

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

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
JOSEPH D. SCHLEIMER, ESQ.	
On behalf of the Petitioner	3
G. ERIC BRUNSTAD, JR., ESQ.	
On behalf of the Respondent	21
REBUTTAL ARGUMENT OF	
JOSEPH D. SCHLEIMER, ESQ.	
On behalf of the Petitioner	52

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

P R O C E E D I N G S

(11:06 a.m.)

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

Mr. Schleimer.

ORAL ARGUMENT OF JOSEPH D. SCHLEIMER

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

24 CHIEF JUSTICE ROBERTS: Well, I guess I
25 could let him answer, but I suppose he would say you go

1 to that court, and you get a motion to compel
2 arbitration.

3 MR. SCHLEIMER: Well, we brought a motion
4 to compel arbitration, which was denied based on
5 1700.44.

6 JUSTICE KENNEDY: I couldn't find the order
7 that the court -- in the record it says that the order
8 would be -- the court granted a preliminary injunction,
9 the superior court, and then it said, according to an
10 order to be entered by the clerk., and I never saw it.
11 How long was the arbitration stayed for? There was an
12 enjoined -- there was an injunction. What was the term
13 of the injunction? Just until further order of the
14 court?

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

1 JUSTICE KENNEDY: Did the Respondent at any
2 point indicate that after the Labor Commission -- Labor
3 Commissioner made the determination that they would not
4 go to superior court for de novo review?

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

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

24 JUSTICE GINSBURG: Well, you may have a
25 right to go to arbitration under this contract, to

1 proceed at once to arbitration, but could you stop a
2 parallel proceeding from going on before the Labor
3 Commission? In other words, your adversary says under
4 the arbitration contract I'm stuck, I have to arbitrate
5 at once, but I can go to the Labor Commission; there's
6 nothing in the Federal Arbitration Act that says I can't
7 do that.

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

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

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

24 MR. SCHLEIMER: Justice Scalia, I would
25 certainly agree that it's a breach of the contract to

1 file a parallel proceeding. The question, of course, is
2 specific performance.

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

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

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

1 Now, if we have incorporated California law,
2 we have incorporated the law that says the arbitrator's
3 decision, his initial decision saying I've got
4 jurisdiction, let's hear some evidence, then that's
5 incorporated in California law --

6 JUSTICE SOUTER: Do you agree that the
7 question of implicit adoption of California law is an
8 issue in the case as it gets to us?

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

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

24 MR. SCHLEIMER: I think that Volt should be
25 rejected. But in the alternative, I think under First

1 Options it should be remanded to the arbitrator. If
2 they want to make an argument that we didn't intend to
3 arbitrate arbitrability, even though California law is
4 per se on that point in our favor, then you have the
5 option of remanding that question to the arbitrator.

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

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

17 CHIEF JUSTICE ROBERTS: But when you say
18 California law applies, you don't mean to the exclusion
19 of Federal law?

20 MR. SCHLEIMER: Of course not. I mean, if
21 one incorporates California law, one doesn't incorporate
22 preempted California law.

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

1 governs the general.

2 MR. SCHLEIMER: Absolutely. The Federal
3 Arbitration Act is all about effectuating the intent of
4 the parties to expeditiously and privately decide the
5 issue.

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

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

23 CHIEF JUSTICE ROBERTS: Counsel, would you
24 have any problem with a California law that said you can
25 arbitrate but the arbitrator must allow the Labor

1 Commissioner to file an amicus brief?

2 MR. SCHLEIMER: I don't know the Labor
3 Commissioner has ever attempted that. I wouldn't be
4 concerned about it. I know --

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

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

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

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

1 JUSTICE KENNEDY: Does the Labor
2 Commissioner have authority to commence proceedings on
3 his own motion or her own motion?

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

6 JUSTICE KENNEDY: Well, you need to be
7 sorry that I asked already then.

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

17 So the only action the legislature has had
18 since deregulating the managers and taking them out of
19 the statute entirely was removing the criminal
20 enforcement power. In terms of the Labor Commissioner's
21 civil enforcement powers, there are statutes. The first
22 hundred sections in the labor code do give the Labor
23 Commissioner certain intervention powers. But, reading
24 those statutes, they would seem to apply in wage cases
25 and confiscation of tools, that sort of thing. They

1 don't really mention -- now would the Labor
2 Commissioner -- if the Labor Commissioner wanted to
3 intervene, I think that if you take the penumbra of all
4 these statutes probably the Labor Commissioner could.

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

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

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

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

24 MR. SCHLEIMER: I would certainly protest,
25 but the arbitrator undoubtedly has the power to wait for

1 the Labor Commissioner to render an advisory decision.
2 In a sense that's what the arbitrator did. In a moment
3 of I think irrational exuberance he talked about the
4 expertise of the Labor Commissioner.

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

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

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

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

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

25 MR. SCHLEIMER: Well, that is what Judge

1 Ferrer asked the superior court to do, was first send
2 this to the Labor Commissioner. Then specifically the
3 complaint by Judge Ferrer sought declaratory relief,
4 that the arbitration is void, the guy is an illegal
5 talent agent, so he should never be allowed to
6 arbitrate. That was the declaratory relief that was
7 sought.

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

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

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

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

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

1 MR. SCHLEIMER: The position I've taken from
2 the beginning, including in my briefs to the court of
3 appeals was yes, that if the decision is correct, if
4 this Court affirms the court of appeal, that the
5 de novo would go to the superior court. Now, it is a
6 true de novo; in other words, it's not deferential to
7 the Labor Commissioner. It's simply a complete
8 rehearing from scratch of the whole case.

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

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

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

1 you'll be really helped. Now what stops him from doing
2 that in the law?

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

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

8 MR. SCHLEIMER: Well --

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

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

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

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

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

25 JUSTICE SCALIA: When we say we'll arbitrate

1 all disputes under this contract, it means we'll
2 arbitrate all disputes under this contract; neither one
3 of us will go to court.

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

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

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

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

19 MR. SCHLEIMER: I think there are a couple
20 --

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

23 MR. SCHLEIMER: I think this entire area of
24 jurisprudence involves pre-dispute arbitration
25 agreements and then some party decides it's not to my

1 advantage and they run to court. I think that's almost
2 every case you've got that.

3 JUSTICE BREYER: Okay.

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

8 (Laughter.)

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

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

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

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

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Brunstad.

5 ORAL ARGUMENT OF G. ERIC BRUNSTAD, JR.

6 ON BEHALF OF THE RESPONDENT

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

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

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

23 MR. BRUNSTAD: The Labor Commissioner --

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

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

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

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

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

1 MR. BRUNSTAD: We never took that position
2 below because we never got that far, Justice Kennedy.
3 We only got to the point whether we should have a
4 preliminary injunction so that the Labor Commissioner
5 could go first. Once the Labor Commissioner --

6 JUSTICE KENNEDY: The arbitrator had already
7 agreed to do that so you didn't need the injunction for
8 that purpose.

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

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

23 MR. BRUNSTAD: Well, Justice Kennedy, I
24 think that it is important -- this goes back to
25 Justice Breyer's question. Why is it a de novo

1 proceeding? Well, in the Sinnamon case, which we cite
2 in our brief, it's for constitutional reasons under
3 California's constitution. The Labor Commissioner
4 doesn't exercise any judicial authority and does not
5 have the power to finally decide this controversy. The
6 Labor Commissioner is merely exercising her
7 administrative power over this dispute because this is
8 part of a comprehensive regulatory scheme.

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

15 MR. BRUNSTAD: On average eight months,
16 Justice Scalia.

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

19 MR. BRUNSTAD: She, Your Honor.

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

23 MR. BRUNSTAD: Well, there are valid
24 reasons and very compelling reasons why California set
25 up this system. California law says if you're going

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

9 JUSTICE SCALIA: This person is not a talent
10 agent.

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

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

22 MR. BRUNSTAD: Chief Justice Roberts, there
23 are other things that the Labor Commissioner is invested
24 with jurisdiction to do. The Labor Commissioner has to
25 find out about these disputes. How does she find out?

1 Because parties bring these petitions. This is a great
2 deterrent for people from violating the California
3 Talent Agencies Act. It works because the dispute has
4 to come before her. She knows who the bad apples are.
5 She knows she can go to get injunctive relief if she
6 needs to. Her expertise is advanced. She gets to
7 decide the controversy initially. And it merely
8 postpones arbitration. And critically, this is --

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

12 MR. BRUNSTAD: No, Justice Souter --

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

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

24 JUSTICE SOUTER: Then they probably
25 shouldn't have agreed to arbitrate, but they did agree

1 to arbitrate, and they want to arbitrate now. And one
2 of the points of arbitration is to get the ball rolling
3 fast, and that cannot be done under the system you are
4 arguing for.

5 MR. BRUNSTAD: But, Justice Souter, this is
6 what they bargained for. They bargained for the
7 application of California law under Volt. That
8 includes --

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

13 MR. BRUNSTAD: Yes, Justice Souter, we cited
14 the Volt case before the California Court of Appeals.
15 Now, the other side did not raise --

16 JUSTICE BREYER: It sounds as if you made
17 the argument below. You say we cited a case.

18 MR. BRUNSTAD: But, Justice Breyer, they did
19 not raise the preemption argument at all.

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

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

25 JUSTICE SOUTER: But you didn't go further

1 than to cite that case. Is that correct?

2 MR. BRUNSTAD: We did not go further than to
3 cite Volt, but let me explain why.

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

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

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

19 MR. BRUNSTAD: True, but --

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

25 MR. BRUNSTAD: Except the Labor Commissioner

1 herself who is supposed to do these administrative
2 procedures for all kinds of valid and compelling
3 State-court -- State-law reasons.

4 JUSTICE SCALIA: But the judgment involved
5 would have been binding --

6 MR. BRUNSTAD: Correct.

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

12 MR. BRUNSTAD: She is, Your Honor.

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

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

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

23 JUSTICE GINSBURG: You said something about
24 that in your brief, and I think that you got it wrong.
25 You said something about -- that the outcome of the

1 litigation can have preclusive effect in the
2 arbitration. But that would be so only if the result
3 favored the non-party to the litigation, because the
4 non-party to the litigation cannot be bound by a
5 judgment that would adversely affect that party's
6 interest. That party wasn't in the proceeding. It
7 isn't bound by it. The parties to the litigation are
8 bound by it, not the non-parties to the litigation.

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

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

20 Now, I say it is a hypothetical because, in
21 fact, superior court judges in California are excellent
22 judges. But California thinks, no, they don't know
23 enough about it. So here's what we do. We say when
24 Jones and Smith enter into an arbitration agreement, if
25 it happens to concern a building dispute, they have to

1 go to Federal -- they go to the superior court. In
2 fact, if they want to, if one of them wants to, the
3 other one doesn't. And everything is delayed while the
4 superior court judge decides all the issues in the case.
5 And then after they can go back to arbitration, if of
6 course they still want to. Could California do that?

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

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

12 MR. BRUNSTAD: Not this agreement, but I
13 understand your hypothetical --

14 JUSTICE BREYER: Mine is what they do
15 is they have the same standard arbitration clause. So
16 I'm asking not about the parties; I'm asking about
17 California.

18 MR. BRUNSTAD: No, Justice Breyer.

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

25 MR. BRUNSTAD: Because here what the Labor

1 Commissioner does is not what a court does. "Labor
2 Commissioner" is not synonymous with "the court" and
3 cannot be under California's constitution. Here you
4 have a complete, again, arbitration postponing rule and
5 nothing more. The arbitrator's hands are not tied in
6 any way; whereas the arbitrator's hands would be tied if
7 in fact you had court litigation that was conclusive
8 between the very parties.

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

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

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

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

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

22 MR. BRUNSTAD: Right.

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

1 MR. BRUNSTAD: No.

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

4 MR. BRUNSTAD: But here it would, yes,
5 because California law requires you to go to the Labor
6 Commissioner first, not to --

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

9 JUSTICE KENNEDY: I just want to understand
10 your position. In this case, does the California
11 provision for de novo review in the superior court apply
12 to stay the arbitration while that aspect of the
13 proceeding is completed?

14 MR. BRUNSTAD: Under California law -- it is
15 California law -- you must go to the Labor Commissioner
16 first before you go either to court or the arbitrator.
17 You must go to the arbitrator second.

18 JUSTICE KENNEDY: My question was: You go
19 to the Labor Commissioner. You also have a de novo
20 right to go to the superior court.

21 MR. BRUNSTAD: That is correct.

22 JUSTICE KENNEDY: Suppose the labor
23 commissioner said something absolutely silly. Wouldn't
24 you think you would have the right to go to superior
25 court?

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

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

5 MR. BRUNSTAD: Justice Kennedy, I think the
6 problem I'm having with your question is that I think
7 you are assuming that there's an arbitration in place
8 while the Labor Commissioner is going forward.

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

11 MR. BRUNSTAD: We do.

12 JUSTICE KENNEDY: The arbitrator is waiting.
13 You go to the Labor Commissioner, you go to the superior
14 court to say enjoin the arbitration while I go to the
15 Labor Commissioner.

16 MR. BRUNSTAD: Correct.

17 JUSTICE KENNEDY: The Labor Commissioner
18 does something silly. Can you not then go to superior
19 court and get de novo review of that wrong decision of
20 the Labor Commissioner before the arbitration starts?

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

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

25 MR. BRUNSTAD: We never got there, Justice

1 Kennedy. We never got to the --

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

4 MR. BRUNSTAD: We took the position that the
5 superior court should stay the arbitration because you
6 have to exhaust the administrative remedies first; and,
7 consistent with the Federal Arbitration Act, section 2,
8 there might be grounds for invalidating this arbitration
9 provision.

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

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

18 JUSTICE GINSBURG: A de novo right in
19 superior court?

20 MR. BRUNSTAD: Yes. But the California
21 Supreme Court has also said, in construing its own
22 arbitration act, which is section 1281, which is
23 basically the same as section 2 of the FAA -- said,
24 look, when we have a right to go to court if you have an
25 arbitration proceeding, the -- a motion to compel

1 arbitration must be granted unless, for example, the
2 arbitration clause is invalid for some reason.

3 CHIEF JUSTICE ROBERTS: Right, so you at
4 least have that additional step. It is -- particularly
5 since you only have 10 days to appeal from the labor
6 commissioner, someone who wants to arbitrate has to
7 appeal, has to go to superior court and get a motion to
8 compel.

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

14 MR. BRUNSTAD: Well, the parties could
15 voluntarily do that. But, yes, if you don't do the de
16 novo proceeding, then the Labor Commissioner's decision
17 becomes binding.

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

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

24 MR. BRUNSTAD: No, Justice Scalia. If I
25 made that impression, I'm sorry. I was mistaken. What

1 I am saying is that if -- if -- you have a right to take
2 an appeal to the California superior court.

3 JUSTICE SCALIA: Right.

4 MR. BRUNSTAD: And once you get to the
5 California superior court, then, under section 1281, you
6 have a right to move to compel for arbitration, just as
7 under the Federal Arbitration Act.

8 JUSTICE SCALIA: But --

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

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

18 MR. BRUNSTAD: Your opponent could appeal
19 the decision compelling the arbitration if it were
20 improperly granted, yes.

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

25 MR. BRUNSTAD: Justice Kennedy, if the

1 arbitration clause is valid and applicable, we will go
2 to arbitration. That validity and applicability has not
3 been tested by any court below. For example, are there
4 grounds --

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

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

9 JUSTICE KENNEDY: Even though in this case
10 you have assumed that that arbitration has to be stayed
11 for the Labor Commissioner. So the case does not have
12 to be stayed, and you would not ask for it to be stayed,
13 in the superior court?

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

21 JUSTICE GINSBURG: Mr. Brunstad, I'm looking
22 at the point in which you said this in your brief. So
23 you go to the labor commission, and then you go to the
24 superior court. This is page 13 of your brief: "The
25 court is required to grant a motion compelling

1 arbitration if the parties have executed a valid and
2 applicable arbitration agreement."

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

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

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

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

1 Court decided in First Options.

2 Here we do not have the unmistakably clear
3 language that the parties intended that the question of
4 arbitrability, itself, to be to the arbitrator. So the
5 court would decide if, in fact, the --

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

9 Now, I am beginning to understand where you
10 are coming from; and Volt does offer you considerable
11 support, as I -- as I read it.

12 MR. BRUNSTAD: Yes, Justice Breyer.

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

18 MR. BRUNSTAD: Correct.

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

22 MR. BRUNSTAD: Yes.

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

1 MR. BRUNSTAD: Yes.

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

5 MR. BRUNSTAD: No.

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

9 MR. BRUNSTAD: No, Justice Breyer.

10 JUSTICE BREYER: Why not?

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

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

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

22 MR. BRUNSTAD: Yes.

23 JUSTICE ALITO: -- for the arbitrator?

24 MR. BRUNSTAD: No.

25 JUSTICE ALITO: Why not?

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

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

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

12 You say also incorporates -- and this is
13 what I find peculiar. California law gives you a
14 procedural right to go to the Labor Commissioner. But
15 it also gives you a procedural right to go to superior
16 court. And, yet, you acknowledge that the arbitration
17 agreement, when you say we will arbitrate, forecloses
18 your using the superior court.

19 Why doesn't it foreclose your using the
20 Labor Commissioner? I don't understand how you slice
21 the bologna that thin. It seems to me, if it excludes
22 California procedures, it excludes both the labor
23 commissioner and the superior court.

24 MR. BRUNSTAD: Two reasons, Justice Scalia:
25 First, in the Buckeye case, for example, the

1 parties specifically selected as their choice of law the
2 Federal Arbitration Act. Here the parties selected
3 California law. This is no different than in Volt.

4 The second reason, Justice Scalia --

5 JUSTICE SCALIA: Wait, wait. Excuse me,
6 I don't understand that answer. California law
7 includes the superior court as much as it includes the
8 Labor Commissioner.

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

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

22 MR. BRUNSTAD: Yes, Justice Ginsburg. But
23 here I think the Court has drawn the proper distinction
24 between, on the one hand, Volt and, on the other hand,
25 Doctor's Associates, Mastrobuono, Perry, Allied-Bruce,

1 all of those cases where the Court has said if it is an
2 arbitration negating rule, you don't incorporate it,
3 because that's fundamentally at war with the decision to
4 arbitrate.

5 But where it's merely an arbitration
6 postponing rule, which was the procedural issue in Volt
7 and the procedural issue here, then we respect that and
8 say that's not preempted, because it's not necessary to
9 preempt.

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

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

23 MR. BRUNSTAD: It is inconceivable,
24 Justice Alito, that the California court would say that
25 arbitration is not permissible in this case. The

1 California Supreme Court has reconciled previously in
2 the Aguilar case, which is 32 Cal. 4th 974. You had two
3 different provisions of law. One said you had
4 nonbinding arbitration for fee disputes between
5 attorneys, and the second was the California Arbitration
6 Act.

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

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

19 Now, California law generally considers the
20 superior court smarter than the Labor Commissioner,
21 which is why you get de novo review before the Superior
22 Court.

23 MR. BRUNSTAD: No, Justice Scalia.

24 JUSTICE SCALIA: No?

25 MR. BRUNSTAD: No.

1 JUSTICE SCALIA: It is stupider than the
2 Labor Commissioner.

3 (Laughter.)

4 MR. BRUNSTAD: No, Justice Scalia. It is
5 the California constitutional provision. Under
6 California's Constitution, for better or for worse, you
7 cannot have the Labor Commissioner --

8 JUSTICE SCALIA: All right. I will amend
9 it. The California superior court is ex officio smarter
10 than the Labor Commissioner, okay? And yet, one of the
11 parties who thinks the Labor Commissioner is dead wrong
12 doesn't get a chance to have this advice corrected the
13 way the California Constitution envisions, by the ex
14 officio smarter superior court.

15 MR. BRUNSTAD: Justice Scalia --

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

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

23 JUSTICE KENNEDY: In this case, the court of
24 appeals, the majority said the fact that the losing
25 party will have a right to de novo hearing, involving

1 additional time and money, does not excuse the defendant
2 from the legal requirement to exhaust his remedy. And I
3 think you're preserving the option to go to the Superior
4 Court, at least to contest the validity of the
5 arbitration clause.

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

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

13 MR. BRUNSTAD: No, Justice Kennedy.

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

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

24 JUSTICE KENNEDY: But you also have the
25 right to challenge what -- the accuracy of the Labor

1 Department's finding. That's what both -- all the
2 judges on the California court agreed with that. So I'm
3 asking, doesn't that make -- require qualification of
4 your statement at page 34 that these procedures are
5 expeditious and informal and do not entail additional
6 expense or delay? All of --

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

9 JUSTICE KENNEDY: That does require some
10 qualification there.

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

14 CHIEF JUSTICE ROBERTS: Counsel, do you --

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

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

24 JUSTICE KENNEDY: I know you didn't, and
25 that's why I'm questioning why you put it in your brief.

1 Doesn't that require some qualification?

2 MR. BRUNSTAD: It is not in the record,
3 Justice Kennedy, because there is no factual record in
4 this case, either ours or their assertions.

5 JUSTICE KENNEDY: And our rules say you
6 don't make factual averments here for the first time.

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

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

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

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

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

25 JUSTICE KENNEDY: But they said it is --

1 they dispute that it is to procure employment.

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

6 JUSTICE GINSBURG: Mr. Brunstad, in that
7 light, on page 43, you say in this case, it is
8 undisputed that Preston was an unlicensed talent agent
9 and that the contract he drafted did not meet the
10 requirements of section 1700.

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

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

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

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

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

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

5 JUSTICE STEVENS: Could I ask one question
6 that I just want to be sure I understand your position?
7 If we had not granted cert, if you had gone to the
8 administrative agency and the agent had ruled against
9 you, what would you have next done?

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

12 JUSTICE STEVENS: To the court?

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

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

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

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

5 MR. BRUNSTAD: I'm sorry, forgive me,
6 Justice Ginsburg. It's undisputed that Mr. Preston
7 never had a license.

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

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

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

15 REBUTTAL ARGUMENT OF JOSEPH D. SCHLEIMER

16 ON BEHALF OF THE PETITIONER

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

19 I would disagree that there wasn't an
20 evidentiary hearing. I don't think the evidence was
21 considered, but in addition to Mr. Preston's
22 declaration, I made an offer of proof which is in the
23 appellant's appendix at page 219. I offered to prove
24 that the "Judge Alex" television program was solicited
25 and procured by an agent of the William Morris Agency.

1 I had made two attempts to depose Judge Ferrer to prove
2 that, and I never got the chance. He didn't want to be
3 deposed.

4 So, there was a full evidentiary hearing.
5 The evidence just wasn't considered because the legal
6 standard that was applied was there's a colorable claim
7 under the Talent Agencies Act, so you can't arbitrate
8 until it's resolved.

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

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

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

1 same parties -- litigation took place.

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

5 Now here he's making a parallel argument.
6 He's saying that the California Code says that people
7 should first go to that Labor Commissioner and that you
8 can stay arbitration while that goes on.

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

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

19 What do you think about that?

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

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

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

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

13 MR. SCHLEIMER: Assuming Volt --

14 JUSTICE BREYER: No, I'm just saying I have
15 to write -- I see all the common sense of your position.
16 I -- absolutely. But to get -- he only need one really
17 good argument. And he's saying whatever the other ones
18 are, here Breyer or somebody is going to have to write
19 the words, and Volt is different because -- so I would
20 like some help on that one.

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

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

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

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

16 MR. SCHLEIMER: Volt was written under the
17 California Arbitration Act, and speaking as a California
18 practitioner that had had a lot of cases decided under
19 the act, you might notice that the same section in Volt
20 was the basis for my motion to compel arbitration. See
21 Code of Civil Procedure CCP 1281.2. CCP 1281 is almost
22 identical to section 2 of the Federal Arbitration Act,
23 but the California Arbitration Act has a number of
24 provisions where the Federal Arbitration Act is silent.
25 One of those is dealing with multi-party litigation

1 where parties are not bound.

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

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

8 JUSTICE SCALIA: Yes. I do, too.

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

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

13 (Laughter.)

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

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

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

25 MR. SCHLEIMER: No.

1 JUSTICE GINSBURG: An agency like the
2 EEOC-Waffle House case.

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

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

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

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

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

1 executive branch function.

2 Here in our case, all they do is supply a
3 hearing room and a hearing officer, it's an adjudicatory
4 function. That's what the arbitrator is supposed to do,
5 is adjudicate the case. That's the distinction. And I
6 see Gilmer as being a situation where there's an attempt
7 to avoid adjudicating in the agreed forum. And I see
8 Waffle House as saying that we're not going to hogtie
9 administrative agencies when they perform the
10 prosecutorial function, the administrative function.

11 I guess if there are no further questions --

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 The case is submitted.

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

16

17

18

19

20

21

22

23

24

25

A				
AAA 7:20 8:23 39:11	administered 22:10	57:4 59:7	appear 12:7	16:4,11,15,25
ABC 49:24	administrative 4:7 21:25 24:7	agreeing 8:10	APPEARAN...	17:15 18:4,4,6
ability 22:11	29:1 35:6 41:3	agreement 8:14	1:14	18:11,16 19:5
above-entitled 1:11 59:15	51:8 54:18	8:16,23 10:25	appellant's	19:24 20:10
absent 16:13,14	57:22,24 58:4	16:15 17:17	52:23	21:10,12 22:13
absolutely 11:2	58:11 59:9,10	18:19,21 20:11	appellate 37:12	22:14,15 23:11
33:23 45:18	admitted 52:4	21:10 28:5,10	appendix 52:23	26:8,11,14,16
55:16 56:4,4	adoption 9:7	28:12 30:13,24	apples 26:4	26:23 27:2,12
accept 50:4 55:7	advance 25:4	31:8,10,12	applicability	28:5,8,10,11
accuracy 47:25	advanced 26:6	39:2,4,14,17	38:2 42:4	28:14,18 29:21
51:21	advantage 20:1	42:17 43:21	applicable 38:1	29:22 30:2,24
accurate 48:12	adversary 7:3	agreements	38:18 39:2,4	31:5,15 32:4
48:13	adversely 30:5	19:25	39:13,17,23	32:16 33:12
achieve 7:23	advice 6:11	Aguilar 45:2	application 27:7	34:4,7,10,14
acknowledge	14:21 36:22	ahead 36:12	30:14 32:18	34:20 35:5,7,8
42:16 44:13	45:16,17 46:12	Alex 1:6 52:24	applied 53:6	35:13,22,25
act 3:23 4:2 7:6	advisory 15:1	Alito 9:18 35:10	applies 3:24 8:7	36:1,2,13 37:6
11:3 15:10	32:10	35:15 41:20,23	10:18,24 43:12	37:7,16,19,24
18:4,6,11 21:9	affect 30:5	41:25 44:10,24	apply 4:2 13:24	38:1,2,6,8,10
22:6,9 25:1	affirms 17:4	Allied-Bruce	22:13 25:18,20	38:15,18,19
26:3 35:7,22	agencies 21:9	43:25	33:11	39:1,2,4,14,17
37:7 43:2 45:6	22:6,9 26:3	allow 11:25 12:6	appropriate	39:20,21,23
47:7,23 50:23	50:23 53:7	12:17	58:17	40:15 42:4,16
53:7 55:22,25	59:9	allowed 16:5	arbitrability	43:2,14,21
56:17,19,22,23	agency 4:7	alternative 9:25	8:25 10:3 39:7	44:2,5,11,14
56:24	12:15 14:22	amend 46:8	39:25 40:4,17	44:19,21,25
acted 14:14	15:9 21:22,25	American 19:5	42:6 54:21	45:4,5,9 47:5,7
acting 6:20 25:3	25:21 41:3	amicus 12:1	arbitrate 4:10	47:22,23 51:15
52:11 58:25	51:8 52:25	answer 4:25	4:13,18 7:4,15	53:23,24 54:8
action 13:17	57:22,24 58:1	13:8 21:18	8:10,14,25	55:22,24 56:2
58:18	58:4,14	22:1 27:20	9:15 10:3	56:17,20,22,23
add 11:13	agent 15:24,24	31:19 40:25	11:25 16:6	56:24 57:5
addition 48:13	16:5 25:1,3,10	43:6 55:24	17:16 18:25	58:7
52:21	25:12,14 50:8	answered 41:15	19:2 20:5	arbitrations
additional 36:4	50:12,14,19,22	answering 8:4	26:25 27:1,1	3:16 6:23
47:1,11 48:5	51:8 52:3,11	anybody 19:17	36:6 42:17	arbitrator 4:16
51:18	52:25	28:23	43:18 44:4	6:8,9,17,17,18
address 21:17	agents 12:9	anyway 11:16	45:11 53:7	6:20 9:22 10:1
adjudicate 59:5	ago 13:11	appeal 3:13 4:19	54:21	10:5 11:25
adjudicating	agree 7:25 9:6	17:4 20:20	arbitrated 3:20	14:11,18,20,22
59:7	19:14,21 21:16	22:11 36:5,7	7:20 56:8	14:25 15:2,6
adjudicatory	26:25	36:19 37:2,10	arbitration 3:17	17:19,20 23:6
57:21 58:5,12	agreed 4:14 8:9	37:17,18 51:11	3:23 4:2,5 5:2	23:10,11,13
59:3	8:24 23:7	53:14	5:4,11 6:13,25	24:13,21 25:17
	26:25 48:2	appeals 9:11	7:1,4,6,9,11,12	25:18,20 28:22
		17:3 27:14	7:13 11:3,14	28:24 30:11
		46:24	12:7 14:15	32:11 33:8,16

<p>33:17 34:12 36:22,23 39:7 40:4 41:8,23 53:10,15 54:4 54:10,11,13,16 54:21,24 55:2 59:4 arbitrator's 6:19 9:2 32:5,6 area 15:7 19:23 58:16 argue 44:15 arguing 27:4 argument 1:12 2:2,7 3:3,6 8:11 9:23 10:2 21:5 27:9,17 27:19,24 50:20 51:17,20 52:15 53:19 54:5 55:17 arising 22:5 ARNOLD 1:3 arranged 49:23 arrangements 14:23 arrest 13:11,12 13:14 articulated 22:8 aside 18:20 asked 13:7 16:1 38:20 54:17 asking 31:16,16 48:3 aspect 33:12 assert 29:8 assertion 4:12 assertions 49:4 Associates 43:25 Association 19:6 assume 10:8 37:17 38:5 assumed 38:10 assumes 14:8 assuming 8:17 34:7 55:13 assumption</p>	<p>44:11 attack 20:23 attempt 59:6 attempted 12:3 attempts 25:14 53:1 attend 12:13,22 attorneys 45:5 authority 13:2 16:9,19 24:4 58:7,17 automatically 7:21 average 24:15 averments 49:6 avoid 28:7 59:7 awfully 12:11 a.m 1:13 3:2</p> <hr/> <p style="text-align: center;">B</p> <p>back 23:24 24:21 31:5 38:17 background 49:16 bad 26:4 ball 27:2 bankruptcy 46:19,21 bargained 27:6 27:6 30:13,14 31:8 32:18 based 4:19 5:4 9:11,12 12:14 basically 35:23 basis 8:15 56:20 bear 26:21 beginning 17:2 40:9 behalf 1:16,17 2:4,6,9 3:7 21:6 52:16 believe 9:9 20:15 benefit 6:11 best 11:11 better 15:10</p>	<p>46:6 53:18 Beverly 1:15 bind 30:10 binding 16:10 29:5,9 36:17 36:21,23 37:12 bit 6:22 13:4 blank 55:12 body 25:8 Boesch 15:8 bologna 42:21 bottom 19:22 40:7 bound 11:14 28:6,10,11,23 30:4,7,8 43:17 57:1 58:7 branch 59:1 brand 22:21,22 breach 7:25 breadth 19:7 Breyer 17:12 18:5,9,24 19:8 19:16,21 20:3 21:13,24 22:2 27:16,18,20 30:15 31:10,14 31:18,19 33:7 40:6,12,13,19 40:23 41:2,6,9 41:10 53:17 55:7,14,18 Breyer's 23:25 brief 12:1 24:2 29:24 38:22,24 39:12 47:9,15 48:13,16,25 51:19 briefed 4:15 briefs 17:2 49:12 bring 24:11 25:5 26:1 41:3 brings 26:20 broadly 56:14 57:11 brought 5:3 6:7</p>	<p>28:18 57:24 Brunstad 1:17 2:5 21:4,5,7,23 22:1,22 23:1,9 23:23 24:15,19 24:23 25:11,22 26:12,18 27:5 27:13,18,23 28:2,13,19,25 29:6,12,18 30:9 31:7,12 31:18,25 32:12 32:15,22 33:1 33:4,14,21 34:1,5,11,16 34:21,25 35:4 35:15,20 36:14 36:24 37:4,9 37:18,25 38:7 38:14,21 39:5 39:18 40:12,18 40:22 41:1,5,9 41:11,22,24 42:1,24 43:9 43:22 44:23 45:23,25 46:4 46:15,19 47:6 47:13,17 48:7 48:11,22 49:2 49:7,14,22 50:2,6,15,20 51:1,10,13,23 52:5,10 Buchwald 22:17 Buckeye 3:11,13 20:9,13,15,19 20:21,24 42:25 builders 17:14 building 30:19 30:25 31:24 builds 23:19 busy 14:10</p> <hr/> <p style="text-align: center;">C</p> <p>C 2:1 3:1 Cal 1:15 45:2 California 3:13</p>	<p>8:7,7,18,19,20 8:22,22 9:1,5,7 10:3,8,9,10,18 10:21,22,24 11:24 13:10 17:24 18:4 20:17,19 21:9 22:4,6,8,9,12 22:13,17 24:24 24:25 26:2,15 27:7,10,14 30:14,15,21,22 31:6,17,23 32:18,20 33:5 33:10,14,15 35:10,16,20 37:2,5 41:14 41:16,16,17,18 41:18 42:10,11 42:13,22 43:3 43:6,11,12,13 44:12,15,20,24 45:1,5,7,14,19 46:5,9,13,17 46:18 48:2 50:23 53:14,21 54:6,23 55:24 56:17,17,23 California's 24:3 32:3 46:6 called 13:13 calling 58:21 Cardegna 3:12 case 3:4,14,18 3:24 4:3 8:20 9:8,10,19 11:7 11:11 12:20,23 16:23 17:8 19:17 20:2,10 20:17,18,21,25 22:17,18 24:1 27:14,17 28:1 28:14 29:15,17 31:4 33:10 34:10 35:10 37:22 38:9,11 40:14 41:19</p>
---	--	---	---	--

42:8,25 44:10 44:12,25 45:2 46:23 47:6,7 47:23 48:23 49:4,10,21 50:7 54:22,23 54:23 56:2,2 57:15 58:2 59:2,5,13,14 cases 4:6 13:24 14:6 44:1 56:18 Cashing 3:12 category 3:16 CCP 56:21,21 cert 51:7 certain 13:23 certainly 7:25 8:15 11:12 12:12,20 14:24 20:20 54:20 challenge 47:25 challenged 49:17 chance 46:12 53:2 Check 3:11 Chief 3:3,8 4:8 4:24 10:6,17 11:23 12:5,16 15:5 21:1,3,7 25:16,22 36:3 37:14 38:19 41:11 48:14 52:13,17 58:13 59:12 choice 43:1 choice-of-law 8:6 9:14,21 10:7 chose 6:6 chosen 15:6 Chronus 41:19 Circuit 8:21 circular 10:12 circumstance 37:22	citations 51:21 51:24 cite 24:1 27:24 28:1,3 41:19 cited 8:20 27:13 27:17 54:23 citizens 3:25 civil 13:21 14:7 15:10 17:13,21 43:11 56:21 claim 53:6 claims 15:15 17:24 clarify 52:11 classes 4:5 clause 9:14 31:15 32:16 34:10 36:2 38:1,6,18 39:20,21,23 42:4 47:5 clear 3:19 18:6 28:8 39:6 40:2 56:5 clearly 9:15 48:17 49:19 clerk 5:10 client's 12:14 code 4:20 13:22 43:11 44:15 53:22 54:6 56:21 collecting 14:10 colorable 53:6 come 26:4 50:14 55:10 57:3,6 comes 8:7,11 18:23 19:17 coming 40:10 commence 13:2 commencing 58:9 commission 6:2 7:3,5 28:7 38:23 commissioner 4:21 5:21,22	6:3,13 8:8,10 8:11 11:21 12:1,3,6,10,12 12:18,24 13:2 13:9,23 14:2,2 14:4,7,8,13,14 14:21 15:1,4 15:11,13 16:2 16:21 17:7 21:23 22:4,10 22:18 23:4,5 23:14,15 24:3 24:6,11,14 25:5,6,7,23,24 26:10 28:25 29:10 31:22 32:1,2 33:6,15 33:19,23 34:8 34:13,15,17,20 35:12 36:6 38:11,14 42:14 42:20,23 43:8 44:16 45:16,20 46:2,7,10,11 47:18 53:11 54:7 57:16,20 58:8,9,21,25 commissioner's 4:11 6:11 13:20 15:20 22:16 36:16 37:11 38:16 common 55:8,15 companies 43:19,19,20 compel 5:1,4 7:9 7:11,13 22:14 35:25 36:8,12 36:19 37:6,16 39:15 47:21 51:14 56:20 compelling 24:24 29:2 37:19 38:25 complaining 58:22 complaint 16:3	complete 17:7 32:4 completed 33:13 completely 51:17 complicated 13:5 comprehensive 24:8 compromise 6:21 concede 50:3 concept 22:7 concern 30:25 concerned 12:4 12:11 51:21 concerns 40:20 conclusive 29:16 32:7 condition 27:11 confess 10:7 confiscation 13:25 conflict 10:16 Conn 1:17 consider 12:18 considerable 40:10 considerably 15:10 consideration 3:21 considered 13:9 52:21 53:5 considers 45:19 consistent 10:9 35:7 consistently 16:12 34:24 constitution 24:3 32:3 46:6 46:13 constitutional 24:2 46:5 construct 45:15 construing 35:21	contest 47:4 contract 3:15,18 3:20,25 6:25 7:4,18,25 8:5 9:20 17:14 18:23 19:1,2 19:12 20:4,7 20:24 32:19,20 39:10,11 40:21 40:23 41:21 50:9 53:12,15 53:23 54:3,14 55:3,21 56:6 56:10,10 contracts 25:4 contractual 18:19,21 contradict 8:16 contradicts 10:24 controls 55:11 controversy 22:5 24:5 26:7 convincing 53:19 correct 17:3 28:1 29:6 33:21 34:16 38:19 40:18 51:13 corrected 46:12 counsel 10:6 11:23 21:3 48:14 59:12 couple 19:19 course 3:23 8:1 10:20 16:14 31:6 court 1:1,12 3:9 3:11,13 4:13 4:16,19,22 5:1 5:7,8,9,14,25 6:4 9:10 11:22 15:17,17,22 16:1,9,15,19 16:23 17:2,4,4 17:5,10,11,24
---	---	--	--	--

<p>19:3,12 20:1 20:10,13 21:8 21:17,20 22:8 22:12 23:20,21 25:19 27:14 29:16 30:18,21 31:1,4,23 32:1 32:2,7,10,25 33:11,16,20,25 34:2,14,19 35:5,14,19,21 35:24 36:7,10 36:11,11 37:2 37:5,15,23 38:3,13,15,17 38:24,25 39:8 39:14,25 40:1 40:5,25 41:15 41:18 42:2,16 42:18,23 43:7 43:10,12,12,23 44:1,18,24 45:1,7,8,15,20 45:22 46:9,14 46:17,22,23 47:4,18,20 48:2,20 49:12 49:16 51:12,13 51:20 53:13,13 53:14,21,24 54:2,12,15,17 courts 4:14 35:16 44:20 46:20 53:10 covenant 19:13 Crest 13:13 criminal 13:14 13:16,19 critically 26:8</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 1:15 2:3,8 3:1 3:6 52:15 day 6:8,18,21 14:17 23:12 days 12:17 36:5 de 4:10,13,15,18</p>	<p>4:23 6:4 15:17 15:21 17:5,6 17:11 22:15 23:19,25 33:11 33:19 34:19 35:14,17,18 36:15 37:23 44:17 45:21 46:22,25 47:11 47:21 53:12 dead 46:11 dealing 19:14 20:23 56:25 debatable 29:14 December 20:14 decide 11:4 14:12 16:16 17:25 24:5 25:18 26:7 39:7,8,15,25 40:5 44:10 decided 3:13 9:22 20:13 35:16 40:1 54:24 56:18 decides 19:25 31:4 decision 3:11,14 4:3,11 6:19 8:21 9:3,3,11 9:11 15:1,18 15:20 17:3 29:16 32:10 34:19 36:16 37:19 44:3 53:11 decisions 4:4 46:20 declaration 16:24 52:22 declaratory 15:23 16:3,6 declaring 3:16 15:23 default 37:11 defendant 47:1 defense 55:6</p>	<p>deferential 17:6 delay 48:6 delayed 31:3 delays 4:10 delineate 22:2 denied 5:4 23:11 Department's 48:1 depose 53:1 deposed 53:3 deprived 12:24 deregulating 13:18 despite 20:10 destroys 26:11 determination 6:3 determined 5:23 determines 5:21 39:3,16 deterrent 26:2 develop 25:8 dictum 57:12 difference 23:22 different 11:9 29:15 31:21 43:3 45:3 47:22 55:19 56:13 58:8 difficult 23:20 dime 58:21 directly 53:25 disagree 52:19 discretion 58:24 dispute 3:24 17:16,17 24:7 26:3 30:25 31:24,24 40:16 49:19 50:1 disputed 4:1 49:19 50:11,24 50:25 51:1,2 52:4,10 disputes 7:19 19:1,2 25:6,7 25:17,25 30:19 45:4</p>	<p>distinction 43:23 59:5 distinguish 11:11 district 46:22 Doctor's 43:25 doing 12:10 14:10 18:1,13 18:18 36:18 doubly 19:4 doubt 57:5 drafted 50:9 drawn 43:23 Dream 54:23 driving 19:9 D.C 1:8</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 1:6 2:1 3:1,1 EEOC-Waffle 58:2 effect 7:14 8:6,9 27:11 30:1 45:9 effectively 5:24 effects 29:21 effectuating 11:3 efficiency 11:16 eight 24:15,17 47:10 either 22:10 26:21 33:3,16 34:1,1 35:3 47:20 49:4 eliminate 4:9 eliminating 4:5 embed 46:17 employment 25:2,13,14 48:18 49:20 50:1 enforcement 13:20,21 57:16 enforcing 15:18 15:19 engineering</p>	<p>17:21 engineers 17:14 enhanced 26:19 26:19 enjoin 34:14 enjoined 5:12 entail 48:5 enter 17:14 30:24 46:20 entered 5:10 40:15,24 53:22 entertainment 15:9 entire 3:15 4:5 19:23 20:24 entirely 13:19 entitled 44:17 envisions 46:13 equivalent 58:18 ERIC 1:17 2:5 21:5 Erickson 20:18 ESQ 1:15,17 2:3 2:5,8 essentially 58:25 estoppel 29:21 everybody 14:8 21:15 evidence 9:4 48:21 50:3 52:20 53:5 58:23 evidentiary 48:23 49:9 52:20 53:4 ex 46:9,13 exactly 6:6 41:19 58:14 example 36:1 38:3 39:20 42:25 excellent 30:21 excising 3:14 exclude 7:21 excludes 42:21 42:22</p>
---	---	---	---	--

exclusion 10:18	46:24 51:25	finding 48:1	20:9 28:4,17	59:8
excuse 36:20	57:3,10	fine 6:16	28:20 29:23	good 14:20
43:5 47:1	facts 11:8 51:25	finished 35:12	30:9 35:18	15:13 19:14
executed 39:1,4	factual 49:3,6	first 8:11,13,24	38:21 39:9,19	55:17
39:13,16	49:12,15	9:25 13:21	43:16,22 50:6	governed 32:20
executive 59:1	factually 48:12	16:1 17:25	50:16,17,21	governs 11:1
exercise 24:4	48:12	22:5 23:5	51:3 52:1,6,8	grant 5:18 18:9
exercised 58:24	fair 19:14	28:22 33:6,16	57:23 58:1,6	38:25 39:15
exercising 24:6	faith 19:14	35:6 38:15	give 13:22 45:9	granted 5:8,18
exhaust 35:6	Falcon 13:13	39:5 40:1 42:7	49:15	5:19 7:10,14
47:2	familiar 14:22	42:25 44:15	given 3:21	36:1 37:20
exhaustion-of-...	far 22:23 23:2	48:20 49:6,7	gives 42:13,15	51:7
22:7	fast 27:3	54:7	gloss 41:17	great 26:1,9
existing 25:19	favor 10:4 28:14	folks 49:24	go 4:6,25 6:4,25	greater 28:16
25:20	55:9 56:14	following 55:10	7:5 15:16 17:5	grounds 35:8
expediency 4:6	avored 30:3	follows 21:14	17:11,18 19:3	38:4
expedited 26:21	favoring 43:12	foreclose 42:19	21:17 22:4	guess 4:24 8:6
expeditious 48:5	fear 10:14	forecloses 42:17	23:5 24:21	33:7 59:11
expeditiously	February 20:15	forgive 52:5	26:5,16,23	gun 14:17
11:4	Federal 3:23 4:1	former 51:20	27:25 28:2,22	guy 16:4
expeditiousness	7:6 8:21 10:9	forth 8:20 23:18	28:23 31:1,1,5	
26:14	10:10,19 11:2	forum 58:5 59:7	32:24 33:5,15	H
expense 11:15	18:3,5,5,10,18	forward 28:15	33:16,17,18,20	hand 43:24,24
48:6	21:20 31:1	29:19 34:8	33:24 34:2,13	handed 3:11
expert 14:13	35:7 37:7	fraud 20:22	34:13,14,18	20:20
21:22 23:15,18	41:17 43:2	fraudulent	35:13,24 36:7	handling 14:6
26:20 29:10	47:7 55:22	39:21	36:11,11,12	hands 30:11
45:16 46:21	56:22,24	friend 4:9 22:21	37:23 38:1,7	32:5,6
expertise 15:4,7	fee 45:4	58:13	38:15,17,18,23	happen 6:23
26:6,20	Ferrer 1:6 3:4	full 53:4	38:23 40:25	22:15 24:10
expert's 45:17	7:15 11:20	function 57:21	42:14,15 44:15	happened 22:19
explain 28:3	16:1,3 21:11	59:1,4,10,10	47:3,20 53:20	happens 21:24
31:20	48:18 49:20,24	fundamentally	53:23 54:7,9	24:21 30:25
explicitly 19:11	53:1 55:2	44:3	54:10,15,17	57:15
44:17	58:20	further 5:13	58:15	harmonize
express 8:14,16	file 8:1 12:1	21:1 27:25	goes 12:5 23:24	45:10,12
10:24	17:23 37:13	28:2 59:11	36:10 38:14	Hartford 1:17
expressed 9:15	47:21		41:11 42:1,3	head 21:15
exuberance 15:3	filed 11:21 14:7	G	54:8	hear 3:3 9:4
15:12	23:10 51:11	G 1:17 2:5 3:1	going 6:12 7:2	15:15 23:13
F	fill 55:12	21:5	9:15 10:15	heard 4:15 12:9
FAA 18:20	final 16:24	general 11:1	11:15,17 12:11	hearing 6:9
35:23	46:20	generally 45:19	17:23 20:10	14:17 20:15
fact 4:15 8:5	finally 24:5	getting 40:7	24:25 25:1	22:15 23:12
30:21 31:2	find 5:6 25:25	Gilmer 59:6	28:7,15 34:8	46:25 47:12,21
32:7 40:5	25:25 31:11	Ginsburg 6:24	39:15 46:17	48:23 49:10
	42:13	7:8 14:11,19	55:18 58:16	52:20 53:4

59:3,3 hears 4:22 held 42:2 help 55:20 helped 18:1 helpful 11:8 22:2 highly 29:14 Hills 1:15 hogtie 59:8 holding 4:20 Honor 24:19 29:12 43:9 49:22 hope 21:18 House 58:2,10 59:8 hundred 13:22 hypothetical 30:17,20 31:13 32:9	improperly 37:20 incident 13:16 include 21:18 included 8:5 includes 27:8 43:7,7 including 17:2 17:17 inconceivable 44:19,23 inconsistent 32:16 51:17 incorporate 8:23 10:8,21 19:5 41:14 42:10 44:2 incorporated 8:18 9:1,2,5 41:13,16 incorporates 10:21 42:12 incorporating 10:11 incorrect 47:9 independent 11:9 indicate 6:2 individual 53:22 inducement 20:22 indulge 45:8 industry 48:19 inefficient 6:10 informal 48:5 informing 26:10 initial 9:3 41:12 initially 23:10 26:7 49:24 injunction 5:8 5:12,13,15,17 5:20 6:9,16,20 7:12 14:9,17 14:19 20:14 23:4,7,10,13 injunctive 26:5 input 32:14	integrity 23:17 intend 10:2 intended 40:3 intent 3:21 8:16 9:12,13,14 11:3 45:8 intention 9:17 interest 30:6 interesting 19:9 interpret 5:18 42:10 44:20 interpretation 9:20 41:21 interpreted 10:9 interpreting 25:8 54:3 intervene 12:18 14:3 intervention 13:23 invalid 36:2 39:20 invalidate 21:10 invalidating 35:8 invested 25:23 invoke 28:12 57:17 invoking 28:6 58:7 involved 29:4 43:18 47:11 involves 19:24 28:4,8 involving 28:9 28:17,21 46:25 irrational 15:3 15:12 issue 3:14 9:8,16 9:18,19 11:5 12:23 39:24,25 44:6,7 49:21 55:5,23 issued 3:14 issues 26:22 31:4 54:25	<hr/> J <hr/> Jane 13:13 January 1:9 job 13:13 jobs 15:14 Jones 17:13,20 21:16 30:24 JOSEPH 1:15 2:3,8 3:6 52:15 JR 1:17 2:5 21:5 judge 7:15 11:20 15:25 16:3 17:22,25 21:11 21:20,21 31:4 49:24 52:24 53:1 55:2 58:20 judges 30:18,21 30:22 48:2 judgment 16:10 29:4,8 30:5 judicata/collat... 29:20 judicial 18:15 24:4 40:16 jurisdiction 4:21 5:22,23 6:12 8:8 9:4,11 25:24 38:16 54:21 55:4,5 jurisdictional 4:20 jurisprudence 19:24 Justice 3:3,9 4:8 4:24 5:6,25 6:1 6:24 7:8,17,24 8:3,4,12 9:6,18 10:6,17,23 11:6,23 12:5 12:16 13:1,6 14:11,19 15:5 15:16,21 16:8 16:17,22 17:12 18:5,9,17,22 18:24,25 19:8 19:16,21 20:3	20:4,9 21:1,3,7 21:13,24 22:2 22:20,23,24 23:2,6,16,23 23:25 24:9,16 24:17,20 25:9 25:12,16,22 26:9,12,13,18 26:24 27:5,9 27:13,16,18,20 27:21,25 28:4 28:17,20 29:4 29:7,13,18,23 30:9,15 31:10 31:14,18,19 32:9,13,15,19 32:23 33:2,7,9 33:18,22 34:3 34:5,9,12,17 34:21,23,25 35:2,10,15,18 36:3,20,24 37:3,8,14,21 37:25 38:5,9 38:19,21 39:9 39:19 40:6,12 40:13,19,23 41:2,6,9,10,20 41:23,25 42:9 42:24 43:4,5 43:16,22 44:10 44:24 45:14,23 45:24 46:1,4,8 46:15,16,19,23 47:7,8,13,14 47:17,24 48:7 48:9,11,14,15 48:22,24 49:3 49:5,8,11,14 49:18,25 50:2 50:6,16,17,21 50:24 51:1,3,5 51:12,16,23 52:1,6,8,13,18 53:17 55:7,14 56:1,7,12 57:2 57:8,11,14,23
---	---	---	--	--

58:1,6,13 59:12 Justice's 41:12	12:6,10,12,17 12:23 13:1,9 13:20,22,22 14:1,2,4,7,8,12 14:14,21 15:1 15:4,11,13,19 16:2,21 17:7 21:23 22:4,10 22:16,18 23:4 23:5,14,14,18 24:3,6,11,14 25:5,6,7,23,24 26:10 27:11 28:7,25 29:9 31:22,25 32:1 33:5,15,19,22 34:8,13,15,17 34:20 35:12 36:5,16 37:10 38:11,14,16,23 42:14,20,22 43:8 44:16 45:16,20 46:2 46:7,10,11 47:18,25 53:11 54:7 57:16,19 58:8,8,21,25	42:10,11,13 43:1,3,6,10 45:3,19 46:18 46:21 55:23 56:5 laws 8:19 45:12 lawsuit 11:22 17:23 lawsuits 11:15 lawyer 15:9 lawyers 10:13 15:11 learns 25:7 left 4:3 legal 12:14 17:18 47:2 53:5 legality 3:15,20 8:14 20:24 56:8 legislature 13:15,17 let's 9:4 38:5 license 50:16 51:4 52:7 light 50:7 limited 39:24 limits 3:16 litigate 20:6 litigation 11:10 11:18,20 28:9 28:15,17 29:19 29:20 30:1,3,4 30:7,8 32:7 34:24 43:14,16 43:20 54:1 56:25 57:4 little 3:10 6:22 13:4 19:18 47:11 long 5:11,17 24:13 53:9 look 9:10 35:24 42:3 53:20 55:3 looking 38:21 looming 6:20	losing 46:24 lot 8:19 55:8 56:18 lower 38:17	Mine 31:14 minimal 51:18 minutes 52:14 mistaken 36:25 moment 8:17 15:2 Monday 1:9 money 47:1 months 3:12 24:15,17 26:16 47:10 moot 6:19 Morris 52:25 motion 5:1,3 6:7 7:9,11,11,13 13:3,3 22:13 23:9 35:25 36:7,12,19 37:13 38:25 39:15 47:21 51:14 54:15 56:20 motions 7:10 move 15:14 37:6 multiplication 11:18,20 multiplicity 4:4 multi-party 56:25 mystery 39:10
<hr/> K <hr/> Kennedy 5:6,25 6:1 11:6 13:1,6 15:16,21 16:8 16:17,22 22:24 23:2,6,16,23 33:9,18,22 34:3,5,9,12,17 34:21,23 35:1 35:2 37:21,25 38:5,9 46:23 47:7,8,13,14 47:17,24 48:7 48:9,11,15,22 48:24 49:3,5,8 49:11,14,18,25 50:2 51:16,23 56:1,7,12 57:14 kind 6:21 10:11 14:7 kinds 29:2 know 4:16 10:15 12:2,4 14:12 17:12,20,21 18:12 24:13,14 30:16,18,22 32:13 39:9 46:20 48:24 53:10 54:4 56:3 knowledgeable 32:14 known 57:11 knows 15:9 26:4 26:5 58:16	<hr/> L <hr/> labor 4:20,21 5:21,22 6:2,2,8 6:11,13 7:2,5 8:8,10,11 11:21,25 12:2	<hr/> M <hr/> M 1:3 magical 4:17 majority 46:24 making 17:24 17:24 44:18 54:5 man 21:22 manager 12:15 13:12 managers 13:18 mandamus 7:15 Marshall 51:20 Mastrobuono 43:25 matter 1:11 11:18 21:21,25 24:12,20 50:3 54:13,16 59:15 matters 48:19 maximum 19:6 mean 10:18,20 10:23,25 18:9 30:16 40:23 42:11 44:21 49:15 53:25 meaning 5:19 9:21 40:20 means 19:1 20:6 22:16 26:10 44:15 54:14 meant 39:18 53:22 meet 8:24 50:9 meeting 49:23 mention 14:1 mere 4:6 merely 21:11 24:6 26:7 44:5 merits 55:6 mind 19:17 24:22	<hr/> N <hr/> N 2:1,1 3:1 necessary 44:8 need 13:6 23:7 55:16 needs 26:6 negating 44:2 neither 19:2 never 3:24 4:1 5:10 10:7 12:9 12:24 16:5 22:23 23:1,2 34:25 35:1 48:22 49:9 50:16 51:4 52:7 53:2	

<p>new 4:13 22:21 22:22</p> <p>nine 3:12 52:14</p> <p>nodding 21:15</p> <p>Nokia 8:21</p> <p>nonbinding 45:4</p> <p>non-parties 30:8</p> <p>non-party 30:3 30:4</p> <p>Normally 25:16</p> <p>notice 12:22 36:19 56:19</p> <p>novo 4:10,13,15 4:18,23 6:4 15:17,21 17:5 17:6,11 22:15 23:19,25 33:11 33:19 34:19 35:14,17,18 36:16 37:23 44:17 45:21 46:22,25 47:11 47:21 53:13</p> <p>number 55:25 56:23</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1</p> <p>obligation 18:23</p> <p>observation 11:13 55:1</p> <p>obvious 21:14</p> <p>occur 14:9</p> <p>offer 40:10 52:22</p> <p>offered 52:23</p> <p>officer 13:9 59:3</p> <p>officio 46:9,14</p> <p>oh 23:21 47:9</p> <p>okay 20:3 27:20 46:10</p> <p>once 7:1,5 23:5 26:14 34:22 36:22,22 37:4</p> <p>ones 55:17</p> <p>operating 25:12 50:22</p>	<p>opinion 21:21 55:9</p> <p>opponent 29:11 36:9 37:16,18 50:13 55:11</p> <p>opportunity 6:6 12:22</p> <p>option 10:5 47:3</p> <p>Options 8:24 10:1 39:5 40:1 42:7</p> <p>oral 1:11 2:2 3:6 21:5</p> <p>order 5:6,7,10 5:13 15:18,22 15:23 16:12 37:16</p> <p>outcome 29:25 54:18</p> <p>overrule 53:16</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1</p> <p>page 2:2 38:24 47:15 48:4,16 50:7 52:23</p> <p>Paint 20:18,22</p> <p>papers 58:20</p> <p>paragraph 55:10</p> <p>parallel 6:10 7:2 7:21 8:1 54:5</p> <p>part 24:8 37:24</p> <p>particular 9:16 15:6</p> <p>particularly 11:8 36:4</p> <p>parties 3:22 4:14 9:12,13 9:14 11:4,9,10 11:14 16:10 18:19 26:1,22 28:11 29:7 30:7,10,12 31:8,16 32:8 32:17 35:13 36:14 39:1,3,6</p>	<p>39:13,16 40:3 40:24 41:13 43:1,2 44:17 45:17 46:11 47:19 54:1 55:24 57:1,4</p> <p>party 19:25 22:11 28:5,5,6 28:9,9,21,24 30:6 43:17 44:14 46:25</p> <p>party's 30:5</p> <p>peace 13:9</p> <p>peculiar 42:13</p> <p>pending 7:10 40:15 54:18</p> <p>penumbra 14:3</p> <p>people 15:15 26:2 29:17 54:6</p> <p>perform 59:9</p> <p>performance 8:2</p> <p>permanent 5:24</p> <p>permissible 44:25</p> <p>Perry 43:25</p> <p>person 15:23 25:9,11 28:18</p> <p>personal 12:14</p> <p>personally 12:20</p> <p>person's 32:14</p> <p>persuasive 20:19</p> <p>petition 11:21</p> <p>Petitioner 1:4 1:16 2:4,9 3:7 52:16</p> <p>petitions 26:1</p> <p>phone 58:21</p> <p>phrased 39:12</p> <p>piece 28:21</p> <p>place 34:7 54:1</p> <p>please 3:9 21:8</p> <p>point 6:2,15 10:4 12:25</p>	<p>13:11 22:12,14 23:3 38:22 48:21 58:23,23</p> <p>pointed 58:19</p> <p>points 27:2 54:11</p> <p>position 16:13 17:1,9,10 22:20,24 23:1 23:17 33:10 34:24 35:2,4 50:12 51:6 55:15 56:3,15</p> <p>positive 18:17</p> <p>possible 30:12</p> <p>postpones 21:11 26:8</p> <p>postponing 28:14 32:4 44:6,12</p> <p>power 13:10,20 14:25 24:5,7 58:11,14</p> <p>powers 13:21,23 57:16</p> <p>practitioner 56:18</p> <p>precedent 27:12</p> <p>preclusive 30:1</p> <p>preempt 44:9</p> <p>preempted 10:22 38:16 44:8</p> <p>preemption 27:19</p> <p>preemptive 16:14</p> <p>preempts 10:10</p> <p>preliminary 5:8 23:4 49:10</p> <p>presented 55:23</p> <p>preserve 23:17</p> <p>preserving 47:3</p> <p>Preston 1:3 3:4 21:10 25:15 48:17 49:23 50:8,16,18</p>	<p>52:3,6</p> <p>Preston's 52:21</p> <p>pretty 15:13 53:18</p> <p>prevail 37:22</p> <p>prevails 16:18 16:20,22</p> <p>prevent 24:11</p> <p>previously 45:1</p> <p>pre-approval 25:4</p> <p>pre-dispute 19:24</p> <p>Prima 20:18,22</p> <p>privately 11:4</p> <p>probably 14:4 26:24 57:20</p> <p>problem 11:24 12:20 30:17 34:6</p> <p>procedural 26:15 42:14,15 44:6,7</p> <p>procedure 22:3 23:19 43:11 56:21</p> <p>procedures 29:2 42:22 48:4</p> <p>proceed 7:1,16 14:14 16:11,11 16:25 18:16 36:13</p> <p>proceeding 7:2 7:22 8:1 11:17 14:7 22:16,19 24:1 30:6,12 33:13 35:12,25 36:16 41:3 43:13 54:18 57:24 58:9</p> <p>proceedings 6:10 13:2 18:16 45:9,10 49:9</p> <p>process 4:17 37:12</p> <p>procure 25:1,12</p>
---	---	--	---	--

25:14 48:18 49:20 50:1 procured 52:25 procuring 13:12 program 52:24 promise 17:16 19:11 54:14 promised 40:24 54:17 proof 52:22 proper 41:6 43:23 properly 9:10 proposing 6:21 prosecutorial 57:21 58:11,18 58:24 59:10 protest 14:24 prove 52:23 53:1 provides 19:6 providing 58:4 provision 8:6 9:21 17:15 32:24 33:11 35:9 44:18 46:5 provisions 7:22 10:8,25 45:3 55:25 56:24 published 20:15 purpose 23:8 pursuant 7:20 put 48:25 putting 58:20 puzzle 54:12 p.m 59:14	qualify 51:3 question 8:1,4 9:7,20 10:5 21:13,14,19 22:2,25 23:25 27:21 33:8,18 34:6 38:20 40:3,20 41:12 41:20 51:5 54:3 56:11 questioning 48:25 questions 21:2 59:11 quiet 56:3,4,7 quite 3:19 31:11 58:8	reflexively 10:14 Regardless 53:17 regulated 12:15 regulatory 24:8 rehearing 17:8 rejected 9:25 related 29:19 43:14,16 53:25 relied 20:17 relief 16:3,6 26:5 remaining 52:14 remand 36:23 remanded 10:1 remanding 10:5 remedies 35:6 remedy 47:2 remember 7:10 removing 13:19 render 15:1 repealing 13:16 repeated 51:18 repeatedly 48:17 49:20 represented 52:9 request 58:23 requested 5:17 5:19,20 require 48:3,9 48:16 49:1 51:19 required 14:12 38:25 58:15 requirement 47:2 requirements 50:10 requires 12:22 33:5 res 29:20 reserve 21:2 resisting 44:14 resolution 26:22 40:16 41:7	resolved 24:12 53:8 respect 44:7 45:12,13 47:16 responded 13:15 Respondent 1:18 2:6 4:17 6:1,15 16:18 16:20,22 21:6 Respondent's 7:11 17:10 56:3,15 responding 27:23 responses 8:13 result 4:4 30:2 retaining 6:12 review 6:4 15:17 15:22 23:19 33:11 34:19 35:14 37:23 44:17 45:21 46:22 ridiculous 45:18 right 6:25 12:14 19:16 22:11 24:22 27:22 32:22 33:20,24 35:13,17,18,24 36:3 37:1,3,6 38:5 40:13 42:14,15 45:11 46:8,25 47:20 47:25 48:15 57:17 road 26:15 Roberts 3:3 4:8 4:24 10:6,17 11:23 12:5,16 15:5 21:3 25:16,22 36:3 37:14 38:20 48:14 52:13 58:13 59:12 rolling 27:2 room 44:21 59:3	rule 8:22 32:4 43:13 44:2,6 44:12 55:4 ruled 51:8,10 rules 6:14 7:20 8:23 19:5 22:13 38:15 39:11 48:19 49:5 53:12,15 ruling 23:12 37:11 run 19:18 20:1 21:17,19,22 running 19:12
<hr/> Q <hr/> Qualcomm 8:21 54:22,24 qualification 48:3,10,16 49:1 50:4,5 qualifications 51:19 qualified 47:15	<hr/> R <hr/> R 3:1 raise 27:15,19 27:21 41:7 48:19 read 20:21,24 31:10 40:11 52:1 reading 13:23 really 3:24 14:1 18:1 54:14 55:16 reason 11:19 36:2 43:4 54:22 58:15 reasons 24:2,24 24:24 26:19 29:3 42:24 REBUTTAL 2:7 52:15 reconciled 45:1 reconsideration 6:7 reconsidered 23:12 record 5:7 49:2 49:3,13 51:24 referred 15:12 refined 26:22	<hr/> S <hr/> S 2:1 3:1 satisfied 42:7 47:19 saw 5:10 53:9 saying 8:15 9:3 37:1 53:19 54:6 55:14,17 58:22 59:8 says 4:9,22 5:7 6:17 7:3,6,19 9:2 12:6,9,16 17:16,20 18:6 18:20 22:21 24:25 25:13 29:11 32:24 35:11 39:10,11 39:12 41:4,19 43:13 44:13,16 54:6,10 55:11 56:7 58:14 Scalia 7:17,24 10:23 18:17,22 18:25 20:4 22:20,23 24:9 24:16,17,20 25:9,12 29:4,7 29:13,18 32:9 32:13,15,19,23 33:2 36:20,24 37:3,8 42:9,24 43:4,5 45:14		

45:23,24 46:1 46:4,8,15,16 46:19 50:24 51:2 57:2,8,11 Scalia's 8:4 scheme 24:8 27:11 44:22 46:16 Schleimer 1:15 2:3,8 3:5,6,8 4:12 5:3,15 6:5 7:8,24 8:12 9:9 9:24 10:13,20 11:2,12 12:2,8 12:19 13:4,8 14:16,24 15:8 15:19,25 16:13 16:20 17:1 18:3,8,14,22 19:4,13,19,23 20:12 52:13,15 52:17 54:20 55:13,21 56:6 56:16 57:6,9 57:19,25 58:3 58:10,19 scope 39:23,24 scratch 17:8 se 10:4 second 8:17 33:17 43:4 45:5 section 4:20 18:14 35:7,22 35:23 37:5 43:11 45:10 50:10,22 56:19 56:22 sections 13:22 see 19:21 28:12 36:9 55:8,15 56:20 59:6,7 seek 14:8 selected 43:1,2 43:10 send 16:1 sense 6:6,21	7:23 14:16 15:2 28:20 34:3 55:8,15 service 3:12 15:10 set 8:20 18:20 24:22,24 settlement 26:21 show 13:13 side 4:9 27:15 34:1,1 49:17 55:8 sides 4:14 silent 55:22,22 56:10,24 silly 33:23 34:18 simply 4:10 6:16 12:22 17:7 28:13 39:19 44:11 Sinnamon 24:1 situation 14:6 20:23 59:6 skepticism 51:22 slice 42:20 smarter 45:20 46:9,14 Smith 17:13 21:16 30:24 solicited 52:24 soliciting 13:12 somebody 55:18 58:6 sorry 13:7 36:25 52:5 sort 13:25 sought 16:3,7 48:17 49:20 sounds 27:16 Souter 8:3,12 9:6 26:9,12,13 26:18,24 27:5 27:9,13,25 Souter's 27:21 speaking 56:17 speaks 56:10	specific 8:2 10:25 43:10 specifically 3:19 16:2 18:12 35:15 43:1 sponte 57:17 stages 49:10 standard 8:24 31:15 42:7 53:6 standing 4:3 Stanford 43:18 43:19 start 26:14 started 40:21 starts 34:20 state 4:4 5:16 10:15 18:20 23:18,19 55:23 56:5 statement 47:9 47:15 48:4 50:19 statements 49:12,15 51:19 51:25 states 1:1,12 3:19 4:1 5:15 State-court 21:20 29:3,19 State-law 29:3 statute 4:19,22 12:21 13:14,16 13:19 25:13 44:16,20 50:14 statutes 4:5 13:21,24 14:4 45:11 stay 6:13 18:15 23:11 33:12 34:4 35:5 37:24 40:14,15 43:15 53:24 54:8,15,17 stayed 5:11 38:10,12,12 staying 40:15	step 36:4,18 Stevens 22:9 51:5,12 stop 7:1,12 stops 18:1,13,18 58:20 strong 53:19,19 struck 10:11 stuck 7:4 stupider 46:1 Styne 22:8 sua 57:17 subject 40:17 46:22 submit 25:3 56:7 submitted 59:13 59:15 subsequent 30:11 substantive 42:11 substituting 31:22,23 successful 37:15 suck 32:23 suing 43:19 superior 4:16,22 5:9 6:4 11:21 15:16,17 16:1 16:9,15,18,23 17:5,11,23 20:13 21:20 22:12 23:20,21 30:18,21 31:1 31:4,23 32:24 33:11,20,24 34:2,13,18 35:5,14,19 36:7,10 37:2,5 37:15,23 38:13 38:24 39:14 42:15,18,23 43:7 44:18 45:20,21 46:9 46:14 47:3,18 47:20 53:13,23	supervisory 58:17 supplied 55:23 supply 59:2 support 40:11 suppose 4:25 33:22 57:14 supposed 22:3,4 25:3,5,7 29:1 59:4 Supreme 1:1,12 22:8 35:21 41:18 45:1,7 45:14 46:17 53:14 sure 12:19 20:5 51:6 56:12 suspiciously 17:15 sweeping 11:7 synonymous 32:2 system 23:18 24:10,22,25 27:3 45:15
<hr/> T <hr/>				
T 2:1,1 take 8:9 14:3,19 22:11,20,24 24:13 36:18 37:1,10 40:14 53:18 58:17 taken 17:1 34:23 35:2 talent 12:9,15 14:22 15:9,23 15:24 16:5 21:9,22 22:6,9 25:1,3,9,11,14 26:3 31:24 50:8,12,14,19 50:22,23 52:3 52:11 53:7 talk 57:15 talked 15:3 talking 56:9				

teach 20:4,7	throw 18:11	unusual 6:23	waiting 34:12	9:20 12:3,12
tear 18:10	tie 30:11	<hr/>	waive 9:23	29:9 33:23
television 48:18	tied 32:5,6	V	waiving 9:19	36:11
52:24	time 13:15 20:12	v 1:5 3:4,12 8:21	want 6:22 9:22	write 55:10,15
tell 51:22	21:2 47:1,11	vacates 5:25	10:2 18:12	55:18 57:14
telling 37:21	48:20 49:6,7	valid 24:23 29:2	19:22 24:9	writing 55:9
term 5:12	51:18	38:1,6,18 39:1	26:15,16 27:1	57:11
terms 11:16	tomorrow 17:23	39:4,13,17,22	31:2,6 33:9	written 11:7
13:20	tools 13:25	validity 3:15,19	51:6 53:2	56:13,16
tested 38:3	touchstone 25:2	8:14 38:2 42:4	54:10 55:4	wrong 29:24
Thank 3:8 21:3	trek 53:9	47:4 56:8	wanted 12:12	34:19 45:18
52:17 59:12	tried 19:18	value 26:11	14:2,9	46:11 55:12
Theater 54:23	true 11:19 17:6	versus 21:16	wants 6:18 31:2	Wyman 13:13
theory 25:18,20	28:19 30:9	22:8 57:21	36:6	<hr/>
thin 42:21	51:25	view 51:22	war 44:3	X
thing 13:25	trying 41:12	vigorously	Washington 1:8	<hr/>
32:20 41:19	TV 13:13	50:25	wasn't 20:19	Y
things 14:10	two 3:10 4:1	violating 26:2	30:6 52:19	<hr/>
25:23 37:10	7:10 8:13	virtually 26:11	53:5	years 3:10 12:9
58:15	28:11 41:2	void 16:4 53:12	way 6:17 11:11	13:11 14:6
think 4:18 6:19	42:24 43:18,19	53:15	30:17 32:6	15:8
7:8,14 9:16,25	43:20 45:2	Volt 9:9,12,24	35:3,11 39:12	<hr/>
10:13 11:8,10	53:1	11:6,11,13,17	39:24 46:13	0
12:13,21 14:3	types 25:17	27:7,14,24	49:8 57:3,7,15	<hr/>
14:5 15:3 16:8	<hr/>	28:3,4,8,12,13	welcome 12:13	06-1463 1:5 3:4
16:18,23 17:22	U	29:18 40:10,13	went 29:19	<hr/>
18:14 19:4,9	undermine	41:15 42:2	49:23	1
19:13,19,23	19:12	43:3,9,24 44:6	we'll 3:3 6:16	<hr/>
20:1 22:1	understand	53:21,21 54:2	18:25 19:1	10 36:5
23:24 29:24	31:13 33:9	54:11,13 55:11	we're 9:15 59:8	11:06 1:13 3:2
30:18 33:2,24	40:9 42:9,20	55:13,19,21	wholesale 8:18	12 26:16 48:17
34:5,6 40:8	43:6 51:6	56:12,13,13,16	William 52:25	12:06 59:14
42:2 43:23	53:18	56:19 57:2,9	wind 10:15	1281 35:22 37:5
44:19 47:3,14	understood 10:7	voluntarily	15:14	43:11 45:10
49:11,16,18	undisputed	36:15	wind 10:15	56:21
50:2 51:23	49:17,22 50:8	<hr/>	15:14	1281.2 56:21
52:20 54:19,20	50:15,18 51:3	W	window 18:11	13 38:24
57:2,6,19,20	52:2,6	Waffle 58:10	wish 52:11	14 1:9
58:19	undoubtedly	59:8	withdrawn 6:16	1700 50:10
thinks 14:20	14:25	wage 13:24	won 36:10	1700.44 4:20 5:5
30:22 45:17	United 1:1,12	15:15	word 5:18	1700.45 12:8
46:11	unlicensed 50:8	wages 14:10	words 7:3 17:6	<hr/>
third 28:4,8,9,24	50:19,21 52:3	Waisbren 22:17	31:22,23,24	2
29:7	unmistakably	wait 12:17 14:13	55:19	<hr/>
thought 7:17	39:6 40:2	14:25 29:16	work 22:3 47:19	2 35:7,23 56:22
20:9 31:20	unrelated 53:24	36:9 40:6 43:5	works 12:21	20 12:9 14:5
36:21 50:11,12	53:25	43:5	26:3 35:11	2005 20:14
			worse 46:6	2006 8:21 20:16
			wouldn't 4:8	2008 1:9
				21 2:6
				219 52:23

<hr/> 3 <hr/> 3 2:4 18:14 30 12:17 32 15:8 45:2 34 47:15 48:4				
<hr/> 4 <hr/> 4th 45:2 43 50:7				
<hr/> 5 <hr/> 52 2:9				
<hr/> 8 <hr/> 8 26:16				
<hr/> 9 <hr/> 974 45:2				