

1       IN THE SUPREME COURT OF THE UNITED STATES

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3 BUCKEYE CHECK CASHING, INC., :

4                      Petitioner                      :

5 v. : No. 04-1264

6 JOHN CARDEGNA, ET AL. :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, November 29, 2005

10                   The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States  
12   at 11:10 a.m.

13      APPEARANCES:

14 CHRISTOPHER LANDAU, ESQ., Washington, D.C.; on behalf  
15 of the Petitioner.

16 F. PAUL BLAND, JR., ESQ., Washington, D.C.; on behalf  
17 of the Respondents.

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P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument  
next in Buckeye Check Cashing v. Cardegna.

Mr. Landau.

ORAL ARGUMENT OF CHRISTOPHER LANDAU  
ON BEHALF OF THE PETITIONER

MR. LANDAU: Mr. Chief Justice, and may it  
please the Court:

This case presents the question whether a  
party can avoid arbitration by challenging the validity  
of the underlying contract containing an arbitration  
clause as opposed to the arbitration clause itself.

We believe that this Court answered that  
question almost 40 years ago in Prima Paint. The  
Florida Supreme Court tried to distinguish Prima Paint  
on State law grounds, holding that the challenge at  
issue there, fraud in the inducement, would have  
rendered the contract voidable under State law, whereas  
the challenge at issue here, illegality, would have  
rendered the contract void under State law.

We respectfully submit that this distinction  
misses the point. Prima Paint held that a party cannot  
avoid arbitration by challenging the validity of the  
underlying contract as opposed to the arbitration

1 clause because an embedded arbitration provision is  
2 severable from the underlying contract as a matter of  
3 Federal substantive law. Thus, the nature of the State  
4 law ground, on which the underlying contract is  
5 challenged, and the State law severability implications  
6 of that challenge are irrelevant.

7 What matters, as a matter of Federal law, is  
8 that a challenge to the underlying contract does not  
9 allow a court to deny arbitration. Rather, that  
10 challenge must be presented to the arbitrator in the  
11 first instance. That point, we submit, is dispositive.

12 CHIEF JUSTICE ROBERTS: You -- you concede,  
13 though, that if -- if the challenge to the underlying  
14 contract implicates the arbitration clause as well,  
15 that that is for the court and not the arbitrator.

16 MR. LANDAU: Your Honor, we --

17 CHIEF JUSTICE ROBERTS: In other words, you  
18 know, you put a gun to the person's head and say, sign  
19 this contract, and the person does. It contains an  
20 arbitration clause. They don't have to go to  
21 arbitration to challenge that.

22 MR. LANDAU: Your Honor, we concede that  
23 there is asterisk, as we put it in our brief, to the  
24 otherwise bright line rule set down in Prima Paint,  
25 that rule being if you're challenging the arbitration

1 clause, you can stay in court, but if you're  
2 challenging the underlying contract, you have to go to  
3 arbitration, precisely along the lines that Your Honor  
4 identified where the challenge to the underlying  
5 contract involves the parties' assents to the  
6 underlying contract, that challenge necessarily  
7 challenges your assent to arbitration. And given that  
8 the whole premise of arbitration in the first place is  
9 that it's a matter of consent, we would say that that  
10 particular challenge, as the lower courts have  
11 recognized since *Prima Paint*, an assent-based challenge  
12 to the underlying contract, is again an -- an exception  
13 or an asterisk to the otherwise bright line rule.

14 JUSTICE KENNEDY: Does -- does that include a  
15 quarrel over offer and acceptance?

16 MR. LANDAU: Your Honor, I think --

17 JUSTICE KENNEDY: I'm -- we're trying to  
18 explore the -- the meaning of -- of this -- of this  
19 assent. I know there are going to be hard cases, but I  
20 want to try to see how we describe this area where it  
21 is for the court.

22 MR. LANDAU: You're absolutely right, Your  
23 Honor, that there are going to be hard cases. If I  
24 could just start by answering that by saying I think  
25 one thing that's clear is that this case is not one of

1 the hard ones. The challenge to the underlying  
2 contract here --

3 JUSTICE KENNEDY: What about offer and  
4 acceptance?

5 MR. LANDAU: I think generally when you're  
6 not saying I didn't agree to the underlying contract,  
7 in other words, where you're not saying that's a  
8 forgery or the -- the person who signed that didn't  
9 have authority, where you're -- where you're really --  
10 where you're not challenging factual agreement to the  
11 underlying contract, then it's fair game to send you to  
12 -- to arbitration because when -- you factually agreed  
13 to -- to arbitrate.

14 JUSTICE KENNEDY: You misinterpreted my  
15 letter. It was not an acceptance.

16 MR. LANDAU: You misinterpreted my letter.  
17 The -- there was no acceptance at all. I would think  
18 that that's -- that would fall within the scope of this  
19 potential asterisk because you're basically saying I  
20 never agreed to any contract at all. So, therefore, I  
21 would think under those circumstances, the whole  
22 premise of the Prima Paint rule that -- that's once  
23 you've agreed to arbitration, you can let the  
24 arbitrator decide your grievances with the underlying  
25 contract is not present.

1 JUSTICE O'CONNOR: Well, Prima Paint did,  
2 though, involve what we would characterize as a  
3 voidable contract.

4 MR. LANDAU: Your Honor, that is not --

5 JUSTICE O'CONNOR: And I think it is  
6 conceivable that the Florida court was correct that you  
7 could draw the line some way and say contracts that are  
8 void should be handled differently.

9 MR. LANDAU: Your Honor, two responses to  
10 that. At the most fundamental level, I think it misses  
11 the point to talk about the nature or the -- the State  
12 law severability implications of your challenge to the  
13 underlying contract because the insight to Prima Paint  
14 is that you treat the arbitration clause --

15 JUSTICE O'CONNOR: Yes, but voidness is a  
16 question of public policy. The State itself makes a  
17 decision that certain contracts can't be entered into.

18 And the question of voidability is usually one  
19 affecting the -- the will of the contracting party.

20 MR. LANDAU: Your Honor, you're entirely  
21 correct, and I think again the -- the insight of Prima  
22 Paint is that you are perfectly able to present your  
23 challenge to the underlying contract. The question is,  
24 who is the person to -- which is the forum in which you  
25 present that? Are you allowed to -- to present that in

1 court or -- or are you relegated to -- or are you  
2 required to submit it to the arbitrator pursuant to  
3 your agreement? And -- and I think the Prima Paint  
4 court recognized that if you allow parties to avoid  
5 arbitration altogether by bringing whatever challenges  
6 they may have to the underlying contract, whether it be  
7 fraud in the inducement or illegality or -- you know,  
8 there are obviously any number of grounds for  
9 challenging contracts under State law -- you  
10 effectively vitiate the arbitration agreement, the --  
11 the whole point of which is that we're going to --  
12 we've chosen the arbitrator as -- the arbitration as  
13 the correct forum to resolve our dispute.

14 And -- and so again, as long as you are not  
15 challenging arbitration specifically -- the arbitration  
16 law specifically, then it's fair game to send you to  
17 arbitration, again where you are perfectly entitled to  
18 raise the whole panoply of challenges that you may  
19 have.

20 JUSTICE KENNEDY: It's -- it's a little odd  
21 that --

22 JUSTICE GINSBURG: Mr. Landau --

23 JUSTICE KENNEDY: -- the way our -- it's a  
24 little odd that the way our cases have -- have worked  
25 out is that we assume there's two contracts, one for



1 arbitration and the other for the rest of the  
2 contracts. That's -- that's the way we've rationalized  
3 these cases. It seems a little odd to me.

4 MR. LANDAU: Well, Your Honor, again, I think  
5 the -- the Federal Arbitration Act, both section 4 and  
6 section 2 of the Federal Arbitration Act, certainly  
7 permits that -- that way of looking at it because  
8 section 4, as Prima Paint emphasized, says, you know,  
9 once the making of the arbitration agreement is clear,  
10 it must go to arbitration. And section 2 says it's the  
11 arbitration provision in a written contract -- or the  
12 written provision in a contract that shall be valid and  
13 enforceable. And so, both those provisions do  
14 distinguish between the arbitration provision  
15 specifically and, in fact, treat it as an underlying  
16 contract.

17 And again, I don't think there's any shame in  
18 admitting that Prima Paint, I think, recognized the  
19 important policy implications of a contrary rule, that  
20 --

21 JUSTICE GINSBURG: Mr. Landau, maybe this --  
22 this is a point your -- the respondent makes. Prima  
23 Paint talks about section 4 and it says, with respect  
24 to matters within the jurisdiction of the Federal  
25 courts. So the answer to everything you said could be,

1 fine, if this were proceeding in, say, the Southern  
2 District of Florida, but it's in a State court. And  
3 Prima Paint just spoke about procedure in Federal  
4 court.

5 MR. LANDAU: Your Honor, it is certainly true  
6 that Prima Paint itself arose from Federal court and  
7 that the decision is, I think, rather carefully written  
8 to talk about Federal courts as a -- in fact, Justice  
9 Harlan concurred in Prima Paint to say he would have  
10 affirmed the Second Circuit in that case on the basis  
11 of the Lawrence case, which said that this rule applies  
12 in Federal and State court, the FAA.

13 But the Court was obviously unwilling in  
14 Prima Paint to cross the bridge of saying that our rule  
15 applies in State court. And I think that, frankly,  
16 that's why it's written in that way of -- of focusing  
17 on section 4 and not really specifically addressing  
18 section 2.

19 This Court, however, subsequently confronted  
20 that issue head-on in the Southland case and held that  
21 the substantive provisions of the Federal Arbitration  
22 Act, really relying on Prima Paint for the proposition  
23 that the -- the Federal Arbitration Act does create  
24 Federal substantive law enacted under the commerce  
25 power -- it says that that rule -- those rules of

1 substantive arbitration law apply in State as well as  
2 Federal court because you really wouldn't want to  
3 attribute to Congress kind of a -- a reverse Erie  
4 presumption of creating substantive Federal law that  
5 applied only in diversity cases in Federal court which  
6 would then promote forum shopping between Federal and  
7 State courts.

8 CHIEF JUSTICE ROBERTS: What -- what's wrong  
9 with the argument that when you're dealing with a void  
10 contract, as opposed to a voidable one, that the State  
11 policy is that you don't enforce any aspect of it? I  
12 mean, if you and I had, you know, a contract for murder  
13 and it had an arbitration clause, it's pretty strange  
14 to send that to an arbitrator and enforce part of that  
15 contract as opposed to saying that the contract as a  
16 whole is void.

17 MR. LANDAU: Not really, Your Honor, in the  
18 sense that the -- the insight of Prima Paint, again, is  
19 that you treat the arbitration clause as separate from  
20 the underlying contract. So --

21 CHIEF JUSTICE ROBERTS: But we don't do that  
22 with other provisions of void contracts. I mean, if  
23 our contract had a liquidated damages clause -- if you  
24 didn't go ahead and murder somebody, you'd owe me  
25 \$1,000 -- we don't say, well, that part is enforceable

1 even if the contract as a whole is not enforceable. We  
2 treat it as a whole. Because the subject matter of the  
3 contract is illegal ab initio, the whole contract is --  
4 is void and illegal.

5 MR. LANDAU: Your Honor, that is certainly  
6 one plausible world view that one could have taken as  
7 an initial matter when confronting this issue. I mean,  
8 it's a little bit like a chicken and egg issue here.  
9 You have got the underlying contract, which contains an  
10 arbitration provision, and one could certainly say, as  
11 Your Honor just did, that well, if the underlying  
12 contract falls, it seems perfectly sensible to say that  
13 everything falls. This Court specifically rejected  
14 that approach in Prima Paint.

15 JUSTICE SCALIA: Of course, you could say the  
16 same thing about a voidable contract. You could say,  
17 you know, the whole contract is voidable.

18 MR. LANDAU: Well, in fact --

19 JUSTICE SCALIA: I mean, in -- in that  
20 respect, a contract that's void is no different from a  
21 contract that's voidable.

22 MR. LANDAU: In fact -- exactly. The -- in  
23 Prima Paint itself, it was far from clear that the  
24 rescission suit that was sought there -- in other  
25 words, when a contract is -- is voidable, basically

1    what that does is that -- under general common law  
2    principles, that creates an option for the aggrieved  
3    party. And that party can either seek to affirm that  
4    contract or it can seek to rescind that contract. And  
5    when you seek to rescind it, basically you're saying it  
6    was void ab initio, which is exactly what Justice Black  
7    said in his dissent in Prima Paint.

8               JUSTICE GINSBURG: You also run into a  
9    problem with the -- some States classify a contract as  
10   voidable and other States for that same ground make it  
11   void. So at least you would have -- you would lose the  
12   uniformity if you've made the distinction between those  
13   two.

14              MR. LANDAU: You are absolutely right, Your  
15   Honor, and I don't think this Court should lose sight  
16   of the bright line importance of the Prima Paint rule.  
17   But in a sense, Prima Paint again is a rule of Federal  
18   law. The Court in that case specifically affirmed the  
19   Federal law approach taken by the First Circuit as  
20   opposed to the State law approach, which I think was a  
21   little bit like Your Honor's hypothetical, the Chief  
22   Justice's hypothetical.

23              CHIEF JUSTICE ROBERTS: Do we usually -- do  
24   we usually ask arbitrators to enforce broader notions  
25   of public policy as opposed to the specific agreements

1 of the party? In other words, if the reason the  
2 contract is void or voidable has to do with broad State  
3 public policy, do we -- what -- what's this -- the best  
4 you case you have for the notion that arbitrators  
5 enforce those types of constraints as opposed to  
6 figuring out what the parties agreed to?

7 MR. LANDAU: Oh, sure, Your Honor. I think  
8 if you think about the Mitsubishi case, all the cases  
9 that sent statutory cases to arbitrators and said that,  
10 you know, RICO claims or antitrust claims could be  
11 arbitrated, I think initially the -- the argument that  
12 was made against that was precisely the one Your Honor  
13 is making, that, gee, arbitrators have expertise in the  
14 specific commercial agreements here, but we don't  
15 expect them to be knowledgeable about RICO or -- or  
16 other statutes.

17 But I think the insight of the cases, really  
18 over the last 30 years in this Court, is that  
19 arbitrators are perfectly able and certainly have to be  
20 presumed to be able to decide legal and public policy  
21 questions.

22 And I think if you -- again, if you go the  
23 other way and you say, well, we're going to allow  
24 challenges to the arbitration clause, we're not going  
25 to allow it to be enforced, I think you are really

1 going to declare open season on arbitration in the  
2 sense that it is -- as a logical matter, there is no  
3 way to limit the principle that the other side is  
4 proposing to challenges based on illegality, which is  
5 what they've tried to -- to cabin this off as.

6 Basically -- and I think the Florida Supreme  
7 Court was very forthright about this -- they said it's  
8 any challenge that leads to the contract being void as  
9 a matter of State law. And in fact, the -- the  
10 respondents in their brief in this Court really admit  
11 that it's any challenge that goes to contract  
12 formation, the formation at all of the underlying  
13 contract. So they would presumably sweep in all things  
14 like consideration, mutuality, anything that could be a  
15 ground for that.

16 JUSTICE GINSBURG: What would be the issues  
17 for the arbitrator in this case? Is there anything  
18 other than was it -- was this interest usurious? The  
19 dispute between the parties -- we're not told what the  
20 issues are that would be subject to arbitration.

21 MR. LANDAU: That is the key issue, Your  
22 Honor. They are essentially saying that the underlying  
23 interest in the contract is usurious, in violation of  
24 several Florida statutes.

25 And again, one thing that is important to

1 keep in mind is that there is no question that these  
2 issues now, the practices that they're complaining  
3 about, are entirely legal in Florida today. There was  
4 an act passed in 2001 that clearly made all this legal.

5 The only issue is they're saying it was illegal prior  
6 to enactment of that statute and whether or not that  
7 statute clarified the law or changed the previous law.

8 But presumably the arbitrator would be asked  
9 to decide is -- was the law in Florida prior to 2001  
10 such that -- that these other statutes that limited --  
11 that limited interest applied here. The underlying  
12 dispute is really about whether these charges are  
13 interest or whether it's a service fee for cashing a  
14 check. That's the heart of the underlying dispute, and  
15 that's certainly one that the arbitrator is capable of  
16 deciding --

17 JUSTICE SCALIA: Did the arbitrator --

18 MR. LANDAU: -- looking to Florida --

19 JUSTICE SCALIA: Could the arbitrator decide  
20 that I'm -- I'm going to apply the new statute rather  
21 than the old one?

22 MR. LANDAU: Well, I think the arbitrator  
23 will say, you know -- first of all, if I could just  
24 make one point clear for the record. The -- this --  
25 the underlying issue here, whether or not this 2001



1 statute changed the law or simply clarified the law is  
2 currently pending in the Florida Supreme Court. It was  
3 argued on -- on September 30th in -- in a case that did  
4 not involve arbitration.

5 So presumably, the arbitrator, if this case  
6 goes to arbitration, will look at that case and will  
7 decide whether or not that governs this case, will  
8 decide is there any ground for distinguishing this  
9 case.

10 And -- and, you know, one point to remember  
11 is that when you go to arbitration, that's not the end  
12 of the line. You have rights to judicial review of  
13 arbitration.

14 So going back to your hypothetical, Mr. Chief  
15 Justice, if the -- if the contract were to be, let's  
16 say, for murder -- that's a favorite example of -- of  
17 respondents -- that does not mean that a contract for  
18 murder gets enforced. That means that the arbitrator  
19 will decide whether the contract for murder is -- is  
20 valid under State law and -- again, this is in the  
21 farfetched situation where somebody who has signed a  
22 contract for murder is actually trying to enforce  
23 arbitration, you know, presumably from his or her jail  
24 cell --

25 (Laughter.)

1           MR. LANDAU:  -- and then would -- would try  
2   to enforce arbitration, and then if -- you know, if the  
3   arbitrator says it's illegal, would -- you know, even  
4   if the arbitrator were, in the most fanciful situation,  
5   to say, yes, this contract for murder is legal under  
6   the law of our State, well, then presumably you could  
7   go up for manifest disregard review.  There are  
8   safeguards in the process.

9           What they're trying to do is short-circuit  
10  the process, and I think this goes back to Justice  
11  Ginsburg's question.  The -- what they are now  
12  describing as the threshold issue of contract formation  
13  -- contract validity is not a threshold issue at all.  
14  It's what this whole dispute is about.  It is what they  
15  are challenging here.  They are saying these contracts  
16  are illegal because they charge too much interest, that  
17  what they're charging is in fact interest and that was  
18  illegal.

19           Well, they are now saying that the -- the  
20  court should decide that underlying question as a  
21  threshold matter.  Well, then there's actually nothing  
22  whatsoever left for the arbitrator to decide, and they  
23  have effectively vitiated the arbitration agreement.  
24  And again --

25           CHIEF JUSTICE ROBERTS:  Oh, no, that's not

1 true. There may be dozens of other subsidiary issues  
2 apart from illegality. They may say, well, once you  
3 determine that it's legal, we think that we're entitled  
4 to these damages or those damages or -- or the rate  
5 should be this or that. Just because there's a  
6 threshold issue doesn't mean there aren't other issues  
7 that an arbitrator might decide.

8 MR. LANDAU: Well, Your Honor, I -- I guess  
9 maybe it depends on how you look at the word threshold.  
10 I mean, I would think that that is the core issue in  
11 the dispute. I mean, certainly there -- you are  
12 absolutely right that there could be some ancillary  
13 issues like damages.

14 But clearly, the -- the nub, the crux of  
15 their challenge here is a challenge to the legality of  
16 the underlying contract. And under their view, they  
17 get to obtain judicial resolution of that issue in the  
18 first instance, notwithstanding the fact that they  
19 don't dispute that they agreed to arbitrate all issues  
20 relating not only to the validity of the arbitration  
21 clause itself, but relating to the underlying contract.

22 So there's no question here -- and I think  
23 this is really important not to lose sight of -- that  
24 this dispute falls within the plain language of their  
25 arbitration provision. If you look at joint appendix

1 42, the arbitration provision here is very broadly  
2 worded in this regard, and the parties clearly agreed  
3 to do it. The only question is basically whether the  
4 State could frustrate the -- the plain, express intent  
5 of the parties by saying, oh, well, this challenge  
6 implicates arbitration -- implicates legality.

7 JUSTICE STEVENS: If the case was one in  
8 which the merits issue you claim is basically the same  
9 as the legality issue under the contract -- but would  
10 your argument be as strong if it were different, if you  
11 had a different reason for claiming that the contract  
12 was void or voidable?

13 MR. LANDAU: The -- I think the argument,  
14 Your Honor, would be the same. It's just -- it's a  
15 particularly stark illustration here of the dangers of  
16 the -- of -- of that position. It may not -- you're  
17 absolutely right. It may not always be the case that  
18 the -- that the challenge to the contract is going to  
19 be the merits dispute in itself, but I think where, as  
20 here, it is, it really shows how pernicious this rule  
21 is and precisely why the Prima Paint rule, which again  
22 has been in effect almost 40 years now -- why that  
23 approach works and actually promotes the policy  
24 supporting arbitration.

25 And when you -- again, when you think of an

1 alternative rule, it's one in which you could come in  
2 -- the party who has concededly agreed to an  
3 arbitration clause and says, well, I think the  
4 underlying contract is void on public policy grounds,  
5 which again you can make in virtually any case. Under  
6 the Florida Supreme Court's rationale in this Court --  
7 in this case, that is a basis for remaining in court,  
8 and --

9 JUSTICE STEVENS: What about the possibility  
10 that you always want a neutral decision-maker in cases  
11 like this? The arbitrator always has an interest in  
12 finding that the contract is valid and arbitrable  
13 because that's his source of business is arbitrating  
14 disputes.

15 MR. LANDAU: Your Honor, you -- I think it's  
16 important to keep in mind that in this case, they have  
17 not challenged the arbitrator. The reason --

18 JUSTICE STEVENS: No. I'm just talking about  
19 as a general matter if we're trying to decide the issue  
20 not just on these facts, but what is the better rule --

21 MR. LANDAU: Your Honor, I don't -- I think  
22 that's -- again, that -- if you were to have a  
23 presumption that the arbitrator is always in favor of  
24 upholding a contract, that would seem somewhat in  
25 tension at the very --

1 JUSTICE BREYER: No, no. I mean, the  
2 question is, I take it, in most of the arbitration  
3 associations, once you have arbitration, you will get  
4 paid even though -- the arbitrator will be paid, won't  
5 he, whether --

6 MR. LANDAU: Oh, yes.

7 JUSTICE BREYER: -- he decides one way or the  
8 other?

9 MR. LANDAU: Oh, I'm sorry. Then yes.

10 JUSTICE BREYER: So he has no particular  
11 interest in getting paid in upholding the contract or  
12 not.

13 MR. LANDAU: You're absolutely right, Your  
14 Honor. That is absolutely clear. And -- and again, I  
15 would think he would not have an interest in -- in  
16 saying that a contract for murder is perfectly valid.  
17 You're absolutely right. It wouldn't get him more  
18 money in his pocket and it certainly would, I think,  
19 lead to the reputation of a rogue arbitrator out there  
20 who is not to be trusted. And -- and presumably that  
21 person wouldn't -- wouldn't get much business.

22 Again, so I think that the key point here is  
23 that the respondents have tried to create a lot of  
24 State law issues regarding void, voidable. And -- and  
25 I think as Justice Ginsburg pointed out, the problem is

1 it's kind of like trying to put a square peg in a round  
2 hole, that whether something is void or voidable under  
3 State law, which may vary from State to State, kind of  
4 misses the whole point which is the genius of a Federal  
5 separability rule is we don't care about those State  
6 law issues. You don't have to get into that bog to  
7 decide the arbitrability question or the -- you know,  
8 you cannot avoid arbitration by simply coming up with  
9 all those grounds. And whether it's ground A for  
10 challenging the underlying contract and whatever the  
11 severability implications may be of ground A or ground  
12 B, the point is when you're not challenging the  
13 arbitration clause, it's fair game to send you to  
14 arbitration, and then you can raise ground A or ground  
15 B or whatever ground you have before the arbitrator.  
16 And it's simply not a basis for avoiding arbitration  
17 altogether to be talking about that.

18 And again, the -- the point -- I think this  
19 is all kind of a common-sensical point that you want to  
20 get parties quickly to arbitration. I mean, if you --  
21 if you have a situation where the parties have to spend  
22 years in court litigating these kind of issues, that  
23 really, in and of itself, defeats the whole point of --  
24 of arbitration.

25 JUSTICE KENNEDY: Well, Prima Paint certainly

1     displaced the States and State law from this area in a  
2     very substantial -- to a very substantial extent.

3             I'm curious now. Have there been any  
4     attempts in Congress to overrule Prima Paint?

5             MR. LANDAU: I'm not aware of any, Your  
6     Honor. And to the contrary, I think the Federal  
7     Arbitration Act has been amended multiple times since  
8     1967 and it has always been in a pro-arbitration  
9     direction, as this Court emphasized in the Allied-Bruce  
10    case where there was a concerted attack not on Prima  
11    Paint, but on Southland.

12            And in a sense, Southland is really a -- a  
13    reflection of Prima Paint because Southland simply says  
14    that the -- the substantive Federal arbitration law  
15    that was announced in Prima Paint sensibly should not  
16    be limited to Federal court, but should also apply in  
17    State court.

18            So I think the -- the Court faced a fork in  
19    the road in Prima Paint about the meaning of the  
20    Federal Arbitration Act. Was it just a procedural  
21    provision that governed in -- in Federal proceedings  
22    based on Congress' power over the Federal courts and  
23    their procedures? Or was it a substantive provision  
24    enacted under the Commerce Clause? And this Court took  
25    the latter approach and made that absolutely crystal



1 clear in -- in Southland and then later again in  
2 Allied-Bruce.

3 And so what I think the respondents are  
4 really asking you to do here is to really overrule root  
5 and branch the whole Federal substantive law of  
6 arbitrability altogether and say, well, this should  
7 just be -- you took the wrong path back in 1967 and --  
8 and you should just interpret the FAA to be a -- a  
9 procedural statute. We would respectfully submit that  
10 that would cause an earthquake in the law in terms of  
11 arbitration and, therefore, would respectfully urge you  
12 to reverse the Supreme Court of Florida's judgment.

13 I'd like to reserve the balance of my time.

14 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
15 Landau.

16 Mr. Bland.

17 ORAL ARGUMENT OF F. PAUL BLAND, JR.

18 ON BEHALF OF THE RESPONDENTS

19 MR. BLAND: Thank you, Mr. Chief Justice, and  
20 may it please the Court:

21 This Court has repeatedly said that Federal  
22 law preempts State law only where Congress clearly and  
23 manifestly intended for it to do so. And the Court has  
24 also repeatedly said that the best guide to what  
25 Congress intended was the language of the statutes.

1           Now, petitioners have not pointed to any  
2   language of the Federal Arbitration Act itself that  
3   would create a separability rule for this case. And  
4   moreover, the language of the act itself and  
5   particularly section 2 -- and particularly section 2  
6   the way it was followed in the Prima Paint case --  
7   actually strongly supports us. Section 2 says that an  
8   arbitration provision is enforceable if it is in a  
9   contract evidencing interstate commerce.

10           Now, to order of arbitration, they say, well,  
11   the -- the threshold issue is whether there's an  
12   agreement. Let's have the arbitrator decide that. To  
13   order arbitration is to enforce the act. That is  
14   enforcing the act. But they want to enforce the act  
15   before we've determined if section 2 is met, before the  
16   requirements of section 2 are met. That's not the way  
17   --

18           CHIEF JUSTICE ROBERTS: I guess what they  
19   would say is that there -- they insist only that the  
20   agreement be to arbitrate, and to the extent there is  
21   an agreement to arbitrate, they can enforce section 2,  
22   and the arbitrator can decide whether the broader  
23   agreement is enforceable.

24           MR. BLAND: That's an argument. The word  
25   agreement was used in section 4, and that's the -- that

1 provision, of course, is the provision that refers only  
2 to the -- not only applies to the United States  
3 district courts, that refers to jurisdiction under  
4 title 28 and twice refers to the Federal Rules of Civil  
5 Procedure, and that in the Southland case in footnote  
6 10, this Court said doesn't apply in the State courts.

7           Section 2 doesn't use the word agreement.  
8 Section 2 uses the word contract, Mr. Chief Justice.  
9 And the word contract is a very different idea than  
10 agreement. If section 2 had said an agreement in  
11 interstate commerce or a transaction in interstate  
12 commerce, perhaps they would have a point. But the  
13 Court, instead, used -- excuse me. The Congress,  
14 instead, used the word contract. Contract is one of  
15 the most important words in the law.

16           Now, when the Court in Prima Paint looked at  
17 this, in the first sentence, the very first sentence of  
18 Prima Paint, the Court said this case involves a  
19 contract involving the U.S. Arbitration Act. And in  
20 the first sentence, the Court said this case is a case  
21 involving contracting parties. The Court didn't say  
22 we're going to see what the arbitrator thinks as to  
23 whether there's a contract.

24           In Prima Paint, this Court did it the right  
25 way. They said section 2 -- does it apply first? Only

1 if it does apply, only if once after we have crossed  
2 that Rubicon will we go to the next step.

3 Then the Court in Prima Paint goes and  
4 discusses whether or not the interstate commerce prong  
5 has been met. And there's a long discussion of is this  
6 in interstate commerce or not, and they find that it  
7 is.

8 Well, under their theory, under petitioner's  
9 theory, why should the Court be deciding interstate  
10 commerce? Arbitrator -- the interstate commerce issue  
11 goes to the whole contract. Why shouldn't the  
12 arbitrator decide the interstate commerce issue?

13 JUSTICE BREYER: When I was working on the  
14 first options in those cases, I thought there was from  
15 Southland a pretty clear distinction between whether  
16 the person is attacking the arbitration clause itself.  
17 If he says that's not valid, that probably goes to the  
18 court, unless there's some other special thing. But if  
19 what he's doing is attacking the rest of the contract  
20 as illegal, that doesn't. That goes to the arbitrator.

21 Now, I really did think that was the law.  
22 And even if I was wrong in thinking that was the law,  
23 it seems to me the whole community, the whole business  
24 community in the United States thinks it's the law.  
25 Everybody else thinks it's the law, and the briefs on

1 your side don't even say that it isn't the law, except  
2 for yours. They say go and overrule the cases that  
3 make it the law.

4 MR. BLAND: We -- we do not in any way urge  
5 this Court to overturn -- the Court does not need to  
6 overturn Southland, Your Honor. And let me make two  
7 points about Southland.

8 JUSTICE BREYER: I mean, logically you're  
9 right. I accept all that you're saying logically. You  
10 could make those distinctions, but you also could come  
11 out the other way logically. And so to expose to you  
12 what's really bothering me about the case are two  
13 things.

14 One, I think you're worried about consumer  
15 contracts, and there are a lot of good arguments on  
16 your side.

17 But this rule also applies to business  
18 contracts, and there what's bothering me is that --  
19 that the whole business community seems to have  
20 developed an arbitration system throughout the world  
21 that depends upon the distinction I just made. And if  
22 we decide for you, we're going to throw a large section  
23 of those contracts back into the laws of the 50 States  
24 and arbitration will be seriously injured as the  
25 commercial community has come to rely on it.

1                   Now, that's what's worrying me because I  
2       wouldn't want to reach a decision, in the absence of it  
3       being clear anyway, that would make a significant  
4       negative difference to the gross national product of  
5       the United States, for example.

6                   MR. BLAND: Well, Your Honor, let -- before I  
7       go on with the statutory arguments --

8                   JUSTICE BREYER: I'm putting it dramatically  
9       because I want to get your --

10                  MR. BLAND: -- let me -- before I talk about  
11       the statutory arguments, then let me go to the policy  
12       arguments and this idea that we're going to open the  
13       flood gates and undermine the Federal Arbitration Act.

14                  It is a minimal requirement to say that you  
15       must have a contract in interstate commerce. And in  
16       the Southland case, on page 10, at the bottom of page  
17       10 and page 11, before it said that section 2 would  
18       apply in States, Chief Justice Burger's opinion for  
19       this Court started off and said there -- we perceive  
20       two limitations on arbitration -- on the enforceability  
21       of arbitration provisions. And the first of those is  
22       it does have to be in a contract in interstate  
23       commerce. So there is nothing in Southland that said,  
24       oh, well, the question about whether or not there's a  
25       contract is something the arbitrator gets to decide.

1 The beginning of the opinion said that particular issue  
2 is one for the -- is one that is a limitation on the  
3 enforceability of contracts.

4 Is this going to lead to an explosion of  
5 litigation over the formation of contracts? It will  
6 not because there are fairly few cases where there is  
7 an argument that the entire contract is void ab initio  
8 such that it comes up.

9 JUSTICE SCALIA: Every usury case, for  
10 example. That's very few? I mean, that's a lot of  
11 cases.

12 MR. BLAND: After the National Banking Act,  
13 Your Honor, there are actually very few usury cases  
14 left. If you look at the six cases they cite that are  
15 all -- they say they're Federal. There are six Federal  
16 court of appeals decisions that support them. Four of  
17 those are payday lending cases decided since 2000. The  
18 principal economic effect of this case actually is  
19 going to involve the payday lending industry.

20 And was it irrational for the State of  
21 Florida to say that it's loan-sharking to charge people  
22 up to 1300 percent interest? We think that that --  
23 whether -- whether Florida made a good decision or not  
24 with its usury laws, usury laws just don't apply to  
25 many cases.

1 JUSTICE SCALIA: What about fraud in the  
2 inducement?

3 MR. BLAND: Fraud in the inducement does not  
4 go to rendering the contract void ab initio. A  
5 contract comes into existence. You cross the statutory  
6 language of section 2. Fraud in the inducement --  
7 there is a contract. Now one party has a defense to  
8 it. Suppose --

9 JUSTICE GINSBURG: Mr. Bland.

10 MR. BLAND: -- Your Honor --

11 JUSTICE GINSBURG: Mr. Bland, some State may  
12 say fraud in the inducement is void. These -- these  
13 are classifications that States make. These are labels  
14 that the State puts on them. And you are introducing  
15 vast disuniformity if you say that the line to draw is  
16 between void and voidable. You are forced into that  
17 because the Prima Paint case dealt with voidable. So  
18 you -- that you -- you are drawing a line between void  
19 and voidable which shifts from State to State.

20 MR. BLAND: Well, the -- the -- Your Honor,  
21 first, the Congress drew the line when it said that you  
22 had to have a contract first as to whether or not a  
23 contract came into existence.

24 But the law of contracts does not differ so  
25 much from State to State. This case in the American



1 Airlines v. -- this Court -- excuse me -- in the  
2 American Airlines v. Wolens case said that the law of  
3 contracts is not largely disuniform from State to  
4 State, and there is no State in the country that I know  
5 of -- and I'm fairly certain of this -- that hold that  
6 fraud in the inducement means that a contract never  
7 came into existence.

8 And the reason for that is -- is that if  
9 someone defrauds me into buying a stock or someone has  
10 an unconscionable deal or almost any of the other  
11 things that give rise to defenses to formed contracts,  
12 one party has an option to get out of it. If someone  
13 defrauds me into buying a stock but then the stock  
14 price shoots up through the roof -- it's one of Justice  
15 Breyer's clever technology inventions that works --

16 (Laughter.)

17 MR. BLAND: -- I have an option at that point  
18 to hold onto the stock, even though I was defrauded. I  
19 was defrauded. I was cheated, but I'm happy with it.  
20 It turns out it's okay. It is left to the option --

21 CHIEF JUSTICE ROBERTS: But almost every  
22 State --

23 MR. BLAND: -- of the party.

24 CHIEF JUSTICE ROBERTS: -- almost every State  
25 will -- has an exception for contracts that are void

1    against public policy.  And it's just left to the  
2    creativity of the lawyer in any given case to explain  
3    why a particular contract is contrary to public policy.

4    And you would allow that to be shifted from the  
5    arbitrators to court presumably based simply on an  
6    allegation, well, the contract is void, it's against  
7    public policy.

8               MR. BLAND:  I think you will find, Your  
9    Honor, if you look at the -- at the law that's  
10   developed around void ab initio contracts, that it's  
11   fairly rare.  It's a fairly small universe of cases  
12   where State courts have found that an entire line of  
13   business is illegal, where State courts have found that  
14   no contract ever comes into existence because of a  
15   public policy.

16              JUSTICE GINSBURG:  But if you open the door  
17   -- if you open the door -- public policy has been  
18   called an unruly horse.  All you have to do is open the  
19   door and you will have litigation in court, and then  
20   the court will decide what the arbitrator would other  
21   -- otherwise decide.

22              MR. BLAND:  But, Your Honor, there are  
23   already a host of circumstances in which litigants  
24   would like to be able to get out of contracts that do  
25   not involve arbitration clauses, where they would like

1 to be able to argue that no contract came into  
2 existence in the first place.

3 And the public policy typically -- and in  
4 Florida particularly -- tends to be linked to statutes.

5 In most States, there is a rule that says of contract  
6 law, that we will not void a contract because some  
7 judge feels there's a public policy, but it has to be  
8 based on a statute. And we cited several cases, and  
9 the law professors in Professor Alderman and Braucher's  
10 brief cited a variety of cases around the country in  
11 which courts have only struck down contracts for public  
12 policy where they violated a statute that forbid  
13 equality.

14 JUSTICE GINSBURG: You're giving the end  
15 result. How many cases have the lawyers gone into  
16 court and said, court, strike down this contract  
17 because it's against public policy? Courts may reject  
18 many of those, but --

19 MR. BLAND: Well, I think there's no reason  
20 to suspect that there's going to be abuse in which  
21 parties are going to come in and make frivolous  
22 arguments that an entire line of business is illegal  
23 and then -- and that that's going to cause a flood gate  
24 of cases into courts because courts have, with rule 11  
25 and other similar rules, a lot of ways of getting rid

1 of those.

2 JUSTICE BREYER: Well, what about --

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

4 JUSTICE SCALIA: You get rid of them after  
5 frustrating the arbitration provision, the whole  
6 purpose of which is to keep you out of courts.

7 I'd like to -- I'd like to ask you about your  
8 argument on section 2, which --

9 MR. BLAND: Please.

10 JUSTICE SCALIA: -- appears at page 3 of the  
11 petitioner's brief. If you want to read it the way  
12 you're reading it, you say a written provision in a  
13 contract evidencing a transaction involving commerce.  
14 You say that has to be a -- a contract that is a valid  
15 contract.

16 Well, what do you do about the end of section  
17 2 which says, shall be valid, irrevocable, and  
18 enforceable, save upon such grounds as exist at law or  
19 in equity for the revocation of any contract? That  
20 would apply to -- to contracts that are not -- not void  
21 but voidable.

22 MR. BLAND: Exactly, and that's the language  
23 --

24 JUSTICE SCALIA: So Southland was wrong.

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

1 Honor, that's the language that -- that the  
2 separability rule in Prima Paint has been used to apply  
3 to. The first part of section 2 says this is how you  
4 create an arbitration provision. You have an  
5 enforceable provision if it's in a contract, but there  
6 is an exception for general State contract laws that  
7 provide defenses to a contract.

8 JUSTICE SCALIA: Why?

9 MR. BLAND: That --

10 JUSTICE SCALIA: Why would you make that --  
11 that weird distinction --

12 MR. BLAND: Because that --

13 JUSTICE SCALIA: -- and treat the first part  
14 of it as though it applies across the board to the  
15 entire contract, but the last part of it, reading it  
16 differently? I -- I don't understand that.

17 MR. BLAND: The first part of it is the way  
18 you -- the way you trigger the existing forceability  
19 option at all is that it has to be in a contract in  
20 interstate commerce. That's why in Prima Paint the  
21 Court went through interstate commerce rather than  
22 leaving that for the arbitrator.

23 The second part is once you have an  
24 enforceable agreement, it may be subject to certain  
25 defenses.

1           And then in Prima Paint, what this Court did  
2   was it looked at section 4 of the act and it derived  
3   from section 4 of the act, the one that only applies in  
4   Federal court and refers to the Federal Rules of  
5   Judicial Procedure, a rule of separability for these  
6   kinds of defenses, for the defenses that arise in the  
7   Savings Clause.

8           JUSTICE SCALIA: It seems to me even if you  
9   separate it, you still have the language, save upon  
10   such grounds that exist in law or in equity for the  
11   revocation of any contract. Unless you take that  
12   language, the reference to contract in section 2, as  
13   referring to two separate things, the contract without  
14   the -- without the arbitration clause and the  
15   arbitration clause alone, it seems to me section 2  
16   doesn't make any sense.

17           MR. BLAND: With all respect, Your Honor, I  
18   think that the way that it makes sense is that the --  
19   you get the threshold issue of getting through the  
20   limitation, as this Court described it in Southland on  
21   pages 10 and 11, of the limitation on the  
22   enforceability of arbitration clauses of is it in a  
23   contract in the first place. That is the -- what the  
24   first part is talking about.

25           Then separately the Court -- the -- the

1 Congress had intended only a limited intrusion into  
2 State law, as this Court said in the Volt case where it  
3 said that this -- that there was not -- this is not the  
4 National Bank Act. There was no field preemption.  
5 There was no express preemption. There was only  
6 conflict preemption.

7 And in the Allied-Bruce case, what Justice  
8 Breyer's opinion for the Court said was we recognize  
9 that State law will play an important role for certain  
10 contract defenses after the contract has first been  
11 found to be enforceable.

12 I think that if -- if this jurisdictional  
13 idea -- the way you get into the Arbitration Act, what  
14 triggers that the Arbitration Act exists -- and this is  
15 pretty much the language that's used at the -- in the  
16 bottom of 10 and top of 11 of Southland -- is that you  
17 have an arbitration agreement that's enforceable. Then  
18 there is a but in which Congress left out an  
19 alternative where you have specific challenges to how  
20 the arbitration clause is formed. I think that that's  
21 a very workable system, but that's also the way  
22 Congress drafted the statute.

23 JUSTICE BREYER: It's not -- the workability  
24 of it depends on how many challenges you get to people  
25 saying this contract is void, you know. And if there

1 are a lot of them, then that takes a whole wide set of  
2 cases out of arbitration and puts them into the courts,  
3 just where they're trying to escape. And -- and so I  
4 don't know the answer to how many, to be truthful, and  
5 I suspect no one does.

6 So I'm wondering if there isn't another route  
7 to the problem you're getting at, which is, as I think  
8 in other countries, you say there's a doctrine of  
9 kompetenz-kompetenz. You know that? You know what I'm  
10 thinking of?

11 MR. BLAND: No, I'm afraid I do not, Your  
12 Honor.

13 JUSTICE BREYER: It's arbitration generally.  
14 They don't even look to see whether people agreed  
15 about the arbitration clause. It says arbitration. It  
16 goes to arbitration regardless.

17 Now, the safeguard is, A, maybe the  
18 arbitrator will get it right or, B, if the arbitrator  
19 doesn't get it right, they have to come to court to  
20 enforce it. And at that point, you could say, you  
21 know, this arbitrator is out to lunch. Our cases say  
22 he has to be really out to lunch, but you could make  
23 some distinctions there, you see. And -- and if this  
24 is really a problem that arbitrators are upholding  
25 illegal contracts, that might be the place to begin to



1 make the distinctions. Say, Judge, look at this a  
2 little more closely where it's illegal, the whole  
3 contract, et cetera.

4 What do you think?

5 MR. BLAND: I -- I think two things, Your  
6 Honor. First, I'd like to say that I think an enormous  
7 difference between the European illustrations, for  
8 example, that you give in this setting is that here the  
9 Federal Arbitration Act is not a common law rule of  
10 let's push as many cases as we can from the civil  
11 justice system into arbitration. It is a statute that  
12 has language. And the way this Court has treated that  
13 language before is this Court has always said not until  
14 the case falls within section 2 will you then go and  
15 enforce section 2, that you have to be in the act  
16 before you apply the act.

17 JUSTICE GINSBURG: If we take --

18 MR. BLAND: And I think that that language is  
19 --

20 JUSTICE GINSBURG: -- if we take, Mr. Bland,  
21 what you said so -- the words transaction involving  
22 commerce, but a contract -- okay. So you spoke about  
23 void contracts. Well, what about there's not enough  
24 consideration, things that go to the formation? So  
25 this contract was never formed. So --

1           MR. BLAND: Those are issues that we believe  
2 also are issues that a court would resolve. I think,  
3 Your Honor, that there are very few --

4           JUSTICE GINSBURG: So we're going far -- far  
5 beyond a void subject matter like usury. But you could  
6 say there -- there wasn't sufficient consideration.  
7 There was no mutuality or things that go to the  
8 formation of a contract.

9           MR. BLAND: I think that when Your Honor used  
10 the word far, that that -- that that is not really  
11 fair. There are really very, very few contracts in the  
12 United States of America in 2005 that are going to be  
13 struck down because there wasn't enough consideration.  
14 That sort of argument against contract formation very  
15 rarely comes up. I do a ton of consumer contract  
16 cases. We've never gotten rid of a contract on the  
17 grounds there wasn't consideration.

18           These doctrines are on the books. They are  
19 certainly part of what makes a contract different from  
20 an agreement. It's certainly one of the reasons why I  
21 think it's important that Congress chose such a loaded  
22 word, but these -- there are very few cases that  
23 involve this.

24           And -- and one thing about the -- about the  
25 illegal issue and the voidability -- the -- the void ab

1 initio issue that Your Honor raises. In Florida -- and  
2 we cited a number of cases of this in our brief and in  
3 the -- in -- both in our brief and -- and in the  
4 contract law professors' amicus brief, there's a number  
5 of cases around the country. You only strike down a  
6 contract as void ab initio where the principal purpose,  
7 the essence of the contract is that -- that it was to  
8 do an illegal purpose, was that it was to violate a  
9 statute as reflected in -- as -- as it would reflect  
10 the public policy of a State. You could have a  
11 contract that has one or two illegal provisions or  
12 minor legal provisions. Those are not enough to get  
13 the entire contract thrown out as void ab initio. It's  
14 a much higher test.

15 If I can use an analogy. There may be a lot  
16 of people who wish they weren't married, but meeting  
17 the tests of annulment are very different from divorce.  
18 Trying to prove that a contract is void ab initio such  
19 that it is so extremely illegal that no provision of it  
20 will come into contract doesn't come up very often.

21 What we are talking about with void ab initio  
22 contracts that violate public policies and statutes are  
23 we are talking about businesses that are skirting  
24 around on the edge of legality. We are talking about a  
25 business where there is a colorable argument that

1 someone can go into court and say, this entire line of  
2 business is loan-sharking. It's a crime. It's 29  
3 times the -- the felony rate of loan-sharking in  
4 Florida. That's why so many of these cases are payday  
5 lending cases. You don't see a lot of void ab initio  
6 cases in which come -- someone comes in and say, hey,  
7 you know, they sold me a car and the entire line of  
8 business of car selling was void ab initio.

9           The only example that's supposed to show the  
10 flood gates that has come from petitioner's brief is  
11 they cite to this Vacation Beach case in Florida. And  
12 what -- that was a case that involved was sort of a  
13 uniquely Florida problem, but after a bunch of  
14 hurricanes, they've had people come down who were  
15 unlicensed contractors and they go and say we know how  
16 to fix roofs and so forth and they do not. And then  
17 people's roofs blow off, and there have actually been a  
18 number of people who have died.

19           So the State set up a licensing regime that  
20 was a licensing regime not designed to extort money  
21 from businesses, but a licensing regime designed --  
22 scheme based on safety and health and welfare of the  
23 citizens and said, you can't go into this line of  
24 business without passing certain certifications.

25           So in that case, it was a declaratory

1 judgment action in which a company -- in which a  
2 company comes in and says, this company is falsely  
3 representing they know how to do this work and they  
4 don't. And in fact, the court of appeals notes it  
5 could be a crime.

6 And now petitioner comes in and says, well,  
7 this is an outrage. Of course, the arbitrator should  
8 decide that question in the first place. No. That's a  
9 business that is arguably -- and probably more than  
10 arguably -- operating on the outskirts of the law.  
11 Their reliance interests are different.

12 CHIEF JUSTICE ROBERTS: But there's no -- but  
13 -- but why do you assume that that underlying  
14 illegality taints the arbitration clause? I mean, take  
15 the arbitration clause that you would find in a  
16 perfectly normal contract, and if you put it in the --  
17 the contract of the sort that you're hypothesizing, I  
18 don't see why this underlying substance of the contract  
19 taints the enforceability of the arbitration clause.

20 MR. BLAND: Because -- because the language  
21 of the statute is what draws the key link difference to  
22 me, Your Honor. The statute says an arbitration  
23 provision is enforceable if it is in a contract  
24 evidencing interstate commerce. The in a contract  
25 makes the legality of the whole contract -- for the

1 contract comes into existence. You can't drive this  
2 car until you start it, and the way that the Federal  
3 Arbitration Act works is it becomes enforceable once  
4 those terms are met.

5 Under their theory, there's no good reason  
6 why in Prima Paint this Court spent all those pages  
7 talking about whether interstate commerce was met. Why  
8 wasn't that for the arbitrator? The reason that that  
9 wasn't for the arbitrator was that was something that  
10 went to the threshold issue of whether section 2 had  
11 been met.

12 JUSTICE GINSBURG: Are you saying then if  
13 this case, the case that was brought in Florida, had  
14 been brought or removed in -- more likely removed  
15 because there was diversity, removed to the Federal  
16 court, the Federal court should do just what the  
17 Florida Supreme Court did? Or would the Federal court  
18 say, well, we've got our instructions from Prima Paint?  
19 It says excise the arbitration clause. If that's  
20 okay, we decide the other questions.

21 MR. BLAND: Your Honor, in this case I  
22 believe that the answer is that you would have the same  
23 result in State court or in Federal court. And the  
24 reason I believe that is because section 2 makes the  
25 existence of a contract a precondition, and you don't

1 get to anything else if that is not met.

2 JUSTICE SCALIA: Doesn't it -- doesn't it  
3 follow from -- from that theory of yours that in every  
4 case you are entitled to a judicial determination, not  
5 an arbitrator's determination, but a judicial  
6 determination that this was a contract evidencing a  
7 transaction involving commerce?

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

10 JUSTICE SCALIA: Wow. So in every -- every  
11 case, the person who -- who is being brought to  
12 arbitration can say, I deny that interstate commerce is  
13 involved in -- in this -- in this contract and I want  
14 to have a -- a judicial determination of it.

15 MR. BLAND: And of course, in the Efabco case  
16 --

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

18 MR. BLAND: Well, that -- this Court 2 years  
19 ago in 2003 in the Efabco case, the Alabama Supreme  
20 Court had developed a practice of finding that lots of  
21 contracts didn't involve interstate commerce and  
22 interstate commerce didn't reach to a lot of things.  
23 And this Court just 2 years ago said this is an issue  
24 for the court and there is interstate commerce here and  
25 they -- they -- and this Court -- I can't remember the

1 phrase -- per curiam. There was no need for an  
2 argument or whatever. The Court just came in and  
3 resolved it --

4 JUSTICE GINSBURG: You said this was an issue  
5 for the court. Was there an alternate forum in that  
6 case? Was it an arbitration case?

7 MR. BLAND: This was an arbitration case, and  
8 the Alabama Supreme Court had said that we're not going  
9 to enforce the Federal Arbitration Act, and Alabama is  
10 one of the three States that has -- that has a State  
11 statute that bars it.

12 JUSTICE BREYER: I had thought that the  
13 interstate commerce question was like *Crowell v.*  
14 *Benson*. You know, it's like a constitutional fact.  
15 And in fact, if you can't -- if there's not the  
16 constitutional -- if there's not the connection with  
17 interstate commerce, Congress, at least arguably, would  
18 lack the constitutional power to tell the State court  
19 what to do in this case. So it's not as surprising if  
20 there is a difference between that kind of fact and the  
21 kind of fact that goes to whether the -- the contract  
22 is void ab initio.

23 MR. BLAND: But it -- but it is also a  
24 statutory fact, Your Honor.

25 JUSTICE BREYER: Yes, it is. It's both.



1           MR. BLAND: It's a fact that the statute says  
2 both. It is a constitutional fact. I certainly  
3 concede that.

4           Justice Ginsburg, I believe I did not answer  
5 -- I'm sorry.

6           JUSTICE SCALIA: The question isn't whether  
7 the court can -- can determine that fact. Ultimately,  
8 if the arbitrator determines it incorrectly, you can  
9 take it to court. But the question is whether in every  
10 arbitration case, you can go immediately to court to  
11 have that question of interstate commerce or not  
12 determined. And that would really throw a monkey  
13 wrench into the whole system, it seems to me.

14          MR. BLAND: Your Honor, it's -- it would not  
15 throw a monkey wrench because it's exactly what  
16 happened in Prima Paint. In Prima Paint, this Court  
17 started off and before it enforced the Arbitration Act,  
18 before it got into what it called the main issue and  
19 started talking about what does section 4 mean, this  
20 Court first went and did the entire interstate commerce  
21 analysis. This Court said, we've got to figure out if  
22 we're in section 2 first and described that. It's not  
23 the monkey wrench. It's exactly what's happened.

24          And in the Efabco case, it was a issue for  
25 the Court. To say that now, whether or not section 2

1 exists except for the assent agreement, but everything  
2 else about a contract and everything else about  
3 interstate commerce would suddenly be for the  
4 arbitrator, that is an exact shift from what this Court  
5 did in Prima Paint, and it's a shift from what Chief  
6 Justice Warren Burger said in the -- in the Southland  
7 case, that this is a prerequisite.

8 JUSTICE SCALIA: Once the case is in the  
9 court, of course, the court has to decide that  
10 question. Once it is in the court. And it was in the  
11 court in -- in Prima Paint. The question is does it  
12 have to go first to the court before it goes to the  
13 arbitrator, and -- and Prima Paint doesn't decide that  
14 question.

15 MR. BLAND: Well, where these cases come up  
16 again and again, Your Honor, is someone brings a  
17 lawsuit in court and then there is a motion to compel  
18 arbitration and there is a challenge to that motion.  
19 There are next to no challenges anywhere in the country  
20 right now in the -- after your decision 2 years ago, in  
21 which anyone is saying, oh, this transaction doesn't  
22 involve interstate commerce.

23 There are going to be a small number of  
24 challenges involving companies operating at the edge of  
25 legality and maybe a tiny number of challenges

1 involving consideration where people are going to be  
2 able to say there's no contract at all, there's not  
3 even a -- there's not even the beginning of a contract  
4 here. There's not going to be a wealth of hundreds of  
5 the -- of those, but there's going to be some cases,  
6 mostly involving the payday lending industry, but  
7 they're just aren't dozens of businesses out there  
8 where there is a conceivable, plausible, colorable  
9 argument that the whole line of business is violating  
10 the law.

11 JUSTICE STEVENS: Mr. Bland, I'm curious to  
12 know if you agree with your opponent that whoever  
13 decides it, an arbitrator or a judge, it's really going  
14 to be decided by the Florida Supreme Court in the next  
15 couple of months.

16 MR. BLAND: I think that the question of  
17 whether or not this is illegal will be something that's  
18 decided by the Florida Supreme Court, but that question  
19 -- first of all, if this case is sent back to  
20 arbitration, the arbitration clause, of course, is on  
21 an individual basis and this case could never be  
22 pursued on an individual basis. If it's not done as a  
23 class action, it would be the end of the case.

24 But moreover, the arbitrator is basically  
25 free to ignore what the ruling of the Florida Supreme

1 Court is. You know, there was a ruling from the Third  
2 Circuit a few weeks ago that said that glaring errors  
3 of law are not grounds for overturning an arbitration  
4 decision. So the Florida Supreme Court could come out  
5 and say this is plainly illegal, and then a row of  
6 arbitrators could come in and say, seems okay to us,  
7 and there's really not going to be a court challenge to  
8 that. So I would not agree with that as a matter of --  
9 as a matter of practical reality, Your Honor.

10 This State law that we're talking about is  
11 not about hostility to arbitration. The rule that  
12 distinguishes between void contracts and the small  
13 universe of cases that are void ab initio is a rule  
14 that goes back something like a hundred years in  
15 Florida and it goes back hundreds more years through --  
16 it's come up in decisions of this Court. It has come  
17 up in decisions of English courts that go back that  
18 were traced by the contract professors.

19 At the time that the Congress wrote the  
20 Arbitration Act in 1925, this distinction was set out  
21 in Corbin and in the First Restatement of Contracts.  
22 This is basic, core common law of contracts. And the  
23 idea that in 1925 Congress wanted to throw out all of  
24 the basic core rules of contracts and, instead, replace  
25 them with some new Federal rule of contract, when they

1 didn't define contract, and when they put it as a  
2 precondition before the act applies, the idea that  
3 general rules of State contract law are going to be  
4 tossed overboard is really going to be a dramatic  
5 change for this Court -- for this Court's  
6 jurisprudence.

7           In case after case, this Court has said  
8 arbitration clauses are as enforceable as other  
9 contracts, but no more so. And that was the basis of  
10 this Court's ruling in the EEOC v. Waffle House case  
11 just a few years ago. Just like petitioner here, the  
12 Waffle House was saying arbitration clauses are sort of  
13 super contracts. They are something so many businesses  
14 have relied on, as Justice Breyer says, that they are  
15 -- that they are treated by a different and better set  
16 of rules. These are contracts which are just better  
17 and more important than other contracts.

18           And this Court stopped and, in Justice  
19 Stevens' opinion in the Waffle Case, said slow down.  
20 First, you just have to treat these like other  
21 contracts. And here, there's no signature line for the  
22 EEOC. The EEOC didn't sign on. We're going to treat  
23 this like another contract, and by a 6 to 3 vote, this  
24 Court found that you couldn't enforce it.

25           They want to put the cart before the horse.

1 They want to enforce this Arbitration Act before its  
2 terms were met. That is not what this Court did in  
3 Prima Paint. Prima Paint did it right. They said  
4 section 2 first and only if section 2 applies, then do  
5 we jump to the next point, you know, sort of dinner  
6 before dessert. And that was the appropriate approach  
7 because you have to find out if section 2 is there and  
8 cross that threshold before you start saying now that  
9 we're in the Federal Arbitration Act, how much fun  
10 would it be to apply section 4, the part that keeps  
11 talking about the Federal Rules of Civil Procedure, to  
12 cases in State court proceedings and apply a decision  
13 that was based entirely on language in section 4 to  
14 State court proceedings.

15 That is simply an enormous expansion of the  
16 law in this area, and we urge the Court strongly to  
17 affirm the decision below. Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, Mr. Bland.

19 Mr. Landau, you have 4-and-a-half minutes  
20 remaining.

21 REBUTTAL ARGUMENT OF CHRISTOPHER LANDAU

22 ON BEHALF OF THE PETITIONER

23 MR. LANDAU: Thank you, Mr. Chief Justice.

24 Three --

25 JUSTICE SCALIA: Mr. Landau, I'd like to know

1    how you read section 2.  What -- what meaning do you  
2    give to a written provision in a contract?

3               MR. LANDAU:  Your Honor, I think the word  
4    contract is not a precondition in the sense that  
5    respondents talk about in the sense that the court has  
6    to look into whether it's a valid contract with all the  
7    bells and whistles of State contract law because I  
8    think that is entirely inconsistent with *Prima Paint*.  
9    I think the -- the answer is --

10              CHIEF JUSTICE ROBERTS:  But State law -- the  
11   supposition is that State law provides that in this  
12   case, the usury context, whatever, you do not have a  
13   contract.  That's the difference between void ab initio  
14   and voidable.

15              MR. LANDAU:  Your Honor, I think the point is  
16   that it -- the key part there is -- I think Justice  
17   Breyer was getting to this -- that it has to be a -- a  
18   contract that evidences interstate commerce to have the  
19   hook of commerce power for the FAA to apply in the  
20   first place.  That was enacted under the substantive  
21   commerce power.

22              Then the question arises -- and this is  
23   really where they're hanging their hats in this case to  
24   say, well, you have the word contract.  The word  
25   contract brings with it all the bells and whistles of

1 State law for a valid underlying contract. The problem  
2 with that is that looking at it that way -- I think  
3 this is the heart of this case -- that completely  
4 undermines -- or the severability rule says, we've got  
5 a different contract. The underlying contract is -- is  
6 there, and you can raise your challenge to that  
7 contract, but as long as you're not challenging the --  
8 the arbitration clause, then any challenge you have to  
9 the underlying contract goes to the arbitrator.

10 And again, I think the point is to say that,  
11 well, they don't deny that there's a severability rule,  
12 but to say that before you apply the Federal  
13 severability rule, you have to go and look at the  
14 underlying contract and ascertain all this is to deny  
15 the Federal severability rule.

16 JUSTICE SCALIA: I -- I guess that respondent  
17 uses the language in the way it -- he says it should be  
18 used when he refers to a contract that is void ab  
19 initio. There's no such thing as a contract that is  
20 void ab initio, is there?

21 MR. LANDAU: No.

22 JUSTICE SCALIA: If you take the meaning of  
23 contract that he takes in section 2.

24 MR. LANDAU: I -- I think you're -- you're  
25 right, Your Honor. I mean, I think the -- the point is



1 it -- it just doesn't make sense to say that you have  
2 to go through all the bells and whistles of looking at  
3 the validity of the underlying contract if the whole  
4 point of Prima Paint -- I think this goes back to what  
5 the Chief Justice said is you just look at the  
6 arbitration provision as a severable contract. So to  
7 say that --

8 CHIEF JUSTICE ROBERTS: But I -- his answer  
9 would be, well, you only get to do that if you're under  
10 the Federal Arbitration Act in the first place, and if  
11 you don't have a contract, then you're not under the  
12 Federal Arbitration Act under State law.

13 MR. LANDAU: You're right, Your Honor. I  
14 think that's the key point, that to say that the -- you  
15 have to go to the -- the validity of the underlying  
16 contract under State law and the severability  
17 implications of the challenge to the underlying  
18 contract before you -- before you even get to the  
19 arbitration clause is essentially to negate the  
20 severability of the arbitration clause because the  
21 whole reason you're looking at the underlying contract  
22 is presumably to see whether or not the arbitration  
23 clause can fall. So they cannot logically have a  
24 regime that says the arbitration clause is severable  
25 from the underlying contract.

1 JUSTICE BREYER: They can logically because  
2 they say the arbitration clause, when embedded in a  
3 contract that is voidable -- i.e., A and B enter into a  
4 contract. B says it's voidable. I void it. I void  
5 it. And there they say, fine, there was a contract and  
6 therefore this arbitration clause, which is separable  
7 -- you go to arbitration. But if it's void, where B  
8 doesn't have to say I void it, I void it, you never had  
9 a contract in the first place. Now, that is a logical  
10 position.

11 MR. LANDAU: And you're absolutely right,  
12 Your Honor, and that was the lines that were drawn in  
13 Prima Paint. That -- that was the -- the real issue  
14 that was presented. They said there was no contract.  
15 They said I'm bringing a rescission suit. And if you  
16 read what Justice Black said in dissent in Prima Paint,  
17 he said there was no contract.

18 And this kind of goes back to what Justice  
19 Ginsburg was saying, that to talk about the  
20 implications, the severability implications, of  
21 particular challenges under State law misses the point  
22 that the Federal severability rule doesn't depend on  
23 State law.

24 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
25 Landau.

1                   MR. LANDAU: Thank you.

2                   CHIEF JUSTICE ROBERTS: The case is  
3 submitted.

4                   (Whereupon, at 12:09 p.m., the case in the  
5 above-entitled matter was submitted.)

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