IN THE SUPREME COURT OF THE UNITED STATES

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ARNOLD M. PRESTON, :

Petitioner :

v. : No. 06-1463

ALEX E. FERRER. :

- x

Washington, D.C.

Monday, January 14, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

JOSEPH D. SCHLEIMER, ESQ., Beverly Hills, Cal.; on behalf of the Petitioner.

G. ERIC BRUNSTAD, JR., ESQ., Hartford, Conn.; on behalf of the Respondent.

C O N T E N T S

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

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

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

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

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

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

arbitration.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. SCHLEIMER: Absolutely. The Federal

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

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

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

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

MR. SCHLEIMER: I don't know the Labor

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

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

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

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

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

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

his own motion or her own motion?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. SCHLEIMER: Well --

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

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

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

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

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

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

of us will go to court.

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

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

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

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

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

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

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

JUSTICE BREYER: Okay.

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

(Laughter.)

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Brunstad.

ORAL ARGUMENT OF G. ERIC BRUNSTAD, JR.

ON BEHALF OF THE RESPONDENT

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

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

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

MR. BRUNSTAD: The Labor Commissioner --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BRUNSTAD: She, Your Honor.

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

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

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

JUSTICE SCALIA: This person is not a talent agent.

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

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

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

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

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

MR. BRUNSTAD: No, but the --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BRUNSTAD: True, but --

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

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

JUSTICE SCALIA: Judgment involved would have been binding --

MR. BRUNSTAD: Yes.

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

MR. BRUNSTAD: She is, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

MR. BRUNSTAD: But I understand your hypothetical --

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

MR. BRUNSTAD: No, Justice Breyer.

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

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

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

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

MR. BRUNSTAD: Well, that would be --

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

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

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

MR. BRUNSTAD: Right.

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

MR. BRUNSTAD: No.

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

MR. BRUNSTAD: But here it would, yes,

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

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

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

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

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

MR. BRUNSTAD: That is correct.

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

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

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

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

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

MR. BRUNSTAD: We do.

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

MR. BRUNSTAD: Correct.

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

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

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

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

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

MR. BRUNSTAD: We took the position that the

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

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

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

JUSTICE GINSBURG: A de novo right in Superior Court?

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

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

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

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

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

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

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

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

JUSTICE SCALIA: Right.

MR. BRUNSTAD: And once you get to the

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

JUSTICE SCALIA: But --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

court would decide if, in fact, the --

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

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

MR. BRUNSTAD: Yes, Justice Breyer.

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

MR. BRUNSTAD: Correct.

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

MR. BRUNSTAD: Yes.

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

MR. BRUNSTAD: Yes.

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

MR. BRUNSTAD: No.

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

MR. BRUNSTAD: No, Justice Breyer.

JUSTICE BREYER: Why not?

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

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

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

MR. BRUNSTAD: Yes.

JUSTICE ALITO: -- for the arbitrator?

MR. BRUNSTAD: No.

JUSTICE ALITO: Why not?

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

itself.

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

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

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

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

MR. BRUNSTAD: Two reasons, Justice Scalia:

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

The second reason, Justice Scalia --

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

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

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

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

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

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

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

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

attorneys, and the second was the California Arbitration Act.

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

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

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

MR. BRUNSTAD: No, Justice Scalia.

JUSTICE SCALIA: No?

MR. BRUNSTAD: No.

JUSTICE SCALIA: It is stupider than the Labor Commissioner.

(Laughter.)

MR. BRUNSTAD: No, Justice Scalia. It is

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

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

MR. BRUNSTAD: Justice Scalia --

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

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

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

clause.

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

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

MR. BRUNSTAD: No, Justice Kennedy.

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

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

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

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

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

JUSTICE KENNEDY: That does require some qualification there.

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

CHIEF JUSTICE ROBERTS: Counsel, do you --

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

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

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

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

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

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

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

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

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

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

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

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

qualification --

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

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

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

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

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

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

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

JUSTICE STEVENS: Could I ask one question

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

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

JUSTICE STEVENS: To the court?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Now here he's making a parallel argument.

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

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

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

What do you think about that?

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

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

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

defense on the merits.

JUSTICE BREYER: Well, I -- I accept that. I see a lot of common sense on your side of it. But imagine I'm writing an opinion in your favor and now I come to the following paragraph which I have to write: "Your opponent says that Volt controls here; but that is wrong because" -- and now fill in the blank for me.

MR. SCHLEIMER: Assuming Volt --

JUSTICE BREYER: Now, I'm just saying I have to write. I see all the common sense of your position. I -- absolutely. But to get -- you only need one really good argument. And he's saying whatever the other ones are, here Breyer or somebody is going to have to write the words, and Volt is different because -- so I would like some help on that one.

MR. SCHLEIMER: Because in Volt the contract was silent, and the Federal Arbitration Act was silent on the issue that was presented, and State law supplied the answer. The California Arbitration Act has a number of --

JUSTICE KENNEDY: But that's always the case. It's always the case that the arbitration is quiet on this. It is -- the Respondent's position is that it is absolutely quiet, but it is also absolutely clear that it is State law.

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

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

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

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

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

JUSTICE SCALIA: Yeah. I do, too.

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

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

(Laughter.)

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

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

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

MR. SCHLEIMER: No.

JUSTICE GINSBURG: An agency like the EEOC Waffle House.

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

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

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

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

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

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

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

I guess if there are no further questions --

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

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

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