1   IN THE SUPREME COURT OF THE UNITED STATES

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3   HALL STREET ASSOCIATES,   :

4   L.L.C.,   :

5   Petitioner   :

6   v.   : No. 06-989

7   MATTEL, INC.   :

8   - - - - - - - - - - - - - - - - - - x

9   Washington, D.C.

10   Wednesday, November 7, 2007

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12   The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 10:05 a.m.

15 APPEARANCES:

16 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on

17   behalf of the Petitioner.

18 BETH S. BRINKMANN, ESQ., Washington, D.C.; on

19   behalf of the Respondent.

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1   C O N T E N T S

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

2   (10:05 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   first today in Case 06-989, Hall Street Associates v.

5   Mattel, Inc.

6   Mr. Phillips.

7   ORAL ARGUMENT OF CARTER G. PHILLIPS

8   ON BEHALF OF THE PETITIONER

9   MR. PHILLIPS: Thank you, Mr. Chief Justice,

10   and may it please the Court:

11   In this case two very sophisticated parties

12   agreed to arbitrate an ongoing dispute that was pending

13   in litigation before the United States District Court

14   for the District of Oregon. Their agreement states

15   plainly that after an arbitration award is issued the

16   district court -- and this is at Pet. App. 16a -- "shall

17   vacate, modify, or correct any award where the

18   arbitrator's conclusions of law are erroneous."

19   Ultimately what this Court must decide is whether there

20   is anything in either the Federal Arbitration Act or any

21   other Federal law that renders this non-adhesive,

22   unambiguous contract agreement unenforceable.

23   JUSTICE GINSBURG: Mr. Phillips, would you

24   say the same thing if the agreement provided for de novo

25   review in the district court?

1   MR. PHILLIPS: I would be more concerned

2   about identifying a standard of review for the district

3   court than identifying a standard for modifying the

4   arbitration award pursuant to the agreement. So I think

5   that's a different issue. I think that's closer to

6   dealing with a judicial function than this is, which is

7   simply implementing the intent of the parties as to what

8   the standards ought to be for enforcing a judicial award.

9   JUSTICE GINSBURG: But that would be -- I am

10   assuming that the parties wrote that standard into their

11   contract, so to the extent you're relying on party

12   autonomy, why couldn't the parties elect whatever

13   standard of review they wish?

14   MR. PHILLIPS: Justice Ginsburg, I recognize

15   that there is a limit to party autonomy. I think there

16   ought to be a very strong preference for party autonomy,

17   and I'm not saying that if I were here and I had an

18   agreement by which de novo review is the standard I

19   wouldn't defend that autonomy. All I'm saying is that I

20   recognize that there are limitations on autonomy that

21   recognize the functions of the judiciary. But that

22   limitation isn't remotely implicated in this particular

23   case.

24   JUSTICE KENNEDY: Well, it's -- what are

25   the functions are judicial -- what about an agreement,

1   arbitration agreement, that the district court can find

2   facts de novo?

3   MR. PHILLIPS: That one I think worries me

4   less because it doesn't -- it doesn't suggest -- I mean

5   it just says that we will leave to the district --to the

6   district court the findings, and essentially renders the

7   arbitration agreement --

8   JUSTICE KENNEDY: Well, suppose it's a

9   complex matter of monitoring emissions, looking at water

10   quality, and the arbitrator has to sit by the river for

11   a month, the district judge had to go down and sit by

12   the river for a month.

13   MR. PHILLIPS: But again, the parties under

14   those circumstances it seems to me are perfectly free to

15   decide whether they want those issues to be decided

16   conclusively by the arbitrator or to have them

17   adjudicated at the end of the day by the Federal court.

18   And so, if they choose to go through the arbitral

19   process, and then still say nevertheless that's

20   nonbinding and that the district court's free to

21   evaluate that on a de novo record, that it seems to me

22   doesn't in fact implicate the judicial function in quite

23   the same way that the standard of review does.

24   JUSTICE SCALIA: Indeed, are there not such

25   things as nonbinding arbitrations?

1   MR. PHILLIPS: Precisely, Justice Scalia.

2   JUSTICE SCALIA: Which in effect say that

3   when we're done the district court will do it as an

4   original matter.

5   MR. PHILLIPS: Right. And in that context

6   you're not raising the same problem that you're

7   referring to, Justice Ginsburg, because you're not

8   saying anything about the standard of review. You're

9   just simply saying that the court ought to decide the

10   legal issue.

11   Now, I do think that when the parties agree

12   that it's a question of law that the question of law is

13   for the district court to decide. My assumption is that

14   the district court in fact will use de novo review, but

15   the parties are not dictating that. That's a matter

16   that's left -- I'm sorry.

17   JUSTICE ALITO: Doesn't the arbitration

18   agreement in this case set out a standard of review and

19   say on findings of fact they have to be supported by

20   substantial evidence?

21   MR. PHILLIPS: They do, but that issue --

22   that standard of review is not at issue in this

23   particular case. The only question here is whether or

24   not there has been an error of law committed, and

25   obviously the district court found that there was a

1   clear error of law committed. Indeed, the dissenting

2   judge below said it was an irrational decision on the

3   law.

4   CHIEF JUSTICE ROBERTS: Mr. Phillips --

5   JUSTICE GINSBURG: But they were both --

6   they were both in this agreement, both the substantial

7   evidence rule and the standard of review of legal error.

8   So are you saying that you -- we don't have to deal with

9   that question or you're not going to defend it, because

10 the standard was dual. Am I not right about what they

11 --

12   MR. PHILLIPS: No. There are, there are

13 clearly two different standards that are set out in the

14 arbitration agreement and one of them is substantial

15 evidence. But when the matter went from the arbitrator

16 to the district court there was no issue presented by

17 Hall Street on the question of substantial evidence. We

18 didn't challenge any of the factual findings by the --

19 by the arbitrator, and therefore that issue is not

20 presented. I'm not saying I wouldn't defend it. All

21 I'm saying is I don't have to defend it in this

22 particular case because the only issue here is whether

23 there has been an error of law.

24   JUSTICE KENNEDY: But you have to give us a

25 standard. You said, you mentioned, oh, functions of the

1 district court. I don't know the standard you're

2 proposing that will allow us to draw the line and to put

3 cases on one side of the line or the other. You said,

4 well, you can't interfere with the functions of the

5 court. I don't quite understand that.

6   MR. PHILLIPS: Well, the problem there --

7 and again, I think this is largely a fanciful concern

8 because I don't think serious parties who are engaged in

9 arbitration agreements are likely to come up with

10 standards that are completely alien to the judicial

11 process, and indeed there's no empirical evidence to

12 support that. Certainly Respondent didn't cite anything

13 and their amici didn't cite anything like that.

14   But to be sure, Judge Kozinski in his

15 concurring opinion in the original panel decision in

16 Kyocera said he would have a very different reaction to

17 this case if we were talking about the district court

18 either flipping a coin or looking at the entrails of

19 dead birds as the basis for decision. And our basic

20 point is we're not embracing that extreme approach. I

21 mean, we recognize party autonomy as a significant part

22 of what section 2 of the Arbitration Act is all about

23 and we think that ought to drive the analysis of this

24 Court significantly, particularly in how you interpret

25 section 9.

1   CHIEF JUSTICE ROBERTS: Mr. Phillips, why do

2   you care? If this is not enforceable under the Federal

3   Arbitration Act, which gives you kind of a shortcut --

4   the district court must confirm it if certain criteria

5   are met -- I assume you have a normally enforceable

6   contract that the district court can enforce just like

7   it enforces any other contract.

8   MR. PHILLIPS: That's absolutely true,

9   particularly in this context, Mr. Chief Justice, because

10   here we have a situation where we were before the

11   district court, this arrangement came out of the

12   mediation process, the district court reviewed it,

13   blessed it, sent it to the arbitrator --

14   CHIEF JUSTICE ROBERTS: So you should lose.

15   MR. PHILLIPS: -- and it came right back.

16   CHIEF JUSTICE ROBERTS: So you should lose.

17   MR. PHILLIPS: No, no, I should win.

18   CHIEF JUSTICE ROBERTS: No. We should

19   conclude that you don't fall within the Federal

20   Arbitration Act and it's not a big deal because you can

21   bring -- you can have the contract enforced. The

22   district court as far as I can tell wants to enforce

23   this agreement, presumably will enforce it as a

24   contract. So you don't need the Federal Arbitration

25   Act, so why should we fly in the face of its plain

1 language to accommodate your interests?

2   MR. PHILLIPS: Because the problem here is

3 not what happens in the instance if, section 9 not

4 applying, that we're suddenly -- we go back to square

5 one and start over. That might be true in a different

6 case, but in this particular case we started in Federal

7 district court. We brought this action as a -- as a

8 contract action.

9   CHIEF JUSTICE ROBERTS: Is there a basis --

10 well, the Federal Arbitration Act doesn't provide

11 jurisdiction anyway. So I assume you have a basis for

12 being in Federal court --

13   MR. PHILLIPS: Diversity, Your Honor.

14   CHIEF JUSTICE ROBERTS: -- in the first

15 place. So you're just enforcing a contract in diversity

16 in Federal court.

17   MR. PHILLIPS: Right, and that's exactly

18 what we would ask this Court to be doing here.

19   CHIEF JUSTICE ROBERTS: No, you're asking us

20 to bring it under the Federal Arbitration Act and say

21 that the district court must confirm it despite the fact

22 that you've changed the standards under section 9 through

23 11.

24   MR. PHILLIPS: No, Mr. Chief Justice, you've

25 flipped it around. Remember, we lost in the

1 arbitration. We won in the district court. The

2 district court was prepared to enforce the agreement.

3   CHIEF JUSTICE ROBERTS: Right.

4   MR. PHILLIPS: Both the underlying lease

5 agreement and the arbitration agreement. It was the

6 court of appeals that said no, you can't do that, you

7 can't enter a final judgment in this case, and the

8 reason is --

9   CHIEF JUSTICE ROBERTS: But my point --

10   MR. PHILLIPS: -- because of the Federal

11 Arbitration Act.

12   CHIEF JUSTICE ROBERTS: My point is that if

13 you have an ordinary contract action the district court

14 will, because your contract provides a particular

15 standard of review, enforce that. Right?

16   MR. PHILLIPS: Right. No, that's absolutely

17 true. But that's exactly what we're asking you to do

18 here.

19   JUSTICE BREYER: On that point -- the reason

20 I think you're -- there's a little chaos here is because

21 you said -- your question is phrased, does the FAA

22 preclude enforcement of your arbitration agreement? And

23 you're going to say: We answer that question, no, it

24 doesn't preclude it.

25   MR. PHILLIPS: Right.

1   JUSTICE BREYER: It doesn't require it; it

2   doesn't preclude it.

3   But then would we have to go back and say

4   what is the source? There has to be some source of law

5   that authorizes this contractual agreement, and there

6   could be two possible sources. And my question here is,

7   is it clear that in fact either of these two sources

8   does?

9   The first source is State law. I gather the

10   difficulty is that the State of Oregon has an act just

11   like the Federal Arbitration Act, so we'd have to ask

12   the Oregon courts: Is this a legitimate contract under

13   Oregon State law?

14   The alternative source of law is the Federal

15   judge's case management authority. And there we have a

16   statute which clearly gives the judge some kind of

17   authority, but not for your case because your case

18   exceeds the jurisdictional amount. Therefore, in the

19   absence of that statute, is there inherent authority in

20   the district judge?

21   Now, I don't know the answer to either of

22   those questions.

23   MR. PHILLIPS: I --

24   JUSTICE BREYER: My temptation is to say

25   they're open questions and they'd have to be argued on

1 remand, which makes this case the case of the century, I

2 guess, in a certain respect. It's quite a difficult

3 case.

4   MR. PHILLIPS: I was just looking for the

5 case of the day, Your Honor, actually.

6   (Laughter.)

7   JUSTICE BREYER: All right. Well, in a

8 certain area. I overstate.

9   But the -- is there any light you can shed

10 on those two questions, or is there some third possible

11 source of law?

12   MR. PHILLIPS: Well, we know that -- I think

13 the answer to that is that section 2 of the Federal

14 Arbitration Act, which this Court has recognized

15 repeatedly has a very strong preference for enforcing

16 the agreement of the parties, is a part of the answer to

17 that. And you couple that with the fact that Justice

18 Story, back as early as 1814, said that as a matter of

19 common law that the notion of restricted arbitration is

20 a matter completely left to the parties.

21   So I think that there are general common law

22 standards. Now, you know, could Oregon law have gone

23 the other way on that? Maybe. I think it would be an

24 interesting preemption question. But the Respondent has

25 never argued that this is unenforceable as a matter of

1   Oregon law. So I don't think that issue is in this

2   case.

3   As a matter of case management, if the Court

4   wants to defer to anything then it ought to defer to the

5   district court's own assessment that this agreement

6   should be utterly enforceable, that --

7   JUSTICE BREYER: Have you ever argued that

8   this is a matter governed by Oregon law and it is

9   enforceable?

10   MR. PHILLIPS: Right. They never --

11   JUSTICE BREYER: Have you argued that?

12   MR. PHILLIPS: That it is enforceable?

13   JUSTICE BREYER: Yes, under Oregon law.

14 Have you ever argued Oregon law?

15   MR. PHILLIPS: No, we've never argued --

16   JUSTICE BREYER: No?

17   MR. PHILLIPS: -- Oregon law.

18   JUSTICE BREYER: Well, then it's not

19 surprising they haven't argued that Oregon law doesn't

20 apply.

21   MR. PHILLIPS: No, no, they have --

22   CHIEF JUSTICE ROBERTS: Well, they have; they

23   have in fact. On page 43 of their brief, they say that

24 if you prevail the parties would be left to a State law

25 contract action to determine the enforceability of the

1 award.

2   MR. PHILLIPS: Right, but the State law

3 contract action that they're talking about is precisely

4 the State law contract action we brought in this case

5 before the Federal district court under diversity

6 jurisdiction. And at the end of the day what we're

7 asking for is for the Court to enforce --

8   CHIEF JUSTICE ROBERTS: No, no. I --

9   MR. PHILLIPS: -- the district judge's

10 determination --

11   CHIEF JUSTICE ROBERTS: No. Their citation

12 is to an arbitration treatise. The contract they're

13 referring to is the contract to arbitrate. And, unless

14 I'm mistaken, what you want is for the district court to

15 be able to enforce your agreement under the Federal

16 Arbitration Act. Right?

17   MR. PHILLIPS: Because it falls squarely

18 within the Federal Arbitration Act.

19   CHIEF JUSTICE ROBERTS: Well, it doesn't

20 fall squarely within it because the Federal Arbitration

21 Act sets different standards of review. And all I'm

22 saying is I don't see what the big deal is because you

23 -- okay, don't use the Federal Arbitration Act, which

24 gives you kind of an express remedy the district court

25 must confirm. Use normal contract law and say to the

1   district court: Well, you don't have the Federal

2   Arbitration Act, you don't have to confirm it as a

3   judgment, but we have a contract, it's perfectly valid,

4   it sets a different standard of review, you should

5   enforce it.

6   MR. PHILLIPS: Right. But I think the

7   answer to that is that if Congress had a choice as

8   between those alternatives, Congress clearly in section

9   9 made it absolutely indisputable that there's a simple

10   way to enforce it, but it didn't suggest the

11   alternative, which is that you relegate it to some kind

12   of State law, completely complicated process to try and

13   get this arbitration award enforced under those

14   circumstances.

15   JUSTICE SCALIA: Excuse me. I'm just not

16   following this discussion. Does it assume that you can

17   bring an action on the contract and just bypass the

18   provision of the contract which says there will be

19   arbitration? How can you do that? You -- you don't

20   assert you can do that?

21   MR. PHILLIPS: No, we clearly can't do that.

22   JUSTICE SCALIA: You clearly can't do that.

23   MR. PHILLIPS: Right.

24   JUSTICE SCALIA: So somebody has to decide

25   on this arbitration provision.

1   MR. PHILLIPS: Right. And I think the

2   Court, this Court is the court that's got to decide that

3   at this point. I mean, I think that's part of the

4   question presented.

5   CHIEF JUSTICE ROBERTS: The arbitration

6   provision, the arbitration agreement is just a contract.

7   Right?

8   MR. PHILLIPS: To be sure.

9   CHIEF JUSTICE ROBERTS: Well, then I don't

10   understand why it's not enforceable as a contract.

11   MR. PHILLIPS: I don't think we disagree on

12   that, Mr. Chief Justice. I think the -- I think that's

13   enforceable.

14   CHIEF JUSTICE ROBERTS: Well, if it's

15   enforceable -- I'm obviously missing something here. If

16   it's enforceable as a contract, what is the great

17   benefit you get out of prevailing and saying this should

18   be enforced under the Federal Arbitration Act?

19   MR. PHILLIPS: Well, the benefit is the

20   efficiency that the Federal Arbitration Act is trying to

21   promote. I mean, to be sure, there -- there could

22   potentially be any number of routes you might want to

23   identify. The clearest one is where the parties don't

24   care about what happens on the back end, where they say,

25   once you get your -- you have your -- you get your

1   arbitration award and then you go off and you do section

2   9 and we don't have any agreement on that. And that one

3   is easy, and that's the most efficient.

4   Then the question is what do you do in a

5   situation where the parties don't agree with that, where

6   they want the district court to review it.

7   CHIEF JUSTICE ROBERTS: What do you do if

8   you have a contract, an arbitration agreement that's not

9   covered by section 2, it's not concerning a maritime

10   transaction or involving commerce?

11   MR. PHILLIPS: Those are regulated by State

12   law.

13   CHIEF JUSTICE ROBERTS: Okay.

14   MR. PHILLIPS: Purely by State law. But

15   this is the contract that falls within section 2, Mr.

16   Chief Justice.

17   JUSTICE SCALIA: But this -- but this one

18   isn't, and if we say that you lose under the Federal

19   Arbitration Act, is it open to the State court to say,

20   well, that's what the Federal Arbitration Act says, but

21   we handle arbitration differently?

22   MR. PHILLIPS: Well, that's sort of the core

23   question I think that sort of comes out of Southland

24   and the subsequent cases.

25   JUSTICE SCALIA: I think if you lose on the

1   arbitration here, you've got to lose on the arbitration

2   before State court.

3   MR. PHILLIPS: I mean, I think that's what

4   Southland --

5   JUSTICE SCALIA: I mean you don't have to

6   admit that. That's --

7   MR. PHILLIPS: That's the logic of

8   Southland, Your Honor.

9   CHIEF JUSTICE ROBERTS: Why in the -- why is

10   that the case? I mean, this doesn't purport to occupy

11   the field of arbitration and to preempt State law. It

12   provides that a very direct order -- the district court

13   must confirm the arbitration award as a judgment --

14   MR. PHILLIPS: Right.

15   CHIEF JUSTICE ROBERTS: -- if you fall

16   within the criteria. And all I'm saying is they'll say,

17   okay, I don't have to confirm it as a judgment.

18   MR. PHILLIPS: But I think the answer to the

19   conundrum you've raised, Mr. Chief Justice, is that if

20   you're not in section 9, then you ought to be in section

21   2, and there you should do precisely what the contract

22   says, which is that you should vacate or set aside the

23   arbitration agreement --

24   CHIEF JUSTICE ROBERTS: Oh, no. You're in

25   section 2, I agree --

1   MR. PHILLIPS: -- unless -- if there's an

2   error in law.

3   CHIEF JUSTICE ROBERTS: I agree that you're

4   in section 2, and the State court can't invalidate your

5   agreement under some special rule that applies only to

6   arbitration. But you want to be under section 9, and

7   that says --

8   MR. PHILLIPS: No, I --

9   CHIEF JUSTICE ROBERTS: -- that the district

10   court must confirm the arbitration award if it meets

11   certain standards.

12   MR. PHILLIPS: No, I don't need section 9.

13   All I need is section 2 because if -- because under our

14   agreement, what we specifically say is that the district

15   court shall vacate, modify, or correct. We're looking

16   for them to correct this award by saying that the right

17   interpretation of this lease is that this is an

18   applicable environmental law, and therefore the

19   indemnification extends and we are protected.

20   CHIEF JUSTICE ROBERTS: But the only basis

21   --

22   MR. PHILLIPS: That's what I want under

23   section 2.

24   CHIEF JUSTICE ROBERTS: The only basis you

25   have for getting them to correct the award is a

1   different standard of review than the one provided in

2   section 10.

3   MR. PHILLIPS: That's true, but that's -- it

4   seems to me that just makes my point, which is I don't

5   need section 9, Your Honor. All I need -- all I need is

6   an aggressive, not even aggressive -- a fair

7   interpretation of section 2 that says that the parties'

8   intent controls under these circumstances.

9   JUSTICE SOUTER: It's not that you don't

10   need section 9. You want to get rid of section 9 --

11   MR. PHILLIPS: That's quite true.

12   JUSTICE SOUTER: -- because section 9 on its

13   face seems to provide the opposite to what you're

14   asking. Isn't that the problem?

15   MR. PHILLIPS: Well, I don't know that

16   that's the problem. You're right, I don't want section

17   9 to be controlling here, but I don't think it's meant

18   to be controlling under these circumstances. I think

19   what -- I mean they're making the section 9 argument.

20   All I'm saying is that there's not a problem created by

21   section 9.

22   JUSTICE SOUTER: Why isn't -- I mean the

23   argument that it is meant to be controlling is an

24   argument, first, for the plain language.

25   MR. PHILLIPS: What's the "it" there? I'm

1   sorry, Justice Souter.

2   JUSTICE SOUTER: Pardon me?

3   MR. PHILLIPS: When you say "it's meant to

4   be controlling," I don't --

5   JUSTICE SOUTER: Section 9.

6   MR. PHILLIPS: Section 9. I'm sorry.

7   JUSTICE SOUTER: Number one, the plain

8   language of the statute.

9   Number two, an argument that that plain

10   language, as a matter of historical fact, was

11   deliberately chosen when Congress made a choice between

12   two different, basic arbitration schemes.

13   And they chose the arbitration scheme that,

14   in effect, does not allow the -- the kind of variation

15   that you're talking about. So they say the language is

16   plain; the intent behind the language is plain. It is

17   restrictive, and you can't do that. What is your

18   response, in effect, to the plain language construed in

19   terms of the historical argument?

20   MR. PHILLIPS: Yes. Well, the answer -- the

21   plain language doesn't -- doesn't say what happens if

22   the parties reach a different agreement. The first --

23   JUSTICE SOUTER: Well, it may not -- it may

24   not say it for the simple reason that it says

25   unequivocally what should happen, and you are asking for

1   a variation on what it unequivocally provides. That may

2   be the reason it does not go into contingencies.

3   MR. PHILLIPS: Well, I think -- well, first

4   of all, it would seem to me less likely that that's

5   true, given the common law history that comes out of

6   Justice Story's opinion, which said restrictive

7   arbitrations are common.

8   JUSTICE SOUTER: All right. But you're --

9   you're ignoring -- when you say that, you're ignoring

10   the development of arbitration in the period after

11   Justice Story; and you are ignoring the argument that

12   the other side makes that a deliberate choice was made

13   between two generally understood arbitration, statutory

14   arbitration, schemes, and they choose -- they chose the

15   one that is inconsistent with your position.

16   MR. PHILLIPS: Justice Souter, there are two

17   -- there are two questions there, so let me try to

18   answer both of your questions.

19   The first one is: What does the plain

20   meaning of the statute say? The plain meaning of the

21   statute, which is at 1a of the appendix to the petition,

22   is the parties in their agreement agreed that a judgment

23   of the court shall be entered upon the award. We never

24   agreed to that, so the plain language of section 9

25   simply doesn't get you there.

1   Section 9 envisions that this is a -- that

2   this is an understanding.

3   JUSTICE SOUTER: Then how can you get any

4   award enforced, even subject to your terms?

5   MR. PHILLIPS: Because under section 2 the

6   parties have -- have provided a mechanism for that by

7   saying that the district court will correct an award if

8   it's erroneous as a matter of law.

9   JUSTICE SOUTER: Then you have to grapple

10   with the question whether in fact under section 2 you

11   can provide for confirmation in a manner consistent with

12   the provision for confirmation under section 9.

13   MR. PHILLIPS: Right. But all I'm saying is

14   that section 9 doesn't apply in this particular context,

15   and, therefore, it makes all the sense in the world to

16   --

17   JUSTICE SOUTER: You simply -- I -- I don't

18   -- maybe I'm missing something, but you seem to stand

19   there and just say baldly: Section 9 doesn't apply. It

20   doesn't apply, you've repeated that several times. And

21   I at least don't know why it doesn't apply.

22   MR. PHILLIPS: Well, hopefully I can

23   persuade you by rereading the portion of the statute,

24   that the first sentence of section 9, which is at

25   Appendix 1: "If the parties" --

1   JUSTICE SCALIA: Where is it? Where is it?

2   MR. PHILLIPS: 1a of the appendix to the

3   petition. Section 9: "If the parties in their

4   agreement have agreed that a judgment of the court shall

5   be entered upon the award" --

6   JUSTICE SOUTER: Uh-huh.

7   MR. PHILLIPS: These parties didn't agree

8   that a judgment would be entered on the award. They

9   agreed that a judgment would be entered on the basis of

10   whether there was a non-erroneous declaration of law by

11   the arbitrator.

12   JUSTICE SOUTER: Okay. And what you are

13   arguing is: At this point, even though we didn't agree

14   within the meaning of the preamble to the first sentence

15   --

16   MR. PHILLIPS: Right.

17   JUSTICE SOUTER: -- we still have a right to

18   have the award confirmed and enforced --

19   MR. PHILLIPS: Right.

20   JUSTICE SOUTER: -- because we agreed to it

21   under section 2.

22   MR. PHILLIPS: Both parties agreed to it

23   under section 2.

24   JUSTICE SOUTER: And the question, I think,

25   is when you argue in that fashion: Do you have a right

1 under section 2 to provide for confirmation and

2 enforcement under terms which are inconsistent with the

3 provision in section 9?

4   And I think that's the -- that's the

5 question you've got to answer.

6   MR. PHILLIPS: Well, if you -- if you want

7 to make a judgment call and you think there's really a

8 judgment you have to make as between section 2 and

9 section 9, then it seems to me that all of the Court's

10 decisions have recognized that the single most important

11 objective of the Federal Arbitration Act is embodied in

12 section 2, which is -- which is to enforce the intent of

13 the parties --

14   JUSTICE SOUTER: The -- the cases --

15   MR. PHILLIPS: -- is the way you should come

16 out.

17   JUSTICE SOUTER: The intent of the party

18 that's being enforced in those myriad cases is the

19 intent of the parties to arbitrate. I don't believe any

20 of those cases respond to the -- to the issue that we've

21 got before us.

22   And the issue we've got before us as you are

23 now framing it is this: If you do not have a provision

24 within the meaning of the first sentence of section 9 --

25   MR. PHILLIPS: Yes.

1   JUSTICE SOUTER: -- for confirmation and

2   enforcement --

3   MR. PHILLIPS: What do you do?

4   JUSTICE SOUTER: -- but you have a different

5   contractual provision and its terms are different from

6   the enforcement terms under section 9 --

7   MR. PHILLIPS: Right.

8   JUSTICE SOUTER: -- can that contract be

9   recognized? Do you have a right, in effect, to modify

10   the statute?

11   MR. PHILLIPS: But, Justice Souter --

12   JUSTICE SOUTER: And that's what you've got

13   to come to grips with. And --

14   MR. PHILLIPS: Well, I think I am coming to

15   grips with it.

16   JUSTICE SOUTER: No, but it does not answer

17   that question simply to say there are lots of cases

18   saying that the intent of the parties to arbitrate

19   should be enforced. This is a more specific question.

20   MR. PHILLIPS: No, it's not the intent of

21   the parties to arbitrate. It is every facet of the

22   agreement is to be enforced consistent with the intent

23   of the parties.

24   JUSTICE SOUTER: Where do you -- do you have

25   a case that says every facet of the agreement, no matter

1   how inconsistent arguably with other sections of the

2   statute?

3   (Laughter.)

4   JUSTICE SOUTER: No, you don't.

5   MR. PHILLIPS: Well, of course not, Justice

6   Souter.

7   JUSTICE SOUTER: That's why we've got this

8   case here.

9   MR. PHILLIPS: Well, to be sure. But the

10   bottom line here -- and -- and I do want to answer the

11   Illinois v. New York part of this, because I think

12   that's a complete red herring in this case.

13   But it still seems to me that if you think

14   that there is an ambiguity with respect to section 9,

15   first you should resolve that ambiguity by construing it

16   to implement the parties' intent, because that is the

17   overriding objection to the FAA. And second --

18   JUSTICE SOUTER: Okay, but --

19   MR. PHILLIPS: -- if you go to section 10 --

20   JUSTICE SOUTER: If we do that, we've got to

21   dispose of the red herring. So you're going to come

22   back to that?

23   MR. PHILLIPS: Okay. All right, let me

24   answer the red herring. Then -- then I'll tell you what

25   I think about section 10. On the red herring, all --

1   all the -- first of all, there's nothing in the

2   legislative history that suggests that Congress made

3   some kind of conscious choice between New York and

4   Illinois.

5   They talk about the New York model. There

6   is not a word in the legislative history about Illinois.

7   So I don't think that's what the decision was.

8   But even if that were the choice they made,

9   that still doesn't go to the question of what do you do

10   if the parties reach a different agreement.

11   JUSTICE SCALIA: That is, indeed, the issue.

12   What we're arguing about here is whether 9 and 10 are

13   simply default rules that apply where the parties have

14   not otherwise specified. That's -- and that's,

15   arguably, what the New York law and the Illinois -- I --

16   I don't know that any of those cases cited by the other

17   side involved cases where the Illinois rule or the New

18   York rule was applied in the teeth of an arbitration

19   agreement that said something differently.

20   MR. PHILLIPS: No. None of -- none of those

21   cases fall in that category.

22   JUSTICE SCALIA: In other words, I think

23   both the Illinois rule and the New York rule were

24   default rules.

25   MR. PHILLIPS: That's exactly right.

1   JUSTICE SCALIA: And you're arguing that

2   this is the default rule?

3   MR. PHILLIPS: Correct.

4   JUSTICE GINSBURG: It doesn't read like one.

5   10 and 11 don't read like default --

6   MR. PHILLIPS: Well, I think the important

7   part about section 10 to keep in mind is -- is their

8   argument also is predicated on the assumption that

9   section 10 exhaustively lists all of the grounds for

10   modifying an -- vacating an arbitration award. And it

11   is absolutely clear from this Court's decisions both in

12   Wilko and in W.R. Grace that the list in section 10 is

13   not an exclusive list.

14   JUSTICE GINSBURG: What else is there

15   besides the manifest whatever it is?

16   MR. PHILLIPS: The manifest disregard of the

17   law and the -- and public policy. W.R. Grace says you

18   can't enforce any contract that violates public policy.

19   JUSTICE STEVENS: Mr. Phillips, on the

20   question of whether it's just a default rule or a

21   self-executing definition of what's permissible,

22   supposing the agreement between the parties provided

23   that the judgment by the court must be entered in six

24   months rather than a year, and it would be vitiated if

25   it were entered after that. Would that trump the

1   statute?

2   MR. PHILLIPS: I -- I think, yes, I think it

3   probably would, because --

4   JUSTICE STEVENS: I think under your theory

5   you'd have to --

6   MR. PHILLIPS: I don't think Congress meant

7   for it to be -- I don't think Congress intended for this

8   to be not subject to change.

9   JUSTICE STEVENS: Yes.

10   MR. PHILLIPS: I mean, you know, there are

11   -- the question in all of these provisions is are there

12   some components of the FAA that are meant to be

13   mandatory, and there are others that are all subject to

14   change. And I think that one strikes me at least as

15   most likely subject to change, Justice Stevens.

16   If there are no further questions, I'll

17   reserve the balance of my time for rebuttal. Thank you,

18   Your Honor.

19   CHIEF JUSTICE ROBERTS: Thank you,

20   Mr. Phillips.

21   Ms. Brinkmann.

22   ORAL ARGUMENT OF BETH S. BRINKMANN

23   ON BEHALF OF THE RESPONDENT

24   MS. BRINKMANN: Mr. Chief Justice, and may

25   it please the Court:

1   Sections 9, 10 and 11 of the Federal

2   Arbitration Act provide the exclusive grounds on which a

3   court can vacate, modify, correct an arbitration award

4   under the FAA. Those grounds do not include legal

5   error.

6   What Petitioner wants is to graft on an

7   additional ground to that statute, and say, oh,

8   10(a)(5), on any other ground that the parties agree to.

9   JUSTICE SCALIA: What do you do about the

10   fact that our opinions have said that there is another

11   ground under 10, which is manifest miscarriage of

12   justice? That's not listed there.

13   MS. BRINKMANN: Your Honor, manifest

14   disregard is section 10(a)(4), exceeding the power. It

15   is not mere legal error, and it's manifest disregard of

16   the agreement. Section 10 goes to structural errors,

17   structural problems: Corruption, fraud, exceeding the

18   power. And manifest disregard is in the statute, and

19   it's not mere legal error.

20   JUSTICE SCALIA: Why -- why did we go -- go

21   to the trouble of expressing it differently?

22   MS. BRINKMANN: Because --

23   JUSTICE SCALIA: Why not just say section 4?

24   MS. BRINKMANN: It was required in Wilko,

25   because there were two different questions there. There

1   was a provision under the Securities Act that said

2   customers couldn't waive certain rights.

3   And the Court said there: Well, we all know

4   that the Securities Act generally would apply to

5   arbitration. Of course, if an arbitrator didn't apply

6   the Securities Act, that would be manifest disregard,

7   exceeding their power. That they could not do.

8   But what the Wilko Court held was: The

9   customer, if they went to arbitration, was also waiving

10   judicial review of the arbitrator's interpretation of

11   the law. And that was the distinction in Wilko, and

12   that's why manifest disregard is in the statute. It's

13   10(a)(4), and it's that type of error. It is not beyond

14   the statute, and that's what Congress meant to do.

15   JUSTICE GINSBURG: What about public policy?

16   That was the other one Mr. Phillips brought up.

17   MS. BRINKMANN: Yes. Public policy would

18   often be covered under section 2. Section 2 allows any

19   arbitration contract to be voided under any generally

20   applicable State contract law, so that clearly would

21   apply. A lot of that would capture all the public

22   policy. But "public policy" is used in different ways.

23   The Grace case he cites is a labor case.

24   And there have been different developments of

25   arbitration under the labor statute. But what "public

1   policy" has come to mean in that line of cases is where

2   there is another Federal statute that is violated by the

3   arbitration.

4   And there you have another source of law.

5   If there is a later enacted Federal statute that was a

6   congressional intent to trim the Arbitration Act, that's

7   another matter.

8   JUSTICE SCALIA: What would happen in

9   situations like this? Suppose we agree with you; and we

10   say, oh, yes, both of the parties agreed as part of this

11   contract: I don't want to let these arbitrators decide

12   the law. If they get the law wrong, we want -- we want

13   the courts to decide the law. That's the deal. And

14   then you're going to say, oh, that portion of the

15   contract is no good.

16   MS. BRINKMANN: You can't in that situation

17   --

18   JUSTICE SCALIA: Is there no such thing as

19   -- as failure of the contract for -- misunderstanding of

20   the law?

21   MS. BRINKMANN: That would be a common law

22   action as the Chief Justice was referring to, to

23   simply enforce an award. But section 9 created a

24   streamlined approach for enforcement of arbitration

25   awards. When Congress in 1925 said --

1   JUSTICE SCALIA: You think -- you think the

2   State can enforce an arbitration award that would not be

3   enforceable under the FAA?

4   MR. BRINKMANN: Under section 9. I hate to

5   use the words "broadly FAA," because here's the

6   situation: You can have arbitration awards that are

7   clearly covered under section 2, but they are not

8   covered under section 9. Section 9 is a streamlined

9   procedure for enforcement of arbitration where it's

10   under the FAA.

11   When Congress enacted the statute, they

12   said, you know, we are going to give a streamlined

13   approach. If you want to go quickly from award to

14   judgment, you can go right into court and hear section

15   9. That -- and you could agree to this. You have to

16   agree to use section 9. You have to agree to this

17   confirmation.

18   You come in, and that court must enforce

19   that award, confirm that award, unless sections 10 and

20   11 are met. And that's exactly what Congress did.

21   CHIEF JUSTICE ROBERTS: And that happens --

22   outside of the FAA that happens all the time. They are

23   called consent decrees. The party agree -- agrees to

24   particular provisions, and they submit it to the judge

25   and say: We want you to write two words, "so ordered,"

1   at the bottom of this; and then it becomes a judgment.

2   You don't have to worry about the

3   Arbitration Act. It's a contract.

4   MS. BRINKMANN: There are a couple of

5   differences, I would also say, with the consent decree

6   from the section 9 enforcement of the award, Your Honor.

7   Here, of course, Congress spoke to it. And it clearly

8   set up a framework for section 9, 10, and 11: How could

9   you have this streamlined, efficient, final way to get a

10   judgment. That was the purpose of the FAA.

11   So you don't have that in a consent decree

12   situation, and you would not have that in a common law

13   contract action.

14   Also, of course, in that consent decree

15   situation, courts maintain their equitable authority.

16   CHIEF JUSTICE ROBERTS: So then I guess I have

17   the same question for you that I had for your friend:

18   Why do you care? I mean, if you are saying, look, you can

19   enforce this as a State law contract -- you know, it's not

20   streamlined. The judge doesn't have to do it; but, you

21   know, this judge wants to do it. And he is going to

22   enforce it as a State law contract.

23   What do you gain?

24   MS. BRINKMANN: Well, we gain a little of

25   what we try to get through arbitration: Finality, the

1   cessation of the time and cost that this litigation has

2   arisen.

3   We prevail under the ruling of the court

4   that recognized the exclusivity of sections 9, 10 and

5   11; and that would end the litigation. That's certainly

6   of very great interest to our client.

7   JUSTICE SOUTER: What do you say to

8   Mr. Phillips' argument that, within the meaning of the

9   first sentence of section 9, you don't have any

10   agreement at all; and, therefore, you have no right to

11   enforce anything?

12   I take it that's not the position you took

13   below, and that's not the position you're taking here,

14   but how do you answer him?

15   MS. BRINKMANN: That's really a repackaging

16   of Petitioner's severability argument from below. There

17   was an agreement to confirm. It's just whether or not

18   if the -- it becomes legally impossible for the other

19   condition to occur, the legal review can't occur because

20   it's contrary to the statute.

21   What happens -- and the court of appeals

22   here addressed that issue, applied Oregon law, and

23   rejected it. Petitioner filed a rehearing en banc

24   petition on that and did not bring it to this Court on

25   cert.

1   JUSTICE SCALIA: Assume we agree with you

2   that this is a quick and dirty way to get arbitration

3   agreements enforced if you want to bring it within 9 and

4   10, and if you don't, you're free not to; you can go to

5   the State courts. Why can't he still go to the State

6   courts?

7   You say this is going to terminate the

8   litigation. Is this going to be res judicata on

9   anything? All it's going to say is the Federal courts

10   have no jurisdiction over this. It's not under 9 and

11   10. You're going to run off to State court. You're

12   going to protract the litigation rather than bring it to

13   a quick end.

14   MS. BRINKMANN: Your Honor, this is under

15   section 9. The only way it would not be under section 9

16   is if they had won on the severability argument.

17   JUSTICE SCALIA: I don't understand that.

18   MS. BRINKMANN: We sought --

19   JUSTICE GINSBURG: Miss Brinkmann, can we

20   back up a bit, because this agreement had an usual

21   genesis. This was a big case, and the judge kept right

22   in the court a piece of it. And then he and the parties

23   agreed that another piece of it would best be resolved

24   in arbitration. So the judge was in equal participation

25   in that effort. All three parties wanted to get a

1   particular issue resolved through an arbitrator rather

2   than the court, itself.

3   And I doubt very much whether the judge

4   would have been at all interested in that scheme if he

5   thought he were doing an idle thing. That the parties,

6   having agreed to just what the judge thought was a nice

7   way to resolve this issue, would then find themselves

8   out of Federal court and have to bring some kind of suit

9   in State court. It doesn't seem to fit this scenario.

10   MS. BRINKMANN: Two responses, at least to

11   that, Your Honor: Then the parties should have asked

12   the court to appoint a special master. That maintains

13   under the authority of the district court judge. That's

14   not what happened here. And that's important.

15   What is before the Court here is the section

16   9 action to confirm the judgment. And that's what comes

17   to the Court on --

18   CHIEF JUSTICE ROBERTS: You don't have to go

19   back to State court. You have diversity. You are in

20   Federal court, no matter what, right?

21   MS. BRINKMANN: Yes, Your Honor, that's

22   right.

23   JUSTICE BREYER: That's why just what you

24   said is actually what's worrying me about the case.

25   Because what Justice Ginsburg said makes me think that

1   there could be situations, a lot of situations, where

2   Federal judges do want to peel a case off. And you

3   say send it to a master. Maybe some would lend

4   themselves to a master, maybe some wouldn't. I have no

5   idea.

6   And are we going to have to hold in this

7   case whether a judge or when a judge, a Federal judge,

8   does or does not have authority to do such a thing?

9   That's why I say -- I was actually thinking

10   the case of the century, because it's going to take a

11   hundred years to finish.

12   But the fact is there are those issues there

13   once we say section 9 does or doesn't apply. Then you're

14   going to have to say -- suppose we were to say it's just

15   State law. Well, suppose the State doesn't allow

16   enforcement of this kind of contract. Then we have the

17   question of the authority -- of the inherent authority,

18   not statutory, of a Federal district judge to peel off

19   bits of cases and decide them in different ways.

20   I don't know the answer to those questions,

21   but I think they are quite important. So what do I do?

22   MS. BRINKMANN: Well, first of all, Your

23   Honor, if it comes to a question about the particular

24   facts in this case involving the scenario that Justice

25   Ginsburg put forth of the very unusual situation of a

1   Federal district court being there, we would, of course,

2   dismiss the writ as improvidently granted. That has no

3   broader implication, I think --

4   JUSTICE BREYER: Oh, no, because there is a

5   holding in the whole Ninth Circuit, which accounts for a

6   large percent of the country, that the district judge

7   can't do this. And that's quite a significant holding

8   in that circuit, and we ought to review that.

9   MS. BRINKMANN: That would be the question,

10   Your Honor, if when faced with something that a judge

11   wants to peel off, you have to look at what tools a

12   Federal judge has been given. Magistrate judges widely

13   used for all types of picking juries, discovery, special

14   masters, those are the tools that have been given to

15   Federal judges. When arbitration --

16   JUSTICE GINSBURG: Why not use -- why not

17   use Rule 16, pretrial procedure, and the parties and the

18   judge can work out what they think is the most efficient

19   way to resolve this controversy? So they decide at the

20   pretrial conference that they are going to build into

21   this arrangement one issue that they are going to peel

22   off to go to an arbitrator, but the judge is going to

23   retain control through the legal error.

24   MS. BRINKMANN: The arbitrator is what

25   introduces these different elements, because that's a

1   private judge chosen by the parties, paid by the

2   parties. He doesn't have life tenure. It's a very

3   different animal. And what Congress did in the Federal

4   Arbitration Act --

5   JUSTICE GINSBURG: That's a strange argument

6   in this respect. You are arguing that this non-Article

7   III person has more control rather than less control;

8   that if the judge controlled this arbitrator, somehow

9   that would violate Article III.

10   But if the judge has no control and is

11   essentially little more than a rubber stamp on what the

12   non-Article III person does, then that's all right. And

13   the sense of that doesn't come across to me.

14   MS. BRINKMANN: It's because it's a matter

15   of contract law, Justice Ginsburg. The parties agreed

16   to an arbitration here on a contract and the

17   arbitrator's award speaks for the parties. It is their

18   agreement. That's what an arbitration award is, and

19   that's why this streamlined process under section 9 to

20   transfer that award, that contractual agreement --

21   JUSTICE KENNEDY: But -- but the question is

22   whether or not that streamlined process is the only

23   process. It seems to me that if the purpose of the

24   Arbitration Act is to promote confidence in the

25   arbitration process, that if parties agree to have the

1   double assurance that the arbitrator hasn't made some

2   strange ruling of law, that that's quite consistent with

3   the whole purposes of arbitration.

4   MS. BRINKMANN: Well, Your Honor, we are not

5   suggesting that it's the only means to get an award

6   enforced, but if you are doing the section 9 route, the

7   grounds in the statute are the only grounds on which

8   that can be done, and the policy about whether or not

9   those transaction costs, when parties want further

10   review on an arbitration, is shifted to the courts.

11   It's one Congress made --

12   JUSTICE KENNEDY: But you're -- you're

13   asking us to interpret the statute; and let us assume

14   that it's a plausible interpretation and interpret the

15   statute as the Petitioner would. You know, under

16   section 8, the parties can use the authority of the

17   court to libel a ship. The court is extending its

18   authority to -- to use very intrusive means, and to say

19   that the parties can't ensure, if they choose, to have

20   review for correct errors of law -- to correct errors of

21   law when the ship has been seized, it seems to me to

22   promote the whole purposes of the act.

23   MS. BRINKMANN: But, Your Honor, I think

24   that's where we get to -- between when we are talking

25   about section 2 and the purpose is that the parties

1   control how the arbitration progresses. Then we come to

2   the entry of the judgment by a court, and that's what

3   Congress controls; and the grounds in 10 and 11 cannot

4   be perceived as default rules. There are many places in

5   the Federal Arbitration Act where --

6   JUSTICE KENNEDY: Well, we're arguing about

7   that textually. I'm saying there's nothing

8   inconsistent with the Petitioner's position and the

9   basic policies of the Act. You talk about finality,

10   streamline, and so forth; but if the parties have more

11   confidence in the arbitration process by ensuring this

12   added level of review, it seems to me quite consistent

13   with the purposes of the Act.

14   MS. BRINKMANN: Well, two things, Your

15   Honor. If they want to do that, then they don't choose

16   section 9, and they don't include an agreement for

17   section 9, and then they have what Chief Justice Roberts

18   was talking about, a -- a State contract action --

19   JUSTICE STEVENS: Can I interrupt on that

20   for just a minute? You're assuming and the Chief

21   Justice's line of questioning was assuming there's an

22   adequate state remedy available for enforcing this

23   contract, but the whole premise of the statute at the

24   time it was enacted was that there was not a State

25   remedy, because there was a bias against arbitration.

1   And this was thought to be the sole remedy for

2   arbitration at the time the statute was enacted.

3   MS. BRINKMANN: Your Honor, that actually

4   brings me to the red herring. I'd like to address the

5   history, because I think that what happens in

6   Petitioner's reply brief, there's some confusion between

7   common law causes of action to enforce an arbitration

8   award as a contract, and actions under statutes. Some

9   of the commentators confuse that also.

10   There was an opportunity to have judicial

11   review of the law through a contract enforcement case,

12   although there was a clear statement requirement. So

13   there are going to be cases that talk about, that are

14   not under the statue. Then when you look at cases under

15   the statute, you have to differentiate between the cases

16   under the New York model statutes, where you will not

17   find that, and cases under the Illinois statute, where

18   you will, because they allow judicial review.

19   JUSTICE GINSBURG: Are there any --

20   MS. BRINKMANN: Now, when Justice Scalia --

21   JUSTICE GINSBURG: Are there any -- are

22   there any such States left today that are using the

23   Illinois model?

24   MS. BRINKMANN: I believe not, Your Honor.

25   We explain in one of our footnotes that that came into

1 disfavor.

2   But I want to address Justice Scalia's point

3 about the legislative history. There is no case that we

4 have found that says, notwithstanding those statutory

5 grounds, you can contract beyond them, but we do have

6 not only the New York cases, but also in footnote 8, I

7 believe, on page 30, several other statutes that have

8 statutory grounds, and repeatedly they say these are the

9 statutory grounds. That is separate from the common law

10 action where you could have a full jury trial.

11   JUSTICE SCALIA: But -- but the old Illinois

12 and the old New York rules, you don't have any cases

13 which say -- which establish that those rules were not

14 just default rules, but you -- but you were not allowed

15 to depart from them.

16   MS. BRINKMANN: We think the language in

17 those cases will speak -- -

18   JUSTICE SCALIA: You don't -- you don't have

19 any case that holds that?

20   MS. BRINKMANN: The cases say things like "on

21 the statutory grounds." I mean, they do say it. Do they

22 go the next step and say by the way, we are not going to

23 let you do anything else that's -- -

24   JUSTICE SCALIA: You don't have any case

25 that holds that.

1   MS. BRINKMANN: No. No. There's none on

2   the other side, either.

3   JUSTICE GINSBURG: Is there a possibility

4   that the reason the language in the statute is as it

5   is -- when was the Federal Arbitration Act; what year

6   was it?

7   MS. BRINKMANN: 1925.

8   JUSTICE GINSBURG: And there was still

9   abroad in the land considerable distrust of arbitrators.

10   Judges said arbitrators are stepping on our turf, and so

11   they would be naturally resistant to let the arbitrator

12   go ahead and have the most minimal review in court.

13   Maybe the Act was written the way it was to say, if the

14   parties want to go to arbitration, courts, you stay out

15   of it.

16   MS. BRINKMANN: If you choose that -- yes,

17   Your Honor. And even one more step. But we will tell

18   the court to stay out of it only if you agree that

19   you're going to come under for confirmation. It's still

20   let the parties have the review through common law if

21   they want it.

22   That's absolutely correct, Your Honor. And

23   I think it's that additional step, though, that puts the

24   whole picture together. And I do want to emphasize,

25   there is appellate arbitration that takes care of all of

1   the policy concerns about whether or not --

2   JUSTICE KENNEDY: Would you -- would you

3   agree that what we hold in this case applies to suits in

4   admiralty, where you don't go to State court under

5   section 8?

6   MS. BRINKMANN: That's a difficult question,

7   Your Honor. I have looked at many of the old -- some of

8   the arbitration cases did come up from admiralty, and I

9   think the answer is, if it is an action under section 9

10   to confirm, it must be confirmed unless there is

11   vacatur, modification, or correction under 10 or 11.

12   Those are exclusive grounds.

13   JUSTICE KENNEDY: Well, at this point you

14   don't have a State-court fallback for your argument.

15   MS. BRINKMANN: Well --

16   JUSTICE KENNEDY: And I -- I can't see why

17   it isn't -- I just repeat my earlier point -- quite

18   consistent with encouraging confidence in admiralty

19   arbitration to allow district courts to review rulings

20   on a matter of law if the parties so choose.

21   MS. BRINKMANN: I think that question,

22   though, perhaps goes to more or not whether the section

23   9 is the exclusive means for enforcing an award, and it

24   isn't. So perhaps there is some other means that is

25   beyond my expertise.

1   JUSTICE BREYER: Oh, if there is, then let's

2   think -- suppose that in the middle of a trial, the

3   parties say, judge, this is so complicated factually, we

4   have a way that we can get an agreed statement of facts.

5   They walk out the door; they have a friend who has a

6   sign called arbitrator; and they come away from that

7   friend with an agreed statement of facts, which they

8   agree to submit to the judge to apply the law. Now,

9   there is nothing wrong with that, I imagine.

10   MS. BRINKMANN: Well, that sign would have

11   to be changed. It would have to say --

12   JUSTICE BREYER: We know -- I'm sorry. I'm

13   not even going to tell the judge how I find this. I go

14   to a crystal ball; I go to any way I want. I will come

15   in with an agreed statement of facts, and is there

16   anything, if we have that agreed statement of facts,

17   that would will stop the judge from saying I take this

18   agreed statement of facts; there's a difference about

19   how the law applies to it; I will resolve this case?

20   MS. BRINKMANN: There are a couple of

21   things. That's not an arbitration award.

22   JUSTICE BREYER: Well, no -- I just say --

23   well, I'll ask you the next question. I take the answer

24   to the first question is there's nothing wrong with

25   that.

1   MS. BRINKMANN: I have to say --

2   CHIEF JUSTICE ROBERTS: Isn't there --

3   MS. BRINKMANN: -- the court would not be

4   bound by that. It's not a mandatory standard.

5   JUSTICE BREYER: I'm sorry. I thought that,

6   if in fact parties come in with an agreed statement of

7   facts in a case, I've never seen a situation where the

8   judge couldn't say, fine, I agree; that's the -- the

9   judge would say I'm sorry, even though you agree, I

10   insist that you go to trial and --

11   CHIEF JUSTICE ROBERTS: Sure.

12   JUSTICE BREYER: He can?

13   MS. BRINKMANN: I think, I think there would

14   be a State bar --

15   CHIEF JUSTICE ROBERTS: Sure, if the parties

16   agree, and here's our stipulation: We agree that he is

17   a citizen of Pennsylvania and you're a citizen of --

18   JUSTICE BREYER: All right, so there are

19   public policy limitations.

20   MS. BRINKMANN: Well, and it's collusion.

21   It goes to our argument. Parties can apply an injunction.

22   JUSTICE BREYER: Well, is there anything

23   wrong here? My question basically, obviously, is, is

24   there anything wrong in this case if they had come in

25   with an agreed statement of facts?

1   MS. BRINKMANN: I think it would have

2   depended on what the court did with it. So long as it

3   was not binding on the Federal court, because you can't

4   buy an injunction. You cannot stipulate to the

5   erroneous law. The Article III judge maintains that

6   authority.

7   JUSTICE BREYER: All right. I'm trying to

8   get to my question; I'm not asking it very well.

9   What they agreed to is -- it's an agreed

10   statement of facts, subject to section 9 standards,

11   section 9 and 10.

12   MS. BRINKMANN: That's difficult, because

13   it's an award --

14   JUSTICE BREYER: What I'm driving at --

15   whether I've asked it well or not -- is how is this any

16   different from coming in with an agreed statement of

17   facts?

18   MS. BRINKMANN: Because this is an

19   arbitration award. It is a contractual agreement where

20   the award gives -- imposes a legal obligation on someone

21   else, and that award is going to be entered as a

22   judgment of the court, against the parties.

23   JUSTICE STEVENS: May I ask this sort of

24   basic question? Forgetting the text for a minute, what

25   policy reason -- can you think of why would Congress

1   want to prohibit this particular form of agreement?

2   MS. BRINKMANN: Congress wanted to give

3   parties an option for a quick, simple, cost-effective

4   and final way --

5   JUSTICE STEVENS: Why would they want to

6   prohibit an option that takes a little bit longer?

7   MS. BRINKMANN: Because that would be a

8   different action where you would have to look to State

9   contract law, contract law defenses, whether there are

10   State arbitration laws -- it's a different animal. They

11   were looking at the animal of an arbitration agreement

12   and a streamlined method to have that enforced and

13   that's what sections 9, 10, and 11 do. And I have --

14   CHIEF JUSTICE ROBERTS: I thought your

15   answer would be part -- the point Justice Stevens brought

16   up earlier. There was this State hostility to enforcing

17   arbitration agreements at all.

18   MS. BRINKMANN: Uh-huh.

19   CHIEF JUSTICE ROBERTS: And so what the

20   Federal Arbitration Act says is, all right, in the

21   narrow circumstances where the parties agreed, subject

22   to this narrow standard, you have to enforce it. But

23   that doesn't mean we are going to override the State law

24   across the board.

25   MS. BRINKMANN: That's right. It gives the

1   parties the option for choosing that, and if you choose

2   that, you have to do what Congress says.

3   JUSTICE STEVENS: Why do they want to

4   prevent the parties from choosing the option they chose

5   in this case? I don't think that answer says why they'd

6   want to do that.

7   MS. BRINKMANN: They can choose another

8   option, but they -- you may have a full-blown trial about

9   contract law in the award, and that's what section 9

10   would --

11   JUSTICE STEVENS: But then there'd be no

12   arbitration at all. That's right.

13   MS. BRINKMANN: I also have --

14   JUSTICE STEVENS: But I just don't

15   understand why it makes any sense at all to say this

16   type of arbitration agreement is invalid.

17   JUSTICE KENNEDY: And I would add --

18   MS. BRINKMANN: Well, Your Honor, we're not

19   saying it's invalid.

20   JUSTICE KENNEDY: I would add that in

21   admiralty you don't have the back-up of State law.

22   MS. BRINKMANN: We're not saying it's

23   invalid, Your Honor. We're saying that there's

24   entitlement to confirmation of the award unless the

25   grounds of 10 and 11 are there. And Petitioner wants to

1   graft on this thing that says "or on any ground the

2   parties agree on." There's no limit to that, Your

3   Honor. There's nothing for harmless error --

4   JUSTICE SOUTER: No, but the question is

5   still here: Why should there be a limit if the parties

6   themselves agree? Because if they didn't come in under

7   arbitration and they simply came in under contract or

8   whatever the causes of action might be in a diversity

9   case, the court would have to be dealing with these

10   issues anyway.

11   MS. BRINKMANN: It would be under a

12   different cause of action, Justice Souter.

13   JUSTICE SOUTER: Pardon me?

14   MS. BRINKMANN: You'd be under State

15   contract law. Here you'd have to develop a Federal

16   common law of when you took a section 9 and you started

17   reviewing it for error. Are we really going to allow de

18   novo review and vacatur when it's harmless? There's a

19   whole body of Federal law that has developed about

20   harmless error to address those kinds of issues. This

21   would be a Federal --

22   JUSTICE SOUTER: That's true in any

23   diversity case.

24   MS. BRINKMANN: But, Your Honor, this would

25   be under the Federal Arbitration Act, without any

1   guidance from Congress, contrary to the grounds they put

2   forward. And they have no limit.

3   JUSTICE SOUTER: Okay, why didn't Congress

4   give any guidance? One suggestion that the Chief

5   Justice made, and it played through my mind, is maybe

6   the -- what seemed to be the plain language limits in

7   section 9 represent not necessarily a kind of policy

8   choice in a perfect world, but a political policy

9   choice. Maybe that was the term as you -- as you read

10   section 9, maybe that was the term upon which the act

11   could be passed.

12   MS. BRINKMANN: It was --

13   JUSTICE SOUTER: We will, in effect -- we

14   will say: Look, you got to enforce these contracts,

15   arbitration contracts, but you don't have to go one step

16   further. Maybe that was the political deal. Is there

17   any indication that that was the case and that's the

18   explanation for this limit?

19   MS. BRINKMANN: With all respect, I think

20   not. I think that the section 2 and 3, the enforcement

21   of the arbitration agreement, is about the private

22   parties determining the process. But when you get to

23   the entry of a judgment by a court on the award, what

24   Congress did said: We're going to give you an option to

25   have an efficient, streamlined way for that also, and

1   here it is: 9, 10 and 11. Now, you still have

2   something else and you have to agree to this in your

3   agreement, but if you agree to it, this is what you

4   have.

5   And I have to say Petitioner's argument is

6   so broad, as Justice Ginsburg pointed out, there were

7   questions of fact in this. We were -- we were

8   litigating under this agreement also in the district

9   court, and we brought a question of fact to the district

10   court. When the district court first sent this back to

11   the arbitrator, it went through and basically told the

12   arbitrator: You know, you haven't looked at these

13   facts; you haven't looked at these facts; you haven't

14   looked at these facts. I believe it's Pet. App. 57a.

15   And it sent it back to show the arbitrator's work. I

16   mean that is what --

17   JUSTICE GINSBURG: Ms. Brinkmann, if you

18   could --

19   MS. BRINKMANN: -- courts would get mired

20   in under a common law development here to review,

21   according to what --

22   JUSTICE BREYER: Has that been a nightmare

23   -- has it been the nightmare you suggest in labor

24   arbitration? Because I think labor arbitration falls

25   outside the Act, doesn't it?

1   MS. BRINKMANN: It does.

2   JUSTICE BREYER: And has that turned into

3   some kind of terrible nightmare where there are dozens

4   of rules and they have a long complicated labor set of

5   regulations on it? I don't think so, but has it?

6   MS. BRINKMANN: Well, Your Honor, I'm not as

7   familiar with that perhaps as I should be, but I know --

8   JUSTICE BREYER: Well, if we run that pretty

9   well, why wouldn't you run this pretty well --

10   MS. BRINKMANN: I think the --

11   JUSTICE BREYER: -- given a back-up, looking

12   at it as a default?

13   MS. BRINKMANN: I think they're very

14   different policies and different statutory frameworks

15   that apply.

16   JUSTICE GINSBURG: Well, let's take this

17   statute and let's take the circuits that have the rule,

18   the opposite rule. In fact, the Ninth Circuit had the

19   opposite rule until rather recently. What has been the

20   experience -- I think the Fifth Circuit is on the other

21   side?

22   MS. BRINKMANN: Yes.

23   JUSTICE GINSBURG: What has been the

24   experience there?

25   MS. BRINKMANN: There has not been

1   widespread use of this provision. I think that our

2   amici briefs really speak to this, Your Honor, because

3   the difference would be a statement by the U.S. Supreme

4   Court that says parties can now create whatever other

5   grounds they want and go in through section 9 in a

6   streamlined process and are going to impose on Federal

7   courts, not appellate arbitrators, on Federal courts,

8   whatever grounds they want -- de novo review of fact, no

9   harmless error, perhaps create different appellate

10 standards when it goes up.

11   And I think that the amici really point out

12 that that is so contrary to the finality and

13 efficiencies that the animal of arbitration --

14   JUSTICE GINSBURG: I think a lot of those

15 horribles, Mr. Phillips would agree with you because he

16 hesitated even on de novo, and I think he thought that

17 trying to control an appeal from the district court,

18 that would be out of the ballpark.

19   MS. BRINKMANN: I think it would create a

20 hybrid animal that is not what the Arbitration Act is

21 about.

22   JUSTICE SCALIA: Why couldn't you limit it

23 reasonably by saying the parties can agree to anything?

24 We would only have to say "at least," the parties can "at

25 least" agree to anything that the court would be able to

1   do if this had been brought as an action in the court,

2   rather than initially as an arbitration.

3   MS. BRINKMANN: With all due respect --

4   JUSTICE SCALIA: Which means the court would

5   decide the questions of law.

6   MS. BRINKMANN: With all due respect, Your

7   Honor, that would be for Congress to do, not this Court.

8   This is a statutory framework, a statutory cause of

9   action that Congress wrote.

10   JUSTICE SCALIA: I understand, but that

11   would be a limit. You say it's limitless. It doesn't

12   have to be limitless.

13   MS. BRINKMANN: No, but you're putting --

14   you are, I think, as this Court itself has said, you're

15   breeding litigation from a statute whose whole point was

16   to minimize and limit litigation. You're creating a new

17   body of Federal common law that's really antithetical to

18   the core purpose of the Arbitration Act. And I think

19   that the -- that overriding principle of Federal

20   Arbitration Act should really motivate the Court to

21   realize what Congress did and the exclusive grounds that

22   they set forth.

23   JUSTICE GINSBURG: But one problem that I

24   have with your position is you say that the -- you

25   should continue to prevail, although that would be in

1 violation of the parties' agreement. Under the Ninth

2 Circuit decision, you win, what the arbitrator says

3 goes, and there isn't the review that the parties

4 bargained for.

5   MS. BRINKMANN: That's the severability

6 point that they lost on, Your Honor. They had

7 petitioned for cert on severability and tried to say

8 because the judicial review became legally impossible

9 the rest should have fallen. We'd be arguing a

10 different case. They petitioned for rehearing en banc

11 review on that and did not petition for cert on that.

12 But that is answered by the severability ruling below.

13   JUSTICE KENNEDY: Could the parties have an

14 arbitration agreement in which they said, if there are

15 contested issues of law, either party may seek

16 declaratory judgment?

17   MS. BRINKMANN: In court?

18   JUSTICE KENNEDY: In a Federal court, under

19 the Declaratory Judgment Act.

20   MS. BRINKMANN: I don't know if that would

21 be an arbitration agreement. I'm not sure what the --

22   JUSTICE KENNEDY: My hypothetical is it's in

23 the arbitration agreement. If the arbitrator gets stuck

24 on a difficult question of law, either party can seek

25 declaratory relief, and the arbitration proceedings are

1 held in abeyance pending that declaration.

2   MS. BRINKMANN: I hesitate because it sounds

3 like that may just be an advisory opinion, and there

4 might be an Article III problem with that.

5   JUSTICE KENNEDY: No. There's the advisory

6 -- we've been through this. This is a real controversy,

7 not an advisory opinion.

8   MS. BRINKMANN: Then they can go and have --

9   JUSTICE KENNEDY: I think the reason you

10 hesitated to answer yes might be inconsistent with your

11 position.

12   (Laughter.)

13   MS. BRINKMANN: No, I don't think so, Your

14 Honor. I think that if they have a declaratory

15 judgment, then they'll have a judgment. I don't know

16 why they would ever go back to the arbitrator. That's

17 what I'm not --

18   JUSTICE KENNEDY: There are lots of other

19 things for the arbitrator to do. He's got some specific

20 issues of law that are contested.

21   MS. BRINKMANN: I don't see how that is

22 inconsistent with a party independently going for a

23 declaratory judgment action. I don't think that's

24 contrary to our position, Your Honor.

25   Thank you.

1   CHIEF JUSTICE ROBERTS: Thank you, Ms.

2   Brinkmann.

3   Mr. Phillips, you have you 5 minutes

4   remaining.

5   REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

6   ON BEHALF OF THE PETITIONER

7   MR. PHILLIPS: Thank you, Mr. Chief Justice.

8   I'll try to give you back some of that time before I'm

9   done.

10   In my experience in evaluating cases like

11   this, it seems to me that in some ways where you end up

12   depends in large measure on where you start. And the

13   parties fundamentally disagree about whether or not this

14   is an agreement that should be -- you know, who's got

15   the burden? Do we have to show that this agreement is

16   authorized by something or are we entitled to have this

17   agreement and it's their burden to demonstrate clearly

18   that Congress meant not to allow this to be enforced?

19   And it seems to me clear that the answer to that is that

20   it's their burden to find something specific in the

21   Federal Arbitration Act or otherwise that precludes

22   this.

23   Section 9 doesn't get them there because

24   section 9 is predicated always on an agreement of the

25   parties in the first instance, and so that's not a basis

1   for doing that, but even if you thought section --

2   JUSTICE SOUTER: What do you say about her

3   argument that we are limited in considering your

4   argument by the severability ruling that you didn't

5   appeal?

6   MR. PHILLIPS: I don't see how the

7   severability ruling has any relevance to this particular

8   problem, because what we're saying is we are entitled to

9   enforce the -- the agreement of the parties with respect

10   to exactly what the district court has the authority to

11   do. The fact that it -- whether it's severable or not

12   severable doesn't mean that we're not entitled to the

13   enforcement of the agreement as written by the parties.

14   Severability doesn't eliminate our right to have that

15   part of the agreement --

16   JUSTICE SOUTER: No, but it does -- it does

17   preclude -- I mean, her answer is an answer to the

18   argument that you were making in response to a question

19   of mine earlier, that in fact you don't have an

20   agreement within the meaning of the preamble portion of

21   section 9. She says you do because you have one after

22   severance and you didn't appeal severability.

23   MR. PHILLIPS: Right, but all I'm saying is

24   that I think that puts the cart before the horse.

25   Remember, severability only comes up after the court of

1 appeals had decided that this provision in the contract

2 was unenforceable. And then the question is, is there

3 any part -- you know, is the entire arbitration set

4 aside?

5   And what I'm saying is that initial decision

6 is wrong. And, therefore, you don't have to worry about

7 severability. And the reason why it's wrong is because

8 it's their burden to show something in the Federal

9 Arbitration Act that's -- that precludes enforcement of

10 this provision. Section 9 doesn't get you there.

11 Section 10 wouldn't get you there because it's not --

12   JUSTICE SCALIA: Remind me why section 9

13 doesn't get you there -- because of the "if" clause.

14   MR. PHILLIPS: Right. Because of the "if"

15 clause.

16   JUSTICE SCALIA: "If the parties in their

17 agreement have agreed that a judgment of a court shall

18 be entered upon the award made pursuant to" -- but they

19 have agreed to that, haven't they?

20   MR. PHILLIPS: Well no --

21   JUSTICE SCALIA: The question is simply --

22   MR. PHILLIPS: Subject to the condition that

23 the district court would make a determination that there

24 was no error in law. And that -- I mean, that's -- you

25 know, they had -- I mean, it's fascinating. If you look

1   at --

2   JUSTICE SCALIA: Why is, why is that

3   condition excluded from the "if" clause, but all of the

4   other conditions that are set forth in 10 are not

5   excluded from the "if" clause? I mean, it seems to me

6   the "if" clause must embrace any conditions.

7   MR. PHILLIPS: Right. But the point is if,

8   if all you do is agree to an arbitration, then section 9

9   and section 10 apply directly. But if you agree to an

10   arbitration that is subject to legal error review,

11   okay, then the "if" clause doesn't prevent you from

12   being allowed to have that portion enforced, Your Honor.

13   JUSTICE ALITO: Well, if you agree on

14   condition and the conditions are satisfied, are you

15   saying that the district court must enforce under

16   section 9, or are you saying that enforcement would be

17   under some other authority?

18   MR. PHILLIPS: I think the enforcement would

19   be under the existing authority that the district court

20   had in this particular case, because this was a case

21   that was pending before the district court under

22   diversity jurisdiction seeking to enforce the lease

23   agreement. And we have a final decision from the

24   arbitrator. The judge has now made a decision that that

25   is wrong as a matter of law and has enforced the lease

1   in a particular way.

2   And so the question is, is that judgment of

3   the district court subject to challenge? And our answer

4   to that is no. There is nothing in the Federal

5   Arbitration Act that prevents the district judge from

6   doing precisely what it did.

7   JUSTICE KENNEDY: I'm not sure why you have

8   to give the answer you just gave to Justice Alito, if

9   what you told Justice Scalia is correct, that the "if"

10   clause includes the condition that the court review

11   for issues -- for errors of law.

12   MR. PHILLIPS: I'm not sure there is any

13   inconsistency between those two things, to those

14   two statements, Justice Kennedy.

15   JUSTICE KENNEDY: Well, I thought you were

16   arguing to Justice Scalia that section 9 works because

17   you could interpret the "if" clause that way.

18   MR. PHILLIPS: Right.

19   JUSTICE KENNEDY: Now you're telling Justice

20   Alito, oh, well, it's a different action. We have got

21   the action here anyway.

22   MR. PHILLIPS: Right. Well, all I'm saying

23   is that we can win on either theory.

24   My whole point here has been section 9

25   doesn't prevent us from being able to do this. Section

1 10 is not an exhaustive list and, therefore, we are

2 allowed to add to section 10. And at the end of the

3 day, regardless, you ought to interpret this under

4 section 2, consistent with the intent of the parties to

5 ensure that we get what we want.

6   The one point I did want to make about how

7 all of this operates is, you know, in the relationship

8 between the courts and the arbitrators, it seems to me

9 there is probably no more important issue than who decides

10 whether something is arbitrable. And yet, this Court

11 held quite clearly in First Options that even though the

12 statute says it's the arbitrator -- I mean, that it's

13 the court, it can be made the arbitrator by the parties.

14   Thank you, Your Honor.

15   CHIEF JUSTICE ROBERTS: Thank you,

16 Mr. Phillips. The case is submitted.

17   (Whereupon, at 11:06 a.m., the case in the

18 above-entitled matter was submitted.)

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