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IN THE SUPREME COURT OF THE UNITED STATES

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

Petitioner :

v. : No. 09-497

ANTONIO JACKSON. :

- - - - - x

Washington, D.C.

Monday, April 26, 2010

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

APPEARANCES:

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

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

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P R O C E E D I N G S

(10:02 a.m.)

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

Mr. Friedman.

ORAL ARGUMENT OF ROBERT F. FRIEDMAN

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 JUSTICE SOTOMAYOR: You have --

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

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

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

1 Sotomayor.

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

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

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

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

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

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

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

4 MR. FRIEDMAN: Well --

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

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

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

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

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

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

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

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

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

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

25 MR. FRIEDMAN: It certainly would not in and

1 of itself be enough --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 All right?

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

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

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

1 is unconscionable.

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

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

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

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

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

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

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

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

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

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

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

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

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

23 MR. FRIEDMAN: He has made generalized --

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

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

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

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

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

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

23 MR. FRIEDMAN: We agree, Justice Breyer.

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

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

5 MR. FRIEDMAN: We agree --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 JUSTICE SCALIA: Can you --

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

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

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

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

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

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

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

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

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

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

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

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

20 MR. FRIEDMAN: I -- I --

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

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

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

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

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

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

1 court should proceed to send us to the arbitrator.

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

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

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Mr. Silverberg.

14 ORAL ARGUMENT OF IAN E. SILVERBERG
15 ON BEHALF OF THE RESPONDENT

16 MR. SILVERBERG: Thank you,
17 Mr. Chief Justice, and may it please the Court:

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

25 JUSTICE SOTOMAYOR: Could you describe for

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

6 Is that your position?

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

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

1 1, 8, and 9.

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

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

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

25 JUSTICE GINSBURG: Why is that -- why is

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 MR. SILVERBERG: Right.

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

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

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

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

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

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

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

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

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

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

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

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

1 unconscionable. Can't they agree to that?

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

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

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

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

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

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

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

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

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

13 JUSTICE KENNEDY: After this --

14 MR. SILVERBERG: -- saying both --

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

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

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

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

1 JUSTICE KENNEDY: Then the employee loses.

2 He says: Oh, you have to have an open door; this was --
3 this was not properly before the arbitrator.

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

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

10 MR. SILVERBERG: Again, Your Honor --

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

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

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

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

24 CHIEF JUSTICE ROBERTS: I thought your --

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

1 question.

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

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

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

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

24 (Laughter.)

25 JUSTICE BREYER: And I am apparently the

1 only one in the world --

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

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

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

8 (Laughter.)

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

11 (Laughter.)

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

14 MR. SILVERBERG: Yes.

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

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

22 JUSTICE BREYER: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

21 MR. SILVERBERG: I understand.

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

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

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

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

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

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

16 MR. SILVERBERG: Correct.

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

19 MR. SILVERBERG: Yes, Your Honor.

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

25 MR. SILVERBERG: Correct.

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

3 MR. SILVERBERG: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

25 MR. SILVERBERG: Well --

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

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

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

16 MR. SILVERBERG: Right, and our --

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

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

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

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

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

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

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

25 JUSTICE SCALIA: Well, your -- your position

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

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

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

11 MR. SILVERBERG: -- where fraud --

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

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

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

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

1 unconscionability challenges went to the court --

2 JUSTICE SCALIA: Why is that?

3 MR. SILVERBERG: -- and other

4 unconscionability challenges didn't go to the court.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 MR. SILVERBERG: Yes, Your Honor.

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

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

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

23 MR. SILVERBERG: I'm sorry.

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

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

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

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

19 CHIEF JUSTICE ROBERTS: Right.

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

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

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

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

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

21 JUSTICE GINSBURG: Mr. Silverberg --

22 MR. SILVERBERG: Yes, Your Honor.

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

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

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

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

19 MR. SILVERBERG: Well, Your Honor --

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

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

23 JUSTICE SCALIA: No?

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

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

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

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

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

1 Reno, to Minnesota to arbitrate his claim.

2 JUSTICE GINSBURG: Well, this --

3 JUSTICE SCALIA: There --

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

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

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

18 Thank you, Your Honor.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. Friedman, you have 4 minutes remaining.

21 REBUTTAL ARGUMENT OF ROBERT T. FRIEDMAN

22 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

1 already been made.

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

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

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

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

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

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

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

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

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

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

7 MR. FRIEDMAN: Exactly, Justice Scalia.

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

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

22 Thank you.

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

25 The case is submitted.

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