

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   RENT-A-CENTER, WEST, INC.,                   :

4                   Petitioner                   :

5                   v.                               :   No. 09-497

6   ANTONIO JACKSON.                           :

7   - - - - - x

8   Washington, D.C.

9   Monday, April 26, 2010

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11                   The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 10:02 a.m.

14 APPEARANCES:

15 ROBERT F. FRIEDMAN, ESQ., Dallas, Texas; on behalf of  
16 Petitioner.

17 IAN E. SILVERBERG, ESQ., Reno, Nevada; on behalf of  
18 Respondent.

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

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument first this morning in Case 09-497,  
5 Rent-A-Center West v. Jackson.

6 Mr. Friedman.

7 ORAL ARGUMENT OF ROBERT F. FRIEDMAN

8 ON BEHALF OF THE PETITIONER

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

11 The agreement between Antonio Jackson and  
12 Rent-A-Center should be enforced as written. There is  
13 no statutory impediment to the enforcement of the clear  
14 and unmistakable agreement that gives the arbitrator  
15 exclusive authority to decide Jackson's challenge to  
16 enforceability, nor is there any language in the Federal  
17 Arbitration Act that would prohibit the court from  
18 making the determination -- prohibit the arbitrator from  
19 making the determination of Jackson's challenge to  
20 unconscionability.

21 Through frequent holdings of this Court  
22 going back 50 years to the Steelworkers trilogy, this  
23 Court has plainly recognized that parties may delegate  
24 issues as to scope and validity to the arbitrator in the  
25 first instance. The district court and --

1 CHIEF JUSTICE ROBERTS: But not to the  
2 question of which parties have agreed to arbitrate?

3 MR. FRIEDMAN: I'm sorry, Your Honor.

4 CHIEF JUSTICE ROBERTS: Not the question of  
5 which parties have agreed to arbitrate?

6 MR. FRIEDMAN: Which parties can be  
7 potentially scope issues and which parties potentially  
8 as well. In this case, the issue is enforceability.  
9 And through the holdings of First Options, Howsam, and  
10 Bazzle, going back to previous decisions, this Court has  
11 held that parties through clear and unmistakable  
12 delegation can give that to the arbitrator in the first  
13 instance.

14 JUSTICE GINSBURG: But if -- if fraud in the  
15 inducement, I take it, is considered -- even if you have  
16 a very broad arbitration clause, as we do here, fraud in  
17 the inducement is considered a question for the court,  
18 not the arbitrator; is that right?

19 MR. FRIEDMAN: That's correct, Justice  
20 Ginsburg.

21 JUSTICE GINSBURG: So why should  
22 unconscionability be treated differently?

23 MR. FRIEDMAN: Justice Ginsburg, fraud in  
24 the inducement, pursuant to Prima Paint, goes to the  
25 making of the agreement, and under section 4, the court

1 retains decisions over the making of the agreement.  
2 Unconscionability is a post-formation attack. It does  
3 not go to the very limited inquiry that is anticipated  
4 under section 4, of the making --

5 JUSTICE KENNEDY: Why is it post-formation?  
6 Arguably, the -- one of the parties has such a strong  
7 hand that it forces the other party just to decide.  
8 It's almost like -- duress would certainly be for the  
9 court, would it not, if it's a formation issue like  
10 Justice Ginsburg indicated?

11 MR. FRIEDMAN: In some instances,  
12 Justice Kennedy, duress could be; for example, a gun to  
13 somebody's head. But procedural unconscionability does  
14 not go to the same issues of making. And, in fact, under  
15 Nevada law and this State's laws --

16 JUSTICE KENNEDY: Well, I'm not sure what  
17 procedural unconscionability, but this is -- as Justice  
18 Ginsburg indicates, it's not clear to me why this isn't  
19 a formation issue.

20 MR. FRIEDMAN: Formation is a very basic  
21 existential analysis. It goes to mutual assent. Did  
22 the parties sign the agreement and indicate the desire  
23 to be bound by the agreement? Though --

24 JUSTICE SCALIA: I guess you could argue  
25 that on its face the agreement is so one-sided, so

1 unconscionable, that one of the parties must have been  
2 coerced into signing it. I guess you could make that  
3 argument, can't -- couldn't you?

4 MR. FRIEDMAN: Justice Scalia, you could  
5 make that argument --

6 JUSTICE SCALIA: Has -- has that argument  
7 been made here?

8 MR. FRIEDMAN: There was an argument made  
9 that it was one-sided, but it was the same type of  
10 argument that pertains --

11 JUSTICE SCALIA: Was the argument made that  
12 because it was so unconscionable, the employee must have  
13 been coerced into making it?

14 MR. FRIEDMAN: No, Justice Scalia. That  
15 argument was not --

16 JUSTICE SCALIA: I didn't think it -- it had  
17 been made.

18 MR. FRIEDMAN: Getting back to  
19 Justice Ginsburg's question about making --

20 JUSTICE STEVENS: I'm a little puzzled.  
21 What was the argument that was made? Why was it  
22 unconscionable, if not for that reason?

23 MR. FRIEDMAN: Justice Stevens, the argument  
24 was that there was unequal bargaining power because  
25 Mr. Jackson was the -- a putative employee and Rent-A-Center

1 was the employer. He also complained about a couple of  
2 the provisions in the agreement, one pertaining to  
3 discovery, one pertaining to an alleged fee-splitting  
4 provision in the agreement. He did not complain as to  
5 the terms that Justice Scalia just referred to.

6 With respect to making, it is a very limited  
7 inquiry, and section 4 is the provision in the Federal  
8 Arbitration Act that gives a court the power to  
9 enforce the arbitration agreement. Once the court is  
10 satisfied that the making is not an issue and the making  
11 is a very basic issue, the court, pursuant to the plain  
12 language of section 4, must submit the dispute to  
13 arbitration.

14 JUSTICE SOTOMAYOR: You have --

15 MR. FRIEDMAN: Now, in some instances, the  
16 courts will make decisions as to attacks such as  
17 unconscionability. But in this sense --

18 JUSTICE SOTOMAYOR: Counsel, is your problem  
19 with unconscionability being -- as described by the Chief  
20 Justice or Justice Scalia, being forced to or coerced  
21 into signing something -- that's okay for the courts, but  
22 this type of argument that goes to the unfairness of the  
23 process, that's for the arbitrator; is that your  
24 position?

25 MR. FRIEDMAN: That's -- that's right, Justice

1 Sotomayor.

2 JUSTICE SOTOMAYOR: So why -- isn't that an  
3 unwieldy rule? Isn't your quarrel with what the court  
4 defined as remissible unconscionability as a legal  
5 matter, as opposed to trying to parse out what  
6 unconscionability means otherwise?

7 MR. FRIEDMAN: Well, Justice Sotomayor,  
8 unconscionability and fairness attacks go to  
9 post-formation issues that -- that are --

10 JUSTICE SOTOMAYOR: We just gave you one  
11 that didn't: If someone was forced into signing the  
12 agreement in an unconscionable way.

13 MR. FRIEDMAN: But, Justice Sotomayor, if  
14 for example it's fraud in the inducement, such as in  
15 Prima Paint, that does go to the section 4. It does go  
16 to the making of the agreement because there would not  
17 be mutual assent if somebody was forced to enter into  
18 the agreement.

19 In contrast, unconscionability, and  
20 certainly the allegations we've seen here against the  
21 agreement, go to post-formation complaints, complaints  
22 about the fairness of the agreement. They do not go to  
23 the actual, very limited making of the agreement.

24 CHIEF JUSTICE ROBERTS: But I suppose that  
25 the substance of the agreement -- maybe this is just the



1 same question as Justice Scalia's. I suppose the  
2 substance of the agreement is evidence -- could be  
3 evidence on the unconscionability at formation.

4 MR. FRIEDMAN: Well --

5 CHIEF JUSTICE ROBERTS: And that is for the  
6 court.

7 MR. FRIEDMAN: If -- if there is something  
8 in the agreement that would indicate that there was not  
9 mutual assent, as in somebody put a gun to somebody's  
10 head, somebody forced them to do it, that would be for  
11 the court.

12 CHIEF JUSTICE ROBERTS: No, the point is --  
13 it's not that. It would be the -- the provisions are so  
14 one-sided that you may assume from that that the  
15 formation was not voluntary.

16 MR. FRIEDMAN: No, Mr. Chief Justice.  
17 Attacks on the fairness and simply pointing to  
18 provisions and saying, well, these are very unfair; it  
19 must be an indication of it being forced -- no, that would  
20 be for the arbitrator to decide, because it's simply an  
21 attack on the fairness and there's speculation as to why  
22 somebody entered. And in this agreement --

23 JUSTICE SCALIA: I don't agree with that. I  
24 mean, if -- if the argument is made -- I gather it  
25 wasn't made here, but if the argument is made that this

1 agreement was not voluntary, and the evidence of that  
2 involuntariness is how outrageously unfair it is -- now,  
3 I'm not sure that that's enough evidence. You may need  
4 some other stuff as well to -- to persuade a court.

5 But if that is the argument, that the  
6 one-sidedness is evidence that the agreement was not  
7 voluntary, I don't see how that's for the arbitrator.

8 MR. FRIEDMAN: Justice Scalia, under the  
9 section 4 analysis, in the making there needs to be some  
10 evidence that it was forced, the gun to the head  
11 example. Simply pointing to the language in the  
12 agreement as evidence of that would not be enough. That  
13 is an attack on the language of the agreement after it's  
14 been formed.

15 The section 4 analysis is very, very limited,  
16 and it goes to these most basic elements. So the  
17 language of the agreement, while certainly the party  
18 opposing it will have the opportunity to make the  
19 argument it's unconscionable, but that would be for the  
20 arbitrator.

21 JUSTICE SCALIA: You don't think that could  
22 be used along with other evidence? I think all you're  
23 saying is that it is not in and of itself enough, that  
24 every unfair agreement is not a coerced agreement.

25 MR. FRIEDMAN: It certainly would not in and

1 of itself be enough --

2 JUSTICE SCALIA: But you could use it as  
3 evidence if there's other evidence supporting that.  
4 Couldn't you?

5 MR. FRIEDMAN: Your Honor, you would have to  
6 look at the objective manifestation of mutual assent.  
7 For example, in this agreement --

8 JUSTICE SCALIA: I think you can answer that  
9 yes or no. Can you use that in addition to other  
10 evidence to show that the agreement was not voluntary?

11 MR. FRIEDMAN: Justice Scalia, I don't think  
12 so. I think you would have to look to what transpired  
13 at the time the agreement was actually entered into and  
14 was made.

15 JUSTICE STEVENS: And that's no matter how  
16 one-sided? I mean, suppose the agreement provided that  
17 the employee shall pay all the costs of arbitration no  
18 matter who wins and also at the end of the arbitration  
19 shall pay a penalty if he fails to -- it seems to me you  
20 could have a really one-sided -- that would not be  
21 admissible on the issue?

22 MR. FRIEDMAN: Justice Stevens, if there is  
23 an issue about arbitral access, as in there is a block  
24 at the door, you cannot get a ticket to the show,  
25 because of some impediment in getting to arbitration in

1 the first place, under the Court's principles announced  
2 in Randolph and in First Options, you must have access to  
3 the arbitrator. So in your example, if there is  
4 something prohibiting access to the arbitrator, that  
5 would be a different story.

6 Getting back to Justice Scalia's question  
7 about the --

8 JUSTICE GINSBURG: What about the specific  
9 examples he gave, that the -- just take that the -- that  
10 the employee must bear all the costs of the arbitration,  
11 win or lose, that's the provision. Would that provision  
12 be enough to make the issue one for the court rather  
13 than the arbitrator?

14 MR. FRIEDMAN: Justice Ginsburg, if it's  
15 simply a complaint about the fairness, it would not be.  
16 If the parties --

17 JUSTICE GINSBURG: But is it? We don't need  
18 the "if." Tell me whether you think a provision saying  
19 the employee under any and all circumstances pays all  
20 costs -- would that provision make this question of  
21 unconscionability one for the court rather than the  
22 arbitrator?

23 MR. FRIEDMAN: It could, Justice Ginsburg.  
24 It would not be a question of arbitrability if the party  
25 opposing arbitration can meet the very heavy burden

1 established in Randolph to show that the fees would  
2 be -- would prohibit them from actually getting to  
3 arbitration. It would not be simply an attack as we saw  
4 here, with no evidence, that we think a term is unfair.

5           The party opposing arbitration would have to  
6 meet their burden. They would have to put evidence in.  
7 And, for example, in Randolph the Court stated that in  
8 certain instances Mrs. Randolph could have put evidence  
9 in, and had she put evidence in, which she did not, much  
10 as in this case, if she had met her burden to show that  
11 she could not have access to arbitration -- in other  
12 words, if arbitration is an illusory remedy -- that  
13 could be for the court to decide, because, after all,  
14 even in the First Options decision, the anticipation is  
15 you have a clear and unmistakably delegation that the  
16 arbitrator will make a decision, and implicit in that  
17 that there is an arbitrator to make that decision.

18           JUSTICE BREYER: Yes, that's -- that's true.  
19 The thing I was wondering in this case is there's a -- a  
20 dispute that's about racial discrimination and so forth.  
21 There's a clause, and the clause says this is  
22 arbitrable, but that is being disputed because the  
23 plaintiff in the case says that's an unconscionable  
24 provision, so it doesn't really apply. And then you say  
25 but now that dispute is referred to the arbitrator to

1 just read the language. But the plaintiff says that  
2 that language, too, is unconscionable, and as long as  
3 that language is unconscionable, then how is it clear  
4 and unmistakable that they, he, agreed to do it, because  
5 an unconscionable provision is not a provision?

6               So if we apply First Options -- I mean, it's  
7 complicated because of the language; it's not  
8 complicated once you think it out, and -- I hope. But  
9 just applying it very literally, it would seem to say  
10 that you do not have clear and unmistakable evidence  
11 that they agreed to submit this kind of dispute to  
12 arbitration for the reason that what you point to is  
13 itself according to them a product of unconscionability.  
14 How do you -- how do you respond to that?

15               MR. FRIEDMAN: Justice Breyer, under section  
16 4, which is the enforcement mechanism, the court is  
17 limited to make decisions about the making. Once the  
18 making issue is not an issue -- and it has never been an  
19 issue in this case; there has never been an allegation  
20 the making has been affected -- the court at that  
21 point should enforce the agreement pursuant to its  
22 terms.

23               JUSTICE BREYER: Well, making itself  
24 could be, but I think that's a harder question,  
25 whether a -- certainly if the person says you see my

1 signature there; that's not mine; that's Joe Banana's,  
2 who tries to imitate me -- there is no contract, and no  
3 matter what it says, it doesn't go to the arbitrator.  
4 All right?

5 Now, we can argue about whether it is or is  
6 not analogous to that when he claims it's  
7 unconscionable. There's a very good argument it is  
8 analogous. There's a very good argument it is like  
9 fraud in the inducement, and there are some arguments  
10 the other way.

11 But First Options I think cuts through that,  
12 by saying whether that's true or not, unless it's clear  
13 and unmistakable that they wanted this matter, the  
14 matter of whether the arbitration clause itself is  
15 unconscionable referred to the arbitrator, whether or  
16 not they wanted that referred to the arbitrator has to  
17 be clear and unmistakable. And they are claiming no,  
18 because the lack -- the provision that says that is  
19 itself a product of unconscionability. That's to repeat  
20 my question. But, having repeated the question, why  
21 isn't that the simplest, most direct, and four-sentence  
22 ground for deciding this case?

23 MR. FRIEDMAN: Justice Breyer, Jackson, first  
24 and foremost, did not ever complain that the arbitrability  
25 provision, the clear and unmistakable delegation provision,

1 is unconscionable.

2 JUSTICE BREYER: He's not saying that this  
3 whole arbitration clause is unconscionable?

4 MR. FRIEDMAN: He's complaining that  
5 generally it's unconscionable --

6 JUSTICE BREYER: Well, all right. So he's  
7 -- he's complaining the whole clause is unconscionable,  
8 and that's part of the clause.

9 MR. FRIEDMAN: Justice Breyer, this is really  
10 very similar to First Options, in which the party said:  
11 I'm not party to the agreement; the scope does not  
12 cover --

13 JUSTICE BREYER: Yes, and in First Options, we  
14 said it wasn't clear and unmistakable.

15 MR. FRIEDMAN: The Court said it was not,  
16 but in First Options the Court set out the rule --

17 JUSTICE BREYER: And the rules were what I  
18 just described.

19 MR. FRIEDMAN: The rule is -- in this case,  
20 there is language that has never been contested, and that  
21 language clearly and unmistakably says that the  
22 arbitrator has exclusive authority. That language has  
23 never been attacked.

24 And as to the issue of unconscionability,  
25 pursuant to section 4, which gives the court the



1 authority to send the arbitration to the arbitrator, the  
2 court should do exactly that. It should send it to the  
3 arbitrator once the making issue is satisfied, and then  
4 the arbitrator can make that decision.

5 CHIEF JUSTICE ROBERTS: So your position is  
6 that the arbitrator gets to decide questions of  
7 unconscionability, but the court gets to decide whether  
8 the arbitrator can do that?

9 MR. FRIEDMAN: In some instances, Justice  
10 Roberts -- Mr. Chief Justice, that is correct. The court  
11 must decide whether the agreement is made. The court  
12 must also decide whether there was a clear and  
13 unmistakable delegation. So under First Options and the  
14 cases that interpret it and the cases before it, the  
15 court must make the initial determination of whether  
16 there is a clear and unmistakable delegation.

17 JUSTICE KENNEDY: Well, do you understand --  
18 and we can ask the Respondent. But, as you understand  
19 Jackson's case, is he saying that part of the clause,  
20 part of the arbitration clause, is unconscionable, that  
21 the whole clause is unconscionable or that the whole  
22 contract is unconscionable?

23 MR. FRIEDMAN: He has made generalized --

24 JUSTICE KENNEDY: Because the complaint is a  
25 bare-bones complaint, and I don't know if there's

1 anything in the pleadings that reflects what his answer  
2 to that question would be.

3 MR. FRIEDMAN: Justice Kennedy, he has  
4 attacked certain provisions specifically of the  
5 agreement. He is arguing about the discovery provision.  
6 He is arguing about the fees provision. And he is arguing  
7 about certain terms excluding claims, that bilaterally  
8 exclude claims. So he has attacked about three  
9 provisions of the agreement specifically.

10 JUSTICE GINSBURG: But all of the  
11 arbitration agreement, not the employment contract as a  
12 whole.

13 MR. FRIEDMAN: Justice Ginsburg, it is a  
14 stand-alone four-page arbitration agreement. And --

15 JUSTICE BREYER: So let's go back to that.  
16 Maybe the other way is simpler. You say you agree that  
17 if my defense to this contract, which you are trying to  
18 enforce against me or which gives me a right to sue you,  
19 look at the argument, you put up this four-page  
20 document, and I say: Look, that is not my signature;  
21 that is the signature of Joe Bananas. We agree that's  
22 for the court.

23 MR. FRIEDMAN: We agree, Justice Breyer.

24 JUSTICE BREYER: Okay. Now, we agree it's  
25 for the court if my defense is, what he did is he got me

1 drunk, told me a bunch of lies, and I signed it. I  
2 grant it's my signature, but look at how squiggly it is.  
3 And my will was not a free one because I was under the  
4 influence of alcohol and lies.

5 MR. FRIEDMAN: We agree --

6 JUSTICE BREYER: Okay. Same. Okay.  
7 That's Prima Paint.

8 MR. FRIEDMAN: -- because that's part of  
9 the fraud issue.

10 JUSTICE BREYER: Okay? Now, he  
11 says the reason that I did not sign this contract -- I  
12 agree it's my signature; I agree it is not squiggly -- but  
13 still my will was overborne. What was it overborne by?  
14 It was overborne by those very situations that lead  
15 courts to label contracts unconscionable. The reason we  
16 don't enforce unconscionable contract is because the  
17 person who was the victim had no free will. He did not  
18 sign it of his own accord. And that doesn't -- there's  
19 no other reason, and that's the basic reason, and  
20 therefore assimilate it to the other two. What's your  
21 response?

22 MR. FRIEDMAN: No, Justice Breyer, that  
23 would be a very different situation. That would be  
24 allegations of procedural unconscionability, unequal  
25 bargaining power, and in fact --

1 JUSTICE SCALIA: Do you agree that a  
2 contract cannot be unconscionable unless it was coerced,  
3 that a finding of unconscionability is the same as a  
4 finding of coercion? You don't agree with that, do you?

5 MR. FRIEDMAN: No, there could be other  
6 types of unconscionability.

7 JUSTICE BREYER: Yes, but that's what I want  
8 the answer to. I know you don't agree with it. What I  
9 want is a list of reasons why.

10 MR. FRIEDMAN: With respect to procedural  
11 unconscionability, issues of unequal economic bargaining  
12 power, which is essentially what we have here -- those are  
13 non-issues that cannot be addressed by the arbitrator.  
14 And, in fact, under Nevada law, Justice Breyer, an  
15 allegation of procedural unconscionability, no matter  
16 how procedural --

17 JUSTICE BREYER: But I'm not interested in  
18 arbitration law. I'm interested in contract law, and I  
19 want to know why as a general matter of contract law an  
20 allegation of unconscionability, defense of  
21 unconscionability, is why is it not enough like the  
22 coercion defense or the inducement defense or the "I was  
23 in Alaska" defense? Isn't it enough like that that they  
24 should be treated alike? And now you're going to say no,  
25 and I want to know why not.

1                   MR. FRIEDMAN: It does not rise to the same  
2 level as something that's fraudulent or something that  
3 is forced with a gun to your head.

4                   CHIEF JUSTICE ROBERTS: I would have thought  
5 the answer to your -- the answer to your answer would be,  
6 well then, the -- you're more likely to win on that  
7 question. Obviously, you are going to lose on the gun to  
8 the head, but if it's simply the economic inequality or  
9 whatever, under the State law you're probably going to  
10 prevail, and they will say there is a valid contract. I  
11 thought the -- your -- your whole point was simply it's  
12 all or nothing.

13                   The courts get to decide is there a valid  
14 contract or is there not. And once they decide there  
15 is, then everything else about unconscionability of  
16 particular clauses is for the arbitrator.

17                   MR. FRIEDMAN: Mr. Chief Justice, most  
18 everything is for the arbitrator, and I want to  
19 distinguish between unconscionability, as Justice Breyer  
20 is referring to, and access issues and issues that go to  
21 the making, because there is a very bright line. Making  
22 issues go to the actual formation, mutual assent, and  
23 there is obviously no mutual assent if you have a gun to  
24 your head.

25                   But issues such as, well, this is unfair, I

1 may have to do this, speculation is simply not enough  
2 to -- to pertain to the making of the agreement, nor is  
3 an issue about an impossibly burdensome access to the  
4 arbitration.

5 JUSTICE SCALIA: Can you --

6 JUSTICE GINSBURG: Mr. Friedman, this  
7 contract is -- is unusual in that, as Judge Hall said,  
8 it was more employee-friendly than most. It had a  
9 clause -- it had a provision for back-end review with  
10 the court. The review -- at the end of the line, there  
11 was to be court review, and as the parties said, it  
12 should be just like review of a district court decision,  
13 a much -- much more focused review than would be in the  
14 case of an arbitration agreement.

15 Now, that clause comes out because of our  
16 decision in Hall. That leaves the -- the arbitration  
17 agreement in -- in an imbalance. There was court review  
18 assured at the back end. So why isn't it reasonable to  
19 say the parties contemplated vigorous court review; if  
20 it can't be had at the back end, it should be had at the  
21 front end?

22 MR. FRIEDMAN: Justice Ginsburg, there will  
23 be court review at the end pursuant to section 10. As a  
24 result of Hall Street, section 10 is now the exclusive  
25 basis on the tail end --

1 JUSTICE GINSBURG: But it was very limited  
2 review. But the parties to this agreement put in a  
3 clause that provided for the standard review, not the  
4 very limited review that the Arbitration Act calls for.

5 MR. FRIEDMAN: That's correct,  
6 Justice Ginsburg. But by operation of law and because  
7 of this Court's decision in Hall Street, now the parties  
8 will receive the section 10 review, much as they would  
9 in the First Options case.

10 JUSTICE SCALIA: Once again, has this  
11 argument been made here? I thought that the only basis  
12 was unconscionability. I suppose you could have made  
13 the argument that the contract is void because one of  
14 its essential provisions has been rendered unlawful and,  
15 therefore -- and is not severable, and, therefore, the  
16 whole contract fails. I suppose you could make that  
17 argument. That hasn't been made, has it?

18 MR. FRIEDMAN: Justice Scalia, that's  
19 absolutely correct. There has been no argument, in  
20 fact, at no time -- and it would have -- the proper  
21 place would have been the district court -- was any  
22 evidence ever put into the record --

23 JUSTICE GINSBURG: How could it be in the  
24 district court? We didn't decide Hall Street until  
25 after the district court was finished in this case.

1           MR. FRIEDMAN: But, Justice Ginsburg, at the  
2   district court no evidence of any sort attacking any  
3   provision. The only attacks here on the provisions are  
4   the arguments that were made by my colleague in the  
5   brief --

6           JUSTICE GINSBURG: I thought you were  
7   making, in answer to Justice Scalia, the question -- he  
8   said, well, they didn't raise it. They didn't raise  
9   that with this provision out, it was an essential  
10   provision, so the contract was void. They had no reason  
11   to make that in the district court because Hall Street  
12   was not yet decided.

13          MR. FRIEDMAN: Justice Ginsburg, my point  
14   simply is they put in no evidence of any sort attacking  
15   anything. We're simply --

16          JUSTICE SCALIA: Can they make it here now?  
17   Can they make -- I mean, even if they had -- you know,  
18   even if there was no reason to make it in the district  
19   court, is the law --

20          MR. FRIEDMAN: I -- I --

21          JUSTICE SCALIA: -- that since they didn't  
22   have an opportunity to make it in the district court,  
23   they can make it in the Supreme Court?

24          MR. FRIEDMAN: Justice Scalia, they could  
25   make that argument before the arbitrator, and the



1 arbitrator could make that decision. Under the clear  
2 and unmistakable delegation, that issue, like other  
3 issues, should be decided by the arbitrator.

4 Nobody is contesting -- at least certainly  
5 nobody contested prior to us getting to the Supreme  
6 Court -- both the district court and the Ninth Circuit  
7 held that the language was clear and unmistakable.  
8 There was never any contest to that issue until we got  
9 here. And because of the clear and unmistakable language  
10 and because the agreement does not implicate the making,  
11 we asked the court to enforce the terms of the agreement  
12 as written and pursuant to Bazzle and Howsam. In  
13 particular, in Bazzle the Court recognized that issues as  
14 to scope and issues as to validity can go to the  
15 arbitrator in the first instance.

16 Here, there can be no doubt -- and certainly  
17 there was no doubt at the district court level and Ninth  
18 Circuit -- that the parties clearly and unmistakably gave  
19 the arbitrator exclusive authority. And we're asking  
20 the Court to give effect to that language.

21 The -- the -- the primary purpose of the  
22 Federal Arbitration Act is to enforce arbitration  
23 agreements pursuant to their terms. Here, there's no  
24 real dispute about what the terms are. Under section 4,  
25 a limited inquiry, once we have satisfied section 4 the

1 court should proceed to send us to the arbitrator.

2 Nobody is arguing that Mr. Jackson can't  
3 make these challenges once he gets to arbitration. In  
4 fact, he certainly can. And the arbitrator will make  
5 that decision. And the arbitrator may decide that it is  
6 unconscionable, in which case he'll set it down. Or  
7 he may decide -- or he or she may decide that it's not  
8 unconscionable, or he or she may decide that certain  
9 terms are problematic and to sever those.

10 At this point, if there's no other  
11 questions, I'd like to reserve my remaining my time.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Mr. Silverberg.

14 ORAL ARGUMENT OF IAN E. SILVERBERG

15 ON BEHALF OF THE RESPONDENT

16 MR. SILVERBERG: Thank you,

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

18 The Petitioner would have the Court adopt a  
19 rule whereby agreements to arbitrate are presumed  
20 enforceable before their validity has been determined by  
21 a court under section 2 of the Federal Arbitration Act.  
22 They would have people like Mr. Jackson waive their  
23 right to go to court through the use of a clause  
24 delegating this judicial function to the arbitrator.

25 JUSTICE SOTOMAYOR: Could you describe for

1 us what is unconscionable about this contract? What is  
2 your claim of unconscionability? He says it's not  
3 arbitration per se; it's just certain of the provisions  
4 here; if you change the provisions, I'm happy with  
5 arbitration.

6 Is that your position?

7 MR. SILVERBERG: Yes, Your Honor, that --  
8 that what is unconscionable about this is it's unusually  
9 one-sided in that the issues that are most important to  
10 Mr. Jackson, such as his racial discrimination case, he  
11 is required to arbitrate, but those issues that might be  
12 most important to the Petitioner, such as trade secrets  
13 and unfair competition, they are not bound to arbitrate.  
14 So --

15 CHIEF JUSTICE ROBERTS: I would have thought  
16 the issue would be -- it's odd to say, I think, that if  
17 you have 10 provisions, some are unconscionable and  
18 some are not. The issue would be whether there is  
19 unconscionability in the making of the whole contract.  
20 In other words, it's the same question I asked your  
21 friend: Why isn't it all or nothing? If it was -- if  
22 there was no unconscionability in the making, then the  
23 arbitrator decides. If there was unconscionability in  
24 the making, then -- then the arbitrator doesn't decide  
25 anything. Questions 1 through 10, not simply, you know,

1 1, 8, and 9.

2 MR. SILVERBERG: If I understand Your  
3 Honor's question, the -- the threshold determination  
4 must first be made by the court under section 2 as to  
5 whether there is unconscionability either of the entire  
6 agreement or any of the provisions. It would then,  
7 assuming that were found, that some provisions were in  
8 fact unconscionable, it would be on State law to  
9 determine whether or not the entire agreement gets  
10 thrown out --

11 CHIEF JUSTICE ROBERTS: No, my point is that  
12 once you get past that gateway question of whether the  
13 formation of the contract was not unconscionable, then  
14 claims that particular provisions were unconscionable  
15 are by definition for the arbitrator to decide.

16 MR. SILVERBERG: No, we would disagree with  
17 that, and here's why, Your Honor, and I think this goes  
18 to something that Justice Sotomayor asked, which is it  
19 creates a very difficult rule to deal with. The  
20 Petitioners here, one, they have made a huge concession,  
21 we believe, in their reply brief by saying that if there's  
22 an illusory remedy, that that is a section of  
23 unconscionability that the court can hear and must hear.  
24 But all these other --

25 JUSTICE GINSBURG: Why is that -- why is

1     that a big concession, because I thought, as the First  
2     Circuit said, if argument is the -- the contract is  
3     illusory, that goes to the court, but here the only  
4     claim is unconscionability. That's a question of  
5     fairness. It doesn't go to the court.

6                 MR. SILVERBERG: The -- the reason it's a  
7     concession is because that's not their original position  
8     and that's not the question that they presented to this  
9     Court.

10                JUSTICE GINSBURG: But if they -- if they  
11     made that concession, so what, under the First Circuit's  
12     reading?

13                MR. SILVERBERG: The First Circuit, Your  
14     Honor, we believe did not interpret this correctly.  
15     They have, we believe, carved out a section of  
16     unconscionability law at the exclusion of all other  
17     unconscionability law.

18                We know that States and Federal courts have  
19     routinely applied State unconscionability law, and they  
20     would have a rule whereby all this jurisprudence of the  
21     States delineating unconscionability law would in  
22     essence be preempted.

23                JUSTICE SCALIA: Is that -- is that right?  
24     Is the arbitrator free to decide unconscionability in a  
25     vacuum without taking into account State law at all?

1 And doesn't he get reviewed afterwards by the State  
2 court on the basis of a much more lenient standard  
3 than -- than if the court decided it de novo. But can  
4 he really disregard State law regarding  
5 unconscionability?

6 MR. SILVERBERG: Well, the problem is, Your  
7 Honor, and if I understand Your Honor's question  
8 correctly, that determination must of course be made by  
9 the court, because the arbitrator doesn't have any  
10 authority to do anything until the requirements of  
11 section 2 are met. And I hope I'm understanding Your  
12 Honor's question.

13 JUSTICE SCALIA: No -- I mean, you -- I  
14 thought you were saying that if we allow this to go to  
15 the arbitrator, the arbitrator can simply disregard the  
16 question of unconscionability.

17 MR. SILVERBERG: That -- in essence, yes.

18 JUSTICE SCALIA: And that's not my  
19 understanding. My understanding is that he's -- he is  
20 obliged to take account of State law regarding  
21 unconscionability, but it's going to be his call, as it  
22 would be the district judge's call if this had gone to  
23 court, whether in fact this is unconscionable.  
24 Afterwards, there will be court review. And if he has  
25 totally disregarded all State law regarding

1 unconscionability, wouldn't -- wouldn't you have a basis  
2 to set aside the -- the arbitration?

3 MR. SILVERBERG: Respectfully, I -- I  
4 disagree with that, and here's why, Your Honor: The  
5 back-end review -- presumably it would be, I believe,  
6 under section 10(a)(4) that he exceeded his authority.  
7 And once the arbitrator is empanelled under the  
8 Federal -- under section 2, once he is authorized to  
9 make any decisions at all, including the issue that the  
10 Petitioner would have him decide of unconscionability  
11 and arbitrability, it would be impossible for anyone to  
12 say he has exceeded his authority.

13 JUSTICE SCALIA: That doesn't mean -- does  
14 that mean he can disregard -- let's assume the contract  
15 is a contract to maim. I mean, it -- you know, it's --  
16 it's like -- it's a Shylock contract, okay? He's going  
17 to be able to exact a pound of flesh. Now, there are  
18 State laws which invalidate contracts to maim. Do you  
19 think that the arbitrator can ignore that, and say,  
20 well, you know, I don't really think it's so bad; a  
21 pound of flesh sounds reasonable to me?

22 MR. SILVERBERG: I think the concern is,  
23 Your Honor, and it's hard to draw the line --

24 JUSTICE SCALIA: Can he ignore the State  
25 law?

1 MR. SILVERBERG: I think there's no  
2 adequate review if he chooses to without the court's  
3 review of --

4 JUSTICE SCALIA: Is that right? You don't  
5 think a State court would in the blink of an eye set  
6 aside an arbitration that allowed a -- a pound of flesh?

7 MR. SILVERBERG: Your Honor, I would hope  
8 they would, but I -- in reading the narrow review of  
9 section 9, 10, and 11, I don't think we have that  
10 guarantee.

11 JUSTICE SCALIA: I think you have a  
12 misunderstanding of the law, then, if that's what you  
13 believe. I -- I think there's no doubt what would  
14 happen in that case.

15 JUSTICE BREYER: What is -- what I'm not sure  
16 about what you are arguing now is my -- as I came into  
17 this, I thought there were three situations. Situation  
18 1 is common in labor arbitration. It's an arbitration  
19 agreement that says wages, hours, and working conditions  
20 disputes will be arbitrated, and we have a question  
21 about whether a particular dispute is or is not full  
22 within the definition.

23 MR. SILVERBERG: Right.

24 JUSTICE BREYER: As to that one, we assume  
25 that the parties intended the question of arbitrability



1 to be arbitrated; we assume it. Normally, that's the  
2 rule. It's the scope of the arbitration agreement.  
3 That's a little hard to distinguish, but sometimes  
4 that's not the argument. The argument could be: Well,  
5 there are four different provisions in the arbitration  
6 section, and we think one of them is void because it's,  
7 say, unconscionable, but the others are okay. Now, that  
8 one, I mean, normally, you could if it's clear enough  
9 say I want that one to go to arbitration.

10 And the third one is that you have a  
11 contract, and it's an arbitration contract, and it's on  
12 four separate pieces of paper, and what you're saying  
13 is, I was in Alaska, or the equivalent, and maybe  
14 unconscionability is the equivalent. On that one I'm  
15 with you.

16 I don't see how you can submit -- agree to  
17 submit that to the arbitrator, because there's no  
18 agreement, or at least no valid one, at least no valid  
19 one under State law.

20 But what are you arguing? That this is that  
21 case or this is the other case I just mentioned, that  
22 middle case where you have 10 provisions and you're  
23 saying that this one over here is unconscionable but  
24 that one isn't; and -- but I did sign a valid  
25 arbitration agreement. I agree with that. It's just that

1 certain provisions of it are invalid because they're  
2 unfair. What are you arguing in this case?

3 MR. SILVERBERG: That -- Your Honor, it  
4 would be the second one. That there are issues --

5 JUSTICE BREYER: Well, the second one -- I  
6 don't see how you get there, because if it's the second,  
7 one you concede that there is an arbitration agreement  
8 that's valid. And if you concede that there is a valid  
9 arbitration agreement between you and your client, and  
10 you're arguing over the scope of different provisions  
11 or whether certain provisions within it are valid or  
12 invalid, why can't you submit that to an arbitrator if  
13 it's clear enough?

14 MR. SILVERBERG: But we don't concede that,  
15 Your Honor. That's the whole point, is that the court  
16 must make that threshold determination.

17 JUSTICE BREYER: As to each provision? As  
18 to each bit of -- why?

19 MR. SILVERBERG: Because that's the mandate  
20 of section 2. The arbitrator derives his authority --

21 JUSTICE BREYER: But suppose you and your --  
22 your client -- rather, your client and the other side have  
23 absolutely agreed, clear as could be, under the  
24 arbitration agreement: We want arbitrated too whether  
25 the provision that these words are contained in is

1 unconscionable. Can't they agree to that?

2 MR. SILVERBERG: Your Honor, the parties are  
3 -- don't necessarily have to take every issue to court,  
4 but should a party challenge that issue as  
5 unconscionable, that door should remain open.

6 This case is not so much -- it is about our  
7 case here, but there's a bigger picture here.

8 JUSTICE BREYER: Okay. Let me say it more  
9 easily. We have agreement number one, four pages, and  
10 within it is a question of -- which just looks like this  
11 one. Agreement number two: The two parties agree that  
12 if any dispute should arise as to whether any words in  
13 agreement number one are unconscionable, they will go to  
14 the arbitrator. Agreement number two is concededly  
15 valid. Now do you want to say that agreement number  
16 one -- those words have to be decided by the court?

17 MR. SILVERBERG: Your Honor, it is our  
18 position that -- that the threshold determination as to  
19 the validity of the contract --

20 JUSTICE BREYER: Right, but if you're going  
21 to say yes --

22 MR. SILVERBERG: -- would go the court.

23 JUSTICE BREYER: -- then I think if you're going  
24 to say yes to that, then it's contrary to First Options, I think.  
25 I'm not sure, but I don't see why not.

1           MR. SILVERBERG: Well, Your Honor, I think  
2   that what Your Honor is describing is the first part of  
3   First Options that looked -- and that's what the  
4   Petitioner would like to rely on, is objective contract  
5   language. But then the Court adds the entire other  
6   section which says we don't presume that parties intend  
7   to arbitrate certain matters and -- because we're not  
8   yet at that scope -- but we want clear and unmistakable  
9   language, not just objective language in the contract.

10           And there's an important reason for that,  
11   because it's impossible to draw the line. You're  
12   carving out certain issues of unconscionability --

13           JUSTICE KENNEDY: After this --

14           MR. SILVERBERG: -- saying both --

15           JUSTICE KENNEDY: After this suit was filed  
16   and both parties are going up the steps to the court,  
17   could the attorneys and the parties stop and say let's  
18   arbitrate this issue of unconscionability and pick an  
19   arbitrator? Could they do that?

20           MR. SILVERBERG: They -- I think the answer  
21   there would be yes, but the door needs to be open in  
22   case there is a challenge, Your Honor. Certainly,  
23   nobody is --

24           JUSTICE KENNEDY: No, then -- then the --

25           MR. SILVERBERG: -- required to go to court.

1 JUSTICE KENNEDY: Then the employee loses.  
2 He says: Oh, you have to have an open door; this was --  
3 this was not properly before the arbitrator.

4 MR. SILVERBERG: I think if Your Honor is  
5 asking --

6 JUSTICE KENNEDY: Because, you see, if  
7 you say yes, that they can arbitrate this, then the  
8 question is why can't they do it when the contract's  
9 signed?

10 MR. SILVERBERG: Again, Your Honor --

11 JUSTICE KENNEDY: Let's assume that the  
12 answer to my question is yes, they can put that to an  
13 arbitrator. If that's so, how can you prevail in this  
14 case if the agreement clearly comprehends submission of  
15 this issue to the arbitrator?

16 MR. SILVERBERG: Well, we don't concede that  
17 it clearly does that. We -- what our position is --

18 JUSTICE KENNEDY: I'm -- I'm asking, assume  
19 you do?

20 MR. SILVERBERG: I don't think that gets us  
21 around the requirements of section 2, Your Honor, that  
22 says the court and the doors to the court must always  
23 remain open for that.

24 CHIEF JUSTICE ROBERTS: I thought your --

25 MR. SILVERBERG: I hope I'm understanding your

1 question.

2 JUSTICE GINSBURG: Mr. Silverberg, the  
3 section 2 on which you place much emphasis just says  
4 that agreements are enforceable save on such grounds as  
5 exist in law or equity for revocation of a contract.  
6 But the section 2 doesn't say any -- anything about who  
7 decides that question.

8 MR. SILVERBERG: That's true, Your Honor,  
9 the -- but the logical reading of that statute would  
10 indicate that these three elements -- a writing, in  
11 interstate commerce, and not revocable at law and  
12 equity -- would have to be met before the arbitrator has  
13 any authority to do anything.

14 And as Your Honor mentioned in the -- in the  
15 Doctor's Associates case, there are certain issues that  
16 are certainly involved, and unconscionability is one of  
17 those issues that can be presented to the court without  
18 violating section 2, as well as fraud and duress, I  
19 believe, were the other ones that the Court had -- had  
20 delineated in that case.

21 JUSTICE BREYER: I read your -- I promise  
22 you I'll go back to First Options, which I thought was  
23 of gem-like clarity --

24 (Laughter.)

25 JUSTICE BREYER: And I am apparently the

1     only one in the world --

2                   MR. SILVERBERG:   That's because it was well  
3     argued.

4                   JUSTICE BREYER:   -- the only one in the  
5     world who thinks that.   And I'll go back to --

6                   JUSTICE SCALIA:   You wrote that, didn't you?  
7     Didn't you write that opinion?

8                   (Laughter.)

9                   JUSTICE BREYER:   I'll go back to that and  
10    look at it.   But the -- the --

11                   (Laughter.)

12                   JUSTICE BREYER:   Looking at your response to  
13    their motion to arbitrate --

14                   MR. SILVERBERG:   Yes.

15                   JUSTICE BREYER:   -- it seemed to me you  
16    said here that -- that because of your -- your position,  
17    your client's position, that the whole thing is  
18    unconscionable.   You didn't say that?

19                   MR. SILVERBERG:   Well, we said that -- it  
20    was certainly my position that the entire agreement was  
21    unconscionable based on Nevada law --

22                   JUSTICE BREYER:   Yes.

23                   MR. SILVERBERG:   And that it was so  
24    incredibly one-sided, and also the limited discovery  
25    provisions, and also because, frankly, we are not

1 looking to treat this anything other than like we would  
2 ordinary contract law that also strikes one-sided  
3 provisions in -- for example, in Nevada, the Fick case,  
4 which would strike down a one-sided prenuptial  
5 agreement, or lease agreements that have one-sided  
6 attorney fee provisions are routinely struck down as  
7 one-sided. So their position --

8 JUSTICE KENNEDY: But which is the stronger  
9 case for arbitration? Case one, you attack the  
10 arbitration clause only, part of the arbitration  
11 contract only, as being unconscionable. Case two, you  
12 attack the whole agreement as being unconscionable. Do  
13 those both stand on the same footing, or is one a  
14 stronger case for submission to the court than the  
15 other?

16 MR. SILVERBERG: I think this Court has made  
17 clear in the severability cases that challenges to the  
18 contract as a whole would go to the arbitrator to  
19 decide. We have here, as Petitioner admits to --

20 JUSTICE KENNEDY: I find that somewhat  
21 paradoxical, but I -- I agree that that -- that that's  
22 the law.

23 MR. SILVERBERG: So the stronger one would  
24 be an -- as this case, which we believe is very  
25 strong, an attack --



1 JUSTICE KENNEDY: So if you do go to the  
2 State court, suppose the State court says: I can't  
3 really decide this question about the one clause unless  
4 I determine the conscionability or the unconscionability  
5 of the entire contract, and I now proceed to do that.

6 Do you have to wait and say: Stop, you  
7 can't do that?

8 MR. SILVERBERG: I think that's what  
9 sections 3 and 4 contemplate, is for -- and they have  
10 been in existence since the passage of the Act -- for  
11 parties to come in and make their case as to whether or  
12 not the FAA would apply or not apply.

13 JUSTICE KENNEDY: But suppose the State  
14 court judge says that he has to look at the whole  
15 contract. Do you say: Oh, I'm sorry to bother you; we  
16 have to go back to the arbitrator now?

17 MR. SILVERBERG: That's not the situation in  
18 this case, but assuming it were --

19 JUSTICE KENNEDY: What's your -- no, it's a  
20 hypothetical case.

21 MR. SILVERBERG: I understand.

22 JUSTICE KENNEDY: What would your position  
23 be in the hypothetical case, representing your client?

24 MR. SILVERBERG: Representing my client, who  
25 is Mr. Jackson, I would want the court to look at the

1 whole thing, but if I were in the Petitioner's shoes I  
2 think I would have an argument that, based on this  
3 Court's precedent --

4 JUSTICE KENNEDY: And what do you think the  
5 judge should decide as between those two possibilities?

6 MR. SILVERBERG: If it's an attack on the  
7 contract as a whole, it should go to the arbitrator. I  
8 think that's clear from many of the Court's cases;  
9 whereas, if the attack is to the arbitration clause  
10 itself, that is something for the court to decide and  
11 determine.

12 JUSTICE SOTOMAYOR: Counsel, I think I heard  
13 Justice Kennedy's question to be -- let's not confuse  
14 the contract as a whole. There's only one contract  
15 here.

16 MR. SILVERBERG: Correct.

17 JUSTICE SOTOMAYOR: It's an agreement to  
18 arbitrate.

19 MR. SILVERBERG: Yes, Your Honor.

20 JUSTICE SOTOMAYOR: So an attack on the --  
21 as I think Justice Breyer noted, you -- an argument that  
22 it's one-sided goes to the entire arbitration agreement.  
23 I don't want to arbitrate because that's not what I  
24 chose to do freely. Correct?

25 MR. SILVERBERG: Correct.

1 JUSTICE SOTOMAYOR: That, you say, is for  
2 the court.

3 MR. SILVERBERG: Yes, Your Honor.

4 JUSTICE SOTOMAYOR: The difference here is  
5 that there are provisions within how the arbitration is  
6 going to be held that, standing alone, you think are  
7 unconscionable, even though the agreement to arbitrate  
8 is not. Am I correct in understanding your allegation?

9 MR. SILVERBERG: No, Your Honor.  
10 Respectfully, it's our position that both are present.  
11 There are certain elements of the arbitration agreement  
12 that are unconscionable and, under Nevada law, which  
13 would render the entire arbitration agreement  
14 unconscionable.

15 JUSTICE SOTOMAYOR: You see, that's what I'm  
16 confused by, because when I first asked you this  
17 question, you said: I would be happy to arbitrate if  
18 the court struck the discovery provision and, I guess,  
19 the fees provision. Which answer are you giving me?

20 MR. SILVERBERG: I'm giving you the one I  
21 just gave you, I think, Your Honor, which is we've got  
22 both certain provisions that are unconscionable, that  
23 under Nevada law render the entire agreement  
24 unconscionable --

25 JUSTICE SOTOMAYOR: Okay. Let's assume --

1                   MR. SILVERBERG: -- and that's what the Court  
2   is to rely on.

3                   JUSTICE SOTOMAYOR: Okay. That -- now I  
4   understand that part of your argument. But let's assume  
5   that that wasn't Nevada law, that Nevada law would say  
6   severability works, and there is an agreement to arbitrate,  
7   and all we have to or could do is strike the unfair provisions.

8                   Let's assume that situation. Who decides  
9   whether to strike the unfair provisions?

10                  MR. SILVERBERG: That would be the court  
11   under our position, Your Honor, and that --

12                  CHIEF JUSTICE ROBERTS: No, that can't be  
13   right. The -- how can you say there's no problem  
14   agreeing to arbitrate, no imbalance in bargaining  
15   authority whatever, but then say, oh, but these  
16   procedures are unconscionable?

17                  It seems to me that the procedures are  
18   there, and the party, the employee, whatever, can look  
19   at those. And if he says, well, that's unconscionable,  
20   you don't sign the agreement as a whole. But once you  
21   are -- in for a penny, in for a pound. If you agree to  
22   arbitrate, then it's at least for the arbitrator to  
23   decide particular provisions, whether they're  
24   unconscionable.

25                  MR. SILVERBERG: Well --

1 CHIEF JUSTICE ROBERTS: I know you're  
2 arguing in the alternative. But the one argument that  
3 we get to pick out the provisions we don't like and say  
4 those are unconscionable, but the agreement as a whole  
5 is not -- that seems to me illogical.

6 MR. SILVERBERG: Your Honor, that is our  
7 position. I hope I am understanding your question. But  
8 this is a matter of State law as to which provisions  
9 would render the entire agreement unconscionable. And I  
10 think that body of unconscionability law is not so  
11 varied that we would have unwieldy results. I think  
12 State --

13 CHIEF JUSTICE ROBERTS: Well, it's a matter  
14 -- it may be a matter of State law, but the open  
15 question is who gets to decide it.

16 MR. SILVERBERG: Right, and our --

17 CHIEF JUSTICE ROBERTS: Arbitrators decide  
18 matters of State law all the time.

19 MR. SILVERBERG: Certainly, they do.  
20 Certainly, they do. But before they have that authority  
21 to even do that, the requirements, again, of section 2  
22 have to be met. And that is our position in this  
23 matter. That's --

24 JUSTICE SCALIA: Let's assume Nevada law  
25 says you cannot -- you cannot fire somebody for coming

1 in late to work any fewer than 10 times, all right?  
2 And an individual is fired. He goes to arbitration, or  
3 at least the company tries to take him to arbitration on  
4 it. And he says, no, because I was fired in violation  
5 of Nevada law.

6 Now, is it your position that that -- that  
7 that case would have to go immediately to court and  
8 could not submit to the arbitrator the issue of whether  
9 indeed he was fired for coming less than 10 times, and  
10 indeed whether if he was coming in less than 10 times,  
11 that would be an invalid basis for a dismissal?

12 MR. SILVERBERG: No, Your Honor, and here's  
13 why: I think Your Honor has described a situation  
14 similar to -- I believe that was the Green Tree  
15 situation, where there was an allegation that the entire  
16 contract was illegal, the usurious contract. But there  
17 was no question as to the making of the agreement to  
18 arbitrate.

19 So, in Your Honor's hypothetical, if there is  
20 no dispute as to the arbitration agreement being subject  
21 to a ground of revocation at law or at equity as  
22 defined in section 2, then I would -- I would concede  
23 that that was something that would go to the arbitrator,  
24 Your Honor.

25 JUSTICE SCALIA: Well, your -- your position

1 seems to be that unconscionability is the same as  
2 coercion in the making of the agreement. And I don't  
3 know that that's true.

4 MR. SILVERBERG: Well, Your Honor,  
5 respectfully, in Doctor's Associates, I think the Court  
6 spoke very clearly that fraud, duress, and  
7 unconscionability are there and are part of something  
8 that can be raised under section 2. And also the  
9 Court's hold in Prima Paint --

10 JUSTICE SCALIA: No, I don't care what we --

11 MR. SILVERBERG: -- where fraud --

12 JUSTICE SCALIA: I don't care what we said in  
13 dictum. It doesn't seem to me that unconscionability is  
14 the same as duress or the same as fraud --

15 MR. SILVERBERG: To -- oh, I'm sorry.

16 JUSTICE SCALIA: -- that you can -- you can  
17 be a stupid person who voluntarily signs an unconscionable  
18 contract. Now, the courts may protect you because you're  
19 stupid, but you haven't been coerced. Is there no  
20 distinction between unconscionability and coercion?

21 MR. SILVERBERG: Not under section 2, Your  
22 Honor. I think the -- the definition that the  
23 Petitioner would have this Court adopt, that narrow view  
24 of making -- again, something Justice Sotomayor  
25 brought up -- would create a rule where certain

1 unconscionability challenges went to the court --

2 JUSTICE SCALIA: Why is that?

3 MR. SILVERBERG: -- and other

4 unconscionability challenges didn't go to the court.

5 JUSTICE SCALIA: Why is that? I would say  
6 all unconscionability challenges, if you have an agreement  
7 that's as clear as this one, would go to the arbitrator.  
8 Which ones would have to go to the court?

9 MR. SILVERBERG: All of them should go to  
10 the court, Your Honor, based on this Court's holding  
11 both in Doctor's Associates and Prima Paint, in that  
12 both fraud in the inducement, like in Prima Paint, and  
13 unconscionability envision a situation where you've  
14 got a formed contract that people can choose to opt out  
15 of. I may be subject to a contract that was induced by  
16 fraud, but I may like the benefit of that bargain. So I  
17 may be able to go ahead with that.

18 And same with an unconscionability challenge.  
19 We've got an agreement that was made that -- that the  
20 innocent party can decide to opt out of. And I think  
21 that's very consistent with this Court's holding and  
22 with what the various State courts have been doing in  
23 reliance on those holdings.

24 JUSTICE BREYER: But not every contract. I  
25 mean, I'll take that argument. I'd like to know



1 about that argument. I'd like to know what really  
2 is the underlying, which I've never looked up.

3 What is the underlying rationale in contract  
4 law of setting aside contracts as unconscionable? Why  
5 do courts do it? What's the theory? I'd like to  
6 know that.

7 MR. SILVERBERG: My understanding is that  
8 it's so unfair that it couldn't really be said that a  
9 party assented to -- to that. And I think that's what --

10 JUSTICE BREYER: See, that's what I wonder,  
11 that last part -- is it that the basic theory is we want to  
12 protect a group of people by -- who voluntarily entered  
13 into contracts by giving them the right to opt out, or is  
14 is that we don't think that they really meant to do it?

15 MR. SILVERBERG: It's the latter, Your  
16 Honor. I think if they really chose to --

17 JUSTICE BREYER: Okay. On that  
18 question, or any other question, is, I would imagine,  
19 where we have agreement one, and the argument is maybe  
20 agreement one was unconscionable. And then we enter  
21 into agreement two, and the parties in agreement two  
22 agree to -- to arbitrate their unconscionability dispute  
23 in agreement one, and there's nothing wrong with  
24 agreement two, I would think that's then the question of  
25 unconscionability is for the arbitrator.

1 MR. SILVERBERG: If I understand your  
2 question --

3 JUSTICE BREYER: You said "all," and I just  
4 don't think you meant all. But maybe you did. That's  
5 why I asked the question.

6 MR. SILVERBERG: I -- I think that the safe  
7 thing to do is to keep the door open to people,  
8 especially in situations like this, where there is such  
9 unequal bargaining power, where people are presented  
10 with a nonnegotiable term of their employment --

11 JUSTICE STEVENS: May I ask this kind of  
12 elementary question?

13 MR. SILVERBERG: Yes, Your Honor.

14 JUSTICE STEVENS: Are there cases out there  
15 that hold that an agreement can be partially  
16 unconscionable, that it's unconscionable for some  
17 clauses but not in its -- in its entirety?

18 MR. SILVERBERG: Certainly. And I think  
19 that would be matter of State law, again, to determine  
20 when there --

21 JUSTICE STEVENS: But there are cases  
22 that -- that draw that distinction?

23 MR. SILVERBERG: I'm sorry.

24 JUSTICE STEVENS: There are cases drawing  
25 that very elementary distinction?

1                   MR. SILVERBERG: I believe so, Your Honor.  
2 I think in Nevada you would -- if we had maybe just one  
3 unconscionable clause, that the court might sever and  
4 send the rest to the -- and validate the rest of the  
5 arbitration agreement. But then when -- certain -- any  
6 number of clauses, depending on State law, would make  
7 the entire agreement to arbitrate unconscionable.

8                   CHIEF JUSTICE ROBERTS: Does it make a  
9 difference in response to Justice Stevens's hypothetical  
10 that there is a provision saying the arbitrator will  
11 decide the conscionability of all clauses? The  
12 arbitrator may decide that clauses 2 and 8 are  
13 unconscionable, but if there's an agreement and it's  
14 not unconscionable that the arbitrator will decide, then  
15 the arbitrator decides all of them, right?

16                  MR. SILVERBERG: If the agreement -- I think  
17 I understand your question. If the agreement to  
18 arbitrate itself is not --

19                  CHIEF JUSTICE ROBERTS: Right.

20                  MR. SILVERBERG: -- there's no  
21 unconscionability challenge to that, and there's no  
22 other fraud in the inducement or any other thing that  
23 the court has mentioned it would go to the broader view  
24 of making the grounds for revocation, if those grounds  
25 for revocation are not present, then I believe the

1 arbitrator would be empowered to make those decisions,  
2 Your Honor.

3 CHIEF JUSTICE ROBERTS: Can I ask you just a  
4 follow-up on Justice Breyer's hypothetical to you where  
5 he had the first agreement and then the issue to the  
6 second? You said you've got to leave the door open.  
7 The door open on the second agreement or on the first  
8 agreement?

9 MR. SILVERBERG: I think the door should be  
10 open on all the agreements, because until that door is  
11 open under section 2 -- as long as that door is open  
12 under section 2, then we don't have the concern about  
13 parties making the terms of arbitration so onerous or  
14 burdensome that they would not be able to even access the  
15 arbitral forum. And that's really a huge concern in --  
16 in not just in this case, but in the bigger picture.  
17 Courts must remain open to protect people.

18 I would venture to say that there are many  
19 people in this room who are subject to arbitration  
20 agreements, and they don't even know, through --

21 JUSTICE GINSBURG: Mr. Silverberg --

22 MR. SILVERBERG: Yes, Your Honor.

23 JUSTICE GINSBURG: -- on that, underlying  
24 your whole case I think is the notion that this is an  
25 adhesion contract; it's a take-it-or-leave-it contract,

1 very common in consumer, credit card agreements, in  
2 employment contracts, that one party has no say except  
3 to sign or not to sign. Are all those contracts subject  
4 to the unconscionability argument that you're making or  
5 only some of them? And if only some, which ones?

6 MR. SILVERBERG: I would suggest, Your  
7 Honor, that they all are subject to that. And then we  
8 look to State law to determine, whether, for example, in  
9 Nevada if you've great procedural unconscionability  
10 they have the sliding scale approach based on the D.R.  
11 Horton case, which we have briefed, where you would  
12 require less of a showing of substantive  
13 unconscionability.

14 JUSTICE SCALIA: Not much use signing an  
15 arbitration agreement then, not much use for the employer.  
16 He's going to end up in court anyway. Every one of them  
17 will be acknowledge as unconscionable. So what's the  
18 use?

19 MR. SILVERBERG: Well, Your Honor --

20 JUSTICE SCALIA: I mean, kiss good-bye to  
21 arbitration.

22 MR. SILVERBERG: Not at all, Your Honor.

23 JUSTICE SCALIA: No?

24 MR. SILVERBERG: That door's been open under  
25 section 3 and 4 since the inception of the Act. We are

1 advocating the status quo be maintained here, Your Honor,  
2 and there is no reason to suggest that there will be some  
3 rush to court on this. Courts are quite capable to do this  
4 in a summary fashion.

5           If a party comes before the court with a  
6 baseless unconscionability challenge, I would imagine  
7 not only will the court dispose of it quickly, but if an  
8 attorney makes a routine practice of bringing baseless  
9 motions to the court, he'll have his own issues to  
10 deal with. So, I don't -- I -- I disagree that there  
11 will be some floodgates or that this will in any way --  
12 to the contrary --

13           JUSTICE SCALIA: The amici certainly claim  
14 the contrary. The Chamber of Commerce claims that this  
15 is what's happening and that it has been a snowballing  
16 effect.

17           MR. SILVERBERG: We disagree with them and  
18 Your Honor, and I would cite that we have some of the  
19 most prestigious arbitrators in this country that have  
20 joined our position and recognized the courts' vital role  
21 in maintaining the fairness of the arbitration process  
22 so the public can trust it and so the weaker parties to  
23 these agreements can be protected, because should that  
24 disappear, there will be nothing to stop stronger  
25 parties from again sending Mr. Jackson, who lives in

1 Reno, to Minnesota to arbitrate his claim.

2 JUSTICE GINSBURG: Well, this --

3 JUSTICE SCALIA: There --

4 JUSTICE GINSBURG: This clause is not of that  
5 kind, and you've singled out three things that made it  
6 unconscionable. One, the fee provision, the splitting  
7 fees, that the court rejected. So the only two left is  
8 the one-sided aspect of it and the limited discovery.

9 It seemed to me that the limited discovery  
10 clause, that that was quite common to say we're not --  
11 we don't want to get involved in the massive discovery  
12 you can get in a -- in a civil proceeding. Is there  
13 something unusual about limiting discovery to documents?

14 MR. SILVERBERG: There -- there is something  
15 unusual. They've gone well beyond the AAA and limited  
16 discovery to one deposition and one expert, which in an  
17 employment case is very difficult.

18 Thank you, Your Honor.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. Friedman, you have 4 minutes remaining.

21 REBUTTAL ARGUMENT OF ROBERT T. FRIEDMAN

22 ON BEHALF OF THE PETITIONER

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

24 I'm hearing terms like "safe thing to do."

25 And in response to -- I think it was a question from

1 Justice Scalia, I'm hearing my colleague state that  
2 there is concern that the arbitrator is not going to  
3 apply State law.

4 This is merely distrust of arbitrators.  
5 This Court has rejected this bias that arbitrators cannot  
6 make these decisions. And, in fact, this Court and many  
7 others have sent very, very complicated issues to the  
8 arbitrator to decide. There is no reason to believe that  
9 an arbitrator, as well as a judge, cannot decide State  
10 law issues of unconscionability, and the arbitrator will  
11 have the discretion and the ability to either strike the  
12 entire arbitration agreement or strike certain clauses  
13 as he or she sees fit.

14 Furthermore, this type of speculation, this  
15 fear as to what the arbitrator may do, that was rejected  
16 in this Court's decisions in Vimar and PacifiCare, where  
17 the Court stated we are going to enforce this, and the  
18 arbitrator may do something wrong, may do something  
19 right, but at the tail end there will be an ability  
20 under section 10 to address it. There is no difference  
21 there.

22 Additionally, this -- this analysis of  
23 unconscionability -- I want to reiterate  
24 unconscionability is based on a policy decision that --  
25 that attacks an agreement that unquestionably has



1 already been made.

2 JUSTICE BREYER: All right. What is the  
3 one-sentence answer, one sentence, to the thing, this is  
4 a very interesting case, lots of stuff in it that we  
5 needn't reach because irrespective of everything else,  
6 they in their reply, the district court, and the court  
7 of appeals all said these whole four pages, the whole  
8 four pages were unconscionable, so none of it's  
9 enforceable, and all we have to decide is whether that's  
10 an issue for the court. And the answer to that  
11 being not an issue for the court is what, in a sentence or  
12 two?

13 MR. FRIEDMAN: Justice Breyer, I'm sorry.  
14 I'm going to ask you to --

15 JUSTICE BREYER: They said, look, there's a  
16 four-page document. They said this four-page document  
17 is unconscionable, the product of unconscionability, and,  
18 therefore, don't enforce it. That's their claim. That  
19 issue is at least is for the court, because there is no  
20 valid agreement here at all, if that's right.

21 MR. FRIEDMAN: No, Justice Breyer, the  
22 determination of unconscionability is for the  
23 arbitrator. The -- the limited role of the court goes  
24 only to the making, not to the issue of  
25 unconscionability. So the court --

1 JUSTICE SOTOMAYOR: The problem -- I -- I  
2 keep going back to my initial question to you, is you  
3 want to parse out what making is from unconscionability,  
4 and you want us to say, well, if it's too onerous a fee  
5 for arbitration, that goes to the making, because you're  
6 depriving the party of -- of an arbitration forum.  
7 If it's discovery, that doesn't go to depriving them  
8 of anything because the arbitrator could give them more  
9 discovery if he or she chose. Am I correct, this is  
10 your argument?

11 MR. FRIEDMAN: No, Justice Sotomayor, our  
12 argument about the onerous fee -- and it would have to  
13 be evidence put in by the party opposing counsel -- by  
14 the party opposing arbitration, that there was an actual  
15 barrier, an impossibly burdensome barrier. So it does not  
16 come under making; it would be under a -- a Randolph  
17 standard or under a First Options standard.

18 There's two areas that we agree are for the  
19 court. One is to determine whether or not there's an  
20 issue with the making of the agreement. The other one,  
21 if it's challenged, is to determine whether or not there  
22 is indeed access to arbitration.

23 The First Circuit in *Auwah* applied this test  
24 very neatly in a very reasonable manner and applied both  
25 First Options and Randolph, harmonized those cases, and

1 made a determination that unconscionability is for the  
2 arbitrator based on a clear and unmistakable delegation.  
3 But issues as to whether or not --

4 JUSTICE SCALIA: If there's no access to  
5 arbitration, there's no way that you can leave that  
6 issue to the arbitrator, is there?

7 MR. FRIEDMAN: Exactly, Justice Scalia.

8 JUSTICE SCALIA: Because you never get to  
9 the arbitrator.

10 MR. FRIEDMAN: Exactly, Justice Scalia. It  
11 fails the First Options test. There can't be an ability  
12 under First Options for the arbitrator to make a  
13 decision if there's no access to the arbitrator. So  
14 those are the two tests. In -- in this case, what I  
15 think I'm hearing is my colleague is saying that the  
16 arbitrator can decide nothing; the arbitrator should  
17 decide nothing, notwithstanding this Court's regular  
18 holdings sending very, very complicated matters to the  
19 arbitrator. In this case, the arbitrator can absolutely  
20 decide these issues of unconscionability as well as a  
21 judge can.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 Mr. Friedman, Mr. Silverberg.

25 The case is submitted.

1                   (Whereupon, at 11:03 a.m., the case in the  
2 above-entitled matter was submitted.)  
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