IN THE SUPREME COURT OF THE UNITED STATES

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HALL STREET ASSOCIATES, L.L.C., Petitioner : v. MATTEL, INC. : No. 06-989

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Washington, D.C.

Wednesday, November 7, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of the Petitioner.

BETH S. BRINKMANN, ESQ., Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Case 06-989, Hall Street Associates v. Mattel, Inc.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONER

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

In this case two very sophisticated parties agreed to arbitrate an ongoing dispute that was pending in litigation before the United States District Court for the District of Oregon. Their agreement states plainly that after an arbitration award is issued the district court -- and this is at Pet. App. 16A -- "shall vacate, modify, or correct any award where the arbitrator's conclusions of law are erroneous." Ultimately what this Court must decide is whether there is anything in either the Federal Arbitration Act or any other Federal law that renders this non-adhesive, unambiguous contract agreement unenforceable.

JUSTICE GINSBURG: Mr. Phillips, would you say the same thing if the agreement provided for de novo review in the district court?

MR. PHILLIPS: I would be more concerned about identifying a standard of review for the district court than identifying a standard for modifying the arbitration award pursuant to the agreement. So I think that's a different issue. I think that's closer to dealing with a judicial function than this is, which is simply implementing the intent of the parties as to what the standard ought to be for enforcing an initial award.

JUSTICE GINSBURG: That would be -- I am assuming that the parties wrote that standard into their contract, so to the extent you're relying on party autonomy why couldn't the parties elect whatever standard of review they wish?

MR. PHILLIPS: Justice Ginsburg, I recognize that there is a limit to party autonomy. I think there ought to be a very strong preference for party autonomy, and I'm not saying that if I were here and I had an agreement by which de novo review is the standard I wouldn't defend that autonomy. All I'm saying is that I recognize that there are limitations on autonomy that recognize the functions of the Judiciary. But that limitation isn't remotely implicated in this particular case.

JUSTICE KENNEDY: Well, in some -- one of the functions of a judicial -- what about an agreement,

arbitration agreement, that the district court can find facts de novo?

MR. PHILLIPS: That one I think worries me less because it doesn't -- it doesn't suggest -- I mean it just says that we will leave to the district, to the district court the findings, and essentially renders the arbitration agreement --

JUSTICE KENNEDY: Well, suppose it's a complex matter of monitoring emissions, looking at water quality, and the arbitrator has to sit by the river for a month, the district judge had to go down and sit by the river for a month.

MR. PHILLIPS: But again, the parties under those circumstances it seems to me are perfectly free to decide whether they want those issues to be decided conclusively by the arbitrator or to have them adjudicated at the end of the day by the Federal court. And so, if they choose to go through the arbitral process, and then still say nevertheless that's nonbinding and that the district court's free to evaluate that on a de novo record, that it seems to me doesn't in fact implicate the judicial function in quite the same way that the standard of review does.

JUSTICE SCALIA: Indeed, are there not such things as nonbinding arbitration's?

MR. PHILLIPS: Precisely, Justice Scalia.

JUSTICE SCALIA: Which in effect say that when we're done the district court will do it as an original matter.

MR. PHILLIPS: Right. And in that context you're not raising the same problem that you're referring to, Justice Ginsburg, because you're not saying anything about the standard of review. You're just simply saying that the court ought to decide the legal issues.

Now, I do think that when the parties agree that it's a question of law that the question of law is for the district court to decide. My assumption is that the district court in fact will use de novo review, but the parties are not dictating that. That's a matter that's left -- I'm sorry.

JUSTICE ALITO: Doesn't the arbitration agreement in this case set out a standard of review and say on findings of fact they have to be supported by substantial evidence?

MR. PHILLIPS: They do, but that issue -- that standard of review is not at issue in this particular case. The only question here is whether or not there has been an error of law committed, and obviously the district court found that there was a

clear error of law committed. Indeed, the dissenting judge below said it was an irrational decision on the law.

CHIEF JUSTICE ROBERTS: Mr. Phillips --

JUSTICE GINSBURG: But they were both -- they were both in this agreement, both the substantial evidence rule and the standard of review of legal error. So are you saying that you -- we don't have to deal with that question or you're not going to defend it, because the standard was dual. Am I not right about what they --

MR. PHILLIPS: No. There are, there are clearly two different standards that are set out in the arbitration agreement and one of them is substantial evidence. But when the matter went from the arbitrator to the district court there was no issue presented by Hall Street on the question of substantial evidence. We didn't challenge any of the factual findings by the -- by the arbitrator, and therefore that issue is not presented. I'm not saying I wouldn't defend it. All I'm saying is I don't have to defend it in this particular case because the only issue here is whether there has been an error of law.

JUSTICE KENNEDY: But you have to give us a standard. You said, you mentioned, oh, functions of the

district court. I don't know the standard you're proposing that will allow us to draw the line and to put cases on one side of the line or the other. You said, well, you can't interfere with the functions of the court. I don't quite understand that.

MR. PHILLIPS: Well, the problem there -- and again, I think this is largely a fanciful concern because I don't think serious parties who are engaged in arbitration agreements are likely to come up with standards that are completely alien to the judicial process, and indeed there's no empirical evidence to support that. Certainly Respondent didn't cite anything and our amici didn't cite anything like that.

But to be sure, Judge Kozinski in his concurring opinion in the original panel decision in Kyocera said he would have a very different reaction to this case if we were talking about the district court either flipping a coin or looking at the entrails of dead birds as the basis for decision. And our basic point is we're not embracing that extreme approach. I mean, we recognize party autonomy as a significant part of what Section 2 of the Arbitration Act is all about and we think that ought to drive the analysis of this Court significantly, particularly in how you interpret Section 9.

CHIEF JUSTICE ROBERTS: Mr. Phillips, why do you care? If this is not enforceable under the Federal Arbitration Act, which gives you kind of a shortcut -- the district court must confirm it if certain criteria are met -- I assume you have a normally enforceable contract that the district court can enforce just like it enforces any other contract.

MR. PHILLIPS: That's absolutely true, particularly in this context, Mr. Chief Justice, because here we have a situation where we were before the district court, this arrangement came out of the mediation process, the district court reviewed it, blessed it, sent it to the arbitrator --

CHIEF JUSTICE ROBERTS: So you should lose.

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

CHIEF JUSTICE ROBERTS: So you should lose.

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

CHIEF JUSTICE ROBERTS: No. We should conclude that you don't fall within the Federal Arbitration Act and it's not a big deal because you can bring -- you can have the contract enforced. The district court as far as I can tell wants to enforce this agreement, presumably will enforce it as a contract. So you don't need the Federal Arbitration Act, so why should we fly in the face of its plain

language to accommodate your interests?

MR. PHILLIPS: Because the problem here is not what happens in the instance if, Section 9 not applying, that we're suddenly -- we go back to square one and start over. That might be true in a different case, but in this particular case we started in Federal district court. We brought this action as a -- as a contract action.

CHIEF JUSTICE ROBERTS: Is there a basis -- well, the Federal Arbitration Act doesn't provide jurisdiction anyway. So I assume you have a basis for being in Federal court --

MR. PHILLIPS: Diversity, Your Honor.

CHIEF JUSTICE ROBERTS: -- in the first place. So you're just enforcing a contract in diversity in Federal court.

MR. PHILLIPS: Right, and that's exactly what we would ask this Court to be doing here.

CHIEF JUSTICE ROBERTS: No, you're asking us to bring it under the Federal Arbitration Act and say that the district court must confirm it despite the fact that you've changed the standards under Section 9 to 11.

MR. PHILLIPS: No, Mr. Chief Justice, you've flipped it around. Remember, we lost in the arbitration. We won in the district court. The

district court was prepared to enforce the agreement.

CHIEF JUSTICE ROBERTS: Right.

MR. PHILLIPS: Both the underlying lease agreement and the arbitration agreement. It was the court of appeals that said no, you can't do that, you can't enter a final judgment in this case, and the reason is --

CHIEF JUSTICE ROBERTS: But my point --

MR. PHILLIPS: -- because of the Federal Arbitration Act.

CHIEF JUSTICE ROBERTS: My point is that if you have an ordinary contract action the district court will, because your contract provides a particular standard of review, enforce that. Right?

MR. PHILLIPS: Right. No, that's absolutely true. But that's exactly what we're asking you to do here.

JUSTICE BREYER: On that point -- the reason I think you're -- there's a little chaos here is because you said -- your question is phrased, does the FAA preclude enforcement of your arbitration agreement? And you're going to say: We answer that question, no, it doesn't preclude it.

MR. PHILLIPS: Right.

JUSTICE BREYER: It doesn't require it; it

doesn't preclude it.

But then would we have to go back and say what is the source? There has to be some source of law that authorizes this contractual agreement, and there could be two possible sources. And my question here is, is it clear that in fact either of these two sources does?

The first source is State law. I gather the difficulty is that the State of Oregon has an act just like the Federal Arbitration Act, so we'd have to ask the Oregon courts: Is this a legitimate contract under Oregon State law.

The alternative source of law is the Federal judge's case management authority. And there we have a statute which clearly gives the judge some kind of authority, but not for your case because your case exceeds the jurisdictional amount. Therefore, in the absence of that statute, is there inherent authority in the district judge?

Now, I don't know the answer to either of those questions.

MR. PHILLIPS: I thought that --

JUSTICE BREYER: My temptation is to say they're open questions and they'd have to be argued on remand, which makes this case the case of the century, I

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

MR. PHILLIPS: I was just looking for the case of the day, Your Honor, actually.

(Laughter.)

JUSTICE BREYER: All right. Well, in a certain area. I overstate.

But the -- is there any light you can shed on those two questions, or is there some third possible source of law?

MR. PHILLIPS: Well, we know that -- I think the answer to that is that Section 2 of the Federal Arbitration Act, which this Court has recognized repeatedly has a very strong preference for enforcing the agreement of the parties, is a part of the answer to that. And you couple that with the fact that Justice Story, back as early as 1814, said that as a matter of common law that the notion of restricted arbitration is a matter completely left to the parties.

So I think that there are general common law standards. Now, you know, could Oregon law have gone the other way on that? Maybe. I think it would be an interesting preemption question. But the Respondent has never argued that this is unenforceable as a matter of Oregon law. So I don't think that issue is in this

case.

As a matter of case management, if the Court wants to defer to anything then it ought to refer to the district court's own assessment that this agreement should be utterly enforceable, that --

JUSTICE BREYER: Have you ever argued that this is a matter governed by Oregon law and it is enforceable?

MR. PHILLIPS: Right. They never --

JUSTICE BREYER: Have you ever argued that?

MR. PHILLIPS: That it is enforceable?

JUSTICE BREYER: Yes, under Oregon law. Have you ever argued Oregon law?

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

JUSTICE BREYER: No?

MR. PHILLIPS: -- Oregon law.

JUSTICE BREYER: Well, then it's not surprising they haven't argued that Oregon law doesn't apply.

MR. PHILLIPS: No, no.

CHIEF JUSTICE ROBERTS: But they have in fact. On page 43 of their brief, they say that if you prevail the parties would be left to a State law contract action to determine the enforceability of the award.

MR. PHILLIPS: Right, but the State law contract action that they're talking about is precisely the State law contract action we brought in this case before the Federal district court under diversity jurisdiction. And at the end of the day what we're asking for is for the Court to enforce --

CHIEF JUSTICE ROBERTS: No, no. I --

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

CHIEF JUSTICE ROBERTS: No. Their citation is to an arbitration treatise. The contract they're referring to is the contract to arbitrate. And, unless I'm mistaken, what you want is for the district court to be able to enforce your agreement under the Federal Arbitration Act. Right?

MR. PHILLIPS: Because it falls squarely within the Federal Arbitration Act.

CHIEF JUSTICE ROBERTS: Well, it doesn't fall squarely within it because the Federal Arbitration Act sets different standards of review. And all I'm saying is I don't see what the big deal is because you -- okay, don't use the Federal Arbitration Act, which gives you kind of an express remedy the district court must confirm. Use normal contract law and say to the district court: Well, you don't have the Federal

Arbitration Act, you don't have to confirm it as a judgment, but we have a contract, it's perfectly valid, it sets a different standard of review, you should enforce it.

MR. PHILLIPS: Right. But I think the answer to that is that if Congress had a choice as between those alternatives, Congress clearly in Section 9 made it absolutely indisputable that there's a simple way to enforce it, but it didn't suggest the alternative, which is that you relegate it to some kind of State law, completely complicated process to try and get this arbitration award enforced under those circumstances.

JUSTICE SCALIA: Excuse me. I'm just not following this discussion. Does it assume that you can bring an action on the contract and just bypass the provision of the contract which says there will be arbitration? How can you do that? You -- you don't assert you can do that?

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

JUSTICE SCALIA: You clearly can't do that.

MR. PHILLIPS: Right.

JUSTICE SCALIA: So somebody has to decide on this arbitration provision.

MR. PHILLIPS: Right. And I think the

Court, this Court is the court that's got to decide that at this point and --

CHIEF JUSTICE ROBERTS: The arbitration provision, the arbitration agreement is just a contract. Right?

MR. PHILLIPS: To be sure.

CHIEF JUSTICE ROBERTS: Well, then I don't understand why it's not enforceable as a contract.

MR. PHILLIPS: I don't think we disagree on that, Mr. Chief Justice. I think the -- I think that's enforceable.

CHIEF JUSTICE ROBERTS: Well, if it's enforceable -- I'm obviously missing something here. If it's enforceable as a contract, what is the great benefit you get out of prevailing and saying this should be enforced under the Federal Arbitration Act?

MR. PHILLIPS: Well, the benefit is the efficiency that the Federal Arbitration Act is trying to promote. I mean, to be sure, there -- there could potentially be any number of routes you might want to identify. The clearest one is where the parties don't care about what happens on the back end, where they say, once you get your -- you have your -- you get your arbitration award and then you go off and you do Section 9 and we don't have any agreement on that. And that one

is easy, and that's the most efficient.

Then the question is what do you do in a situation where the parties don't agree with that, where they want the district court to review it.

CHIEF JUSTICE ROBERTS: What do you do if you have a contract, an arbitration agreement that's not covered by Section 2, it's not concerning a maritime transaction or involving commerce?

MR. PHILLIPS: Those are regulated by State law.

CHIEF JUSTICE ROBERTS: Okay.

MR. PHILLIPS: Purely by State law. But this is the contract that falls within Section 2, Mr. Chief Justice.

JUSTICE SCALIA: But this -- but this one isn't, and if we say that you lose under the Federal Arbitration Act, is it open to the State court to say, well, that's what the Federal Arbitration Act says, but we handle arbitration differently?

MR. PHILLIPS: Well, that's sort of the core question I think that sort of comes out of Southland and --

JUSTICE SCALIA: I think if you lose on the arbitration here, you've got to lose on the arbitration before State court.

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

JUSTICE SCALIA: I mean you don't have to admit that. That's --

MR. PHILLIPS: That's the logic of Southland, Your Honor.

CHIEF JUSTICE ROBERTS: Why in the -- why is that the case? I mean, this doesn't purport to occupy the field of arbitration and to preempt State law. It provides that a very direct order -- the district court must confirm the arbitration award as a judgment --

MR. PHILLIPS: Right.

CHIEF JUSTICE ROBERTS: -- if you fall within the criteria. And all I'm saying is they'll say, okay, I don't have to confirm it as a judgment.

MR. PHILLIPS: But I think the answer to the conundrum you've raised, Mr. Chief Justice, is that if you're not in Section 9, then you ought to be in Section 2, and there you should do precisely what the contract says, which is that you should vacate or set aside the arbitration agreement --

CHIEF JUSTICE ROBERTS: Oh, no. You're in Section 2, I agree --

MR. PHILLIPS: -- unless -- if there's an error in law.

CHIEF JUSTICE ROBERTS: I agree that you're in Section 2, and the State court can't invalidate your agreement under some special rule that applies only to arbitration. But you want to be under Section 9, and that says --

MR. PHILLIPS: No, I --

CHIEF JUSTICE ROBERTS: -- that the district court must confirm the arbitration award if it meets certain standards.

MR. PHILLIPS: No, I don't need Section 9. All I need is Section 2 because if -- because under our agreement, what we specifically say is that the district court shall vacate, modify, or correct. We're looking for them to correct this award by saying that the right interpretation of this lease is that this is an applicable environmental law, and therefore the indemnification extends and we are protected.

CHIEF JUSTICE ROBERTS: But the only basis --

MR. PHILLIPS: That's what I want under Section 2.

CHIEF JUSTICE ROBERTS: The only basis you have for getting them to correct the award is a different standard of review than the one provided in Section 10.

MR. PHILLIPS: That's true, but that's -- it seems to me that just makes my point, which is I don't need Section 9, Your Honor. All I need -- all I need is an aggressive, not even aggressive -- a fair interpretation of Section 2 that says that the parties' intent controls under these circumstances.

JUSTICE SOUTER: It's not that you don't need Section 9. You want to get rid of Section 9 --

MR. PHILLIPS: That's quite true.

JUSTICE SOUTER: -- because Section 9 on its face seems to provide the opposite to what you're asking. Isn't that the problem?

MR. PHILLIPS: Well, I don't know that that's the problem. You're right, I don't want Section 9 to be controlling here, but I don't think it's meant to be controlling under these circumstances. I think what -- I mean they're making the Section 9 argument. All I'm saying is that there's not a problem created by Section 9.

JUSTICE SOUTER: Why isn't -- I mean the argument that it is meant to be controlling is an argument, first, for the plain language.

MR. PHILLIPS: I'm sorry, Justice Souter.

JUSTICE SOUTER: Pardon me?

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

be controlling," I don't --

JUSTICE SOUTER: Section 9.

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

JUSTICE SOUTER: Number one, the plain language of the statute.

Number two, an argument that that plain language, as a matter of historical fact, was deliberately chosen when Congress made a choice between two different, basic arbitration schemes.

And they chose the arbitration scheme that, in effect, does not allow the -- the kind of variation that you're talking about. So they say the language is plain; the intent behind the language is plain. It is restrictive, and you can't do that. What is your response, in effect, to the plain language construed in terms of the historical argument?

MR. PHILLIPS: Yes. Well, the answer -- the plain language doesn't -- doesn't say what happens if the parties reach a different agreement. The first --

JUSTICE SOUTER: Well, it may not -- it may not say it for the simple reason that it says unequivocally what should happen, and you are asking for a variation on what it unequivocally provides. That may be the reason it does not go into contingencies.

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

of all, it would seem to me less likely that that's true, given the common law history that comes out of Justice Story's opinion, which said restrictive arbitrations are common.

JUSTICE SOUTER: All right. But you're -- you're ignoring -- when you say that, you're ignoring the development of arbitration in the period after Justice Story; and you are ignoring the argument that the other side makes that a deliberate choice was made between two generally understood arbitration, statutory arbitration, schemes, and they choose -- they chose the one that is inconsistent with your position.

MR. PHILLIPS: Justice Souter, there are two -- there are two questions there, so let me try to answer both of your questions.

The first one is: What does the plain meaning of the statute say? The plain meaning of the statute, which is at 1a of the appendix to the petition, is the parties in their agreement agreed that a judgment of the court shall be entered upon the award. We never agreed to that, so the plain language of Section 9 simply doesn't get you there.

Section 9 envisions that this is a -- that this is an understanding.

JUSTICE SOUTER: Then how can you get any

award enforced, even subject to your terms?

MR. PHILLIPS: Because under Section 2 the parties have -- have provided a mechanism for that by saying that the district court will correct an award if it's erroneous as a matter of law.

JUSTICE SOUTER: Then you have to grapple with the question whether in fact under Section 2 you can provide for confirmation in a manner consistent with the provision for confirmation under Section 9.

MR. PHILLIPS: Right. But all I'm saying is that Section 9 doesn't apply in this particular context, and, therefore, it makes all the sense in the world to --

JUSTICE SOUTER: You simply -- I -- I don't -- maybe I'm missing something, but you seem to stand there and just say baldly: Section 9 doesn't apply. It doesn't apply, you've repeated that several times. And I at least don't know why it doesn't apply.

MR. PHILLIPS: Well, hopefully I can persuade you by rereading the portion of the statute, that the first sentence of Section 9, which is at Appendix 1: "If the parties" --

JUSTICE STEVENS: Where is it? Where is it?

MR. PHILLIPS: 1a of the appendix to the petition. Section 9: "If the parties in their

agreement have agreed that a judgment of the court shall be entered upon the award" --

JUSTICE STEVENS: Uh-huh.

MR. PHILLIPS: These parties didn't agree that a judgment would be entered on the award. They agreed that a judgment would be entered on the basis of whether there was a non-erroneous declaration of law by the arbitrator.

JUSTICE SOUTER: Okay. And what you are arguing is: At this point, even though we didn't agree within the meaning of the preamble to the first sentence --

MR. PHILLIPS: Correct.

JUSTICE SOUTER: -- we still have a right to have the award confirmed and enforced --

MR. PHILLIPS: Correct.

JUSTICE SOUTER: -- because we agreed to it under Section 2.

MR. PHILLIPS: Both parties agreed to it under Section 2.

JUSTICE SOUTER: And the question, I think, is when you argue in that fashion: Do you have a right under Section 2 to provide for confirmation and enforcement under terms which are inconsistent with the provision in Section 9.

And I think that's the -- that's the question you've got to answer.

MR. PHILLIPS: Well, if you -- if you want to make a judgment call and you think there's really a judgment you have to make as between Section 2 and Section 9, then it seems to me that all of the Court's decisions have recognized that the single most important objective of the Federal Arbitration Act is embodied in Section 2, which is -- which is to enforce the intent of the parties --

JUSTICE SOUTER: The -- the cases --

MR. PHILLIPS: -- is you way you should come out.

JUSTICE SOUTER: The intent of the parties that's being enforced in those myriad cases is the intent of the parties to arbitrate. I don't believe any of those cases respond to the -- to the issue that we've got before us.

And the issue we've got before us as you are now framing it is this: If you do not have a provision within the meaning of the first sentence of Section 9 --

MR. PHILLIPS: Yes.

JUSTICE SOUTER: -- for consummation and enforcement --

MR. PHILLIPS: What do you do?

JUSTICE SOUTER: -- but you have a different contractual provision and its terms are different from the enforcement terms under Section 9 --

MR. PHILLIPS: Right.

JUSTICE SOUTER: -- can that contract be recognized? Do you have a right, in effect, to modify the statute?

MR. PHILLIPS: But, Justice Souter --

JUSTICE SOUTER: And that's what you've got to come to grips with. And --

MR. PHILLIPS: Well, I think I have come to grips with it.

JUSTICE SOUTER: No, but it does not answer that question simply to say there are lots of cases saying that the intent of the parties to arbitrate should be enforced. This is a more specific question.

MR. PHILLIPS: No, it's not the intent of the parties to arbitrate. It is every facet of the agreement is to be enforced consistent with the intent of the parties.

JUSTICE SOUTER: Where do you -- do you have a case that says every facet of the agreement, no matter how inconsistent arguably with other sections of the statute?

(Laughter.)

JUSTICE SOUTER: No, you don't.

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

JUSTICE SOUTER: That's why we've got this case here.

MR. PHILLIPS: Well, to be sure. But the bottom line here -- and -- and I do want to answer the Illinois v. New York part of this, because I think that's a complete red herring in this case.

But it still seems to me that if you think that there is an ambiguity with respect to Section 9, first you should resolve that ambiguity by construing it to implement the parties' intent, because that is the overriding objection to the FAA. And second --

JUSTICE SOUTER: Okay, but --

MR. PHILLIPS: -- if you go to Section 10 --

JUSTICE SOUTER: If we do that, we've got to dispose of the red herring. So you're going to come back to that?

MR. PHILLIPS: Okay. All right, let me answer the red herring. Then -- then I'll tell you what I think about Section 10. On the red herring, all -- all the -- first of all, there's nothing in the legislative history that suggests that Congress made some kind of conscious choice between New York and

Illinois.

They talk about the New York model. There is not a word in the legislative history about Illinois. So I don't think that's what the decision was.

But even if that were the choice they made, that still doesn't go to the question of what do you do if the parties reach a different agreement.

JUSTICE SCALIA: That is, indeed, the issue. What we're arguing about here is whether 9 and 10 are simply default rules that apply where the parties have not otherwise specified. That's -- and that's, arguably, what the New York law and the Illinois -- I -- I don't know that any of those cases cited by the other side involved cases where the Illinois rule or the New York rule was applied in the teeth of an arbitration agreement that said something differently.

MR. PHILLIPS: No. None of -- None of those cases fall in that category.

JUSTICE SCALIA: In other words, I think both the Illinois rule and the New York rule were default rules.

MR. PHILLIPS: That's exactly right.

JUSTICE SCALIA: And you're arguing that this is the default rule?

MR. PHILLIPS: Correct.

JUSTICE GINSBURG: It doesn't read like one. 10 and 11 don't read like default --

MR. PHILLIPS: Well, I think the important part about Section 10 to keep in mind is -- is their argument also is predicated on the assumption that Section 10 exhaustively lists all of the grounds for modifying an -- vacating an arbitration award. And it is absolutely clear from this Court's decisions both in Wilko and in W.R. Grace that the list in Section 10 is not an exclusive list.

JUSTICE GINSBURG: What else is there besides the manifest whatever? The --

MR. PHILLIPS: The manifest disregard of the law and the -- and public policy. W.R. Grace says you can't enforce any contract that violates public policy.

JUSTICE STEVENS: Mr. Phillips, on the question of whether it's just a default rule or a self-executing definition of what's permissible, supposing the agreement between the parties provided that the judgment by the court must be entered in 6 months rather than a year, and it would be vitiated if it were entered after that. Would that trump the statute?

MR. PHILLIPS: I -- I think, yes, I think it probably would, because --

JUSTICE STEVENS: I think under your theory you'd have to --

MR. PHILLIPS: I don't think Congress meant for it to be -- I don't think Congress intended for this to be not subject to change.

JUSTICE STEVENS: Yeah.

MR. PHILLIPS: I mean, you know, there are -- the question in all of these provisions is are there some components of the FAA that are meant to be mandatory, and there are others that are all subject to change. And I think that one strikes me at least as most likely subject to change, Justice Stevens.

If there are no further questions, I'll reserve the balance of my time for rebuttal. Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Phillips.

Ms. Brinkmann.

ORAL ARGUMENT OF BETH S. BRINKMANN

ON BEHALF OF RESPONDENT

MS. BRINKMANN: Mr. Chief Justice, and may it please the Court:

Sections 9, 10 and 11 of the Federal Arbitration Act provide the exclusive grounds on which a court can vacate, modify, correct an arbitration award

under the FAA. Those grounds do not include legal error.

What Petitioner wants is to graft on an additional ground to that statute, and say, oh, 10(A)(5), on any other ground that the parties agree to.

JUSTICE SCALIA: What do you do about the fact that our opinions have said that there is another ground under 10, which is manifest miscarriage of justice? That's not listed there.

MS. BRINKMANN: Your Honor, manifest disregard is Section 10 (A)(4), exceeding the power. It is not mere legal error, and it's manifest disregard of the agreement. Section 10 goes to structural errors, structural problems: Corruption, fraud, exceeding the power. And manifest disregard is in the statute, and it's not mere legal error.

JUSTICE SCALIA: Why -- why did we go -- go to the trouble of expressing it differently?

MS. BRINKMANN: Because --

JUSTICE SCALIA: Why not just say Section 4?

MS. BRINKMANN: It was required in Wilko, because there were two different questions there. There was a provision under the Securities Act that said customers couldn't waive certain right.

And the court said there: Well, we all know

that the Securities Act generally would apply to arbitration. Of course, if an arbitrator didn't apply the Securities Act, that would be manifest disregard, exceeding their power. That they could not do.

But what the Wilko Court held was: The customer, if they went to arbitration, was also waiving judicial review of the arbitrator's interpretation of the law. And that was the distinction in Wilko, and that's why manifest disregard is in the statute. It's 10(A)(4), and it's that type of error. It is not beyond the statute, and that's what Congress meant to do.

JUSTICE GINSBURG: What about public policy? That was the other one Mr. Phillips brought up.

MS. BRINKMANN: Yes. Public policy would often be covered under Section 2. Section 2 allows any arbitration contract to be voided under any generally applicable State contract law, so that clearly would apply. A lot of that would capture off as public policy. But "public policy" is used in different ways.

The Grace case he cites is a labor case. And there have been different developments of arbitration under the labor statute. But what public policy has come to mean in that line of cases is where there is another Federal statute that is violated by the arbitration.

And there you have another source of law. If there is a later enacted Federal statute that was a congressional intent to trim the Arbitration Act, that's another matter.

JUSTICE SCALIA: What would happen in situations like this? Suppose we agree with you; and we say, oh, yes, both of the parties agreed as part of this contract: I don't want to let these arbitrators decide the law. If they get the law wrong, we want -- we want the courts to decide the law. That's the deal. And then you're going to say, oh, that portion of the contract is no good.

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

JUSTICE SCALIA: Is there no such thing as -- as failure of the contract for a misunderstanding of the law?

MS. BRINKMANN: That would be a common law action that the Chief Justice was referring to, to simply enforce an award. But Section 9 created a streamlined approach for enforcement of arbitration awards. When Congress in 1925 said --

JUSTICE SCALIA: You think -- you think the State can enforce an arbitration award that would not be enforceable under the FAA?

MR. PHILLIPS: Under Section 9. I hate to use the words "broadly FAA," because here's the situation: You can have arbitration awards that are clearly covered under Section 2, but they are not covered under Section 9. Section 9 is a streamlined procedure for enforcement of arbitration where it's under the FAA.

When Congress enacted the statute, they said, you know, we are going to give a streamlined approach. If you want to go quickly from award to judgment, you can go right into court and hear Section 9. That -- and you could agree to this. You have to agree to use Section 9. You have to agree to this confirmation.

You come in, and that court must enforce that award, confirm that award, unless Sections 10 and 11 are met. And that's exactly what Congress did.

CHIEF JUSTICE ROBERTS: What happens outside -- that happens all the time. They are called consent decrees. The party agrees, and agrees to particular provisions, and they submit it to the judge and say: We want you to write two words, "so ordered," at the bottom of this; and then it becomes a judgment.

You don't have to worry about the Arbitration Act. It's a contract.

MS. BRINKMANN: There are a couple of differences, I would also say, with the consent decree from the Section 9 enforcement of the award, Your Honor. Here, of course, Congress spoke to it. And it clearly set up a framework for Section 9, 10, and 11: How could you have this streamlined, efficient, final way to get a judgment. That was the purpose of the FAA.

So you don't have that in a consent decree situation, and you would not have that in a common law contract action.

Also, of course, in that consent decree situation, courts maintain their equitable authority.

CHIEF JUSTICE ROBERTS: I have the same question for you that I had for your friend: Why do you care? I mean, if you are saying, look, you can enforce this as a state law contract -- you know, it's not streamlined. The judge doesn't have to do it; but, you know, this judge wants to do it. And he is going to enforce it as a State law contract.

What do you gain?

MS. BRINKMANN: Well, we gain a little of what we try to get through arbitration: Finality, the cessation of the time and cost that this litigation has arisen.

We prevail under the ruling of the court

that recognized the exclusivity of Sections 9, 10 and 11; and that would end the litigation. That's certainly of very great interest to our client.

JUSTICE SOUTER: What do you say to Mr. Phillips' argument that, within the meaning of the first sentence of Section 9, you don't have any agreement at all; and, therefore, you have no right to enforce anything?

I take it that's not the position you took below, and that's not the position you're taking here, but how do you answer him?

MS. BRINKMANN: That's really a repackaging of Petitioner's severability argument from below. There was an agreement to confirm. It's just whether or not if the -- it becomes legally impossible for the other condition to occur, the legal review can't occur because it's contrary to the statute.

What happened -- and the court of appeals here addressed that issue, applied Oregon law, and rejected it. Petitioner filed a rehearing en banc petition on that and did not bring it to this Court on cert.

JUSTICE SCALIA: Assume we agree with you that this is a quick and dirty way to get arbitration agreements enforced if you want to bring it within 9 and

10, and if you don't, you're free not to; you can go to the State courts. Why can't he still go to the State courts?

You say this is going to terminate the litigation. Is this going to be res judicata on anything? All it's going to say is the Federal courts have no jurisdiction over this. It's not under 9 and 10. You're going to run off to State court. You're going to protract the litigation rather than bring it to a quick end.

MS. BRINKMANN: Your Honor, this is under Section 9. The only way it would not be under Section 9 is if they had won on the severability argument.

JUSTICE SCALIA: I don't understand that.

MS. BRINKMANN: We thought --

JUSTICE GINSBURG: Miss Brinkmann, can we back up a bit, because this agreement had an usual genesis. This was a big case, and the judge kept right in the court a piece of it. And then he and the parties agreed that another piece of it would best be resolved in arbitration. So the judge was in equal participation in that effort. All three parties wanted to get a particular issue resolved through an arbitrator rather than the court, itself.

And I doubt very much whether the judge

would have been at all interested in that scheme if he thought he were doing an idle thing. That the parties, having agreed to just what the judge thought was a nice way to resolve this issue, would then find themselves out of Federal court and have to bring some kind of suit in State court. It doesn't seem to fit this scenario.

MS. BRINKMANN: Two responses, at least to that, Your Honor: Then the parties should have asked the court to appoint a special master. That maintains under the authority of the district court judge. That's not what happened here. And that's important.

What is before the Court here is the Section 9 action to confirm the judgment. And that's what comes to the Court on --

CHIEF JUSTICE ROBERTS: You don't have to go back to State court. You have diversity. You are in Federal court, no matter what; right?

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

JUSTICE BREYER: That's why just what you said is actually what's worrying me about the case. Because what Justice Ginsburg said makes me think that there could be situations, a lot of situations, where Federal judges do want to peel the case off. And you say send it to a master. Maybe some would lend

themselves to a master; maybe some wouldn't. I have no idea.

And are we going to have to hold in this case whether a judge or when a judge, a Federal judge, does or does not have authority to do such a thing?

That's why I say -- I was actually thinking the case of the century, because it's going to take a hundred years to finish.

But the fact is there are those issues there once we say Section 9 doesn't apply. Then you're going to have to say -- suppose we were to say it's just State law. Well, suppose the State doesn't allow enforcement of this kind of contract? Then we have the question of the authority -- of the inherent authority, not statutory, of a Federal district judge to peel off bits of cases and decide them in different ways.

I don't know the answer to those questions, but I think they are quite important. So what do I do?

MS. BRINKMANN: Well, first of all, Your Honor, if it comes to a question about the particular facts in this case involving the scenario that Justice Ginsburg put forth of the very unusual situation of a Federal district court being there, we would, of course, dismiss the writ as improperly granted. That has no broader implication, I think --

JUSTICE BREYER: Oh, no, because there is a holding in the whole Ninth Circuit, which accounts for a large percent of the country, that the district judge can't do this. And that's quite a significant holding in that circuit, and we ought to review that.

MS. BRINKMANN: That would be the question, Your Honor, if when faced with something that a judge wants to peel off, you have to look at what tools a Federal judge has been given. Magistrate judges widely used for all types of picking juries, discovery, special masters, those are the tools that have been given to Federal judges. When arbitration --

JUSTICE GINSBURG: Why not use -- why not use Rule 16, pretrial procedure, and the parties and the judge can work out what they think is the most efficient way to resolve this controversy? So they decide at the pretrial conference that they are going to build into this arrangement one issue that they are going to peel off to go to an arbitrator, but the judge is going to retain control through the legal error.

MS. BRINKMANN: The arbitrator is what introduces these different elements, because that's a private judge chosen by the parties, paid by the parties. He doesn't have life tenure. It's a very different animal. And what Congress did in the Federal

Arbitration Act --

JUSTICE GINSBURG: That's a strange argument in this respect. You are arguing that this non-Article III person has more control rather than less control; that if the judge controlled this arbitrator, somehow that would violate Article III.

But if the judge has no control and is essentially little more than a rubber stamp on what the non-Article III person does, then that's all right. And the sense of that doesn't come across to me.

MS. BRINKMANN: It's because it's a matter of contract law, Justice Ginsburg. The parties agreed to an arbitration here on a contract and the arbitrator's award speaks for the parties. It is their agreement. That's what an arbitration award is, and that's why this streamlined process under Section 9 to transfer that award, that contractual agreement --

JUSTICE KENNEDY: But -- but the question is whether or not that streamlined process is the only process. It seems to me that if the purpose of the Arbitration Act is to promote confidence in the arbitration process, that if parties agree to have the double assurance that the arbitrator hasn't made some strange ruling of law, that that's quite consistent with the whole purposes of arbitration.

MS. BRINKMANN: Well, Your Honor, we are not suggesting that it's the only means to get an award enforced, but if you are doing the Section 9 route, the grounds in the statute are the only grounds on which that can be done, and the policy about whether or not those transaction costs, when parties want further review on an arbitration, is shifted to the courts. It's one Congress made --

JUSTICE KENNEDY: But you're -- you're asking us to interpret the statute; and let us assume that it's a plausible interpretation and interpret the statute as the Petitioner would. You know, under Section 8, the parties can use the authority of the court to libel a ship. The court is extending its authority to -- to use very intrusive means, and to say that the parties can't ensure, if they choose, to have review for correct errors of law -- to correct errors of law when the ship has been seized, it seems to me to promote the whole purposes of the act.

MS. BRINKMANN: But, Your Honor, I think that's where we get to -- between when we are talking about Section 2 and the purpose is that the parties control how the arbitration progresses. Then we come to the entry of the judgment by a court, and that's what Congress controls; and the grounds in 10 and 11 cannot

be perceived as default rules. There are many places in the Federal Arbitration Act where --

JUSTICE KENNEDY: Well, we're arguing about that textually. I'm saying that there's nothing inconsistent with the Petitioner's position and the basic policies of the act. You talk about finality, streamline, and so forth; but if the parties have more confidence in the arbitration process by ensuring this added level of review, it seems to me quite consistent with the purposes of the act.

MS. BRINKMANN: Well, two things, Your Honor. If they want to do that, then they don't choose Section 9, and they don't include an agreement for Section 9, and then they have what Chief Justice Roberts was talking about, a -- a state contract action --

JUSTICE STEVENS: Can I interrupt on that for just a minute? You're assuming and the Chief Justice's line of questioning was assuming there's an adequate state remedy available for enforcing this contract, but the whole premise of the statute at the time it was enacted was that there was not a state remedy, because there was a bias against arbitration. And this was thought to be the sole remedy for arbitration at the time the statute was enacted.

MS. BRINKMANN: Your Honor, that actually

brings me to a red herring. I'd like to address the history, because I think that what happens in Petitioner's reply brief, there's some confusion between common-law causes of action to enforce an arbitration award as a contract, and actions under statutes. Some of the commentators confuse that also.

There was an opportunity to have judicial review of the law through a contract enforcement case, although there was a clear statement requirement. So there are going to be cases that talk about, that are not under the statue. Then when you look at cases under the statute, you have to differentiate between the cases under the New York model statutes, where you will not find that, and cases under the Illinois statute, where you will, because they allow judicial review.

JUSTICE GINSBURG: Are there any --

MS. BRINKMANN: Now, when Justice Scalia --

JUSTICE GINSBURG: Are there any -- are there any such States left today that are using the Illinois model?

MS. BRINKMANN: I believe not, Your Honor. We explain in one of our footnotes that that came into disfavor.

But I want to address Justice Scalia's point about the legislative history. There is no case that we

have found that says, notwithstanding those statutory grounds, you can contract beyond them, but we do have not only the New York cases, but also in footnote 8, I believe, on page 30, several other statutes have statutory grounds, and repeatedly they say these are the statutory grounds. That is separate from the common-law action where you could have a full jury trial.

JUSTICE SCALIA: But -- but the old Illinois and the old New York rules, you don't have any cases which say -- which establish that those rules were not just default rules, but you -- but you were not allowed to depart from them.

MS. BRINKMANN: We think the language in those cases will speak -- -

JUSTICE SCALIA: You don't -- you don't have any case that holds that?

MS. BRINKMANN: The cases say things like on the statutory grounds, where they do say it. Do they go the next step and say by the way, we are not going to do anything else that's -- -

JUSTICE SCALIA: You don't have any case that holds that.

MS. BRINKMANN: No. No. There's none on the other side, either.

JUSTICE GINSBURG: Is there a possibility

that the reason the language in the statute is as it is -- when was the Federal Arbitration Act; what year was it?

MS. BRINKMANN: 1925.

JUSTICE GINSBURG: And there was still abroad in the land considerable distrust of arbitrators. Judges said arbitrators are stepping on our turf, and so they would be naturally resistant to let the arbitrator go ahead and have the most minimal review in court. Maybe the act was written the way it was to say, if the parties want to go to arbitration, courts, you stay out of it.

MS. BRINKMANN: If you choose that -- yes, Your Honor. And even one more step. But we will tell the court to stay out of it only if you agree that you're going to come under for confirmation. It's still let the parties have the review through common law if they want it.

That's absolutely correct, Your Honor. And I think it's that additional step, though, that puts the whole picture together. And I do want to emphasize, there is appellate arbitration that takes care all of the policy concerns about whether or not --

JUSTICE KENNEDY: Would you -- would you agree that what we hold in this case applies to suits in

admiralty, where you don't go to State court under Section 8?

MS. BRINKMANN: That's a difficult question, Your Honor. I have looked at many of the old -- some of the arbitration cases did come up from admiralty, and I think the answer is, if it is an action under Section 9 to confirm, it must be confirmed unless there is vacatur, modification, or correction under 10 or 11. Those are exclusive grounds.

JUSTICE KENNEDY: Well, at this point you don't have a State court fallback for your argument.

MS. BRINKMANN: Well --

JUSTICE KENNEDY: And I -- I can't say why it isn't -- I just repeat my earlier point -- quite consistent with encouraging confidence in admiralty arbitration to allow district courts to review rulings on a matter of law if the parties so choose.

MS. BRINKMANN: I think that question, though, perhaps goes to more or not whether the Section 9 is the exclusive means for enforcing an award, and it isn't. So perhaps there is some other means that is beyond my expertise.

JUSTICE BREYER: Oh, if there is, then let's think -- suppose that in the middle of a trial, the parties say, judge, this is so complicated factually, we

have a way that we can get an agreed statement of facts. They walk out the door; they have a friend who has a sign called arbitrator; and they come away from that friend with an agreed statement of facts, which they agree to submit to the judge to apply the law. Now, there is nothing wrong with that, I imagine.

MS. BRINKMANN: Well, that sign would have to be changed. It would have to say --

JUSTICE BREYER: We know -- I'm sorry. I'm not even going to tell the judge how I find this. I go to a crystal ball; I go to any way I want. I will come in with an agreed statement of facts, and is there anything, if we have that agreed statement of facts, that would will stop the judge from saying I take this agreed statement of facts; there's a difference about how the law applies to it; I will resolve this case?

MS. BRINKMANN: There are a couple of things. That's not an arbitration award.

JUSTICE BREYER: Well, no -- I just say -- well, I'll ask you the next question. I take the answer to the first question is there's nothing wrong with that.

MS. BRINKMANN: I have to say --

CHIEF JUSTICE ROBERTS: Isn't there --

MS. BRINKMANN: -- the court would not be

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

JUSTICE BREYER: I'm sorry. I thought that, if in fact parties come in with an agreed statement of fact in a case, I've never seen a situation where the judge couldn't say, fine, I agree; that's the -- the judge would say I'm sorry, even though you agree, I insist that you go to trial and?

CHIEF JUSTICE ROBERTS: Sure.

JUSTICE BREYER: He can?

MS. BRINKMANN: I think, I think there would be a State bar --

CHIEF JUSTICE ROBERTS: Sure, if the parties agree, and here's our stipulation: We agree that he is a citizen of Pennsylvania and you're a citizen of --

JUSTICE BREYER: All right, so there are public policy limitations.

MS. BRINKMANN: Well, and it's collusion. It goes to our argument.

JUSTICE BREYER: Well, is there anything wrong here? My question basically, obviously, is, is there anything wrong in this case if they had come in with an agreed statement of fact?

MS. BRINKMANN: I think it would have depended on what the court did with it. So long as it was not binding on the Federal court, because you can't

buy an injunction. You cannot stipulate to the erroneous law. The Article III judge maintained that authority.

JUSTICE BREYER: All right. I'm trying to get to my question; I'm not asking it very well.

What they agreed to is an agreed statement of facts, subject to Section 9 standards, Section 9 and 10.

MS. BRINKMANN: That's difficult, because it's an award --

JUSTICE BREYER: What I'm driving at, whether I've asked it well or not --

MS. BRINKMANN: Yes, right.

JUSTICE BREYER: -- is is how is it any different from coming in with an agreed statement of facts?

MS. BRINKMANN: Because this is an arbitration award. It is a contractual agreement where the award gives -- imposes a legal obligation on someone else, and that award is going to be entered as a judgment of the court, against the parties.

JUSTICE STEVENS: May I ask this sort of basic question? Forgetting the text for a minute, what policy reason -- can you think of why would Congress want to prohibit this particular form of agreement?

MS. BRINKMANN: Congress wanted to give parties an option for a quick, simple, cost-effective and final way --

JUSTICE STEVENS: Why would they want to prohibit an option that takes a little bit longer?

MS. BRINKMANN: Because that would be a different action where you have to look to State contract law, contract law defenses, whether there are State arbitration laws -- it's a different animal. They were looking at the animal of an arbitration agreement and a streamlined method to have that enforced and that's what Sections 9, 10, and 11 do.

CHIEF JUSTICE ROBERTS: I thought your answer would be part the point Justice Stevens brought up earlier. There was this State hostility to enforcing arbitration agreements at all --

MS. BRINKMANN: Uh-huh.

CHIEF JUSTICE ROBERTS: And so what the Federal Arbitration Act says is, all right, in the narrow circumstances where the parties agreed, subject to this narrow standard, you have to enforce it. But that doesn't mean we are going to override the State law across the board.

MS. BRINKMANN: That's right. It gives the parties the option for choosing that, and if you choose

that, you have to do what Congress says.

JUSTICE STEVENS: Why do they want to prevent the parties from choosing the option they chose in this case? I don't think that answer says why they'd want to do that.

MS. BRINKMANN: They can choose another option, but they may have a full-blown trial about contract law in the award, and that's what Section 9 would --

JUSTICE STEVENS: But then there'd be no arbitration at all. That's right.

MS. BRINKMANN: I also have --

JUSTICE STEVENS: But I just don't understand why it makes any sense at all to say this type of arbitration agreement is invalid.

JUSTICE KENNEDY: And I would add --

MS. BRINKMANN: Well, Your Honor, we're not saying it's invalid.

JUSTICE KENNEDY: I would add that in admiralty you don't have the back-up of State law.

MS. BRINKMANN: We're not saying it's invalid, Your Honor. We're saying that there's entitlement to confirmation of the award unless the grounds of 10 and 11 are there. And Petitioner wants to graft on the thing that says "or on any ground the

parties agree on." There's no limit to that, Your Honor. There's nothing for harmless error --

JUSTICE SOUTER: No, but the question is still here: Why should there be a limit if the parties themselves agree? Because if they didn't come in under arbitration and they simply came in under contract or whatever the causes of action might be in a diversity case, the court would have to be dealing with these issues anyway.

MS. BRINKMANN: It would be under a different cause of action, Justice Souter.

JUSTICE SOUTER: Pardon me?

MS. BRINKMANN: You'd be under State contract law. Here you'd have to develop a Federal common law of when you took a Section 9 and you started reviewing it for error. Are we really going to allow de novo review and vacatur when it's harmless? There's a whole body of Federal law that has developed about harmless error to address those kinds of issues. This would be a Federal --

JUSTICE SOUTER: That's true in any diversity case.

MS. BRINKMANN: But, Your Honor, this would be under the Federal Arbitration Act. Without any guidance from Congress, contrary to the grounds they put

forward. And they have no limit.

JUSTICE SOUTER: Okay, why didn't Congress give any guidance? One suggestion that the Chief Justice made, and it played through my mind, is maybe the -- what seemed to be the plain language limits in Section 9 represent not necessarily a kind of policy choice in a perfect world, but a political policy choice. Maybe that was the term as you -- as you read Section 9, maybe that was the term upon which the act could be passed.

MS. BRINKMANN: It was --

JUSTICE SOUTER: We will, in effect -- we will say: Look, you got to enforce these contracts, arbitration contracts, but you don't have to go one step further. Maybe that was the political deal. Is there any indication that that was the case and that's the explanation for this limit?

MS. BRINKMANN: With all respect, I think not. I think that the Section 2 and 3, the enforcement of the arbitration agreement, is about the private parties determining the process. But when you get to the entry of a judgment by a court on the award, what Congress did said: We're going to give you an option to have an efficient, streamlined way for that also, and here it is: 9, 10 and 11. Now, you still have

something else and you have to agree to this in your agreement, but if you agree to it, this is what you have.

And I have to say Petitioner's argument is so broad, as Justice Ginsburg pointed out, there were questions of fact in this. We were -- we were litigating under this agreement also in the district court, and we brought a question of fact to the district court. When the district court first sent this back to the arbitrator, it went through and basically told the arbitrator: You know, you haven't looked at these facts; you haven't looked at these fact; you haven't looked at these facts. I believe it's Pet. App. 57a. And it sent it back to show the arbitrator's work. I mean that is what --

JUSTICE GINSBURG: Is that what --

MS. BRINKMANN: -- courts would get mired in under a common law development standard of review, according to what --

JUSTICE BREYER: Has that been a nightmare -- has it been the nightmare you suggest in labor arbitration? Because I think labor arbitration falls outside the act, doesn't it?

MS. BRINKMANN: It does.

JUSTICE BREYER: And has that turned into

some kind of terrible nightmare where there are dozens of rules and they have a long complicated labor set of regulations on it? I don't think so, but has it?

MS. BRINKMANN: Well, Your Honor, I'm not as familiar with that perhaps as I should be, but I know --

JUSTICE BREYER: Well, if we run that pretty well, why wouldn't you run this pretty well --

MS. BRINKMANN: I think the --

JUSTICE BREYER: -- given a back-up, looking at it as a default?

MS. BRINKMANN: I think they're very different policies and different statutory frameworks that apply.

JUSTICE GINSBURG: Well, let's take this statute and let's take the circuits that have the rule, the opposite rule. In fact, the Ninth Circuit had the opposite rule until rather recently. What has been the experience -- I think the Fifth Circuit is on the other side?

MS. BRINKMANN: Yes.

JUSTICE GINSBURG: What has been the experience there?

MS. BRINKMANN: There has not been widespread use of this provision. I think that our amici briefs really speak to this, Your Honor, because

the difference would be a statement by the U.S. Supreme Court that says parties can now create whatever other grounds they want and go in through Section 9 in a streamlined process and are going to impose on Federal courts, not appellate arbitrators, on Federal courts, whatever grounds they want -- de novo review of fact, no harmless error, perhaps create different appellate standards when it goes up.

And I think that the amici really point out that that is so contrary to the finality and efficiencies that the animal of arbitration --

JUSTICE GINSBURG: I think a lot of those horribles, Mr. Phillips would agree with you because he hesitated even on de novo, and I think he thought that trying to control an appeal from the district court, that would be out of the ballpark.

MS. BRINKMANN: I think it would create a hybrid animal that is not what the Arbitration Act is about.

JUSTICE SCALIA: Why couldn't you limit it reasonably by saying the parties can agree to anything? We would only have to say at least, the parties can at least agree to anything that the court would be able to do if this had been brought as an action in the court, rather than initially as an arbitration.

MS. BRINKMANN: With all due respect --

JUSTICE SCALIA: Which means the court would decide the questions of law.

MS. BRINKMANN: With all due respect, Your Honor, that would be for Congress to do, not this Court. This is a statutory framework, a statutory cause of action that Congress wrote.

JUSTICE SCALIA: I understand, but that would be a limit. You say it's limitless. It doesn't have to be limitless.

MS. BRINKMANN: No, but you're putting -- you are, I think, as this Court itself has said, you're breeding litigation from a statute whose whole point was to minimize and limit litigation. You're creating a new body of Federal common law that's really antithetical to the core purpose of the Arbitration Act. And I think that the -- that overriding principle of Federal Arbitration Act should really motivate the Court to realize what Congress did and the exclusive grounds that they set forth.

JUSTICE GINSBURG: But one problem that I have with your position is you say that the -- you should continue to prevail, although that would be in violation of the parties' agreement. Under the Ninth Circuit decision, you win, what the arbitrator says

goes, and there isn't the review that the parties bargained for.

MS. BRINKMANN: That's the severability point that they lost on, Your Honor. They had petitioned for cert on severability and tried to say because the judicial review became legally impossible the rest should have followed. We'd be arguing a different case. They petitioned for rehearing en banc review on that and did not petition for cert on that. But that is answered by the severability ruling below.

JUSTICE KENNEDY: Could the parties have an arbitration agreement in which they said, if there are contested issues of law, either party may seek declaratory judgment?

MS. BRINKMANN: In court?

JUSTICE KENNEDY: In a Federal court, under the Declaratory Judgment Act.

MS. BRINKMANN: I don't know if that would be an arbitration agreement. I'm not sure what the --

JUSTICE KENNEDY: My hypothetical is it's in the arbitration agreement. If the arbitrator gets stuck on a difficult question of law, either party can seek declaratory relief, and the arbitration proceedings are held in abeyance pending that declaration.

MS. BRINKMANN: I hesitate because it sounds

like that may just be an advisory opinion, and there might be an Article III problem with that.

JUSTICE KENNEDY: No. There's the advisory -- we've been through this. This is a real controversy, not an advisory opinion.

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

JUSTICE KENNEDY: I think the reason you hesitated to answer yes might be inconsistent with your position.

(Laughter.)

MS. BRINKMANN: No, I don't think so, Your Honor. I think that if they have a declaratory judgment, then they'll have a judgment. I don't know why they would ever go back to the arbitrator. That's what I'm not --

JUSTICE KENNEDY: There are lots of other things for the arbitrator to do. He's got some specific issues of law that are contested.

MS. BRINKMANN: I don't see how that is inconsistent with a party independently going for a declaratory judgment action. I don't think that's contrary to our position, Your Honor.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Ms. Brinkmann.

Mr. Phillips, you have you 5 minutes remaining.

REBUTTAL ARGUMENT OF CARTER G. PHILLIPS
ON BEHALF OF THE PETITIONER

MR. PHILLIPS: Thank you, Mr. Chief Justice. I'll try to give you back some of that time before I'm done.

In my experience in evaluating cases like this, it seems to me that in some ways where you end up depends in large measure on where you start. And the parties fundamentally disagree about whether or not this is an agreement that should be -- you know, who's got the burden? Do we have to show that this agreement is authorized by something or are we entitled to have this agreement and it's their burden to demonstrate clearly that Congress meant not to allow this to be enforced? And it seems to me clear that the answer to that is that it's their burden to find something specific in the Federal Arbitration Act or otherwise that precludes this.

Section 9 doesn't get them there because Section 9 is predicated always on an agreement of the parties in the first instance, and so that's not a basis for doing that, but even if you thought Section --

JUSTICE SOUTER: What do you say about her

argument that we are limited in considering your argument by the severability ruling that you didn't appeal?

MR. PHILLIPS: I don't see how the severability ruling has any relevance to this particular problem, because what we're saying is we are entitled to enforce the -- the agreement of the parties with respect to exactly what the district court has the authority to do. The fact that it -- whether it's severable or not severable doesn't mean that we're not entitled to the enforcement of the agreement as written by the parties. Severability doesn't eliminate our right to have that part of the agreement --

JUSTICE SOUTER: No, but it does -- it does preclude -- I mean, her answer is an answer to the argument that you were making in response to a question of mine earlier, that in fact you don't have an agreement within the meaning of the preamble portion of Section 9. She says you do because you have one after severance and you didn't appeal severability.

MR. PHILLIPS: Right, but all I'm saying is that I think that puts the cart before the horse. Remember, severability only comes up after the court of appeals had decided that this provision in the contract was unenforceable. And then the question is, is there

any part -- you know, is the entire arbitration set aside.

And what I'm saying is that initial decision is wrong. And, therefore, you don't have to worry about severability. And the reason why it's wrong is because it's their burden to show something in the Federal Arbitration Act that's, that precludes enforcement of this provision. Section 9 doesn't get you there. Section 10 wouldn't get you there because it's not --

JUSTICE SCALIA: Remind me why Section 9 doesn't get you there -- because of the "if" clause.

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

JUSTICE SCALIA: If the parties in their agreement have agreed that a judgment of a court shall be entered upon the award made pursuant to -- but they have agreed to that, haven't they?

MR. PHILLIPS: Well no --

JUSTICE SCALIA: The question is simply --

MR. PHILLIPS: Subject to the condition that the district court would make a determination that there was no error in law. And that -- I mean, that's -- you know, they had -- I mean --

JUSTICE SCALIA: Why is, why is that condition excluded from the "if" clause, but all of the

other conditions that are set forth in 10 are not excluded from the "if" clause? I mean, it seems to me the "if" clause must embrace any conditions.

MR. PHILLIPS: Right. But the point is if, if all you do is agree to an arbitration, then Section 9 and Section 10 apply directly. But if you agree to an arbitration that is subject to legal error or review, okay, then the "if" clause doesn't prevent you from being allowed to have that portion enforced, Your Honor.

JUSTICE ALITO: Well, if you agree on condition and the conditions are satisfied, are you saying that the district court must enforce under Section 9, or are you saying that enforcement would be under some other authority?

MR. PHILLIPS: I think the enforcement would be under the existing authority that the district court had in this particular case, because this was a case that was pending before the district court under diversity jurisdiction seeking to enforce the lease agreement. And we have a final decision from the arbitrator. The judge has now made a decision that that is wrong as a matter of law and has enforced the lease in a particular way.

And so the question is, is that judgment of the district court subject to challenge? And our answer

to that is no. There is nothing in the Federal Arbitration Act that prevents the district judge from doing precisely what it did.

JUSTICE KENNEDY: I'm not sure why you have to give the answer you just gave to Justice Alito, if what you told Justice Scalia is correct, that the "if" clause includes the condition that the court reviewed for issues -- for errors of law.

MR. PHILLIPS: I'm not sure there is any inconsistency between those two things, between those two things -- statements.

JUSTICE KENNEDY: Well -- but you're arguing to Justice Scalia that Section 9 works because you could interpret the "if" clause that way.

MR. PHILLIPS: Right.

JUSTICE KENNEDY: Now you're telling Justice Scalia, oh, well, it's a different action. We have got the action here anyway.

MR. PHILLIPS: Right. Well, all I'm saying is that we can win on either theory.

My whole point here has been Section 9 doesn't prevent us from being able to do this. Section 10 is not an exhaustive list and, therefore, we are allowed to add to Section 10. And at the end of the day, regardless, you ought to interpret this under

Section 2, consistent with the intent of the parties to ensure that we get what we want.

The one point I did want to make about how all of this operates is, you know, in the relationship between the courts and arbitrators, it seems to there is probably no more important issue than who decides whether something is arbitratable. And yet, this Court held quite clearly in First Options that even though the statute says it's the arbitrator -- I mean, that it's the court, it can be made the arbitrator by the parties.

Thank you, Your Honor.

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

(Whereupon, at 11:06 a.m., the case in the above-entitled matter was submitted.)