

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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ASHLEY SVEEN, ET AL., )  
 )  
 Petitioners, )  
 )  
 v. ) No. 16-1432  
 )  
 KAYE MELIN, )  
 )  
 Respondent. )  
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Pages: 1 through 73

Place: Washington, D.C.

Date: March 19, 2018

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ASHLEY SVEEN, ET AL., )  
Petitioners, )  
v. ) No. 16-1432  
KAYE MELIN, )  
Respondent. )

Washington, D.C.  
Monday, March 19, 2018

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

APPEARANCES:  
ADAM G. UNIKOWSKY, ESQ., Washington, D.C.; on behalf  
of the Petitioners.  
SHAY DVORETZKY, ESQ., Washington, D.C.; on behalf of  
the Respondent.

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

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument today in Case 16-1432, Sveen versus  
5 Melin.

6 Mr. Unikowsky.

7 ORAL ARGUMENT OF ADAM G. UNIKOWSKY

8 ON BEHALF OF THE PETITIONERS

9 MR. UNIKOWSKY: Mr. Chief Justice, and  
10 may it please the Court:

11 The question before the Court today is  
12 whether the application of a  
13 revocation-on-divorce statute to a life  
14 insurance policy purchased before the enactment  
15 of that statute violates the Contracts Clause.

16 JUSTICE KENNEDY: Could you just -- as  
17 a preliminary matter, after the divorce but  
18 before the owner of the policy died, did he pay  
19 premiums?

20 MR. UNIKOWSKY: I -- I'd have to  
21 check. I'm not -- I'm not sure if he did. He  
22 did pay them before the divorce. I'm not sure  
23 if the -- I -- I -- the policy was live at the  
24 time of his death. I'm not sure -- I think it  
25 may have been funded by the premiums that had

1 already been paid on the policy.

2 JUSTICE KENNEDY: That -- that was  
3 just a factual question. You may want to  
4 introduce your argument and tell us what your  
5 --

6 MR. UNIKOWSKY: My understanding is --

7 JUSTICE KENNEDY: -- what your general  
8 outline is going to be, but I --

9 MR. UNIKOWSKY: I'll just answer your  
10 question. My understanding is that he had  
11 already paid enough into the policy that the  
12 policy itself paid the premiums at a certain  
13 point.

14 JUSTICE KENNEDY: All right. That  
15 could be.

16 MR. UNIKOWSKY: So I think that's --  
17 so I don't think he actually paid any more  
18 after the divorce. My understanding is that  
19 that's what's in that.

20 JUSTICE KENNEDY: In the course of  
21 your argument, suppose this were the first  
22 statute on this subject. Would that make a  
23 difference? And then I could add to the  
24 hypothetical, suppose the empirical evidence  
25 were such that most people assumed that divorce

1 would not change the beneficiary, would that  
2 change -- but I interrupted you at the first.  
3 You might have a broader outline you want to  
4 give.

5 MR. UNIKOWSKY: No, I -- I -- I'm  
6 happy to answer those questions at the outset.  
7 So your first question is, what if this was the  
8 first statute on -- on this issue; in other  
9 words, the first ever revocation-on-divorce  
10 statute? Well, I'd point out that even when  
11 the first of these statutes were enacted around  
12 30 years ago, there already were a number of  
13 statutes, almost universally, in fact, that  
14 revorced -- that revoked wills upon divorce.

15 So, really, the -- the historic  
16 purpose of these statutes, according to the  
17 Uniform Probate Code, was to align the law of  
18 life insurance policies with the law of wills.  
19 So we would take the position that even the  
20 first of these statutes that was enacted could  
21 be applied to existing policies under the --  
22 the Contracts Clause.

23 To turn to your second question, which  
24 was what if, empirically speaking, someone  
25 didn't know? So, first of all, I do think that

1 -- I don't mean to fight the hypothetical, but,  
2 in this case, I think the legislature made the  
3 empirical determination that the typical person  
4 designates a spouse as a beneficiary because  
5 it's the spouse, and when the divorce happens,  
6 the calculus changes. And --

7 JUSTICE SOTOMAYOR: On the basis of  
8 what? Where in the record?

9 MR. UNIKOWSKY: I'm sorry, Your Honor?

10 JUSTICE SOTOMAYOR: Where in the  
11 record is the basis for their empirical  
12 finding?

13 MR. UNIKOWSKY: There's no -- the  
14 legislative history doesn't include any surveys  
15 or anything like that. I --

16 JUSTICE GINSBURG: They were picking  
17 up off the Uniform Probate Code, weren't they?

18 MR. UNIKOWSKY: Yes.

19 JUSTICE GINSBURG: Minnesota was  
20 picking up the model statute, and the model  
21 statute started it off and then in another --

22 MR. UNIKOWSKY: That is correct. So  
23 Minnesota, like numerous other states, simply  
24 implemented the Uniform Probate Code. I don't  
25 think that there's any hearings in the

1 legislative record regarding the empirical  
2 findings underlying that -- that code. I think  
3 it's --

4 JUSTICE GINSBURG: But there was --  
5 there was a -- I mean, if there's -- the  
6 supposition is, on divorce, the policyholder  
7 will not want the ex-spouse to get the policy.  
8 But, as has been pointed out, sometimes there  
9 will be a desire that the beneficiary remain  
10 unchanged.

11 It was suggested by the other side  
12 that Minnesota could have accomplished this in  
13 a much better way; that is, they could have  
14 made it a condition of every divorce decree  
15 that the judge tell the couple: Life  
16 insurance -- do you have life insurance? Do  
17 you want to leave it as it is, or do you want  
18 to change it?

19 MR. UNIKOWSKY: Yeah, so, first of  
20 all, no other statute actually does it that way  
21 without a revocation-on-divorce statute.  
22 Respondent does cite statutes like that from  
23 Virginia and Utah, but those states also have  
24 revocation-on-divorce statutes. These  
25 notification requirements are -- are kind of a



1 supplement to that.

2 I guess Minnesota could have done  
3 that, but I don't think it would accomplish the  
4 goal of the statute, which was to align the law  
5 of life insurance policies which -- with the  
6 law of wills, which is what the Uniform Probate  
7 Code said, because, again, wills automatically  
8 -- excuse me, a divorce automatically revokes  
9 the --

10 JUSTICE GORSUCH: Well, I think,  
11 counsel, Justice Ginsburg's question goes to  
12 the -- the weighing that some of our cases  
13 suggest that we have to do in this -- these  
14 cases. And if you concede, as I believe you  
15 have, that Minnesota could achieve everything  
16 it wants to achieve by prospectively applying  
17 this law and then retroactively or -- ordering  
18 courts to make sure that this issue is dealt  
19 with in divorce decrees, how does that inform  
20 our analysis as to the legitimacy and need for  
21 overriding contracts in these cases?

22 MR. UNIKOWSKY: So, first of all, I  
23 would -- I don't agree with the premise that  
24 Minnesota could have achieved all they wanted  
25 to achieve just by this notice requirement.

1 First of all, I think that, again, the goal is  
2 to align the law of life insurance policies  
3 with the law of wills, and the will is revoked.  
4 So Minnesota wanted to --

5 JUSTICE GORSUCH: Prospectively,  
6 though, you acknowledge it could have achieved  
7 all it wants to achieve?

8 MR. UNIKOWSKY: Yes, that's true.

9 JUSTICE GORSUCH: And, retroactively,  
10 it could have done as Justice Ginsburg suggests  
11 and told divorce courts that this is a matter  
12 that they'd have to take up. So how is it that  
13 they wouldn't be able to achieve all that they  
14 wanted to achieve?

15 MR. UNIKOWSKY: Well, because, first  
16 of all, I mean, the person might not do it and  
17 you might get into all these disputes about  
18 what -- what a decree means. One of the  
19 reasons for this statute is that decrees were  
20 often ambiguous in what they did, whether they  
21 were intended to revoke the designation or not.  
22 And this statute eliminates this ambiguity.

23 That ambiguity wouldn't go away if you  
24 just told people don't forget, you have to  
25 change your policy. They wouldn't do it, and

1 then you'd have a dispute over what the decree  
2 means.

3 So I think that the reason that no  
4 state has adopted that option without a  
5 revocation-on-divorce statute is precisely  
6 because those problems wouldn't be solved.

7 I want to make one other point about  
8 the retroactivity issue, though, which is that,  
9 first of all, I don't think that the arguments  
10 that the -- that the statute doesn't really --  
11 is inconsistent with the intent of a typical  
12 spouse, I don't think that goes to the  
13 retroactivity of a statute. It's more of an  
14 argument that the statute's sort of a bad idea  
15 both going backwards and going forwards.

16 And I don't think the Contracts Clause  
17 is designed to protect against just bad  
18 statutes generally. It's designed to protect  
19 against unfairly retroactive statutes. And  
20 here --

21 CHIEF JUSTICE ROBERTS: Well, does --  
22 does the beneficiary on the policy -- is that  
23 individual properly viewed as a third-party  
24 beneficiary under contract law?

25 MR. UNIKOWSKY: No, Your Honor. It's

1     been conceded in this case that she --  
2     Respondent had no contractual interest. That's  
3     why the sole interest she's protecting is Mark  
4     Sveen's interest under a theory of third-party  
5     standing. I think that if she had a protected  
6     interest, then this case would be very  
7     different. And, by the way, the statute does  
8     not apply if there's a protected --

9             CHIEF JUSTICE ROBERTS: Is that a  
10    matter -- putting aside what you regard as a  
11    concession, I don't know if your friend would  
12    agree with that, but is it a uniform conclusion  
13    under state law, the common law, that a  
14    beneficiary is not -- I mean, they're called  
15    the same thing, third-party beneficiary, under  
16    contract law?

17            MR. UNIKOWSKY: Well, the relevant  
18    question is whether that person has enforceable  
19    vested rights in -- in the contract. So you  
20    actually can buy an insurance policy if you  
21    want to that says that there's a third-party  
22    beneficiary who -- who has a vested right, and  
23    you -- you can't change it without the person's  
24    consent. You can buy that kind of policy if  
25    you want to. And this statute wouldn't apply

1 by its terms to such a policy.

2 But in this particular case, it was  
3 agreed as the case was litigated that it was  
4 Mark Sveen's rights at issue because she -- he  
5 had the -- he had the right to change the  
6 beneficiary days -- excuse me, decisions at  
7 will.

8 JUSTICE KENNEDY: Do -- do any states  
9 say that the -- a person that is the named  
10 beneficiary is a third-party beneficiary for  
11 contract purposes? Do any states say that?

12 MR. UNIKOWSKY: I think that -- so my  
13 understanding is they can be depending on what  
14 the contract says. So you can always, right,  
15 buy insurance if you want to --

16 JUSTICE KENNEDY: Well, that was --  
17 that was your answer.

18 MR. UNIKOWSKY: -- that designates the  
19 person as a third-party beneficiary with  
20 enforceable rights at the time it's purchased.  
21 You can do that in Minnesota or everywhere.  
22 And in that case, the statute wouldn't apply.

23 But here, in this case, as this case  
24 reaches this Court, the argument is that it was  
25 Mr. Sveen's, the decedent's, contractual rights

1 that were infringed. Respondent didn't have  
2 any vested rights in the contract at the time  
3 that Mark Sveen bought it because he had the  
4 right to designate -- redesignate at will.

5 JUSTICE KAGAN: Mr. Unikowsky --

6 JUSTICE SOTOMAYOR: Could you just --

7 JUSTICE KAGAN: -- on the  
8 retroactivity point, here, the statute precedes  
9 both the divorce and the death. But what would  
10 happen if the divorce happened first and then  
11 the enactment of the statute and then the  
12 death? Would the statute have applied?

13 MR. UNIKOWSKY: So I -- that's an  
14 unsettled question of state law. I think that  
15 there is a -- there's an unpublished Minnesota  
16 decision that says it would apply in that  
17 context because the person can still  
18 redesignate. So I think that does present some  
19 retroactivity concerns, but I think it's  
20 retroactivity concerns with respect to the  
21 divorce decree. In other words, it seems to be  
22 altering an employed term of the decree.

23 So I think the analysis in that case  
24 would be kind of a due process analysis because  
25 it's an issue of changing a judgment rather

1 than changing the -- the preexisting contract.

2 JUSTICE GORSUCH: But your answer for  
3 Contract Clause purposes would be the same?

4 MR. UNIKOWSKY: Yes. With respect to  
5 the underlying insurance policy, yes. I think  
6 that the -- the reason that there would be a  
7 retroactivity concern is that it would  
8 interfere with settled expectations at the time  
9 of the divorce.

10 JUSTICE GORSUCH: Based on the decree  
11 rather than the contract?

12 MR. UNIKOWSKY: Yes, Your Honor. And  
13 I think that's an important point in this case  
14 because, again, the Contracts Clause protects  
15 the reliance interest. Fundamentally, that's  
16 why it distinguishes between contracts that are  
17 signed before and after the statute's enacted.

18 And in a case like this, I think the  
19 reliance interests really come into play at the  
20 time of the divorce, because the statute is  
21 inert until the divorce actually happens.

22 And that's when people are thinking  
23 about this, because they're making a decision,  
24 okay, there's this changed circumstance, I'm no  
25 longer married to this person, do I want them

1 to stay the beneficiary or do I not want them  
2 to stay the beneficiary?

3 And at the time that that decision is  
4 made, the existence of the statute makes a  
5 difference in what they do because, if they  
6 know the statute's on the books, they don't  
7 have to contact the insurance company and  
8 change the designation. And in this case, the  
9 statute was passed years before the divorce  
10 occurred.

11 So I think it's --

12 JUSTICE SOTOMAYOR: Could you tell me,  
13 what are the various ways that a -- an insured  
14 who wants to keep his former wife as the  
15 beneficiary, what would he have to do after the  
16 divorce?

17 MR. UNIKOWSKY: Well, there -- first  
18 --

19 JUSTICE SOTOMAYOR: I know he could --  
20 the divorce decree could say yes or no. What  
21 other ways could the insured --

22 MR. UNIKOWSKY: He just has to -- he  
23 just has to send a letter to the company. So  
24 this life insurance policy, as is typical, you  
25 can change the beneficiary whenever you want.



1 JUSTICE SOTOMAYOR: No, let's assume  
2 he doesn't want to.

3 MR. UNIKOWSKY: If he doesn't want to  
4 change? So he just has to send -- so there's  
5 an automatic revocation. So, if he wants to  
6 redesignate the spouse, you send in a change of  
7 beneficiary form. So --

8 JUSTICE SOTOMAYOR: How does the  
9 insurance company know that there has been a  
10 divorce so that they receive the letter and  
11 sort of go: Why is he doing this? We already  
12 have that beneficiary.

13 MR. UNIKOWSKY: Well, I mean, I assume  
14 that the insurance company has -- has lawyers  
15 who's aware that these statutes are -- are on  
16 the books.

17 JUSTICE BREYER: Why does it matter?  
18 The insurance company gets a letter saying I  
19 want my wife to be the beneficiary, period. So  
20 that's the beneficiary.

21 MR. UNIKOWSKY: Yeah, it would be on  
22 the -- I mean, the insurance company has --

23 JUSTICE BREYER: It doesn't matter  
24 whether they know about the divorce, don't know  
25 about the divorce. Who cares?

1 MR. UNIKOWSKY: Right, so if the  
2 insurance company --

3 JUSTICE BREYER: Is that right?

4 MR. UNIKOWSKY: -- gets a letter, I  
5 assume that they'll just put it in the person's  
6 file, it'll have a date on it, and then the  
7 person -- the spouse will be re-added.

8 I think in many cases this is resolved  
9 in the divorce decree, especially where here  
10 the statute was on the books at the time of the  
11 divorce. Any good divorce lawyer is going to  
12 say, look, there's this revocation-on-divorce  
13 statute. If you want to negotiate an agreement  
14 where she's still the beneficiary --

15 JUSTICE SOTOMAYOR: So we have a  
16 Supreme Court case because there was an  
17 ineffective attorney?

18 MR. UNIKOWSKY: Or not. I mean, it's  
19 quite possible that the attorney was perfectly  
20 effective and advised Mr. Sveen you don't have  
21 to change the beneficiary designation because  
22 it's already happened.

23 And now that he's dead, it's somewhat  
24 ironic that Respondent is trying to assert his  
25 rights -- his rights to vindicate his intent

1 when he's not here to say whether he wants --

2 JUSTICE KENNEDY: Well, in most -- in  
3 most cases, I think where there's a lot of  
4 property, the insurance will be on the table  
5 and they'll talk about it.

6 MR. UNIKOWSKY: Yes, absolutely.

7 JUSTICE KENNEDY: Your case applies to  
8 really small divorces, I think. I don't know  
9 which way that cuts.

10 MR. UNIKOWSKY: Well, I think that  
11 it's quite possible that -- so, I mean, we  
12 don't know what the agreement was. We don't  
13 know what Mark Sveen wanted. He's not here.  
14 He can't say what he wants. But --

15 JUSTICE GINSBURG: But there was --  
16 there was a settlement in this divorce?

17 MR. UNIKOWSKY: Yes.

18 JUSTICE GINSBURG: And do we know what  
19 the former wife got in that settlement? You're  
20 urging that she doesn't get the proceeds of the  
21 insurance policy. What did she get?

22 MR. UNIKOWSKY: I mean, the -- the  
23 divorce decree is -- is in the district court  
24 record. I -- I don't recall the -- the precise  
25 way that the property distribution happened,

1 but that's all in the -- the divorce decree is  
2 in the record. And as far as I know, there --  
3 there is no concern that there is some kind of  
4 unfair distribution of property.

5 JUSTICE KENNEDY: The -- the cases  
6 I've -- I've -- I've looked at are our cases,  
7 Allied Steel and Home Savings and Loan,  
8 Blaisdell and Bituminous Coal and so forth.

9 Are -- are there in the circuits or in  
10 the state courts analogous cases where  
11 contracts are -- are changed retroactively and  
12 Contract Clause arguments have been rejected?  
13 Are there -- are there any cases that you can  
14 rely on that -- out in the state courts that  
15 are analogous to this?

16 MR. UNIKOWSKY: Yeah, so I think the  
17 -- the -- the -- the best analogy maybe I'd  
18 have are statutes that -- or, rather, statutes  
19 that affected the way property was divided in  
20 divorce. And this was the way I -- I started  
21 out my remarks today.

22 JUSTICE KENNEDY: In divorce.

23 MR. UNIKOWSKY: So, you know, in the  
24 1970s, there was a very dramatic revolution in  
25 American divorce law. Before the '70s,

1 divorcing wives were left often destitute after  
2 divorce. And a number of states -- actually,  
3 all the states passed statutes that  
4 fundamentally altered divorce and made the  
5 distribution of assets more equitable. Women  
6 still are statistically worse off in divorce,  
7 but it's better now than it was in -- in 1950.

8           And many times divorcing husbands  
9 would lodge due process and Contracts Clause  
10 challenges to these statutes, essentially  
11 saying that, when I bought the asset, I would  
12 have kept it in a divorce. And, therefore, it  
13 violates the Contracts Clause to change the  
14 divorce laws.

15           And those -- those arguments were  
16 rejected by state courts, essentially saying  
17 it's -- it's -- it's a police power issue.  
18 States are allowed to decide how assets are  
19 distributed in divorce.

20           We view this as analogous because,  
21 really, again, the statute is inert until  
22 there's a divorce, and even when there's a  
23 divorce, all the statute does is it regulates  
24 --

25           JUSTICE GORSUCH: But, counsel --

1 counsel, do we know that the -- the dead  
2 husband here didn't, as part of the divorce,  
3 wish this asset to remain with his -- with his  
4 ex-wife? Sometimes that is part of a divorce  
5 arrangement, that certain assets stay with the  
6 spouse.

7 Is there any indication in this record  
8 at all that the decedent wished this asset to  
9 go anywhere else?

10 MR. UNIKOWSKY: I mean, we don't know.  
11 All we know is that the statute was on the  
12 books and there is a life -- there's a divorce  
13 settlement and the settlement does not override  
14 the default rule that perhaps the divorce  
15 lawyers told them about. I mean, we don't know  
16 what the divorce lawyers told them. That's all  
17 we know.

18 So, no there -- I mean, we don't  
19 exactly know what he wanted and we don't know  
20 at this point, that's certainly the case. But  
21 I -- I think that it's just hard to say there's  
22 an impairment of his reliance interests when,  
23 really, the reliance interests came to play  
24 when the state --

25 JUSTICE GORSUCH: Does anyone pay life

1 insurance for the joy of paying life insurance?

2 MR. UNIKOWSKY: No.

3 JUSTICE GORSUCH: Isn't the  
4 specification of the beneficiary pretty  
5 important? I mean, Justice Washington in  
6 Dartmouth College said, you know, the bounty of  
7 a contract is -- is -- is essential to the  
8 obligation.

9 MR. UNIKOWSKY: Absolutely, Your  
10 Honor. Of course, the identity of the  
11 beneficiary is very important. It's the key of  
12 the policy.

13 But the point -- what this statute  
14 does is it construes the divorce as an  
15 exercise, as an option to change the  
16 beneficiary, which the legislature has deemed  
17 that not everyone, but most people want to do.  
18 And it still reserves the option in the  
19 policyholder to -- to redesignate the ex-spouse  
20 either in the divorce decree --

21 JUSTICE GINSBURG: He --

22 MR. UNIKOWSKY: Itself. Excuse me.

23 JUSTICE GINSBURG: He had -- he had  
24 already designated the contingent beneficiaries  
25 were his children, right?

1           MR. UNIKOWSKY: Correct. So, yes, so  
2 his -- so -- and that's another reason we think  
3 that the statute isn't necessarily an  
4 impairment, because when the -- the money goes  
5 to -- it's not as though the insurer is  
6 relieved of the obligation to pay. The money  
7 simply goes to the contingent beneficiaries.

8           JUSTICE GORSUCH: Well, what -- what  
9 if it didn't go to his contingent  
10 beneficiaries? Then what?

11          MR. UNIKOWSKY: Well, if there's no  
12 contingent beneficiary, it goes into the  
13 estate, and it's -- it's -- the money is  
14 distributed.

15          JUSTICE GORSUCH: Let's say the  
16 statute said it -- it goes to a charity or --  
17 or, instead of the children, some -- some nice  
18 thing for children. Would that be a Contract  
19 Clause violation?

20          MR. UNIKOWSKY: I think that that  
21 would --

22          JUSTICE GORSUCH: And if not, why not?

23          MR. UNIKOWSKY: I think that would be  
24 a -- a more difficult case for us.

25          JUSTICE GORSUCH: No, no, no, no, no,



1 not so easy.

2 (Laughter.)

3 MR. UNIKOWSKY: So I'm -- I'm --

4 JUSTICE GORSUCH: Would that be a  
5 Contract Clause violation?

6 MR. UNIKOWSKY: So I'm going to stick  
7 to my --

8 JUSTICE GORSUCH: Surely you've given  
9 some thought to that.

10 MR. UNIKOWSKY: I'm going to stick to  
11 my guns and say I don't think it was, but you  
12 don't have to agree with me to vote for us in  
13 this case. Okay?

14 So, first of all, I am going to stick  
15 to my guns and say I don't think that would be  
16 a Contracts Clause violation.

17 JUSTICE GORSUCH: So the state says,  
18 contract, we don't care about your primary or  
19 your contingent beneficiary. The money goes to  
20 the state.

21 The Constitution of the United States  
22 says that a state cannot impair the obligations  
23 of a contract.

24 And -- and you don't think we have a  
25 problem?

1 MR. UNIKOWSKY: I think that would be  
2 a taking because it would violate the Con --

3 JUSTICE GORSUCH: No, no, no, no, a  
4 Contract Clause.

5 MR. UNIKOWSKY: No, I don't think so.  
6 That would be a taking because it would violate  
7 the Constitution even going forwards.

8 JUSTICE GORSUCH: No, I'm asking you  
9 about Contract Clause violation.

10 MR. UNIKOWSKY: Yes.

11 JUSTICE GORSUCH: You'd say that's no  
12 Contract Clause violation. There's no  
13 impairment of an obligation in that case.

14 MR. UNIKOWSKY: If the money just  
15 escheats to the state --

16 JUSTICE GORSUCH: No, no, the statute  
17 just says it goes to the -- goes to wherever,  
18 to the state, a nice charitable organization  
19 we'd all agree on that most people would  
20 support, if not everybody, most people, just  
21 like most people would want to change their  
22 beneficiary here. That there's no impairment  
23 of an obligation in that case?

24 MR. UNIKOWSKY: Right, so we have the  
25 broader arguments and the narrower arguments in

1     our brief. Under the broadest argument in my  
2     brief, that's not an impairment, because it's  
3     like a will. We make the argument this is  
4     analogous to a will. A will isn't a contract.  
5     It may be bad for money in a will to be  
6     distributed to some party, but that's not a  
7     contractual obligation.

8             But if you disagree with me, Your  
9     Honor, we have several arguments in our brief  
10    that distinguish this precise scenario you have  
11    discussed. So one of our leading arguments in  
12    our brief is that this is a mere default rule  
13    and that's not an impairment when there's only  
14    a paperwork burden.

15            That argument which we make which is  
16    supported by numerous 19th Century cases, long  
17    before Blaisdell, would not apply to the  
18    hypothetical you've just given.

19            So we cite a number of cases in which  
20    there's these recording statutes that say, if  
21    you don't submit a piece of paperwork to the  
22    government, you lose your rights altogether.  
23    They're extinguished.

24            And those statutes did not exist at  
25    the time the contract was purchased.

1           And in a series of 19th century cases,  
2           from peak -- a peak era of enforcement of the  
3           Contracts Clause, the Court had no difficulty  
4           upholding those statutes saying it's just a  
5           paperwork obligation and, therefore, there's no  
6           impairment in the relevant sense.

7           And so --

8           JUSTICE GORSUCH: They also talked  
9           about remedies, right, as being distinct from  
10          obligations, didn't they?

11          MR. UNIKOWSKY: Some of those --  
12          that's true. But I think that these were not  
13          remedial statutes. I think that these  
14          destroyed the obligations altogether. Like, if  
15          you didn't submit the recording obligation, the  
16          mortgage was wiped out. So that's not -- I  
17          don't think it's a remedial issue. I think  
18          that's wiping out the rights.

19          I mean, for instance, the Gilfillan  
20          case from the 19th century is another good  
21          example that has nothing to do with contractual  
22          remedies. That was a case involving a  
23          bondholder settlement --

24          JUSTICE GORSUCH: The recording  
25          statutes meant -- merely said that your -- your

1 remedy would be different if you didn't record,  
2 right?

3 MR. UNIKOWSKY: It wasn't -- no, the  
4 rights were completely wiped out. You -- you  
5 -- the land patent just ceased to exist. If  
6 someone else bought the property, your  
7 contractual rights were eliminated. I don't  
8 think that's really remedial argument. It  
9 would just completely destroy the rights of the  
10 contract, period.

11 And maybe the Gilfillan case is a  
12 better example, which is a good 19th century  
13 case which was not a case about remedies. That  
14 was a case involving a corporate bondholder  
15 settlement where the legislature was concerned  
16 that -- that citizens wouldn't agree to the  
17 settlement which might not leave the company  
18 afloat. So it enacted this statute saying that  
19 if you don't dissent affirmatively from the  
20 settlement, you'll be deemed to have consented  
21 to the settlement.

22 And the Court had no difficulty  
23 upholding the statute, saying it's a mere  
24 paperwork obligation; all you have to do is  
25 send a letter to the insurance company -- or --

1 or to the -- to the company in that case;  
2 there's no impairment of a contractual  
3 obligation.

4 And that's the same -- excuse me,  
5 that's the same impairment in this case.

6 CHIEF JUSTICE ROBERTS: You made the  
7 point earlier that -- I understood you to make  
8 the point that this would be outside the scope  
9 of the Contract Clause because it was an  
10 exercise of the state's police power?

11 MR. UNIKOWSKY: In the -- yes. That's  
12 a different argument in the context of divorce.  
13 Maybe I --

14 CHIEF JUSTICE ROBERTS: Yeah. But --  
15 but is that true to the full extent of the  
16 police power? Anything that we would  
17 characterize as a police power authority would  
18 be exempt from scrutiny under the Contract  
19 Clause?

20 MR. UNIKOWSKY: No, this is a -- an  
21 argument of the sui generis nature of divorce.  
22 So the relevant point for us is that even when  
23 Mr. Sveen -- and I'm sorry to be jumping around  
24 between these arguments -- but even when  
25 Mr. Sveen purchased the insurance policy, the

1 state had the authority to decide what would  
2 happen to that beneficiary designation in a  
3 divorce. It's not like an ordinary contract  
4 where courts are bound by the intent of the  
5 parties. A divorce court, even at the time he  
6 bought the policy, had the power to give the  
7 policy to his ex-spouse as part of the  
8 equitable distribution of property or force him  
9 to keep paying proceeds to the ex-spouse as an  
10 ancillary to an alimony order. So I think that  
11 --

12 JUSTICE SOTOMAYOR: My problem with  
13 the police power argument you're making is that  
14 I don't think it stands alone, meaning you can  
15 think that the state has a greater interest in  
16 certain areas like divorce or others, regulated  
17 fields like mineral, et cetera, but I don't  
18 think that state police power gives unbounded  
19 discretion to the state.

20 To some extent, it's intermixed with  
21 what's the state's purpose and is it a  
22 legitimate thing it's doing.

23 MR. UNIKOWSKY: Your Honor, we are not  
24 arguing for unbounded state power. There's  
25 this particular argument about divorce which is

1       premised on the fact that even when Mr. Sveen  
2       bought the policy, the divorce court had made  
3       -- it was the divorce court's decision on what  
4       would happen to that policy in a divorce.

5                 JUSTICE SOTOMAYOR: Well, that goes  
6       back to Justice Gorsuch's question, could the  
7       state say, upon divorce, I'm giving the money  
8       to the state or I'm giving it to a charity, et  
9       cetera?

10                MR. UNIKOWSKY: See --

11                JUSTICE SOTOMAYOR: And you said yes,  
12       but I wasn't quite sure why.

13                It seems to me that, even under state  
14       power, you have to be able to articulate some  
15       fit between the need and the solution.

16                MR. UNIKOWSKY: Right. So my response  
17       to Justice Gorsuch was about a different  
18       argument about treating insurance policies like  
19       wills. With regard to a divorce, I agree with  
20       you that I don't think that just giving the  
21       money to a charity or to the government could  
22       conceivably be deemed as an exercise of  
23       preexisting police power, because, at the time  
24       Mark Sveen bought his policy, a divorce court  
25       couldn't just randomly take the parties' assets



1 and give it to the government to discourage  
2 divorce or something. That was not within the  
3 repertoire of options for the divorce court.

4 But the divorce court could revoke  
5 beneficiary designations. That happened all  
6 the time. So I think that the difference  
7 between that -- in the context of our divorce  
8 argument, the difference between Justice  
9 Gorsuch's hypothetical and this statute is that  
10 this statute -- reflects the exercise of a  
11 preexisting power vested in courts and --

12 JUSTICE KAGAN: Please.

13 MR. UNIKOWSKY: No, go ahead, I'm  
14 sorry.

15 JUSTICE KAGAN: So this might be an  
16 unfair question, but one of the things that  
17 struck me in reading your brief and now in  
18 listening to you, it's a -- it's an unusual  
19 thing we see in your brief, this kind of we  
20 have five arguments in varying levels.

21 You know, it's -- it's the police  
22 power; it's not a contractual obligation; it's  
23 not an impairment at all; it's not a  
24 substantial impairment; maybe it is, but it's  
25 justified. Did I get all those five right?

1 MR. UNIKOWSKY: Yes, you did.

2 (Laughter.)

3 JUSTICE KAGAN: Really, which one do  
4 you think? Because --

5 (Laughter.)

6 JUSTICE KAGAN: -- you know, you're  
7 answering some of our questions like, oh,  
8 that's an answer from column 1. And no, now I  
9 can give you an answer from column 3.

10 But when we have to decide this case,  
11 we presumably have to pick one. And if we were  
12 to go with you, I mean, where do you really  
13 think that the -- this -- this is -- the  
14 question is here?

15 MR. UNIKOWSKY: I think that the --  
16 the cleanest way to vote for us, and I hope you  
17 do, is that it's just -- it's really just a  
18 default rule and it's just a paperwork burden  
19 and there's no interference with the reliance  
20 interests, because, really, the reliance  
21 interests come into play at the time of the  
22 divorce.

23 JUSTICE KENNEDY: So you're -- you're  
24 saying it's not a substantial alteration; is  
25 that the --

1           MR. UNIKOWSKY: That's right. So I  
2 think there's --

3           JUSTICE KENNEDY: Is that the same  
4 argument?

5           MR. UNIKOWSKY: Yes, I -- I think so.  
6 And there's really two pieces to that. One is  
7 that you only have to send in a letter to the  
8 company, and this Court has said in a lot of  
9 cases that that's not a sufficient impairment  
10 to implicate the Contracts Clause. And also  
11 the fact that the -- the goal of the Contracts  
12 Clause is to protect reliance interests. And  
13 here, realistically, the reliance interests  
14 come to play at the time of the divorce because  
15 the statute's inert until then.

16          CHIEF JUSTICE ROBERTS: When you say  
17 it's not a substantial impairment, are you  
18 acknowledging that it is an impairment? At  
19 least in terms of ranking your -- your  
20 arguments?

21          MR. UNIKOWSKY: I don't think it's an  
22 impairment at all, but I think that because  
23 this Court has held that insubstantial  
24 impairments are not impairments at all, I think  
25 that's sort of an easier way to get to where we

1 want. But, certainly, we argue in our brief,  
2 and I'm -- I stick to our argument today, that  
3 there's just not an impairment, period, because  
4 it's simply the exercise as an option that  
5 leaves the option to redesignate the  
6 beneficiary by sending a letter.

7 I also think the divorce aspect of the  
8 case is important. And I do think the  
9 arguments sort of go together. The -- the  
10 state has broad authority over divorce. It  
11 always has. We quote James -- John Marshall  
12 and James Kent, who have given broad powers to  
13 the legislature over divorce.

14 And if the Court is concerned that you  
15 don't want to give the legislature unlimited  
16 power over divorce, then you can say: Well,  
17 the -- the legislature has broad powers to  
18 legislate the effect of a divorce decree and  
19 how -- you know, maybe even if that power is  
20 not unlimited, it at least extends to imposing  
21 this kind of paperwork burden, which, even  
22 outside the divorce context, this Court has  
23 already held does not constitute a substantial  
24 impairment.

25 So I'd like to reserve my time if I

1 may.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Mr. Dvoretzky.

5 ORAL ARGUMENT OF SHAY DVORETZKY  
6 ON BEHALF OF THE RESPONDENT

7 MR. DVORETZKY: Mr. Chief Justice, and  
8 may it please the Court:

9 The Constitution forbids states from  
10 passing any law impairing the obligation of  
11 contracts. Here, Minnesota directly and  
12 retroactively altered the contractual means by  
13 which policyholders select who will receive  
14 policy proceeds, and it did so even though it  
15 had evident alternatives, such as requiring  
16 notice of the revocation statute in divorce  
17 decrees, to achieve its purposes equally well  
18 but without impairing contractual obligations.

19 Minnesota, therefore, violated the  
20 Contracts Clause's clear prohibition, whether  
21 this Court returns to that clause's original  
22 understanding, takes the smaller step of  
23 treating impairments of public and private  
24 contracts alike, or simply applies current  
25 doctrine.

1           JUSTICE GINSBURG: The -- the court,  
2           it has been pointed out, in a divorce setting  
3           can say, presented with this very situation,  
4           the children get the proceeds of this policy.  
5           She's out. We've provided for equitable  
6           division of other property.

7           If a divorce court can do that, why  
8           can't the legislature make the same assessment?

9           MR. DVORETZKY: Because the Contracts  
10          Clause applies to laws passed by legislatures  
11          and not to the actions of courts.

12          Chief Justice Taft explained that in  
13          an opinion long -- a long time ago, and that  
14          opinion itself cited 20 other precedents of  
15          this Court saying the same thing. It follows  
16          from the text of the Contracts Clause that it  
17          speaks only of laws. And it makes sense that  
18          -- that the Contracts Clause would only apply  
19          to legislatures rather than courts because  
20          courts are constantly in the business of  
21          addressing contractual disputes, and the  
22          framers did not mean to constitutionalize every  
23          Contracts Clause case. But when a state --

24          JUSTICE SOTOMAYOR: I'm sorry, judges  
25          do what they do as a result of laws, meaning

1 they don't just decide to redistribute  
2 insurance proceeds out of the kindness of their  
3 heart or -- or -- they do it because there's a  
4 specific law that gives them the right to do  
5 that. So I'm not sure what the difference is.

6 MR. DVORETZKY: I think the --

7 JUSTICE SOTOMAYOR: If the law is  
8 compelling it or the law is permitting it, then  
9 it's the judge as well as the law.

10 MR. DVORETZKY: I think there's a  
11 difference between courts exercising their  
12 discretion and states enacting laws that have  
13 this kind of --

14 JUSTICE KENNEDY: Well, but Justice  
15 Sotomayor's point and Justice Ginsburg's point  
16 is the same. Suppose the state said that, in a  
17 divorce decree, the court will assume that the  
18 intent is to leave the beneficiaries the same  
19 or leave the beneficiaries different. And the  
20 court acts under that statute.

21 Then you have a contract clause. Just  
22 the fact that the court is implementing the  
23 state's policy doesn't mean that it's a court  
24 decree, not a state decree.

25 MR. DVORETZKY: I think there -- there

1 is -- there has historically been a fundamental  
2 distinction, though, between what courts do and  
3 what legislatures do, and that's a result,  
4 again, both of precedent and of the commonsense  
5 notion that the Contracts Clause can't apply to  
6 what courts do, or else every time a court does  
7 anything with respect to a contract, outside  
8 the divorce context as well, every time a court  
9 declares a contract unconscionable, that would  
10 be a contracts violation. That just can't be.

11 But this Court has long recognized, as  
12 the framers intended, that when a legislature  
13 passes a law that impairs contract, that is  
14 getting directly at the heart of what the  
15 Contracts Clause was intended to cover.

16 JUSTICE BREYER: Well, I take it here  
17 the contract is -- let's call him Mr. Smith --  
18 he has a contract with an insurance company.  
19 That contract provides that after a divorce the  
20 money will still go to the designated  
21 beneficiary.

22 They pass a law and it says it will  
23 not go to the beneficiary that you initially  
24 designated, unless you act affirmatively.  
25 Right? That's the contract.



1 MR. DVORETZKY: That --

2 JUSTICE BREYER: That's the situation  
3 in front of us?

4 MR. DVORETZKY: That's -- yes.

5 JUSTICE BREYER: Yes. Okay. Now I  
6 found this -- three cases from the 19th century  
7 -- 1870s, 1880s, 1923 -- not a period when this  
8 Court was about to interpret the Contracts  
9 Clause loosely. I think that's fair.

10 One of the cases says the legislature  
11 passes a law after Smith, who is a bondholder  
12 of a corporation, enters into a contract with  
13 the corporation. So this is a contract, Smith  
14 and the corporation. They have a bond.

15 The legislature passes a law that  
16 makes that bond less valuable, less valuable.  
17 All right? Applies it retroactively. And this  
18 Court says: That's fine.

19 You know why? Because all that Smith  
20 has to do in order to stop its value going  
21 down, rejecting the change, is affirmatively  
22 notify the company. And they say: No, that  
23 isn't a big deal. Okay?

24 Case two: Smith buys property at a  
25 tax sale, at a tax sale. All right? Now the

1 owners can get it back, by the way, if they pay  
2 their taxes within a year or some period of  
3 time. They pass a law retroactively saying:  
4 Smith, you can't keep your property unless you  
5 tell the owners they're about to lose it.

6 That would seem to make quite a  
7 difference, because, after all, if they find  
8 out, they might object and pay the back-taxes.

9 The court says: Not a big deal. It  
10 doesn't violate the clause.

11 Case three. Okay. What's case three?  
12 Conley. Yeah, Smith has an agreement with the  
13 mortgage company. It says: Where there is  
14 foreclosure, the mortgage company has to do A,  
15 B, and C. Retroactively, the legislature says:  
16 Oh, by the way, mortgage company, you also have  
17 to do D, which is file an affidavit.

18 Surely, an affidavit is no easier to  
19 file than to write a letter to an insurance  
20 company. The Court says: That is not an  
21 obligation -- you have not violated the  
22 Contracts Clause, because filing an extra  
23 affidavit is not a big deal.

24 So, when I read those three cases, I  
25 looked at what they said was not a big deal.

1 Then I looked at the obligation here, which is  
2 simply write a letter to the insurance company  
3 if you don't like they're changing the  
4 designation that I originally put out. And I  
5 thought maybe this isn't a big deal.

6 (Laughter.)

7 JUSTICE BREYER: Which, of course, is  
8 just what they're arguing. So I would like to  
9 know, how do I, forgetting Blaisdell, hold for  
10 you?

11 MR. DVORETZKY: First, Justice Breyer,  
12 let me emphasize the -- the key term of this  
13 contractual -- this contract, the life  
14 insurance contract, provides precisely how the  
15 policyholder is to designate the beneficiary  
16 and, in turn, assures the policyholder that  
17 that is the beneficiary that will be paid.

18 That is --

19 JUSTICE BREYER: Just like the  
20 mortgage contract. All right, go --

21 MR. DVORETZKY: Well, I disagree that  
22 it's --

23 JUSTICE BREYER: No -- so -- so go  
24 ahead. Sorry.

25 MR. DVORETZKY: That is different than

1 the cases that --

2 JUSTICE BREYER: Okay. Okay. Go  
3 ahead.

4 MR. DVORETZKY: That is different than  
5 the cases that you were talking about. Let me  
6 start with the Gilfillan case. That is the  
7 case involving the bond and the -- the  
8 retroactive -- the retroactive change there.

9 The Court went out of its way in the  
10 Gilfillan opinion to point out that the -- the  
11 bond contract there was a particular kind of  
12 contract in which bondholders effectively  
13 assume obligations to one another.

14 It's a type of contract where there is  
15 like a good -- a duty of good faith and fair  
16 dealing to your co-bondholders. That's very  
17 different than our case, where the policyholder  
18 has a direct and explicit assurance about the  
19 beneficiary designation.

20 So there's a difference in the -- in  
21 the nature of the impairment.

22 Moreover, in the Gilfillan case, the  
23 Court also focused on the practicalities and  
24 whether or not it was still reasonably possible  
25 for the bondholder to protect his original

1 contractual rights. And the Court noted that  
2 there was both actual notice of the change and  
3 sufficient time to object to it.

4           Whereas, in this case, the entire  
5 premise of the Minnesota law, according to the  
6 Petitioners, is that policyholders are  
7 inattentive to their beneficiary designations.

8           It is simply -- it's paradoxical to  
9 expect an inattentive policyholder, somebody  
10 who is presumed not to know about this or to be  
11 paying attention to it, to protect their rights  
12 by -- by being aware of the law and then  
13 objecting to the change.

14           And so the practicalities here cut  
15 exactly the opposite way as in --

16           JUSTICE KAGAN: Well, that might be  
17 true -- I'm sorry to -- that might be true if  
18 the divorce preceded the statute, right,  
19 because, presumably, the time when even an  
20 inattentive person is going to come upon this  
21 problem is when the divorce occurs.

22           And as long as the divorce is  
23 subsequent to the statute, I don't see how you  
24 can make that argument.

25           MR. DVORETZKY: Well, I would agree

1 with you if Minnesota had taken the same kind  
2 of step that Virginia has taken and actually  
3 required the divorce decree to inform the  
4 divorcing parties about the  
5 revocation-on-divorce statute.

6 At least under modern doctrine, that  
7 would solve our concerns because, at that  
8 point, you're right, as part of the divorce,  
9 the policyholder, the divorcing party, would be  
10 aware of the change.

11 But there's no reason to presume that  
12 as part of the divorce, absent such a notice  
13 requirement, that the inattentive policyholder  
14 is aware. Indeed, the whole premise of the  
15 statute is that people do go through divorces,  
16 but this issue of beneficiary designations is  
17 not something that they are paying attention  
18 to. And so --

19 JUSTICE GINSBURG: Do you think it's  
20 not a fair assumption that most people when  
21 they divorce do not want their former spouse to  
22 be enriched beyond whatever the law requires,  
23 if you have to make a guess?

24 You're talking about an impairment of  
25 the policyholder's rights. But the Minnesota

1 legislature has said, not 100 percent, but most  
2 cases of divorce, the spouse who is the  
3 policyholder would not want the former spouse  
4 to get the proceeds, would much prefer they go  
5 to his children.

6 MR. DVORETZKY: Justice --

7 JUSTICE GINSBURG: Isn't that a  
8 reasonable assumption for a legislature to  
9 make?

10 MR. DVORETZKY: I -- I don't think  
11 that it is, at least not without some evidence  
12 in the record to that effect. And there's no  
13 statement of legislative purpose, there's no  
14 amicus support from Minnesota or from any other  
15 states whose laws are at issue here, as to the  
16 empirical assumption that your question  
17 suggests.

18 I think that there are some people who  
19 would want to keep -- who would want to change  
20 beneficiary designations, but there are plenty  
21 of reasons why people might not. That's why  
22 the federal government and almost half the  
23 states don't have this kind of a law. And if  
24 --

25 JUSTICE GINSBURG: I'd like to ask the

1 question I asked Mr. Unikowsky. Do you know  
2 what the settlement was in the divorce decree,  
3 what Melin got out of the divorce?

4 MR. DVORETZKY: Justice Ginsburg, that  
5 is in -- the district court docket for that is  
6 45-3, and it spells out who got which car, and  
7 I think there was a snowmobile and an ATV and  
8 some other property. But it's all spelled out  
9 at District Court 45-3.

10 But what the divorce decree -- two  
11 things of note on the divorce decree.

12 One, it is silent about insurance, and  
13 so we simply don't know one way or another  
14 based on the divorce decree itself what Mr.  
15 Sveen's intentions were.

16 We do know that Ms. Melin put an --  
17 had an affidavit in the record that they had  
18 maintained -- that they had reached an oral  
19 agreement to maintain one another as  
20 beneficiaries.

21 JUSTICE GINSBURG: Yes, but that was  
22 not approved.

23 MR. DVORETZKY: That's true. But the  
24 only evidence in the record, one way or  
25 another, that didn't satisfy Minnesota's clear



1 and convincing evidence standard for an oral  
2 contract.

3 But -- but if Your Honor's question is  
4 what evidence do we have, that's the only  
5 evidence that we have. And she, in fact, kept  
6 him as her policy beneficiary up until the time  
7 of his death. The other --

8 JUSTICE ALITO: What if there were --  
9 what if there was evidence that Mr. Sveen was  
10 very well aware of this statute at the time of  
11 the divorce but did nothing?

12 So suppose there was testimony by 10  
13 witnesses that at the time of the divorce he --  
14 he got a copy of the statute and he read it?

15 MR. DVORETZKY: I --

16 JUSTICE ALITO: Would that make a  
17 difference?

18 MR. DVORETZKY: I still don't think it  
19 would make a difference, because the way the  
20 Court has considered these sorts of impairment  
21 questions and whether -- whether it is possible  
22 to overcome the impairment by informing the  
23 insurance company has been on an  
24 across-the-board basis, not based on the  
25 particular facts of a case.

1           So the McGahey case, which is from the  
2           era that Justice Breyer was asking me about  
3           earlier, is an example of this. That was the  
4           case where, retroactively, the state required  
5           bondholders to produce the original bond, and  
6           not just the bond coupon, in order to collect.

7           And there were surely some -- some  
8           bondholders who could have produced the  
9           original bond but many who couldn't. And the  
10          Court --

11          JUSTICE BREYER: Which is easier?  
12          Which is easier? To produce an original bond  
13          that you bought, say, 20 years ago, and who  
14          knows where it is, or to write a letter saying,  
15          please, keep my wife as beneficiary? That's a  
16          loaded question.

17          MR. DVORETZKY: Well --

18          (Laughter.)

19          MR. DVORETZKY: But -- but -- but I  
20          think it's -- it's a loaded -- it's a loaded  
21          question because it has a premise built into it  
22          that it's only easy to file the form if you are  
23          aware of the need to do so. And the whole  
24          premise of the Minnesota law is that people are  
25          not aware of the need to do so.

1 JUSTICE BREYER: Well, I said likely.  
2 I mean, I don't know. I'm not a family law  
3 expert, which family law is the most difficult  
4 subject I think there is. It's horrible,  
5 human, terrible. It's really difficult.

6 But if I were to guess, I would guess  
7 that when there is a divorce proceeding,  
8 there's a lawyer, quite often, usually, and he  
9 discusses with his client, the lawyer, what --  
10 that this is likely to affect property.

11 Now I'm not saying which, but a lot of  
12 people would think: I have an insurance  
13 policy. Now I don't know that that happens,  
14 but I suspect.

15 MR. DVORETZKY: I suspect that  
16 sometimes it does, but it doesn't always happen  
17 because not everybody even --

18 JUSTICE BREYER: You're absolutely  
19 right on that. I mean, that might not be a  
20 fair question because sometimes people will and  
21 sometimes they won't. And I think you're  
22 originally saying often they won't think of it,  
23 and that's true. And sometimes they will think  
24 of it, that's true. I don't think actually  
25 perhaps neither of us knows how often they

1 think of it.

2 MR. DVORETZKY: Right. But I think  
3 the point is that what the Contracts Clause is  
4 concerned with is the impairment of the rights  
5 of those who weren't counseled, who are not  
6 aware, who don't know that they need to file  
7 the form.

8 JUSTICE KAGAN: But, Mr. Dvoretzky, if  
9 I could come back to Justice Alito's question  
10 because, in answering Justice Alito, you say we  
11 don't look to Mr. Sveen in particular, even if  
12 we know a lot about him. We look to this broad  
13 class of people who are in this situation.

14 And if that's true -- I mean, I guess  
15 I had sort of conceptualized your argument as  
16 the exact opposite. Well, we don't know  
17 anything about Mr. Sveen, so even if it's true  
18 that people generally want to give their life  
19 insurance policy to their children, that  
20 doesn't matter because we don't know that about  
21 Mr. Sveen.

22 But if you're saying: Really, we look  
23 to the broad class of people, then why  
24 shouldn't the broad class of people that we  
25 look to be -- you know, why shouldn't we make

1 the same judgment that the -- or -- that the  
2 legislature made or at least accept that  
3 judgment that if we look to the broad class of  
4 people, most of them would rather give their  
5 life insurance policy to their children than to  
6 the -- their divorced spouse?

7 MR. DVORETZKY: Because I think it's  
8 indisputable that whether or not most would,  
9 many would not. And -- and the contracts --

10 JUSTICE KAGAN: Well, but you just  
11 said we're not -- I mean, if -- if -- if the  
12 question is the class, rather than the  
13 individual, then what option do we have other  
14 than to say something in general about the  
15 class?

16 MR. DVORETZKY: Because I think when  
17 you speak about the class as a whole, you're  
18 also encompassing some individual -- some  
19 individuals within that class who aren't going  
20 to want their rights to -- to be abrogated by  
21 the legislature.

22 And what the Contracts Clause is  
23 concerned with is making sure, even under this  
24 Court's modern jurisprudence, that the  
25 legislature doesn't abrogate the rights of

1 some, even if it's intending to benefit others  
2 by effectuating their intent. And here --

3 JUSTICE ALITO: But it seems to me  
4 you're -- your answer to me, to my question,  
5 leads to the conclusion that you are impairing  
6 the insured's -- the obligations that the  
7 insured counts on in -- in relation to the  
8 contract.

9 There's a contract. The meaning of  
10 the contract is determined by state law. The  
11 insured knows at the time of the divorce that  
12 under state law the meaning of the contract is  
13 that the -- the ex-spouse, the now ex-spouse,  
14 will not be the beneficiary. The -- the -- the  
15 alternative beneficiaries will -- will receive  
16 the money. And you're saying that doesn't  
17 matter that the insured may have counted on  
18 this. Still, the -- the -- the -- the state  
19 law dictating the -- interpreting the contract  
20 is overridden by the Contracts Clause.

21 MR. DVORETZKY: And that's because,  
22 for Contracts Clause purposes, the relevant law  
23 is the time -- is the law that is in effect at  
24 the time of the contract. That's the -- the  
25 relevant law that informs what the contractual

1 terms mean. And --

2 JUSTICE ALITO: But the -- I thought  
3 this statute was in place at the time of the  
4 contract?

5 MR. DVORETZKY: No, it was not. The  
6 -- the statute was enacted in 2002.

7 JUSTICE ALITO: Okay.

8 MR. DVORETZKY: And the contract was  
9 from 1998.

10 JUSTICE GINSBURG: But it was in place  
11 at the time of the divorce?

12 MR. DVORETZKY: It was in place at the  
13 time of the divorce. And, as we've been  
14 discussing, there's simply no evidence one way  
15 or another, besides the -- the conduct of the  
16 parties after the divorce with respect to  
17 Ms. Melin's beneficiary designation, no  
18 evidence that Mr. Sveen either was or was not  
19 aware of it.

20 The -- the divorce decree that I cited  
21 earlier at 45-3 has a very long appendix with  
22 various notices that Minnesota already requires  
23 divorce courts to provide and divorce decrees  
24 to include. The state has no interest that I  
25 can fathom and certainly no interest that any

1 state has come forward to advance for why it  
2 needed to achieve its purported goals in this  
3 case the way it did.

4 And by -- by doing this the way it  
5 did, it is impairing the contractual rights of  
6 at least some policyholders, those who have  
7 good reasons for not wanting to revoke their  
8 beneficiary designations.

9 JUSTICE BREYER: Just one second. I  
10 took -- I took Justice Alito as asking  
11 something like this, but -- and I am curious.  
12 A lot of people did buy life insurance policies  
13 before 2002 which don't say anything about it,  
14 right? They bought it before.

15 A lot of people probably were divorced  
16 between 2002 and 2018. So what, if you win  
17 this case, what happens to all those people who  
18 were told by their lawyers that state law means  
19 that your wife is no longer the beneficiary  
20 unless you write a letter to the insurance  
21 company? And they say: Good, I don't want her  
22 to be. I want my children to be. Great.

23 What happens to those people if you  
24 win this case?

25 MR. DVORETZKY: I think that their



1 beneficiary designations are determined in  
2 accordance with the terms of their contract.

3 JUSTICE BREYER: I'm just saying  
4 obviously the question is do all those people  
5 who thought their children would get the money,  
6 they're just out of luck? Is that right?

7 MR. DVORETZKY: They're out of luck  
8 unless they redesignate --

9 JUSTICE GORSUCH: They have to write a  
10 letter.

11 MR. DVORETZKY: Unless -- right,  
12 exactly. Unless they redesignate the  
13 beneficiary.

14 JUSTICE GORSUCH: Somebody has to  
15 write a letter. Okay.

16 (Laughter.)

17 JUSTICE GORSUCH: I think we've  
18 established that.

19 JUSTICE BREYER: They have to -- they  
20 have to find out about this case, if you win,  
21 and maybe they just read Supreme Court cases --  
22 it's possible --

23 (Laughter.)

24 MR. DVORETZKY: We all do.

25 JUSTICE KENNEDY: I was going to --

1 JUSTICE GORSUCH: Hopefully, they read  
2 --

3 JUSTICE KENNEDY: And they read -- and  
4 they read the Contract Clause and they read the  
5 Dartmouth College case.

6 (Laughter.)

7 JUSTICE GORSUCH: Either that or the  
8 state statute.

9 Okay. My -- my question for you,  
10 though, I want to pick up where Justice Breyer  
11 left off, and that's recording statutes. What  
12 do we do about those? This Court has long held  
13 that those are fine and -- even though they  
14 pose some limits on -- on contracting. And --  
15 and your colleague on the other side suggested  
16 that the best line we draw is how substantial  
17 the impairment is.

18 This Court has approved recording  
19 statutes as an impairment. What do we do about  
20 those?

21 MR. DVORETZKY: The recording statutes  
22 are different for a few reasons. First, the  
23 recording statutes don't directly change an  
24 express term of the contract in the way that  
25 this law does.

1                   Here, we have a contract with a  
2 beneficiary --

3                   JUSTICE SOTOMAYOR: I'm sorry, it  
4 takes away an express term of the contract. It  
5 does away with the contract. You fail to  
6 record, you get no protection.

7                   MR. DVORETZKY: Well, first, the --

8                   JUSTICE SOTOMAYOR: Here, you get a  
9 beneficiary, one you've designated as an  
10 alternative, so you get somebody. The money's  
11 paid. That's a lot better than having your  
12 rights revoked completely.

13                  MR. DVORETZKY: First, Justice  
14 Sotomayor, the contract in those cases didn't  
15 speak one way or another to the recording  
16 obligation. That was simply a procedural  
17 change as to remedy that legislatures adopted  
18 after the fact.

19                  Second, the -- the recording statutes  
20 don't leave the property owners without  
21 recourse. If Mr. Smith, from Justice Breyer's  
22 hypothetical, sells the same property twice,  
23 only one of them can get the property, but the  
24 other one still has recourse against Mr. Smith  
25 for double-selling the property.

1           And so the recording statutes are  
2           fundamentally different because they're not  
3           acting directly on the contract in the same way  
4           as the law that's at issue here, and there's  
5           still -- there's still a remedy. It's not  
6           nullifying the entire point of the contract,  
7           which, in the life insurance context, is to  
8           provide for a particular beneficiary.

9           I'd also suggest from -- again from  
10          this era of cases, that the relevant analogs  
11          are the Seibert and the McGahey cases, and  
12          those two cases stand for -- for two  
13          propositions.

14          One, Seibert stands for the  
15          proposition that, when a legislature does  
16          directly change a term of the contract, that in  
17          that situation, the Court has found -- has  
18          found a Contracts Clause violation.

19          So, in Seibert, there was a bond that  
20          provided for a particular procedure for  
21          collecting the taxes that would be used to pay  
22          the bonds. The legislature subsequently  
23          changed that, and the Court found a violation.  
24          That's analogous to the situation here where  
25          you have a contractual provision about

1 beneficiary selection.

2           And then McGahey, as I was mentioning  
3 earlier, that is the case where yet -- that is  
4 the case where the bondholders had to produce  
5 the original bond and the Court, looking at the  
6 class of bondholders as a whole, recognized  
7 that some bondholders might be able to meet  
8 that requirement, but in order to protect the  
9 rights of those who couldn't, and it was  
10 impractical for those who couldn't to somehow  
11 produce these bonds, the Court recognized that  
12 there was a Contract Clause violation.

13           JUSTICE SOTOMAYOR: But that goes back  
14 to Justice Gorsuch's point, which is we look at  
15 the nature of the impairment, how difficult is  
16 it to do whatever is being changed. And  
17 there's a big difference between producing  
18 something you may have lost 20 years before and  
19 writing a letter to an insurance company or  
20 including it in your divorce decree or doing  
21 something else. It doesn't cost you much to  
22 do.

23           MR. DVORETZKY: So, again, I think  
24 those cases stand for the proposition that  
25 there isn't -- the reason there wasn't an

1     impairment there is that the contract was not  
2     being directly altered by the legislature in  
3     the way that it is here.

4             Even if you look at it as a  
5     practicability question, though, the -- the  
6     practical problem here is that policyholders  
7     are presumed to be unaware. And, again, under  
8     the original understanding of the Contracts  
9     Clause, any impairment was sufficient. At a  
10    minimum, if you -- if the Court were to  
11    equalize the treatment of public and private  
12    contracts, essentially ending the experiment  
13    begun in U.S. Trust, the state here has a less  
14    restrictive way of achieving its objectives  
15    simply by providing notice.

16            And, lastly, even under the -- the  
17    Court's more flexible modern precedents, if the  
18    Contracts Clause means anything at all, it's  
19    that the state can't impair contractual rights  
20    gratuitously. Where -- where there is an  
21    alternative that works equally well, at a  
22    minimum, the state has to do that much.

23            And -- and even under the Court's  
24    modern cases, the Court has said repeatedly  
25    that the Contracts Clause is more than just

1 rational basis review. And so what does that  
2 mean? At a minimum, it means, one, the state  
3 -- litigants, after the fact, can't just come  
4 in with conjecture about what the state  
5 legislature was trying to achieve. There must  
6 be some showing of that in the record. That's  
7 what the Court said in Allied Structural.

8 And, second, where contractual rights  
9 are impaired and there's a ready alternative,  
10 at a minimum, the legislature ought to be  
11 required to take that particular alternative.

12 Mr. Unikowsky suggested --

13 JUSTICE GINSBURG: May I -- what is  
14 your position on a policy that's taken out  
15 after the statute's enactment? Then it's okay,  
16 right?

17 MR. DVORETZKY: Yes, that would -- if  
18 the policy is taken out after the statute's  
19 enactment, then the statute is not acting  
20 retroactively on that policy.

21 JUSTICE ALITO: What about the  
22 retroactive application of a slayer statute?

23 MR. DVORETZKY: So I think, under  
24 modern Contracts Clause doctrine, that would  
25 probably pass muster because the state's

1 interest in ensuring that murderers don't  
2 collect life insurance proceeds is, I think,  
3 both intuitively and I'm sure --

4 JUSTICE ALITO: What about -- what  
5 about the original understanding?

6 MR. DVORETZKY: So, under the original  
7 understanding, I think it's a harder question.  
8 I think, arguably, if the slayer statute were  
9 viewed as a form of punishment for murder, then  
10 that could be within the -- the very narrow  
11 original understanding of the legislature's  
12 police power. But that's very far removed from  
13 this case, which doesn't address -- again, the  
14 original understanding of the police power,  
15 something had to be directly related to health,  
16 safety, or morals.

17 So slayer statutes might survive under  
18 the original understanding. I think they  
19 almost surely would survive under the modern  
20 understanding because the interest is much  
21 greater than the minor interest that's at issue  
22 here, and I don't think that just a -- a notice  
23 requirement wouldn't be sufficient in that  
24 case.

25 But it --



1           JUSTICE GINSBURG:  There was also, I  
2     think, an example on the other side of a change  
3     in the status of adopted children to make them,  
4     for all purposes, the same as biological  
5     children.

6           MR. DVORETZKY:  So I -- I think, under  
7     the original understanding, that would be a  
8     Contracts Clause violation.  Under the modern  
9     test, there is a -- a court -- there is a case  
10    we cited in our brief that has found such a  
11    change to be unconstitutional.

12           It would, however -- there would,  
13    however, be a stronger case for its  
14    constitutionality than there is here if, under  
15    the modern approach, the state thought that it  
16    had a strong policy interest in ensuring the  
17    equal treatment of adopted children.

18           That, however, is fundamentally  
19    different from this case, where -- where no one  
20    has made any showing of a strong policy  
21    interest in effectuating the presumed intent of  
22    some policyholders at the expense of the intent  
23    of others.

24           Mr. Unikowsky, in his argument, made a  
25    few points as to why the Virginia alternative,

1 or a notice alternative, would not be  
2 sufficient, that I'd just like to briefly  
3 address.

4 One, the notice -- the notice that is  
5 provided can exist alongside the  
6 revocation-on-divorce statute. In other words,  
7 a state is free to have, under the modern  
8 approach, the revocation-on-divorce statute on  
9 the books so long as it tells people. And --  
10 and it's also free to do the same thing -- have  
11 the same revocation-on-divorce statute for  
12 wills and for life insurance policies, and also  
13 to provide the same notice for wills and for  
14 life insurance policies.

15 And so, in that respect, that achieves  
16 the goal that -- that Mr. Unikowsky posited of  
17 achieving equal treatment of wills and life  
18 insurance policies so long as that is actually  
19 what people want, as long as that is actually  
20 what the -- the divorcing parties want.

21 As for disputes about what a decree --  
22 a decree means, the revocation-on-divorce  
23 statute can take effect so long as there is  
24 notice. And so there doesn't need to be a  
25 dispute about what the decree means if, in

1 fact, the -- the revocation-on-divorce statute  
2 has simply taken effect.

3 If the Court has no further questions,  
4 again, the Contracts Clause is absolute in its  
5 language. Chief Justice Marshall recognized  
6 long ago that this was a clause so clear that  
7 it could hardly be misunderstood and recognized  
8 that it applied to all manner of contracts.

9 We ask that the Court bear that  
10 original understanding of the Contracts Clause  
11 in mind in resolving this case. And even under  
12 the more deferential modern approach, that  
13 original understanding ought to inform the  
14 approach, particularly where, as here, there's  
15 a ready alternative to achieve all of the  
16 state's objectives without impairing anybody's  
17 contractual rights.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Five minutes, Mr. Unikowsky.

21 REBUTTAL ARGUMENT OF ADAM G. UNIKOWSKY

22 ON BEHALF OF THE PETITIONERS

23 MR. UNIKOWSKY: Thank you, Mr. Chief  
24 Justice.

25 So there's been a lot of different

1 arguments floating around at the argument  
2 today. There's arguments about divorces, about  
3 wills, about reliance, and others. So I'd like  
4 to just say a few words about what I think  
5 would be a -- a kind of a clean way to resolve  
6 this case narrowly that wouldn't open some of  
7 the parade of horrors that -- that some  
8 members of the Court have been concerned about.

9           Some lower courts have conceptualized  
10 life insurance policy beneficiary designations  
11 as similar to wills. That's a broad argument  
12 that produces some of the concerns that Justice  
13 Gorsuch posed questions about.

14           We stick to that argument, but the  
15 Court doesn't need to -- to decide that in  
16 order to -- to vote in our favor today.

17           So I think -- I'm sorry. I think that  
18 the first important principle is that this is a  
19 divorce case. The Court isn't reaching out and  
20 interfering with private relationships. The  
21 statute only comes into effect when people come  
22 to the court and vest the court with  
23 jurisdiction to divide their assets.

24           And my colleague discussed what -- the  
25 statements of Chief Justice Marshall. Chief

1 Justice Marshall himself said that the  
2 Contracts Clause has never been understood to  
3 restrict the general right of the legislature  
4 to legislate on the subject of divorces. So I  
5 think that we have a very strong originalist  
6 argument that, specifically in the context of  
7 divorce, the police power simply --

8 JUSTICE GORSUCH: But isn't that  
9 because Justice Marshall also said that  
10 marriage contracts are not within the  
11 cognizance of the Contract Clause? And I don't  
12 think anyone disputes that life insurance  
13 policies are within the cognizance of the  
14 Contract Clause, or -- or do you?

15 MR. UNIKOWSKY: No, I -- I --  
16 certainly, they are. But the statement that  
17 Chief Justice Marshall made is that the general  
18 right of the legislature to legislate on the  
19 subject of divorces has not been questioned.

20 And I think this is a fortiori --

21 JUSTICE GORSUCH: Because marriage  
22 contracts are not within the cognizance of the  
23 clause.

24 MR. UNIKOWSKY: No, but I -- I think  
25 this is --

1 JUSTICE GORSUCH: Right?

2 MR. UNIKOWSKY: -- an a fortiori case.  
3 No, that's not why, Your Honor. I don't think  
4 so.

5 It's true he said that. I acknowledge  
6 that in our brief, that that was the context in  
7 which he was saying it. But I think that this  
8 is an a fortiori kind of case, because if the  
9 legislature has the power to sever a  
10 contractual relationship -- a marriage  
11 relationship all together, which will  
12 necessarily have dramatic impacts on the  
13 parties' property interests, I think it's a  
14 much lesser power to simply regulate one way in  
15 which a divorce decree severs that  
16 relationship.

17 And I think that it's -- there's also  
18 -- history provides a different lesson, which  
19 is that there's never been a case ever, until a  
20 few cases on the circuit split in this case,  
21 where any court has held that a statute  
22 regulating the effect of a divorce decree  
23 violates the Contracts Clause. And it's not  
24 for lack of opportunities, because the law of  
25 equitable distribution of property has changed

1 dramatically over the century -- over the two  
2 centuries. And yet, this type of argument has  
3 never succeeded.

4           So I think that, at a minimum,  
5 especially in the context of a tradition of  
6 state law control over divorce, there's a broad  
7 police power there, but I -- I don't think the  
8 Court has to hold that divorce courts have  
9 unlimited power.

10           I think that if divorce -- if the  
11 police power over divorce means anything, it's  
12 the power to enact this very narrow kind of  
13 default rule.

14           You know, my colleague talks about the  
15 Seibert and McGahey -- and McGahey cases from  
16 the 19th century. Those were dramatically  
17 different. Those were post-Civil War era cases  
18 where state legislatures passed laws to  
19 prevented hated out-of-state bondholders from  
20 being paid back. That was the purpose of these  
21 laws.

22           Professor Ely's book about the  
23 Contracts Clause, who wrote an amicus brief in  
24 this case, discusses the Virginia statute where  
25 there's a whole bunch of cases where the

1 Virginia legislature specifically tried to  
2 prevent bondholders from being paid back by  
3 putting these requirements they knew that they  
4 couldn't meet.

5           And then there's the -- the Seibert  
6 case, where there was a contractual right to  
7 force courts to pay money on these bonds, which  
8 was abrogated. The new law provided that the  
9 prosecutor had to get the county court to pay  
10 -- to raise taxes, which was never going to  
11 happen.

12           So these were laws that were  
13 specifically designed to prevent creditors from  
14 being paid back. That can't be more different  
15 from this case, which really is a paperwork  
16 obligation, which is quite comparable to this  
17 -- to the recording obligations that we talk  
18 about.

19           In fact, I think that this is less of  
20 a burden, because, as Justice Sotomayor pointed  
21 out, you don't submit that form, your land  
22 patent is completely wiped out. You don't get  
23 anything. That strikes me as a far greater  
24 impairment than this case, where the failure to  
25 submit a form is actually going to vindicate



1 the person's intent in the typical case.

2           So I think that when you talk about  
3 the broad police power over divorce and then  
4 the fact that it's only writing a letter, I  
5 think the statute is constitutional, especially  
6 -- and the third thing I'd like to talk about  
7 is the reliance issue because this is a case  
8 about retroactivity.

9           The question is not whether the Court  
10 agrees with the statute or not. The question  
11 isn't even whether it typically vindicates the  
12 intent of the spouse or not. That's a policy  
13 question, both going forward or -- and  
14 backwards.

15           The question is whether it  
16 retroactively impairs a contractual obligation.  
17 And the answer is no, because the reliance  
18 interest, as I think even my colleague  
19 conceded, really comes into play at the time of  
20 the divorce. That is when people are thinking  
21 about this. The statute doesn't even do  
22 anything until the divorce happens.

23           And I think that reliance is important  
24 to the Contracts Clause because that's why the  
25 clause distinguishes between statutes passed

1 before and after a contract, because of the  
2 recognition that the contract itself generates  
3 reliance interests.

4 And so, therefore, if -- it's  
5 essentially undisputed that reliance interests  
6 really come into play at the time of the  
7 divorce rather than at the time of contracting,  
8 it's just not an impairment of contractual  
9 obligations in the relevant sense.

10 The only thing that would be impaired  
11 -- the only reliance expectations that would be  
12 impaired are those of Mark Sveen, who might not  
13 be able to get the proceeds, or who might not  
14 be able to distribute the proceeds as he  
15 intended.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel. The case is submitted.

19 (Whereupon, 11:06 a.m., the hearing  
20 concluded.)

21

22

23

24

25

## Official

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