1      IN THE SUPREME COURT OF THE UNITED STATES

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3    ARTHUR ANDERSEN LLP, ET              :

4    AL.                                  :

5            Petitioners                  :

6        v.                               :  No. 08-146

7    WAYNE CARLISLE, ET AL.               :

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

9                        Washington, D.C.

10                        Tuesday, March 3, 2009

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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 11:19 a.m.

15   APPEARANCES:

16   M. MILLER BAKER, ESQ., Washington, D.C.; on behalf of

17       the Petitioners.

18   PAUL M. De MARCO, ESQ., Cincinnati, Ohio; on behalf

19       of the Respondents.

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1                       C O N T E N T S

2   ORAL ARGUMENT OF                                    PAGE

3   M. MILLER BAKER, ESQ.

7   REBUTTAL ARGUMENT OF

8   M. MILLER BAKER, ESQ.

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

2                                    (11:19 a.m.)

3          CHIEF JUSTICE ROBERTS:  We'll hear argument

4     next in Case 08-146, Arthur Andersen v. Carlisle.

5                Mr. Baker.

6          ORAL ARGUMENT OF M. MILLER BAKER

7            ON BEHALF OF THE PETITIONERS

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

9     please the Court:

10               The principal question before the Court

11    today is whether nonparties to an arbitration agreement

12    that are otherwise entitled to enforce that agreement

13    under State law are foreclosed as a matter of law from

14    seeking relief under section 3 of the Federal

15    Arbitration Act.

16               Respondents' argument that section 3

17    forecloses such relief to nonparties is contrary to both

18    the text of section 3 and the structure of the FAA.

19    Nothing in the text of section 3 forecloses nonparty

20    enforcement rights, and under the structure of the Act

21    section 3 is a procedural device to enforce, rather than

22    a substantive limitation upon, State law arbitration

23    rights made applicable by section 2.

24               I'll begin with the text of section 3.

25    Under section 3, a stay is mandatory if the issue in

1    suit is, quote, "referable to arbitration under such an

2    agreement."  We contend that there are three elements

3    that determine whether or not an issue is referable to

4    arbitration under the agreement.  First, the applicant

5    must be able to enforce the agreement.  Second, the

6    plaintiff must be bound by the agreement.  And, third,

7    the claim must fall within the scope of the agreement.

8              Nothing in section 3 limits who can enforce

9    the agreement.  To answer that question we have to turn

10   to section 2.

11             JUSTICE GINSBURG:  Before you leave the

12   text, it says as you -- "referable to arbitration under

13   an agreement," but then it says "shall on application of

14   one of the parties."  How do we know whether that is

15   parties to the litigation or parties to the arbitration

16   agreement?

17             MR. BAKER:  Your Honor, it's -- it's clear

18   from the -- from the context it's referring to parties

19   to the action.  Likewise, in section 4 there's a

20   reference to parties, and it's parties to the

21   controversy.  So section 3 refers to parties to the

22   action in which the section 3 stay is sought.  Section

23   4, likewise, the companion enforcement provision, refers

24   to parties to the controversy.

25             CHIEF JUSTICE ROBERTS:  And what -- what is

1       the "controversy"?  Is it the controversy asserted to be

2       subject to arbitration or something else?

3                   MR. BAKER:  Well, "controversy" is in -- in

4       section 4, Your Honor, as opposed to section 3.  But the

5       controversy in this case is a tort claim against various

6       defendants.  And that -- the Petitioners in this case

7       assert that they are entitled to enforce the arbitration

8       clause, and under that clause this controversy is

9       supposed to be arbitrated.

10                  Now, section 2 is the primary substantive

11      provision of the Act.  Section 2 establishes that

12      questions concerning the enforceability of an

13      arbitration agreement, including who may enforce that

14      agreement, are decided by State law.  This Court's

15      decision in Perry v. Thomas recognized and applied this

16      principle.

17                  In Perry this Court remanded to State court

18      to decide the question of whether nonparties could

19      enforce an arbitration agreement.  In so doing, this

20      Court instructed the lower court to apply State law to

21      determine the very question that's before this case,

22      whether non -- before this Court, whether nonparties

23      could enforce the arbitration agreement.

24                  JUSTICE GINSBURG:  In practice, are there

25      decisions in which -- and I'm assuming that you are

1    right on the jurisdictional question -- in which a

2    nonparty to the arbitration agreement but a party to the

3    litigation has, in fact, succeeded in getting a stay

4    under section 3?

5                I mean, one question is -- and that's the

6    question on the merits -- assuming that a -- that a

7    party to the litigation, not a party to the arbitration

8    agreement, can come to court and say, court, stay the

9    action pending arbitration.  Have there been cases in

10   which section 3 stays have been issued on the request of

11   someone who is not party to the arbitration agreement

12   but is a litigant in the case?

13               MR. BAKER:  Yes, there have been, Your

14   Honor.  And there -- there are numerous cases.  In fact,

15   for the last 60 years it has been a recognized, settled

16   principle of FAA law that nonparties to an arbitration

17   agreement that are otherwise entitled to enforce the

18   agreement are able to seek and obtain stays under

19   section 3.

20               JUSTICE GINSBURG:  Well, the question --

21   ability is one thing.  It means they -- they have the

22   capacity to apply under section 3.  I was just wondering

23   how in practice -- I mean, here's a case where you have

24   three parties together counseling a certain tax shelter.

25   One of them enters an arbitration agreement with the

1    enterprise that they are advising.  The other two,

2    sophisticated players, do not.

3         My question is, conceding jurisdiction, it

4    seems to me unlikely that a court would listen to two

5    such people who were perfectly equipped to get an

6    arbitration agreement themselves and didn't.

7         MR. BAKER:  Well, Your Honor, it depends

8    upon the facts and the law.  It may well be that those

9    nonparties have no arbitration rights, in which case a

10   section 3 stay would not be available -- available to

11   them.

12        The question is whether they have rights

13   under State law.  If they do have rights under State law

14   to enforce the arbitration agreement to which they are

15   not parties, then they are entitled to a section 3 stay.

16        JUSTICE SOUTER:  I -- I don't see that the

17   -- that the section 3 stay follows from that.  It may

18   very well be that in whatever ultimate forum the case is

19   thrashed out in that the -- that the nonsignatories will

20   be able to enforce the arbitration agreement.

21        The question here is whether they can get a

22   stay in midstream in order to litigate that as a

23   separate issue.  And one argument for saying that they

24   should not, that the stay right should be limited to

25   signatories, is that the policy of the -- the Federal

1    Arbitration Act is to enforce arbitration agreements.

2    It is not a policy simply to promote arbitration under

3    all possible circumstances.  It is a policy to enforce

4    contracts because the contracts, in effect, were being

5    given short shrift before the act was passed.

6              If the policy is one to enforce contracts

7    and, as Justice Ginsburg said, they had a chance to make

8    an arbitration agreement and they didn't do it, then

9    that is a good reason to say the Federal courts will not

10   stay the proceedings in midstream for somebody who

11   didn't get the agreement that that person could have

12   gotten.  What is your answer to that argument?

13             MR. BAKER:  Section 2, Your Honor, sets the

14   policy of the FAA, and section 2 establishes that State

15   law determines the rights and obligations of nonparties

16   to an arbitration agreement.  If nonparties have rights

17   --

18             JUSTICE SOUTER:  Including -- and -- and

19   you're saying that that covers, in effect, even a point

20   of Federal procedure as to whether you get, in practical

21   terms, an interlocutory appeal.  That's a question of

22   State law?

23             MR. BAKER:  Your Honor, that brings us to

24   the question of appellate jurisdiction, but first let me

25   deal with the merits.  Section 3, as this Court has

1    recognized on various occasions, is a procedural device

2    to enforce the substantive policy of section 2.  It has

3    no substantive component on its own.

4              Section 2 establishes -- settles the

5    question of who may enforce or is bound by an

6    arbitration agreement.  It settles that question by

7    directing a court to look to State law.  Section 3 is --

8              JUSTICE SOUTER:  And the question here is:

9    What is the procedure to be followed in a Federal court

10   when there is disagreement about that?  And to say that

11   that is a question of State law strikes me as a stretch.

12             MR. BAKER:  Your Honor, section 3 is a

13   procedural device to enforce State law arbitration

14   rights.  Section -- likewise, section 4 is the same

15   thing.

16             JUSTICE SCALIA:  Why do you say that section

17   2 -- it isn't at all clear to me that section 2 says

18   State law determines whether somebody not a party to the

19   arbitration agreement can -- can enforce it.

20             MR. BAKER:  Your Honor, that was the reading

21   of this Court in the Perry v. Thomas decision in 1987.

22   This Court construed section 2 as being a touchstone for

23   choice of law and that section 2 required the court

24   concerning questions concerning the enforceability of an

25   arbitration agreement to look to State law to answer

1    those questions.

2              JUSTICE SCALIA:  Including enforceability by

3    whom?

4              MR. BAKER:  Absolutely.  That was the

5    precise question before the court in Perry and this

6    Court remanded to the California Court of Appeals to

7    determine whether nonsignatories to an arbitration

8    agreement could enforce that agreement.  The California

9    Court of Appeals on remand held that they could under a

10   theory of agency, which is indistinguishable in

11   principle from the theory that Petitioners are asserting

12   here today.

13             Respondents' theory, their interpretation of

14   the Federal Arbitration Act, would wipe out six decades

15   of FAA case law recognizing that nonparties have

16   enforcement rights.

17             JUSTICE GINSBURG:  Do we have any

18   situation -- and this one is really peculiar because the

19   one party who has the arbitration agreement with

20   Carlisle is now out of it, and is not going to get back

21   in, because -- is it Bricolage -- is bankrupt, so there

22   is an automatic stay of any litigation against

23   Bricolage.

24             The one party that has the arbitration

25   agreement is out of the picture, so you have an

1    arbitration agreement effectively with no one, that two

2    parties who have no arbitration agreement are trying to

3    enforce:  The difference between parties to the

4    litigation joining in an ongoing arbitration brought by

5    either party to the arbitration agreement, and relying

6    on an arbitration agreement effectively without two

7    parties to it.

8              MR. BAKER:  Your Honor, the bankruptcy of

9    Bricolage has no effect whatsoever on our rights under

10   State law to enforce the agreement.  It is what it is,

11   but --

12             JUSTICE GINSBURG:  But if you have a party

13   to the agreement who is no longer in the picture,

14   doesn't that change things?

15             MR. BAKER:  Well, the Respondents might --

16   might contend so, and they -- they are free to argue on

17   remand the question of whether or not that bankruptcy in

18   any way affects our rights, whether we can prevail under

19   equitable estoppel in this case.  But for purposes of

20   this Court, the question that we -- that the Court has

21   to decide is whether or not as a matter of law a

22   nonparty is foreclosed from seeking relief under section

23   3, and section 3 does not foreclose such relief because

24   section 2 establishes the principle that this -- that a

25   court is to look to State law to determine the question

1      of who can enforce an arbitration agreement.

2                So we're saying that Respondents' theory of

3      the case would wipe out 60 years of FAA case law

4      recognizing that nonparties have arbitration rights.

5      Theories such as third party beneficiary, assignment,

6      agency, estoppel, including equitable estoppel,

7      assumption, successor in interest, none of those cases

8      can survive effectively if this Court were to affirm the

9      decision of the Sixth Circuit.

10               I will now turn to section 16 and the

11     question of appellate jurisdiction.  Respondents, like

12     the court below, erroneously conflate the merits of the

13     section 3 issue with appellate jurisdiction.  Thus if

14     you reject their interpretation of section 3,

15     necessarily their appellate jurisdiction argument fails.

16     But that -- their theory of appellate jurisdiction

17     nevertheless should be rejected on its own merits.

18               Under section 16, and that's found at page 3

19     of the blue brief -- an appeal may be taken from an

20     order refusing a stay of any action under this title.

21     This establishes a broad category of orders that are

22     immediately appealable.  The Sixth Circuit below used a

23     signatory test to determine whether it had appellate

24     jurisdiction.  Now, this test is legally erroneous, as

25     the Respondents concede.  For 70 years -- should be 80

1    years -- the Federal Arbitration Act has been understood

2    not to contain a signatory requirement.

3              JUSTICE SOUTER:  May -- may I ask you this?

4    Let's assume State law said we -- we don't recognize

5    stays at this stage of the game.  Therefore, we will not

6    give a stay to anyone.  Would State law prevail?

7              MR. BAKER:  Your Honor, State law controls

8    the question of who may enforce the agreement, who has

9    rights and obligations under the agreement.  Sections 3

10   and 4 control the question of whether relief is

11   available in Federal court.  The procedural devices to

12   enforce State law arbitration rights may vary from State

13   to Federal Court, but the principle of who --

14             JUSTICE SOUTER:  But isn't that the problem?

15   That's what I'm getting at.  Isn't that the problem for

16   you in this case?  Because you keep arguing that their

17   substantive rights under the agreement are issues of

18   State law, but the question before us is not one of

19   ultimate substantive right.  At some point there will be

20   an -- an appellate process open to them and they can

21   assert those substantive rights if they didn't get them

22   at trial.

23             The issue here is not substantive right.

24   The issue here is a procedural right, and it's a

25   procedural right which depends upon the terms of the

13

1    Federal statute, and that's why it seems to me that it

2    may very well be that the Federal statute determines not

3    only the procedural right, the stay, but who may ask for

4    it, that being a sensible Federal question rather than a

5    State question.

6              MR. BAKER:  Your Honor, the premise of your

7    question drives a wedge between section 2 and section 3

8    that is inconsistent with this Court's -- Court's

9    decision in Bernhardt.  This Court in Bernhardt said

10   that section 3 cannot be read apart from section 2.

11   Section -- this Court has never characterized section 3

12   or section 4 as containing any substantive elements.

13   Such --

14             JUSTICE SOUTER:  And your argument depends

15   upon, as Justice Scalia pointed out a moment ago,

16   reading section 2 as in effect incorporating State law

17   for purposes of determining substantive rights.

18             MR. BAKER:  It absolutely does.

19             JUSTICE SOUTER:  Okay, but that still begs

20   the question whether the -- whether the incorporation of

21   State law to determine substantive rights controls the

22   question of what law determines procedural rights, when

23   a Federal procedural right is claimed, which is what is

24   involved here.

25             MR. BAKER:  That's -- that's correct.  And

1    sections -- it is a Federal question as to what sections

2    3 and 4 require.

3              JUSTICE SOUTER:  And regardless of State law

4    the answer to the Federal question is independent of it.

5              MR. BAKER:  That's not correct, Your Honor.

6              JUSTICE SOUTER:  Then I'm -- I'm missing the

7    logic of your argument.

8              MR. BAKER:  The logic of the argument is

9    that section 3 and section 4, as this Court has said on

10   several occasions, are devices to enforce the principle

11   of arbitration enforceability outlined in section 2.

12   Section 2 establishes the substantive principle here.

13   Sections 3 and 4 are mere procedural devices.  Under --

14             JUSTICE SOUTER:  But they are Federal

15   procedural devices and State law could not contradict

16   them.  That's -- that's what we got into when I said

17   what if State law said there could be no stay?  You

18   agree at that point that of course the Federal law would

19   prevail?

20             MR. BAKER:  That would apply to -- that

21   would apply to the question of the -- the action in that

22   court, but in the Federal court the threshold --

23             JUSTICE SOUTER:  It would apply to what the

24   judge is supposed to do at that moment when somebody

25   says, I want a stay.  And the judge at that point

15

1    consults Federal law, not State law, doesn't he?

2              MR. BAKER:  That -- on the procedural

3    question of what procedural mechanism --

4              JUSTICE SOUTER:  Well, just stick to my

5    question.  He says:  I want a stay.  Does the judge look

6    to State law or Federal law?

7              MR. BAKER:  The judge first looks to the

8    question of who can enforce the agreement, and to ask

9    that -- to answer that question, the judge has to look

10   to State law.

11             JUSTICE ALITO:  Why is that necessarily so?

12   I don't understand your answer to that question, or your

13   statement that your argument is dependent on the

14   resolution of that choice of law issue.

15             Are the courts of appeals unanimous on the

16   question of whether the enforceability of an arbitration

17   agreement by a nonparty is a question of State law?  I

18   think there's at least a Fourth Circuit decision that

19   says it's a question of Federal law, but why -- why do

20   we have to decide that and why is your argument

21   dependent on it?

22             Suppose that is, suppose that were a

23   question of Federal law, what would that -- it might

24   change the ultimate outcome of whether there's an

25   entitlement to a stay, but I don't see why it has any

1    effect on a question of whether there is jurisdiction.

2              MR. BAKER:  I don't think it has any

3    question -- effect on the question of jurisdiction, Your

4    Honor.

5              JUSTICE ALITO:  Nor does it mean that you

6    necessarily cannot enforce the arbitration agreement,

7    does it?

8              MR. BAKER:  It means that -- well, you have

9    to look to a source of law to determine whether a

10   nonparty has rights under an arbitration agreement.  I'm

11   aware of that Fourth Circuit case.  Your Honor, I

12   believe that the court was incorrect.  I believe this

13   Court's decisions in Perry and ensuing cases make it

14   clear that State law determines the rights and

15   obligations of nonparties to an arbitration agreement.

16   That's a settled principle.  And so that is a threshold

17   question that has to be --

18             JUSTICE GINSBURG:  But if you read section

19   3, if you interpret, as you do, the word "parties" to

20   mean parties to the litigation, then for purposes of

21   jurisdiction the only thing is, is this person a party

22   to the litigation?  Yes.  End of case; they can move for

23   a stay.  Then whether they're entitled to one because of

24   this equitable estoppel theory which is determined by

25   the State law is a merits question.

1            You are making a more complex jurisdictional

2    argument than I understand.  What's wrong with the

3    simple argument that section 3 says parties; that means

4    parties to the litigation; the -- the Petitioners here

5    are parties to the litigation.  Therefore, they can move

6    for a stay of the arbitration.  And then we go to the

7    merits and say, do they have a good reason for staying

8    the arbitration?

9            But you're presenting a more complex

10   argument on the jurisdictional point which I don't quite

11   understand.

12           MR. BAKER:  Your Honor, I'm not sure I

13   understand the question.  Are you referring to appellate

14   jurisdiction or jurisdiction under the FAA?

15           JUSTICE GINSBURG:  First, is there

16   jurisdiction -- yes, appellate jurisdiction.  If you --

17   if there's an application to stay, is that appealable?

18   Why isn't -- why isn't the answer clearly yes?

19           MR. BAKER:  The answer, Your Honor, is

20   clearly yes.  If we're talking about --

21           JUSTICE GINSBURG:  But your step -- you seem

22   to be involving some merits question of State law in

23   that question.

24           MR. BAKER:  Your Honor, I turned to the

25   merits first because the Sixth Circuit below erroneously

1  conflated two entirely distinct concepts.  The first is

2  appellate --

3            JUSTICE GINSBURG:  You shouldn't do that.

4  You should tell us, this is the jurisdictional argument.

5  If we pass that threshold, then we get to the merits.

6            MR. BAKER:  All right.  Well, I'll start

7  with jurisdiction, Your Honor.

8            JUSTICE GINSBURG:  Good.

9            (Laughter.)

10            MR. BAKER:  All right.  Section 16 makes it

11  clear that all one needs to have for appellate

12  jurisdiction is a motion under section 3 for a stay

13  pending appeal, and that is denied.  That establishes a

14  broad category of orders.  The Sixth Circuit didn't

15  apply that text.  The Sixth Circuit used a --

16            JUSTICE GINSBURG:  May I ask -- may I ask?

17  Suppose it's somebody who has interest in the litigation

18  but is not a party either to the arbitration agreement

19  or to the litigation?

20            MR. BAKER:  If a -- if a party -- if a

21  litigant makes a section 3 stay and they claim no right

22  to enforce the arbitration agreement, that denial of

23  that stay would be appealable, all right, because

24  section 16 --

25            JUSTICE GINSBURG:  I'm asking of somebody

1   who is not a litigant, who can -- if somebody who is an

2   interested spectator moves for a stay of litigation to

3   which that person is not a party, and the court says of

4   course not.  Would that be reviewable on appeal?

5           MR. BAKER:  No, because they -- the

6   spectator is not even a party, Your Honor, to the

7   litigation.  Section 3 contemplates parties to the

8   litigation seeking a stay.

9           On the question of appellate jurisdiction,

10   if a litigant makes a request for a section 3 stay and

11   the stay request is denied, there is clearly appellate

12   jurisdiction under section 16.  That is -- in our view.

13           JUSTICE GINSBURG:  That's your

14   jurisdictional argument.

15           MR. BAKER:  That's our jurisdictional

16   argument.  The mere request for relief under section 3

17   and the denial of that request triggers appellate

18   jurisdiction.

19           JUSTICE GINSBURG:  And you're saying that's

20   all that's before us because it was thrown out --

21           MR. BAKER:  That's not all that's before

22   you.  The Sixth Circuit below conflated the question of

23   whether there's appellate jurisdiction with whether non-

24   signatories can seek relief under section 3.  That's why

25   it's essential for the Court to reach the second

1    questioned presented, which is whether non-signatories

2    as a matter of law are foreclosed from seeking relief

3    under section 3.

4              The court below -- I'll turn back to

5    appellate jurisdiction to -- Your Honor.  The court

6    below used a fact-based test; that is, is the party

7    seeking relief a signatory to the agreement?  That --

8    that cannot be the law.  Eighty years of FAA law

9    establishes that you don't have to be a signatory to

10   enforce an arbitration agreement.  In addition, it

11   violates this Court's rule that you look to categories

12   of orders, rather than the facts of a given case in some

13   appellate jurisdictions.

14             JUSTICE BREYER:  What are the instances in

15   which somebody who is not a signatory might seem to have

16   a right to enforce it?  I can think of one.  Suppose

17   he's a third-party beneficiary of the contract.  Are

18   there others?

19             MR. BAKER:  Well, absolutely, Your Honor.

20             JUSTICE BREYER:  What?

21             MR. BAKER:  There's assignment, successor in

22   interest, assumption, estoppel.

23             JUSTICE BREYER:  Okay.

24             MR. BAKER:  There's a whole --

25             JUSTICE BREYER:  I mean, which one applies

1    here?

2              MR. BAKER:  Well, estoppel, and there are --

3              JUSTICE BREYER:  Estoppel?  I don't

4    understand estoppel.

5              MR. BAKER:  Well, Your Honor, it's a theory

6    that was --

7              JUSTICE BREYER:  I know what estoppel is in

8    the law.

9              (Laughter.)

10             MR. BAKER:  More precisely, it's equitable

11   estoppel, but the -- the practice treatises have entire

12   chapters devoted to --

13             JUSTICE BREYER:  I know, but I haven't

14   unfortunately had a chance to read all the practice

15   treatises.  So could you explain to me quite simply what

16   is the theory of equitable estoppel that allows someone

17   who is not a signatory to an arbitration contract to

18   have it enforced?

19             MR. BAKER:  Yes, Your Honor.  The theory

20   here is that the Respondents asserted claims of -- of

21   concerted misconduct, of conspiracy against the

22   Petitioners, some of whom were -- one of -- well, none

23   of whom were signatories to the arbitration agreement in

24   Bricolage which did -- was a signatory to the agreement,

25   that claim of concerted misconduct, in our view, where

 1    the Respondents are relying upon the agreement, that is

 2    the agreement that they entered into with Bricolage to

 3    -- is a theory upon which they are now seeking relief

 4    from us.  They are claiming that this contract that

 5    contains the arbitration clause was an instrumentality

 6    for the fraud that was perpetrated on them.  Because of

 7    that they are now estopped from seeking, claiming that

 8    they are not -- not obligated to arbitrate under the

 9    agreement.

10                JUSTICE BREYER:  In other words, whenever I

11    sign a contract with anybody -- I sign one with Smith, I

12    ask him to buy some wheat, I sell him some wheat, and

13    there's an arbitration clause.  And now I sue all kinds

14    of other people, and the contract is part of the

15    lawsuit.  Are there many cases like that?  Maybe it was

16    a shipper, or something, who they sent the contract to,

17    and he had to figure out what to do on the basis of the

18    contract.  Or maybe there was a cousin who told me to go

19    to see Smith in the first place.  Maybe -- I don't know.

20    There are a lot of people.  So, now all those people

21    have to go to arbitration?

22                Because you're saying whenever I go in and

23    have a contract with X and there's an arbitration

24    clause, then in any future lawsuit where I sue anybody

25    and that contract is an essential part of it, the breach

23

1    thereof, he could put me in arbitration.  Boy, that

2    sounds extreme.  I mean, I guess there are -- there'd

3    have to be several treatises on this, but it doesn't

4    sound intuitively sensible.

5                MR. BAKER:  Well, Your Honor, we're not

6    saying that that applies in every case.  There's more --

7                JUSTICE BREYER:  Oh, okay.  That's all I

8    wanted to know is what's the theory in this case.

9                MR. BAKER:  The theory of equitable

10   estoppel.

11               JUSTICE BREYER:  If that's the theory, I --

12   unless I think it always applies, I could just say I

13   don't have to decide about a third-party beneficiary.

14               MR. BAKER:  Your Honor --

15               JUSTICE BREYER:  I just have to decide

16   whether you can enforce it.  Now -- so you'd better say

17   some other things.

18               (Laughter.)

19               JUSTICE KENNEDY:  Well, of course, one of --

20               MR. BAKER:  Well, Your Honor, give me --

21               JUSTICE KENNEDY:  One of the things you're

22   going to say is that, with all due respect, Justice

23   Breyer, this conflates the merits with the

24   jurisdictional problem, which is exactly the mistake

25   that the court of appeals made.  Is that your theory of

24

1    the case?

2              MR. BAKER:  Well, that's -- that's the first

3    error of the court of appeals, but the court of -- the

4    second error of the court of appeals was to decide --

5    was to hold as a matter of law that section 3 does not

6    allow nonparties to enforce an arbitration agreement.

7              The question of the merits of equitable

8    estoppel is not before this court, Your Honor, and it

9    may well be on remand in the Sixth Circuit that --

10             JUSTICE BREYER:  I wouldn't have asked my

11   question if you hadn't said we have to go beyond the

12   question whether they had jurisdiction and answer the

13   merits, which is whether you can in fact enforce it.

14             MR. BAKER:  Your Honor --

15             JUSTICE BREYER:  Now you're saying, no, we

16   don't.

17             MR. BAKER:  Your Honor, the merits -- there

18   are two parts to the merits.  The first is whether as a

19   matter of law nonparties are foreclosed from seeking

20   relief under section 3.  That -- that is all this Court

21   need decide.  That is what the question --

22             JUSTICE BREYER:  I could just rely on my

23   third-party beneficiary example?

24             MR. BAKER:  As an example?  Exactly.  A

25   third-party beneficiary can enforce an agreement as a

1   matter -- is entitled to enforce -- to use section 3.

2            JUSTICE SCALIA:   If he can do it under State

3   law?

4            MR. BAKER:   If he can do it under State law.

5   Absolutely, Justice Scalia.

6            The question of whether or not we satisfied

7   the requirements of equitable estoppel is not before the

8   Court.   That's a question to be decided on remand by the

9   Sixth Circuit.

10           Unless there are any further questions, I'd

11   like to reserve the balance of my time.

12           CHIEF JUSTICE ROBERTS:   Thank you, counsel.

13           Mr. De Marco.

14         ORAL ARGUMENT OF PAUL M. De MARCO

15           ON BEHALF OF THE RESPONDENTS

16           MR. De MARCO:   Mr. Chief Justice, and may it

17   please the Court:

18           Estoppel is what you invoke when you have no

19   contract to invoke, and this version of equitable

20   estoppel is what you invoke when you have no arbitration

21   agreement to invoke.

22           I want to come to a question that was just

23   asked by Justice Breyer.   Section 3 mandates only stays

24   in aid of contract-based arbitration obligations.   They

25   are not fungible, these arbitration agreements.   They

26

1    cannot just be picked up by anyone and advanced as a

2    ground for arbitration.

3              This court has consistently said, in Volt,

4    for example, at page 478:  The FAA does not require

5    parties to arbitrate.

6              JUSTICE BREYER:  Well, I thought the first

7    issue -- I never got past the first issue.

8              MR. De MARCO:  Yes, sir.

9              JUSTICE BREYER:  And the first issue was,

10   does he have a right to appeal?  And I read the statute,

11   and to me section 16 says yes.  He asked for a stay.  It

12   was denied, and it says an appeal may be taken from an

13   order refusing a stay.  So there's an order refusing a

14   stay; he appealed.  Why can't he appeal?

15             MR. De MARCO:  Because the stay that he

16   requested was distinctly outside section 3, not as a

17   merits question, but so far outside question -- section

18   3 that we can say he should not -- that the stay was not

19   requested under section 3; it was not denied under

20   section --

21             JUSTICE BREYER:  Is there any -- is there

22   any other example in the law -- I can't think of one --

23   where you say this party has so silly an argument, which

24   is really what you're saying --

25             MR. De MARCO:  Right.

27

1                    JUSTICE BREYER:  -- that we don't even let

2     him appeal.

3                    MR. De MARCO:  Yes.  There are --

4                    JUSTICE BREYER:  It seems to me I've gotten

5     a lot of appeals where the appeal, I don't think, is too

6     meritorious, but nonetheless I never heard of saying you

7     can't appeal.

8                    MR. De MARCO:  Right.  There are sort of

9     what I would call the Trojan Horse appeals, where a

10    party actually has moved to compel discovery and they

11    characterized it as an injunction.  When that was

12    denied, they said:  An injunction was denied; we have

13    the right under 1292(a).  The court of appeals is

14    perfectly able to pierce that and say:  No, that's a

15    discovery motion; that's outside of the injunctive area.

16                   And here why we're saying this, Your Honor,

17    we recognize what they say about the Behrens case.  This

18    is an instance where we're asking the Court to, in a

19    sense, pull the veil on these section 3 --

20                   JUSTICE BREYER:  As to that, if you did

21    that, I got your first point.  I understand it.  I agree

22    with it.

23                   As to the second point, you say -- I was

24    surprised because I hadn't quite taken that in -- that

25    we are now supposed to reach what we would call the

28

1    merits of the appeal.  Now, there you just heard your

2    co-counsel say:  Look, you don't have to decide whether

3    my equitable theory is good or not.  You haven't read

4    the treatises, I have; which is a fair comment.  And --

5    and all I want you to say is that sometimes, at least, a

6    third party could enforce a contract to arbitration that

7    two others make.

8              The statute doesn't say he can't.  The

9    statute doesn't say he has to be the one who signed it.

10   And if you think of a third party beneficiary or an

11   assignment, for example, you would think, of course,

12   there are other people, say an assignee, who could

13   enforce it.

14             MR. De MARCO:  Right.  And there's a reason

15   why those -- in those cases, the third -- I will call

16   them nonparties were allowed to enforce.  Let me preface

17   that by saying not all of those were -- we've heard a

18   lot about State law and Federal law.  Not all of those

19   are tightly grounded in Federal law.

20             But take your example of the third party

21   beneficiary, they cite a case called J.P.  Morgan in

22   which the woman was incompetent, the agreement with the

23   nursing home was signed as -- on her behalf.  I think

24   that's clear in that kind of case that the nonparty is

25   asserting the right through the contract, because of the

1    contract, dependent on the contract.

2              Here, by claiming equitable estoppel not

3    only aren't the Petitioners asserting rights that flow

4    to them from the contract, because they have no

5    contract; they are actually saying -- this is the gist,

6    it gets back to your question, what's the gist of their

7    equitable estoppel theory.  It's as we quote in footnote

8    13:  The gist of it is that equitable principles prevent

9    Respondents from claiming that they have no obligation

10   to arbitrate with the Petitioners despite the lack of an

11   agreement.

12             Their very theory assumes that what section

13   3 says must exist is absent.  Their very theory says we

14   don't have an agreement of our own to assert, and

15   therefore, we need equitable principles to fill the

16   void.  Now, where do these equitable principles come

17   from?

18             JUSTICE GINSBURG:  Then you might say that

19   they haven't stated a claim on which relief can be

20   granted, but that is the merits question.  We are

21   supposed to be dealing with the question of whether the

22   denial of the stay -- there was a denial of a stay -- is

23   appealable under section 16.  And to decide that

24   question I don't think you get into how meritorious

25   their claim was for the stay.

1            MR. De MARCO:  Your Honor, the fact that

2    they have filed a motion, and as I referred to it, the

3    concern that we have, and I think the concern that

4    animated DSMC and Universal when they took up this

5    issue, was the Trojan Horse stay motion.  We have to

6    keep in mind not every stay that is filed pending

7    arbitration, a stay pending arbitration is necessarily

8    filed under section 3, because in footnote 23 of Moses

9    H. Cone this Court recognized another kind of stay

10   pending arbitration, and that's a discretionary stay.

11            JUSTICE SOUTER:  Okay.  And what is the

12   criterion for identifying a section 3 stay?

13            MR. De MARCO:  The criterion, Your Honor, is

14   that the right to the stay must be -- the right to --

15   the statute speaks in terms of referable to arbitration

16   under an agreement.  What does that mean?  "Referable to

17   arbitration" is the arbitration obligation.  "Under" in

18   that means dependent on, because of.  So the

19   arbitrability of it depends on a written agreement.

20            JUSTICE SOUTER:  And your -- and your

21   position is that the statute should be so construed that

22   only a signatory to the written agreement has a right to

23   the stay, indeed has a right to request the stay under

24   article 3?

25            MR. De MARCO:  Yes.

1                    JUSTICE SOUTER:  What is your reason for

2      saying that?

3                    MR. De MARCO:  Just to clarify, the statute

4      being section 3.

5                    JUSTICE SOUTER:  Yes.

6                    MR. De MARCO:  Yes.  The reason for that is

7      this Court has been very clear in its interpretations of

8      the FAA in general.  The FAA in general, the Court has

9      said, requires -- does not require parties to arbitrate

10     when they have not agreed to do so.  So that sets the

11     standard.  If there is no agreement, you cannot force

12     that signatory, which didn't have an agreement with that

13     nonsignatory, to arbitrate.

14                   JUSTICE KENNEDY:  Well, what do you do with

15     third party beneficiary assignment assumption?

16                   MR. De MARCO:  All of those examples,

17     Justice Kennedy, in all of those examples the right to

18     enforce the agreement, let's say the right to procure a

19     stay based on the agreement, flows from the intention of

20     the parties to the original agreement.

21                   The examples they use -- assignment, they

22     cite a case where there is -- there was an express

23     assignment, and in the assignment the Court said they

24     actually assigned the agreement with the arbitration

25     clause in it to the successor.  They cite an assumption

32

1    case.  It was an express signed assumption.  Those are

2    all cases of contract-based arbitration.

3                JUSTICE KENNEDY:  Well, in a way that was

4    where one of the parties, without the other party's

5    consent, say assignee, a third party beneficiary.  Here

6    in a way it's a fortiori because the party who is

7    objecting, his or its own actions caused the agreement

8    to come into play.  That's their theory.

9                MR. De MARCO:  Well, let me tease that out a

10   bit.  The -- one of the -- the problems in this area,

11   this equitable estoppel that has developed as an ersatz

12   form of equity principle, it is not tied to section 3

13   nor is it tied to State law.  It is -- it is perfectly

14   ad hoc, so it's an amorphous concept that we've seen

15   develop over the last --

16               JUSTICE BREYER:  Your proper -- I see this

17   is actually a pretty difficult question to me, and --

18   because it seems to me sometimes they have to be able to

19   enforce it, the assignee, the third party beneficiary.

20               MR. De MARCO:  Right.

21               JUSTICE BREYER:  And now what I don't know,

22   is what they're doing, it's true that section 3 and all

23   the other sections, they talk about the agreement, but

24   they don't say that the individual who is asking for the

25   stay has to be the same person who signed it, as they

1    couldn't.  So how do we know which among all the

2    possible people in the case who hasn't signed it should

3    and should not be able to enforce it?

4              Their argument is look to State law, okay?

5    And your argument is derive some principles yourself.

6    Really.

7              MR. De MARCO:  Right.

8              JUSTICE BREYER:  And so, so -- is it

9    possible to answer this case by saying he's wrong in

10   thinking you always look to State law.  It may depend on

11   what the State law says.  So that's the answer to the

12   question.  You should have had your appeal.  Go appeal,

13   and let the courts below work that out first, knowing

14   that the State law is relevant but not always

15   determinative.  Then we'll get some -- we'll get some

16   case law on this and we'll be in a better position to

17   figure out what the right answer is.

18             MR. De MARCO:  Justice Breyer, the question

19   of arbitrability does not always depend on State law.

20   In Volt, in first options this Court said sometimes it

21   does, but it does when the issue is, was a contract

22   formed, is a contract valid.  How are we going to

23   interpret that contract?

24             Here where equitable estoppel is concerned,

25   that's not the consideration.  Therefore, because you

34

1    can -- you can interpret the contract until the cows

2    come home, you're never going to find the Petitioners in

3    it.  So that the question --

4              JUSTICE BREYER:  Well, you see it's a little

5    hard.  I can imagine a case where they're sitting in the

6    room drawing up the contract, they put it in the

7    arbitration agreement.  There are four other people

8    directly related to the room.  The parties look around

9    and say, hey, we have arbitration here, I hope everybody

10   understands everybody is going to have to do this.  And

11   they all say, okay, don't worry about it.

12             Now, I would say, hey, maybe they're

13   estopped.  And there they're going right through the

14   contract.

15             MR. De MARCO:  Right.

16             JUSTICE BREYER:  So I hate to write the

17   words "equitable estoppel is never relevant."  I would

18   rather write the words "I'm uncertain State law is

19   relevant policy."  You know, it's not true that it's

20   always relevant.

21             MR. De MARCO:  I think the safest ground is

22   to clear up first this question of how arbitrability is

23   decided.  And I think Justice Alito asked the question:

24   Is -- is there unanimity among the courts of appeals.

25             The Fourth Circuit case that I -- I think

1    was mentioned, I believe that's the Bailey case.  I

2    don't even think there is unanimity, unfortunately,

3    within the Fifth Circuit.  But there -- the -- the

4    better view, I think, that is expressed in the Fourth

5    Circuit case is that when the issue that's pivotal is

6    contract interpretation, arbitrability in that narrow

7    sense, that's State law.  When it's not, it's Federal

8    law.

9              And I think that's why you see these

10   equitable estoppel cases not talking at all about State

11   law.  It is sort of an ersatz, ad hoc version of Federal

12   equity that's being --

13             JUSTICE SOUTER:  Okay.  Why shouldn't the

14   Federal law be even simpler than that?  And I -- I

15   proposed one, and -- and probably because I don't

16   understand the law well enough, it may -- may have been

17   simply simplistic.

18             But my suggestion was the -- the issue

19   before us should be construed narrowly as being the

20   question of who can ask for a stay.  And the answer to

21   that would be only a person -- or one possible answer to

22   that would be only a person who has signed the

23   arbitration agreement, because the Federal policy is to

24   enforce agreements, not force arbitration.  And,

25   therefore, it is sensible as a matter of Federal policy

1    to say, we're not going to stop this trial in mid-track

2    for arbitration unless you who are asking for it to be

3    stopped signed an arbitration agreement yourself, and

4    it's that agreement that you're trying to enforce.

5              Now, that is maybe a -- a too simplistic

6    approach, but tell me what's good or bad about that.

7              MR. De MARCO:  I think that it's the correct

8    approach to say that we are not talking generically

9    about the enforceability of arbitration agreements.  We

10   are talking in the context under section 3 of an

11   existing lawsuit.  That one party says, hey, I want to

12   stay this lawsuit.  So it is a different enforcement

13   mechanism than -- than the -- than the generic law.

14             JUSTICE SOUTER:  Okay.  That opens the door

15   to my simplistic theory.  Now --

16             MR. De MARCO:  Yes.

17             JUSTICE SOUTER:  -- is it a good theory or a

18   bad theory?

19             MR. De MARCO:  It's a good theory because

20   then, once you've opened that door to the -- the ability

21   to ask for a stay, you must ask:  Well, what are the

22   ground rules for asking for this stay?

23             And while my friend continuously returns to

24   State law, our point is you don't depart from the terms

25   of section 3 itself, because section 3 itself tells you

1   the circumstances under which the mandatory stay

2   provision applies.  And those circumstances are only

3   when it is referable to arbitration under a written

4   agreement.

5          JUSTICE SOUTER:  Okay.  But it seems to me

6   that that's not enough, because "under the written

7   agreement" leaves open the question of whether the

8   written agreement can be enforced right here and now by

9   getting a stay only by somebody who signed it or by a

10  third party beneficiary or -- or somebody dependent on

11  the contract plus some other legal theory.

12         My simplistic suggestion was:  Keep it

13  simple and simply say the -- "under the agreement" means

14  an agreement signed by you, and the reason we confine it

15  to an agreement signed by you is not because the phrase

16  "under this agreement" tells us that.  It doesn't.  That

17  leaves the question open.

18         We say it is going to be confined to an

19  agreement signed by you because that's really the -- the

20  nub of the Federal policy.  We want to enforce

21  agreements, and we want to confine this extraordinary

22  remedy of a stay to people who went to enough trouble to

23  make -- and I don't know whether that's a good idea or

24  not.  And -- I mean it's favorable to you, so it's in

25  your interest to say it's a good idea, but I may be

38

1    getting into trouble by that.  And that's what I want

2    you to tell me.

3              MR. De MARCO:  Well, that's consistent with

4    the Federal policy as this Court has expressed that

5    Federal policy.  It has -- it has said repeatedly the

6    Federal policy is not a general policy to encourage this

7    form of dispute resolution but, rather, it is to give

8    effect to parties when and if they agree to arbitration.

9    So I agree that that is, and should be, the starting

10   point of the analysis.  Is -- and -- and it was

11   expressed in -- in Mitsubishi this way:  That -- that

12   the intent of the FAA is to give effect to arbitration

13   agreements, to put them on an equal footing with all

14   other agreements, but not more so.  And I believe what

15   -- what Petitioners are asking for is a "more so."

16             JUSTICE STEVENS:  Mr. De Marco, can I ask

17   you this question?  In section 3 do you agree with his

18   reading of the word "parties," or do you think "parties"

19   just means parties to the contract?

20             MR. De MARCO:  With my friend's reading?

21             JUSTICE STEVENS:  Yes.

22             MR. De MARCO:  Justice Stevens, I have to be

23   honest and say I'm concerned about that argument because

24   I think Congress has used the word "parties" throughout

25   the FAA rather haphazardly to mean three different

1    things, maybe four:  Party to the agreement, party to

2    the action, party to the arbitration, or party-like

3    person.  And I would be concerned about hanging it on --

4    on that.  So my -- my answer is, because of the way it's

5    used in sections 3, 4, 5, 9, I would be concerned about

6    -- about resting on that.

7            JUSTICE STEVENS:  You are concerned about --

8    does that mean you agree with him that "parties" means

9    parties to the action and not parties to the contract?

10           MR. De MARCO:  I -- actually in section 3

11    what I would say is it's equivocal, and the rest of the

12    FAA doesn't help us understand that.  So it's an -- it's

13    an issue on which I would not hang my hat, because it is

14    equivocal.

15           JUSTICE BREYER:  What would you think about

16    saying that some parties -- some parties to the case who

17    are not parties to the contract can as third parties,

18    nonetheless, enforce arbitration?  We have listed a few

19    examples, assignees, et cetera.  When considering

20    whether this is one of them, judge, the key question --

21    we can tell you what the key question is and what it

22    isn't.  What it is has to do with the intent of the

23    persons who did sign the contract.

24           MR. De MARCO:  Right.

25           JUSTICE BREYER:  Something related to that.

1    We don't have to be specific.

2              MR. De MARCO:  Right.

3              JUSTICE BREYER:  What it isn't is a case

4    management device.  Because what I think the temptation

5    would be for the judge is to -- is to -- let's send them

6    all off to arbitration if we can, and then I would not

7    have to worry about this case for a while.  And come

8    back, and I'll figure it out.

9              MR. De MARCO:  Right.

10             JUSTICE BREYER:  So is that -- is that

11   right, or is it wrong?  What's your insight or guess on

12   that?

13             MR. De MARCO:  I think it's -- it's correct.

14             JUSTICE BREYER:  I'm just looking for ways

15   of separating these sheep from goats.

16             MR. De MARCO:  Yes.  The only way, I think,

17   to give effect to what the Court said, which is nobody

18   is going to be forced to arbitrate when they haven't

19   agreed to arbitrate, is for judges to take section 3

20   seriously when it is proffered as the basis for a stay

21   motion and to -- and to apply it as --

22             JUSTICE GINSBURG:  You -- you just told us

23   that section 3 was ambiguous.  You don't know if the

24   reference to "parties" means parties to the arbitration

25   agreement or parties in the litigation.  So how can we

41

1    take it -- we take it seriously, yes, and say there's an

2    ambiguity.  We don't know from the text which is the

3    proper reference, parties to the agreement or parties to

4    the litigation.

5             MR. De MARCO:  Justice Ginsburg, by

6    declining Justice Stevens's invitation of sorts to read

7    "parties" a particular way, I did not mean to -- to

8    suggest that the referable -- issue referable to

9    arbitration under a written agreement is ambiguous.  I

10   don't think that's ambiguous.

11            I think as applied here in this case it's

12   clear that the -- the Petitioners' claim of

13   arbitrability does not flow, to use Justice Breyer's

14   terms, from that which the parties to the Bricolage

15   agreement intended.  They don't claim that the parties

16   to that agreement intended for them to be covered, as

17   would be the case with a third-party beneficiary or --

18            JUSTICE ALITO:  If the "parties" in -- in

19   section 3 means parties to the arbitration agreement,

20   would that mean that a -- someone who is not a party to

21   the litigation could file a stay motion under section 3,

22   someone who is not a party to the litigation but is a

23   party to the arbitration agreement?

24            MR. De MARCO:  If it were limited to parties

25   to the -- if it were interpreted as parties to the

42

1    arbitration agreement, then it would suggest that a

2    party outside the litigation -- let's say a party that's

3    conducting an arbitration pursuant to an arbitration

4    agreement could intervene.

5              That's what happened in DSMC.  The -- the --

6    one of the contracting parties intervened and said, we

7    are engaged in this arbitration.  We want you to stop

8    this, what had been claimed to be, nonarbitrable

9    litigation.

10             JUSTICE ALITO:  Well, once they intervene,

11   they are a party to the litigation as well.

12             MR. De MARCO:  Pardon me?

13             JUSTICE ALITO:  Once they intervene they

14   are.

15             MR. De MARCO:  There I think it was for the

16   limited purpose of seeking a stay.  I -- I take your

17   point, though, that -- I -- I think we have to be

18   careful in -- in judging the -- a stay motion, to focus

19   on the language of section 3 under the under-written

20   agreement language, and when -- when that is the focus,

21   I think it's clear that theories such as equitable

22   estoppel, an outlier among all those theories that were

23   listed, assumption, assignment -- an outlier among

24   them -- uniquely says that despite the lack of a written

25   agreement to arbitrate, equity requires; equity says it

1    should be arbitrated.  That -- that I think is

2    incompatible with the language of section 3.

3                    JUSTICE GINSBURG:  But you would recognize

4    that there is some appeal possibility, because you

5    already said or at least you said in your brief that the

6    12 might -- let's get this question settled about the

7    equitable estoppel and going to arbitration; That the

8    district court in its discretion that could give a

9    1292(b) order and say I want to get this issue settled

10   on appeal before I go on with the case.

11                   MR. De MARCO:  Correct.

12                   JUSTICE GINSBURG:  That would be all right.

13                   MR. De MARCO:  There is an appellate pathway

14   and that is 1292(b).  That has always existed for

15   discretionary stays.  I think it applies when a party

16   attempts, perhaps labels its motion a section 3 stay,

17   but misses the mark by not truly grounding it in

18   section 3.  When it misses the mark, their outlet --

19   their pathway to interlocutory appeal ought to be

20   1292(b), particularly because section 16(b) indicates

21   Congress felt that was a compatible accommodation in the

22   stay -- in the arbitration context.

23                   JUSTICE GINSBURG:  Well -- the district

24   judge could say, I'm going to treat this as a 1292(b)

25   issue, and I'm going to grant the stay so that the court

1    of appeals can tell -- can tell me what the law is?

2              MR. De MARCO:  That's correct, Justice

3    Ginsburg.  I want to be clear that the rule we propose

4    as to these claimants asserting equitable estoppel does

5    not preclude them from seeking a stay, even based on

6    equitable estoppel.  And the best example I can give you

7    is one in the D.C. Circuit, in the post-DSMC era.

8    There's a case called Toledano in which the party was

9    asserting exactly the same theory that -- that

10   Petitioners are, equitable estoppel entitles us to a

11   stay.  And what the court said there is well, DSMC has

12   come down and said you cannot under section 3 predicate

13   a stay on equitable estoppel, because you are by

14   definition saying I am not subject to a written

15   agreement; that's the predicate for section 3.

16             So what the District Court said in that

17   State -- in that case, it entertained the stay as a

18   discretionary stay, and it granted it.  It granted it on

19   the very same ground that my friend is insisting should

20   be the ground for a mandatory stay in the post-DSMC era;

21   it's a basis in the District of Columbia for a

22   discretionary stay.  It worked exactly the same way.

23             The difference was you --  you were true to

24   the language of section 3 and you were true to the

25   language of section 16(a)(1)(A); you don't have the

1    runaway stays in the D.C. Circuit that you have in the

2    Fifth Circuit and the Eleventh Circuit and to some

3    extent in the Fourth Circuit; and you don't have the

4    interlocutory appeals from those except under 1292.

5              I want to come back to a -- to a question

6    that was -- that was asked by Justice Ginsburg about

7    Bricolage.  If Bricolage were, let's say, back in the

8    picture, or does the fact that Bricolage is out of the

9    picture make a difference?

10             The only sense in which an issue in this

11   case was ever referable to arbitration under an

12   agreement in writing is under the Bricolage agreement.

13   Once Bricolage departed the case, that obligation that

14   Respondents may have had to arbitrate with Bricolage

15   became inoperative, and what I see Petitioners

16   attempting to do is to disaggregate that the obligation

17   that Respondents undertook to arbitrate with Bricolage

18   from Bricolage's reciprocal obligation, detach it, and

19   run away with it as if it's a fungible commodity and say

20   we are now owed this obligation, when -- contrary to

21   everything this Court has ever said.

22             That's not the way the FAA works, because

23   with the FAA the starting point as this Court said in

24   Mitsubishi is did the parties agree to arbitrate that

25   dispute?  And if we're talking about the -- the absence

46

1    of Bricolage, I think we're -- we're dealing with a case

2    where even among the equitable estoppel cases, this case

3    will turn out to be an outlier because of Bricolage's

4    absence.

5                    I say that because we're also dealing with

6    accountants who were their accountants for 25 years

7    before Bricolage came along.  We're dealing with a law

8    firm that had a written retention agreement, had a

9    contract with them and didn't think to put it in that

10   contract, saying, "oh, pay no attention to that, let me

11   show you this contract that they signed with someone

12   else."

13                   It gets back to Justice Breyer's point:  If

14   I -- let's say I unilaterally published in The

15   Washington Post, "I am through with litigation,

16   henceforth I will arbitrate every dispute with every

17   other human being that I get involved in."  That's not a

18   section 3 agreement to arbitrate.

19                   Agreement imports the notion of an exchange

20   of arbitration obligations, which we do not have here.

21   Bricolage is gone.  There's no question that the premise

22   of this equitable estoppel argument is the absence of a

23   -- of an agreement to arbitrate should be overlooked

24   because of equity.

25                   JUSTICE GINSBURG:  Bricolage did move to

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1    compel, it did move for a stay, did make a section 3

2    application; and then it -- it became bankrupt and got

3    the benefit of the automatic stay in bankruptcy.

4              MR. De MARCO:  Right.

5              JUSTICE GINSBURG:  But I take it that

6    Andersen and Curtis are saying we have a right to be

7    substituted for Bricolage.  That's --

8              MR. De MARCO:  That's what their -- that's

9    apparently their argument, and the problem is how do

10   they fill that gap.  They attempt to fill it with State

11   law.  I think State law does not apply, the language of

12   section 3 applies, Your Honor, and section 3 cannot get

13   them there from here.

14             CHIEF JUSTICE ROBERTS:  Thank you,

15   Mr. De Marco.

16             Mr. Baker, you have four minutes remaining.

17           REBUTTAL ARGUMENT OF M. MILLER BAKER

18             ON BEHALF OF THE PETITIONERS

19             MR. BAKER:  Thank you, Your Honor.

20             The question of appellate jurisdiction, the

21   Petitioners here made a motion for relief under section

22   3, and that motion was denied.  Therefore there is

23   jurisdiction under section 16 to reach the question of

24   whether we were entitled to relief under section 3.

25             Respondents have made a very important

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1 concession that decides this case.  Respondents concede

2 that under section 3 nonparties can enforce an

3 arbitration agreement through the mechanism of section

4 3.  That decides this case.  This case should be

5 remanded to the Court of Appeals to decide the question

6 of whether on these facts, these nonparty Petitioners

7 can actually enforce section 3.

8          The Petitioners' quarrel is with the

9 doctrine of equitable estoppel.  They don't like it, but

10 there's nothing in the text of section 3 that allows

11 this Court or any court to distinguish between the

12 various doctrines or legal theories that nonparties may

13 seek to which -- to enforce section 3.  We happen to

14 have used section 3, happen to have invoked equitable

15 estoppel as the basis for invoking section 3, but it

16 could have been assigned and it could have been a third

17 party beneficiary.

18          They have -- Respondents have conceded the

19 principle that section 3 is available to provide relief

20 on nonparties who are otherwise entitled to enforce the

21 agreement.  They just think that on the merits we don't

22 satisfy the requirements of equitable estoppel.  That's

23 a question to be decided on remand.  Equitable estoppel,

24 I will say very briefly, presupposes the existence of a

25 written arbitration agreement.  In the absence of a

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1    written arbitration agreement, Petitioners here would

2    not have any ability to assert this theory of equitable

3    estoppel.  So -- so it's not completely separated from

4    or detached from the existence of a written arbitration

5    agreement.

6              I would like to turn to Justice Souter's

7    signatory test for allowing relief under section 3.

8    With all respect, this defies 80 years of case law

9    interpreting the Federal Arbitration Act.  It defies the

10   history of the Federal Arbitration Act.  It's settled

11   that Congress in enacting this Act, chose New York law,

12   and the New York arbitration act lad a much more

13   stringent requirement for arbitrating existing disputes

14   which required a signature.

15             Congress, as we outlined in our brief, did

16   not choose that section of the New York law as a model

17   when it enacted the FAA in 1925.  1292(b), the right to

18   appellate jurisdiction is illusory because that is

19   denied; a nonparty with arbitration rights be forced to

20   litigate and lose the very things that arbitration is

21   designed to avoid -- that is, the cost and time of being

22   in litigation in a district court.  Not only that, the

23   District Court will suffer the loss of judicial

24   efficiency by having to litigate -- litigate a case

25   before it or adjudicate a case that should be in

1    arbitration.

2         Unless there are any further questions, I

3    will conclude the argument.

4         CHIEF JUSTICE ROBERTS:  Thank you, counsel.

5         The case is submitted.

6         (Whereupon, at 12:19 p.m., the case in the

7    above-entitled matter was submitted.)

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25

51

## A

**ability** 6:21
  37:20 50:2
**able** 4:5 6:18
  7:20 28:14
  33:18 34:3
**above-entitled**
  1:12 51:7
**absence** 46:25
  47:4,22 49:25
**absent** 30:13
**absolutely** 10:4
  14:18 21:19
  26:5
**accommodation**
  44:21
**accountants**
  47:6,6
**act** 3:15,20 5:11
  8:1,5 10:14
  13:1 50:9,10
  50:11,12
**action** 4:19,22
  6:9 12:20
  15:21 40:2,9
**actions** 33:7
**ad** 33:14 36:11
**addition** 21:10
**adjudicate**
  50:25
**advanced** 27:1
**advising** 7:1
**affirm** 12:8
**agency** 10:10
  12:6
**ago** 14:15
**agree** 15:18
  28:21 39:8,9
  39:17 40:8
  46:24
**agreed** 32:10
  41:19
**agreement** 3:11
  3:12 4:2,4,5,6
  4:7,9,13,16
  5:13,14,19,23
  6:2,8,11,17,18

  6:25 7:6,14,20
  8:8,11,16 9:6
  9:19,25 10:8,8
  10:19,25 11:1
  11:2,5,6,10,13
  12:1 13:8,9,17
  16:8,17 17:6
  17:10,15 19:18
  19:22 21:7,10
  22:23,24 23:1
  23:2,9 25:6,25
  26:21 29:22
  30:11,14 31:16
  31:19,22 32:11
  32:12,18,19,20
  32:24 33:7,23
  35:7 36:23
  37:3,4 38:4,7,8
  38:13,14,15,16
  38:19 40:1
  41:25 42:3,9
  42:15,16,19,23
  43:1,4,20,25
  45:15 46:12,12
  47:8,18,19,23
  49:3,21,25
  50:1,5
**agreements** 8:1
  26:25 36:24
  37:9 38:21
  39:13,14
**aid** 26:24
**AL** 1:4,7
**Alito** 16:11 17:5
  35:23 42:18
  43:10,13
**allow** 25:6
**allowed** 29:16
**allowing** 50:7
**allows** 22:16
  49:10
**ambiguity** 42:2
**ambiguous**
  41:23 42:9,10
**amorphous**
  33:14
**analysis** 39:10

**Andersen** 1:3
  3:4 48:6
**animated** 31:4
**answer** 4:9 8:12
  9:25 15:4 16:9
  16:12 18:18,19
  25:12 34:9,11
  34:17 36:20,21
  40:4
**anybody** 23:11
  23:24
**apart** 14:10
**apparently** 48:9
**appeal** 8:21
  12:19 19:13
  20:4 27:10,12
  27:14 28:2,5,7
  29:1 34:12,12
  44:4,10,19
**appealable**
  12:22 18:17
  19:23 30:23
**appealed** 27:14
**appeals** 10:6,9
  16:15 24:25
  25:3,4 28:5,9
  28:13 35:24
  45:1 46:4 49:5
**APPEARAN...**
  1:15
**appellate** 8:24
  12:11,13,15,16
  12:23 13:20
  18:13,16 19:2
  19:11 20:9,11
  20:17,23 21:5
  21:13 44:13
  48:20 50:18
**applicable** 3:23
**applicant** 4:4
**application** 4:13
  18:17 48:2
**applied** 5:15
  42:11
**applies** 21:25
  24:6,12 38:2
  44:15 48:12

**apply** 5:20 6:22
  15:20,21,23
  19:15 41:21
  48:11
**approach** 37:6,8
**arbitrability**
  31:19 34:19
  35:22 36:6
  42:13
**arbitrate** 23:8
  27:5 30:10
  32:9,13 41:18
  41:19 43:25
  46:14,17,24
  47:16,18,23
**arbitrated** 5:9
  44:1
**arbitrating**
  50:13
**arbitration** 3:11
  3:15,22 4:1,4
  4:12,15 5:2,7
  5:13,19,23 6:2
  6:7,9,11,16,25
  7:6,9,14,20 8:1
  8:1,2,8,16 9:6
  9:13,19,25
  10:7,14,19,24
  11:1,2,4,5,6
  12:1,4 13:1,12
  15:11 16:16
  17:6,10,15
  18:6,8 19:18
  19:22 21:10
  22:17,23 23:5
  23:13,21,23
  24:1 25:6
  26:20,24,25
  27:2 29:6 31:7
  31:7,10,15,17
  31:17 32:24
  33:2 35:7,9
  36:23,24 37:2
  37:3,9 38:3
  39:8,12 40:2
  40:18 41:6,24
  42:9,19,23

  43:1,3,3,7 44:7
  44:22 46:11
  47:20 49:3,25
  50:1,4,9,10,12
  50:19,20 51:1
**area** 28:15 33:10
**argue** 11:16
**arguing** 13:16
**argument** 1:13
  2:2,7 3:3,6,16
  7:23 8:12
  12:15 14:14
  15:7,8 16:13
  16:20 18:2,3
  18:10 19:4
  20:14,16 26:14
  27:23 34:4,5
  39:23 47:22
  48:9,17 51:3
**Arthur** 1:3 3:4
**article** 31:24
**asked** 25:10
  26:23 27:11
  35:23 46:6
**asking** 19:25
  28:18 33:24
  37:2,22 39:15
**assert** 5:7 13:21
  30:14 50:2
**asserted** 5:1
  22:20
**asserting** 10:11
  29:25 30:3
  45:4,9
**assigned** 32:24
  49:16
**assignee** 29:12
  33:5,19
**assignees** 40:19
**assignment** 12:5
  21:21 29:11
  32:15,21,23,23
  43:23
**assume** 13:4
**assumes** 30:12
**assuming** 5:25
  6:6

**assumption** 12:7 21:22 32:15,25 33:1 43:23
**attempt** 48:10
**attempting** 46:16
**attempts** 44:16
**attention** 47:10
**automatic** 10:22 48:3
**available** 7:10 7:10 13:11 49:19
**avoid** 50:21
**aware** 17:11
**a.m** 1:14 3:2

—————————
**B**
**back** 10:20 21:4 30:6 41:8 46:5 46:7 47:13
**bad** 37:6,18
**Bailey** 36:1
**Baker** 1:16 2:3,8 3:5,6,8 4:17 5:3 6:13 7:7 8:13,23 9:12 9:20 10:4 11:8 11:15 13:7 14:6,18,25 15:5,8,20 16:2 16:7 17:2,8 18:12,19,24 19:6,10,20 20:5,15,21 21:19,21,24 22:2,5,10,19 24:5,9,14,20 25:2,14,17,24 26:4 48:16,17 48:19
**balance** 26:11
**bankrupt** 10:21 48:2
**bankruptcy** 11:8,17 48:3
**based** 32:19

45:5
**basis** 23:17 41:20 45:21 49:15
**begs** 14:19
**behalf** 1:16,18 2:4,6,9 3:7 26:15 29:23 48:18
**Behrens** 28:17
**believe** 17:12,12 36:1 39:14
**beneficiary** 12:5 21:17 24:13 25:23,25 29:10 29:21 32:15 33:5,19 38:10 42:17 49:17
**benefit** 48:3
**Bernhardt** 14:9 14:9
**best** 45:6
**better** 24:16 34:16 36:4
**beyond** 25:11
**bit** 33:10
**blue** 12:19
**bound** 4:6 9:5
**Boy** 24:1
**breach** 23:25
**Breyer** 21:14,20 21:23,25 22:3 22:7,13 23:10 24:7,11,15,23 25:10,15,22 26:23 27:6,9 27:21 28:1,4 28:20 33:16,21 34:8,18 35:4 35:16 40:15,25 41:3,10,14
**Breyer's** 42:13 47:13
**Bricolage** 10:21 10:23 11:9 22:24 23:2 42:14 46:7,7,8

46:12,13,14,17 47:1,7,21,25 48:7
**Bricolage's** 46:18 47:3
**brief** 12:19 44:5 50:15
**briefly** 49:24
**brings** 8:23
**broad** 12:21 19:14
**brought** 11:4
**buy** 23:12

—————————
**C**
**C** 2:1 3:1
**California** 10:6 10:8
**call** 28:9,25 29:15
**called** 29:21 45:8
**capacity** 6:22
**careful** 43:18
**Carlisle** 1:7 3:4 10:20
**case** 3:4 5:5,6,21 6:12,23 7:9,18 10:15 11:19 12:3,3 13:16 17:11,22 21:12 24:6,8 25:1 28:17 29:21,24 32:22 33:1 34:2,9,16 35:5 35:25 36:1,5 40:16 41:3,7 42:11,17 44:10 45:8,17 46:11 46:13 47:1,2 49:1,4,4 50:8 50:24,25 51:5 51:6
**cases** 6:9,14 12:7 17:13 23:15 29:15 33:2 36:10

47:2
**categories** 21:11
**category** 12:21 19:14
**caused** 33:7
**certain** 6:24
**cetera** 40:19
**chance** 8:7 22:14
**change** 11:14 16:24
**chapters** 22:12
**characterized** 14:11 28:11
**Chief** 3:3,8 4:25 26:12,16 48:14 51:4
**choice** 9:23 16:14
**choose** 50:16
**chose** 50:11
**Cincinnati** 1:18
**Circuit** 12:9,22 16:18 17:11 18:25 19:14,15 20:22 25:9 26:9 35:25 36:3,5 45:7 46:1,2,2,3
**circumstances** 8:3 38:1,2
**cite** 29:21 32:22 32:25
**claim** 4:7 5:5 19:21 22:25 30:19,25 42:12 42:15
**claimants** 45:4
**claimed** 14:23 43:8
**claiming** 23:4,7 30:2,9
**claims** 22:20
**clarify** 32:3
**clause** 5:8,8 23:5 23:13,24 32:25
**clear** 4:17 9:17

17:14 19:11 29:24 32:7 35:22 42:12 43:21 45:3
**clearly** 18:18,20 20:11
**Columbia** 45:21
**come** 6:8 26:22 30:16 33:8 35:2 41:7 45:12 46:5
**comment** 29:4
**commodity** 46:19
**companion** 4:23
**compatible** 44:21
**compel** 28:10 48:1
**completely** 50:3
**complex** 18:1,9
**component** 9:3
**concede** 12:25 49:1
**conceded** 49:18
**conceding** 7:3
**concept** 33:14
**concepts** 19:1
**concern** 31:3,3
**concerned** 34:24 39:23 40:3,5,7
**concerning** 5:12 9:24,24
**concerted** 22:21 22:25
**concession** 49:1
**conclude** 51:3
**conducting** 43:3
**Cone** 31:9
**confine** 38:14,21
**confined** 38:18
**conflate** 12:12
**conflated** 19:1 20:22
**conflates** 24:23
**Congress** 39:24 44:21 50:11,15

consent 33:5

consideration
34:25

considering
40:19

consistent 39:3

consistently
27:3

conspiracy
22:21

construed 9:22
31:21 36:19

consults 16:1

contain 13:2

containing
14:12

contains 23:5

contemplates
20:7

contend 4:2
11:16

context 4:18
37:10 44:22

continuously
37:23

contract 21:17
22:17 23:4,11
23:14,16,18,23
23:25 26:19
29:6,25 30:1,1
30:4,5 34:21
34:22,23 35:1
35:6,14 36:6
38:11 39:19
40:9,17,23
47:9,10,11

contracting 43:6

contracts 8:4,4
8:6

contract-based
26:24 33:2

contradict 15:15

contrary 3:17
46:20

control 13:10

controls 13:7
14:21

controversy
4:21,24 5:1,1,3
5:5,8

correct 14:25
15:5 37:7
41:13 44:11
45:2

cost 50:21

counsel 26:12
51:4

counseling 6:24

course 15:18
20:4 24:19
29:11

court 1:1,13 3:9
3:10 5:17,17
5:20,20,22 6:8
6:8 7:4 8:25
9:7,9,21,22,23
10:5,6,6,9
11:20,20,25
12:8,12 13:11
13:13 14:9,11
15:9,22,22
17:12 20:3,25
21:4,5 24:25
25:3,3,4,8,20
26:8,17 27:3
28:13,18 31:9
32:7,8,23
34:20 39:4
41:17 44:8,25
45:11,16 46:21
46:23 49:5,11
49:11 50:22,23

courts 8:9 16:15
34:13 35:24

Court's 5:14
14:8,8 17:13
21:11

cousin 23:18

covered 42:16

covers 8:19

cows 35:1

co-counsel 29:2

criterion 31:12
31:13

Curtis 48:6

_____

**D**

D 3:1

De 1:18 2:5
26:13,14,16
27:8,15,25
28:3,8 29:14
31:1,13,25
32:3,6,16 33:9
33:20 34:7,18
35:15,21 37:7
37:16,19 39:3
39:16,20,22
40:10,24 41:2
41:9,13,16
42:5,24 43:12
43:15 44:11,13
45:2 48:4,8,15

deal 8:25

dealing 30:21
47:1,5,7

decades 10:14

decide 5:18
11:21 16:20
24:13,15 25:4
25:21 29:2
30:23 49:5

decided 5:14
26:8 35:23
49:23

decides 49:1,4

decision 5:15
9:21 12:9 14:9
16:18

decisions 5:25
17:13

declining 42:6

defendants 5:6

defies 50:8,9

definition 45:14

denial 19:22
20:17 30:22,22

denied 19:13
20:11 27:12,19
28:12,12 48:22
50:19

depart 37:24

departed 46:13

depend 34:10,19

dependent
16:13,21 30:1
31:18 38:10

depends 7:7
13:25 14:14
31:19

derive 34:5

designed 50:21

despite 30:10
43:24

detach 46:18

detached 50:4

determinative
34:15

determine 4:3
5:21 10:7
11:25 12:23
14:21 17:9

determined
17:24

determines 8:15
9:18 14:2,22
17:14

determining
14:17

develop 33:15

developed 33:11

device 3:21 9:1
9:13 41:4

devices 13:11
15:10,13,15

devoted 22:12

difference 11:3
45:23 46:9

different 37:12
39:25

difficult 33:17

directing 9:7

directly 35:8

disaggregate
46:16

disagreement
9:10

discovery 28:10

28:15

discretion 44:8

discretionary
31:10 44:15
45:18,22

dispute 39:7
46:25 47:16

disputes 50:13

distinct 19:1

distinctly 27:16

distinguish
49:11

district 44:8,23
45:16,21 50:22
50:23

doctrine 49:9

doctrines 49:12

doing 5:19 33:22

door 37:14,20

drawing 35:6

drives 14:7

DSMC 31:4
43:5 45:11

due 24:22

D.C 1:9,16 45:7
46:1

_____

**E**

E 2:1 3:1,1

effect 8:4,19
11:9 14:16
17:1,3 39:8,12
41:17

effectively 11:1
11:6 12:8

efficiency 50:24

Eighty 21:8

either 11:5
19:18

elements 4:2
14:12

Eleventh 46:2

enacted 50:17

enacting 50:11

encourage 39:6

enforce 3:12,21
4:5,8 5:7,13,19

5:23 6:17 7:14
7:20 8:1,3,6
9:2,5,13,19
10:8 11:3,10
12:1 13:8,12
15:10 16:8
17:6 19:22
21:10,16 24:16
25:6,13,25
26:1 29:6,13
29:16 32:18
33:19 34:3
36:24 37:4
38:20 40:18
49:2,7,13,20
**enforceability**
5:12 9:24 10:2
15:11 16:16
37:9
**enforced** 22:18
38:8
**enforcement**
3:20 4:23
10:16 37:12
**engaged** 43:7
**ensuing** 17:13
**entered** 23:2
**enterprise** 7:1
**enters** 6:25
**entertained**
45:17
**entire** 22:11
**entirely** 19:1
**entitled** 3:12 5:7
6:17 7:15
17:23 26:1
48:24 49:20
**entitlement**
16:25
**entitles** 45:10
**equal** 39:13
**equipped** 7:5
**equitable** 11:19
12:6 17:24
22:10,16 24:9
25:7 26:7,19
29:3 30:2,7,8

30:15,16 33:11
34:24 35:17
36:10 43:21
44:7 45:4,6,10
45:13 47:2,22
49:9,14,22,23
50:2
**equity** 33:12
36:12 43:25,25
47:24
**equivocal** 40:11
40:14
**era** 45:7,20
**erroneous** 12:24
**erroneously**
12:12 18:25
**error** 25:3,4
**ersatz** 33:11
36:11
**ESQ** 1:16,18 2:3
2:5,8
**essential** 20:25
23:25
**establishes** 5:11
8:14 9:4 11:24
12:21 15:12
19:13 21:9
**estopped** 23:7
35:13
**estoppel** 11:19
12:6,6 17:24
21:22 22:2,3,4
22:7,11,16
24:10 25:8
26:7,18,20
30:2,7 33:11
34:24 35:17
36:10 43:22
44:7 45:4,6,10
45:13 47:2,22
49:9,15,22,23
50:3
**et** 1:3,7 40:19
**everybody** 35:9
35:10
**exactly** 24:24
25:24 45:9,22

**example** 25:23
25:24 27:4,22
29:11,20 45:6
**examples** 32:16
32:17,21 40:19
**exchange** 47:19
**exist** 30:13
**existed** 44:14
**existence** 49:24
50:4
**existing** 37:11
50:13
**explain** 22:15
**express** 32:22
33:1
**expressed** 36:4
39:4,11
**extent** 46:3
**extraordinary**
38:21
**extreme** 24:2

### F

**FAA** 3:18 6:16
8:14 10:15
12:3 18:14
21:8 27:4 32:8
32:8 39:12,25
40:12 46:22,23
50:17
**fact** 6:3,14 25:13
31:1 46:8
**facts** 7:8 21:12
49:6
**fact-based** 21:6
**fails** 12:15
**fair** 29:4
**fall** 4:7
**far** 27:17
**favorable** 38:24
**Federal** 3:14
7:25 8:9,20 9:9
10:14 13:1,11
13:13 14:1,2,4
14:23 15:1,4
15:14,18,22
16:1,6,19,23

29:18,19 36:7
36:11,14,23,25
38:20 39:4,5,6
50:9,10
**felt** 44:21
**Fifth** 36:3 46:2
**figure** 23:17
34:17 41:8
**file** 42:21
**filed** 31:2,6,8
**fill** 30:15 48:10
48:10
**find** 35:2
**firm** 47:8
**first** 4:4 8:24
16:7 18:15,25
19:1 23:19
25:2,18 27:6,7
27:9 28:21
34:13,20 35:22
**flow** 30:3 42:13
**flows** 32:19
**focus** 43:18,20
**followed** 9:9
**follows** 7:17
**footing** 39:13
**footnote** 30:7
31:8
**force** 32:11
36:24
**forced** 41:18
50:19
**foreclose** 11:23
**foreclosed** 3:13
11:22 21:2
25:19
**forecloses** 3:17
3:19
**form** 33:12 39:7
**formed** 34:22
**fortiori** 33:6
**forum** 7:18
**found** 12:18
**four** 35:7 40:1
48:16
**Fourth** 16:18
17:11 35:25

36:4 46:3
**fraud** 23:6
**free** 11:16
**friend** 37:23
45:19
**friend's** 39:20
**fungible** 26:25
46:19
**further** 26:10
51:2
**future** 23:24

### G

**G** 3:1
**game** 13:5
**gap** 48:10
**general** 32:8,8
39:6
**generic** 37:13
**generically** 37:8
**getting** 6:3
13:15 38:9
39:1
**Ginsburg** 4:11
5:24 6:20 8:7
10:17 11:12
17:18 18:15,21
19:3,8,16,25
20:13,19 30:18
41:22 42:5
44:3,12,23
45:3 46:6
47:25 48:5
**gist** 30:5,6,8
**give** 13:6 24:20
39:7,12 41:17
44:8 45:6
**given** 8:5 21:12
**go** 18:6 23:18,21
23:22 25:11
34:12 44:10
**goats** 41:15
**going** 10:20
24:22 34:22
35:2,10,13
37:1 38:18
41:18 44:7,24

44:25
**good** 8:9 18:7
  19:8 29:3 37:6
  37:17,19 38:23
  38:25
**gotten** 8:12 28:4
**grant** 44:25
**granted** 30:20
  45:18,18
**ground** 27:2
  35:21 37:22
  45:19,20
**grounded** 29:19
**grounding**
  44:17
**guess** 24:2 41:11

**H**

**H** 31:9
**hang** 40:13
**hanging** 40:3
**haphazardly**
  39:25
**happen** 49:13,14
**happened** 43:5
**hard** 35:5
**hat** 40:13
**hate** 35:16
**hear** 3:3
**heard** 28:6 29:1
  29:17
**held** 10:9
**help** 40:12
**henceforth**
  47:16
**hey** 35:9,12
  37:11
**history** 50:10
**hoc** 33:14 36:11
**hold** 25:5
**home** 29:23 35:2
**honest** 39:23
**Honor** 4:17 5:4
  6:14 7:7 8:13
  8:23 9:12,20
  11:8 13:7 14:6
  15:5 17:4,11

18:12,19,24
19:7 20:6 21:5
21:19 22:5,19
24:5,14,20
25:8,14,17
28:16 31:1,13
48:12,19
**hope** 35:9
**Horse** 28:9 31:5
**human** 47:17

**I**

**idea** 38:23,25
**identifying**
  31:12
**illusory** 50:18
**imagine** 35:5
**immediately**
  12:22
**important** 48:25
**imports** 47:19
**including** 5:13
  8:18 10:2 12:6
**incompatible**
  44:2
**incompetent**
  29:22
**inconsistent**
  14:8
**incorporating**
  14:16
**incorporation**
  14:20
**incorrect** 17:12
**independent**
  15:4
**indicates** 44:20
**indistinguisha...**
  10:10
**individual** 33:24
**injunction** 28:11
  28:12
**injunctive** 28:15
**inoperative**
  46:15
**insight** 41:11
**insisting** 45:19

**instance** 28:18
**instances** 21:14
**instructed** 5:20
**instrumentality**
  23:5
**intended** 42:15
  42:16
**intent** 39:12
  40:22
**intention** 32:19
**interest** 12:7
  19:17 21:22
  38:25
**interested** 20:2
**interlocutory**
  8:21 44:19
  46:4
**interpret** 17:19
  34:23 35:1
**interpretation**
  10:13 12:14
  36:6
**interpretations**
  32:7
**interpreted**
  42:25
**interpreting**
  50:9
**intervene** 43:4
  43:10,13
**intervened** 43:6
**intuitively** 24:4
**invitation** 42:6
**invoke** 26:18,19
  26:20,21
**invoked** 49:14
**invoking** 49:15
**involved** 14:24
  47:17
**involving** 18:22
**issue** 3:25 4:3
  7:23 12:13
  13:23,24 16:14
  27:7,7,9 31:5
  34:21 36:5,18
  40:13 42:8
  44:9,25 46:10

**issued** 6:10
**issues** 13:17

**J**

**joining** 11:4
**judge** 15:24,25
  16:5,7,9 40:20
  41:5 44:24
**judges** 41:19
**judging** 43:18
**judicial** 50:23
**jurisdiction** 7:3
  8:24 12:11,13
  12:15,16,24
  17:1,3,21
  18:14,14,16,16
  19:7,12 20:9
  20:12,18,23
  21:5 25:12
  48:20,23 50:18
**jurisdictional**
  6:1 18:1,10
  19:4 20:14,15
  24:24
**jurisdictions**
  21:13
**Justice** 3:3,8
  4:11,25 5:24
  6:20 7:16 8:7
  8:18 9:8,16
  10:2,17 11:12
  13:3,14 14:14
  14:15,19 15:3
  15:6,14,23
  16:4,11 17:5
  17:18 18:15,21
  19:3,8,16,25
  20:13,19 21:14
  21:20,23,25
  22:3,7,13
  23:10 24:7,11
  24:15,19,21,22
  25:10,15,22
  26:2,5,12,16
  26:23 27:6,9
  27:21 28:1,4
  28:20 30:18

31:11,20 32:1
32:5,14,17
33:3,16,21
34:8,18 35:4
35:16,23 36:13
37:14,17 38:5
39:16,21,22
40:7,15,25
41:3,10,14,22
42:5,6,13,18
43:10,13 44:3
44:12,23 45:2
46:6 47:13,25
48:5,14 50:6
51:4
**J.P** 29:21

**K**

**keep** 13:16 31:6
  38:12
**Kennedy** 24:19
  24:21 32:14,17
  33:3
**key** 40:20,21
**kind** 29:24 31:9
**kinds** 23:13
**know** 4:14 22:7
  22:13 23:19
  24:8 33:21
  34:1 35:19
  38:23 41:23
  42:2
**knowing** 34:13

**L**

**labels** 44:16
**lack** 30:10 43:24
**lad** 50:12
**language** 43:19
  43:20 44:2
  45:24,25 48:11
**Laughter** 19:9
  22:9 24:18
**law** 3:13,13,22
  5:14,20 6:16
  7:8,13,13 8:15
  8:22 9:7,11,13

9:18,23,25
10:15 11:10,21
11:25 12:3
13:4,6,7,12,18
14:16,21,22
15:3,15,17,18
16:1,1,6,6,10
16:14,17,19,23
17:9,14,25
18:22 21:2,8,8
22:8 25:5,19
26:3,4 27:22
29:18,18,19
33:13 34:4,10
34:11,14,16,19
35:18 36:7,8
36:11,14,16
37:13,24 45:1
47:7 48:11,11
50:8,11,16
**lawsuit** 23:15,24
37:11,12
**leave** 4:11
**leaves** 38:7,17
**legal** 38:11
49:12
**legally** 12:24
**let's** 13:4 32:18
41:5 43:2 44:6
46:7 47:14
**likewise** 4:19,23
9:14
**limitation** 3:22
**limited** 7:24
42:24 43:16
**limits** 4:8
**listed** 40:18
43:23
**listen** 7:4
**litigant** 6:12
19:21 20:1,10
**litigate** 7:22
50:20,24,24
**litigation** 4:15
6:3,7 10:22
11:4 17:20,22
18:4,5 19:17

19:19 20:2,7,8
41:25 42:4,21
42:22 43:2,9
43:11 47:15
50:22
**little** 35:4
**LLP** 1:3
**logic** 15:7,8
**longer** 11:13
**look** 9:7,25
11:25 16:5,9
17:9 21:11
29:2 34:4,10
35:8
**looking** 41:14
**looks** 16:7
**lose** 50:20
**loss** 50:23
**lot** 23:20 28:5
29:18
**lower** 5:20

_____
**M**
_____

**M** 1:16,18 2:3,5
2:8 3:6 26:14
48:17
**making** 18:1
**management**
41:4
**mandates** 26:23
**mandatory** 3:25
38:1 45:20
**March** 1:10
**Marco** 1:18 2:5
26:13,14,16
27:8,15,25
28:3,8 29:14
31:1,13,25
32:3,6,16 33:9
33:20 34:7,18
35:15,21 37:7
37:16,19 39:3
39:16,20,22
40:10,24 41:2
41:9,13,16
42:5,24 43:12
43:15 44:11,13

45:2 48:4,8,15
**mark** 44:17,18
**matter** 1:12 3:13
11:21 21:2
25:5,19 26:1
36:25 51:7
**mean** 6:5,23
17:5,20 21:25
24:2 31:16
38:24 39:25
40:8 42:7,20
**means** 6:21 17:8
18:3 31:18
38:13 39:19
40:8 41:24
42:19
**mechanism** 16:3
37:13 49:3
**mentioned** 36:1
**mere** 15:13
20:16
**meritorious**
28:6 30:24
**merits** 6:6 8:25
12:12,17 17:25
18:7,22,25
19:5 24:23
25:7,13,17,18
27:17 29:1
30:20 49:21
**midstream** 7:22
8:10
**mid-track** 37:1
**MILLER** 1:16
2:3,8 3:6 48:17
**mind** 31:6
**minutes** 48:16
**misconduct**
22:21,25
**misses** 44:17,18
**missing** 15:6
**mistake** 24:24
**Mitsubishi**
39:11 46:24
**model** 50:16
**moment** 14:15
15:24

**Morgan** 29:21
**Moses** 31:8
**motion** 19:12
28:15 31:2,5
41:21 42:21
43:18 44:16
48:21,22
**move** 17:22 18:5
47:25 48:1
**moved** 28:10
**moves** 20:2

_____
**N**
_____

**N** 2:1,1 3:1
**narrow** 36:6
**narrowly** 36:19
**necessarily**
12:15 16:11
17:6 31:7
**need** 25:21
30:15
**needs** 19:11
**never** 14:11 27:7
28:6 35:2,17
**nevertheless**
12:17
**New** 50:11,12,16
**non** 5:22 20:23
**nonarbitrable**
43:8
**nonparties** 3:11
3:17 5:18,22
6:16 7:9 8:15
8:16 10:15
12:4 17:15
25:6,19 29:16
49:2,12,20
**nonparty** 3:19
6:2 11:22
16:17 17:10
29:24 49:6
50:19
**nonsignatories**
7:19 10:7
**nonsignatory**
32:13
**non-signatories**

21:1
**notion** 47:19
**nub** 38:20
**numerous** 6:14
**nursing** 29:23

_____
**O**
_____

**O** 2:1 3:1
**objecting** 33:7
**obligated** 23:8
**obligation** 30:9
31:17 46:13,16
46:18,20
**obligations** 8:15
13:9 17:15
26:24 47:20
**obtain** 6:18
**occasions** 9:1
15:10
**oh** 24:7 47:10
**Ohio** 1:18
**okay** 14:19
21:23 24:7
31:11 34:4
35:11 36:13
37:14 38:5
**once** 37:20
43:10,13 46:13
**ongoing** 11:4
**open** 13:20 38:7
38:17
**opened** 37:20
**opens** 37:14
**opposed** 5:4
**options** 34:20
**oral** 1:12 2:2 3:6
26:14
**order** 7:22 12:20
27:13,13 44:9
**orders** 12:21
19:14 21:12
**original** 32:20
**ought** 44:19
**outcome** 16:24
**outlet** 44:18
**outlier** 43:22,23
47:3

**outlined** 15:11
  50:15
**outside** 27:16,17
  28:15 43:2
**overlooked**
  47:23
**owed** 46:20

_____
**P**
_____
**P** 3:1
**page** 2:2 12:18
  27:4
**Pardon** 43:12
**part** 23:14,25
**particular** 42:7
**particularly**
  44:20
**parties** 4:14,15
  4:15,18,20,20
  4:21,24 6:24
  7:15 11:2,3,7
  17:19,20 18:3
  18:4,5 20:7
  27:5 32:9,20
  33:4 35:8 39:8
  39:18,18,19,24
  40:8,9,9,16,16
  40:17,17 41:24
  41:24,25 42:3
  42:3,7,14,15
  42:18,19,24,25
  43:6 46:24
**parts** 25:18
**party** 6:2,7,7,11
  9:18 10:19,24
  11:5,12 12:5
  17:21 19:18,20
  20:3,6 21:6
  27:23 28:10
  29:6,10,20
  32:15 33:5,6
  33:19 37:11
  38:10 40:1,1,2
  42:20,22,23
  43:2,2,11
  44:15 45:8
  49:17

**party's** 33:4
**party-like** 40:2
**pass** 19:5
**passed** 8:5
**pathway** 44:13
  44:19
**PAUL** 1:18 2:5
  26:14
**pay** 47:10
**peculiar** 10:18
**pending** 6:9
  19:13 31:6,7
  31:10
**people** 7:5 23:14
  23:20,20 29:12
  34:2 35:7
  38:22
**perfectly** 7:5
  28:14 33:13
**perpetrated**
  23:6
**Perry** 5:15,17
  9:21 10:5
  17:13
**person** 8:11
  17:21 20:3
  33:25 36:21,22
  40:3
**persons** 40:23
**Petitioners** 1:5
  1:17 2:4,9 3:7
  5:6 10:11 18:4
  22:22 30:3,10
  35:2 39:15
  42:12 45:10
  46:15 48:18,21
  49:6,8 50:1
**phrase** 38:15
**picked** 27:1
**picture** 10:25
  11:13 46:8,9
**pierce** 28:14
**pivotal** 36:5
**place** 23:19
**plaintiff** 4:6
**play** 33:8
**players** 7:2

**please** 3:9 26:17
**plus** 38:11
**point** 8:19 13:19
  15:18,25 18:10
  28:21,23 37:24
  39:10 43:17
  46:23 47:13
**pointed** 14:15
**policy** 7:25 8:2,3
  8:6,14 9:2
  35:19 36:23,25
  38:20 39:4,5,6
  39:6
**position** 31:21
  34:16
**possibility** 44:4
**possible** 8:3 34:2
  34:9 36:21
**Post** 47:15
**post-DSMC**
  45:7,20
**practical** 8:20
**practice** 5:24
  6:23 22:11,14
**precise** 10:5
**precisely** 22:10
**preclude** 45:5
**predicate** 45:12
  45:15
**preface** 29:16
**premise** 14:6
  47:21
**presented** 21:1
**presenting** 18:9
**presupposes**
  49:24
**pretty** 33:17
**prevail** 11:18
  13:6 15:19
**prevent** 30:8
**primary** 5:10
**principal** 3:10
**principle** 5:16
  6:16 10:11
  11:24 13:13
  15:10,12 17:16
  33:12 49:19

**principles** 30:8
  30:15,16 34:5
**probably** 36:15
**problem** 13:14
  13:15 24:24
  48:9
**problems** 33:10
**procedural** 3:21
  9:1,13 13:11
  13:24,25 14:3
  14:22,23 15:13
  15:15 16:2,3
**procedure** 8:20
  9:9
**proceedings**
  8:10
**process** 13:20
**procure** 32:18
**proffered** 41:20
**promote** 8:2
**proper** 33:16
  42:3
**propose** 45:3
**proposed** 36:15
**provide** 49:19
**provision** 4:23
  5:11 38:2
**published** 47:14
**pull** 28:19
**purpose** 43:16
**purposes** 11:19
  14:17 17:20
**pursuant** 43:3
**put** 24:1 35:6
  39:13 47:9
**p.m** 51:6

_____
**Q**
_____
**quarrel** 49:8
**question** 3:10
  4:9 5:18,21 6:1
  6:5,6,20 7:3,12
  7:21 8:21,24
  9:5,6,8,11 10:5
  11:17,20,25
  12:11 13:8,10
  13:18 14:4,5,7

  14:20,22 15:1
  15:4,21 16:3,5
  16:8,9,12,16
  16:17,19,23
  17:1,3,3,17,25
  18:13,22,23
  20:9,22 25:7
  25:11,12,21
  26:6,8,22
  27:17,17 30:6
  30:20,21,24
  33:17 34:12,18
  35:3,22,23
  36:20 38:7,17
  39:17 40:20,21
  44:6 46:5
  47:21 48:20,23
  49:5,23
**questioned** 21:1
**questions** 5:12
  9:24 10:1
  26:10 51:2
**quite** 18:10
  22:15 28:24
**quote** 4:1 30:7

_____
**R**
_____
**R** 3:1
**reach** 20:25
  28:25 48:23
**read** 14:10
  17:18 22:14
  27:10 29:3
  42:6
**reading** 9:20
  14:16 39:18,20
**really** 10:18
  27:24 34:6
  38:19
**reason** 8:9 18:7
  29:14 32:1,6
  38:14
**REBUTTAL**
  2:7 48:17
**reciprocal** 46:18
**recognize** 13:4
  28:17 44:3

**recognized** 5:15
6:15 9:1 31:9
**recognizing**
10:15 12:4
**referable** 4:1,3
4:12 31:15,16
38:3 42:8,8
46:11
**reference** 4:20
41:24 42:3
**referred** 31:2
**referring** 4:18
18:13
**refers** 4:21,23
**refusing** 12:20
27:13,13
**regardless** 15:3
**reject** 12:14
**rejected** 12:17
**related** 35:8
40:25
**relevant** 34:14
35:17,19,20
**relief** 3:14,17
11:22,23 13:10
20:16,24 21:2
21:7 23:3
25:20 30:19
48:21,24 49:19
50:7
**rely** 25:22
**relying** 11:5
23:1
**remaining** 48:16
**remand** 10:9
11:17 25:9
26:8 49:23
**remanded** 5:17
10:6 49:5
**remedy** 38:22
**repeatedly** 39:5
**request** 6:10
20:10,11,16,17
31:23
**requested** 27:16
27:19
**require** 15:2

27:4 32:9
**required** 9:23
50:14
**requirement**
13:2 50:13
**requirements**
26:7 49:22
**requires** 32:9
43:25
**reserve** 26:11
**resolution** 16:14
39:7
**respect** 24:22
50:8
**Respondents**
1:19 2:6 3:16
10:13 11:15
12:2,11,25
22:20 23:1
26:15 30:9
46:14,17 48:25
49:1,18
**rest** 40:11
**resting** 40:6
**retention** 47:8
**returns** 37:23
**reviewable** 20:4
**right** 6:1 7:24
13:19,23,24,25
14:3,23 19:6
19:10,21,23
21:16 27:10,25
28:8,13 29:14
29:25 31:14,14
31:22,23 32:17
32:18 33:20
34:7,17 35:13
35:15 38:8
40:24 41:2,9
41:11 44:12
48:4,6 50:17
**rights** 3:20,23
7:9,12,13 8:15
8:16 9:14
10:16 11:9,18
12:4 13:9,12
13:17,21 14:17

14:21,22 17:10
17:14 30:3
50:19
**ROBERTS** 3:3
4:25 26:12
48:14 51:4
**room** 35:6,8
**rule** 21:11 45:3
**rules** 37:22
**run** 46:19
**runaway** 46:1

_____
 **S**
_____

**S** 2:1 3:1
**safest** 35:21
**satisfied** 26:6
**satisfy** 49:22
**saying** 7:23 8:19
12:2 20:19
23:22 24:6
25:15 27:24
28:6,16 29:17
30:5 32:2 34:9
40:16 45:14
47:10 48:6
**says** 4:12,13
9:17 15:25
16:5,19 18:3
20:3 27:11,12
30:13,13 34:11
37:11 43:24,25
**Scalia** 9:16 10:2
14:15 26:2,5
**scope** 4:7
**second** 4:5 20:25
25:4 28:23
**section** 3:14,16
3:18,19,21,23
3:24,25 4:8,10
4:19,21,22,22
5:4,4,10,11 6:4
6:10,19,22
7:10,15,17
8:13,14,25 9:2
9:4,7,12,14,14
9:16,17,22,23
11:22,23,24

12:10,13,14,18
14:7,7,10,10
14:11,11,12,16
15:9,9,11,12
17:18 18:3
19:10,12,21,24
20:7,10,12,16
20:24 21:3
25:5,20 26:1
26:23 27:11,16
27:17,19,20
28:19 30:12,23
31:8,12 32:4
33:12,22 37:10
37:25,25 39:17
40:10 41:19,23
42:19,21 43:19
44:2,16,18,20
45:12,15,24,25
47:18 48:1,12
48:12,21,23,24
49:2,3,7,10,13
49:14,15,19
50:7,16
**sections** 13:9
15:1,1,13
33:23 40:5
**see** 7:16 16:25
23:19 33:16
35:4 36:9
46:15
**seek** 6:18 20:24
49:13
**seeking** 3:14
11:22 20:8
21:2,7 23:3,7
25:19 43:16
45:5
**seen** 33:14
**sell** 23:12
**send** 41:5
**sense** 28:19 36:7
46:10
**sensible** 14:4
24:4 36:25
**sent** 23:16
**separate** 7:23

**separated** 50:3
**separating**
41:15
**seriously** 41:20
42:1
**sets** 8:13 32:10
**settled** 6:15
17:16 44:6,9
50:10
**settles** 9:4,6
**sheep** 41:15
**shelter** 6:24
**shipper** 23:16
**short** 8:5
**show** 47:11
**shrift** 8:5
**sign** 23:11,11
40:23
**signatories** 7:25
20:24 22:23
**signatory** 12:23
13:2 21:7,9,15
22:17,24 31:22
32:12 50:7
**signature** 50:14
**signed** 29:9,23
33:1,25 34:2
36:22 37:3
38:9,14,15,19
47:11
**silly** 27:23
**simple** 18:3
38:13
**simpler** 36:14
**simplistic** 36:17
37:5,15 38:12
**simply** 8:2 22:15
36:17 38:13
**sir** 27:8
**sitting** 35:5
**situation** 10:18
**six** 10:14
**Sixth** 12:9,22
18:25 19:14,15
20:22 25:9
26:9
**Smith** 23:11,19

**somebody** 8:10
9:18 15:24
19:17,25 20:1
21:15 38:9,10
**sophisticated**
7:2
**sort** 28:8 36:11
**sorts** 42:6
**sought** 4:22
**sound** 24:4
**sounds** 24:2
**source** 17:9
**SOUTER** 7:16
8:18 9:8 13:3
13:14 14:14,19
15:3,6,14,23
16:4 31:11,20
32:1,5 36:13
37:14,17 38:5
**Souter's** 50:6
**speaks** 31:15
**specific** 41:1
**spectator** 20:2,6
**stage** 13:5
**standard** 32:11
**start** 19:6
**starting** 39:9
46:23
**State** 3:13,22
5:14,17,20
7:13,13 8:14
8:22 9:7,11,13
9:18,25 11:10
11:25 13:4,6,7
13:12,12,18
14:5,16,21
15:3,15,17
16:1,6,10,17
17:14,25 18:22
26:2,4 29:18
33:13 34:4,10
34:11,14,19
35:18 36:7,10
37:24 45:17
48:10,11
**stated** 30:19
**statement** 16:13

**States** 1:1,13
**statute** 14:1,2
27:10 29:8,9
31:15,21 32:3
**stay** 3:25 4:22
6:3,8 7:10,15
7:17,22,24
8:10 10:22
12:20 13:6
14:3 15:17,25
16:5,25 17:23
18:6,17 19:12
19:21,23 20:2
20:8,10,11
27:11,13,14,15
27:18 30:22,22
30:25 31:5,6,7
31:9,10,12,14
31:23,23 32:19
33:25 36:20
37:12,21,22
38:1,9,22
41:20 42:21
43:16,18 44:16
44:22,25 45:5
45:11,13,17,18
45:20,22 48:1
48:3
**staying** 18:7
**stays** 6:10,18
13:5 26:23
44:15 46:1
**step** 18:21
**Stevens** 39:16
39:21,22 40:7
**Stevens's** 42:6
**stick** 16:4
**stop** 37:1 43:7
**stopped** 37:3
**stretch** 9:11
**strikes** 9:11
**stringent** 50:13
**structure** 3:18
3:20
**subject** 5:2
45:14
**submitted** 51:5

51:7
**substantive** 3:22
5:10 9:2,3
13:17,19,21,23
14:12,17,21
15:12
**substituted** 48:7
**succeeded** 6:3
**successor** 12:7
21:21 32:25
**sue** 23:13,24
**suffer** 50:23
**suggest** 42:8
43:1
**suggestion**
36:18 38:12
**suit** 4:1
**suppose** 16:22
16:22 19:17
21:16
**supposed** 5:9
15:24 28:25
30:21
**Supreme** 1:1,13
**sure** 18:12
**surprised** 28:24
**survive** 12:8

_____
**T**
**T** 2:1,1
**take** 29:20 41:19
42:1,1 43:16
48:5
**taken** 12:19
27:12 28:24
**talk** 33:23
**talking** 18:20
36:10 37:8,10
46:25
**tax** 6:24
**tease** 33:9
**tell** 19:4 37:6
39:2 40:21
45:1,1
**tells** 37:25 38:16
**temptation** 41:4
**terms** 8:21

13:25 31:15
37:24 42:14
**test** 12:23,24
21:6 50:7
**text** 3:18,19,24
4:12 19:15
42:2 49:10
**Thank** 26:12
48:14,19 51:4
**theories** 12:5
43:21,22 49:12
**theory** 10:10,11
10:13 12:2,16
17:24 22:5,16
22:19 23:3
24:8,9,11,25
29:3 30:7,12
30:13 33:8
37:15,17,18,19
38:11 45:9
50:2
**thereof** 24:1
**thing** 6:21 9:15
17:21
**things** 11:14
24:17,21 40:1
50:20
**think** 16:18 17:2
21:16 24:12
27:22 28:5
29:10,11,23
30:24 31:3
35:21,23,25
36:2,4,9 37:7
39:18,24 40:15
41:4,13,16
42:10,11 43:15
43:17,21 44:1
44:15 47:1,9
48:11 49:21
**thinking** 34:10
**third** 4:6 12:5
29:6,10,15,20
32:15 33:5,19
38:10 40:17
49:16
**third-party**

21:17 24:13
25:23,25 42:17
**Thomas** 5:15
9:21
**thought** 27:6
**thrashed** 7:19
**three** 4:2 6:24
39:25
**threshold** 15:22
17:16 19:5
**thrown** 20:20
**tied** 33:12,13
**tightly** 29:19
**time** 26:11 50:21
**title** 12:20
**today** 3:11 10:12
**told** 23:18 41:22
**Toledano** 45:8
**tort** 5:5
**touchstone** 9:22
**treat** 44:24
**treatises** 22:11
22:15 24:3
29:4
**trial** 13:22 37:1
**triggers** 20:17
**Trojan** 28:9
31:5
**trouble** 38:22
39:1
**true** 33:22 35:19
45:23,24
**truly** 44:17
**trying** 11:2 37:4
**Tuesday** 1:10
**turn** 4:9 12:10
21:4 47:3 50:6
**turned** 18:24
**two** 7:1,4 11:1,6
19:1 25:18
29:7

_____
**U**
**ultimate** 7:18
13:19 16:24
**unanimity** 35:24
36:2

**unanimous**
  16:15
**uncertain** 35:18
**understand**
  16:12 18:2,11
  18:13 22:4
  28:21 36:16
  40:12
**understands**
  35:10
**understood** 13:1
**undertook**
  46:17
**under-written**
  43:19
**unfortunately**
  22:14 36:2
**unilaterally**
  47:14
**uniquely** 43:24
**United** 1:1,13
**Universal** 31:4
**use** 26:1 32:21
  42:13

_____
**V**
**v** 1:6 3:4 5:15
  9:21
**valid** 34:22
**various** 5:5 9:1
  49:12
**vary** 13:12
**veil** 28:19
**version** 26:19
  36:11
**view** 20:12
  22:25 36:4
**violates** 21:11
**void** 30:16
**Volt** 27:3 34:20

_____
**W**
**want** 15:25 16:5
  26:22 29:5
  37:11 38:20,21
  39:1 43:7 44:9
  45:3 46:5

**wanted** 24:8
**Washington** 1:9
  1:16 47:15
**way** 11:18 33:3
  33:6 39:11
  40:4 41:16
  42:7 45:22
  46:22
**WAYNE** 1:7
**ways** 41:14
**wedge** 14:7
**went** 38:22
**we'll** 3:3 34:15
  34:15,16
**we're** 12:2 18:20
  24:5 28:16,18
  37:1 46:25
  47:1,1,5,7
**we've** 29:17
  33:14
**whatsoever** 11:9
**wheat** 23:12,12
**wipe** 10:14 12:3
**woman** 29:22
**wondering** 6:22
**word** 17:19
  39:18,24
**words** 23:10
  35:17,18
**work** 34:13
**worked** 45:22
**works** 46:22
**worry** 35:11
  41:7
**wouldn't** 25:10
**write** 35:16,18
**writing** 46:12
**written** 31:19,22
  38:3,6,8 42:9
  43:24 45:14
  47:8 49:25
  50:1,4
**wrong** 18:2 34:9
  41:11

_____
**X**
**x** 1:2,8 23:23

_____
**Y**
**years** 6:15 12:3
  12:25 13:1
  21:8 47:6 50:8
**York** 50:11,12
  50:16

_____
**0**
**08-146** 1:6 3:4

_____
**1**
**11:19** 1:14 3:2
**12** 44:6
**12:19** 51:6
**1292** 46:4
**1292(a)** 28:13
**1292(b)** 44:9,14
  44:20,24 50:17
**13** 30:8
**16** 12:10,18
  19:10,24 20:12
  27:11 30:23
  48:23
**16(a)(1)(A)**
  45:25
**16(b)** 44:20
**1925** 50:17
**1987** 9:21

_____
**2**
**2** 3:23 4:10 5:10
  5:11 8:13,14
  9:2,4,17,17,22
  9:23 11:24
  14:7,10,16
  15:11,12
**2009** 1:10
**23** 31:8
**25** 47:6
**26** 2:6

_____
**3**
**3** 1:10 2:4 3:14
  3:16,18,19,21
  3:24,25 4:8,21
  4:22 5:4 6:4,10
  6:19,22 7:10

7:15,17 8:25
9:7,12 11:23
11:23 12:13,14
12:18 13:9
14:7,10,11
15:2,9,13
17:19 18:3
19:12,21 20:7
20:10,16,24
21:3 25:5,20
26:1,23 27:16
27:18,19 28:19
30:13 31:8,12
31:24 32:4
33:12,22 37:10
37:25,25 39:17
40:5,10 41:19
41:23 42:19,21
43:19 44:2,16
44:18 45:12,15
45:24 47:18
48:1,12,12,22
48:24 49:2,4,7
49:10,13,14,15
49:19 50:7

_____
**4**
**4** 4:19,23 5:4
  9:14 13:10
  14:12 15:2,9
  15:13 40:5
**478** 27:4
**48** 2:9

_____
**5**
**5** 40:5

_____
**6**
**60** 6:15 12:3

_____
**7**
**70** 12:25

_____
**8**
**80** 12:25 50:8

_____
**9**
**9** 40:5