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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 06-1463, Preston v. Ferrer.

Mr. Schleimer.

ORAL ARGUMENT OF JOSEPH D. SCHLEIMER
ON BEHALF OF THE PETITIONER

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

It's been a little less than two years since this Court handed down the decision in Buckeye Check Cashing Service v. Cardegna. Within nine months after Buckeye was decided, the California Court of Appeal issued its decision in this case excising the issue of validity or legality of a contract from an entire category of arbitrations, declaring it off limits to arbitration.

The contract in this case couldn't be more clear. It states quite specifically that the validity or legality of the contract shall be arbitrated. So there was no consideration given to the intent of the parties.

The Federal Arbitration Act, of course, applies in this case. There was never really a dispute about that, because it'S a contract between the citizens

1 of two States and it was never disputed that the Federal
2 Arbitration Act would apply.

3 If left standing, the decision in this case
4 could result in a multiplicity of State law decisions
5 and statutes eliminating arbitration in entire classes
6 of cases through the mere expediency of having it go to
7 an administrative agency.

8 CHIEF JUSTICE ROBERTS: Well, It wouldn't
9 eliminate it. Your friend on the other side says it the
10 simply delays it, because you get to arbitrate de novo
11 after the commissioner's decision.

12 MR. SCHLEIMER: Well, the assertion that we
13 get to arbitrate de novo is new in this Court. In the
14 courts below the parties agreed, and both sides briefed,
15 the fact that the de novo would be heard by the superior
16 court, not by the arbitrator. I don't know what -- by
17 what magical process the Respondent would think that we
18 would get to arbitrate the de novo, because the statute
19 on which the court of appeal based its jurisdictional
20 holding, Labor Code Section 1700.44, that's where the
21 labor commissioner gets jurisdiction from the same
22 statute and says the superior court hears the de novo.

23 CHIEF JUSTICE ROBERTS: Well, I guess I
24 could let him answer, but I suppose he would say you go
25 to that court, and you get a motion to compel

1 arbitration.

2 MR. SCHLEIMER: Well, we have brought a
3 motion to compel arbitration, which was denied based on
4 1700.44.

5 JUSTICE KENNEDY: I couldn't find the order
6 that the court -- in the record it says that the order
7 would be -- the court granted a preliminary injunction,
8 the superior court, and then it said, according to an
9 order to be entered by the clerk. How long was the
10 arbitration stayed for? There was an enjoined -- there
11 was an injunction. What was the term of the injunction?
12 Just until further order of the court?

13 MR. SCHLEIMER: The injunction states -- and
14 I'm implying this, because it doesn't actually state how
15 long it lasts -- the injunction was requested and it was
16 granted with just the word "grant." So I interpret it
17 as meaning that what was granted was what was requested,
18 and what was requested was an injunction that would last
19 until the Labor Commissioner determined that she doesn't
20 have jurisdiction. Now, since the Labor Commissioner
21 had already determined that she does have jurisdiction,
22 it's effectively permanent or, as you say,
23 Justice Kennedy, until the court vacates it.

24 JUSTICE KENNEDY: Did the Respondent at any
25 point indicate that after the Labor Commission, Labor

1 Commissioner, made a determination that they would not
2 go to superior court for de novo review?

3 MR. SCHLEIMER: Well, they actually had in a
4 sense an opportunity to do exactly that and chose not
5 to. The motion for reconsideration was brought before
6 the Labor -- before the arbitrator one day before the
7 injunction hearing. The arbitrator said: Well, it's
8 inefficient to have parallel proceedings and maybe I can
9 benefit from the Labor Commissioner's advice in this.
10 So while retaining his jurisdiction, he said: I'm going
11 to stay the arbitration until the Labor Commissioner
12 rules.

13 Now, at that point the Respondent could have
14 simply withdrawn the injunction and said, fine, we'll do
15 it the way the arbitrator says; what the arbitrator
16 wants, the arbitrator shall get. Instead, the next day
17 the arbitrator's decision became moot. Now, I think the
18 arbitrator, acting with an injunction looming the next
19 day, was proposing in a sense a kind of compromise: You
20 can both have a little bit of what you want. It's not
21 unusual in arbitrations for that to happen.

22 JUSTICE GINSBURG: Well, you may have a
23 right to go to arbitration under this context, to
24 proceed at once to arbitration. But could you stop a
25 parallel proceeding from going on before the Labor

1 Commission? In other words, your adversary says under
2 the arbitration contract I'm stuck, I have to arbitrate
3 at once, but I can go to the Labor Commission; there's
4 nothing in the Federal Arbitration Act that says I can't
5 do that.

6 MR. SCHLEIMER: Justice Ginsburg, I think
7 that if the motion to compel arbitration had been
8 granted -- remember there were two motions pending, my
9 motion to compel arbitration and the Respondent's motion
10 for an injunction to stop the arbitration.

11 If the motion to compel arbitration had been
12 granted, I think that would have been in effect a
13 mandamus to Judge Ferrer that he had to arbitrate and
14 not proceed.

15 JUSTICE SCALIA: I would have thought you
16 would -- you would say that when you have a contract
17 which says that any disputes under this shall be
18 arbitrated pursuant to the rules of the AAA or whatever,
19 that that does automatically exclude a parallel
20 proceeding. Otherwise, provisions like that make no
21 sense at all; they achieve nothing.

22 MR. SCHLEIMER: Justice Scalia, I would
23 certainly agree that it's a breach of the contract to
24 file a parallel proceeding. The question, of course, is
25 specific performance.

1 JUSTICE SOUTER: What do you -- what do you
2 make, in answering Justice Scalia's question, what do
3 you make of the fact that this contract included, I
4 guess, a choice of law provision to the effect that
5 California law applies, and if California law comes in
6 so does the jurisdiction of the Labor Commissioner? So
7 that in effect you have implicitly agreed to take the
8 Labor Commissioner as well as agreeing to arbitrate, and
9 the argument is the Labor Commissioner comes first.

10 MR. SCHLEIMER: Well, Justice Souter, I have
11 two responses to that. My first is that, since there's
12 an express agreement to arbitrate validity or legality,
13 that there is certainly no basis for saying that there's
14 some implied intent to contradict the express agreement.

15 The second is that, assuming for a moment
16 that we have incorporated California law wholesale, and
17 California has a lot of law, one of the laws that
18 California has, as set forth in the case I cited,
19 *Qualcomm v. Nokia*, a Federal Circuit decision in 2006
20 under California law, California law has a rule that if
21 you incorporate the AAA rules into your agreement, you
22 meet the First Option standard that you have agreed to
23 arbitrate arbitrability.

24 Now, if we have incorporated California law,
25 we have incorporated the law that says the arbitrator's

1 decision, his initial decision saying I've got
2 jurisdiction, let's hear some evidence, then that's
3 incorporated in California law --

4 JUSTICE SOUTER: Do you agree that the
5 question of implicit option of California law is at
6 issue in the case as it gets to us?

7 MR. SCHLEIMER: I don't believe that Volt is
8 properly in the case. If you look at the court of
9 appeals decision, the decision is based on jurisdiction,
10 it's not based on intent of the parties. Volt is all
11 about the intent of the parties that you imply from a
12 choice of law clause. And if the intent of the parties
13 is so clearly expressed that we're going to arbitrate a
14 particular issue, I don't think you even get to an
15 implied intention.

16 JUSTICE ALITO: Why isn't that an issue in
17 the case, unless you're waiving the issue? Wouldn't it
18 be a question of contract interpretation as to the
19 meaning of the choice of law provision that should be
20 decided by the arbitrator? Unless you want to waive
21 that argument.

22 MR. SCHLEIMER: I think that Volt should be
23 rejected. But in the alternative, I think under First
24 Options it should be remanded to the arbitrator. If
25 they want to make an argument that we didn't intend to

1 arbitrate arbitrability, even though California law is
2 per se on that point in our favor, then you have the
3 option of remanding that question to the arbitrator.

4 CHIEF JUSTICE ROBERTS: Counsel, I have to
5 confess I've never understood these choice of alaw
6 provisions. You incorporate California law. I assume
7 California law is interpreted consistent with Federal
8 law. If Federal law preempts California law, that's
9 what you're incorporating. It always struck me as kind
10 of circular.

11 MR. SCHLEIMER: Well, I think lawyers do it
12 reflexively because out of fear that somehow the law in
13 some other State that they don't know is going to wind
14 up being the conflict of law --

15 CHIEF JUSTICE ROBERTS: When you say
16 California law applies, you don't mean to the exclusion
17 of Federal law?

18 MR. SCHLEIMER: Of course not. I mean, if
19 one incorporates California law, one doesn't incorporate
20 pre-empted California law.

21 JUSTICE SCALIA: Nor do you mean that
22 California applies even when it contradicts the express
23 provisions of your agreement? I mean, the specific
24 governs of the general?

25 MR. SCHLEIMER: Absolutely. The Federal

1 Arbitration Act is all about effectuating the intent of
2 the parties to expeditiously and privately decide the
3 issue.

4 JUSTICE KENNEDY: I must say that the Volt
5 case is written in rather sweeping language that's not
6 particularly helpful to you. On its facts, I think it's
7 different because there were other parties, independent
8 parties in the litigation. Don't you think that's the
9 best way to distinguish Volt in your case?

10 MR. SCHLEIMER: Certainly. To that I would
11 add the observation that under Volt, since there were
12 parties that were not bound by arbitration, you are
13 going to have all the expense of the other lawsuits,
14 anyway. So, you have in terms of the efficiency of the
15 proceeding, in Volt you were going to have a
16 multiplication of litigation no matter what you did.
17 Here that's not true. The only reason we had a
18 multiplication of litigation is because Judge Ferrer
19 filed a Labor Commissioner petition and then a Superior
20 Court lawsuit.

21 CHIEF JUSTICE ROBERTS: Counsel, would you
22 have any problem with a California law that said you can
23 arbitrate but the arbitrator must allow the Labor
24 Commissioner to file an amicus brief?

25 MR. SCHLEIMER: I don't know the Labor

1 Commissioner has ever attempted that. I wouldn't be
2 concerned about it. I know --

3 CHIEF JUSTICE ROBERTS: What if it goes on
4 and says, and you must allow the Labor Commissioner to
5 appear at the arbitration?

6 MR. SCHLEIMER: Well, that is what 1700.45
7 says for talent agents. In 20 years I've never heard of
8 the Labor Commissioner doing that. But I can't imagine
9 anyone is going to be awfully concerned about it. I
10 certainly wouldn't be. If the Labor Commissioner wanted
11 to attend, they would be welcome. I don't think that's
12 based on a legal right because my client's a personal
13 manager and isn't regulated by the talent agency --

14 CHIEF JUSTICE ROBERTS: So, what if it says
15 you've got to wait for 30 days to allow the Labor
16 Commissioner to consider whether or not to intervene?

17 MR. SCHLEIMER: I'm not sure -- I
18 certainly -- personally, in this case no problem with
19 that. I don't think that's how it works. The statute
20 simply requires notice and an opportunity to attend; and
21 there's no issue in this case as to whether the Labor
22 Commissioner was deprived of that, because we never got
23 to that point.

24 JUSTICE KENNEDY: Does the Labor
25 Commissioner have authority to commence proceedings on

1 his own motion or her own motion?

2 MR. SCHLEIMER: It's a little bit
3 complicated.

4 JUSTICE KENNEDY: Well, I'm sorry that I
5 asked already.

6 MR. SCHLEIMER: I have an answer for you.
7 The Labor Commissioner is considered a peace officer
8 under California law. They actually have the power to
9 arrest. At one point many years ago, there was an
10 arrest of a manager for soliciting and procuring. He
11 got Jane Wyman a job on a TV show called "Falcon Crest,"
12 and there was an arrest and there was a criminal statute
13 at that time. And the legislature responded to this
14 incident by repealing the criminal statute.

15 So the only action the legislature has had
16 since deregulating the managers and taking them out of
17 the statute entirely was removing the criminal
18 enforcement power. In terms of the Labor Commissioner's
19 civil enforcement powers, there are statutes. The first
20 hundred sections in the labor code do give the Labor
21 Commissioner certain intervention powers. But, reading
22 those statutes, they would seem to apply in wage cases
23 and confiscation of tools, that sort of thing. They
24 don't really mention -- now would the Labor
25 Commissioner -- if the Labor Commissioner wanted to

1 intervene, I think that if you take the penumbra of all
2 these statutes probably the Labor Commissioner could.

3 I think, even though there's not in my 20
4 years handling these cases been a situation where the
5 Labor Commissioner filed any kind of a civil proceeding,
6 everybody assumes the Labor Commissioner could seek an
7 injunction if they wanted to. It just doesn't occur
8 because they're busy doing things like collecting wages.

9 JUSTICE GINSBURG: Could the arbitrator
10 decide, I know I'm not required to do this but the Labor
11 Commissioner is the expert and I'd rather wait until the
12 Labor Commissioner acted before I proceed with the
13 arbitration?

14 MR. SCHLEIMER: Well, in a sense, under the
15 gun of the injunction hearing the next day, that's what
16 the arbitrator did.

17 JUSTICE GINSBURG: Take out the exception.
18 The arbitrator just thinks that it would be good to have
19 the advice of the Labor Commissioner because the
20 arbitrator is not so familiar with these talent agency
21 arrangements.

22 MR. SCHLEIMER: I would certainly protest,
23 but the arbitrator undoubtedly has the power to wait for
24 the Labor Commissioner to render an advisory decision.
25 In a sense that's what the arbitrator did. In a moment

1 of I think irrational exuberance he talked about the
2 expertise of the Labor Commissioner.

3 CHIEF JUSTICE ROBERTS: How was the
4 arbitrator chosen? Does he or she have any particular
5 expertise in this area?

6 MR. SCHLEIMER: Yes. Mr. Bosch has 32 years
7 as an entertainment lawyer. He knows the Talent Agency
8 Act considerable better than any of the civil service
9 lawyers at the Labor Commissioner. That's why I
10 referred to it as irrational exuberance, because the
11 Labor Commissioner -- some of them get pretty good and
12 then they move on to other jobs, and you wind up with
13 people who hear wage claims.

14 JUSTICE KENNEDY: If you go to the superior
15 court for de novo review, can you ask the superior court
16 for an order enforcing its decision?

17 MR. SCHLEIMER: Enforcing the Labor
18 Commissioner's decision?

19 JUSTICE KENNEDY: Well, you get de novo
20 review. So do you ask the court for an order -- a
21 declaratory order, declaring that the person is a talent
22 agent or is not a talent agent?

23 MR. SCHLEIMER: Well, that is what Judge
24 Ferrer asked the superior court to do, was first send
25 this to the Labor Commissioner. Then specifically the

1 complaint by Judge Ferrer sought declaratory relief,
2 that the arbitration is void, the guy is an illegal
3 talent agent, so he should never be allowed to
4 arbitrate. That was the declaratory relief that was
5 sought.

6 JUSTICE KENNEDY: So do you think it would
7 be within the authority of the superior court to say
8 this is a judgment binding on the parties and the
9 arbitration will not proceed, or must proceed
10 consistently with my order?

11 MR. SCHLEIMER: Well, absent -- our position
12 is that that's preemptive, of course. Absent the
13 arbitration agreement, it would be the superior court
14 that would decide it.

15 JUSTICE KENNEDY: Yes. Well, but if the
16 Respondent prevails, don't you think that the superior
17 court has that authority?

18 MR. SCHLEIMER: If the Respondent prevails
19 in the Labor Commissioner?

20 JUSTICE KENNEDY: If Respondent prevails in
21 this case, don't you think that the superior court can
22 then say that its declaration is final and the
23 arbitration shall not proceed?

24 MR. SCHLEIMER: The position I've taken from
25 the beginning, including in my briefs to the court of

1 appeals was yes, that if the decision is correct, if
2 this Court affirms the court of appeals, that the
3 de novo would go to the superior court. Now, it is a
4 true de novo; in other words, it's not deferential to
5 the Labor Commissioner. It's simply a complete
6 rehearing from scratch of the whole case.

7 But it has always been my position and it
8 was until we got to this Court the Respondent's position
9 that the de novo would go to the superior court.

10 JUSTICE BREYER: What is it -- I should know
11 this, but I don't. Imagine that Jones and Smith, civil
12 engineers, builders, enter into a contract. They have
13 an arbitration provision suspiciously like this one. It
14 says we promise to arbitrate everything, any dispute,
15 including a dispute about whether this agreement is
16 legal or not itself. They have that. They go to the
17 arbitrator.

18 Jones says: You know, Mr. Arbitrator, you
19 don't know that much about civil engineering, but
20 there's a judge here who does. So I think what I'm
21 going to do tomorrow is file a lawsuit in the superior
22 court in California making the same claims I'm making
23 here and maybe that judge will decide it first and then
24 you'll be really helped. Now what stops him from doing
25 that in the law?

1 MR. SCHLEIMER: Well, the Federal
2 Arbitration Act and the California Arbitration --

3 JUSTICE BREYER: The Federal -- the Federal
4 Arbitration Act says what that makes it clear he can't
5 do that?

6 MR. SCHLEIMER: Well --

7 JUSTICE BREYER: I mean, I grant you if he
8 can do it you might as well tear up the Federal
9 Arbitration Act and throw it out the window. But I just
10 want to know what is it in the law specifically that
11 stops him from doing that.

12 MR. SCHLEIMER: Well, I think in Section 3
13 would -- there should be a stay of the judicial
14 proceedings so that the arbitration can proceed.

15 JUSTICE SCALIA: But that's not positive
16 Federal law. What stops him from doing it is the
17 contractual agreement, isn't it, between the parties?
18 The FAA just says that the State will not set aside that
19 contractual agreement.

20 MR. SCHLEIMER: Yes, Justice Scalia. The
21 obligation comes from the contract.

22 JUSTICE BREYER: So even though it's not --

23 JUSTICE SCALIA: When we say we'll arbitrate
24 all disputes under this contract, it means we'll
25 arbitrate all disputes under this contract; neither one

1 of us will go to court.

2 MR. SCHLEIMER: I think that's doubly so if
3 you incorporate the rules of the American Arbitration
4 Association, which provides you with the maximum
5 breadth.

6 JUSTICE BREYER: Well, but that -- that's
7 what I'm driving at, and I think that's interesting,
8 that there's an implicit -- because it doesn't say it
9 explicitly -- there's an implicit promise not to
10 undermine this contract by running off to court.

11 MR. SCHLEIMER: I think it's a covenant of
12 good faith and fair dealing. If you agree to do it you
13 should do it.

14 JUSTICE BREYER: All right. And so you
15 can't -- no case comes to your mind where anybody has
16 tried that little end run? And --

17 MR. SCHLEIMER: I think there are a couple
18 --

19 JUSTICE BREYER: I agree, I don't see how
20 they could, but I just want to get to the bottom of it.

21 MR. SCHLEIMER: I think this entire area of
22 jurisprudence involves pre-dispute arbitration
23 agreements and then some party decides it's not to my
24 advantage and they run to court. That's almost every
25 case.

1 JUSTICE BREYER: Okay.

2 JUSTICE SCALIA: I used to teach contract
3 law, and I am sure that when you say you'll arbitrate,
4 it means you won't litigate. And even if I didn't ever
5 teach contract law, it would still be the law.

6 (Laughter.)

7 JUSTICE GINSBURG: I thought Buckeye was --
8 was such a case, going to court despite the arbitration
9 agreement.

10 MR. SCHLEIMER: At -- at the time we were in
11 the superior court, Buckeye had not yet been decided.
12 We were -- in December of 2005 was the injunction
13 hearing, and Buckeye I believe was published in February
14 of 2006.

15 I relied on the California case, the
16 Erickson case, which made Prima Paint the law of
17 California, and it wasn't persuasive. Then Buckeye was
18 handed down while we were on appeal. But I certainly,
19 when I read Buckeye, I said that's my price, because
20 Prima Paint was about fraud in the inducement. We were
21 in a situation where we were dealing with an attack on
22 the legality of the entire contract and I read Buckeye
23 and said, that's my case.

24 Mr. Chief Justice, if there's no further
25 questions, I'd like to reserve my time.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Brunstad.

3 ORAL ARGUMENT OF G. ERIC BRUNSTAD, JR.

4 ON BEHALF OF THE RESPONDENT

5 MR. BRUNSTAD: Mr. Chief Justice, and may it
6 please the Court:

7 The California Talent Agencies Act does not
8 invalidate the arbitration agreement between Mr. Preston
9 and Judge Ferrer. At most, it merely postpones
10 arbitration --

11 JUSTICE BREYER: Well, the question is
12 obvious. The question just follows from what I said.
13 You were there nodding your head when everybody seems
14 seemed to agree that the Jones versus Smith, they can't
15 go run off to court. So you're just about to address
16 this, and I hope you'll include the answer to the
17 question, which is if they can't run off to the
18 Federal -- to the State court judge, the superior court
19 judge, to get his opinion on the matter, why can they
20 run off to this man, namely the talent agency expert --

21 MR. BRUNSTAD: The Labor Commissioner --

22 JUSTICE BREYER: -- who happens to be an
23 administrative agency? Why does it matter?

24 MR. BRUNSTAD: I think to answer your
25 question, Justice Breyer, it's helpful just to delineate

1 the procedure of how it's supposed to work. You're
2 supposed to go to the California Labor Commissioner
3 first if there's any controversy arising under the
4 California Talent Agencies Act. That is an exhaustion
5 of administrative remedies concept that the California
6 Supreme Court articulated in *Styne v Stevens*. After the
7 California Talent Agencies Act has been administered by
8 the Labor Commissioner, either party has as of right the
9 ability to take an appeal to the California Superior
10 Court, at which point all of the California arbitration
11 rules apply, and a motion to compel arbitration could be
12 made at that point and arbitration could happen. And
13 now it's a de novo hearing from the Labor Commissioner's
14 proceeding, which means under California law, the
15 *Waisbren* case and the *Buchwald* case, that it's as though
16 the Labor Commissioner proceeding had not happened at
17 all. The --

18 JUSTICE SCALIA: Did you take a position
19 below? Your friend says that this is brand new up here.

20 MR. BRUNSTAD: It's not brand new,
21 Justice Scalia. We never got that far.

22 JUSTICE KENNEDY: Did you take that position
23 below, was the question.

24 MR. BRUNSTAD: We never took that position
25 below because we never got that far, Justice Kennedy.

1 We only got to the point whether we should have a
2 preliminary injunction so that the Labor Commissioner
3 could go first. Once the Labor Commissioner --

4 JUSTICE KENNEDY: The arbitrator already
5 agreed to do that. You didn't need the injunction for
6 that purpose.

7 MR. BRUNSTAD: Well, the motion for the
8 injunction was filed because the arbitrator initially
9 denied a stay of arbitration. The arbitrator himself
10 then reconsidered his ruling a day before the hearing on
11 the injunction, and the arbitrator said I'd like to hear
12 from the Labor Commissioner because the Labor
13 Commissioner is expert.

14 JUSTICE KENNEDY: Well -- but if your
15 position is that we have to preserve the integrity of
16 the State system, the Labor expert and so forth and the
17 State builds in to that procedure, de novo review
18 Superior Court, it seems to me rather difficult for you
19 to now just say oh, well, the Superior Court doesn't
20 make any difference.

21 MR. BRUNSTAD: Well, Justice Kennedy, I
22 think that it is important -- this goes back to
23 Justice Breyer's question. Why is it a de novo
24 proceeding? Well, in the Sinnamon case, which we cite
25 in our brief, there are constitutional reasons under the

1 California's constitution. The Labor Commissioner
2 doesn't exercise any judicial authority and does not
3 have the power to finally decide this controversy. The
4 Labor Commissioner is merely exercising her
5 administrative power over this dispute because this is
6 part of a comprehensive regulatory scheme.

7 JUSTICE SCALIA: Why would you want this to
8 happen? Why -- who would imagine such a system in which
9 you bring it to the Labor Commissioner and you prevent
10 the matter from being resolved immediately with an
11 arbitrator. I don't know how long does it take for the
12 Labor Commissioner? I don't know.

13 MR. BRUNSTAD: On average 8 months, Justice
14 Scalia.

15 JUSTICE SCALIA: Eight months. But then
16 when he's done --

17 MR. BRUNSTAD: She, Your Honor.

18 JUSTICE SCALIA: She. No matter what
19 happens, you go back to the arbitrator. Who in his
20 right mind would set up such a system?

21 MR. BRUNSTAD: Well, there are valid
22 reasons. There are very compelling reasons why
23 California set up this system. California law says if
24 you're going to act like a talent agent, you're going to
25 procure employment -- that's the touchstone -- you're

1 acting as a talent agency, you're supposed to submit
2 your contracts in advance for pre-approval from the
3 Labor Commissioner. You're supposed to bring your
4 disputes there. That's how the Labor Commissioner
5 learns of disputes. The Labor Commissioner is supposed
6 to develop this body of law by interpreting it. All --

7 JUSTICE SCALIA: This person is not a talent
8 agent.

9 MR. BRUNSTAD: The is person is a talent
10 agent, Justice Scalia. He was operating to procure
11 employment. And the statute says anyone who even
12 attempts to procure employment is a talent agent, and
13 that is all that Mr. Preston did.

14 CHIEF JUSTICE ROBERTS: Normally we say that
15 those types of disputes are for the arbitrator to
16 decide. The theory is that the arbitrator can apply the
17 existing law as well as a court, and if that's the
18 theory, couldn't the arbitrator apply the existing law
19 as well as an agency?

20 MR. BRUNSTAD: Chief Justice Roberts, there
21 are other things that the Labor Commissioner is invested
22 with jurisdiction to do. The Labor Commissioner has to
23 find out about these disputes. How does she find out?
24 Because parties bring these petitions. This is a great
25 deterrent for people from violating the California

1 Talent Agencies Act. It works because the dispute has
2 to come before her. She knows who the bad apples are.
3 She knows she can go to get injunctive relief if she
4 needs to. Her expertise is advanced. She gets to
5 decide the controversy initially. And it merely
6 postpones arbitration. And critically, this is --

7 JUSTICE SOUTER: Well, that may be great as
8 a means of informing the Labor Commissioner, but it
9 virtually destroys the value of arbitration --

10 MR. BRUNSTAD: No, but the --

11 JUSTICE SOUTER: -- because the
12 expeditiousness of arbitration is gone once you start
13 down the California procedural road. They don't want to
14 go to arbitration 8 to 12 months later. They want it
15 now.

16 MR. BRUNSTAD: No, Justice Souter, it's
17 actually enhanced. It's enhanced for all the reasons
18 that, when expert brings his or her expertise to bear,
19 you can get a settlement; you get expedited resolution
20 the issues get rekindled. Most parties don't go to
21 arbitration after this because --

22 JUSTICE SOUTER: Then they probably
23 shouldn't have agreed to arbitrate, but they did agree
24 to arbitrate, and they want to arbitrate now. And one
25 of the points of arbitration is to get the ball rolling

1 fast, and that cannot be done under the system you are
2 arguing for.

3 MR. BRUNSTAD: But, Justice Souter, this is
4 what they bargained for. They bargained for the
5 application of California law under the --

6 JUSTICE SOUTER: Did you make that argument
7 below, that implicitly they have imported the California
8 labor scheme in as a -- in effect, as a condition
9 precedent to the arbitration?

10 MR. BRUNSTAD: Yes, Justice Souter, we cited
11 the Volt case before the California court of appeal.
12 Now, the other side did not raise --

13 JUSTICE BREYER: It sounds as if you made
14 the argument -- well, you say we cited a case.

15 MR. BRUNSTAD: But, Justice Breyer, they did
16 not raise the pre-emption argument at all.

17 JUSTICE BREYER: Okay. The answer to
18 Justice Souter's question is no, we didn't raise it
19 below. Is that right?

20 MR. BRUNSTAD: We did by responding to their
21 argument. We did cite Volt. The only other --

22 JUSTICE SOUTER: But you didn't go further
23 than to decide that case. Is that correct?

24 MR. BRUNSTAD: We did not go further than to
25 cite Volt, but let me --

1 JUSTICE GINSBURG: Volt involves a third
2 party who is not party to the arbitration agreement.
3 You have a party who is bound nonetheless invoking the
4 Labor Commission to avoid going immediately to
5 arbitration. Volt is very clear. It involves a third
6 party, litigation involving a third party who is not
7 bound by the arbitration agreement. Here you have only
8 two parties. They are both bound by the arbitration
9 agreement. I don't see how you can invoke Volt.

10 MR. BRUNSTAD: Because Volt simply was about
11 -- a case about postponing arbitration in favor of
12 litigation going forward, which has actually had a
13 greater impact --

14 JUSTICE GINSBURG: Litigation involving a
15 person who couldn't be brought into the arbitration.

16 MR. BRUNSTAD: True, but --

17 JUSTICE GINSBURG: It makes sense to say
18 that piece of it involving a party who can't be before
19 the arbitrator should be -- should be -- go first. But
20 here you don't have anybody who isn't bound to go before
21 the arbitrator. You have no third party.

22 MR. BRUNSTAD: Except the Labor Commissioner
23 herself who is supposed to do these administrative
24 procedures for all kinds of validate and compelling
25 State court -- State law reasons.

1 JUSTICE SCALIA: Judgment involved would
2 have been binding --

3 MR. BRUNSTAD: Yes.

4 JUSTICE SCALIA: -- on the third parties.
5 You don't -- and you assert that the judgment here
6 wouldn't be binding at all. It's just because the Labor
7 Commissioner, he or she, is such an expert on this --
8 your opponent says she's not at all --

9 MR. BRUNSTAD: She is, Your Honor.

10 JUSTICE SCALIA: Well, I imagine that's
11 highly debatable.

12 It's a different case where you say you have
13 to wait for a court decision which will be conclusive as
14 to many of the people in the case.

15 MR. BRUNSTAD: But, Justice Scalia, in Volt,
16 the State court litigation went forward, the related
17 litigation. It could have res judicata/collateral
18 estoppel effects on the arbitration. It has even more
19 of an impact on arbitration --

20 JUSTICE GINSBURG: You said something about
21 that in your brief, and I think that you got it wrong.
22 You said something about -- that the outcome of the
23 litigation can have preclusive effect in the
24 arbitration. But that would be so only if the result
25 favored the non-party to the litigation, because the

1 non-party to the litigation cannot be bound by a
2 judgment that would adversely affect that party's
3 interest. That party wasn't in the proceeding. It
4 isn't bound by it. The parties to the litigation are
5 bound by it, not the non-parties to the litigation.

6 MR. BRUNSTAD: True, Justice Ginsburg, but
7 at least it can bind one of the parties and therefore
8 tie the hands of the arbitrator in the subsequent
9 proceeding. Here this is not possible. The parties
10 bargained for this in their agreement when they
11 bargained for the application of California law.

12 JUSTICE BREYER: Could California law do
13 this? I mean could they say, you know, we have a
14 problem. By the way, this is just a hypothetical. We
15 think that our judges in the Superior Court don't know
16 very much about building disputes.

17 Now, I say it is a hypothetical because, in
18 fact, Superior Court judges in California are excellent
19 judges. But California thinks, no, they don't know
20 enough about it. So here's what we do. We say when
21 Jones and Smith enter into an arbitration agreement, if
22 it happens to concern a building dispute, they have to
23 go to Federal -- they can go to the Superior Court. In
24 fact, if they want to, if one of them wants to, the
25 other one doesn't. And everything is delayed while the

1 Superior Court judge decides all the issues in the case.
2 And then after they can go back to arbitration, if of
3 course they still want to. Could California do that?

4 MR. BRUNSTAD: Well, if that's what parties
5 bargained for, that was their agreement. It would be --

6 JUSTICE BREYER: I've read the agreement,
7 and I don't quite find their -- here --

8 MR. BRUNSTAD: But I understand your
9 hypothetical --

10 JUSTICE BREYER: In my mind is what they do
11 is they have the same standard arbitration clause. So
12 I'm asking not about the parties; I'm asking about
13 California.

14 MR. BRUNSTAD: No, Justice Breyer.

15 JUSTICE BREYER: No. The answer is no. I
16 thought so. And so now you explain to me how this is
17 any different than what I just said, other than
18 substituting the words "Labor Commissioner" for
19 "California Superior Court" and substituting the words
20 "talent dispute" for the words "building dispute."

21 MR. BRUNSTAD: Because here what the Labor
22 Commissioner does is not what a court does. "Labor
23 Commissioner" is not synonymous with "the court" and
24 cannot be under California's constitution. Here you
25 have a complete, again, arbitration postponing rule and

1 nothing more. The arbitrator's hands are not tied in
2 any way; whereas the arbitrator's hands would be tied if
3 in fact you had court litigation that was conclusive
4 between the --

5 JUSTICE SCALIA: No. His hypothetical was
6 that the court decision would just be advisory and the
7 arbitrator could ignore it.

8 MR. BRUNSTAD: Well, that would be --

9 JUSTICE SCALIA: Just get, you know, a
10 knowledgeable person's input.

11 MR. BRUNSTAD: But, Justice Scalia, that
12 would be inconsistent with the arbitration clause
13 itself. Here, however, it is not. Here the parties
14 bargained for the application of California law.

15 JUSTICE SCALIA: This contract said the same
16 thing. This contract will be governed by California
17 law.

18 MR. BRUNSTAD: Right.

19 JUSTICE SCALIA: Would it suck up this
20 provision that says you have to go to the Superior
21 Court?

22 MR. BRUNSTAD: No.

23 JUSTICE SCALIA: No. I don't think so
24 either.

25 MR. BRUNSTAD: But here it would, yes,

1 because California law requires you to go to the Labor
2 Commissioner first, not to --

3 JUSTICE BREYER: Well, I guess that would be
4 a question for the arbitrator.

5 JUSTICE KENNEDY: I just want to understand
6 your position. In this case, does the California
7 provision for de novo review in the Superior Court apply
8 to stay the arbitration while that aspect of the
9 proceeding is completed?

10 MR. BRUNSTAD: Under California law -- it is
11 California law -- you must go to the labor commissioner
12 first before you go either to court or the arbitrator.
13 You must go to the arbitrator second.

14 JUSTICE KENNEDY: My question was: You go
15 to the labor commissioner. You also have a de novo
16 right to go to the superior court.

17 MR. BRUNSTAD: That is correct.

18 JUSTICE KENNEDY: Suppose the labor
19 commissioner said something absolutely silly. Wouldn't
20 you think you would have the right to go to the Superior
21 Court?

22 MR. BRUNSTAD: Either side -- either side
23 can go to the superior court.

24 JUSTICE KENNEDY: And it would make no sense
25 to do that and -- and not to also stay the arbitration.

1 MR. BRUNSTAD: Justice Kennedy, I think the
2 problem I'm having with your question is that I think
3 you are assuming that there's an arbitration in place
4 while the labor commissioner is going forward.

5 JUSTICE KENNEDY: No. Now, we have this
6 case. We have an arbitration clause.

7 MR. BRUNSTAD: We do.

8 JUSTICE KENNEDY: The arbitrator is waiting.
9 You go to the labor commissioner, you go to the superior
10 court to say enjoin the arbitration while I go to the
11 labor commissioner.

12 MR. BRUNSTAD: Correct.

13 JUSTICE KENNEDY: The labor commissioner
14 does something silly. Can you not then go to superior
15 court and get de novo review of that wrong decision of
16 the labor commissioner before the arbitration starts?

17 MR. BRUNSTAD: No, Justice Kennedy, because
18 once --

19 JUSTICE KENNEDY: Have you taken that
20 position consistently in this litigation?

21 MR. BRUNSTAD: We never got there, Justice
22 Kennedy. We never got to the --

23 JUSTICE KENNEDY: You have taken no position
24 on it either way?

25 MR. BRUNSTAD: We took the position that the

1 superior court should stay the arbitration because you
2 have to exhaust the administrative remedies first; and,
3 consistent with the Federal Arbitration Act, Section 2,
4 there might be grounds for invalidating this Arbitration
5 Act.

6 JUSTICE ALITO: Is there any California case
7 that says that this works this way? That after the
8 proceeding is finished before the labor commissioner,
9 the parties have a right to go to arbitration before
10 there's de novo review in the superior court?

11 MR. BRUNSTAD: Specifically, Justice Alito,
12 no. What the California courts have decided is that
13 there is a de novo right, and --

14 JUSTICE GINSBURG: A de novo right in
15 Superior Court?

16 MR. BRUNSTAD: Yes. But the California
17 Supreme Court has also said, in construing its own
18 arbitration act, which is Section 1281, which is
19 basically the same as Section 2 of the FAA -- said,
20 look, when we have a right to go to court if you have an
21 arbitration proceeding, the -- a motion to compel
22 arbitration must be granted unless, for example, the
23 arbitration clause is invalid for some reason.

24 CHIEF JUSTICE ROBERTS: Right, you at least
25 have that additional step. It is -- particularly since

1 you only have 10 days to appeal from the labor
2 commissioner, someone who wants to arbitrate has to
3 appeal, has to go to superior court and get a motion to
4 compel.

5 You can't even wait to see if your opponent
6 goes to superior court and -- well, if he has won, he
7 wouldn't go into court. But you have to go to the court
8 to get a motion to compel? You can't just go ahead and
9 proceed with arbitration.

10 MR. BRUNSTAD: Well, the parties could
11 voluntarily do that. But, yes, if you don't do the de
12 novo proceeding, then the labor commissioner's decision
13 becomes binding.

14 So you must take the step of doing the
15 notice of appeal and then do a motion to compel.

16 JUSTICE SCALIA: Excuse me. You say -- I
17 thought you said it doesn't become binding. That it is
18 just advice to the arbitrator. Once you -- once you get
19 the remand to the arbitrator, it is not binding.

20 MR. BRUNSTAD: No, Justice Scalia. If I
21 made that impression, I'm sorry. I was mistaken. What
22 I am saying is that if -- if -- you have a right to take
23 an appeal to the California Superior Court.

24 JUSTICE SCALIA: Right.

25 MR. BRUNSTAD: And once you get to the

1 California Superior Court, then, under Section 1281, you
2 have a right to move to compel for arbitration, just as
3 under the Federal Arbitration Act.

4 JUSTICE SCALIA: But --

5 MR. BRUNSTAD: If do you not do those
6 things, if you do not take the appeal, then the labor
7 commissioner's -- by default, her ruling becomes
8 binding. So you have to do the appellate process, and
9 you must file a motion.

10 CHIEF JUSTICE ROBERTS: And if you -- and if
11 you are successful and get from the superior court an
12 order to compel arbitration, your opponent can then
13 appeal it, I assume.

14 MR. BRUNSTAD: Your opponent can appeal the
15 decision compelling the arbitration if it were
16 improperly granted, yes.

17 JUSTICE KENNEDY: Are you telling us that
18 under no circumstance, if you prevail in this case,
19 would you go to the superior court for de novo review
20 and -- and, as part of that, stay the arbitration?

21 MR. BRUNSTAD: Justice Kennedy, if the
22 arbitration clause is valid and applicable, we will go
23 to arbitration. That validity and applicability has not
24 been tested by any court below. For example, are there
25 grounds --

1 JUSTICE KENNEDY: All right. Let's assume
2 the arbitration clause is valid.

3 MR. BRUNSTAD: Yes, we will go to
4 arbitration.

5 JUSTICE KENNEDY: Even though in this case
6 you have assumed that that arbitration has to be stayed
7 for the labor commissioner. So the case does not have
8 to be stayed, and you would not ask for it to be stayed,
9 in the superior court?

10 MR. BRUNSTAD: Labor commissioner goes
11 first. Then, we go to arbitration. If this Court rules
12 that the labor commissioner's jurisdiction is preempted,
13 then we go back to the -- to the lower court. If the
14 arbitration clause is valid and applicable, we will go
15 to arbitration. That is correct. Chief Justice
16 Roberts, you asked a question about the --

17 JUSTICE GINSBURG: Mr. Brunstad, I'm looking
18 at the point in which you said this in your brief. You
19 said you go to the labor commission, and then you go to
20 the Superior Court. This is page 13 of your brief.

21 The court is required to grant a motion
22 compelling arbitration if the parties have executed a
23 valid and applicable arbitration agreement.

24 Well, who determines if the parties have
25 executed a valid and applicable arbitration agreement?

1 MR. BRUNSTAD: Under First Options here,
2 were it not unmistakably clear that the parties said
3 that the arbitrator should decide arbitrability, that
4 would be for the court to decide.

5 JUSTICE GINSBURG: Well, we know -- this is
6 not a mystery in this contract. It says it in the
7 contract, and it says it under the AAA rules. But you
8 phrased this in your brief in a way that says, well, if
9 the parties have executed a valid and applicable
10 arbitration agreement, that's what the superior court is
11 going to decide. So it won't grant a motion to compel
12 unless it determines that the parties have executed the
13 valid and applicable arbitration agreement.

14 MR. BRUNSTAD: And what I meant in that
15 language, Justice Ginsburg, is simply this: For
16 example, if the arbitration clause were invalid because
17 the arbitration clause, itself, were, say, fraudulent
18 or -- for something, then it would not be validate and
19 applicable; or if the scope of the arbitration clause
20 were limited in some way, then the scope issue, the
21 arbitrability issue, is for the court to decide as this
22 Court decided in First Options.

23 Here we do not have the unmistakably clear
24 language that the parties intended that the question of
25 arbitrability, itself, to be to the arbitrator. So the

1 court would decide if, in fact, the --

2 JUSTICE BREYER: Right, this is -- this is
3 -- actually now we are getting to the bottom of
4 something here, I think.

5 Now, I am beginning to understand where you
6 are coming from; and Volt does offer you considerable
7 support, as I -- as I agreed.

8 MR. BRUNSTAD: Yes, Justice Breyer.

9 JUSTICE BREYER: All right. Now, Volt,
10 however, is a case, I take it, in which the stay that
11 was entered was a stay staying the arbitration pending
12 the resolution of a judicial dispute that was not
13 subject to arbitrability.

14 MR. BRUNSTAD: Correct.

15 JUSTICE BREYER: Therefore, it seems to me
16 that the question here concerns the meaning of this
17 contract, and that's where we started.

18 MR. BRUNSTAD: Yes.

19 JUSTICE BREYER: Does this contract mean
20 that the parties who entered have promised, one, not
21 themselves to go to court? Answer: Yes.

22 MR. BRUNSTAD: Yes.

23 JUSTICE BREYER: Two, not themselves to
24 bring a proceeding before this administrative agency?
25 And that's where he says yes, and you say no.

1 MR. BRUNSTAD: No.

2 JUSTICE BREYER: And then is the proper
3 resolution of that to say: Well, you can raise that,
4 too, before the arbitrator?

5 MR. BRUNSTAD: No, Justice Breyer.

6 JUSTICE BREYER: Why not?

7 MR. BRUNSTAD: And this goes to the Chief
8 Justice's initial question which I have been trying to
9 get to. And that is when the parties incorporated
10 California law, what did they incorporate?

11 Well, in Volt this Court answered: When
12 they incorporated California law, it was California law;
13 not California law with a gloss of Federal law, but
14 California law. And the California Supreme Court in the
15 Chronus case that we cite says exactly the same thing.

16 JUSTICE ALITO: Isn't that a question of
17 contract interpretation --

18 MR. BRUNSTAD: Yes.

19 JUSTICE ALITO: -- for the arbitrator?

20 MR. BRUNSTAD: No.

21 JUSTICE ALITO: Why not?

22 MR. BRUNSTAD: Because that goes -- because
23 I think that this Court held that it to be no in Volt.
24 It said, look, where the -- because that goes to the
25 applicability, the validity, of the arbitration clause,

1 itself.

2 Here we don't have arbitrability, itself.
3 The First Options standard is not satisfied under this
4 case.

5 JUSTICE SCALIA: Well, I don't understand --
6 so you incorporate California law. I interpret that to
7 mean substantive law of California.

8 You say also incorporates -- and this is
9 what I find peculiar. California law gives you a
10 procedural right to go to the labor commission. But it
11 also gives you a procedural right to go to superior
12 court. And, yet, you acknowledge that the arbitration
13 agreement, when you say we will arbitrate, forecloses
14 your using the superior court.

15 Why doesn't it foreclose your using the
16 labor commissioner? I don't understand how you slice
17 the bologna that thin. To me, if it excludes California
18 procedures, it excludes both the labor commissioner and
19 the superior court.

20 MR. BRUNSTAD: Two reasons, Justice Scalia:

21 First, in the Buckeye case, for example, the
22 parties specifically selected as their choice of law the
23 Federal Arbitration Act. Here the parties selected
24 California law. This is no different than in Volt.

25 The second reason, Justice Scalia --

1 JUSTICE SCALIA: Let me -- I want to
2 understand that answer. California law includes the
3 Superior Court as much as it includes the labor
4 commissioner.

5 MR. BRUNSTAD: In Volt, Your Honor, the
6 specific law that was -- the Court said was selected was
7 Section 1281 of the California Code of Civil Procedure,
8 which applies in a California court favoring a court
9 proceeding because California has this rule that says if
10 you have arbitration and related litigation, you can
11 stay --

12 JUSTICE GINSBURG: Related litigation with
13 someone other than the parties that you bound yourself
14 to arbitrate with. That involved Stanford and two
15 companies, Stanford suing two companies or -- in
16 litigation with two companies with whom it had no
17 arbitration agreement.

18 MR. BRUNSTAD: Yes, Justice Ginsburg. But
19 here I think the Court has drawn the proper distinction
20 between, on the one hand, Volt and, on the other hand,
21 Doctor's Associates, Mastrobuono, Perry, Allied-Bruce,
22 all of those cases where the Court has said if it is an
23 arbitration negating rule, you don't incorporate it,
24 because that's fundamentally at war with the decision to
25 arbitrate.

1 But where it's merely an arbitration
2 postponing rule, which was the procedural issue in Volt
3 and the procedural issue here, then we respect that and
4 say that's not pre-empted, because it's not necessary to
5 pre-empt.

6 JUSTICE ALITO: How can we decide this case
7 on the assumption that this is simply an arbitration
8 postponing rule when there's no California case that
9 says that, do you acknowledge?

10 And a party resisting arbitration could well
11 argue that the California Code means that you go first
12 to the Labor Commissioner and then, as the statute says
13 explicitly, the parties are entitled to a de novo review
14 before the Superior Court without making any provision
15 for arbitration. Do you think it is inconceivable the
16 California courts could interpret the statute to mean
17 that, that there's no room for arbitration in the -- in
18 this scheme?

19 MR. BRUNSTAD: It is inconceivable,
20 Justice Alito, that the California court would say that
21 arbitration is not permissible in this case. The
22 California Supreme Court has reconciled previously in
23 the Aguilar case, which is 32 Cal. 4th 974. You had two
24 different provisions of law. One said you had
25 nonbinding arbitration for fee disputes between

1 attorneys, and the second was the California Arbitration
2 Act.

3 And the California Supreme Court said, as
4 this Court said, that it will indulge every intent to
5 give effect to such proceedings, the arbitration
6 proceedings, in Section 1281. It will harmonize the
7 statutes and say if you if you have a right to
8 arbitrate, we will respect that and we will harmonize
9 the laws so we respect that.

10 JUSTICE SCALIA: So the California Supreme
11 Court would construct a system in which you get the
12 advice of this expert, the Labor Commissioner. One of
13 the parties thinks that this expert's advice is
14 ridiculous, just absolutely wrong.

15 Now, California law generally considers the
16 Superior Court smarter than the Labor Commissioner,
17 which is why you get de novo review before the Superior
18 Court.

19 MR. BRUNSTAD: No, Justice Scalia.

20 JUSTICE SCALIA: No?

21 MR. BRUNSTAD: No.

22 JUSTICE SCALIA: It is stupider than the
23 Labor Commissioner.

24 (Laughter.)

25 MR. BRUNSTAD: No, Justice Scalia. It is

1 the California constitutional provision. Under
2 California's constitution, for better or worse, you
3 cannot have the Labor Commissioner --

4 JUSTICE SCALIA: All right. I will amend
5 it. The California Superior Court is ex officio smarter
6 than the Labor Commissioner, okay? And yet, one of the
7 parties who thinks the Labor Commissioner is dead wrong
8 doesn't get a chance to have this advice corrected the
9 way the California constitution envisions, by the ex
10 officio smarter Superior Court.

11 MR. BRUNSTAD: Justice Scalia --

12 JUSTICE SCALIA: And that is the scheme that
13 the California Supreme Court is going to embed in
14 California law?

15 MR. BRUNSTAD: Justice Scalia, bankruptcy
16 courts cannot enter final decisions, yet we know that
17 they're expert in bankruptcy law, even though they're
18 subject to de novo review in the district court.

19 JUSTICE KENNEDY: In this case, the Court of
20 Appeals, the majority said the fact that the losing
21 party will have a right to de novo hearing, involving
22 additional time and money, does not excuse the Defendant
23 from the legal requirement to exhaust his remedy. And I
24 think you're preserving the option to go to the Superior
25 Court, at least the contestability of the arbitration

1 clause.

2 MR. BRUNSTAD: But that's the case in every
3 Federal Arbitration Act case, Justice Kennedy.

4 JUSTICE KENNEDY: So that, it seems to me,
5 makes incorrect your statement in your brief that, oh,
6 this is just for eight months, so that there's very
7 little additional time involved because of the de novo
8 hearing.

9 MR. BRUNSTAD: No, Justice Kennedy.

10 JUSTICE KENNEDY: Don't you think that your
11 statement at page 34 of the brief has to be qualified in
12 that respect?

13 MR. BRUNSTAD: Justice Kennedy, if we get to
14 the Superior Court -- the Labor Commissioner does her
15 work, and if the parties are not satisfied with it,
16 either of them has the right to go to the Superior Court
17 for a de novo hearing and file a motion to compel
18 arbitration. This would be no different than any other
19 Arbitration Act case where, when you get to the --

20 JUSTICE KENNEDY: But you also have the
21 right to challenge what -- the accuracy of the Labor
22 Department's finding. That's what both -- all the
23 judges on the California court agreed with that. So I'm
24 asking, doesn't that make -- require qualification of
25 your statement at page 34 that these procedures are

1 expeditious and informal and do not entail additional
2 expense or delay? All of --

3 MR. BRUNSTAD: Yes, Justice Kennedy. Yes.
4 That is --

5 JUSTICE KENNEDY: That does require some
6 qualification there.

7 MR. BRUNSTAD: Yes, Justice Kennedy, that
8 is -- that is factually accurate. That is a factually
9 accurate addition to what we said in our brief.

10 CHIEF JUSTICE ROBERTS: Counsel, do you --

11 JUSTICE KENNEDY: All right. Does it also
12 require some qualification in you brief where, at page
13 12, you say Preston clearly and repeatedly sought to
14 procure employment for Ferrer in the television
15 industry? Our rules say that you cannot raise matters
16 for the first time in this Court. And you have no
17 evidence on that point.

18 MR. BRUNSTAD: Justice Kennedy, we never got
19 to an evidentiary hearing in this case.

20 JUSTICE KENNEDY: I know you didn't, and
21 that's why I'm questioning why you put it in your brief.
22 Doesn't that require some qualification?

23 MR. BRUNSTAD: It is not in the record,
24 Justice Kennedy, because there is no factual record in
25 this case --

1 JUSTICE KENNEDY: Therefore, don't make
2 factual averments here for the first time.

3 MR. BRUNSTAD: It's not for the first time,
4 Justice Kennedy. It was made all the way through the
5 proceedings below. We never got to an evidentiary
6 hearing. This case is still at the preliminary stages.

7 JUSTICE KENNEDY: Do you think, in the
8 briefs to this Court, you can make factual statements
9 that are not in the record?

10 MR. BRUNSTAD: Well, Justice Kennedy, that
11 would mean we could make no factual statements to give
12 the Court any background at all. I think it is
13 undisputed; it isn't challenged by the other side.

14 JUSTICE KENNEDY: I think they do say that
15 it is disputed. They do dispute that he clearly and
16 repeatedly sought to procure employment for Ferrer.
17 That's the whole issue in the case.

18 MR. BRUNSTAD: It's undisputed, that Mr.
19 Preston went and arranged the meeting with Judge Ferrer
20 initially with the folks at ABC.

21 JUSTICE KENNEDY: But they said it is --
22 they dispute that it is to procure employment.

23 MR. BRUNSTAD: I think, Justice Kennedy, I
24 will concede that it is not a matter of evidence, so
25 that qualification -- I will accept that

1 qualification --

2 JUSTICE GINSBURG: In that light, on page
3 43, you say in this case, it is undisputed that Preston
4 was an unlicensed talent agent and that the contract he
5 drafted did not meet the requirements of Section 1700.

6 I thought it is very much disputed whether
7 he was a talent agent at all. I thought the position
8 was -- that your opponent is taking is that he was not a
9 talent agent, that he didn't come under the statute.

10 MR. BRUNSTAD: It is undisputed,
11 Justice Ginsburg, that Mr. Preston never had a license.

12 JUSTICE GINSBURG: But that's not what you
13 said here. You say it is undisputed that Preston was an
14 unlicensed talent agent. That's your statement.

15 MR. BRUNSTAD: Our argument,
16 Justice Ginsburg, is that he was unlicensed but he was
17 operating as a talent agent under section -- under the
18 California Talent Agencies Act.

19 JUSTICE SCALIA: The latter is disputed.
20 The latter is vigorously disputed.

21 MR. BRUNSTAD: That is disputed, Justice
22 Scalia. And they have disputed that. But it is -- let
23 me qualify that then, Justice Ginsburg. It's undisputed
24 that he never had a license.

25 JUSTICE STEVENS: Could I ask one question

1 that I just want to be sure I understand your position?
2 If we had not granted cert, if you had gone to the
3 administrative agency and the agent had ruled against
4 you, what would you have next done?

5 MR. BRUNSTAD: Ruled against us? We would
6 have filed an appeal to the --

7 JUSTICE STEVENS: To the court?

8 MR. BRUNSTAD: To the court, correct. And
9 then there would have been a motion to compel for
10 arbitration. That --

11 JUSTICE KENNEDY: That seems to me
12 completely inconsistent with your argument that
13 additional time was minimal. And if you have repeated
14 statements in your brief that require qualifications, if
15 in your former argument in Marshal, the Court is
16 concerned with the accuracy of one of your citations,
17 shouldn't we view with some skepticism what you tell us?

18 MR. BRUNSTAD: No, Justice Kennedy. I think
19 that all of our citations to the record and all of our
20 statements about the facts are, in fact, true.

21 JUSTICE GINSBURG: What I just read you,
22 this one, you said it isn't. You say it is undisputed
23 that Preston was an unlicensed talent agent. And you
24 just admitted that that is disputed.

25 MR. BRUNSTAD: I'm sorry, forgive me,

1 Justice Ginsburg. It's undisputed that Mr. Preston
2 never had a license.

3 JUSTICE GINSBURG: But that's not what you
4 represented.

5 MR. BRUNSTAD: It is disputed whether he was
6 acting as a talent agent or not. I wish to clarify
7 that.

8 CHIEF JUSTICE ROBERTS: Mr. Schleimer, you
9 have nine minutes remaining.

10 REBUTTAL ARGUMENT OF JOSEPH D. SCHLEIMER

11 ON BEHALF OF THE PETITIONER

12 MR. SCHLEIMER: Thank you, Mr. Chief
13 Justice.

14 I would disagree that there wasn't an
15 evidentiary hearing. I don't think the evidence is
16 considered, but in addition to Mr. Preston's
17 declaration, I made an offer of proof which is in the
18 appellant's appendix at page 219. I offered to prove
19 that the Judge Alex television program is solicited and
20 procured by an agent of the William Morris Agency. I
21 had made two attempts to depose Judge Ferrer to prove
22 that, and I never got the chance. He didn't want to be
23 deposed.

24 So, there was a full evidentiary hearing.
25 The evidence just wasn't considered because the legal

1 standard that was applied was there's a colorable claim
2 under the Talent Agencies Act, so you can't arbitrate
3 until it's resolved.

4 Now I saw this as being a long trek through
5 the courts. I don't know when the arbitrator gets to
6 make his decision. If -- if the Labor Commissioner
7 rules that the contract is void and then we have a de
8 novo and the Superior Court does that, and the court of
9 appeal does it, and then the California Supreme Court
10 rules the contract is void, does the arbitrator get to
11 overrule that.

12 JUSTICE BREYER: Regardless of the -- I now
13 understand better than I did what I take as a pretty
14 strong argument. I'm not saying convincing, but strong.

15 And that would be this: If you go look at
16 Volt, and in Volt the Court said that the California
17 Code meant that the individual who'd entered into the
18 arbitration contract could go and can ask a superior
19 court to stay an arbitration while some unrelated --
20 some unrelated -- I mean directly related but not the
21 same parties -- litigation took place.

22 The Court didn't in Volt say that that
23 question of interpreting this contract is for the
24 arbitrator. I don't know why it didn't. But it didn't.

25 Now here he's making a parallel argument.

1 He's saying that the California Code says that people
2 should first go to that Labor Commissioner and that you
3 can stay arbitration while that goes on.

4 Now -- and I say well, why don't you go to
5 the arbitrator? He says I don't want to go to the
6 arbitrator on that one, but he points to Volt.

7 And so the puzzle is this: if the Court in
8 Volt didn't say this is a matter for the arbitrator,
9 whether the contract really means that you promise not
10 to go into court and make a motion to stay, why here is
11 it a matter for the arbitrator whether you implicitly
12 promised not to go into court and asked him to stay
13 pending the outcome of this administrative proceeding?

14 What do you think about that?

15 MR. SCHLEIMER: I certainly think that the
16 arbitrator had jurisdiction to arbitrate arbitrability.

17 And the reason for that is the Qualcomm case
18 and the Dream Theater case is a California case cited in
19 Qualcomm, and that the arbitrator should have decided
20 all these issues.

21 I would make this observation. If we -- if
22 we had gone to the arbitrator and Judge Ferrer had said
23 look, this contract is illegal, said you don't have
24 jurisdiction, and I want you to rule you don't have
25 jurisdiction, the same illegality issue would be a

1 defense on the merits.

2 JUSTICE BREYER: Well, I -- I accept that.

3 I see a lot of common sense on your side of it. But

4 imagine I'm writing an opinion in your favor and now I

5 come to the following paragraph which I have to write:

6 "Your opponent says that Volt controls here; but that is

7 wrong because" -- and now fill in the blank for me.

8 MR. SCHLEIMER: Assuming Volt --

9 JUSTICE BREYER: Now, I'm just saying I have
10 to write. I see all the common sense of your position.

11 I -- absolutely. But to get -- you only need one really

12 good argument. And he's saying whatever the other ones

13 are, here Breyer or somebody is going to have to write

14 the words, and Volt is different because -- so I would

15 like some help on that one.

16 MR. SCHLEIMER: Because in Volt the contract

17 was silent, and the Federal Arbitration Act was silent

18 on the issue that was presented, and State law supplied

19 the answer. The California Arbitration Act has a number

20 of --

21 JUSTICE KENNEDY: But that's always the

22 case. It's always the case that the arbitration is

23 quiet on this. It is -- the Respondent's position is

24 that it is absolutely quiet, but it is also absolutely

25 clear that it is State law.

1 MR. SCHLEIMER: The contract here, I would
2 submit, Justice Kennedy, is not quiet because it says
3 that validity or legality shall be arbitrated. And
4 that's what we are talking about. So you don't have a
5 silent contract. You have a contract that speaks to
6 that question.

7 JUSTICE KENNEDY: I'm not sure that Volt
8 would have been different. Volt is -- Volt is written
9 very broadly, it seems to me, in favor of the
10 Respondent's position.

11 MR. SCHLEIMER: Volt was written under the
12 California Arbitration Act, and speaking as a California
13 practitioner that had had a lot of cases, you might
14 notice that the same section in Volt was the basis for
15 my motion to compel arbitration. See codicil procedure
16 CC P 1281.2. CC P 1281 is almost identical to Section 2
17 of the Federal Arbitration Act, but the California
18 Arbitration Act has a number of provisions where the
19 Federal Arbitration Act is silent. One of those is
20 dealing with multi-party litigation where parties are
21 not bound.

22 JUSTICE SCALIA: You think Volt would have
23 come out the same way if -- if in fact, all of the
24 parties in this other litigation had agreed to
25 arbitration? You have any doubt --

1 MR. SCHLEIMER: I think it would have come
2 out the other way, yes.

3 JUSTICE SCALIA: Yeah. I do, too.

4 MR. SCHLEIMER: That's what Volt was all
5 about, was the fact that --

6 JUSTICE SCALIA: Writing broadly is known as
7 dictum, isn't it?

8 (Laughter.)

9 JUSTICE KENNEDY: I suppose if we write the
10 case your way, we have to talk about what happens if
11 this Labor Commissioner had enforcement powers, that
12 they had the sua sponte right to invoke, and that they
13 did?

14 MR. SCHLEIMER: I think the Labor
15 Commissioner probably does. I think it has to do with
16 the adjudicatory versus prosecutorial function of an
17 administrative agency.

18 JUSTICE GINSBURG: But this is not a
19 proceeding brought by the administrative agency.

20 MR. SCHLEIMER: No.

21 JUSTICE GINSBURG: An agency like the EEOC
22 Waffle House.

23 MR. SCHLEIMER: This is -- this is an --
24 this is an administrative agency providing an
25 adjudicatory forum.

1 JUSTICE GINSBURG: This is somebody who's
2 bound by arbitration invoking whatever authority the
3 Labor Commissioner has, quite different from the Labor
4 Commissioner commencing a proceeding.

5 MR. SCHLEIMER: Waffle House was all about
6 the prosecutorial or administrative power. This
7 is about the adjudicatory --

8 CHIEF JUSTICE ROBERTS: Well, your friend
9 says that this agency has exactly that power, and the
10 reason you required these things to go before her, is
11 that she knows what's going on in the area and, if
12 appropriate, can take the supervisory authority or
13 whatever the equivalent of prosecutorial action is.

14 MR. SCHLEIMER: I think I pointed out in my
15 papers that nothing stops Judge Ferrer from putting a
16 dime in the phone, calling the Labor Commissioner and
17 complaining, saying there's been illegality here. They
18 may request some evidence at that point. But the point
19 is that the prosecutorial discretion will be exercised
20 by the Labor Commissioner acting in an essentially
21 executive branch function.

22 Here in our case, all they did was supply a
23 hearing room and a hearing officer, an adjudicatory
24 function. That's what the arbitrator is supposed to do,
25 is adjudicate the case. That's the distinction. And I

1 see Gilmer as being a situation where there's an attempt
2 to avoid adjudicating in the agreed forum. And I see
3 Waffle House as saying that we're not going to hogtie
4 administrative agencies when they perform the
5 prosecutorial function, the administrative function.

6 I guess if there are no further questions --

7 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

8 The case is submitted.

9 (Whereupon, at 12:06 p.m., the case in the
10 above-entitled matter was submitted.)

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