:10,20</p>	<p>defense 18:17,25 20:16,18,18,19 defined 8:4 46:4 definition 28:10 32:17 47:3 delegate 3:23 delegating 26:20 delegation 4:12 13:15 15:25 17:13,16 24:23 58:6 delineated 38:10 delineating 29:16 depending 50:11 deposition 54:19 depriving 57:10 57:11 derives 34:15 describe 26:21 described 7:19 16:18 45:20 describing 35:20 desire 5:22 determination 3:18,19 17:15 27:23 30:3 35:13 57:1 58:5 determine 28:4 40:14 41:21 49:24 52:13 57:23,25 determined 26:16 dictum 46:18 difference 42:14 50:14 55:24 different 12:5 19:19 32:25 34:5 differently 4:22 difficult 28:14 54:20 direct 15:21</p>
--	--	---	--	---

disagree 28:11 30:24 53:14,21	doubt 25:12,13 32:8	56:13	exclusion 29:11	23:5 25:11
disappear 54:3	draw 31:18 36:4	enforced 3:12	exclusive 3:15	27:24 28:21
discovery 7:3 18:5 39:9 43:3 54:11,12,14,16 54:19 57:11,13	drawing 50:2,5	enforcement 3:13 14:16	16:22 22:20	29:6,8 35:17
discretion 55:15	drunk 19:1	enter 8:17 48:25	25:15	35:20,21 38:12
discrimination 13:20 27:6	duress 5:8,12 38:8 46:13,19	entered 9:22 11:13 48:17	exist 37:20	43:1 51:10,12
dismissal 45:18	D.C 1:8	entire 27:25	existence 40:20	57:21 58:2,4
dispose 53:11	D.R 52:15	28:4 35:23	existential 5:21	58:15,16
dispute 7:12 13:20,25 14:11 25:20 32:16 35:7 46:2 49:2	E	39:7 40:15	expert 54:19	fit 55:17
disputed 13:22	E 1:17 2:1,6 3:1 3:1 26:10	42:7,23 43:8	eye 31:25	flesh 31:12,16 32:1
disputes 32:15	easily 35:4	44:16 45:22	F	floodgates 53:15
disregard 29:24 30:10 31:9	economic 20:7 21:4	50:12 55:16	F 1:15 2:3,9 3:7	focused 22:9
disregarded 30:20	effect 25:16 53:20	entirety 49:22	FAA 40:22	follow-up 51:9
distinction 46:25 50:2,5	effect 25:16 53:20	envision 47:18	face 5:25	footing 39:23
distinguish 21:15 32:23	eight 50:17	equity 37:20 38:2 46:3	fact 5:14 19:21 20:10 23:16 25:25 28:3 30:18 55:10	forced 7:20 8:11 8:17 9:10,19 10:10 20:24
district 3:25 22:8 23:17,20 23:21,23 24:7 24:14,18 25:2 25:13 30:17 56:10	either 27:25 55:15	equivalent 33:8 33:9	fails 11:19 23:12 58:15	forces 5:7
distrust 55:8	elementary 49:17 50:5	especially 49:13	fairness 8:8,22 9:17,21 12:15 28:25 53:25	formation 5:9 5:19,20 9:3,15 21:18 28:8
Doctor's 38:5 46:12 47:16	elements 10:16 37:25 42:21	ESQ 1:15,17 2:3 2:6,9	fall 32:16	formed 10:14 47:19
document 18:20 56:20,20	empanelled 31:2	essence 29:17 30:12	fashion 53:8	forth 13:20
documents 54:16	emphasis 37:18	essential 23:10 24:5	fear 55:19	forum 51:20 57:10
doing 48:2	employee 6:12 6:25 11:17 12:10,19 36:17 44:1	essentially 20:8	Federal 3:16 7:7 25:18 26:17 29:13 31:3	found 28:2
door 11:24 34:25 36:13,18 49:12 51:11,12 51:14,15,16	employee-frie... 22:4	established 13:1	fee 39:16 54:8 57:8,16	four 32:25 33:7 35:4 54:23 56:11,12
doors 37:13	employer 7:1 52:20	evidence 9:2,3 10:1,3,6,10,12 10:22 11:3,3 11:10 13:4,6,8 13:9 14:10 23:18,23 24:10 57:17	fees 13:1 18:6 43:4 54:9	four-page 18:14 18:19 56:20,20
door's 53:3	employment 18:11 52:7 54:20	exactly 17:2 58:11,14	fee-splitting 7:3	four-sentence 15:21
	empowered 51:6	example 5:12 8:14 10:11 11:7 12:3 13:7 39:13 52:13	fewer 45:8	frankly 39:10
	enforce 7:9 14:21 18:18 19:12 25:7,18 55:21 56:22	exceeded 31:1,7	Fick 39:13	fraud 4:14,16,23 8:14 15:9 38:8 46:13,20 47:17 47:21 51:2
	enforceability 3:16 4:8	exclude 18:8	filed 36:7	fraudulent 20:23
	enforceable 26:16 37:19	excluding 18:7	find 40:5	free 19:3,13 29:19
			finding 19:24,25	freely 42:9
			finished 23:21	frequent 3:21
			fire 45:7	Friedman 1:15
			fired 45:9,11,16	
			first 3:4,25 4:9 4:12 12:1,2 13:14 14:6 15:11 16:10,13 16:16 17:13	

2:3,9 3:6,7,9 4:3,6,19,23 5:11,20 6:4,8 6:14,18,23 7:15,25 8:7,13 9:4,7,16 10:8 10:25 11:5,11 11:22 12:14,23 14:15 15:23 16:4,9,15,19 17:9,23 18:3 18:13,23 19:5 19:18 20:1,6 20:22 21:13 22:2,18 23:1 23:14,22 24:9 24:16,20 54:23 54:25 55:2 56:17,25 57:15 58:11,14 59:3 friend 27:16 front 22:17 function 26:20 Furthermore 55:18	24:9 28:20 29:5 37:17 52:1 54:6 Ginsburg's 6:19 give 4:12 25:16 57:12 gives 3:14 7:8 16:25 18:18 giving 43:4,5 48:18 go 5:3,14 8:8,15 8:15,21,22 15:3 18:15 21:16,18 25:10 26:19 28:25 30:9 33:4 35:8 36:15 38:12,23 40:3,11 41:1 41:17 45:14 46:5 47:8,11 47:12,14,22 51:3 57:11 goes 4:24 5:21 7:22 10:16 28:12,23 42:7 45:9 57:2,9 going 3:22 4:10 20:20 21:3,5 30:16 31:11 35:15,16 36:7 42:16 52:21 55:6,21 57:6 good 15:7,8 good-bye 52:25 grant 19:2 great 52:14 Green 45:21 ground 15:22 grounds 37:19 46:3 51:4,4 group 48:17 guarantee 32:5 guess 5:24 6:2 43:3 gun 5:12 9:9 10:10 20:24	21:3,19 <hr/> H <hr/> Hall 22:3,12,20 23:3,20 24:7 hand 5:7 happen 32:9 happening 53:19 happy 26:25 43:2 hard 31:18 32:23 harder 14:24 harmonized 58:4 head 5:13 9:10 10:10 20:24 21:4,20 hear 3:3 28:18 28:18 heard 41:22 hearing 55:3,5 58:19 heavy 12:25 held 4:11 25:3 42:16 hold 46:16 49:20 holding 47:15 48:1 holdings 3:21 4:9 58:22 Honor 4:3 11:5 27:3 28:12 29:9 30:2,24 31:18 32:2 33:23 34:10,22 35:12,19,20 36:14,20 37:1 37:12,23 38:4 42:4,13,19 43:6,19 44:13 45:19,20 46:6 46:11 47:3,15 48:21 49:18 50:6 51:7 52:2 52:12,24 53:2	53:5,22 54:21 Honor's 27:23 30:2,7 46:1 hope 14:8 30:6 32:2 37:14 44:14 Horton 52:16 hours 32:14 Howsam 4:9 25:8 huge 28:15 51:20 hypothetical 41:5,8 46:1 50:14 51:9 <hr/> I <hr/> IAN 1:17 2:6 26:10 ignore 31:14,19 illegal 45:23 illogical 44:12 illusory 13:12 28:17,23 imagine 48:23 53:10 imbalance 22:13 43:22 imitate 15:2 immediately 45:14 impediment 3:13 11:25 implicate 25:6 implicit 13:16 important 27:5 27:8 36:3 impossible 31:6 36:4 impossibly 21:24 57:19 inception 53:4 including 31:4 incredibly 39:9 indicate 5:22 9:8 37:25 indicated 5:10	indicates 5:18 indication 9:19 individual 45:9 induced 47:20 inducement 4:15,17,24 8:14 15:9 20:18 47:17 51:2 inequality 21:4 influence 19:4 initial 17:15 57:6 innocent 47:25 inquiry 5:3 7:7 25:21 instance 3:25 4:13 25:11 instances 5:11 7:15 13:8 17:9 intend 35:24 intended 32:20 interested 20:13 20:14 interesting 56:8 interpret 17:14 29:9 interstate 38:1 invalid 33:21 34:7 45:18 invalidate 31:13 involuntariness 10:2 involved 38:6 54:14 irrespective 56:9 issue 4:8 5:9,19 7:10,11 11:21 11:23 12:12 14:18,18,19 16:24 17:3 21:24 24:23 25:4 27:11,13 31:4 34:23,24 36:9 37:6
---	---	--	---	--

45:15 51:10 56:14,15,23 57:3,24 58:10 issues 3:24 4:7 5:14 8:9 20:7 21:16,16,18,21 24:24 25:9,10 27:5,7 36:5 38:5,7 53:13 55:11,14 58:7 58:24	18:13,15,24 19:6,18,22 20:3,10,13,25 21:13,15 22:1 22:2,18,22 23:2,6,14,19 23:22 24:2,3,9 24:12,17,20 26:8,13,21 27:10 28:6,13 28:20 29:5,18 30:8,13 31:8 31:19,24 32:6 32:10,19 33:25 34:12,16 35:3 35:15 36:6,16 36:22 37:2,9 37:16,17 38:11 38:15,19,21,23 39:2,18 40:5 40:11,23 41:4 41:7,14,22,23 42:2,5,6,11,14 42:25 43:10,20 44:20,24 45:6 46:7,17,22 47:5,9 48:4,15 48:22 49:8,16 49:19 50:1,4 50:13,14,24 51:8,9 52:1,3 52:19,25 53:17 54:6,22 55:2,5 56:6,17,19,25 57:5,15 58:8 58:11,12,14 59:2	Kennedy's 41:23 kind 14:11 49:16 54:7 Kiss 52:25 know 17:25 20:4 20:15,21 24:13 27:20 29:13 31:10,15 44:8 46:10 48:5,6 48:11 51:25	leaves 22:12 left 54:10 legal 8:4 lenient 29:22 let's 18:15 31:9 36:9 37:2 41:23 43:10,12 43:16 45:6 level 20:23 25:13 lies 19:1,4 limited 5:3 7:6 8:23 10:15 14:17 22:22,25 25:21 39:9 54:11,12,18 57:2 limiting 54:16 line 21:17 22:6 31:18 36:4 list 20:5 literally 14:9 little 6:20 32:23 lives 54:4 logical 37:24 long 14:2 51:16 look 11:6,12 18:19,20 19:2 38:24 40:24 41:10 44:1 52:13 56:19 looked 35:21 48:7 looking 38:24 39:11 looks 35:5 lose 12:11 21:3 loses 36:17 lots 56:8	6:13,19 7:6,10 7:10 8:16,23 10:9 14:17,18 14:20,23 17:3 21:17,17,23 24:3 25:6 27:14,17,19 45:24 46:9 47:5 51:4,18 52:9 57:3,7,9 57:20,24 mandate 34:14 manifestation 11:6 manner 58:3 massive 54:14 matter 1:11 8:5 11:15,18 15:3 15:13,14 20:11 20:15 44:15,20 44:21 45:5 49:24 59:6 matters 35:25 44:25 58:22 mean 9:24 11:16 14:6 16:13 24:13 30:8 31:8,9,10 33:3 48:5 means 8:6 meant 48:19 49:9 mechanism 14:16 meet 12:25 13:6 mentioned 33:16 38:4 51:3 merely 55:8 met 13:10 30:6 38:2 45:4 middle 33:17 mine 15:1 Minnesota 54:5 minutes 54:23 misunderstan...
J		L		
Jackson 1:6 3:5 3:11 6:25 15:23 25:23 26:18 27:6 41:10 54:4 Jackson's 3:15 3:19 17:19 Joe 15:1 18:21 joined 53:24 judge 22:3 40:24 41:15 55:13 58:25 judge's 30:17 judicial 26:20 jurisprudence 29:15 Justice 3:3,9 4:1 4:4,14,19,21 4:23 5:5,10,12 5:16,17,24 6:4 6:6,11,14,16 6:19,20,23 7:5 7:14,18,20,20 7:25 8:2,7,10 8:13,24 9:1,5 9:12,16,23 10:8,21 11:2,8 11:11,15,22 12:6,8,14,17 12:23 13:18 14:15,23 15:23 16:2,6,9,13,17 17:5,9,10,17 17:24 18:3,10				
	K		M	
	keep 49:12 57:6 Kennedy 5:5,12 5:16 17:17,24 18:3 36:6,16 36:22 37:2,9 39:18 40:5,11 40:23 41:4,7 41:14	label 19:11 labor 32:13 lack 15:18 language 3:16 7:12 10:11,13 10:17 14:1,2,3 14:7 16:20,21 16:22 25:3,5 25:16 35:23 36:2,2 late 45:8 Laughter 38:14 law 5:15 20:10 20:14,14,15 21:5 23:2 24:15 28:3 29:11,12,14,16 29:20,24 30:15 30:20 31:20 32:7 33:14 37:20 38:1 39:8,12 40:7 42:22 43:8,12 43:13 44:15,17 44:21,25 45:6 45:12 46:3 48:9 49:24 50:11 52:13 55:7,14 laws 5:15 31:13 lead 19:10 lease 39:15 leave 51:11 52:5 58:9	maim 31:10,13 maintained 53:5 maintaining 53:25 making 3:18,19 4:25 5:1,14	mandate 34:14 manifestation 11:6 manner 58:3 massive 54:14 matter 1:11 8:5 11:15,18 15:3 15:13,14 20:11 20:15 44:15,20 44:21 45:5 49:24 59:6 matters 35:25 44:25 58:22 mean 9:24 11:16 14:6 16:13 24:13 30:8 31:8,9,10 33:3 48:5 means 8:6 meant 48:19 49:9 mechanism 14:16 meet 12:25 13:6 mentioned 33:16 38:4 51:3 merely 55:8 met 13:10 30:6 38:2 45:4 middle 33:17 mine 15:1 Minnesota 54:5 minutes 54:23 misunderstan...

<p>32:7 Monday 1:9 morning 3:4 motion 38:25 motions 53:13 mutual 5:21 8:17 9:9 11:6 21:18,19</p> <hr/> <p style="text-align: center;">N</p> <p>N 2:1,1 3:1 narrow 32:3 47:4 neatly 58:3 necessarily 34:23 need 10:3 12:17 needn't 56:9 needs 10:9 36:13 Nevada 1:17 5:15 20:10 39:8,13 42:22 43:8,12,13 45:6,12 50:7 52:14 never 14:18,19 16:20,23 25:4 48:7 Ninth 25:2,13 nonnegotiable 49:15 non-issues 20:9 normally 32:21 33:3 noted 42:6 notion 52:4 notwithstandi... 58:21 novo 29:23 number 35:4,6,8 35:9,10 50:11</p> <hr/> <p style="text-align: center;">O</p> <p>O 2:1 3:1 objective 11:6 35:22 36:2 obliged 30:15</p>	<p>obviously 21:3 21:19 odd 27:11 oh 36:17 40:25 43:23 46:21,21 okay 7:21 18:24 19:6,6 31:11 33:2 35:3 48:22 once 7:9 14:8,17 17:3 21:10 23:6 25:21,24 28:7 31:2,3 44:3 onerous 51:18 57:8,16 ones 38:9 47:12 52:10 one-sentence 56:7 one-sided 5:25 6:9 9:14 11:16 11:20 27:5 39:9,12,14,15 39:17 42:7 54:10 one-sidedness 10:6 open 34:25 36:13,18 37:14 44:21 49:12 51:11,12,15,16 51:16,22 53:3 operation 23:2 opinion 38:22 opportunity 10:18 24:18 opposed 8:5 opposing 10:18 12:25 13:5 57:17,18 opt 47:19,25 48:18 Options 4:9 12:2 13:14 14:6 15:11 16:10,13</p>	<p>16:16 17:13 23:5 35:17,21 38:12 57:21 58:4,15,16 oral 1:11 2:2,5 3:7 26:10 ordinary 39:12 original 29:2 outrageously 10:2 overborne 19:9 19:9,10</p> <hr/> <p style="text-align: center;">P</p> <p>P 3:1 PacifiCare 55:20 PAGE 2:2 pages 35:4 56:11 56:12 Paint 4:24 8:15 46:16 47:16,17 paper 33:7 paradoxical 40:6 parse 8:5 57:7 part 16:8 17:19 17:20 35:20 39:20 43:11 46:14 48:16 partially 49:20 particular 21:12 25:9 28:9 32:16 44:6 parties 3:23 4:2 4:5,6,7,11 5:6 5:22 6:1 12:16 22:7,15,23 23:3 25:14 32:20 34:22 35:6,24 36:7,8 40:21 49:1 51:18 54:1,4 party 5:7 10:17 12:24 13:5 16:10,11 34:24 44:1 47:25</p>	<p>48:14 52:7 53:9 57:10,17 57:18 passage 40:20 pay 11:17,19 pays 12:19 penalty 11:19 penny 44:4 people 26:18 47:19 48:17 49:12,14 51:22 51:24 permissible 8:4 person 14:25 19:13 46:23 persuade 10:4 pertain 21:23 pertaining 7:2,3 pertains 6:10 Petitioner 1:4,16 2:4,10 3:8 26:14 27:8 31:5 35:22 40:4 47:4 55:1 Petitioners 28:15 Petitioner's 41:11 pick 36:10 44:9 picture 35:2 51:21 pieces 33:7 place 12:1 23:17 37:18 plain 7:11 plainly 3:23 plaintiff 13:23 14:1 pleadings 18:1 please 3:10 26:13 point 9:12 14:12 14:21 21:7 24:9 26:6 28:6 34:10 pointing 9:17</p>	<p>10:11 policy 56:3 position 7:24 17:5 27:2 29:2 35:13 37:8 39:3,4,7 41:7 42:20 43:19 44:14 45:4,13 46:7 53:24 possibilities 41:15 post-formation 5:2,5 8:9,21 potentially 4:7,7 pound 31:12,16 32:1 44:4 power 6:24 7:8 19:21 20:8 49:14 practice 53:12 precedent 41:13 preempted 29:17 prenuptial 39:14 present 42:20 51:5 presented 29:3 38:7 49:14 prestigious 53:23 presumably 30:25 presume 35:24 presumed 26:15 prevail 21:6 37:4 previous 4:10 Prima 4:24 8:15 46:16 47:16,17 primary 25:17 principles 12:1 prior 25:1 probably 21:5 problem 7:18 30:1 43:21</p>
---	--	---	---	---

<p>57:5 problematic 26:5 procedural 5:13 5:17 19:20 20:6,11,12 52:14 procedures 43:24,25 proceed 25:22 40:15 proceeding 54:15 process 7:23 53:25 product 14:13 15:19 56:21 prohibit 3:17,18 13:2 prohibiting 12:4 promise 38:11 proper 23:16 properly 36:18 protect 46:24 48:17 51:22 protected 54:2 provided 11:16 22:24 provision 7:4,7 12:11,11,18,20 13:24 14:5,5 15:18,24,25 18:5,6 22:5 23:24 24:5,6 34:11,12,20 43:3,4 50:15 54:9 provisions 7:2 9:13,18 18:4,9 23:10,24 26:24 26:25 27:12 28:1,2,9 32:25 33:17,21 34:5 34:6 39:10,13 39:16 42:15 43:7,15,17</p>	<p>44:6,10,15 public 54:1 purpose 25:17 pursuant 4:24 7:11 14:21 16:25 22:19 25:8,19 put 9:9 13:6,8,9 18:19 22:23 23:18 24:10 37:3 57:17 putative 6:25 puzzled 6:20</p> <hr/> <p style="text-align: center;">Q</p> <p>quarrel 8:3 question 4:2,4 4:17 6:19 9:1 12:6,20,24 14:24 15:20,20 18:2 21:3 24:3 27:15,23 28:7 28:24 29:3 30:2,7,11 32:15,20 35:5 36:24 37:3,15 37:22 40:13 41:23 43:2 44:14,22 45:24 48:23,23 49:4 49:7,10,17 50:22 55:4 57:6 questions 17:6 26:7 27:20 quickly 53:11 quite 53:7 54:13 quo 53:4</p> <hr/> <p style="text-align: center;">R</p> <p>R 3:1 racial 13:20 27:6 raise 24:4,4 raised 46:15 Randolph 12:2 13:1,7,8 57:20</p>	<p>58:4 rationale 48:8 reach 56:9 read 14:1 38:11 reading 29:7 32:3 37:24 real 25:20 really 11:20 13:24 16:9 29:24 31:15 40:13 48:6,13 48:19,21 51:20 reason 6:22 14:12 19:7,11 19:15,15 24:6 24:14 29:1 36:3 53:5 55:12 reasonable 22:14 31:16 58:3 reasons 20:5 REBUTTAL 2:8 54:25 receive 23:4 recognized 3:23 25:9 53:24 record 23:18 referred 7:5 13:25 15:15,16 referring 21:16 reflects 18:1 regarding 29:24 30:15,20 regular 58:21 reiterate 56:2 rejected 54:9 55:9,19 reliance 48:3 rely 35:22 43:9 remain 34:25 37:14 51:22 remaining 26:7 54:24 remedy 13:12 28:17</p>	<p>render 42:23 43:8 44:16 rendered 23:10 Reno 1:17 54:5 Rent-A-Center 1:3 3:5,12 6:25 repeat 15:19 repeated 15:20 reply 28:16 56:10 representing 41:8,9 require 52:17 required 27:7 36:15 requirements 30:5 37:12 45:3 reserve 26:7 respect 7:6 20:6 respectfully 30:23 42:20 46:12 respond 14:14 Respondent 1:18 2:7 17:18 26:11 response 19:17 38:24 50:14 55:4 rest 50:9,9 result 22:20 results 44:18 retains 5:1 review 22:5,6,7 22:8,9,13,15 22:19,23,24,25 23:4 30:19,25 31:22,23 32:3 reviewed 29:21 revocable 38:1 revocation 37:20 46:3 51:4,5 right 4:18 7:25 15:4 16:6</p>	<p>18:18 26:19 29:18 31:24 32:18 35:15 43:21 44:23 45:8 48:18 50:20,24 55:23 56:6,24 rise 20:22 ROBERT 1:15 2:3,9 3:7 54:25 Roberts 3:3 4:1 4:4 8:24 9:5,12 17:5,10 20:25 22:1 26:8 27:10 28:6 37:16 43:20 44:20,24 50:13 50:24 51:8 54:22 59:2 role 53:24 57:2 room 51:24 routine 53:12 routinely 29:14 39:16 rule 8:3 16:19 26:15 28:14 29:15 32:22 47:6 rules 16:16,17 rulings 48:3 rush 53:6</p> <hr/> <p style="text-align: center;">S</p> <p>S 2:1 3:1 safe 49:11 55:3 satisfied 7:10 17:3 25:21 save 37:19 saw 13:3 saying 9:18 10:23 12:18 15:12 16:2 17:19 28:16 30:9 33:7,18 50:15 58:19 says 13:21,23 14:1,25 15:3</p>
---	---	--	---	---

<p>15:18 16:21 19:7 26:23 32:14 35:24 36:17 37:13,18 40:12,24 44:2 45:7,11 scale 52:15 Scalia 5:24 6:4,6 6:11,14,16 7:5 7:20 9:23 10:8 10:21 11:2,8 11:11 19:22 23:6,14 24:3 24:12,17,20 29:18 30:8,13 31:8,19,24 32:6 38:21 45:6 46:7,17 46:22 47:9 52:19,25 53:17 55:5 58:8,11 58:12,14 Scalia's 9:1 12:6 scope 3:24 4:7 16:11 25:10 32:22 34:5 36:1 se 26:24 second 33:24,25 34:1 51:11,12 secrets 27:8 section 4:25 5:4 7:7,12 8:15 10:9,15 14:15 16:25 22:19,20 23:4 25:20,21 26:17 27:24 28:17 29:10 30:6 31:1,3 32:4 33:1 34:15 35:24 37:12,18,21 38:8 45:3 46:4 46:15 47:2 51:16,17 53:3 55:24</p>	<p>sections 40:19 see 10:7 14:25 33:11 34:1 35:18 36:22 42:25 seen 8:20 sees 55:17 send 17:1,2 25:22 26:2 50:9 sending 54:4 58:22 sent 55:11 sentence 56:7,15 separability 40:2 separate 33:7 set 16:16 30:22 31:25 setting 48:9 sever 26:5 50:8 severability 43:13 severable 23:11 shoes 41:11 show 11:10,24 13:1,10 showing 52:17 Shylock 31:11 side 34:17 sign 5:22 19:7 19:14 33:19 44:3 52:8,8 55:12 signature 15:1 18:20,21 19:2 19:8 signed 19:1 36:25 signing 6:2 7:21 8:11 52:19 signs 46:23 Silverberg 1:17 2:6 26:9,10,12 27:3,22 28:11 29:1,8 30:1,12</p>	<p>30:23 31:17,21 32:2,18 33:23 34:9,14,22 35:12,19 36:12 36:20 37:1,7 37:11,17,23 38:17 39:1,6 40:1,8,18 41:2 41:6,9,16 42:1 42:4,10,13,19 43:5,18 44:13 44:23 45:1,19 46:11,21 47:2 47:14 48:12,20 49:6,11,18,23 50:3,6,21,25 51:14 52:1,2 52:11,24 53:2 53:21 54:17 59:3 similar 16:10 45:21 simpler 18:16 simplest 15:21 simply 9:17,20 10:11 12:15 13:3 21:4,7,22 24:10 27:20 30:10 singled 54:7 situation 19:19 32:12 41:2 43:16 45:20,22 47:18 situations 19:10 32:12 49:13 sliding 52:15 snowballing 53:19 somebody 8:17 9:9,10,22 45:7 somebody's 5:13 9:9 somewhat 40:5 sorry 4:3 40:25 46:21 50:3</p>	<p>56:17 sort 23:23 24:10 Sotomayor 7:14 7:18 8:1,2,7,10 8:13 26:21 28:13 41:22 42:2,5,11,14 42:25 43:10 47:5 57:5,15 sounds 31:16 specific 12:8 specifically 18:4 18:9 speculation 9:21 21:22 55:18 splitting 54:9 spoke 46:13 squiggly 19:2,8 stand 39:23 standard 22:24 29:22 57:21,21 standing 42:16 stand-alone 18:14 state 21:5 28:3 29:14,20,21,24 30:15,20 31:13 31:19,25 33:14 40:12,12,23 44:15,19,21,25 48:2 49:24 50:11 52:13 55:5,7,13 stated 13:7 55:21 States 1:1,12 29:13,16 State's 5:15 status 53:4 statute 37:24 statutory 3:13 Steelworkers 3:22 steps 36:7 Stevens 6:20,23 11:15,22 49:16</p>	<p>49:19 50:1,4 50:14 stop 36:8 40:16 54:3 story 12:5 Street 22:20 23:3,20 24:7 strike 39:14 43:15,17 55:15 55:16 strikes 39:12 strong 5:6 40:10 stronger 39:18 39:24 40:8 54:3 struck 39:16 43:3 stuff 10:4 56:8 stupid 46:22,24 subject 46:2 47:20 51:24 52:8,12 submission 37:5 39:24 submit 7:12 14:11 33:11,12 34:7 45:15 submitted 59:4 59:6 substance 8:25 9:2 substantive 52:17 sue 18:18 suggest 52:11 53:6 suit 36:7 summary 53:7 supporting 11:3 suppose 8:24 9:1 11:16 23:8,12 34:16 40:12,23 Supreme 1:1,12 24:19 25:1 sure 5:16 10:3 32:10 35:18</p>
--	---	---	---	--

<p style="text-align: center;">T</p> <p>T 2:1,1 54:25 tail 22:21 55:23 take 4:15 12:9 30:15 34:23 45:10 48:5 52:5 Tell 12:18 ten 27:12 33:17 45:8,16,17 term 13:4 terms 7:5 14:22 18:7 25:7,19 25:20 26:5 51:18 55:3 test 58:2,15 tests 58:18 Texas 1:15 Thank 3:9 26:8 26:12 54:21,22 55:2 59:1,2 theory 48:10,16 thing 13:19 39:4 41:11 49:12 51:2 55:3 56:7 things 54:8 think 6:16 10:21 10:22 11:8,11 11:12 12:18 13:4 14:8,24 15:11 27:11 28:12 31:14,15 31:17,21,25 32:4,6,8 33:1 35:16,17,19 36:12,20 37:11 40:1,18 41:12 41:14,18,22 42:6,16 43:6 44:17,18 45:20 46:12 47:3,25 48:14,19,21 49:4,9,11,23 50:7,21 51:14 52:4 55:4 58:19</p>	<p>thinks 38:20 third 33:5 thought 20:25 21:7 23:7 24:2 27:10 28:21 30:9 32:12 37:16 38:12 52:22 three 18:8 32:12 37:25 54:8 threshold 27:23 34:11 35:13 thrown 28:5 ticket 11:24 time 11:13 23:16 26:7 44:25 times 45:8,16,17 told 19:1 totally 30:20 trade 27:8 transpired 11:12 treat 39:11 treated 4:22 20:20 Tree 45:21 tries 15:2 45:10 trilogy 3:22 true 13:18 15:12 37:23 46:10 trust 54:1 trying 8:5 18:17 two 19:16 35:6,6 35:9 39:21 41:15 49:1,1,4 50:17 54:10 56:16 57:22 58:18 type 6:9 7:22 55:18 types 20:2</p> <hr/> <p style="text-align: center;">U</p> <p>unconscionabi... 3:20 4:22 5:2 5:13,17 7:17 7:19 8:4,6,8,19</p>	<p>9:3 12:21 14:13 15:19 16:24 17:7 19:20,24 20:2 20:7,11,16,17 21:11,15 23:8 26:23 27:14,17 27:18,25 28:18 28:24 29:11,12 29:14,16,19,25 30:11,16,21 31:5 33:9 36:5 36:10 38:6 40:14 44:17 46:8,14,19 47:1,7,8,10,18 47:23 49:2,5 51:1 52:9,14 52:18 53:10 55:14 56:2,3 56:21 57:1,4,7 58:5,24 unconscionable 6:1,12,22 8:12 10:19 13:23 14:2,3,5 15:7 15:15 16:1,3,5 16:7 17:20,21 17:22 19:11,12 19:23 26:2,4 26:22 27:4,12 28:3,8,9 30:18 33:2,18 34:21 34:25 35:8 39:5,8,21,22 42:17,22,24 43:7,9,24 44:2 44:7,11,16 46:23 48:9,25 49:21,21 50:8 50:12,18,19 52:22 54:8 56:12,21 underlying 48:7 48:8 52:3 understand</p>	<p>17:17,18 27:22 30:2 41:6 43:11 49:6 50:22 understanding 30:6,14,14 37:14 42:18 44:14 48:12 unequal 6:24 19:20 20:7 49:14 unfair 9:18 10:2 10:24 13:4 21:21 27:9 33:22 43:15,17 48:13 unfairness 7:22 United 1:1,12 unlawful 23:10 unmistakable 3:14 4:11 14:4 14:10 15:13,17 15:25 16:14 17:13 24:23 25:3,5 36:1 58:6 unmistakably 13:15 16:21 17:16 25:14 unquestionably 56:4 unusual 22:3 54:16,18 unusually 27:4 unwieldy 8:3 44:18 use 11:2,9 26:19 52:19,23 usurious 45:23 ut 22:22</p> <hr/> <p style="text-align: center;">V</p> <p>v 1:5 3:5 vacuum 29:20 valid 21:6,9 33:13,13,19 34:3,3,6 35:10</p>	<p>56:24 validate 50:9 validity 3:24 25:10 26:16 35:14 varied 44:18 various 48:2 venture 51:23 victim 19:13 view 47:4 51:3 vigorous 22:15 Vimar 55:20 violating 38:8 violation 45:11 vital 53:24 void 23:9 24:6 33:1 voluntarily 46:23 48:17 voluntary 9:15 10:1,7 11:10</p> <hr/> <p style="text-align: center;">W</p> <p>wages 32:14 wait 40:16 waive 26:18 want 20:3,5,15 20:21 21:14 33:4 34:19 35:10 36:1 41:10 42:8 48:16 54:14 56:2 57:7,8 wanted 15:13,16 Washington 1:8 wasn't 9:25 43:12 way 8:12 15:10 18:16 53:15 58:9 weaker 54:1 went 47:7 West 1:3 3:5 we've 8:20 win 12:11 21:2 wins 11:18 wonder 48:15</p>
---	--	--	--	---

wondering 13:19	<hr/> 3 <hr/>			
words 13:12 27:15 34:20 35:7,11	3 2:4 40:19 53:3 <hr/> 4 <hr/>			
work 45:8 working 32:14 works 43:13 world 38:16,20 wouldn't 30:21 30:21	4 4:25 5:4 7:7,12 8:15 10:9,15 14:16 16:25 25:20,21 40:19 53:3 <hr/> 5 <hr/>			
write 38:22 writing 37:25 written 3:12 25:8 wrong 49:3 55:22 wrote 38:21	5 3:22 54 2:10 <hr/> 8 <hr/>			
<hr/> X <hr/>	8 27:21 <hr/> 9 <hr/>			
x 1:2,7	9 27:21 32:4			
<hr/> Y <hr/>				
years 3:22				
<hr/> 0 <hr/>				
09-497 1:5 3:4				
<hr/> 1 <hr/>				
1 27:20,21 32:13 10 22:19,20 23:4 27:20 32:4 55:24 10(a)(4) 31:1 10:02 1:13 3:2 11 32:4 11:03 59:5				
<hr/> 2 <hr/>				
2 26:17 27:24 30:6 31:3 34:15 37:12,18 37:21 38:8 45:3 46:4,15 47:2 51:16,17 2010 1:9 26 1:9 2:7				