

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ATLANTIC MARINE CONSTRUCTION :

4 COMPANY, INC., :

5 Petitioner : No. 12-929

6 v. :

7 UNITED STATES DISTRICT COURT FOR :

8 THE WESTERN DISTRICT OF :

9 TEXAS, ET AL. :

10 - - - - - x

11 Washington, D.C.

12 Wednesday, October 9, 2013

13

14 The above-entitled matter came on for oral

15 argument before the Supreme Court of the United States

16 at 11:05 a.m.

17 APPEARANCES:

18 WILLIAM S. HASTINGS, ESQ., Dallas, Texas; on behalf of

19 Petitioner.

20 WILLIAM R. ALLENSWORTH, ESQ., Austin, Texas; on behalf

21 of Respondents.

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

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next this morning in Case 12-929, Atlantic Marine
5 Construction Company v. The United States District Court
6 for the Western District of Texas.

7 Mr. Hastings.

8 ORAL ARGUMENT OF WILLIAMS S. HASTINGS

9 ON BEHALF OF THE PETITIONER

10 MR. HASTINGS: Mr. Chief Justice, and may it
11 please the Court:

12 Forum selection clauses have been frequently
13 used in contracts of all types. They should be enforced
14 as written, and the enforcement of a contractual forum
15 selection clause should not just be left to convenience
16 discretionary balancing tests.

17 Rule 12(b)(3), in Section 1406 of the United
18 States Code, provide appropriate and effective means for
19 enforcing a contractual forum selection clause. The
20 language of those provisions is written broadly.
21 Congress used words like "wrong," and the rule uses the
22 word "improper," which have plain and natural meanings
23 that are broad and are sufficient to authorize district
24 courts to act to enforce the contractual clause.

25 JUSTICE KENNEDY: Is -- is it common in the

1 treatises or in the cases to say that a forum selection
2 clause is a venue provision? I thought venue was
3 something that Congress determined.

4 MR. HASTINGS: Your Honor, the cases do
5 discuss it as a venue provision. One example would be
6 this Court's decision in Stewart addressed a forum
7 selection clause in a 1404(a) transfer analysis, which
8 is clearly a venue analysis. In addition to that, with
9 the 2011 amendments to the United States Code, Congress
10 adopted a definition of venue. It's in Section 1390.
11 That definition says the place of litigation. I'm
12 paraphrasing it, but it's -- it's a pretty
13 straightforward definition.

14 The legislative history of Section 201 of
15 that Act acknowledges that the definition was intended
16 to make venue determinations easier and to make it
17 clearer that parties could waive or adjust these types
18 of provisions even by contract. The words "by
19 contract."

20 JUSTICE ALITO: In the Stewart case to which
21 you just referred, the court said, "The parties do not
22 dispute that the district court properly denied the
23 motion to dismiss the case for improper venue under
24 1406(a)" because Respondent apparently does business in
25 the Northern District of Alabama, which was not the

1 jurisdiction specified in the forum selection clause.

2 So what -- if we were to write an opinion in
3 your favor, what would you suggest we say about that?

4 MR. HASTINGS: Your Honor, I believe the
5 correct reading of that language is what the Second
6 Circuit has said in the trade comment decision, and
7 others have written on this, that Stewart and -- and the
8 text read by that footnote. That's footnote 8, I
9 believe. The text right there said, "The immediate
10 issue is how we address 1404(a)."

11 And the way the majority of the circuit
12 courts have read it is the issue in Stewart, this
13 procedural issue that we're here on today, which is
14 simply not presented to the Court.

15 And so the Court could very easily write a
16 decision that acknowledges Stewart still controls on a
17 1404(a) analysis, but acknowledged that, like the majority
18 of the circuits, that Stewart simply did not have to
19 address this problem.

20 JUSTICE ALITO: Well, that's -- that's true,
21 but it means that the entire discussion in Stewart is
22 beside the point. The Court wrote a decision about an
23 issue that really never should arise because the party
24 seeking -- as you see it, the party seeking to enforce
25 the forum selection clause should proceed under 1406.

1 So Stewart said, well, if -- if you proceed
2 under the wrong provision, this is how it should come
3 out. It makes the whole decision essentially
4 meaningless, doesn't it?

5 MR. HASTINGS: Justice Alito, I respectfully
6 disagree. And here's what the meaning of Stewart would
7 be, as -- as we understand it. First of all, under the
8 facts of Stewart, the same situation would arise, of
9 course, if a party waived their proper venue objection.
10 That may be a narrow line of cases, but that would still
11 apply in a case where a party doesn't assert the
12 contract at first.

13 But there's another place where Stewart
14 would still apply, when a case is filed in the proper
15 jurisdiction. Here, if this lawsuit had been filed in
16 Virginia, there would be a very limited place for
17 exceptional circumstances for a court to look at a
18 1404(a) analysis and determine if public interest
19 required something other than the contract clause.

20 JUSTICE ALITO: I don't see how that
21 would -- I don't see how that would work. You're --
22 this is the argument you made in your reply brief, that
23 if this -- if the case had been filed in the
24 jurisdiction specified in the forum selection clause,
25 that court could nevertheless proceed under 1404(a) and

1 transfer it back to the Western District of Texas, for
2 example. That's -- that's your argument, right?

3 MR. HASTINGS: In exceptional cases, Your
4 Honor.

5 JUSTICE ALITO: In exceptional cases. But
6 1404(a) says that it can -- a case can be transferred to
7 a district where it might have been brought. And your
8 argument under 1406 is that they couldn't be brought in
9 the Western District of Texas, that's a place where
10 there's a wrong venue.

11 MR. HASTINGS: And, Your Honor, the language
12 of the statutes, particularly, the language you were
13 just referring to about "might have been brought," needs
14 to be read in context of decisions from this Court. In
15 Van Dusen, this Court held that that language "might
16 have been brought" was a term of art.

17 The Court has never reached that conclusion
18 with respect to wrong or improper. And in Van Dusen,
19 the Court said the "might have been brought" language
20 was a term of art referring back to a congressionally
21 chosen venue under 1391.

22 And so, when this plays out under 1404(a),
23 the court -- if the case is in the proper venue and
24 we're on to the second issue of 1404(a), the proper
25 reading of the language would allow the court, truly

1 in exceptional circumstances, to follow -- follow the
2 language of the statute and send it to another place
3 where Congress said the case could have been.

4 And, again, this is really the second issue
5 in the case. We would emphasize that it's truly
6 exceptional cases where parties had contracted for a
7 forum, they've truly resolved the conveniences among the
8 parties among themselves.

9 JUSTICE KAGAN: Mr. Hastings, Section 1391
10 says the following, "Except as otherwise provided by
11 law" -- not by contract -- "by law, this section shall
12 govern" -- shall govern -- "the venue of all" -- "all
13 civil actions brought in district courts of the United
14 States." And then it goes on to specify certain rules
15 for where venue in a case can lie.

16 So if I'm looking at that, I'm thinking,
17 well, those rules apply. And they can't be reversed or
18 countermanded or whatever by -- by contract, by parties'
19 agreement, except to the extent that the contract can
20 figure centrally into the 1404 analysis. But it's not
21 appropriate in the 1406 analysis because -- you know,
22 the statute says what the statute says. Here is venue.

23 MR. HASTINGS: And, Your Honor, the language
24 of Section 1391, and the first part, I believe it's
25 1391(a) where it has the language of "shall govern in

1 federal courts," that's really no different than what
2 this Court said in Stewart of Federal law controls venue
3 in Federal courts.

4 But the issue that comes up is that venue --
5 venue is very important. Venue, even before the current
6 statutes were written, was recognized as being a
7 privilege for the litigants. They're to protect the
8 defendants. And even in Neirbo, in the 1939, so almost
9 a decade before the -- some of the current statutes were
10 written, this Court said venue was subject to
11 disposition by the parties.

12 JUSTICE GINSBURG: That's only -- what that
13 tells us is that venue is a highly waivable thing.
14 You can stand on your venue right, but you don't have
15 to.

16 My problem with your interpretation is you
17 are allowing a private agreement to make a venue
18 prescription that Congress enacted improper. Congress
19 said it was proper. It may be that it should not apply
20 in this case because the parties have consented to
21 something else, but it's not a wrong venue.

22 I mean, suppose the question had never come
23 up. The -- there wasn't a claim that this was a wrong
24 venue. The -- the case could have proceeded, and it
25 would have been a place of proper venue, right?

1 MR. HASTINGS: Your Honor, if there was no
2 objection raised, yes.

3 JUSTICE GINSBURG: But it doesn't become --
4 it's a place of proper venue. There may be a reason why
5 another venue is the one that should control in this
6 case, but you can't make a private agreement -- can't
7 say what Congress says is proper is improper.

8 MR. HASTINGS: And, Your Honor, in response
9 to that, first of all, the venue rights have always
10 been, like many Federal rights, waivable provisions.
11 And when a contract --

12 JUSTICE GINSBURG: That doesn't mean it's
13 improper. It means it's waivable.

14 MR. HASTINGS: And, Your Honor, the language
15 of the word "improper," improper is a broad term, and it
16 has a broad meaning. I'd like to focus on "improper"
17 for just a second. We have two different words,
18 "improper" and "wrong." But "improper" is used in
19 12(b) (3).

20 Congress didn't -- or -- and the courts did
21 not explain what that applies. In practice, that word
22 is used for many different contexts. It's used to
23 enforce forum selection clauses. The majority of the
24 circuit courts -- in fact, more circuits than have
25 weighed in on our favor use that language to enforce

1 foreign clauses and clauses requiring State court
2 forums. It's used in a very broad context in order to
3 enforce people's contract rights. It's even used in
4 arbitration context.

5 Although the FAA gives parties the right to
6 move under the FAA, many parties raise their complaints
7 under the 12(b)(3) because of the procedural impact of
8 12(b) motions, allowing parties not to have to answer
9 complicated Federal cases and get to proceed to
10 arbitration more quickly.

11 Giving the language a plain and natural
12 meaning allows the courts to, essentially, do justice
13 and allow to streamline and have efficient running of
14 cases and to enforce parties' rights in contracts.

15 JUSTICE KENNEDY: So what --

16 JUSTICE KAGAN: Mr. Hastings, I wonder what
17 you think of this analogy. Any party can waive a
18 personal jurisdiction defense, but would you say that
19 parties by contract can create personal jurisdiction in
20 a court in which it otherwise doesn't exist?

21 MR. HASTINGS: Your Honor, personal
22 jurisdiction is -- is also essentially a personal right
23 of the defendant. And so if the defendant is willing to
24 consent to personal jurisdiction, as often happens in
25 contracts --

1 JUSTICE KAGAN: Well, as I said, anybody can
2 waive it. Just like anybody can waive almost everything
3 in our -- in -- in the way the Federal rules work. But
4 do you think that parties can actually create personal
5 jurisdiction where it doesn't exist by law?

6 MR. HASTINGS: Focusing on personal
7 jurisdiction, not subject matter jurisdiction, yes,
8 because parties can consent and contract to waive the
9 personal jurisdiction objections. And, Your Honor, I
10 believe that has been recognized by many of the circuit
11 courts.

12 JUSTICE GINSBURG: Because consent is a
13 basis for personal jurisdiction.

14 MR. HASTINGS: Exactly, Your Honor. Just
15 like --

16 JUSTICE SCALIA: Could -- could I ask, what
17 difference would it make to you if -- if I thought the
18 venue here is proper, but I thought that there -- there
19 was no cause of action in this circuit, and the case --
20 as one of the amicus briefs proposed. What difference
21 would that make to you?

22 MR. HASTINGS: And, Justice Scalia, that
23 would -- Professor Sachs' brief certainly makes that
24 argument. I would begin by acknowledging that that rule
25 would be far better than leaving this to discretionary

1 balancing tests.

2 What difference it would make, it actually
3 would be very favorable to my client because this case
4 would have to be dismissed. We have concerns about that
5 rule. That's why we didn't push that as our argument.
6 The circuits have a three-way split.

7 JUSTICE GINSBURG: Isn't that -- that's a
8 problem with the argument. Both 1404(a) and 1406
9 provide for transfer. This Court has emphasized that
10 it's one Federal system, and within the Federal system,
11 the result shouldn't be dismissed, bring the case all
12 over again, pay a new filing fee; instead of that, just
13 transfer to the appropriate forum. And that's what
14 Professor Sachs' view leaves out because the result, as
15 you say, is -- it's only dismissal, no transfer.

16 MR. HASTINGS: And Justice Ginsburg, that is one
17 of the -- one of the concerns with the rule. But
18 Professor Sachs' approach does, first of all, start off
19 with a strong benefit of enforcing contracts. It's just
20 not as effective as 12(b)(3), because when we are
21 dealing with what's really a venue issue --

22 JUSTICE SCALIA: Excuse me. But what if
23 there is no personal jurisdiction, okay, and the -- and
24 the suit is dismissed because there is no personal
25 jurisdiction. Would a Federal court transfer it to --

1 to another court that has personal jurisdiction?

2 MR. HASTINGS: Your Honor, under the current
3 statutes, I believe the court would have the discretion
4 to transfer it based upon personal jurisdiction.

5 JUSTICE GINSBURG: Where -- it's -- 1404(a)
6 and 1406 deal with venue. They don't deal with personal
7 jurisdiction.

8 MR. HASTINGS: Your Honor, many -- many
9 courts have actually read 1406 to also allow for
10 addressing personal jurisdiction. There's a circuit
11 split on that issue.

12 JUSTICE KAGAN: Mr. Hastings, has 12(b)(6)
13 ever been used to your knowledge to deal with a case in
14 which the question is which court the plaintiff should
15 have brought the suit in, rather than whether the
16 plaintiff has a viable claim in any court?

17 MR. HASTINGS: Yes --

18 JUSTICE KAGAN: Because it seems to me a bit
19 of a category error. The 12(b)(6) is something -- it's
20 an on-the-merits determination about the viability of
21 your claim. It has res judicata effect, whereas this is
22 not. This is just a question of, did you bring the
23 thing in the right place and you should be allowed to
24 bring it someplace else.

25 MR. HASTINGS: Justice Kagan, the First

1 Circuit has been using the 12(b)(6) approach to address
2 whether the case is in the right --

3 JUSTICE KAGAN: No, I know the courts have been.
4 I'm saying, except for this kind of case, has a court
5 ever used 12(b)(6) to deal with a case of which court?

6 MR. HASTINGS: Outside of the forum
7 selection clause context --

8 JUSTICE KAGAN: Or to deal with anything
9 that's not an on-the-merits determination that precludes
10 a case in any court?

11 MR. HASTINGS: And, Your Honor, I'm not
12 aware of a court doing it outside of the context of the
13 forum selection clause issue, as the First Circuit --

14 JUSTICE BREYER: I have one question here.
15 It seems -- because I start out for reasons I won't go
16 into thinking, well, perhaps it doesn't matter, frankly;
17 you can get to the same result under any one of these
18 three approaches.

19 But then one thing Professor Sachs says does
20 bother me, that if we take your approach, then how do we
21 deal with the problem of removal? I mean, you can only
22 remove a case to a court which is in the district where
23 the person -- the plaintiff filed. Now, if there is a
24 forum selection clause, the defendant seems to me to be
25 stuck, because he can't go to a -- he can't go to a --

1 to another.

2 He can't go to another court. He can't go
3 to the court within the district because of the forum
4 selection clause, and he can't go into another court
5 because of 1441(a). So that argues to me that we ought
6 to either take the 1404 approach, or we ought to take
7 Professor Sachs' approach, unless you have an answer to
8 that.

9 MR. HASTINGS: Justice Breyer, I do have an
10 answer to the removal issue. And the answer starts in
11 Section 1390(c). And in 1390(c), Congress said --

12 CHIEF JUSTICE ROBERTS: Where can -- where
13 can I find that?

14 MR. HASTINGS: Chief Justice Roberts, it's
15 28 U.S. Code 1390(c).

16 CHIEF JUSTICE ROBERTS: It's not
17 conveniently set forth in any of the papers, right?

18 MR. HASTINGS: No, Your Honor, it's not. I
19 did not know that this issue was going to come up.

20 CHIEF JUSTICE ROBERTS: Fair enough.

21 MR. HASTINGS: With respect to 1390(c),
22 Congress said --

23 JUSTICE KENNEDY: 1390(c)?

24 MR. HASTINGS: Yes, sir. Yes, Your Honor.
25 Congress said that these rules, with the

1 exception of the transfer rules, do not apply in removal
2 cases. Congress has answered the question. Removal
3 procedure is governed by the statutes on removal, and,
4 yes, if you are in State court, there is one court you
5 can remove to. This rule and this issue doesn't change
6 that.

7 But if you -- if this case had been filed in
8 Texas State court, for example, and was removed to the
9 Western District, 1390(c) still says that the transfer
10 rules -- it doesn't say 1404(a); it says the transfer
11 rules, which would also pick up 1406 -- could still
12 apply to reallocate the venue for the lawsuit if there
13 was a contract clause or if it was --

14 JUSTICE BREYER: You didn't really
15 explain -- I'm sorry. I'll read it more carefully
16 later. But how -- it says you have to -- you have to
17 remove to the court or the district and division where
18 the place of action is pending, so if it's filed in
19 State court in Texas, you have to remove to the Texas
20 Federal court. Now, how do we get -- and you can't go
21 to the Texas Federal court, according to you, because of
22 the contract.

23 Okay. Now, how -- now, you explain how --
24 how this provision over 1390(c) gets around that?

25 MR. HASTINGS: And, Justice Breyer, I would

1 respectfully disagree about whether you can get to the
2 Texas court.

3 JUSTICE BREYER: Well, you -- in other
4 words, you can remove to the Texas court, even though it
5 says you can remove -- you can remove to the district
6 court despite the contract.

7 MR. HASTINGS: Yes, Justice Breyer,
8 because --

9 JUSTICE BREYER: Despite the contract.

10 MR. HASTINGS: Because of the specific
11 Federal statutes allowing for removal. They tell
12 specifically where the removal must go, and so we're not
13 suggesting that the court would have to --

14 JUSTICE BREYER: So what the court should
15 say in Texas is, we have a contract which says you have
16 to go to Virginia, but because of 1390(a) we forget
17 about the contract and we remove it here.

18 MR. HASTINGS: No --

19 JUSTICE BREYER: That's what you're saying
20 Texas should say.

21 MR. HASTINGS: No, Your Honor.

22 JUSTICE BREYER: No?

23 MR. HASTINGS: What I'm saying is the State
24 district -- if the parties were in the State district
25 court and remove it to the Federal district court, under

1 the statutes, under 1390 -- well, first of all, that
2 was -- that's what the removal statutes require.

3 JUSTICE BREYER: Yes.

4 MR. HASTINGS: 1390(c), which say the
5 transfer rules still apply, the Texas district court, if
6 we had our contract, should have said, now that you've
7 removed this to Federal court, we must transfer this
8 case to Virginia because the transfer rules still apply.

9 JUSTICE BREYER: Now, what about -- suppose
10 the plaintiff says, Please dismiss this immediately
11 because of 1406 or -- you know, because 1406 says you
12 have to dismiss it; venue isn't proper here.

13 MR. HASTINGS: And, Your Honor, under that
14 circumstance, if it was a contract requiring a State
15 court forum -- I think that's what I understand the
16 question to be.

17 JUSTICE BREYER: No, no. The contract says
18 you go to Virginia.

19 MR. HASTINGS: Okay.

20 JUSTICE BREYER: They filed it in Texas
21 State court. You tried to remove it to Texas Federal
22 court.

23 MR. HASTINGS: And, Your Honor --

24 JUSTICE BREYER: And they say, I'm very
25 sorry. The contract that he loves says we can't remove

1 it to Texas Federal court.

2 MR. HASTINGS: And, Your Honor, the contract
3 would not prevent the removal, but once the case was
4 removed the contract would control where the case --
5 where the case would be allocated.

6 JUSTICE KENNEDY: Can I ask --

7 JUSTICE ALITO: May I ask about -- just go
8 ahead.

9 JUSTICE KENNEDY: May I? In a forum non
10 conveniens motion, I say, oh, the witnesses are some
11 places, what is the statutory and/or Federal Rules of
12 Civil Procedure basis for forum non conveniens?

13 MR. HASTINGS: Justice Kennedy, that's an
14 excellent question because the courts, when they usually
15 rule on forum non conveniens, do not specify that.
16 There's not a Federal --

17 JUSTICE KENNEDY: You just cite Gulf Oil,
18 and that's it?

19 MR. HASTINGS: In many times, yes, but a lot
20 of times, parties do go ahead and cite 12(b)(3). That's
21 often done by parties in litigation.

22 JUSTICE GINSBURG: That's if it's -- if it's
23 a State forum or foreign forum, but 1404(a) is a
24 codification of the forum non conveniens doctrine?

25 MR. HASTINGS: For the Federal courts, yes,

1 Your Honor.

2 JUSTICE ALITO: Can I ask you this about the
3 Professor Sachs' argument? Doesn't it lead to the
4 consequence -- doesn't it show that -- wouldn't it mean
5 that Justice Scalia's dissent was correct in Stewart and
6 the majority was wrong in Stewart?

7 Because if this is -- if this is
8 contractual -- suppose Ricoh, in that case, had moved --
9 had adopted -- had taken the approach that Professor
10 Sachs has recommended and moved for summary judgment - moved to
11 12(b)(6) or summary judgment; that would be a contract
12 issue. It would be governed by Alabama law. Alabama
13 law says the forum selection clause is no good.

14 MR. HASTINGS: And, Justice Alito, we do
15 think there is some tension between Professor Sachs'
16 position and the Stewart decision because, if Professor
17 Sachs is correct and the First Circuit's correct, there
18 really would be no room for a 1404 balancing issue. The
19 issue, I believe, that you are asking about --

20 JUSTICE SCALIA: But why is that? Why
21 wouldn't 1404(a) continue to apply?

22 MR. HASTINGS: Justice Scalia, if the
23 contract -- if the contract elevated this to an issue on
24 the merits, is essentially what 12(b)(6) does, then it
25 becomes an issue not just about venue; it becomes an

1 issue about merits. And so a venue allocation provision
2 wouldn't change the fact that if the case was in the
3 wrong forum --

4 JUSTICE SCALIA: If -- but it depends
5 upon -- upon the defendant. If he chooses to go the
6 1404(a) route, he could go that way, couldn't he?

7 MR. HASTINGS: Well, Your Honor --

8 JUSTICE SCALIA: He wouldn't have to move
9 under 12(b)(6), would he?

10 MR. HASTINGS: He wouldn't have to move
11 under 12(b)(6), but --

12 JUSTICE SCALIA: So it -- so it wouldn't
13 necessarily overrule Stewart.

14 MR. HASTINGS: But there's a potential
15 problem here, and this is one of the practical issues
16 with Professor Sachs' issue -- approach. If it's an
17 issue on the merits, it doesn't have to be raised right
18 at the beginning of the case.

19 A party could certainly move to transfer and
20 do a lot of other things, but they could raise that
21 issue as a defense on the merits of the lawsuit and have
22 it resolved at trial after the entire proceeding had
23 proceeded in a forum other than where the contract was
24 required.

25 JUSTICE GINSBURG: I don't follow that. If

1 it's an affirmative defense, you have to raise it or you
2 lose it. You can't hold back an affirmative defense,
3 and, in the middle of the trial, say, Oh, there's an
4 affirmative defense here. (8)(c) requires you to
5 state it.

6 MR. HASTINGS: And, Justice Ginsburg, it
7 would certainly have to be pleaded. And certainly,
8 there is opportunity -- you know, leave is freely
9 granted in cases unless -- you know, other circumstances
10 arise. It's possible to plead it down the line. But
11 most importantly, it's when do you get a ruling on that
12 issue? And that's the problem.

13 JUSTICE BREYER: Well, what is the problem
14 with this? You admit that if he goes to Virginia --
15 well, he files his suit in Virginia. All right. Then
16 he says, judge, everything's in Texas, please remove
17 under 1404(a) -- you know, go -- send it down to Texas.
18 And you agree that -- that in an unusual case, you say,
19 because you give a lot of weight to the contract, he
20 could win and go to Texas, right?

21 MR. HASTINGS: That's our position, yes.

22 JUSTICE BREYER: That's your position, fine.
23 If that's your position, what conceivable difference
24 does it make if he goes to Texas in the first place, and
25 then you say, remove it to Virginia? I mean, it should

1 work out the same way. It should work out that the
2 balancing under 1404 -- you know, it gives you the --
3 the factors should be the same, shouldn't they?

4 MR. HASTINGS: Your Honor, the way this
5 would work out is if -- focusing on the 1404(a) issue,
6 the real issue gets down to where does the lawsuit need
7 to be filed, what rules are going to be in place, and if
8 a party can just file in Texas because they want -- they
9 want to try to move it there for convenience, they can
10 just file in Texas, what they're doing is they're
11 requiring a party who just wants to live --

12 JUSTICE BREYER: It's a terrible thing. You
13 have to say 1404(a), and the other case he has to say
14 1404(a) and it -- I mean, maybe it makes some tremendous
15 practical difference.

16 But if it makes not much difference, I have
17 three routes that seem to me all should work out the
18 same way, and in favor of their route is the absolute
19 language that Justice Kagan pointed out before, plus the
20 footnote. Okay?

21 So I'm thinking, hey, this doesn't make --
22 it's important to have a rule. It's important to have
23 one clear approach. But as between the three, it
24 shouldn't matter, and they should all reach the same
25 conclusions. So let's go with the language of Stewart.

1 All right. What about -- now, what's the answer to
2 that?

3 MR. HASTINGS: Justice Breyer, first of all,
4 I would agree with you that under this case, all three
5 routes should have lead -- led to the exact same
6 conclusion. That's -- that is correct under this case,
7 but that may not be in all cases. Why it matters is
8 that parties should be forced to honor their contracts.

9 And so if a party honors its contract and
10 there's a very high standard, such as the exceptional
11 circumstances standard for receiving a transfer,
12 their -- parties who are following their contract, it's
13 unlikely you're going to have much litigation over
14 transfers.

15 Whereas if a party can say I can try my shot
16 at a home court forum, file in violation of the contract
17 and then make the other party raise this issue and have
18 to litigate venue, we're going to have a tremendous
19 litigation about venue. That's the problem.

20 JUSTICE SOTOMAYOR: The law travels with --
21 the law of the transferring State travels to the
22 transferred State. So they've undone -- they're taking
23 Texas law, if you go under 1404, to Virginia.

24 MR. HASTINGS: And that would be a problem
25 in many cases, Your Honor.

1 JUSTICE SOTOMAYOR: And that would defeat
2 the purpose of the venue selection to start with.
3 That's part of your argument?

4 JUSTICE GINSBURG: That would be taken care
5 of simply by saying Van Dusen v. Barrack does not apply
6 when a party is acting in violation of a contractual
7 provision. Van Dusen against Barrack was intended to
8 give the plaintiff plaintiff's choice of initial forum.
9 If plaintiff chooses a forum in violation of the
10 contract, there's no reason why Van Dusen should apply.

11 MR. HASTINGS: And, Justice Ginsburg,
12 that -- that points out that if the Court were to not
13 just strictly enforce the contracts, it raises many new
14 issues that this Court has not yet had to address.

15 I'd like to reserve my time.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 Mr. Allensworth?

18 ORAL ARGUMENT OF WILLIAM R. ALLENSWORTH

19 ON BEHALF OF THE RESPONDENT

20 MR. ALLENSWORTH: Mr. Chief Justice, may it
21 please the Court:

22 We brought this \$160,000 construction case
23 in the Western District of Texas, which is where we
24 performed our work, where the project's located, where
25 all the witnesses reside, and where virtually all of the

1 evidence is located.

2 JUSTICE KAGAN: But, Mr. Allensworth, where
3 you agreed not to bring it.

4 MR. ALLENSWORTH: Yes.

5 JUSTICE KAGAN: So I'm going back to what
6 Justice Breyer says. Let's suppose you're right about
7 1404, and I think you have some pretty good arguments.
8 1404, it seems to me, shouldn't affect this case in the
9 sense that you should have -- this was a negotiated
10 contract.

11 You got something for the fact that you
12 accepted inconvenience when you brought a suit. And
13 under 1404, the court is perfectly entitled -- the court
14 has to take that into account, that this was a
15 negotiated contract, that you accepted in convenience,
16 and that you got something for your -- for your
17 acceptance of inconvenience. The end. You have to live
18 with your contract.

19 MR. ALLENSWORTH: No, Your Honor. We have a
20 contract, and we are having to live with it in the sense
21 that we're up here now 15 months after the district
22 court ruled that we were supposed to -- we should --
23 15 months after the district court denied the motion to
24 transfer.

25 What we -- and we did -- and those are

1 indeed the terms of our contract. However, the -- we
2 felt that any court following Stewart, and 1404 would
3 weigh the interests of justice in the decision whether
4 to grant the transfer or not, and indeed, that's exactly
5 what the district court found.

6 JUSTICE ALITO: Well, the interests -- the
7 interests of justice that the district court weighed
8 almost all boiled down to the interests of your client,
9 the inconvenience of witnesses. Well, Atlantic Marine,
10 to the extent we're talking about their witnesses,
11 they're not concerned about the inconvenience of having
12 their witnesses go to -- to Norfolk, but your
13 witnesses -- the other witnesses are your witnesses. So
14 that's a factor that goes to your convenience.
15 Compulsory process to produce witnesses, same thing.

16 So what were the public interests that --
17 what were the interests that were weighed here that are
18 not the interests of J-Crew?

19 MR. ALLENSWORTH: If I might, Your Honor,
20 first off, the district court didn't give any shrift to
21 our witness. He was concerned with the nonparty
22 witnesses who were not a party to this --

23 JUSTICE ALITO: Well, if they're not your
24 witnesses, then they're -- they're Atlantic Marine's
25 witnesses. So why should that be -- why should the

1 inconvenience of Atlantic Marine's witnesses be a factor
2 that weighs against Atlantic Marine's position that the
3 case should be tried in Norfolk?

4 MR. ALLENSWORTH: They were neither Atlantic
5 Marine's witnesses, nor our witnesses. They were
6 nonparty witnesses, and the issue that Judge
7 Higginbotham addressed in the Fifth Circuit --

8 JUSTICE SCALIA: Just volunteer witnesses?
9 Are they just going to walk in the courtroom and say,
10 I'd -- I'd like to testify?

11 (Laughter.)

12 MR. ALLENSWORTH: Exactly.

13 JUSTICE SCALIA: Surely, they're one side's
14 or the other's, aren't they?

15 MR. ALLENSWORTH: Your Honor --

16 JUSTICE SCALIA: What kind of -- what kind
17 of proceedings do they have in there?

18 (Laughter.)

19 MR. ALLENSWORTH: Your Honor, our point is
20 that, if it's in Texas, they can get in their pickup and
21 drive to the courthouse and testify. And if this case
22 is moved to Virginia, those witnesses essentially are
23 unavailable to us.

24 JUSTICE ALITO: Who -- who is going to call
25 these witnesses, you or Atlantic Marine?

1 MR. ALLENSWORTH: We'd be the ones calling
2 them.

3 JUSTICE ALITO: You do, so they're your
4 witnesses. The fact that they don't work for you is --
5 is immaterial here. So let's say they're out of the
6 picture. Now, what else -- what's left? What other
7 public interests are involved?

8 MR. ALLENSWORTH: The law of Texas, which we
9 think applies to this case, with which the district
10 court --

11 JUSTICE ALITO: Is -- Texas contract law is
12 so arcane that the judges in the Eastern District of
13 Virginia can't figure it out? Is that right?

14 MR. ALLENSWORTH: I wouldn't suggest that,
15 Your Honor.

16 JUSTICE ALITO: Oh, okay.

17 (Laughter.)

18 JUSTICE BREYER: All right. So why -- why
19 then couldn't you go to Virginia with all these factors?
20 I mean, maybe the jury has to take 42 visits to the
21 bottom of an oil well shaft. I don't know. I mean,
22 there could be something that would weigh in your favor.
23 I don't know the case. So why not go to Virginia and
24 then file a 1404 motion?

25 And it should reach the same result, whether

1 you -- you go to Texas and ask to stay there or whether
2 you go to Virginia under 1404(a) -- you win this case,
3 let's say -- or whether you go to Virginia. It should
4 get to the same place, shouldn't it?

5 MR. ALLENSWORTH: Your Honor, in some ways,
6 that's exactly what we're worried about. The same place
7 is 15 months after the court's ruled on the transfer
8 motion.

9 JUSTICE BREYER: So it's actually your
10 expense because you would have to go to Virginia and you
11 would have to file the motion. Maybe you can do it by
12 mail or you'd have to -- but I don't know.

13 MR. ALLENSWORTH: We filed a motion. If we
14 filed -- if we filed this lawsuit in Virginia and filed
15 it simultaneously with a 1404 motion --

16 JUSTICE BREYER: Yes.

17 MR. ALLENSWORTH: -- by their lights --

18 JUSTICE BREYER: Yes.

19 MR. ALLENSWORTH: -- the court, as I think
20 one of the Justices pointed out, couldn't transfer it
21 back to Texas anyway because, by their lights, venue is
22 improper anywhere except Virginia.

23 JUSTICE BREYER: No, no. They are not
24 saying -- they said that you could make the 1404 motion
25 in Virginia, and they think it would only be granted in

1 an exceptional case, but that's their opinion in that,
2 and so it should come to the same conclusion. They
3 aren't barring you from that on their view.

4 But my thought is that, if all these come to
5 the same result in the end and you just need one ruling,
6 we have something pointing on their side -- your side,
7 which is the Stewart footnote and the language of the --
8 you know, the absolute language of the venue statutes,
9 and you have something pointing in their side, which is,
10 if we count by numbers, five circuits are in their favor
11 and only three in yours.

12 All right. Help me.

13 MR. ALLENSWORTH: If there wasn't -- if
14 there hadn't been a forum selection clause in the
15 contract and we'd filed suit in Texas, it's
16 inconceivable that they could -- they could have
17 successfully moved the case to Virginia. The only thing
18 going in favor of this case going to Virginia is that
19 forum selection clause.

20 CHIEF JUSTICE ROBERTS: Well, that's kind of
21 a big thing, isn't it? I mean, that's what the whole --
22 (Laughter.)

23 MR. ALLENSWORTH: It's a significant factor.

24 CHIEF JUSTICE ROBERTS: It's a significant
25 factor. And -- and the problem, the difference, all

1 things don't lead to the same place. 1404 says to the
2 district court, look at a hodge-podge of things,
3 including the interest of justice, and -- and figure it
4 out and -- you know, maybe they will give the contract
5 some weight or maybe they won't, and if they do, it's
6 not clear how you weigh the contract against the
7 interest of justice. It gives a broad discretion. It
8 says they may transfer.

9 1406 is an entirely different animal. It
10 says you shall dismiss or -- or transfer. It's sort of
11 a -- you know, you have the safety valve to transfer,
12 and I don't know why you -- you so cavalierly dismiss,
13 oh, it's in the contract, of course, but we've got more
14 witnesses.

15 MR. ALLENSWORTH: It is in the -- Your
16 Honor, it is in the contract. Because it's in the
17 contract, we didn't get the deference that otherwise
18 plaintiff would get on selection of venue. We had --

19 CHIEF JUSTICE ROBERTS: Well, that couldn't
20 have come as a surprise.

21 MR. ALLENSWORTH: No, sir. And we
22 haven't -- we haven't attacked the clause on Bremen
23 standards. We haven't claimed it was induced by fraud
24 or that it was overreaching. We accept that. The
25 question that we've got is whether the -- whether the

1 Federal judiciary has to accept that contract clause as
2 guiding their decision --

3 JUSTICE KAGAN: Well, it does in this way.

4 JUSTICE ALITO: Well, if 1404 -- if the
5 court --

6 JUSTICE KAGAN: It does in this way. 1404,
7 as Justice Ginsburg said, is a codification of forum non
8 conveniens law, which is a balancing of private and
9 public interests. It seems to me what Justice Alito
10 said was absolutely right. You have given up the
11 ability to claim private interests here by virtue of
12 your choice to sign that contract.

13 The only thing that could weigh in the
14 balance against that is if there is some -- something
15 that has nothing to do with your convenience, but is
16 instead a feature of -- of -- something about why it's
17 important to the judicial system, to the public
18 interest, about keeping the trial in one place.

19 And as Justice Alito suggested, you have not
20 been able to point to anything, nor would there be
21 anything to point to, in most cases involving forum
22 selection clauses.

23 MR. ALLENSWORTH: In most cases, there
24 wouldn't be, and that's why in most cases the clauses
25 are enforced, and that's why I don't think you have seen

1 one of these for 25 years.

2 The reason that we've got -- that we think
3 our case is somewhat unique is that it involves a
4 construction project in the district in which we filed
5 suit. All of the witnesses are there. Virtually all of
6 the physical evidence is there. It's subject, if we
7 stay in Texas, to Texas law.

8 And for those reasons, if the case is going
9 to get sent to Virginia, the systemic integrity of the
10 system, I think, is put in play.

11 CHIEF JUSTICE ROBERTS: No, but the reason
12 for these clauses -- the enforceability of these clauses
13 is critically important to a lot of modern commerce.

14 If you -- I don't know what the details are
15 here, but a lot of times your company -- and they are
16 doing business now all across the country, and you say,
17 I don't want to do business all across the country if
18 I'm going to get dragged into different courts, who
19 knows where, with different -- where the juries are
20 different, I want to do business around the country, so
21 long as, if I am going to be sued, it's right here. So
22 I'm only going to do business with people who are
23 willing to say, if I have a problem, I will sue you
24 right here.

25 That's -- that's critically important to

1 modern -- modern commerce. And the idea, well, you're
2 going to let a court say, well, but there are a few more
3 witnesses here -- you know, it's convenient to them and
4 all that, that -- that seems to be throwing a
5 significant wrench into the process.

6 MR. ALLENSWORTH: Your Honor, I -- I don't
7 view it as a wrench, as opposed to an opportunity or
8 mandate from Congress to the -- to the Federal courts to
9 exercise some discretion in deciding whether to enforce
10 these clauses or not. Stewart v. Ricoh --

11 JUSTICE SOTOMAYOR: But your -- your
12 adversary is not taking that discretion away. It's
13 saying -- your adversary, I understand, is conceding
14 that Virginia has the ability to apply 1404 in it's
15 judgment, but you should honor the contract.

16 I have one fundamental problem, which is
17 slightly different. Under Bremen and Carnival, if the
18 forum selected was arbitration or a State court, then
19 the court has no 1404 power. It must transfer to those
20 venues.

21 If we accept 1404 as applying, then we're
22 disfavoring commercial parties from picking Federal
23 courts because they're going to have to accept that a
24 non-selected venue will have the power to make the
25 decision whether to transfer or not.

1 That seems to me to invite -- there may be
2 people who think that's a good thing, get cases out of
3 the Federal court, even if they are international
4 commercial cases. But isn't that what you are inviting?

5 MR. ALLENSWORTH: Your Honor, I would say
6 that's a possibility. I would say that, on the other
7 hand, that the arbitration example that you brought up,
8 that is governed by a separate statute anyway. So
9 the -- the Federal Arbitration Act is going to govern
10 whether that --

11 JUSTICE SOTOMAYOR: Well --

12 MR. ALLENSWORTH: -- whether the arbitration
13 clause ought to be enforced or not.

14 JUSTICE GINSBURG: The -- the clause here
15 allowed suit in -- in State or Federal court. Suppose
16 the clause -- the forum selection clause had just said "all
17 disputes shall be litigated in the Circuit Court for the
18 City of Norfolk." It doesn't say anything about the
19 Eastern District of Virginia. What would be the result
20 then?

21 MR. ALLENSWORTH: The Court would have to
22 dismiss our case.

23 JUSTICE GINSBURG: And equally --

24 MR. ALLENSWORTH: Because he couldn't -- he
25 couldn't transfer it to -- he can't force that into a

1 Virginia circuit.

2 JUSTICE GINSBURG: And the same thing if --
3 if the choice was of an arbitral forum, then you
4 recognize in those two cases the result would have to be
5 dismissal?

6 MR. ALLENSWORTH: Yes, Your Honor.

7 JUSTICE ALITO: And what would be the
8 authority for dismissing the case if it had specified
9 the State court?

10 MR. ALLENSWORTH: I think it would be the
11 same one as in Bremen, which didn't -- in The Bremen,
12 which didn't mention court --

13 JUSTICE KAGAN: No. Bremen is an admiralty
14 case. Why won't it just be a forum non conveniens?

15 MR. ALLENSWORTH: It -- it would be, and --
16 I've forgotten which Justice raised the question about
17 this. 1404(a) is a codification of forum non
18 conveniens. In the absence of that, the case would just
19 be dismissed.

20 JUSTICE KAGAN: Yes. I mean, 1404, it
21 says that if it's says -- if the contract clause
22 specifies a Federal court, it's a 1404 motion. If it
23 specifies a State court, it's a forum non conveniens
24 motion.

25 MR. ALLENSWORTH: With the same result -- I

1 would say the same result. Dismissal would be --

2 JUSTICE BREYER: That argues, then, it might
3 be slightly against you.

4 MR. ALLENSWORTH: I'm sorry?

5 JUSTICE BREYER: The -- if, in fact, you
6 specify a State court, if, in fact, you specify a
7 foreign court, if, in fact, you specify arbitration, you
8 agree, in those instances, you are going to use forum
9 non conveniens or you are going to use 1406. But you
10 are saying where you specify a court in a different
11 State, namely a Federal court in a different State,
12 there you use 1404.

13 JUSTICE KAGAN: Well, it's not 1406. It's
14 just forum non conveniens, which is --

15 JUSTICE BREYER: Yes, it was forum non
16 conveniens. Oh, you use forum non conveniens in all
17 three? You don't use -- I mean, they specify a State
18 court?

19 MR. ALLENSWORTH: Because the 1406 wouldn't
20 apply because the -- because --

21 JUSTICE BREYER: They say venue is a State
22 court --

23 MR. ALLENSWORTH: No, sir.

24 JUSTICE BREYER: -- use forum non conveniens
25 in all those?

1 Okay. Use forum non conveniens in all
2 those, but you use 1404 if they specify another Federal
3 court. That's what -- that's what -- that's what
4 you're --

5 JUSTICE SOTOMAYOR: You use 12(b)(3), not
6 1404.

7 JUSTICE BREYER: All right.

8 JUSTICE SOTOMAYOR: In those other cases,
9 you --

10 JUSTICE BREYER: You use 12(b)(3), okay.

11 JUSTICE SOTOMAYOR: -- you use 12(b)(3).

12 MR. ALLENSWORTH: Yes. Yes.

13 JUSTICE BREYER: But my point is you're
14 using something else, so they would say, well, let's
15 have it the same -- you know -- okay. I see the answer.

16 MR. ALLENSWORTH: Justice Breyer --

17 JUSTICE BREYER: Forget it.

18 MR. ALLENSWORTH: No, but that raises a
19 larger question, and if I could -- if I could address for
20 just a second -- and that's the systemic integrity of
21 the -- of the system.

22 If you are going to transfer a case to --
23 within the system to another Federal court that's going
24 to have to hear the case, one like this one where he is
25 likely going to have to hear it without witnesses or

1 certainly without live witnesses, and to render a
2 judgment based on facts that were developed 1,500 miles
3 away on a project that is that far away, that does
4 implicate, I think, the integrity of the system and
5 that, ultimately, a Federal judge is the one that's
6 going to have to write and take it up in judgment, if I
7 can't scare up the witnesses to be in Virginia.

8 JUSTICE SCALIA: Don't -- don't put me in
9 the group that thinks you can use forum non conveniens.
10 When -- when you have a forum selection clause for a
11 State court and suit is brought -- attempted to be
12 brought in a Federal court -- I mean, if it's in the
13 Federal court, that is the most convenient court -- I
14 mean, let's say it's in -- in a different State where
15 all the witnesses are.

16 I think it's very strange to say that,
17 because there is a contract provision requiring it to be
18 brought in a State court, this court is an inconvenient
19 court. I -- do you know that the doctrine of forum non
20 conveniens has ever been used that way.

21 MR. ALLENSWORTH: No, sir. No, Your Honor,
22 I don't. I don't. And to confess I haven't thought
23 through the -- the question that you just said.

24 JUSTICE BREYER: Do you know the answer --
25 this is another -- I keep thinking they should all come

1 to the same conclusion. But, then, what about this
2 point Justice Sotomayor raised? Suppose you sue in
3 Texas -- you know, you get there, but the contract,
4 let's say, was a different contract from yours, but it
5 just was made in Nevada. Everything about this concerns
6 Nevada. Are they really going to use Texas law to
7 interpret the contract rather than Nevada's?

8 I would have thought that the choice of law
9 question is a different question, and where you sue
10 should be irrelevant to the choice of law question
11 except insofar -- I don't know. Maybe you looked --

12 MR. ALLENSWORTH: Van Dusen said that the
13 law moves with the -- with the --

14 JUSTICE GINSBURG: Only because the
15 plaintiff -- the plaintiff's choice of forum was to be
16 respected. But if the plaintiff chooses a forum in
17 violation of the contract, the whole rationale of that
18 case falls.

19 MR. ALLENSWORTH: Your Honor --

20 JUSTICE GINSBURG: It was to honor the
21 plaintiff's choice of forum. Well, the contract says
22 the plaintiff doesn't have a choice.

23 MR. ALLENSWORTH: Your Honor, the contract
24 as Judge Higginbotham pointed out doesn't have a
25 selection of law -- law clause. They put -- it's got

1 every other dispute resolution clause that could be in
2 there to make it difficult for us to get this case to a
3 court, but it doesn't have a -- it doesn't have a choice
4 of law provision in it.

5 JUSTICE GINSBURG: But the only reason that
6 Van Dusen came out the way it did was -- I think it was
7 that Justice Black said the plaintiff's choice of forum
8 merits respect. It doesn't merit respect when the
9 plaintiff has agreed that the suit will go forward
10 someplace else.

11 MR. ALLENSWORTH: I don't recall. Sorry.

12 JUSTICE SOTOMAYOR: In other words, that
13 issue has not been decided by them.

14 JUSTICE ALITO: If 1404 is the correct
15 procedural route, why shouldn't the rule be something
16 like this, where there is a forum selection clause, the
17 burden is on -- the burden of trying to establish venue
18 in some other jurisdiction is on the party opposing the
19 forum selection clause, not the party that's invoking
20 the forum selection clause.

21 And the only factors that can be considered
22 against the forum selection clause to -- to result in an
23 exceptional case where that wouldn't be honored are
24 factors that have nothing to do with the convenience of
25 the -- of the party that doesn't want it tried in -- in

1 the selected forum or with the likelihood of success of
2 the party that doesn't want it tried in the -- in
3 the jurisdiction specified in the forum selection
4 clause.

5 So in your case, if there had been a
6 hurricane that wiped out the courts of the Eastern
7 District of Virginia for some period of time so no cases
8 could be tried, or there was an incredible backload of
9 cases there that would prevent the case from being
10 tried, maybe that would be -- those would be something
11 that might amount to an exceptional circumstance, but
12 everything else is off the board.

13 What's wrong with that?

14 MR. ALLENSWORTH: First off, on the validity
15 of the clause, we acknowledge we'd have the burden. If we
16 were trying to avoid this clause on the ground, on
17 whatever grounds, or under any Bremen grounds or we'd gotten
18 cheated into it or anything like that. We'd have the
19 burden on that. We didn't try to carry that burden.
20 We're not attacking the clause. They have the burden on
21 the main case -- on the transfer itself.

22 JUSTICE ALITO: Well, why should that -- why
23 should that be, where there's a forum selection clause?

24 MR. ALLENSWORTH: I don't think that it's
25 even a matter, really, so much of burden as it is of

1 weight, and you all have already spoken on that where
2 you said that it's -- that clause is to get
3 significant -- significant weight. It ought to be
4 central to the analysis, but it's not dispositive.

5 And our -- our contention was that the
6 clause was not dispositive, but that every -- every
7 factor that possibly could go -- militate against
8 transferring this case to Virginia existed, and that's
9 why the court, giving appropriate deference to the
10 clause, to that clause, hearing what the evidence was
11 and deciding as you --

12 JUSTICE SCALIA: It should have been a
13 Virginia court to make that decision, instead of your
14 friendly, down home Texas court. And that's -- you
15 know, that was why the forum selection clause was put in
16 there. It doesn't seem to me such a stretch as you
17 think it is to say that the venue is improper when you
18 have agreed that venue would not lie in this court.

19 MR. ALLENSWORTH: We can't confer venue. We
20 can -- we can waive venue, but we can't make improper
21 venue --

22 JUSTICE SCALIA: So the -- the question is:
23 Is it improper when it's been waived? Is it improper
24 for a court to acknowledge venue when the party has --
25 has said I -- I cannot -- I cannot bring my suit in this

1 court. I don't think it's a terrible stretch to -- to
2 call that improper venue.

3 However theoretical it may be, venue is --
4 is decided by -- by statute, of course it is. But
5 people may waive it, and when people have waived it, I
6 don't know that there's a great interest in -- in saying
7 that, nonetheless, the venue remains proper.

8 It seems to me you've given it away, and it
9 ought to be -- it ought to be the -- the court where the
10 parties agree that suit would lie that would decide
11 these -- these change-of-venue questions.

12 The provision need not be absolutely
13 dispositive, but to the extent it isn't, that is a call
14 that -- that ought to be made by the jurisdiction that
15 the parties agreed to. The whole litigation ought to
16 begin there. They shouldn't have to litigate this
17 change of venue provision in a court where the parties
18 agreed they would not appear.

19 It seems to me terribly unfair.

20 MR. ALLENSWORTH: There's a couple of
21 factors on that, Your Honor. First off, the rule that I
22 think my colleagues here are calling for effectively
23 emasculates 1404 and takes the Federal judiciary out of
24 it. The question -- and I follow your question about
25 the propriety of the venue.

1 JUSTICE SCALIA: Why is that? Why is that?
2 Why can't the Court, where you agreed to be sued, apply
3 1404?

4 MR. ALLENSWORTH: Another reason for that is
5 that our contract has a one-way arbitration clause in it
6 which they -- which the Petitioner claims not to have
7 waived. If this case is decided -- it goes to
8 Virginia -- if we filed the case in Virginia and they
9 immediately demanded arbitration, the case would be
10 arbitrated.

11 But under the FAA, it would be sent to an --
12 it'd be -- the court in Virginia would appoint an
13 arbitrator in -- presumably, in Virginia. And under the
14 FAA, we don't even necessarily even have the right to
15 take depositions to provide -- to move to get the
16 evidence before the court even in deposition form.

17 We'd rather have the case decided in Texas
18 on \$160,000 case, and I know that's a pittance.

19 JUSTICE SOTOMAYOR: Excuse me. Are you
20 saying that, by filing in Texas, you're not going to
21 arbitration?

22 MR. ALLENSWORTH: No. If we go to
23 arbitration, we go to arbitration in Texas. We don't
24 have any complaint about that. What we don't want to do
25 is to go to arbitration in Virginia, which it has

1 not had -- and in this contract, for everything it's got
2 in it, it doesn't have a clause that says that
3 arbitration would be conducted in -- there's not a
4 choice of forum clause for the arbitration. There is
5 for litigation, but not for arbitration.

6 JUSTICE SOTOMAYOR: So what's more favorable
7 about Texas other than your convenience? What's more
8 favorable about arbitration in Texas other than your
9 convenience?

10 MR. ALLENSWORTH: That's my --

11 JUSTICE SOTOMAYOR: That's the only thing.
12 It's convenient for you to be in Texas.

13 MR. ALLENSWORTH: It's convenient for us.
14 The arbitrator can drive out to the project and draw his
15 own conclusions about what -- about how the thing is
16 built. He can talk to the witnesses who are within his
17 subpoena power or the subpoena power of our District
18 Court in Texas to show up. Yes, sir.

19 JUSTICE BREYER: Are -- are you finished?

20 All right. I'd just like, if you'd want, to
21 give you a chance to take what I've -- I think Professor
22 Sachs says, look, there is a way which you can both
23 follow the statutes literally and say, well, venue is
24 here, and also get the place to the right forum
25 respecting the contract.

1 Just say it is an affirmative defense, which
2 Justice Ginsburg says the First Circuits follow this
3 approach. You put it in the complaint. The answer, and
4 once it's in the answer, the judge can put it front and
5 center. Indeed, in case he forgets to do that, the
6 defendant will remind him and say, you've got to get it
7 to the right court, and let's decide this affirmative
8 defense thing first.

9 And -- and now, we're back in the same
10 place. What do you think of that?

11 MR. ALLENSWORTH: I think that that's going
12 to unnecessarily complicate this. It gets in -- it
13 raises some difficult to hearing questions about
14 which -- difficult hearing questions which the Court, I
15 think, successfully avoided in -- with its decision in
16 Stewart.

17 I don't think that -- that 12(b) motions are
18 particularly appropriate places to decide these contract
19 issues. And it eliminates the 1404 gatekeeper role that
20 the district court otherwise could be providing and was
21 providing.

22 JUSTICE KAGAN: Professor Sachs says that,
23 in the case of any disputed facts on a 12(b)(6), you
24 would have to have a trial. Do you agree with that?

25 MR. ALLENSWORTH: Yes, Your Honor, and I

1 think that he under -- underestimates the ability for
2 resolute counsel to raise disputed facts that would
3 otherwise prevent the summary judgment practice that he
4 suggested --

5 CHIEF JUSTICE ROBERTS: Well, what facts
6 are -- what facts are -- in the normal case, what facts
7 are going to be pertinent? I mean, you've got the
8 contract there. I mean, I suppose you can always say,
9 we entered under duress and all that, but that wouldn't
10 seem to me to be typical in the normal commercial case
11 in which these provisions are critically important.

12 What facts are going to be there?

13 MR. ALLENSWORTH: I think there might be a
14 question of materiality. There might be a question --

15 CHIEF JUSTICE ROBERTS: But what type --
16 what type of materiality?

17 MR. ALLENSWORTH: How material that clause
18 was to the parties' contract or whether you were going
19 to try to have separability and focus exclusively on
20 that clause.

21 CHIEF JUSTICE ROBERTS: Well, the venue
22 provision -- I mean, if they go to the trouble of
23 putting a venue selection -- forum selection provision
24 in, I would say it seems pretty material.

25 MR. ALLENSWORTH: It might or might not,

1 depending on whichever State law applies to -- and
2 what -- because that would be under State law to decide
3 on the materiality, what the effect of the prior breach
4 is.

5 We -- this case has been cast in Manichean
6 terms about our breach of the contract by failing to
7 file suit in Virginia. The only written -- the only
8 handwritten clause in this entire contract, which is in
9 the appendix, I think, at Page 16, is the one that says
10 what the price is.

11 What brings us here to the Federal system is
12 not for a declaratory relief or to make new law on
13 venue; it's to collect \$160,000. That clause, I think,
14 ultimately would be weighed -- might be weighed depending
15 on the Court, if it -- if the case was being decided on
16 purely contract grounds--

17 JUSTICE SOTOMAYOR: So they would be -- the
18 only people collecting that \$160,000 are going to be the
19 lawyers.

20 (Laughter.)

21 MR. ALLENSWORTH: I -- I wish.

22 (Laughter.)

23 JUSTICE SOTOMAYOR: You took a contingency
24 case in a contract matter?

25 MR. ALLENSWORTH: And the other thing, as

1 Professor Sachs points out --

2 JUSTICE SCALIA: I wish.

3 (Laughter.)

4 MR. ALLENSWORTH: The -- as he points out,
5 and Justice Haynes -- Judge Haynes did in the Fifth
6 Circuit, whether they can file suit for us for breach of
7 contract and the expense that we've put them to. Yes, I
8 think -- I think they probably could. We at least get
9 \$160,000 head start on that, and they can bring that as
10 an offset to our claim if they want to.

11 We disagree with the question of whether it
12 would cost them any more to litigate in Texas than it
13 would in Virginia anyway. They're going to have to hire
14 a law firm. If we litigate in Virginia, they are going
15 to have to send a lot of -- batch of lawyers back to
16 Texas to defend the depositions that we'd ask to be
17 taken there.

18 I don't know that this case costs any more
19 to be litigated in Texas where the witnesses are
20 available and where they might not have to be deposed
21 than in Virginia where they have to -- where they have
22 to ship them across the country.

23 If there is no further questions, thank you,
24 Your Honor.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Hastings, you have four minutes left.

2 REBUTTAL ARGUMENT OF WILLIAM S. HASTINGS

3 ON BEHALF OF THE PETITIONER

4 MR. HASTINGS: Thank you, Mr. Chief Justice.

5 I have just a few brief comments.

6 First, the parties bargained for the right
7 result, and they bargained and reached a contract that
8 should settle the issue of convenience and where this
9 case should be litigated. Stewart has an important
10 observation that I think needs to be emphasized. Even
11 under a 1404(a) analysis, the majority in Stewart said
12 The Bremen is still instructive. And if it's
13 instructive on anything, on any rules enforcing a
14 contract, it should be instructive at this level.

15 The burden should be on the party trying to
16 get out from their contract. The Fifth Circuit
17 misallocated the burden. The burden should also be a
18 high one. It really should require exceptional
19 circumstances or perhaps even more, and it should not be
20 a case where a party can avoid its contract based upon
21 inconveniences that were foreseeable at the time of
22 contracting.

23 For example, the fact that J-Crew hired
24 Texans to work on its project, it knew what the project
25 was about and what it would need to do, and it should

1 not be able to rely upon hiring Texans to change the
2 deal it negotiated with my client.

3 There needs to be a clear rule that allows
4 the courts to hopefully answer the questions about
5 contracts and venue, so we all can stop litigating these
6 issues and know the right answers and avoid inundating
7 the courts with motions to transfer for parties wanting
8 to renegotiate contracts.

9 Since the Third Circuit and Sixth Circuit
10 and, now, the Fifth Circuit have adopted the minority
11 position, there has been a proliferation of litigation
12 when a contract already answered the question. We cited
13 many cases in our cert petition in a footnote, and I
14 know there's been many more since then. And those are
15 the ones that you can find published. That doesn't even
16 mention the ones that are unpublished. And so a clear
17 rule needs to be in place to avoid these problems.

18 Justice Kagan, you raised the issue of forum
19 non conveniens as perhaps the answer as to what would
20 happen for a State or foreign contract clause. I wanted
21 to briefly touch on that because I don't believe that's
22 the right answer.

23 The Bremen looked at a case that came up as
24 a forum non conveniens case and said, we are not going
25 to use the forum non conveniens test for enforcing a

1 contract requiring litigation in an international forum.
2 They resoundingly rejected the forum non conveniens
3 approach, and I believe the circuit courts have read
4 Bremen as rejecting that approach.

5 If that were going to be the approach to
6 answer the problem created by the Fifth Circuit for
7 foreign and State courts, what we would end up with is a
8 new common law approach, whether called forum non
9 conveniens or called something else, that looks like
10 nothing like forum non conveniens and probably a whole
11 new line of litigation over how that's --

12 JUSTICE KAGAN: I think you mistook my point
13 at least. Maybe I didn't express it clearly. Bremen
14 comes up on a forum non conveniens motion, and the Court
15 says, yes, the contract controls, quite properly so.

16 So -- you know, the fact that it comes up on
17 a forum non conveniens motion has nothing to do with the
18 question of whether the contract controls where, people have
19 negotiated for a certain set of things and there is no
20 exceptional public interest otherwise.

21 MR. HASTINGS: And, Justice Kagan, following
22 Bremen, the lower courts have recognized that what
23 essentially Bremen is doing is saying forum non
24 conveniens is not the right approach, and so instead of
25 a common law vehicle to answer this issue, we submit

1 that the right answer is right there in the rules
2 already.

3 It's 12(b)(3) is the best answer. Section
4 1406 allows the Court also to address this issue.
5 Honestly, Section -- Rule 12(b)(6) in Professor Sachs'
6 approach is much better than leaving these issues to
7 balancing tests.

8 JUSTICE KAGAN: Can I ask you one last
9 question about 12(b)(6)?

10 MR. HASTINGS: Yes, Your Honor.

11 JUSTICE KAGAN: Which is -- you know, when
12 1404 is -- suppose a State which does not recognize
13 these clauses, 1404 trumps that according to Stewart.
14 But if you were under 12(b)(6), you would have to go to
15 what Justice Scalia does in the Stewart dissent. I
16 think you would have to go to a twin aims of Erie
17 analysis.

18 And in that circumstance, it seems to me
19 that the State law would come out the victor; isn't that
20 right?

21 MR. HASTINGS: Justice Kagan, the only way I
22 know how to answer that question is I do not know how
23 the Professor Sachs approach can actually be reconciled
24 with Stewart. There is significant tensions in how that
25 plays out as an issue that I do not know how it plays

1 out, but I suspect it would result in lots of
2 litigation --

3 JUSTICE SOTOMAYOR: If it's under 12(b)(3),
4 then Stewart stays, and it's Federal law that controls
5 and the judge decides, right?

6 MR. HASTINGS: Yes, Your Honor, and that's
7 why we are asking this Court to follow the majority
8 approach on this issue.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Counsel.

11 The case is submitted.

12 (Whereupon, at 12:04 p.m., the case in the
13 above-entitled matter was submitted.)

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