1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BUCKEYE CHECK CASHING, INC., :

4 Petitioner :

5 v. : No. 04-1264

6 JOHN CARDEGNA, ET AL. :

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8 Washington, D.C.

9 Tuesday, November 29, 2005

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States

12 at 11:10 a.m.

13 APPEARANCES:

14 CHRISTOPHER LANDAU, ESQ., Washington, D.C.; on behalf

15 of the Petitioner.

16 F. PAUL BLAND, JR., ESQ., Washington, D.C.; on behalf

17 of the Respondents.

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1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE

3 CHRISTOPHER LANDAU, ESQ.

4 On behalf of the Petitioner 3

5 F. PAUL BLAND, JR., ESQ.

6 On behalf of the Respondents 25

7 REBUTTAL ARGUMENT OF

8 CHRISTOPHER LANDAU, ESQ.

9 On behalf of the Petitioner 54

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

2 (11:10 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 next in Buckeye Check Cashing v. Cardegna.

5 Mr. Landau.

6 ORAL ARGUMENT OF CHRISTOPHER LANDAU

7 ON BEHALF OF THE PETITIONER

8 MR. LANDAU: Mr. Chief Justice, and may it

9 please the Court:

10 This case presents the question whether a

11 party can avoid arbitration by challenging the validity

12 of the underlying contract containing an arbitration

13 clause as opposed to the arbitration clause itself.

14 We believe that this Court answered that

15 question almost 40 years ago in Prima Paint. The

16 Florida Supreme Court tried to distinguish Prima Paint

17 on State law grounds, holding that the challenge at

18 issue there, fraud in the inducement, would have

19 rendered the contract voidable under State law, whereas

20 the challenge at issue here, illegality, would have

21 rendered the contract void under State law.

22 We respectfully submit that this distinction

23 misses the point. Prima Paint held that a party cannot

24 avoid arbitration by challenging the validity of the

25 underlying contract as opposed to the arbitration

1 clause because an embedded arbitration provision is
2 severable from the underlying contract as a matter of
3 Federal substantive law. Thus, the nature of the State
4 law ground, on which the underlying contract is
5 challenged, and the State law severability implications
6 of that challenge are irrelevant.
7 What matters, as a matter of Federal law, is
8 that a challenge to the underlying contract does not
9 allow a court to deny arbitration. Rather, that
10 challenge must be presented to the arbitrator in the
11 first instance. That point, we submit, is dispositive.
12 CHIEF JUSTICE ROBERTS: You -- you concede,
13 though, that if -- if the challenge to the underlying
14 contract implicates the arbitration clause as well,
15 that that is for the court and not the arbitrator.
16 MR. LANDAU: Your Honor, we --
17 CHIEF JUSTICE ROBERTS: In other words, you
18 know, you put a gun to the person's head and say, sign
19 this contract, and the person does. It contains an
20 arbitration clause. They don't have to go to
21 arbitration to challenge that.
22 MR. LANDAU: Your Honor, we concede that
23 there is asterisk, as we put it in our brief, to the
24 otherwise bright line rule set down in Prima Paint,
25 that rule being if you're challenging the arbitration

1 clause, you can stay in court, but if you're
2 challenging the underlying contract, you have to go to
3 arbitration, precisely along the lines that Your Honor
4 identified where the challenge to the underlying
5 contract involves the parties' assents to the
6 underlying contract, that challenge necessarily
7 challenges your assent to arbitration. And given that
8 the whole premise of arbitration in the first place is
9 that it's a matter of consent, we would say that that
10 particular challenge, as the lower courts have
11 recognized since Prima Paint, an assent-based challenge
12 to the underlying contract, is again an -- an exception
13 or an asterisk to the otherwise bright line rule.
14 JUSTICE KENNEDY: Does -- does that include a
15 quarrel over offer and acceptance?
16 MR. LANDAU: Your Honor, I think --
17 JUSTICE KENNEDY: I'm -- we're trying to
18 explore the -- the meaning of -- of this -- of this
19 assent. I know there are going to be hard cases, but I
20 want to try to see how we describe this area where it
21 is for the court.
22 MR. LANDAU: You're absolutely right, Your
23 Honor, that there are going to be hard cases. If I
24 could just start by answering that by saying I think
25 one thing that's clear is that this case is not one of

1 the hard ones. The challenge to the underlying
2 contract here --
3 JUSTICE KENNEDY: What about offer and
4 acceptance?
5 MR. LANDAU: I think generally when you're
6 not saying I didn't agree to the underlying contract,
7 in other words, where you're not saying that's a
8 forgery or the -- the person who signed that didn't
9 have authority, where you're -- where you're really --
10 where you're not challenging factual agreement to the
11 underlying contract, then it's fair game to send you to
12 -- to arbitration because when -- you factually agreed
13 to -- to arbitrate.
14 JUSTICE KENNEDY: You misinterpreted my
15 letter. It was not an acceptance.
16 MR. LANDAU: You misinterpreted my letter.
17 The -- there was no acceptance at all. I would think
18 that that's -- that would fall within the scope of this
19 potential asterisk because you're basically saying I
20 never agreed to any contract at all. So, therefore, I
21 would think under those circumstances, the whole
22 premise of the Prima Paint rule that -- that's once
23 you've agreed to arbitration, you can let the
24 arbitrator decide your grievances with the underlying
25 contract is not present.

1 JUSTICE O'CONNOR: Well, Prima Paint did,
2 though, involve what we would characterize as a
3 voidable contract.
4 MR. LANDAU: Your Honor, that is not --
5 JUSTICE O'CONNOR: And I think it is
6 conceivable that the Florida court was correct that you
7 could draw the line some way and say contracts that are
8 void should be handled differently.
9 MR. LANDAU: Your Honor, two responses to
10 that. At the most fundamental level, I think it misses
11 the point to talk about the nature or the -- the State
12 law severability implications of your challenge to the
13 underlying contract because the insight to Prima Paint
14 is that you treat the arbitration clause --
15 JUSTICE O'CONNOR: Yes, but voidness is a
16 question of public policy. The State itself makes a
17 decision that certain contracts can't be entered into.
18 And the question of voidability is usually one
19 affecting the -- the will of the contracting party.
20 MR. LANDAU: Your Honor, you're entirely
21 correct, and I think again the -- the insight of Prima
22 Paint is that you are perfectly able to present your
23 challenge to the underlying contract. The question is,
24 who is the person to -- which is the forum in which you
25 present that? Are you allowed to -- to present that in

1 court or -- or are you relegated to -- or are you
2 required to submit it to the arbitrator pursuant to
3 your agreement? And -- and I think the Prima Paint
4 court recognized that if you allow parties to avoid
5 arbitration altogether by bringing whatever challenges
6 they may have to the underlying contract, whether it be
7 fraud in the inducement or illegality or -- you know,
8 there are obviously any number of grounds for
9 challenging contracts under State law -- you
10 effectively vitiate the arbitration agreement, the --
11 the whole point of which is that we're going to --
12 we've chosen the arbitrator as -- the arbitration as
13 the correct forum to resolve our dispute.
14 And -- and so again, as long as you are not
15 challenging arbitration specifically -- the arbitration
16 law specifically, then it's fair game to send you to
17 arbitration, again where you are perfectly entitled to
18 raise the whole panoply of challenges that you may
19 have.
20 JUSTICE KENNEDY: It's -- it's a little odd
21 that --
22 JUSTICE GINSBURG: Mr. Landau --
23 JUSTICE KENNEDY: -- the way our -- it's a
24 little odd that the way our cases have -- have worked
25 out is that we assume there's two contracts, one for

1 arbitration and the other for the rest of the
2 contracts. That's -- that's the way we've rationalized
3 these cases. It seems a little odd to me.
4 MR. LANDAU: Well, Your Honor, again, I think
5 the -- the Federal Arbitration Act, both section 4 and
6 section 2 of the Federal Arbitration Act, certainly
7 permits that -- that way of looking at it because
8 section 4, as Prima Paint emphasized, says, you know,
9 once the making of the arbitration agreement is clear,
10 it must go to arbitration. And section 2 says it's the
11 arbitration provision in a written contract -- or the
12 written provision in a contract that shall be valid and
13 enforceable. And so, both those provisions do
14 distinguish between the arbitration provision
15 specifically and, in fact, treat it as an underlying
16 contract.
17 And again, I don't think there's any shame in
18 admitting that Prima Paint, I think, recognized the
19 important policy implications of a contrary rule, that
20 --
21 JUSTICE GINSBURG: Mr. Landau, maybe this --
22 this is a point your -- the respondent makes. Prima
23 Paint talks about section 4 and it says, with respect
24 to matters within the jurisdiction of the Federal
25 courts. So the answer to everything you said could be,

1 fine, if this were proceeding in, say, the Southern
2 District of Florida, but it's in a State court. And
3 Prima Paint just spoke about procedure in Federal
4 court.
5 MR. LANDAU: Your Honor, it is certainly true
6 that Prima Paint itself arose from Federal court and
7 that the decision is, I think, rather carefully written
8 to talk about Federal courts as a -- in fact, Justice
9 Harlan concurred in Prima Paint to say he would have
10 affirmed the Second Circuit in that case on the basis
11 of the Lawrence case, which said that this rule applies
12 in Federal and State court, the FAA.
13 But the Court was obviously unwilling in
14 Prima Paint to cross the bridge of saying that our rule
15 applies in State court. And I think that, frankly,
16 that's why it's written in that way of -- of focusing
17 on section 4 and not really specifically addressing
18 section 2.
19 This Court, however, subsequently confronted
20 that issue head-on in the Southland case and held that
21 the substantive provisions of the Federal Arbitration
22 Act, really relying on Prima Paint for the proposition
23 that the -- the Federal Arbitration Act does create
24 Federal substantive law enacted under the commerce
25 power -- it says that that rule -- those rules of

1 substantive arbitration law apply in State as well as
2 Federal court because you really wouldn't want to
3 attribute to Congress kind of a -- a reverse Erie
4 presumption of creating substantive Federal law that
5 applied only in diversity cases in Federal court which
6 would then promote forum shopping between Federal and
7 State courts.
8 CHIEF JUSTICE ROBERTS: What -- what's wrong
9 with the argument that when you're dealing with a void
10 contract, as opposed to a voidable one, that the State
11 policy is that you don't enforce any aspect of it? I
12 mean, if you and I had, you know, a contract for murder
13 and it had an arbitration clause, it's pretty strange
14 to send that to an arbitrator and enforce part of that
15 contract as opposed to saying that the contract as a
16 whole is void.
17 MR. LANDAU: Not really, Your Honor, in the
18 sense that the -- the insight of Prima Paint, again, is
19 that you treat the arbitration clause as separate from
20 the underlying contract. So --
21 CHIEF JUSTICE ROBERTS: But we don't do that
22 with other provisions of void contracts. I mean, if
23 our contract had a liquidated damages clause -- if you
24 didn't go ahead and murder somebody, you'd owe me
25 $1,000 -- we don't say, well, that part is enforceable

1 even if the contract as a whole is not enforceable. We
2 treat it as a whole. Because the subject matter of the
3 contract is illegal ab initio, the whole contract is --
4 is void and illegal.
5 MR. LANDAU: Your Honor, that is certainly
6 one plausible world view that one could have taken as
7 an initial matter when confronting this issue. I mean,
8 it's a little bit like a chicken and egg issue here.
9 You have got the underlying contract, which contains an
10 arbitration provision, and one could certainly say, as
11 Your Honor just did, that well, if the underlying
12 contract falls, it seems perfectly sensible to say that
13 everything falls. This Court specifically rejected
14 that approach in Prima Paint.
15 JUSTICE SCALIA: Of course, you could say the
16 same thing about a voidable contract. You could say,
17 you know, the whole contract is voidable.
18 MR. LANDAU: Well, in fact --
19 JUSTICE SCALIA: I mean, in -- in that
20 respect, a contract that's void is no different from a
21 contract that's voidable.
22 MR. LANDAU: In fact -- exactly. The -- in
23 Prima Paint itself, it was far from clear that the
24 rescission suit that was sought there -- in other
25 words, when a contract is -- is voidable, basically

1 what that does is that -- under general common law
2 principles, that creates an option for the aggrieved
3 party. And that party can either seek to affirm that
4 contract or it can seek to rescind that contract. And
5 when you seek to rescind it, basically you're saying it
6 was void ab initio, which is exactly what Justice Black
7 said in his dissent in Prima Paint.
8 JUSTICE GINSBURG: You also run into a
9 problem with the -- some States classify a contract as
10 voidable and other States for that same ground make it
11 void. So at least you would have -- you would lose the
12 uniformity if you've made the distinction between those
13 two.
14 MR. LANDAU: You are absolutely right, Your
15 Honor, and I don't think this Court should lose sight
16 of the bright line importance of the Prima Paint rule.
17 But in a sense, Prima Paint again is a rule of Federal
18 law. The Court in that case specifically affirmed the
19 Federal law approach taken by the First Circuit as
20 opposed to the State law approach, which I think was a
21 little bit like Your Honor's hypothetical, the Chief
22 Justice's hypothetical.
23 CHIEF JUSTICE ROBERTS: Do we usually -- do
24 we usually ask arbitrators to enforce broader notions
25 of public policy as opposed to the specific agreements

1 of the party? In other words, if the reason the
2 contract is void or voidable has to do with broad State
3 public policy, do we -- what -- what's this -- the best
4 you case you have for the notion that arbitrators
5 enforce those types of constraints as opposed to
6 figuring out what the parties agreed to?
7 MR. LANDAU: Oh, sure, Your Honor. I think
8 if you think about the Mitsubishi case, all the cases
9 that sent statutory cases to arbitrators and said that,
10 you know, RICO claims or antitrust claims could be
11 arbitrated, I think initially the -- the argument that
12 was made against that was precisely the one Your Honor
13 is making, that, gee, arbitrators have expertise in the
14 specific commercial agreements here, but we don't
15 expect them to be knowledgeable about RICO or -- or
16 other statutes.
17 But I think the insight of the cases, really
18 over the last 30 years in this Court, is that
19 arbitrators are perfectly able and certainly have to be
20 presumed to be able to decide legal and public policy
21 questions.
22 And I think if you -- again, if you go the
23 other way and you say, well, we're going to allow
24 challenges to the arbitration clause, we're not going
25 to allow it to be enforced, I think you are really

1 going to declare open season on arbitration in the
2 sense that it is -- as a logical matter, there is no
3 way to limit the principle that the other side is
4 proposing to challenges based on illegality, which is
5 what they've tried to -- to cabin this off as.
6 Basically -- and I think the Florida Supreme
7 Court was very forthright about this -- they said it's
8 any challenge that leads to the contract being void as
9 a matter of State law. And in fact, the -- the
10 respondents in their brief in this Court really admit
11 that it's any challenge that goes to contract
12 formation, the formation at all of the underlying
13 contract. So they would presumably sweep in all things
14 like consideration, mutuality, anything that could be a
15 ground for that.
16 JUSTICE GINSBURG: What would be the issues
17 for the arbitrator in this case? Is there anything
18 other than was it -- was this interest usurious? The
19 dispute between the parties -- we're not told what the
20 issues are that would be subject to arbitration.
21 MR. LANDAU: That is the key issue, Your
22 Honor. They are essentially saying that the underlying
23 interest in the contract is usurious, in violation of
24 several Florida statutes.
25 And again, one thing that is important to

1 keep in mind is that there is no question that these
2 issues now, the practices that they're complaining
3 about, are entirely legal in Florida today. There was
4 an act passed in 2001 that clearly made all this legal.
5 The only issue is they're saying it was illegal prior
6 to enactment of that statute and whether or not that
7 statute clarified the law or changed the previous law.
8 But presumably the arbitrator would be asked
9 to decide is -- was the law in Florida prior to 2001
10 such that -- that these other statutes that limited --
11 that limited interest applied here. The underlying
12 dispute is really about whether these charges are
13 interest or whether it's a service fee for cashing a
14 check. That's the heart of the underlying dispute, and
15 that's certainly one that the arbitrator is capable of
16 deciding --
17 JUSTICE SCALIA: Did the arbitrator --
18 MR. LANDAU: -- looking to Florida --
19 JUSTICE SCALIA: Could the arbitrator decide
20 that I'm -- I'm going to apply the new statute rather
21 than the old one?
22 MR. LANDAU: Well, I think the arbitrator
23 will say, you know -- first of all, if I could just
24 make one point clear for the record. The -- this --
25 the underlying issue here, whether or not this 2001

1 statute changed the law or simply clarified the law is
2 currently pending in the Florida Supreme Court. It was
3 argued on -- on September 30th in -- in a case that did
4 not involve arbitration.
5 So presumably, the arbitrator, if this case
6 goes to arbitration, will look at that case and will
7 decide whether or not that governs this case, will
8 decide is there any ground for distinguishing this
9 case.
10 And -- and, you know, one point to remember
11 is that when you go to arbitration, that's not the end
12 of the line. You have rights to judicial review of
13 arbitration.
14 So going back to your hypothetical, Mr. Chief
15 Justice, if the -- if the contract were to be, let's
16 say, for murder -- that's a favorite example of -- of
17 respondents -- that does not mean that a contract for
18 murder gets enforced. That means that the arbitrator
19 will decide whether the contract for murder is -- is
20 valid under State law and -- again, this is in the
21 farfetched situation where somebody who has signed a
22 contract for murder is actually trying to enforce
23 arbitration, you know, presumably from his or her jail
24 cell --
25 (Laughter.)

1 MR. LANDAU: -- and then would -- would try
2 to enforce arbitration, and then if -- you know, if the
3 arbitrator says it's illegal, would -- you know, even
4 if the arbitrator were, in the most fanciful situation,
5 to say, yes, this contract for murder is legal under
6 the law of our State, well, then presumably you could
7 go up for manifest disregard review. There are
8 safeguards in the process.
9 What they're trying to do is short-circuit
10 the process, and I think this goes back to Justice
11 Ginsburg's question. The -- what they are now
12 describing as the threshold issue of contract formation
13 -- contract validity is not a threshold issue at all.
14 It's what this whole dispute is about. It is what they
15 are challenging here. They are saying these contracts
16 are illegal because they charge too much interest, that
17 what they're charging is in fact interest and that was
18 illegal.
19 Well, they are now saying that the -- the
20 court should decide that underlying question as a
21 threshold matter. Well, then there's actually nothing
22 whatsoever left for the arbitrator to decide, and they
23 have effectively vitiated the arbitration agreement.
24 And again --
25 CHIEF JUSTICE ROBERTS: Oh, no, that's not

1 true. There may be dozens of other subsidiary issues
2 apart from illegality. They may say, well, once you
3 determine that it's legal, we think that we're entitled
4 to these damages or those damages or -- or the rate
5 should be this or that. Just because there's a
6 threshold issue doesn't mean there aren't other issues
7 that an arbitrator might decide.
8 MR. LANDAU: Well, Your Honor, I -- I guess
9 maybe it depends on how you look at the word threshold.
10 I mean, I would think that that is the core issue in
11 the dispute. I mean, certainly there -- you are
12 absolutely right that there could be some ancillary
13 issues like damages.
14 But clearly, the -- the nub, the crux of
15 their challenge here is a challenge to the legality of
16 the underlying contract. And under their view, they
17 get to obtain judicial resolution of that issue in the
18 first instance, notwithstanding the fact that they
19 don't dispute that they agreed to arbitrate all issues
20 relating not only to the validity of the arbitration
21 clause itself, but relating to the underlying contract.
22 So there's no question here -- and I think
23 this is really important not to lose sight of -- that
24 this dispute falls within the plain language of their
25 arbitration provision. If you look at joint appendix

1 42, the arbitration provision here is very broadly
2 worded in this regard, and the parties clearly agreed
3 to do it. The only question is basically whether the
4 State could frustrate the -- the plain, express intent
5 of the parties by saying, oh, well, this challenge
6 implicates arbitration -- implicates legality.
7 JUSTICE STEVENS: If the case was one in
8 which the merits issue you claim is basically the same
9 as the legality issue under the contract -- but would
10 your argument be as strong if it were different, if you
11 had a different reason for claiming that the contract
12 was void or voidable?
13 MR. LANDAU: The -- I think the argument,
14 Your Honor, would be the same. It's just -- it's a
15 particularly stark illustration here of the dangers of
16 the -- of -- of that position. It may not -- you're
17 absolutely right. It may not always be the case that
18 the -- that the challenge to the contract is going to
19 be the merits dispute in itself, but I think where, as
20 here, it is, it really shows how pernicious this rule
21 is and precisely why the Prima Paint rule, which again
22 has been in effect almost 40 years now -- why that
23 approach works and actually promotes the policy
24 supporting arbitration.
25 And when you -- again, when you think of an

1 alternative rule, it's one in which you could come in
2 -- the party who has concededly agreed to an
3 arbitration clause and says, well, I think the
4 underlying contract is void on public policy grounds,
5 which again you can make in virtually any case. Under
6 the Florida Supreme Court's rationale in this Court --
7 in this case, that is a basis for remaining in court,
8 and --
9 JUSTICE STEVENS: What about the possibility
10 that you always want a neutral decision-maker in cases
11 like this? The arbitrator always has an interest in
12 finding that the contract is valid and arbitrable
13 because that's his source of business is arbitrating
14 disputes.
15 MR. LANDAU: Your Honor, you -- I think it's
16 important to keep in mind that in this case, they have
17 not challenged the arbitrator. The reason --
18 JUSTICE STEVENS: No. I'm just talking about
19 as a general matter if we're trying to decide the issue
20 not just on these facts, but what is the better rule --
21 MR. LANDAU: Your Honor, I don't -- I think
22 that's -- again, that -- if you were to have a
23 presumption that the arbitrator is always in favor of
24 upholding a contract, that would seem somewhat in
25 tension at the very --

1 JUSTICE BREYER: No, no. I mean, the
2 question is, I take it, in most of the arbitration
3 associations, once you have arbitration, you will get
4 paid even though -- the arbitrator will be paid, won't
5 he, whether --
6 MR. LANDAU: Oh, yes.
7 JUSTICE BREYER: -- he decides one way or the
8 other?
9 MR. LANDAU: Oh, I'm sorry. Then yes.
10 JUSTICE BREYER: So he has no particular
11 interest in getting paid in upholding the contract or
12 not.
13 MR. LANDAU: You're absolutely right, Your
14 Honor. That is absolutely clear. And -- and again, I
15 would think he would not have an interest in -- in
16 saying that a contract for murder is perfectly valid.
17 You're absolutely right. It wouldn't get him more
18 money in his pocket and it certainly would, I think,
19 lead to the reputation of a rogue arbitrator out there
20 who is not to be trusted. And -- and presumably that
21 person wouldn't -- wouldn't get much business.
22 Again, so I think that the key point here is
23 that the respondents have tried to create a lot of
24 State law issues regarding void, voidable. And -- and
25 I think as Justice Ginsburg pointed out, the problem is

1 it's kind of like trying to put a square peg in a round
2 hole, that whether something is void or voidable under
3 State law, which may vary from State to State, kind of
4 misses the whole point which is the genius of a Federal
5 separability rule is we don't care about those State
6 law issues. You don't have to get into that bog to
7 decide the arbitrability question or the -- you know,
8 you cannot avoid arbitration by simply coming up with
9 all those grounds. And whether it's ground A for
10 challenging the underlying contract and whatever the
11 severability implications may be of ground A or ground
12 B, the point is when you're not challenging the
13 arbitration clause, it's fair game to send you to
14 arbitration, and then you can raise ground A or ground
15 B or whatever ground you have before the arbitrator.
16 And it's simply not a basis for avoiding arbitration
17 altogether to be talking about that.
18 And again, the -- the point -- I think this
19 is all kind of a common-sensical point that you want to
20 get parties quickly to arbitration. I mean, if you --
21 if you have a situation where the parties have to spend
22 years in court litigating these kind of issues, that
23 really, in and of itself, defeats the whole point of --
24 of arbitration.
25 JUSTICE KENNEDY: Well, Prima Paint certainly

1 displaced the States and State law from this area in a
2 very substantial -- to a very substantial extent.
3 I'm curious now. Have there been any
4 attempts in Congress to overrule Prima Paint?
5 MR. LANDAU: I'm not aware of any, Your
6 Honor. And to the contrary, I think the Federal
7 Arbitration Act has been amended multiple times since
8 1967 and it has always been in a pro-arbitration
9 direction, as this Court emphasized in the Allied-Bruce
10 case where there was a concerted attack not on Prima
11 Paint, but on Southland.
12 And in a sense, Southland is really a -- a
13 reflection of Prima Paint because Southland simply says
14 that the -- the substantive Federal arbitration law
15 that was announced in Prima Paint sensibly should not
16 be limited to Federal court, but should also apply in
17 State court.
18 So I think the -- the Court faced a fork in
19 the road in Prima Paint about the meaning of the
20 Federal Arbitration Act. Was it just a procedural
21 provision that governed in -- in Federal proceedings
22 based on Congress' power over the Federal courts and
23 their procedures? Or was it a substantive provision
24 enacted under the Commerce Clause? And this Court took
25 the latter approach and made that absolutely crystal

1 clear in -- in Southland and then later again in
2 Allied-Bruce.
3 And so what I think the respondents are
4 really asking you to do here is to really overrule root
5 and branch the whole Federal substantive law of
6 arbitrability altogether and say, well, this should
7 just be -- you took the wrong path back in 1967 and --
8 and you should just interpret the FAA to be a -- a
9 procedural statute. We would respectfully submit that
10 that would cause an earthquake in the law in terms of
11 arbitration and, therefore, would respectfully urge you
12 to reverse the Supreme Court of Florida's judgment.
13 I'd like to reserve the balance of my time.
14 CHIEF JUSTICE ROBERTS: Thank you, Mr.
15 Landau.
16 Mr. Bland.
17 ORAL ARGUMENT OF F. PAUL BLAND, JR.
18 ON BEHALF OF THE RESPONDENTS
19 MR. BLAND: Thank you, Mr. Chief Justice, and
20 may it please the Court:
21 This Court has repeatedly said that Federal
22 law preempts State law only where Congress clearly and
23 manifestly intended for it to do so. And the Court has
24 also repeatedly said that the best guide to what
25 Congress intended was the language of the statutes.

1 Now, petitioners have not pointed to any
2 language of the Federal Arbitration Act itself that
3 would create a separability rule for this case. And
4 moreover, the language of the act itself and
5 particularly section 2 -- and particularly section 2
6 the way it was followed in the Prima Paint case --
7 actually strongly supports us. Section 2 says that an
8 arbitration provision is enforceable if it is in a
9 contract evidencing interstate commerce.
10 Now, to order of arbitration, they say, well,
11 the -- the threshold issue is whether there's an
12 agreement. Let's have the arbitrator decide that. To
13 order arbitration is to enforce the act. That is
14 enforcing the act. But they want to enforce the act
15 before we've determined if section 2 is met, before the
16 requirements of section 2 are met. That's not the way
17 --
18 CHIEF JUSTICE ROBERTS: I guess what they
19 would say is that there -- they insist only that the
20 agreement be to arbitrate, and to the extent there is
21 an agreement to arbitrate, they can enforce section 2,
22 and the arbitrator can decide whether the broader
23 agreement is enforceable.
24 MR. BLAND: That's an argument. The word
25 agreement was used in section 4, and that's the -- that

1 provision, of course, is the provision that refers only
2 to the -- not only applies to the United States
3 district courts, that refers to jurisdiction under
4 title 28 and twice refers to the Federal Rules of Civil
5 Procedure, and that in the Southland case in footnote
6 10, this Court said doesn't apply in the State courts.
7 Section 2 doesn't use the word agreement.
8 Section 2 uses the word contract, Mr. Chief Justice.
9 And the word contract is a very different idea than
10 agreement. If section 2 had said an agreement in
11 interstate commerce or a transaction in interstate
12 commerce, perhaps they would have a point. But the
13 Court, instead, used -- excuse me. The Congress,
14 instead, used the word contract. Contract is one of
15 the most important words in the law.
16 Now, when the Court in Prima Paint looked at
17 this, in the first sentence, the very first sentence of
18 Prima Paint, the Court said this case involves a
19 contract involving the U.S. Arbitration Act. And in
20 the first sentence, the Court said this case is a case
21 involving contracting parties. The Court didn't say
22 we're going to see what the arbitrator thinks as to
23 whether there's a contract.
24 In Prima Paint, this Court did it the right
25 way. They said section 2 -- does it apply first? Only

1 if it does apply, only if once after we have crossed
2 that Rubicon will we go to the next step.
3 Then the Court in Prima Paint goes and
4 discusses whether or not the interstate commerce prong
5 has been met. And there's a long discussion of is this
6 in interstate commerce or not, and they find that it
7 is.
8 Well, under their theory, under petitioner's
9 theory, why should the Court be deciding interstate
10 commerce? Arbitrator -- the interstate commerce issue
11 goes to the whole contract. Why shouldn't the
12 arbitrator decide the interstate commerce issue?
13 JUSTICE BREYER: When I was working on the
14 first options in those cases, I thought there was from
15 Southland a pretty clear distinction between whether
16 the person is attacking the arbitration clause itself.
17 If he says that's not valid, that probably goes to the
18 court, unless there's some other special thing. But if
19 what he's doing is attacking the rest of the contract
20 as illegal, that doesn't. That goes to the arbitrator.
21 Now, I really did think that was the law.
22 And even if I was wrong in thinking that was the law,
23 it seems to me the whole community, the whole business
24 community in the United States thinks it's the law.
25 Everybody else thinks it's the law, and the briefs on

1 your side don't even say that it isn't the law, except
2 for yours. They say go and overrule the cases that
3 make it the law.
4 MR. BLAND: We -- we do not in any way urge
5 this Court to overturn -- the Court does not need to
6 overturn Southland, Your Honor. And let me make two
7 points about Southland.
8 JUSTICE BREYER: I mean, logically you're
9 right. I accept all that you're saying logically. You
10 could make those distinctions, but you also could come
11 out the other way logically. And so to expose to you
12 what's really bothering me about the case are two
13 things.
14 One, I think you're worried about consumer
15 contracts, and there are a lot of good arguments on
16 your side.
17 But this rule also applies to business
18 contracts, and there what's bothering me is that --
19 that the whole business community seems to have
20 developed an arbitration system throughout the world
21 that depends upon the distinction I just made. And if
22 we decide for you, we're going to throw a large section
23 of those contracts back into the laws of the 50 States
24 and arbitration will be seriously injured as the
25 commercial community has come to rely on it.

1 Now, that's what's worrying me because I
2 wouldn't want to reach a decision, in the absence of it
3 being clear anyway, that would make a significant
4 negative difference to the gross national product of
5 the United States, for example.
6 MR. BLAND: Well, Your Honor, let -- before I
7 go on with the statutory arguments --
8 JUSTICE BREYER: I'm putting it dramatically
9 because I want to get your --
10 MR. BLAND: -- let me -- before I talk about
11 the statutory arguments, then let me go to the policy
12 arguments and this idea that we're going to open the
13 flood gates and undermine the Federal Arbitration Act.
14 It is a minimal requirement to say that you
15 must have a contract in interstate commerce. And in
16 the Southland case, on page 10, at the bottom of page
17 10 and page 11, before it said that section 2 would
18 apply in States, Chief Justice Burger's opinion for
19 this Court started off and said there -- we perceive
20 two limitations on arbitration -- on the enforceability
21 of arbitration provisions. And the first of those is
22 it does have to be in a contract in interstate
23 commerce. So there is nothing in Southland that said,
24 oh, well, the question about whether or not there's a
25 contract is something the arbitrator gets to decide.

1 The beginning of the opinion said that particular issue
2 is one for the -- is one that is a limitation on the
3 enforceability of contracts.
4 Is this going to lead to an explosion of
5 litigation over the formation of contracts? It will
6 not because there are fairly few cases where there is
7 an argument that the entire contract is void ab initio
8 such that it comes up.
9 JUSTICE SCALIA: Every usury case, for
10 example. That's very few? I mean, that's a lot of
11 cases.
12 MR. BLAND: After the National Banking Act,
13 Your Honor, there are actually very few usury cases
14 left. If you look at the six cases they cite that are
15 all -- they say they're Federal. There are six Federal
16 court of appeals decisions that support them. Four of
17 those are payday lending cases decided since 2000. The
18 principal economic effect of this case actually is
19 going to involve the payday lending industry.
20 And was it irrational for the State of
21 Florida to say that it's loan-sharking to charge people
22 up to 1300 percent interest? We think that that --
23 whether -- whether Florida made a good decision or not
24 with its usury laws, usury laws just don't apply to
25 many cases.

1 JUSTICE SCALIA: What about fraud in the
2 inducement?
3 MR. BLAND: Fraud in the inducement does not
4 go to rendering the contract void ab initio. A
5 contract comes into existence. You cross the statutory
6 language of section 2. Fraud in the inducement --
7 there is a contract. Now one party has a defense to
8 it. Suppose --
9 JUSTICE GINSBURG: Mr. Bland.
10 MR. BLAND: -- Your Honor --
11 JUSTICE GINSBURG: Mr. Bland, some State may
12 say fraud in the inducement is void. These -- these
13 are classifications that States make. These are labels
14 that the State puts on them. And you are introducing
15 vast disuniformity if you say that the line to draw is
16 between void and voidable. You are forced into that
17 because the Prima Paint case dealt with voidable. So
18 you -- that you -- you are drawing a line between void
19 and voidable which shifts from State to State.
20 MR. BLAND: Well, the -- the -- Your Honor,
21 first, the Congress drew the line when it said that you
22 had to have a contract first as to whether or not a
23 contract came into existence.
24 But the law of contracts does not differ so
25 much from State to State. This case in the American

1 Airlines v. -- this Court -- excuse me -- in the
2 American Airlines v. Wolens case said that the law of
3 contracts is not largely disuniform from State to
4 State, and there is no State in the country that I know
5 of -- and I'm fairly certain of this -- that hold that
6 fraud in the inducement means that a contract never
7 came into existence.
8 And the reason for that is -- is that if
9 someone defrauds me into buying a stock or someone has
10 an unconscionable deal or almost any of the other
11 things that give rise to defenses to formed contracts,
12 one party has an option to get of out it. If someone
13 defrauds me into buying a stock but then the stock
14 price shoots up through the roof -- it's one of Justice
15 Breyer's clever technology inventions that works --
16 (Laughter.)
17 MR. BLAND: -- I have an option at that point
18 to hold onto the stock, even though I was defrauded. I
19 was defrauded. I was cheated, but I'm happy with it.
20 It turns out it's okay. It is left to the option --
21 CHIEF JUSTICE ROBERTS: But almost every
22 State --
23 MR. BLAND: -- of the party.
24 CHIEF JUSTICE ROBERTS: -- almost ever State
25 will -- has an exception for contracts that are void

1 against public policy. And it's just left to the
2 creativity of the lawyer in any given case to explain
3 why a particular contract is contrary to public policy.
4 And you would allow that to be shifted from the
5 arbitrators to court presumably based simply on an
6 allegation, well, the contract is void, it's against
7 public policy.
8 MR. BLAND: I think you will find, Your
9 Honor, if you look at the -- at the law that's
10 developed around void ab initio contracts, that it's
11 fairly rare. It's a fairly small universe of cases
12 where State courts have found that an entire line of
13 business is illegal, where State courts have found that
14 no contract ever comes into existence because of a
15 public policy.
16 JUSTICE GINSBURG: But if you open the door
17 -- if you open the door -- public policy has been
18 called an unruly horse. All you have to do is open the
19 door and you will have litigation in court, and then
20 the court will decide what the arbitrator would other
21 -- otherwise decide.
22 MR. BLAND: But, Your Honor, there are
23 already a host of circumstances in which litigants
24 would like to be able to get out of contracts that do
25 not involve arbitration clauses, where they would like

1 to be able to argue that no contract came into
2 existence in the first place.
3 And the public policy typically -- and in
4 Florida particularly -- tends to be linked to statutes.
5 In most States, there is a rule that says of contract
6 law, that we will not void a contract because some
7 judge feels there's a public policy, but it has to be
8 based on a statute. And we cited several cases, and
9 the law professors in Professor Alderman and Braucher's
10 brief cited a variety of cases around the country in
11 which courts have only struck down contracts for public
12 policy where they violated a statute that forbid
13 equality.
14 JUSTICE GINSBURG: You're giving the end
15 result. How many cases have the lawyers gone into
16 court and said, court, strike down this contract
17 because it's against public policy? Courts may reject
18 many of those, but --
19 MR. BLAND: Well, I think there's no reason
20 to suspect that there's going to be abuse in which
21 parties are going to come in and make frivolous
22 arguments that an entire line of business is illegal
23 and then -- and that that's going to cause a flood gate
24 of cases into courts because courts have, with rule 11
25 and other similar rules, a lot of ways of getting rid

1 of those.

2 JUSTICE BREYER: Well, what about --

3 MR. BLAND: It's very hard --

4 JUSTICE SCALIA: You get rid of them after

5 frustrating the arbitration provision, the whole

6 purpose of which is to keep you out of courts.

7 I'd like to -- I'd like to ask you about your

8 argument on section 2, which --

9 MR. BLAND: Please.

10 JUSTICE SCALIA: -- appears at page 3 of the

11 petitioner's brief. If you want to read it the way

12 you're reading it, you say a written provision in a

13 contract evidencing a transaction involving commerce.

14 You say that has to be a -- a contract that is a valid

15 contract.

16 Well, what do you do about the end of section

17 2 which says, shall be valid, irrevocable, and

18 enforceable, save upon such grounds as exist at law or

19 in equity for the revocation of any contract? That

20 would apply to -- to contracts that are not -- not void

21 but voidable.

22 MR. BLAND: Exactly, and that's the language

23 --

24 JUSTICE SCALIA: So Southland was wrong.

25 MR. BLAND: No. With all respect, Your

1 Honor, that's the language that -- that the
2 separability rule in Prima Paint has been used to apply
3 to. The first part of section 2 says this is how you
4 create an arbitration provision. You have an
5 enforceable provision if it's in a contract, but there
6 is an exception for general State contract laws that
7 provide defenses to a contract.
8 JUSTICE SCALIA: Why?
9 MR. BLAND: That --
10 JUSTICE SCALIA: Why would you make that --
11 that weird distinction --
12 MR. BLAND: Because that --
13 JUSTICE SCALIA: -- and treat the first part
14 of it as though it applies across the board to the
15 entire contract, but the last part of it, reading it
16 differently? I -- I don't understand that.
17 MR. BLAND: The first part of it is the way
18 you -- the way you trigger the existing forceability
19 option at all is that it has to be in a contract in
20 interstate commerce. That's why in Prima Paint the
21 Court went through interstate commerce rather than
22 leaving that for the arbitrator.
23 The second part is once you have an
24 enforceable agreement, it may be subject to certain
25 defenses.

1 And then in Prima Paint, what this Court did
2 was it looked at section 4 of the act and it derived
3 from section 4 of the act, the one that only applies in
4 Federal court and refers to the Federal Rules of
5 Judicial Procedure, a rule of separability for these
6 kinds of defenses, for the defenses that arise in the
7 Savings Clause.
8 JUSTICE SCALIA: It seems to me even if you
9 separate it, you still have the language, save upon
10 such grounds that exist in law or in equity for the
11 revocation of any contract. Unless you take that
12 language, the reference to contract in section 2, as
13 referring to two separate things, the contract without
14 the -- without the arbitration clause and the
15 arbitration clause alone, it seems to me section 2
16 doesn't make any sense.
17 MR. BLAND: With all respect, Your Honor, I
18 think that the way that it makes sense is that the --
19 you get the threshold issue of getting through the
20 limitation, as this Court described it in Southland on
21 pages 10 and 11, of the limitation on the
22 enforceability of arbitration clauses of is it in a
23 contract in the first place. That is the -- what the
24 first part is talking about.
25 Then separately the Court -- the -- the

1 Congress had intended only a limited intrusion into
2 State law, as this Court said in the Volt case where it
3 said that this -- that there was not -- this is not the
4 National Bank Act. There was no field preemption.
5 There was no express preemption. There was only
6 conflict preemption.
7 And in the Allied-Bruce case, what Justice
8 Breyer's opinion for the Court said was we recognize
9 that State law will play an important role for certain
10 contract defenses after the contract has first been
11 found to be enforceable.
12 I think that if -- if this jurisdictional
13 idea -- the way you get into the Arbitration Act, what
14 triggers that the Arbitration Act exists -- and this is
15 pretty much the language that's used at the -- in the
16 bottom of 10 and top of 11 of Southland -- is that you
17 have an arbitration agreement that's enforceable. Then
18 there is a but in which Congress left out an
19 alternative where you have specific challenges to how
20 the arbitration clause is formed. I think that that's
21 a very workable system, but that's also the way
22 Congress drafted the statute.
23 JUSTICE BREYER: It's not -- the workability
24 of it depends on how many challenges you get to people
25 saying this contract is void, you know. And if there

1 are a lot of them, then that takes a whole wide set of
2 cases out of arbitration and puts them into the courts,
3 just where they're trying to escape. And -- and so I
4 don't know the answer to how many, to be truthful, and
5 I suspect no one does.
6 So I'm wondering if there isn't another route
7 to the problem you're getting at, which is, as I think
8 in other countries, you say there's a doctrine of
9 kompetenz-kompetenz. You know that? You know what I'm
10 thinking of?
11 MR. BLAND: No, I'm afraid I do not, Your
12 Honor.
13 JUSTICE BREYER: It's arbitration generally.
14 They don't even look to see whether people agreed
15 about the arbitration clause. It says arbitration. It
16 goes to arbitration regardless.
17 Now, the safeguard is, A, maybe the
18 arbitrator will get it right or, B, if the arbitrator
19 doesn't get it right, they have to come to court to
20 enforce it. And at that point, you could say, you
21 know, this arbitrator is out to lunch. Our cases say
22 he has to be really out to lunch, but you could make
23 some distinctions there, you see. And -- and if this
24 is really a problem that arbitrators are upholding
25 illegal contracts, that might be the place to begin to

1 make the distinctions. Say, Judge, look at this a
2 little more closely where it's illegal, the whole
3 contract, et cetera.
4 What do you think?
5 MR. BLAND: I -- I think two things, Your
6 Honor. First, I'd like to say that I think an enormous
7 difference between the European illustrations, for
8 example, that you give in this setting is that here the
9 Federal Arbitration Act is not a common law rule of
10 let's push as many cases as we can from the civil
11 justice system into arbitration. It is a statute that
12 has language. And the way this Court has treated that
13 language before is this Court has always said not until
14 the case falls within section 2 will you then go and
15 enforce section 2, that you have to be in the act
16 before you apply the act.
17 JUSTICE GINSBURG: If we take --
18 MR. BLAND: And I think that that language is
19 --
20 JUSTICE GINSBURG: -- if we take, Mr. Bland,
21 what you said so -- the words transaction involving
22 commerce, but a contract -- okay. So you spoke about
23 void contracts. Well, what about there's not enough
24 consideration, things that go to the formation? So
25 this contract was never formed. So --

1 MR. BLAND: Those are issues that we believe
2 also are issues that a court would resolve. I think,
3 Your Honor, that there are very few --
4 JUSTICE GINSBURG: So we're going far -- far
5 beyond a void subject matter like usury. But you could
6 say there -- there wasn't sufficient consideration.
7 There was no mutuality or things that go to the
8 formation of a contract.
9 MR. BLAND: I think that when Your Honor used
10 the word far, that that -- that that is not really
11 fair. There are really very, very few contracts in the
12 United States of America in 2005 that are going to be
13 struck down because there wasn't enough consideration.
14 That sort of argument against contract formation very
15 rarely comes up. I do a ton of consumer contract
16 cases. We've never gotten rid of a contract on the
17 grounds there wasn't consideration.
18 These doctrines are on the books. They are
19 certainly part of what makes a contract different from
20 an agreement. It's certainly one of the reasons why I
21 think it's important that Congress chose such a loaded
22 word, but these -- there are very few cases that
23 involve this.
24 And -- and one thing about the -- about the
25 illegal issue and the voidability -- the -- the void ab

1 initio issue that Your Honor raises. In Florida -- and
2 we cited a number of cases of this in our brief and in
3 the -- in -- both in our brief and -- and in the
4 contract law professors' amicus brief, there's a number
5 of cases around the country. You only strike down a
6 contract as void ab initio where the principal purpose,
7 the essence of the contract is that -- that it was to
8 do an illegal purpose, was that it was to violate a
9 statute as reflected in -- as -- as it would reflect
10 the public policy of a State. You could have a
11 contract that has one or two illegal provisions or
12 minor legal provisions. Those are not enough to get
13 the entire contract thrown out as void ab initio. It's
14 a much higher test.
15 If I can use an analogy. There may be a lot
16 of people who wish they weren't married, but meeting
17 the tests of annulment are very different from divorce.
18 Trying to prove that a contract is void ab initio such
19 that it is so extremely illegal that no provision of it
20 will come into contract doesn't come up very often.
21 What we are talking about with void ab initio
22 contracts that violate public policies and statutes are
23 we are talking about businesses that are skirting
24 around on the edge of legality. We are talking about a
25 business where there is a colorable argument that

1 someone can go into court and say, this entire line of
2 business is loan-sharking. It's a crime. It's 29
3 times the -- the felony rate of loan-sharking in
4 Florida. That's why so many of these cases are payday
5 lending cases. You don't see a lot of void ab initio
6 cases in which come -- someone comes in and say, hey,
7 you know, they sold me a car and the entire line of
8 business of car selling was void ab initio.
9 The only example that's supposed to show the
10 flood gates that has come from petitioner's brief is
11 they cite to this Vacation Beach case in Florida. And
12 what -- that was a case that involved was sort of a
13 uniquely Florida problem, but after a bunch of
14 hurricanes, they've had people come down who were
15 unlicensed contractors and they go and say we know how
16 to fix roofs and so forth and they do not. And then
17 people's roofs blow off, and there have actually been a
18 number of people who have died.
19 So the State set up a licensing regime that
20 was a licensing regime not designed to extort money
21 from businesses, but a licensing regime designed --
22 scheme based on safety and health and welfare of the
23 citizens and said, you can't go into this line of
24 business without passing certain certifications.
25 So in that case, it was a declaratory

1 judgment action in which a company -- in which a
2 company comes in and says, this company is falsely
3 representing they know how to do this work and they
4 don't. And in fact, the court of appeals notes it
5 could be a crime.
6 And now petitioner comes in and says, well,
7 this is an outrage. Of course, the arbitrator should
8 decide that question in the first place. No. That's a
9 business that is arguably -- and probably more than
10 arguably -- operating on the outskirts of the law.
11 Their reliance interests are different.
12 CHIEF JUSTICE ROBERTS: But there's no -- but
13 -- but why do you assume that that underlying
14 illegality taints the arbitration clause? I mean, take
15 the arbitration clause that you would find in a
16 perfectly normal contract, and if you put it in the --
17 the contract of the sort that you're hypothesizing, I
18 don't see why this underlying substance of the contract
19 taints the enforceability of the arbitration clause.
20 MR. BLAND: Because -- because the language
21 of the statute is what draws the key link difference to
22 me, Your Honor. The statute says an arbitration
23 provision is enforceable if it is in a contract
24 evidencing interstate commerce. The in a contract
25 makes the legality of the whole contract -- for the

1 contract comes into existence. You can't drive this
2 car until you start it, and the way that the Federal
3 Arbitration Act works is it becomes enforceable once
4 those terms are met.
5 Under their theory, there's no good reason
6 why in Prima Paint this Court spent all those pages
7 talking about whether interstate commerce was met. Why
8 wasn't that for the arbitrator? The reason that that
9 wasn't for the arbitrator was that was something that
10 went to the threshold issue of whether section 2 had
11 been met.
12 JUSTICE GINSBURG: Are you saying then if
13 this case, the case that was brought in Florida, had
14 been brought or removed in -- more likely removed
15 because there was diversity, removed to the Federal
16 court, the Federal court should do just what the
17 Florida Supreme Court did? Or would the Federal court
18 say, well, we've got our instructions from Prima Paint?
19 It says excise the arbitration clause. If that's
20 okay, we decide the other questions.
21 MR. BLAND: Your Honor, in this case I
22 believe that the answer is that you would have the same
23 result in State court or in Federal court. And the
24 reason I believe that is because section 2 makes the
25 existence of a contract a precondition, and you don't

1 get to anything else if that is not met.

2 JUSTICE SCALIA: Doesn't it -- doesn't it

3 follow from -- from that theory of yours that in every

4 case you are entitled to a judicial determination, not

5 an arbitrator's determination, but a judicial

6 determination that this was a contract evidencing a

7 transaction involving commerce?

8 MR. BLAND: Yes, we do believe that, Your

9 Honor.

10 JUSTICE SCALIA: Wow. So in every -- every

11 case, the person who -- who is being brought to

12 arbitration can say, I deny that interstate commerce is

13 involved in -- in this -- in this contract and I want

14 to have a -- a judicial determination of it.

15 MR. BLAND: And of course, in the Efabco case

16 --

17 JUSTICE SCALIA: Well, I mean, that's --

18 MR. BLAND: Well, that -- this Court 2 years

19 ago in 2003 in the Efabco case, the Alabama Supreme

20 Court had developed a practice of finding that lots of

21 contracts didn't involve interstate commerce and

22 interstate commerce didn't reach to a lot of things.

23 And this Court just 2 years ago said this is an issue

24 for the court and there is interstate commerce here and

25 they -- they -- and this Court -- I can't remember the

1 phrase -- per curiam. There was no need for an
2 argument or whatever. The Court just came in and
3 resolved it --
4 JUSTICE GINSBURG: You said this was an issue
5 for the court. Was there an alternate forum in that
6 case? Was it an arbitration case?
7 MR. BLAND: This was an arbitration case, and
8 the Alabama Supreme Court had said that we're not going
9 to enforce the Federal Arbitration Act, and Alabama is
10 one of the three States that has -- that has a State
11 statute that bars it.
12 JUSTICE BREYER: I had thought that the
13 interstate commerce question was like Crowell v.
14 Benson. You know, it's like a constitutional fact.
15 And in fact, if you can't -- if there's not the
16 constitutional -- if there's not the connection with
17 interstate commerce, Congress, at least arguably, would
18 lack the constitutional power to tell the State court
19 what to do in this case. So it's not as surprising if
20 there is a difference between that kind of fact and the
21 kind of fact that goes to whether the -- the contract
22 is void ab initio.
23 MR. BLAND: But it -- but it is also a
24 statutory fact, Your Honor.
25 JUSTICE BREYER: Yes, it is. It's both.

1 MR. BLAND: It's a fact that the statute says
2 both. It is a constitutional fact. I certainly
3 concede that.
4 Justice Ginsburg, I believe I did not answer
5 -- I'm sorry.
6 JUSTICE SCALIA: The question isn't whether
7 the court can -- can determine that fact. Ultimately,
8 if the arbitrator determines it incorrectly, you can
9 take it to court. But the question is whether in every
10 arbitration case, you can go immediately to court to
11 have that question of interstate commerce or not
12 determined. And that would really throw a monkey
13 wrench into the whole system, it seems to me.
14 MR. BLAND: Your Honor, it's -- it would not
15 throw a monkey wrench because it's exactly what
16 happened in Prima Paint. In Prima Paint, this Court
17 started off and before it enforced the Arbitration Act,
18 before it got into what it called the main issue and
19 started talking about what does section 4 mean, this
20 Court first went and did the entire interstate commerce
21 analysis. This Court said, we've got to figure out if
22 we're in section 2 first and described that. It's not
23 the monkey wrench. It's exactly what's happened.
24 And in the Efabco case, it was a issue for
25 the Court. To say that now, whether or not section 2

1 exists except for the assent agreement, but everything
2 else about a contract and everything else about
3 interstate commerce would suddenly be for the
4 arbitrator, that is an exact shift from what this Court
5 did in Prima Paint, and it's a shift from what Chief
6 Justice Warren Burger said in the -- in the Southland
7 case, that this is a prerequisite.
8 JUSTICE SCALIA: Once the case is in the
9 court, of course, the court has to decide that
10 question. Once it is in the court. And it was in the
11 court in -- in Prima Paint. The question is does it
12 have to go first to the court before it goes to the
13 arbitrator, and -- and Prima Paint doesn't decide that
14 question.
15 MR. BLAND: Well, where these cases come up
16 again and again, Your Honor, is someone brings a
17 lawsuit in court and then there is a motion to compel
18 arbitration and there is a challenge to that motion.
19 There are next to no challenges anywhere in the country
20 right now in the -- after your decision 2 years ago, in
21 which anyone is saying, oh, this transaction doesn't
22 involve interstate commerce.
23 There are going to be a small number of
24 challenges involving companies operating at the edge of
25 legality and maybe a tiny number of challenges

1 involving consideration where people are going to be
2 able to say there's no contract at all, there's not
3 even a -- there's not even the beginning of a contract
4 here. There's not going to be a wealth of hundreds of
5 the -- of those, but there's going to be some cases,
6 mostly involving the payday lending industry, but
7 they're just aren't dozens of businesses out there
8 where there is a conceivable, plausible, colorable
9 argument that the whole line of business is violating
10 the law.
11 JUSTICE STEVENS: Mr. Bland, I'm curious to
12 know if you agree with your opponent that whoever
13 decides it, an arbitrator or a judge, it's really going
14 to be decided by the Florida Supreme Court in the next
15 couple of months.
16 MR. BLAND: I think that the question of
17 whether or not this is illegal will be something that's
18 decided by the Florida Supreme Court, but that question
19 -- first of all, if this case is sent back to
20 arbitration, the arbitration clause, of course, is on
21 an individual basis and this case could never be
22 pursued on an individual basis. If it's not done as a
23 class action, it would be the end of the case.
24 But moreover, the arbitrator is basically
25 free to ignore what the ruling of the Florida Supreme

1 Court is. You know, there was a ruling from the Third
2 Circuit a few weeks ago that said that glaring errors
3 of law are not grounds for overturning an arbitration
4 decision. So the Florida Supreme Court could come out
5 and say this is plainly illegal, and then a row of
6 arbitrators could come in and say, seems okay to us,
7 and there's really not going to be a court challenge to
8 that. So I would not agree with that as a matter of --
9 as a matter of practical reality, Your Honor.
10 This State law that we're talking about is
11 not about hostility to arbitration. The rule that
12 distinguishes between void contracts and the small
13 universe of cases that are void ab initio is a rule
14 that goes back something like a hundred years in
15 Florida and it goes back hundreds more years through --
16 it's come up in decisions of this Court. It has come
17 up in decisions of English courts that go back that
18 were traced by the contract professors.
19 At the time that the Congress wrote the
20 Arbitration Act in 1925, this distinction was set out
21 in Corbin and in the First Restatement of Contracts.
22 This is basic, core common law of contracts. And the
23 idea that in 1925 Congress wanted to throw out all of
24 the basic core rules of contracts and, instead, replace
25 them with some new Federal rule of contract, when they

1 didn’t define contract, and when they put it as a
2 precondition before the act applies, the idea that
3 general rules of State contract law are going to be
4 tossed overboard is really going to be a dramatic
5 change for this Court -- for this Court’s
6 jurisprudence.
7 In case after case, this Court has said
8 arbitration clauses are as enforceable as other
9 contracts, but no more so. And that was the basis of
10 this Court’s ruling in the EEOC v. Waffle House case
11 just a few years ago. Just like petitioner here, the
12 Waffle House was saying arbitration clauses are sort of
13 super contracts. They are something so many businesses
14 have relied on, as Justice Breyer says, that they are
15 -- that they are treated by a different and better set
16 of rules. These are contracts which are just better
17 and more important than other contracts.
18 And this Court stopped and, in Justice
19 Stevens’ opinion in the Waffle Case, said slow down.
20 First, you just have to treat these like other
21 contracts. And here, there’s no signature line for the
22 EEOC. The EEOC didn’t sign on. We’re going to treat
23 this like another contract, and by a 6 to 3 vote, this
24 Court found that you couldn’t enforce it.
25 They want to put the cart before the horse.

1 They want to enforce this Arbitration Act before its
2 terms were met. That is not what this Court did in
3 Prima Paint. Prima Paint did it right. They said
4 section 2 first and only if section 2 applies, then do
5 we jump to the next point, you know, sort of dinner
6 before dessert. And that was the appropriate approach
7 because you have to find out if section 2 is there and
8 cross that threshold before you start saying now that
9 we're in the Federal Arbitration Act, how much fun
10 would it be to apply section 4, the part that keeps
11 talking about the Federal Rules of Civil Procedure, to
12 cases in State court proceedings and apply a decision
13 that was based entirely on language in section 4 to
14 State court proceedings.
15 That is simply an enormous expansion of the
16 law in this area, and we urge the Court strongly to
17 affirm the decision below. Thank you.
18 CHIEF JUSTICE ROBERTS: Thank you, Mr. Bland.
19 Mr. Landau, you have 4-and-a-half minutes
20 remaining.
21 REBUTTAL ARGUMENT OF CHRISTOPHER LANDAU
22 ON BEHALF OF THE PETITIONER
23 MR. LANDAU: Thank you, Mr. Chief Justice.
24 Three --
25 JUSTICE SCALIA: Mr. Landau, I'd like to know

1 how you read section 2. What -- what meaning do you
2 give to a written provision in a contract?
3 MR. LANDAU: Your Honor, I think the word
4 contract is not a precondition in the sense that
5 respondents talk about in the sense that the court has
6 to look into whether it's a valid contract with all the
7 bells and whistles of State contract law because I
8 think that is entirely inconsistent with Prima Paint.
9 I think the -- the answer is --
10 CHIEF JUSTICE ROBERTS: But State law -- the
11 supposition is that State law provides that in this
12 case, the usury context, whatever, you do not have a
13 contract. That's the difference between void ab initio
14 and voidable.
15 MR. LANDAU: Your Honor, I think the point is
16 that it -- the key part there is -- I think Justice
17 Breyer was getting to this -- that it has to be a -- a
18 contract that evidences interstate commerce to have the
19 hook of commerce power for the FAA to apply in the
20 first place. That was enacted under the substantive
21 commerce power.
22 Then the question arises -- and this is
23 really where they're hanging their hats in this case to
24 say, well, you have the word contract. The word
25 contract brings with it all the bells and whistles of

1 State law for a valid underlying contract. The problem
2 with that is that looking at it that way -- I think
3 this is the heart of this case -- that completely
4 undermines -- or the severability rule says, we've got
5 a different contract. The underlying contract is -- is
6 there, and you can raise your challenge to that
7 contract, but as long as you're not challenging the --
8 the arbitration clause, then any challenge you have to
9 the underlying contract goes to the arbitrator.
10 And again, I think the point is to say that,
11 well, they don't deny that there's a severability rule,
12 but to say that before you apply the Federal
13 severability rule, you have to go and look at the
14 underlying contract and ascertain all this is to deny
15 the Federal severability rule.
16 JUSTICE SCALIA: I -- I guess that respondent
17 uses the language in the way it -- he says it should be
18 used when he refers to a contract that is void ab
19 initio. There's no such thing as a contract that is
20 void ab initio, is there?
21 MR. LANDAU: No.
22 JUSTICE SCALIA: If you take the meaning of
23 contract that he takes in section 2.
24 MR. LANDAU: I -- I think you're -- you're
25 right, Your Honor. I mean, I think the -- the point is

1 it -- it just doesn't make sense to say that you have
2 to go through all the bells and whistles of looking at
3 the validity of the underlying contract if the whole
4 point of Prima Paint -- I think this goes back to what
5 the Chief Justice said is you just look at the
6 arbitration provision as a severable contract. So to
7 say that --
8 CHIEF JUSTICE ROBERTS: But I -- his answer
9 would be, well, you only get to do that if you're under
10 the Federal Arbitration Act in the first place, and if
11 you don't have a contract, then you're not under the
12 Federal Arbitration Act under State law.
13 MR. LANDAU: You're right, Your Honor. I
14 think that's the key point, that to say that the -- you
15 have to go to the -- the validity of the underlying
16 contract under State law and the severability
17 implications of the challenge to the underlying
18 contract before you -- before you even get to the
19 arbitration clause is essentially to negate the
20 severability of the arbitration clause because the
21 whole reason you're looking at the underlying contract
22 is presumably to see whether or not the arbitration
23 clause can fall. So they cannot logically have a
24 regime that says the arbitration clause is severable
25 from the underlying contract.

1 JUSTICE BREYER: They can logically because
2 they say the arbitration clause, when embedded in a
3 contract that is voidable -- i.e., A and B enter into a
4 contract. B says it's voidable. I void it. I void
5 it. And there they say, fine, there was a contract and
6 therefore this arbitration clause, which is separable
7 -- you go to arbitration. But if it's void, where B
8 doesn't have to say I void it, I void it, you never had
9 a contract in the first place. Now, that is a logical
10 position.
11 MR. LANDAU: And you're absolutely right,
12 Your Honor, and that was the lines that were drawn in
13 Prima Paint. That -- that was the -- the real issue
14 that was presented. They said there was no contract.
15 They said I'm bringing a rescission suit. And if you
16 read what Justice Black said in dissent in Prima Paint,
17 he said there was no contract.
18 And this kind of goes back to what Justice
19 Ginsburg was saying, that to talk about the
20 implications, the severability implications, of
21 particular challenges under State law misses the point
22 that the Federal severability rule doesn't depend on
23 State law.
24 CHIEF JUSTICE ROBERTS: Thank you, Mr.
25 Landau.

1 MR. LANDAU: Thank you.

2 CHIEF JUSTICE ROBERTS: The case is

3 submitted.

4 (Whereupon, at 12:09 p.m., the case in the

5 above-entitled matter was submitted.)

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