

1 explicit reference in the power of attorney with respect
2 to anything other than arbitration agreements?

3 MR. SALYER: Is -- is there anything?

4 JUSTICE GINSBURG: Is there an explicit
5 reference -- to be effective, you've just told us, the
6 power of attorney has to explicitly state the -- that
7 disputes will be settled by an arbitration.

8 My question is whether there is any other
9 contract that in order to be made effectively in
10 Kentucky, it must be an explicit reference in the power
11 of attorney.

12 MR. SALYER: Oh, I -- I understand your --
13 your question, Justice Ginsburg.

14 From -- this is the announcing of this
15 particular rule, but logically, from here on out, any
16 such actions taken by an -- a -- an attorney-in-fact
17 that might restrict the principal's free speech rights,
18 say, by entering into a contract with a
19 non-disparagement clause or some sort of confidentiality
20 clause, that would necessarily have to be spelled out in
21 a power of attorney.

22 JUSTICE BREYER: In other words --

23 JUSTICE KENNEDY: In other words -- in other
24 words, for a number of years Kentucky had allowed powers
25 of attorney and the first time that one was called into

1 question under this theory was with reference to the
2 arbitration.

3 MR. SALYER: Well, Your Honor, here --
4 here's the thing about Kentucky powers of attorney. It
5 has been the law of Kentucky since 1912 that powers of
6 attorney are to be strictly interpreted and that the --
7 the third party deals with the principal by an agent at
8 that third party's own peril. Therefore, it is up to
9 and -- and incumbent upon that third party to be very
10 clear and understand what the agent is allowed to do.
11 And -- and -- and the fact is that it is -- the reason
12 that these cases have not come up is that the third
13 parties, the -- the banks, the -- the whatever that
14 are -- are receiving powers of attorney as authority of
15 agents for principals, they've always demanded very
16 explicit information in that power of attorney.

17 And this happens to be an instance where you
18 have the third party who doesn't -- who doesn't actually
19 want more explicit language in the power of attorney.

20 Have I answered your -- your -- yes, sir.

21 JUSTICE BREYER: So in Kentucky, I issue a
22 power of attorney to Jones and say, you have full power
23 to protect, defend and maximize the value of all my
24 property. Okay. That's what it says.

25 MR. SALYER: Yes, Your Honor.

1 JUSTICE BREYER: And someone claims that
2 this piece of land over here that we thought belonged to
3 Smith belongs to him under various deeds. All right?

4 MR. SALYER: Yes, Your Honor.

5 JUSTICE BREYER: Now, the -- the attorney
6 says, in my opinion, I want this tried before a judge
7 because I think I'll get a fairer shake. Okay.
8 Illegal; right?

9 MR. SALYER: Are you making the distinction,
10 Your Honor, between --

11 JUSTICE BREYER: Well, you just said
12 anything that waives the right to a jury is illegal
13 unless it's explicitly there. So, that's case one.

14 Case two, similar kind of argument, and the
15 lawyers for the two parties get together and say, we'd
16 like to settle this case. Illegal; right? No power,
17 they can't do it in Kentucky. Can't settle cases.
18 Can't have traces -- cases tried before a judge. Is
19 that right?

20 MR. SALYER: No, Your Honor. That --
21 that --

22 JUSTICE BREYER: Oh, that's not right. Oh,
23 I see. In other words, you -- you -- you -- why -- why
24 isn't it right? Because after all, the fundamental
25 right of trial by jury is being -- you're giving the

1 attorney the power to refuse to have a jury.

2 MR. SALYER: Well, Your Honor --

3 JUSTICE BREYER: So what's the difference
4 between that and the case we have, where we're not going
5 to have a mediator, we're not going to have settlement,
6 we're not going to have a judge trial, we're going to
7 have an arbitrator.

8 MR. SALYER: Your Honor, the -- the
9 interpretive rule that the Kentucky Supreme Court
10 enunciated was the power to waive generally fundamental
11 constitutional rights. The -- the idea that -- that
12 the -- the person is going to waive their jury rights
13 in -- in general from now on --

14 JUSTICE BREYER: All he did was say that in
15 the attorney's judgment, if he wants to go to
16 arbitration and thinks that's best, he can do it. Now,
17 I just don't see the difference between that and
18 implying, in the attorney's judgment, if he wants to
19 settle a case, rather than going to a jury, he can do
20 it. Or, if in the attorney's judgment, he would like a
21 case tried before a judge instead of a jury, he can do
22 it. And you're going to tell me that that's ridiculous
23 to think that a general power of attorney would give the
24 attorney the right to say, no jury, judge trial. No
25 jury, mediator. Oh, but it makes perfect sense to say

1 no jury, arbitrary -- arbitrator.

2 Now, if you're not going to tell me that
3 those are treated exactly alike, I will tell you in my
4 opinion right now you have discriminated against
5 arbitration --

6 MR. SALYER: Well, Your Honor --

7 JUSTICE BREYER: Unless you can find some
8 difference.

9 MR. SALYER: It seems to me that the
10 analogue to what you're -- you're proposing would be an
11 instance where the -- the attorney engaged with another
12 party never to have a jury trial with that party
13 pre-dispute just for a -- for from now on. Or that
14 they're always going to go to mediation and never go
15 to --

16 JUSTICE BREYER: No, that isn't this. You
17 say that a attorney -- I'll be repeating myself. I'm
18 testing out whether it's really true. Of course I'm
19 highly suspicious as you can tell from my tone of voice.
20 What I really think has happened is that Kentucky just
21 doesn't like the Federal law. That's what I suspect.
22 So they're not going to follow it. Now, that, of
23 course, you're going to say, no, they would never do
24 that. So I'm trying to test this out. And that's why I
25 asked my question. Because it seems to me that

1 arbitration as a means of settlement of a case, of a
2 dispute, mediation as a means of settling a dispute, a
3 judge as a means of settling a dispute, are equally and
4 no different in the respect that none of those three
5 involves a trial by jury.

6 So I just want to know -- and you have
7 already said, no, no, they're all different. Well, that
8 to me proves that they're treating arbitration
9 specially. So I put my whole argument there because I
10 want you to have an opportunity to reply.

11 MR. SALYER: Thank you, Your Honor.

12 I -- I think that the -- the -- the
13 distinction that -- that would be made there is that
14 we're -- we're talking about an agreement that's
15 pre-dispute and waives a -- this particular right
16 vis-à-vis the nursing home resident and the nursing home
17 potentially in perpetuity.

18 And I guess the analogue to -- to a --
19 coming to an agreement to settle pre-dispute would be a
20 liquidated damages clause. And I think that the -- that
21 the Kentucky Supreme Court probably would not look very
22 favorably on an attorney-in-fact executing a liquidated
23 damages clause with a nursing home to settle any
24 potential personal injury that occurred at -- during the
25 nursing home resident's stay.

1 But I -- I actually want to get to -- to, if
2 I could, to a more overarching point in -- in this case;
3 and that is, the Federal Arbitration Act does not extend
4 this Court's powers of interpretation beyond agreements
5 to arbitrate. Moreover, DIRECTV was the exception that
6 proved the rule, and the rule applies here. Excuse me.

7 This Court does not ordinarily instruct
8 States in how to interpret the instruments and documents
9 that are governed by State law. Now --

10 CHIEF JUSTICE ROBERTS: And maybe I missed
11 your -- missed your point. The FAA does not extend
12 beyond what?

13 MR. SALYER: Agreements to -- beyond
14 agreements to arbitrate and --

15 CHIEF JUSTICE ROBERTS: Interpret --
16 interpreting them or anything with respect to them? For
17 example, you're not arguing that if Kentucky had a law
18 saying you can't have agreements to arbitrate, that
19 would certainly be covered by the FAA.

20 MR. SALYER: Yes, Your Honor, that --
21 that -- well, we believe, would be covered by the FAA.

22 CHIEF JUSTICE ROBERTS: So -- and if that
23 was a decision of a court that said, under our common
24 law you can't have agreements to arbitrate, that would
25 also?

1 MR. SALYER: Totally not. That's what the
2 Federal Arbitration Act is directly directed at.

3 CHIEF JUSTICE ROBERTS: Well, since we're
4 talking about laws that have an impact on agreements to
5 arbitrate, I guess I don't understand the effect of your
6 principle.

7 MR. SALYER: Well, we're looking at the
8 black letter of Section 2, which provides that
9 agreements to arbitrate shall be valid, irrevocable, and
10 enforceable, save upon such grounds as exist for the
11 revocation of any contract.

12 CHIEF JUSTICE ROBERTS: Right.

13 MR. SALYER: That pertains specifically to
14 arbitration agreements. And so what do we have here?
15 We have an absence of authority of the signator to this
16 arbitration agreement. That certainly should qualify as
17 a -- a ground for revocation of any contract, absence of
18 authority.

19 So that is as far as the Federal Arbitration
20 Act extends. It extends to the enforcement of formed,
21 existing arbitration agreements. It doesn't bootstrap
22 them into place by -- Section 2 creates substantive
23 contract rights, certainly. The presumption of
24 arbitrability in certain instances, the preemption of
25 State law in certain instances. What it does not create

1 are other kinds of rights, such as the right -- the
2 entitlement to the creation of agency in someone else's
3 agency instrument.

4 Have I answered --

5 JUSTICE GINSBURG: So -- and your reasoning,
6 I take it, that Kentucky could adopt a law that says
7 agents lack authority to enter into arbitration on
8 behalf of the principal.

9 MR. SALYER: Well, technically, Your Honor,
10 that's correct. However, this Court would not have to
11 go that far in this particular case, because again, what
12 we're talking about is interpreting a power of attorney.

13 And if you -- if you take a look at -- let's
14 use a comparison, the -- the spectrum of Volt on one end
15 and DIRECTV on the other end. We have instances where
16 this Court in Volt said that ordinarily, issues of State
17 contract law interpretation are for the States. And it
18 accepted the -- the lower California court's
19 interpretation of that -- that particular California
20 contract, even though it -- it meant that there was not
21 going to be an arbitration. On the other hand, in
22 DIRECTV, the opposite occurred.

23 And now what's really the difference there?
24 The difference there is where the decision maker has
25 effectively abandoned its interpretive role. In

1 DIRECTV, one could certainly say that the California
2 Appellate Court in that case had abandoned its
3 interpretive role and rather imposed its own policy
4 interests and -- and predilections on that -- that
5 contract.

6 To use another example -- now, this is
7 slightly different because it would fall under the
8 10(b)4 deference standards -- but the difference between
9 Stolt-Nielson on the one hand and Oxford Health on the
10 other. You have an instance where an arbitrator simply
11 imposed a policy decision on its quote-unquote
12 "interpretation of the contract," and in which case the
13 arbitrator had gone outside of his express powers under
14 that contract, and Oxford Health, where, even though
15 there was some suspicion that the arbitrator had gotten
16 his or her interpretation of the agreement wrong,
17 nonetheless, that arbitrator was attempting to interpret
18 that arbitration contract, and this Court respected
19 that.

20 Now, again, I understand that that was under
21 the 10(b)4 analysis. But if you look in this case,
22 Clark refers to all contracts. And I think my friend,
23 Mr. Pincus, is probably relying on a literal
24 interpretation, well, all contracts means -- means all
25 contracts. But we must recall that in Volt v. Leland

1 Stanford, what we had was also a potential literal
2 interpretation, the Law of the place. The law of the
3 place, in that instance, the place being California,
4 well, what is the literal law of that place? That
5 law -- the law of that place is the law of the State of
6 California and Federal law.

7 But the California court had determined that
8 the local understanding of the local usage of that
9 phrase -- phrase, "law of the place," actually just
10 referred to California State law.

11 CHIEF JUSTICE ROBERTS: Can I talk about --
12 focus a little bit on -- on Wellner. What is your
13 response to Mr. Pincus's argument that personal property
14 does include arbitration because choses in action are
15 personal property?

16 MR. SALYER: Well, the -- my response to
17 that, Your Honor, Mr. Chief Justice, is that the
18 Kentucky Supreme Court certainly engaged in trying to
19 understand the intentions of the words that the
20 principals meant. And it simply said that a
21 principal -- no principal who grants the power to their
22 son, their daughter, their -- their spouse, their --
23 their attorney-in-fact to buy and sell property or
24 engage in contracts involving property would ever think
25 about -- would allow that -- that attorney-in-fact to

1 engage -- engage in one of these arbitration agreements.

2 In that -- in the earlier case regarding
3 powers of attorney in Kentucky -- and that was -- I
4 believe it's U.S. Guarantee & Trust. It's an older
5 case, from -- from 1912. The -- there's language to the
6 effect of giving the power for an agent to buy or sell
7 property does not intrinsically give that person the --
8 the power to mortgage property, although one could say
9 that that should naturally flow from -- from the -- the
10 overarching language. So that's the -- the sort of
11 backdrop and context in which the Kentucky Supreme Court
12 is operating.

13 If I could turn for a second to DIRECTV,
14 which is a -- obviously relied upon, to a large extent,
15 by Kindred. In that particular case, I think that this
16 Court reiterated its basic assumption that ordinarily,
17 what a State instrument means is a question for State
18 law in the State courts. And only in exceptional
19 circumstances will this Court engage in a preemption,
20 and in essence, an independent review and
21 reinterpretation of that State instrument.

22 And in DIRECTV, the two similar points that
23 seem to -- to stand out are that that California
24 Appellate Court singled out arbitration, singled out the
25 Federal Arbitration Act for not incorporating Federal

1 Arbitration Act preemption into the way they read their
2 California contract, the DIRECTV contract. And they did
3 so without attempting to tie that effectively to what
4 the parties might intend in the DIRECTV contract.

5 Here, we do not have that. We have the
6 Kentucky Supreme Court announcing an interpretive rule
7 that -- and it may be difficult for them to -- to work
8 it out over -- over time, but again, that's the way the
9 common law develops, that if you have a general waiver
10 of a fundamental constitutional right by a power of
11 attorney, that has to be spelled out in the document.

12 JUSTICE BREYER: We give the power of
13 attorney to manage my patent, general. A lot of
14 litigation. The other side comes in and says, okay,
15 we'll settle. I'd like you to sign this paper, and this
16 says what you will say and what you won't say about my
17 patent. Absolutely normal. What you will say about
18 your patent, what you won't say about it in certain
19 areas. Can't do that in Kentucky, huh? Free speech.
20 Free speech.

21 MR. SALYER: Your Honor, Mr. Justice Breyer,
22 I think that's correct.

23 JUSTICE BREYER: Can't -- can't give a
24 power -- general power of attorney that will allow a
25 person to settle a patent case on perfectly ordinary

1 terms.

2 MR. SALYER: Well, it doesn't make a
3 difference --

4 JUSTICE BREYER: Is there any case that
5 suggests that -- except this case, which happens to deal
6 with arbitration.

7 MR. SALYER: Well, it does have to --

8 JUSTICE BREYER: You see, I don't know how
9 to -- the part I don't know how to deal with your
10 argument is, is you say every time I think of examples
11 that would be very weird, which is what I'm trying to
12 do, then -- then you say, oh, well, yeah, that's right.
13 You can't do that anymore in Kentucky. And every time
14 you say that, the law of Kentucky in terms of attorneys,
15 powers of attorney is getting more and more peculiar.
16 That's why I suspect something is going to happen there.

17 So what should I -- what do you think?

18 MR. SALYER: Well, Your Honor, I think that
19 the interpretive rule is -- is rather explicit.

20 JUSTICE BREYER: Now -- now we say that you
21 cannot enter into a power of attorney giving the power
22 of attorney the power to enter into normal patent
23 settlements.

24 MR. SALYER: To --

25 JUSTICE BREYER: Well, what about business

1 settlements? What about business settlements where, you
2 know, there is a perfectly normal thing where a person
3 agrees not to compete, and in agreeing not to compete,
4 you're agreeing not to go to certain places?

5 MR. SALYER: Well --

6 JUSTICE BREYER: For that business anyway, a
7 lot of constitutional rights that might infringe. It
8 might if you didn't waive it. I don't know.

9 MR. SALYER: Well, Justice Breyer, I mean,
10 that -- again, that's a -- that's a question of what
11 constitutes a fundamental -- constitute --

12 JUSTICE BREYER: Yeah.

13 MR. SALYER: -- fundamental constitutional
14 right. Now --

15 JUSTICE BREYER: What do you say about the
16 competing product?

17 MR. SALYER: Right. That would, in fact, be
18 a infringement on the principal's free speech. Indeed,
19 in instances where there are settlements in personal
20 injury actions, often there are non-disparagement
21 clauses.

22 JUSTICE BREYER: Right, right. And, by the
23 way, he makes a product, you know, the person who's
24 given the power of attorney. And as part of the
25 disagreement, the attorney -- a disagreement with OSHA.

1 He agrees that OSHA can come in and inspect his plant at
2 various hours of the day or night. That kind of power
3 of attorney would be illegal also in Kentucky. I mean,
4 is there any State that makes that kind of power of
5 attorney illegal or requires it to be explicit somehow
6 that you could settle an ordinary OSHA case, you could
7 settle an ordinary competition case, you could settle an
8 ordinary, you know, patent case on fairly ordinary
9 terms, and it says when you give a power of attorney to
10 do that, you have to be explicit? Is there any State
11 other than Kentucky in this opinion that has ever held
12 such a thing? Maybe there is.

13 MR. SALYER: Well, Your Honor, if I could
14 use a -- a comparative example from the -- the UCC, we
15 know that in ongoing transactions between commercial
16 parties under the UCC, whether a -- a contract clause is
17 incorporated into the contract, if and when it is
18 incorporated, may turn on whether or not that clause is
19 considered material.

20 Now, whether or not it's -- it's considered
21 material is a question of State law. And as -- as I
22 understand, they -- that has never been challenged at --
23 that -- some instances, that would -- that will, in
24 fact, cause arbitration clauses not to be incorporated
25 in contracts and not be enforceable because they're

1 considered material and they haven't been negotiated
2 properly.

3 What -- what constitutes a fundamental
4 constitutional right is, of course, an -- an open
5 question, but it does seem that certain things such as
6 speech, marriage, religious rights, those sorts of
7 things cannot be dealt with on a permanent basis
8 vis-à-vis another party by an agent without the
9 principal explicitly authorizing them to do so.

10 Furthermore, what the principal has
11 explicitly authorized the agent to do so is an
12 interpretive question regarding this -- this instrument.
13 And just as a -- with a State statute, what a State
14 statute means is a question for the State supreme court.
15 What the principals meant was encompassed within these
16 powers of attorney. Ultimately, someone has to
17 determine what that is. And I posit that that -- that
18 should be the State's supreme court.

19 JUSTICE GINSBURG: But what about the
20 principle that making an arbitration agreement harder to
21 form than other agreements violates the Federal
22 Arbitration Act. As Mr. Pincus mentioned, the main rule
23 is equal footing. Arbitration we thought to be on the
24 same footing as all other contracts. If you make the
25 arbitration agreement harder to form because you have to

1 have this explicit reference than other contracts,
2 doesn't that discriminate against arbitration
3 agreements?

4 MR. SALYER: Perhaps it does, Your Honor.
5 But, again, our -- our position is that the Federal
6 Arbitration Act does not extend beyond agreements to
7 arbitrate, such that in the -- the instance of the --
8 the UCC example that I just used where a State decision
9 as to whether or not arbitration clauses are considered
10 material might make that -- might make it harder to form
11 the arbitration agreement as part of the larger
12 commercial contract. We believe that the Federal
13 Arbitration does not speak to that.

14 However, there are, on the other hand,
15 instances where if a State specifically singles out
16 arbitration to make it more difficult to form, we
17 believe that the formation -- that the FAA would have
18 something to say along those lines. And the -- the
19 example I would like to use in that instance is the
20 facts of Casarotto, if -- if they were slightly
21 different.

22 If the Montana statute hadn't used the
23 language in its subsection that unless the arbitration
24 clause is in -- you know, on the first page in bold
25 letters, then that particular clause is unenforceable.

1 If they -- if that statute had simply said, we do not
2 recognize the formation of an agreement to arbitrate
3 unless these hoops are -- are jumped through, that, we
4 believe, would be addressed by the Federal Arbitration
5 Act because it's not really a formation issue. It's
6 really an enforceability issue, relieving the parties to
7 the contract in Casarotto of the responsibility for what
8 they voluntarily signed in which there was a clear
9 meaning.

10 JUSTICE GINSBURG: Well, you say you're
11 distinguishing formation from enforcement, but we have
12 two separate agreements that both been formed the power
13 of attorney that's been concluded, the agent has signed
14 the arbitration agreement. So it's not a question of
15 the formation of those agreements; it's what -- what
16 they mean, what is the proper interpretation of the
17 power of attorney.

18 MR. SALYER: Yes, Justice Ginsburg. That --
19 that's correct inasmuch as -- the question here revolves
20 around what the power of attorney means. If the power
21 of attorney encompassed the authority for the agent to
22 sign this agreement, then, as the Kentucky Supreme Court
23 said, the agreement will be enforced. If it doesn't,
24 then there's no agreement. And I'm saying -- saying
25 that the Federal Arbitration Act does not bear upon

1 answering that question; that that is a function of
2 State law and of the State court's interpretation of a
3 power of attorney instrument.

4 So in summation, our -- our general --
5 our -- our general position is that the Federal
6 Arbitration Act again does not extend this Court's
7 interpretive powers beyond agreements to arbitrate. It
8 does not extend them to powers of attorney. However,
9 this Court need not even reach out to that particular
10 principle because we are talking about interpreting a
11 power of attorney, which, in the ordinary course of a
12 State instrument, is up to the State supreme court to --
13 to -- to make that interpretation. And this Court will
14 only step in and substitute its interpretation for that
15 of the State supreme court in the exceptional
16 circumstances.

17 And the only exceptional circumstances that
18 this Court has identified in DIRECTV do not apply here.
19 The Kentucky Supreme Court did not single out
20 arbitration for distinctive treatment, and the Kentucky
21 Supreme Court went out of its way to tie the -- its
22 interpretation of the meaning and authority of the power
23 of attorney to the intention of the principal.

24 No further questions.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Pincus, you have ten minutes.

2 REBUTTAL ARGUMENT OF ANDREW J. PINCUS

3 ON BEHALF OF THE PETITIONERS

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

5 Just a couple of quick points.

6 With respect to the -- the question about
7 whether the FAA is limited to arbitration agreements, I
8 think it's important to note that the text of the FAA
9 says that arbitration agreements shall be valid
10 irrevocable, and enforceable, save upon such grounds as
11 exist at law or in equity for the revocation of any
12 contract.

13 So it's true the focus of the FAA is on
14 whether the arbitration agreement is enforceable or not,
15 but there's nothing in the FAA that prohibits its
16 application to an antecedent agreement if that
17 antecedent agreement prohibits the enforcement of the
18 arbitration agreement on a ground that's specific to
19 arbitration.

20 And I think that's not only true of the text
21 of the statutes; it's true because the implications of
22 that rule would be quite dramatic. For example, a State
23 could just enact a statute that says a power of attorney
24 can never be interpreted to confer the ability to enter
25 into an arbitration agreement either at all, which my

1 friend, I think, acknowledged would -- would be
2 problematic under the FAA or could impose all kinds of
3 special requirements. It has to be notarized. There
4 have to be warnings about the dangers of arbitration.
5 And surely --

6 CHIEF JUSTICE ROBERTS: Now, the State could
7 also --

8 MR. PINCUS: -- that would --

9 CHIEF JUSTICE ROBERTS: The State could also
10 enact a statute that says powers of attorney can't
11 waive -- can't waive fundamental rights. Would -- would
12 that violate the FAA, in your view?

13 MR. PINCUS: I -- I think it would present a
14 more difficult question than this case. And let me
15 explain why and then let me answer your -- your
16 question, Mr. Chief Justice.

17 I think as -- as some of Justice Breyer's
18 questions indicated, the rule here doesn't, in fact,
19 embody that principle because it is both -- it -- it is
20 underinclusive in two respects. It doesn't even affect
21 all jury waivers because --

22 CHIEF JUSTICE ROBERTS: Yeah. But I mean,
23 legislators -- legislatures often pass statutes that are
24 underinclusive or overinclusive. So I don't think that
25 distinguishes the case.

1 MR. PINCUS: Well, I think the question
2 would be just how inclusive is it. If -- if it's
3 interpreted -- if it is the same kind of --

4 CHIEF JUSTICE ROBERTS: It -- it says it
5 embodies the rule that the supreme -- Kentucky Supreme
6 Court adopted, which is that you can't -- you can't
7 waive fundamental rights, and like a lot of statutes,
8 it's going to require some interpretation. But that's
9 all it says. It says, you can't -- you know, they're
10 worried about the scope of powers of attorney, and they
11 say powers of attorney in Kentucky cannot waive
12 fundamental rights under the Constitution.

13 MR. PINCUS: And -- and I -- I -- I think
14 our answer to that question would be -- although the
15 Court doesn't have to reach it here -- that lumping
16 arbitration agreements into that category of fundamental
17 rights is a judgment that the FAA precludes the State
18 from making because the judgment --

19 JUSTICE KAGAN: But that -- that suggests
20 that the arbitration is a preferred right, and I thought
21 that the idea of the FAA was to say it can't be --
22 whatever, dis-preferred, un-preferred, you know -- but
23 not to put it on its own separate plane, like you can't
24 deal with this in the same way that you could deal with
25 any other fundamental right.

1 MR. PINCUS: Well, that's why I say it would
2 be a harder question, Your Honor, but -- but I think
3 the -- the critical thing is here, it's quite clear from
4 the State court's own opinion that that isn't the rule
5 of decision here because the State court, as the dissent
6 points out, the -- the express authorization requirement
7 doesn't apply to jury waivers in a host of different
8 circumstances, as Justice Breyer's opinions pointed out,
9 and it also doesn't apply to lots of fundamental --
10 other kinds of fundamental rights.

11 JUSTICE KAGAN: But how do we really know?
12 Are -- are you saying that a court can never announce a
13 generally applicable rule first in an arbitration case?

14 MR. PINCUS: Well, I think it -- it
15 certainly is something that should raise a lot of
16 suspicion. Can it never -- I would never want to say
17 never, but I do think that this aspect of the case
18 presents a -- a more compelling argument for application
19 of the FAA than Imburgia.

20 In Imburgia, the threshold question for the
21 court was, does the California State courts'
22 interpretation of the phrase "law of your State"
23 actually discriminate against -- single out arbitration?
24 There's no doubt that this rule is singling out
25 arbitration. If that's what the court --

1 JUSTICE KAGAN: Suppose -- well, suppose --

2 MR. PINCUS: -- expressly says, the question
3 is how broad is it singling out.

4 CHIEF JUSTICE ROBERTS: It doesn't single
5 out arbitration. That happens to be the issue before
6 it. I mean, basically, it seems to me what it's coming
7 down to is you just don't believe the Kentucky Supreme
8 Court when it says this is the general principle. And
9 you're saying, well, I really think you're hostile to
10 arbitration because I haven't heard that principle
11 before and this is the first one. But you know, if --
12 if the Kentucky legislature passes a law that does the
13 same thing, I mean, are you going to be suspicious of
14 them too just because arbitration might be the first
15 time it comes up?

16 MR. PINCUS: I -- I think it -- it depends
17 on the circumstances and it depends on -- on how
18 badly --

19 JUSTICE KAGAN: Suppose -- suppose we send
20 this back and we say we don't really believe you. We
21 think you're being hostile to arbitration, and they say,
22 well, prove it. And in five cases involving other
23 fundamental rights they do what Justice Breyer suggests
24 that they don't really have any intention of doing, but
25 they really do it. They say no, we're -- we're really

1 serious about this. We think powers of attorney are --
2 are -- are special things and we have to impose special
3 protections. And then it comes up here, you know, the
4 sixth time. They say, and arbitration too.

5 What do we do then?

6 MR. PINCUS: Well, I -- I guess a couple of
7 things. First of all, I -- I do think the Court has to
8 make a judgment, as it did in Imburgia, based on what's
9 before it at the time. And what's before the Court at
10 this time is a rule created in the context of
11 arbitration --

12 JUSTICE KAGAN: Well, I know, but I want --

13 MR. PINCUS: -- premised on --

14 JUSTICE KAGAN: -- what I want to hear you
15 talk about, usually we don't presume that State courts
16 are acting in ways that are not in accordance with law.
17 Actually, we usually give them the benefit of a kind of
18 good faith presumption.

19 So if you're saying, well, no, they have to
20 prove it first in five other cases before we'll believe
21 them that they really do mean all constitutional rights,
22 that seems, you know, an unusual rule to apply to State
23 supreme courts who we usually think are acting in good
24 faith and in accordance with law.

25 MR. PINCUS: Well, I don't -- I don't know

1 that they have to prove it. I think this Court has to
2 look at the objective indicia, as it did in *Imburgia*, as
3 it's done in other cases, to see what -- what is really
4 going on in a case. And I think even the majority below
5 did not -- although it said all fundamental rights, the
6 five instances that it identified were not general,
7 fundamental rights. Free speech, for example, was not
8 one. They are the most --

9 CHIEF JUSTICE ROBERTS: So you --

10 MR. PINCUS: -- onerous -- I'm sorry.

11 CHIEF JUSTICE ROBERTS: You have to look at
12 what's going on in the case. So in my case where you
13 just have a statute, there's nothing else to look at.
14 So how -- how -- I still don't get why that would be
15 invalid.

16 MR. PINCUS: I -- I think the question in
17 that case would not be whether it's going to be applied
18 to the category of fundamental rights. The question in
19 that case would be does the FAA permit a State to make a
20 judgment that contracts with respect to arbitration
21 should be lumped in --

22 CHIEF JUSTICE ROBERTS: There's no talk
23 about arbitration. The word "arbitration" --

24 MR. PINCUS: No, I understand --

25 CHIEF JUSTICE ROBERTS: -- doesn't come up.

1 MR. PINCUS: -- but -- but there still is a
2 question, I think. What the FAA -- at bottom, what the
3 FAA said to -- was reacting to was State courts saying
4 arbitration is especially onerous and troublesome and
5 we're going to require -- we're going to require special
6 processes if we --

7 CHIEF JUSTICE ROBERTS: We understand that.
8 But I'm talking about a legislative proposition. And it
9 doesn't say anything about arbitration. It just says
10 powers of attorney. You can't waive fundamental rights
11 unless it's expressly stated.

12 MR. PINCUS: I -- I think it would be a much
13 harder case. I don't know --

14 CHIEF JUSTICE ROBERTS: Well, I know, but
15 the problem is -- is that it is, in terms of the
16 law-making authority, Kentucky would say to the supreme
17 court, you know, we make these rules through the courts
18 as we did in this case. And I just -- I guess I just
19 don't see -- I -- I don't think you've -- well, you
20 haven't come up with a distinction that persuades me,
21 and that's important because I think, as Justice Kagan
22 said, we have to assume the Kentucky Supreme Court is
23 acting in good faith.

24 JUSTICE BREYER: So isn't it that -- that
25 your answer is there's nothing wrong with that statute?

1 MR. PINCUS: Well, I think -- I think --

2 JUSTICE BREYER: And that, in fact, what the
3 statutes does, whether it covers arbitration or not, if
4 a court holds that it does cover arbitration, you have
5 to look to see whether the other things in there are
6 like arbitration sufficiently or there are other things
7 that aren't covered that are like arbitration
8 sufficiently, so that you could, at the end, draw a
9 conclusion that this is or is not discriminatory.

10 CHIEF JUSTICE ROBERTS: There's nothing else
11 in there. The -- the first time --

12 MR. PINCUS: That's exactly --

13 CHIEF JUSTICE ROBERTS: The first time the
14 statute is applied, it happens to be to an arbitration
15 case. It happens to be to this case. But you can't say
16 oh, look in the background of it. It's all about
17 hostility to arbitration. You can't --

18 MR. PINCUS: Well, I -- I -- I guess two
19 answers. Just to return to this case for a minute, I --
20 I don't think that's the rule that's being applied. I
21 think it's clear, because the instances of fundamental
22 rights that were identified were one part --

23 CHIEF JUSTICE ROBERTS: Mr. Pincus, you
24 understand that when your first answer is, let's go to
25 this case, that's not the most compelling response.

1 MR. PINCUS: I understand, Your Honor,
2 but -- but I -- I -- and to answer the question more
3 broadly, I -- I do think there's a -- there's a question
4 that the Court would have to answer in that
5 circumstance, whether, as Justice Breyer put it more
6 eloquently than I did, that the -- that arbitration is
7 being included in that category not because of some
8 special characteristic of arbitration, but because
9 arbitration agreements have the same characteristics as
10 all of those other things --

11 CHIEF JUSTICE ROBERTS: All right. Well,
12 how would you do that? That's the position that you and
13 maybe Justice Breyer are taking. How would you -- how
14 would you go about that? How would you say we've got to
15 decide why arbitration is being included in this?

16 MR. PINCUS: Well, and -- I would say, as an
17 advocate at least, that the problem with that judgment
18 is that what Congress said in the FAA is, in fact, you
19 can't say that arbitration agreements should be treated
20 like some special category of contracts just because of
21 a characteristic of arbitration. There has to be
22 another reason. And what the State is doing there is
23 saying arbitration is especially significant because of
24 a -- of a characteristic. It waives the jury right that
25 is intrinsic to arbitration, and I think that conflicts

1 with the Federal policy.

2 So, yes, the State could say that with all
3 fundamental rights. My argument would be it can't do
4 that with respect to arbitration and -- and I might
5 lose.

6 JUSTICE BREYER: If -- so the -- as I -- as
7 I understand the question better, one, of course the
8 legislature could enact such a statute.

9 Two, if we have our first case arbitration
10 and they say arbitration is included among it, then what
11 we're job is is to read the opinion.

12 Now, sometimes courts don't write enough in
13 the opinion for us to make the decision as to whether or
14 not it is being discriminated against, in which case we
15 send it back and ask them to write more. So is that
16 what we should do?

17 CHIEF JUSTICE ROBERTS: Yes or no, and your
18 time is expired.

19 MR. PINCUS: No.

20 (Laughter.)

21 MR. PINCUS: I think you have enough here.

22 CHIEF JUSTICE ROBERTS: No. Thank you. You
23 can answer it.

24 MR. PINCUS: I -- I think the answer is no
25 because I -- I think there's enough in this opinion.

1 I -- I think for the reasons indicated in Justice
2 Breyer's question, the -- the category here doesn't
3 apply to all jury waivers. So the argument that it
4 applies even to the waiver of a jury right is not true,
5 and it doesn't apply to all fundamental rights. The
6 examples that were given are the most onerous kind --

7 JUSTICE KAGAN: He cheated --

8 MR. PINCUS: -- of contracts you can
9 imagine.

10 (Laughter.)

11 MR. PINCUS: Sorry.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 The case is submitted.

14 (Whereupon, at 11:23 a.m., the case in the
15 above-entitled matter was submitted.)

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