

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 HALL STREET ASSOCIATES, :

4 L.L.C., :

5 Petitioner :

6 v. : No. 06-989

7 MATTEL, INC. :

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9 Washington, D.C.

10 Wednesday, November 7, 2007

11

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

15 APPEARANCES:

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

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

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

2 (10:05 a.m.)

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

6 Mr. Phillips.

7 ORAL ARGUMENT OF CARTER G. PHILLIPS

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

1 MR. PHILLIPS: Precisely, Justice Scalia.

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

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

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

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

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

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

4 CHIEF JUSTICE ROBERTS: Mr. Phillips --

5 JUSTICE GINSBURG: But they were both --
6 they were both in this agreement, both the substantial
7 evidence rule and the standard of review of legal error.
8 So are you saying that you -- we don't have to deal with
9 that question or you're not going to defend it, because
10 the standard was dual. Am I not right about what they
11 --

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

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

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

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

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

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

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

14 CHIEF JUSTICE ROBERTS: So you should lose.

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

16 CHIEF JUSTICE ROBERTS: So you should lose.

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

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

1 language to accommodate your interests?

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

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

13 MR. PHILLIPS: Diversity, Your Honor.

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

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

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

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

1 district court was prepared to enforce the agreement.

2 CHIEF JUSTICE ROBERTS: Right.

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

8 CHIEF JUSTICE ROBERTS: But my point --

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

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

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

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

24 MR. PHILLIPS: Right.

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

1 doesn't preclude it.

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

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

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

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

22 MR. PHILLIPS: I thought that --

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

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

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

5 (Laughter.)

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

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

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

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

1 case.

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

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

9 MR. PHILLIPS: Right. They never --

10 JUSTICE BREYER: Have you ever argued that?

11 MR. PHILLIPS: That it is enforceable?

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

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

15 JUSTICE BREYER: No?

16 MR. PHILLIPS: -- Oregon law.

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

20 MR. PHILLIPS: No, no.

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

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

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

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

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

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

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

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

5 MR. PHILLIPS: Right. But I think the
6 answer to that is that if Congress had a choice as
7 between those alternatives, Congress clearly in Section
8 9 made it absolutely indisputable that there's a simple
9 way to enforce it, but it didn't suggest the
10 alternative, which is that you relegate it to some kind
11 of State law, completely complicated process to try and
12 get this arbitration award enforced under those
13 circumstances.

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

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

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

22 MR. PHILLIPS: Right.

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

25 MR. PHILLIPS: Right. And I think the

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

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

6 MR. PHILLIPS: To be sure.

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

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

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

17 MR. PHILLIPS: Well, the benefit is the
18 efficiency that the Federal Arbitration Act is trying to
19 promote. I mean, to be sure, there -- there could
20 potentially be any number of routes you might want to
21 identify. The clearest one is where the parties don't
22 care about what happens on the back end, where they say,
23 once you get your -- you have your -- you get your
24 arbitration award and then you go off and you do Section
25 9 and we don't have any agreement on that. And that one

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

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

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

9 MR. PHILLIPS: Those are regulated by State
10 law.

11 CHIEF JUSTICE ROBERTS: Okay.

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

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

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

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

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

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

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

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

12 MR. PHILLIPS: Right.

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

16 MR. PHILLIPS: But I think the answer to the
17 conundrum you've raised, Mr. Chief Justice, is that if
18 you're not in Section 9, then you ought to be in Section
19 2, and there you should do precisely what the contract
20 says, which is that you should vacate or set aside the
21 arbitration agreement --

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

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

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

6 MR. PHILLIPS: No, I --

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

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

18 CHIEF JUSTICE ROBERTS: But the only basis
19 --

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

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

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

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

9 MR. PHILLIPS: That's quite true.

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

13 MR. PHILLIPS: Well, I don't know that
14 that's the problem. You're right, I don't want Section
15 9 to be controlling here, but I don't think it's meant
16 to be controlling under these circumstances. I think
17 what -- I mean they're making the Section 9 argument.
18 All I'm saying is that there's not a problem created by
19 Section 9.

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

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

24 JUSTICE SOUTER: Pardon me?

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

1 be controlling," I don't --

2 JUSTICE SOUTER: Section 9.

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE SOUTER: Then how can you get any

1 award enforced, even subject to your terms?

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

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

10 MR. PHILLIPS: Right. But all I'm saying is
11 that Section 9 doesn't apply in this particular context,
12 and, therefore, it makes all the sense in the world to
13 --

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

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

23 JUSTICE STEVENS: Where is it? Where is it?

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

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

3 JUSTICE STEVENS: Uh-huh.

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

9 JUSTICE SOUTER: Okay. And what you are
10 arguing is: At this point, even though we didn't agree
11 within the meaning of the preamble to the first sentence
12 --

13 MR. PHILLIPS: Correct.

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

16 MR. PHILLIPS: Correct.

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

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

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

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

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

11 JUSTICE SOUTER: The -- the cases --

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

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

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

22 MR. PHILLIPS: Yes.

23 JUSTICE SOUTER: -- for consummation and
24 enforcement --

25 MR. PHILLIPS: What do you do?

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

4 MR. PHILLIPS: Right.

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

8 MR. PHILLIPS: But, Justice Souter --

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

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

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

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

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

25 (Laughter.)

1 JUSTICE SOUTER: No, you don't.

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

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

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

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

15 JUSTICE SOUTER: Okay, but --

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

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

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

1 Illinois.

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

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

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

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

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

22 MR. PHILLIPS: That's exactly right.

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

25 MR. PHILLIPS: Correct.

1 JUSTICE GINSBURG: It doesn't read like one.
2 10 and 11 don't read like default --

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

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

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

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

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

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

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

6 JUSTICE STEVENS: Yeah.

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

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

16 CHIEF JUSTICE ROBERTS: Thank you,
17 Mr. Phillips.

18 Ms. Brinkmann.

19 ORAL ARGUMENT OF BETH S. BRINKMANN

20 ON BEHALF OF RESPONDENT

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

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

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

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

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

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

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

19 MS. BRINKMANN: Because --

20 JUSTICE SCALIA: Why not just say Section 4?

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

25 And the court said there: Well, we all know

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

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

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

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

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

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

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

13 MS. BRINKMANN: You can't in that situation
14 --

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

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

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

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

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

15 You come in, and that court must enforce
16 that award, confirm that award, unless Sections 10 and
17 11 are met. And that's exactly what Congress did.

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

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

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

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

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

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

20 What do you gain?

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

25 We prevail under the ruling of the court

1 that recognized the exclusivity of Sections 9, 10 and
2 11; and that would end the litigation. That's certainly
3 of very great interest to our client.

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

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

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

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

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

1 10, and if you don't, you're free not to; you can go to
2 the State courts. Why can't he still go to the State
3 courts?

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

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

14 JUSTICE SCALIA: I don't understand that.

15 MS. BRINKMANN: We thought --

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

25 And I doubt very much whether the judge

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

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

12 What is before the Court here is the Section
13 9 action to confirm the judgment. And that's what comes
14 to the Court on --

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Arbitration Act --

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

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

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

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

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

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

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

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

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

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

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

25 MS. BRINKMANN: Your Honor, that actually

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

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

16 JUSTICE GINSBURG: Are there any --

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE GINSBURG: Is there a possibility

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

4 MS. BRINKMANN: 1925.

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

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

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

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

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

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

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

12 MS. BRINKMANN: Well --

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

18 MS. BRINKMANN: I think that question,
19 though, perhaps goes to more or not whether the Section
20 9 is the exclusive means for enforcing an award, and it
21 isn't. So perhaps there is some other means that is
22 beyond my expertise.

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

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

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

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

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

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

23 MS. BRINKMANN: I have to say --

24 CHIEF JUSTICE ROBERTS: Isn't there --

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

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

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

8 CHIEF JUSTICE ROBERTS: Sure.

9 JUSTICE BREYER: He can?

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

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

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

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

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

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

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

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

6 What they agreed to is an agreed statement
7 of facts, subject to Section 9 standards, Section 9 and
8 10.

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

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

13 MS. BRINKMANN: Yes, right.

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

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

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

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

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

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

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

17 MS. BRINKMANN: Uh-huh.

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

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

1 that, you have to do what Congress says.

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

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

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

12 MS. BRINKMANN: I also have --

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

16 JUSTICE KENNEDY: And I would add --

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

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

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

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

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

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

12 JUSTICE SOUTER: Pardon me?

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

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

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

1 forward. And they have no limit.

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

11 MS. BRINKMANN: It was --

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

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

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

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

16 JUSTICE GINSBURG: Is that what --

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

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

24 MS. BRINKMANN: It does.

25 JUSTICE BREYER: And has that turned into

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

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

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

8 MS. BRINKMANN: I think the --

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

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

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

20 MS. BRINKMANN: Yes.

21 JUSTICE GINSBURG: What has been the
22 experience there?

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

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

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

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

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

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

1 MS. BRINKMANN: With all due respect --

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

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

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

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

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

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

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

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

15 MS. BRINKMANN: In court?

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

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

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

25 MS. BRINKMANN: I hesitate because it sounds

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

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

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

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

10 (Laughter.)

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

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

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

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, Ms.
25 Brinkmann.

1 Mr. Phillips, you have you 5 minutes
2 remaining.

3 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

4 ON BEHALF OF THE PETITIONER

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

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

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

25 JUSTICE SOUTER: What do you say about her

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

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

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

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

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

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

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

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

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

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

18 MR. PHILLIPS: Well no --

19 JUSTICE SCALIA: The question is simply --

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

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

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

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

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

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

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

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

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

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

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

15 MR. PHILLIPS: Right.

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

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

21 My whole point here has been Section 9
22 doesn't prevent us from being able to do this. Section
23 10 is not an exhaustive list and, therefore, we are
24 allowed to add to Section 10. And at the end of the
25 day, regardless, you ought to interpret this under

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

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

11 Thank you, Your Honor.

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

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

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