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IN THE SUPREME COURT OF THE UNITED STATES

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ATLANTIC MARINE CONSTRUCTION :
COMPANY, INC., :

Petitioner : No. 12-929

v. :

UNITED STATES DISTRICT COURT FOR :
THE WESTERN DISTRICT OF :
TEXAS, ET AL. :

- - - - - x

Washington, D.C.

Wednesday, October 9, 2013

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:05 a.m.

APPEARANCES:

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

WILLIAM R. ALLENSWORTH, ESQ., Austin, Texas; on behalf
of Respondents.

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P R O C E E D I N G S

(11:05 a.m.)

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

Mr. Hastings.

ORAL ARGUMENT OF WILLIAMS S. HASTINGS

ON BEHALF OF THE PETITIONER

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

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

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

JUSTICE KENNEDY: Is -- is it common in the

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

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

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

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

1 jurisdiction specified in the forum selection clause.

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

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

11 And the way the majority of the circuit
12 courts have read it is the issue in Stewart, this
13 procedural issue that we're here on today, which is
14 simply not presented to the Court. And so the Court
15 could very easily write a decision that acknowledges
16 Stewart still controls on a 1404(a) analysis, but
17 acknowledged that, like a majority of the circuits, that
18 Stewart simply did not have to address this problem.

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

1 wrong provision, this is how it should come out. It
2 makes the whole decision essentially meaningless,
3 doesn't it?

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

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

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

1 example. That's -- that's your argument, right?

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

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

10 MR. HASTINGS: And, Your Honor, the language
11 of the statutes, particularly, the language you were
12 just referring to about "might have been brought," needs
13 to be read in context of decisions from this Court. In
14 Van Dusen, this Court held that that language "might
15 have been brought" was a term of art. The Court has
16 never reached that conclusion with respect to wrong or
17 improper. And in Van Dusen, the Court said the "might
18 have been brought" language was a term of art referring
19 back to a congressionally chosen venue under 1391.

20 And so when this plays out under 1404(a),
21 the court -- if the case is in the proper venue and
22 we're on to the second issue of 1404(a), the proper
23 reading of the language would allow the court in truly
24 and exceptional circumstances to follow -- follow the
25 language of the statute and send it to another place

1 where Congress said the case could have been.

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

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

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

21 MR. HASTINGS: And, Your Honor, the language
22 of Section 1391, and the first part, I believe it's
23 1391(a) where it has the language of "shall govern in
24 federal courts," that's really no different than what
25 this Court said in Stewart of Federal law controls venue

1 in Federal courts.

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

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

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

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

24 MR. HASTINGS: Your Honor, if there was no
25 objection raised, yes.

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

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

10 JUSTICE GINSBURG: That doesn't mean it's
11 improper. It means it's waivable.

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

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

1 enforce people's contract rights. It's even used in
2 arbitration context.

3 Although the FAA gives parties the right to
4 move under the FAA, many parties raise their complaints
5 under the 12(b)(3) because of the procedural impact of
6 12(b) motions, allowing parties not to have to answer
7 complicated Federal cases and get to proceed to
8 arbitration more quickly. Giving the language a plain
9 and natural meaning allows the courts to, essentially,
10 do justice and allow to streamline and have efficient
11 running of cases and to enforce parties' rights in
12 contracts.

13 JUSTICE KENNEDY: So what --

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

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

24 JUSTICE KAGAN: Well, as I said, anybody can
25 waive it. Just like anybody can waive almost everything

1 in our -- in -- in the way the Federal rules work. But
2 do you think that parties can actually create personal
3 jurisdiction where it doesn't exist by law?

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

10 JUSTICE GINSBURG: Because consent is a
11 basis for personal jurisdiction.

12 MR. HASTINGS: Exactly, Your Honor. Just
13 like --

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

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

25 What difference it would make, it actually

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

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

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

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

25 MR. HASTINGS: Your Honor, under the current

1 statutes I believe the court would have the discretion
2 to transfer it based upon personal jurisdiction.

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

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

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

15 MR. HASTINGS: Yes --

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

23 MR. HASTINGS: Justice Kagan, the First
24 Circuit has been using the 12(b)(6) approach to address
25 whether the case is in the right --

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

4 MR. HASTINGS: Outside of the forum
5 selection clause context --

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

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

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

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

1 selection clause, and he can't go into another court
2 because of 1441(a).

3 So that argues to me that we ought to either
4 take the 1404 approach or we ought to take Professor
5 Sachs' approach, unless you have an answer to that.

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

9 CHIEF JUSTICE ROBERTS: Where can -- where
10 can I find that?

11 MR. HASTINGS: Chief Justice Roberts, it's
12 28 U.S. Code 1390(c).

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

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

17 CHIEF JUSTICE ROBERTS: Fair enough.

18 MR. HASTINGS: With respect to 1390(c),
19 Congress said --

20 JUSTICE KENNEDY: 1390(c)?

21 MR. HASTINGS: Yes, sir. Yes, Your Honor.

22 Congress said that these rules, with the
23 exception of the transfer rules, do not apply in removal
24 cases. Congress has answered the question. Removal
25 procedure is governed by the statutes on removal, and

1 yes, if you are in State court, there is one court you
2 can remove to. This rule and this issue doesn't change
3 that.

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

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

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

22 MR. HASTINGS: And, Justice Breyer, I would
23 respectfully disagree about whether you can get to the
24 Texas court.

25 JUSTICE BREYER: Well, you -- in other

1 words, you can remove to the Texas court even though it
2 says you can remove -- you can remove to the district
3 court despite the contract.

4 MR. HASTINGS: Yes, Justice Breyer,
5 because --

6 JUSTICE BREYER: Despite the contract.

7 MR. HASTINGS: Because of the specific
8 Federal statutes allowing for removal. They tell
9 specifically where the removal must go. And so we're
10 not suggesting that the court would have to --

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

15 MR. HASTINGS: That's no --

16 JUSTICE BREYER: That's what you're saying
17 Texas should say.

18 MR. HASTINGS: No, Your Honor.

19 JUSTICE BREYER: No?

20 MR. HASTINGS: What I'm saying if the State
21 district -- if the parties were in the State district
22 court and remove it to the Federal district court, under
23 the statutes, under 1390 -- well, first of all, that
24 was -- that's what the removal statutes require.

25 JUSTICE BREYER: Yes.

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

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

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

15 JUSTICE BREYER: No. No. The contract says
16 you go to Virginia.

17 MR. HASTINGS: Okay.

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

21 MR. HASTINGS: And, Your Honor --

22 JUSTICE BREYER: And they say: I'm very
23 sorry. The contract that he loves says we can't remove
24 it to Texas Federal court.

25 MR. HASTINGS: And, Your Honor, the contract

1 would not prevent the removal, but once the case was
2 removed the contract would control where the case --
3 where the case would be allocated.

4 JUSTICE KENNEDY: Can I ask --

5 JUSTICE ALITO: May I ask about -- just go
6 ahead.

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

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

15 JUSTICE KENNEDY: You just cite Gulf Oil,
16 and that's it?

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

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

23 MR. HASTINGS: For the Federal courts, yes,
24 Your Honor.

25 JUSTICE ALITO: Can I ask you this about the

1 Professor Sachs' argument? Doesn't it lead to the
2 consequence -- doesn't it show that -- wouldn't it mean
3 that Justice Scalia's dissent was correct in Stewart and
4 the majority was wrong in Stewart? Because if this is
5 -- if this is contractual -- suppose Ricoh in that case
6 had moved -- had adopted -- had taken the approach that
7 Professor Sachs has recommended and moved for summary
8 judgment, 12(b)(6) or summary judgment; that would be a
9 contract issue. It would be governed by Alabama law.
10 Alabama law says the forum selection clause is no good.

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

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

19 MR. HASTINGS: Justice Scalia, if the
20 contract -- if the contract elevated this to an issue on
21 the merits, is essentially what 12(b)(6) does, then it
22 becomes an issue not just about venue; it becomes an
23 issue about merits. And so a venue allocation provision
24 wouldn't change the fact that if the case was in the
25 wrong forum --

1 JUSTICE SCALIA: If -- but it depends
2 upon -- upon the defendant. If he chooses to go the
3 1404(a) route, he could go that way, couldn't he?

4 MR. HASTINGS: Well, Your Honor --

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

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

9 JUSTICE SCALIA: So it -- so it wouldn't
10 necessarily overrule Stewart.

11 MR. HASTINGS: But there's a potential
12 problem here, and this is one of the practical issues
13 with Professor Sachs' issue -- approach. If it's an
14 issue on the merits, it doesn't have to be raised right
15 at the beginning of the case. A party could certainly
16 move to transfer and do a lot of other things, but they
17 could raise that issue as a defense on the merits of the
18 lawsuit and have it resolved at trial after the entire
19 proceeding had proceeded in a forum other than where the
20 contract was required.

21 JUSTICE GINSBURG: I don't follow that. If
22 it's an affirmative defense, you have to raise it or you
23 lose it. You can't hold back an affirmative defense,
24 and in the middle of the trial say: Oh, there's an
25 affirmative defense here. (8)(c) requires you to

1 state it.

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

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

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

18 JUSTICE BREYER: That's your position, fine.
19 If that's your position, what conceivable difference
20 does it make if he goes to Texas in the first place and
21 then you say remove it to Virginia? I mean, it should
22 work out the same way. It should work out that the
23 balancing under 1404, you know, it gives you the -- the
24 factors should be the same, shouldn't they?

25 MR. HASTINGS: Your Honor, the way this

1 would work out is if -- focusing on the 1404(a) issue,
2 the real issue gets down to where does the lawsuit need
3 to be filed, what rules are going to be in place, and if
4 a party can just file in Texas because they want -- they
5 want to try to move it there for convenience, they can
6 just file in Texas, what they're doing is they're
7 requiring a party who just wants to live --

8 JUSTICE BREYER: It's a terrible thing. You
9 have to say 1404(a), and the other case he has to say
10 1404(a) and it -- I mean, maybe it makes some tremendous
11 practical difference.

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

17 So I'm thinking, hey, this doesn't make --
18 it's important to have a rule. It's important to have
19 one clear approach. But as between the three, it
20 shouldn't matter, and they should all reach the same
21 conclusions. So let's go with the language of Stewart.
22 All right. What about -- now, what's the answer to
23 that?

24 MR. HASTINGS: Justice Breyer, first of all,
25 I would agree with you that under this case, all three

1 routes should have lead -- led to the exact same
2 conclusion. That's -- that is correct under this case,
3 but that may not be in all cases. Why it matters is
4 that parties should be forced to honor their contracts.
5 And so if a party honors its contract and there's a very
6 high standard, such as the exceptional circumstances
7 standard for receiving a transfer, their -- parties who
8 are following their contract, it's unlikely you're going
9 to have much litigation over transfers.

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

15 JUSTICE SOTOMAYOR: The law travels with --
16 the law of the transferring State travels to the
17 transferred State. So they've undone -- they're taking
18 Texas law, if you go under 1404, to Virginia.

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

21 JUSTICE SOTOMAYOR: And that would defeat
22 the purpose of the venue selection to start with.
23 That's part of your argument?

24 JUSTICE GINSBURG: That would be taken care
25 of simply by saying Van Dusen v. Barrack does not apply

1 when a party is acting in violation of a contractual
2 provision. Van Dusen against Barrack was intended to
3 give the plaintiff plaintiff's choice of initial forum.
4 If plaintiff chooses a forum in violation of the
5 contract, there's no reason why Van Dusen should apply.

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

10 I's like to reserve my time.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Allensworth?

13 ORAL ARGUMENT OF WILLIAM R. ALLENSWORTH

14 ON BEHALF OF THE RESPONDENT

15 MR. ALLENSWORTH: Mr. Chief Justice, may it
16 please the Court:

17 We brought this \$160,000 construction case
18 in the Western District of Texas, which is where we
19 performed our work, where the project's located, where
20 all the witnesses reside, and where virtually all of the
21 evidence is located.

22 JUSTICE KAGAN: But, Mr. Allensworth, where
23 you agreed not to bring it.

24 MR. ALLENSWORTH: Yes.

25 JUSTICE KAGAN: So I'm going back to what

1 Justice Breyer says. Let's suppose you're right about
2 1404, and I think you have some pretty good arguments.
3 1404, it seems to me, shouldn't affect this case in the
4 sense that you should have -- this was a negotiated
5 contract.

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

14 MR. ALLENSWORTH: No, Your Honor. We have a
15 contract, and we are having to live with it in the sense
16 that we're up here now 15 months after the district
17 court ruled that we were supposed to -- we should --
18 15 months after the district court denied the motion to
19 transfer.

20 What we -- and we did nego -- and those are
21 indeed the terms of our contract. However, the -- we
22 felt that any court following Stewart and 1404 would
23 weigh the interests of justice in the decision whether
24 to grant the transfer or not, and indeed, that's exactly
25 what the district court found.

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

11 So what were the public interests that --
12 what were the interests that were weighed here that are
13 not the interests of J. Crew?

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

18 JUSTICE ALITO: Well, if they're not your
19 witnesses, then they're -- they're Atlantic Marine's
20 witnesses. So why should that be -- why should the
21 inconvenience of Atlantic Marine's witnesses be a factor
22 that weighs against Atlantic Marine's position that the
23 case should be tried in Norfolk?

24 MR. ALLENSWORTH: They were neither Atlantic
25 Marine's witnesses nor our witnesses. They were

1 nonparty witnesses, and the issue that Judge
2 Higginbotham addressed in the Fifth Circuit --

3 JUSTICE SCALIA: Just volunteer witnesses?
4 Are they just going to walk in the courtroom and say
5 I'd -- I'd would like to testify?

6 (Laughter.)

7 MR. ALLENSWORTH: Exactly.

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

10 MR. ALLENSWORTH: Your Honor --

11 JUSTICE SCALIA: What kind of -- what kind
12 of proceedings do they have there?

13 (Laughter.)

14 MR. ALLENSWORTH: Your Honor, our point is
15 that if it's in Texas, they can get in their pickup and
16 drive to the courthouse and testify. And if this case
17 is moved to Virginia, those witnesses essentially are
18 unavailable to us.

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

21 MR. ALLENSWORTH: We'd be the ones calling
22 them.

23 JUSTICE ALITO: You do, so they're your
24 witnesses. The fact that they don't work for you is --
25 is immaterial here.

1 So let's say they're out of the picture.
2 Now, what else -- what's left? What other public
3 interests are involved?

4 MR. ALLENSWORTH: The law of Texas, which we
5 think applies to this case, with which the district
6 court --

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

10 MR. ALLENSWORTH: I wouldn't suggest that,
11 Your Honor.

12 JUSTICE ALITO: Oh, okay.

13 (Laughter.)

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

21 And it should reach the same result, whether
22 you -- you go to Texas and ask to stay there or whether
23 you go to Virginia under 1404(a) -- you win this case,
24 let's say -- or whether you go to Virginia. It should
25 get to the same place, shouldn't it?

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

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

9 MR. ALLENSWORTH: We filed a motion. If we
10 filed -- if we filed this lawsuit in Virginia and filed
11 it simultaneously with a 1404 motion --

12 JUSTICE BREYER: Yes.

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

14 JUSTICE BREYER: Yes.

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

19 JUSTICE BREYER: No, no. They are not
20 saying -- they said that you could make the 1404 motion
21 in Virginia, and they think it would only be granted in
22 an exceptional case, but that's their opinion in that,
23 and so it should come to the same conclusion. They
24 aren't barring you from that on their view.

25 But my thought is that if all these come to

1 the same result in the end and you just need one ruling,
2 we have something pointing on their side -- your side,
3 which is the Stewart footnote and the language of the --
4 you know, the absolute language of the venue statutes,
5 and you have something pointing in their side, which is,
6 if we count by numbers, five circuits are in their favor
7 and only three in yours.

8 All right. Help me.

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

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

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

20 CHIEF JUSTICE ROBERTS: It's a significant
21 factor. And -- and the problem, the difference, all
22 things don't lead to the same place. 1404 says to the
23 district court: Look at a hodge-podge of things,
24 including the interest of justice, and -- and figure it
25 out and, you know, maybe they will give the contract

1 some weight or maybe they won't, and if they do, it's
2 not clear how you weigh the contract against the
3 interest of justice. It gives a broad discretion. It
4 says they may transfer.

5 1406 is an entirely different animal. It
6 says you shall dismiss or -- or transfer. It's sort of
7 a -- you know, you have the safety valve to transfer.
8 And I don't know why you -- you so cavalierly dismiss:
9 Oh, it's in the contract, of course, but we've got more
10 witnesses.

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

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

17 MR. ALLENSWORTH: No, sir. And we
18 haven't -- we haven't attacked the clause on Bremen
19 standards. We haven't claimed it was induced by fraud
20 or that it was overreaching. We accept that. The
21 question that we've got is whether the -- whether the
22 Federal judiciary has to accept that contract clause as
23 guiding their decision --

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

25 JUSTICE ALITO: Well, if 1404 -- if the

1 court --

2 JUSTICE KAGAN: It does in this way. 1404,
3 as Justice Ginsburg said, is a codification of forum non
4 conveniens law, which is a balancing of private and
5 public interests. It seems to me what Justice Alito
6 said was absolutely right. You have given up the
7 ability to claim private interests here by virtue of
8 your choice to sign that contract. The only thing that
9 could weigh in the balance against that is if there is
10 some -- something that has nothing to do with your
11 convenience but is instead a feature of -- of --
12 something about why it's important to the judicial
13 system, to the public interest, about keeping the trial
14 in one place.

15 And as Justice Alito suggested, you have not
16 been able to point to anything, nor would there be
17 anything to point to, in most cases involving forum
18 selection clauses.

19 MR. ALLENSWORTH: In most cases there
20 wouldn't be, and that's why in most cases the clauses
21 are enforced, and that's why I don't think you have seen
22 one of these for 25 years.

23 The reason that we've got -- that we think
24 our case is somewhat unique is that it involves a
25 construction project in the district in which we filed

1 suit. All of the witnesses are there. Virtually all of
2 the physical evidence is there. It's subject, if we
3 stay in Texas, to Texas law. And for those reasons, if
4 the case is going to get sent to Virginia, the systemic
5 integrity of the system I think is put in play.

6 CHIEF JUSTICE ROBERTS: No. But the reason
7 for these clauses -- the enforceability of these clauses
8 is critically important to a lot of modern commerce. If
9 you -- I don't know what the details are here, but a lot
10 of times your company -- and they are doing business now
11 all across the country, and you say: I don't want to do
12 business all across the country if I'm going to get
13 dragged into different courts who knows where with
14 different -- where the juries are different. I want to
15 do business around the country so long as, if I am going
16 to be sued, it's right here. So I'm only going to do
17 business with people who are willing to say: If I have
18 a problem, I will sue you right here.

19 That's -- that's critically important to
20 modern -- modern commerce. And the idea, well, you're
21 going to let a court say, well, but there are a few more
22 witnesses here, you know, it's convenient to them and
23 all that, that -- that seems to be throwing a
24 significant wrench into the process.

25 MR. ALLENSWORTH: Your Honor, I -- I don't

1 view it as a wrench, as opposed to an opportunity or
2 mandate from Congress to the -- to the Federal courts to
3 exercise some discretion in deciding whether to enforce
4 these clauses or not.

5 Stewart v. Ricoh --

6 JUSTICE SOTOMAYOR: But your -- your
7 adversary is not taking that discretion away. It's
8 saying -- your adversary I understand is conceding that
9 Virginia has the ability to apply 1404 in it's judgment,
10 but you should honor the contract.

11 I have one fundamental problem which is
12 slightly different. Under Bremen and Carnival, if the
13 forum selected was arbitration or a State court, then
14 the court has no 1404 power. It must transfer to those
15 venues. If we accept 1404 as applying, then we're
16 disfavoring commercial parties from picking Federal
17 courts because they're going to have to accept that a
18 non-selected venue will have the power to make the
19 decision whether to transfer or not.

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

24 MR. ALLENSWORTH: Your Honor, I would say
25 that's a possibility. I would say that on the other

1 hand, that the arbitration example that you brought up,
2 that is governed by a separate statute anyway. So
3 the -- the Federal Arbitration Act is going to govern
4 whether that --

5 JUSTICE SOTOMAYOR: Well --

6 MR. ALLENSWORTH: -- whether the arbitration
7 clause ought to be enforced or not.

8 JUSTICE GINSBURG: The -- the clause here
9 allows suits in -- in State or Federal court. Suppose
10 the clause -- the forum selection clause just said "all
11 disputes shall be litigated in the Circuit Court for the
12 City of Norfolk." It doesn't say anything about the
13 Eastern District of Virginia. What would be the result
14 then?

15 MR. ALLENSWORTH: The Court would have to
16 dismiss our case.

17 JUSTICE GINSBURG: And equally --

18 MR. ALLENSWORTH: Because he couldn't -- he
19 couldn't transfer it to -- he can't force that into a
20 Virginia circuit.

21 JUSTICE GINSBURG: And the same thing if --
22 if the choice was of an arbitral forum, then you
23 recognize in those two cases the result would have to be
24 dismissal?

25 MR. ALLENSWORTH: Yes, Your Honor.

1 JUSTICE ALITO: And what would be the
2 authority for dismissing the case if it had specified
3 the State court?

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

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

9 MR. ALLENSWORTH: It -- it would be, and --
10 I've forgotten which Justice raised the question about
11 this. 1404(a) is a codification of forum non
12 conveniens. In the absence of that, the case would just
13 be dismissed.

14 JUSTICE KAGAN: Yes. I mean, 1404, it
15 says that if it's says -- if the contract clause
16 specifies a Federal court, it's a 1404 motion. If it
17 specifies a State court, it's a forum non conveniens
18 motion.

19 MR. ALLENSWORTH: With the same result. I
20 would say the same result. Dismissal would be --

21 JUSTICE BREYER: That argues, then, it might
22 be slightly against you.

23 MR. ALLENSWORTH: I'm sorry?

24 JUSTICE BREYER: The -- if in fact you
25 specify a State court, if in fact you specify a foreign

1 court, if in fact you specify arbitration, you agree in
2 those instances you are going to use forum non
3 conveniens or you are going to use 1406. But you are
4 saying where you specify a court in a different State,
5 namely a Federal court in a different State, there you
6 use 1404.

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

9 JUSTICE BREYER: Yes, it was forum non
10 conveniens. Oh, you use forum non conveniens in all
11 three? You don't use -- I mean, they specify a State
12 court?

13 MR. ALLENSWORTH: Because the 1406 wouldn't
14 apply because the -- because --

15 JUSTICE BREYER: They say venue is a State
16 court --

17 MR. ALLENSWORTH: Yes, sir.

18 JUSTICE BREYER: -- use forum non conveniens
19 in all those?

20 Okay. Use forum non conveniens in all
21 those, but you use 1404 if they specify another Federal
22 court. That's what -- that's what -- that's what
23 you're --

24 JUSTICE SOTOMAYOR: You use 12(b)(3), not
25 1404.

1 JUSTICE BREYER: All right.

2 JUSTICE SOTOMAYOR: In those other cases
3 you --

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

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

6 MR. ALLENSWORTH: Yes. Yes.

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

10 MR. ALLENSWORTH: Justice Breyer --

11 JUSTICE BREYER: Forget it.

12 MR. ALLENSWORTH: No, but that raises a
13 larger question, and if I could -- if I could venture
14 just a second -- and that's the systemic integrity of
15 the -- of the system.

16 If you are going to transfer a case to --
17 within the system to another Federal court that's going
18 to have to hear the case, one like this one where he is
19 likely going to have to hear it without witnesses or
20 certainly without live witnesses, and to render a
21 judgment based on facts that were developed 1,500 miles
22 away on a project that is that far away, that does
23 implicate, I think, the integrity of the system and that
24 ultimately a Federal judge is the one that's going to
25 have to write and take it up in judgment if I can't

1 scare up the witnesses to be in Virginia.

2 JUSTICE SCALIA: Don't -- don't put me in
3 the group that thinks you can use forum non conveniens.
4 When -- when you have a forum selection clause for a
5 State court and suit is brought -- attempted to be
6 brought in a Federal court -- I mean, if it's in the
7 Federal court, that is the most convenient court -- I
8 mean, let's say it's in -- in a different State where
9 all the witnesses are. I think it's very strange to say
10 that, because there is a contract provision requiring it
11 to be brought in a State court, this court is an
12 inconvenient court. I -- do you know that the doctrine
13 of forum non conveniens has ever been used that way?

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

17 JUSTICE BREYER: Do you know the answer,
18 this is another -- I keep thinking they should all come
19 to the same conclusion. But, then, what about this
20 point Justice Sotomayor raised. Suppose you sue in
21 Texas. You know, you get there, but the contract, let's
22 say, was a different contract from yours, but it just
23 was made in Nevada. Everything about this concerns
24 Nevada. Are they really going to use Texas law to
25 interpret the contract rather than Nevada's?

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

5 MR. ALLENSWORTH: Van Dusen said that the
6 law moves with the -- with the --

7 JUSTICE GINSBURG: Only because the
8 Plaintiff -- the Plaintiff's choice of forum was to be
9 respected. But if the Plaintiff chooses a forum in
10 violation of the contract, the whole rationale of that
11 case falls.

12 MR. ALLENSWORTH: Your Honor --

13 JUSTICE GINSBURG: It was to honor the
14 Plaintiff's choice of forum. Well, the contract says
15 the Plaintiff doesn't have a choice.

16 MR. ALLENSWORTH: Your Honor, the contract
17 that Judge Higginbotham pointed out doesn't have a
18 selection of law -- law clause. They put -- it's got
19 every other dispute resolution clause that could be in
20 there to make it difficult for us to get this case to a
21 Court, but it doesn't have a -- it doesn't have a choice
22 of law provision in it.

23 JUSTICE GINSBURG: That the only reason that
24 Van Dusen came out the way it did was -- I think it was
25 that Justice Black said the Plaintiff's choice of forum

1 merits respect. It doesn't merit respect when the
2 Plaintiff has agreed that the suit will go forward
3 someplace else.

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

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

7 JUSTICE ALITO: If 1404 is the correct
8 procedural route, why shouldn't the rule be something
9 like this: Where there is a forum selection clause, the
10 burden is on -- the burden of trying to establish venue
11 in some other jurisdiction is on the party opposing the
12 forum selection clause, not the party that's invoking
13 the forum selection clause.

14 And the only factors that can be considered
15 against the forum selection clause to -- to result in an
16 exceptional case where that wouldn't be honored are
17 factors that have nothing to do with the convenience of
18 the -- of the party that doesn't want it tried in -- in
19 the selected forum or with the likelihood of success of
20 the party that doesn't want it tried in the sel -- in
21 the jurisdiction specified in the forum selection
22 clause.

23 So in your case, if there had been a
24 hurricane that wiped out the courts of the Eastern
25 District of Virginia for some period of time so no cases

1 could be tried, or there was an incredible back load of
2 cases there that would prevent the case from being
3 tried, maybe that would be -- those would be something
4 that might amount to an exceptional circumstance, but
5 everything else is off the board. What's wrong with
6 that?

7 MR. ALLENSWORTH: First off, on the validity
8 of the clause, we acknowledge we'd have the burden. We
9 were trying to avoid this clause on the ground, on
10 whatever grounds, on any Bremen grounds or we got
11 cheated into it or anything like that. We'd have the
12 burden on that. We didn't try to carry that burden.
13 We're not attacking the clause. They have the burden on
14 the main case -- on the transfer itself.

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

17 MR. ALLENSWORTH: I don't think that it's
18 even a matter really so much of burden as it is of
19 weight. And you all already have spoken on that where
20 you said that it's -- that clause is to get
21 significant -- significant weight. It ought to be
22 central to the analysis, but it's not dispositive. And
23 our -- our contention was that the clause was not
24 dispositive, but that every -- every factor that
25 possibly could go -- militate against transferring this

1 case to Virginia existed, and that's why the court,
2 giving appropriate deference to the clause, to that
3 clause, hearing what the evidence was and deciding as
4 you --

5 JUSTICE SCALIA: It should have been a
6 Virginia court to make that decision instead of your
7 friendly, down home Texas court. And that's -- you
8 know, that was why the forum selection clause was put in
9 there. It doesn't seem to me such a stretch as you
10 think it is to say that the venue is improper when you
11 have agreed that venue would not lie in this Court.

12 MR. ALLENSWORTH: We can't confer venue. We
13 can -- we can waive venue, but we can't make improper
14 venue --

15 JUSTICE SCALIA: So the -- the question is:
16 Is it improper when it's been waived? Is it improper
17 for a court to acknowledge venue when the party has --
18 has said I -- I cannot -- I cannot bring my suit in this
19 court. I don't think it's a terrible stretch to -- to
20 call that improper venue. However theoretical it may
21 be, venue is -- is decided by -- by statute, of course
22 it is. But people may waive it, and when people have
23 waived it, I don't know that there's a great interest
24 in -- in saying that, nonetheless, the venue remains
25 proper.

1 It seems to me you've given it away and it
2 ought to be -- it ought to be the -- the court where the
3 parties agree that suit would lie that would decide
4 these -- these change-of-venue questions. The provision
5 need not be absolutely dispositive, but to the extent it
6 isn't, that is a call that -- that ought to be made by
7 the jurisdiction that the parties agreed to. The whole
8 litigation ought to begin there. They shouldn't have to
9 litigate this change of venue provision in a court where
10 the parties agreed they would not appear.

11 It seems to me terribly unfair.

12 MR. ALLENSWORTH: There's a couple of
13 factors on that, Your Honor. First off, the rule that I
14 think my colleagues here are calling for effectively
15 emasculates 1404 and takes the Federal judiciary out of
16 it. The question -- and I follow your question about
17 the propriety of the venue.

18 JUSTICE SCALIA: Why is that? Why is that?
19 Why can't the Court, where you agreed to be sued, apply
20 1404?

21 MR. ALLENSWORTH: Another reason for that is
22 that our contract has a one-way arbitration clause in it
23 which they -- which the Petitioner claims not to have
24 waived. If this case is decided -- it goes to
25 Virginia -- if we filed the case in Virginia and they

1 immediately demanded arbitration, the case would be
2 arbitrated. But under the FAA, it would be sent to
3 an -- it'd be -- the court in Virginia would appoint an
4 arbitrator in -- presumably in Virginia. And under the
5 FAA, we don't even necessarily even have the right to
6 take depositions to provide -- to move to get the
7 evidence before the court even in deposition form. We'd
8 rather have the case decided in Texas on \$160,000 case,
9 and I know that's a pittance.

10 JUSTICE SOTOMAYOR: Excuse me. Are you
11 saying that by filing in Texas, you're not going to
12 arbitration?

13 MR. ALLENSWORTH: No. If we go to
14 arbitration, we go to arbitration in Texas. We don't
15 have any complaint about that. What we don't want to do
16 is go to arbitration in Virginia, which it has not had
17 -- and in this contract, for everything it's got in it,
18 it doesn't have a clause that says that arbitration
19 would be conducted in -- there's not a choice of forum
20 clause for the arbitration. There is for litigation,
21 but not for arbitration.

22 JUSTICE SOTOMAYOR: So what's more favorable
23 about Texas other than your convenience? What's more
24 favorable about arbitration in Texas other than your
25 convenience?

1 MR. ALLENSWORTH: That's my --

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

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

10 JUSTICE BREYER: Are -- are you finished?
11 All right. I'd just like, if you'd want, to give you a
12 chance to take what I've -- I think Professor Sachs
13 says, look, there is a way which you can both follow the
14 statutes literally and say, well, venue is here, and
15 also get the place to the right forum respecting the
16 contract.

17 Just say it is an affirmative defense, which
18 Justice Ginsburg says the First Circuits follow this
19 approach. You put it in the complaint. The answer, and
20 once it's in the answer, the judge can put it front and
21 center. Indeed, in case he forgets to do that, the
22 defendant will remind him and say you've got to get it
23 to the right court and let's decide this affirmative
24 defense thing first. And -- and now we're back in the
25 same place. What do you think of that?

1 MR. ALLENSWORTH: I think that that's going
2 to unnecessarily complicate this. It gets in -- it
3 raises some difficult to hearing questions about which
4 -- difficult hearing questions which the Court, I think,
5 successfully avoided in -- with its decision in Stewart.

6 I don't think that -- that 12(b) motions are
7 particularly appropriate places to decide these contract
8 issues. And it eliminates the 1404 gatekeeper role that
9 the district court otherwise could be providing and was
10 providing.

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

14 MR. ALLENSWORTH: Yes, Your Honor, and I
15 think that he under -- underestimates the ability for
16 resolute counsel to raise undisputed facts that would
17 otherwise prevent the summary judgment practice that he
18 suggested --

19 CHIEF JUSTICE ROBERTS: Well, what facts are
20 -- what facts are -- in the normal case, what facts are
21 going to be pertinent? I mean, you've got the contract
22 there. I mean, I suppose you can always say, we entered
23 under duress and all that, but that wouldn't seem to me
24 to be typical in the normal commercial case in which
25 these provisions are critically important. What

1 facts are going to be there.

2 MR. ALLENSWORTH: I think there might be a
3 question of materiality. There might be a question --

4 CHIEF JUSTICE ROBERTS: But what type --
5 what type of materiality?

6 MR. ALLENSWORTH: How material that clause
7 was to the parties' contract or whether you were going
8 to try to have severability and focus exclusively on
9 that clause.

10 CHIEF JUSTICE ROBERTS: Well, the venue
11 provision -- I mean, if they go to the trouble of
12 putting a venue selection -- forum selection provision
13 in, I would say it seems pretty material.

14 MR. ALLENSWORTH: It might or might not,
15 depending on whichever state law applies to -- and
16 what -- because that would be under state law to decide
17 on the materiality, what the effect of the prior breach
18 is.

19 We -- this case has been cast in Manatee in
20 terms about our breach of the contract by failing to
21 file suit in Virginia. The only written -- the only
22 handwritten clause in this entire contract, which is in
23 the appendix, I think, at Page 16, is the one that says
24 what the price is.

25 What brings us here to the federal system is

1 not for a declaratory relief or to make new law on
2 venue; it's to collect \$160,000. That clause, I think,
3 ultimately would be weighed -- may be weighed depending
4 on the Court, if it -- if the case was being decided on
5 purely --

6 JUSTICE SOTOMAYOR: So they would be -- the
7 only people collecting that \$160,000 are going to be the
8 lawyers.

9 (Laughter.)

10 MR. ALLENSWORTH: I -- I wish.

11 (Laughter.)

12 JUSTICE SOTOMAYOR: You took a contingency
13 case in a contract matter?

14 MR. ALLENSWORTH: And the other thing, as
15 Professor Sachs points out --

16 JUSTICE SCALIA: I wish.

17 (Laughter.)

18 MR. ALLENSWORTH: The -- as he points out,
19 and Justice Haynes -- Judge Haynes did in the Fifth
20 Circuit, whether they can file suit for us for breach of
21 contract and the expense that we put them to. Yes, I
22 think -- I think they probably could. We at least get
23 \$160,000 head start on that, and they can bring that as
24 an offset to our claim if they want to.

25 We disagree with the question of whether it

1 would cost them any more to litigate in Texas than it
2 would in Virginia anyway. They're going to have to hire
3 a law firm. If we litigate in Virginia, they are going
4 to have to send a lot of -- batch of lawyers back to
5 Texas to defend the depositions that we'd ask to be
6 taken there. I don't know that this case costs any more
7 to be litigated in Texas where the witnesses are
8 available and where they might not have to be deposed
9 than in Virginia where they have to -- where they have
10 to ship them across the country.

11 If there is no further questions, thank you,
12 Your Honor.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Mr. Hastings, you have four minutes left.

15 REBUTTAL ARGUMENT OF WILLIAM S. HASTINGS
16 ON BEHALF OF THE PETITIONER

17 MR. HASTINGS: Thank you, Mr. Chief Justice.
18 I have just a few brief comments.

19 First, the parties bargained for the right
20 result, and they bargained and reached a contract that
21 should settle the issue of conveniens and where this
22 case should be litigated. Stewart has an important
23 observation that I think needs to be emphasized. Even
24 under a 1404(a) analysis, the majority in Stewart said
25 The Bremen is still instructive. And if it's

1 instructive on anything, on any rules enforcing a
2 contract, it should be instructive at this level.

3 The burden should be on the party trying to
4 get out from their contract. The Fifth Circuit
5 misallocated the burden. The burden should also be a
6 high one. It really should require exceptional
7 circumstances or perhaps even more, and it should not be
8 a case where a party can avoid its contract based upon
9 inconveniences that were foreseeable at the time of
10 contracting. For example, the fact that J-Crew hired
11 Texans to work on its project. It knew what the project
12 was about and what it would need to do, and it should
13 not be able to rely upon hiring Texans to change the
14 deal it negotiated with my client.

15 There needs to be a clear rule that allows
16 the courts to hopefully answer the questions about
17 contracts and venue so we all can stop litigating these
18 issues and know the right answers and avoid inundating
19 the courts with motions to transfer for parties wanting
20 to renegotiate contracts.

21 Since the Third Circuit and Sixth Circuit
22 and now the Fifth Circuit have adopted the minority
23 position, there has been a proliferation of litigation
24 when a contract already answered the question. We cited
25 many cases in our cert petition in a footnote, and I

1 know there's been many more since then. And those are
2 the ones that you can find published. That doesn't even
3 mention the ones that are unpublished. And so a clear
4 rule needs to be in place to avoid these problems.

5 Justice Kagan, you raised the issue of forum
6 non conveniens as perhaps the answer as to what would
7 happen for a state or foreign contract clause. I wanted
8 to briefly touch on that because I don't believe that's
9 the right answer.

10 The Bremen looked at a case that came up as
11 a forum non conveniens case and said, we are not going
12 to use the forum non conveniens test for enforcing a
13 contract requiring litigation in an international forum.
14 They resoundingly rejected the forum non conveniens
15 approach, and I believe the circuit courts have read
16 Bremen as rejecting that approach.

17 If that were going to be the approach to
18 answer the problem created by the Fifth Circuit for
19 foreign and state courts, what we would end up with is a
20 new common law approach, whether called forum non
21 conveniens or called something else, that looks like
22 nothing like forum non conveniens and probably a whole
23 new line of litigation over how that's --

24 JUSTICE KAGAN: I think you mistook my point
25 at least. Maybe I didn't express it clearly. Bremen

1 comes up on a forum non conveniens motion, and the Court
2 says, yes, the contract controls, quite properly so.
3 So, you know, the fact that it comes up on a forum non
4 conveniens motion has nothing to do with the question of
5 whether the contract controls where, if it negotiated
6 for a certain set of things and there is no exceptional
7 public interest otherwise.

8 MR. HASTINGS: And, Justice Kagan, following
9 Bremen, the lower courts have recognized that what
10 essentially Bremen is doing is saying forum non
11 conveniens is not the right approach, and so instead of
12 a common law vehicle to answer this issue, we submit
13 that the right answer is right there in the rules
14 already. It's 12(b)(3) is the best answer. Section
15 1406 allows the Court also to address this issue.
16 Honestly, Section -- Rule 12(b)(6) in Professor Sach's
17 approach is much better than leaving these issues to
18 balancing tests.

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

21 MR. HASTINGS: Yes, Your Honor.

22 JUSTICE KAGAN: Which is, you know, when
23 1404 is -- suppose a state which does not recognize
24 these clauses, 1404 trumps that according to Stewart.
25 But if you were under 12(b)(6), you would have to go to

1 what Justice Scalia does in the Stewart dissent. I
2 think you would have to go to a twin aims of Erie
3 analysis. And in that circumstance, it seems to me that
4 the state law would come out the victor; isn't that
5 right?

6 MR. HASTINGS: Justice Kagan, the only way I
7 know how to answer that question is I do not know how
8 the Professor Sachs approach can actually be reconciled
9 with Stewart. There is significant tensions in how that
10 plays out as an issue that I do not know how it plays
11 out, but I suspect it would result in lots of
12 litigation --

13 JUSTICE SOTOMAYOR: If it's under 12(b)(3)
14 then Stewart stays, and it's Federal law that controls
15 and a judge decides, right?

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

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 Counsel.

21 The case is submitted.

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

24
25

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