OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: VOLT INFORMATION SCIENCES, INC., Petitioner V. BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY

CASE NO: 87-1318

PLACE: WASHINGTON, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

VOLT INFORMATION SCIENCES, INC., :

Petitioner :

v. : No. 87-1318

BOARD OF TRUSTEES OF LELAND :

STANFORD JUNIOR UNIVERSITY :

Washington, D.C.

Wednesday, November 30, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:48 o'clock p.m.

APPEARANCES:

JAMES E. HARRINGTON, ESQ., San Francisco, California; on behalf of the Petitioner.

DAVID M. HEILBRON, ESQ., San Francisco, California; on behalf of the Respondent.

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P R O C E E D I N G S

(1:48 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1318, Volt Information Sciences v. The Board of Trustees of Leland Stanford Junior University.

Mr. Harrington, you may proceed whenever you're ready.

ORAL ARGUMENT OF JAMES E. HARRINGTON

ON BEHALF OF THE PETITIONER

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

This case concerns the effect of a contractual choice-of-law clause on federal preemption of a state statute that conflicts with the Federal Arbitration Act.

The case presents several discrete issues that have been raised in brief by the parties. These issues include:

First, the question of whether the state court of appeal was correct in construing the choice-of-law clause to exclude any application of federal law to this case and thus to shield the state statute against preemption;

Second, whether the choice-of-law clause should be held invalid and unenforceable as a violation of the federal public policy favoring the arbitration of

private disputes in the event that the court of appeal's interpretation of the clause should be accepted;

And third, the question raised by Stanford's contention that the state statute at issue here would not be preempted by the Federal Arbitration Act even in the event that the contract had contained no choice-of-law clause.

In addition to these three substantive issues, the case presents a -- a fourth issue that was raised by the Court itself in its order postponing consideration of the question of its jurisdiction, and that issue, at least as the parties have discerned it from the Court's order, is whether the Court has jurisdiction to reexamine the court of appeal's interpretation of the choice-of-law clause or whether, on the other hand, that interpretation rests upon an acequate and independent state ground that precludes review of that issue by this Court.

Under the rules of the Court, I am of course required to discuss the jurisdictional issue at the outset of my argument, and I will therefore proceed directly to an examination of that issue, leaving the remaining issues I've mentioned for treatment later in the course of the argument if time should still permit.

Turning then to the question of jurisdiction,

I would remind the Court initially that we have enumerated in our briefs no less than eight alternative reasons why this Court, indeed, possesses jurisdiction to determine the effect of the choice-of-law clause in this case and why this Court's examination of that issue is not foreclosed by an adequate and independent state ground.

I, of course, won't recapitulate all of these reasons here. Rather I want to emphasize only two of them that I deem to be particularly important: the first of them, because it would permit the Court to sustain its jurisdiction in this case on a particularly narrow ground, if it should so desire; and the other, because it would allow the Court to provide significant further guidance for the development of the law concerning the general question of the effect of a -- of a choice-of-law clause on the scope of federal preemption and the applicability of federal law.

The first and probably the narrowest ground on which the Court might sustain its jurisdiction in this case is provided by the specific wording of the choice-of-law clause itself. As the Court will recall, the clause provides that the contract shall be governed by "the law of the place where the project is located." Since there was no extrinsic evidence in the record of

what the parties meant by that phrase, the only way the phrase can be interpreted and the only way the court of appeal could, could have interpreted it is by deciding -- is by determining the literal meaning of those words, "law of the place where the project is located."

But in order to determine the literal meaning of those words, one has to decide what law is in fact a law of the place where the project is located or, in other words, what law applies at that place. And in this case, since the question was whether federal law in particular was encompassed within the scope of the phrase, "law of the place where the project is located," one can only interpret the phrase in reference to that issue by deciding whether federal law in particular applies at that place.

QUESTION: But that -- I don't see how that gets away from the, the idea this is basically a question of fact, what the parties meant as manifested by, by the use of the phrase you, you just said.

MR. HARRINGTON: Well, it might have been a question of fact, Mr. Chief Justice, if -- if there had been any evidence in the record concerning the parties' intent, but I know it's well-settled in California and presumably in the federal courts as well that where there is no extrinsic evidence bearing upon the meaning

of the words in a contract, then the meaning of the contract is a question of law that the appellate court has jurisdiction to review de novo.

QUESTION: Well --

MR. HARRINGTON: But we have, of course, presented in our -- excuse me, Justice White.

QUESTION: Why -- the real -- one of the questions here is what does the word "place" mean. And why wouldn't -- why wouldn't California law apply to, to, to deciding what place means? And under California law, if there's a contract that says place, it means the State of California.

MR. HARRINGTON: Well, that's apparently what the court of appeal said, and of course we, we think that the -- since California --

QUESTION: Why would federal law have anything, anything at all to do with -- with deciding what the word "place" means in a California --

MR. HARRINGTON: Well, if place means a place within the State of California, which in this case it was -- must necessarily have meant, then it also means a place within the United States. And so, federal law --

QUESTION: Well, it doesn't under California law.

MR. HARRINGTON: Well, the question in this

case, of course, is whether -- in the first place we -- we -- as we've shown I think in our reply brief, there are two flatly contrary rulings. The most recent rulings of the other courts of appeals are contrary on this question of how to interpret this type -- this type of choice-of-clause -- choice-of-law clause, and in those cases, the clause went a little further than this and said the law -- the law of California or I think in one case it was the law of New York --

QUESTION: Are you saying that if -- if a California court interprets general language used by parties to refer to some kind of law other than California law, it automatically becomes a question of law of some other jurisdiction?

MR. HARRINGTON: Let's see. I'm not sure I understand the Chief Justice's question.

QUESTION: Well, supposing that a contract said this contract is going to be arbitrated either in Tokyo or Beijing, whichever is the larger city. And this is a California contract entered into by California people, and the California court says, well, it means such and such. Well, that doesn't mean it's not a question of California law anymore because it refers to, to places outside of California, does it?

MR. HARRINGTON: Well, I think this -- this

Court has indicated that -- in that case there would be no -- no question of federal law involved in the syllogism by which the Court reaches its interpretation of the clause because the question of which is the larger as between those two cities is --

QUESTION: A question of Chinese law.

MR. HARRINGTON: -- not a federal question.

QUESTION: Is that what -- you wouldn't think it was a question of Chinese law though?

MR. HARRINGTON: No, I wouldn't I think it would be a question of fact, which is the larger of those two cities. But in this case the question is to decide the meaning of this phrase with reference to the question, which was the question in this case, whether that phrase encompasses federal law, you have to decide is federal law law of that place. Is federal law --

QUESTION: No, you don't.

MR. HARRINGTON: -- (inaudible) law that place.

QUESTION: You're confusing what is the fact, which is a federal question, is federal law law in California. I suppose that is a federal question.

MR. HARRINGTON: Right.

QUESTION: You're confusing the fact with what the parties meant, and what the parties meant is in no way a federal question. It's simply a question of

California law. Did the parties mean federal law or state law? Why is that a federal question?

MR. HARRINGTON: Well, I think to answer that question, Justice Scalia, I have to turn back to the beginning. Since there was no extrinsic evidence of what the parties meant, I think the only way to interpret that phrase is to determine the literal meaning of the words. And to me the literal meaning of the words, "law of the place where the project is located," must be determined by deciding what laws apply at that place.

And I don't think there's any dispute about what the place is here. It's the Stanford campus in California. And the question is what laws apply at that place.

QUESTION: That's -- that's true only if you take the preliminary step of saying that place means all laws that apply to that place, but that is precisely the question before the Court. And it seems to me that's a state law question. Does place mean --

MR. HARRINGTON: No, the --

QUESTION: -- law of the place mean all laws applicable to the place or only the state law applicable to the place?

MR. HARRINGTON: Right, right. Well, let me

-- let me -- perhaps I can illustrate with a previous decision of the Court what I -- what I'm getting at here. My, my point is that in order to, to interpret this -- to decide whether it means all laws applicable at the place, or in this case the only question was does it mean federal law since that was the -- that was the matter at issue, you, you have to decide does -- does federal law apply at the -- does -- well, I, I, I guess the nearest analogy I can think of is a, is a case decided in 1985 called Ake v. Oklahoma that the Court will probably recall.

And the issue -- the issue in that case was whether a -- whether the defendant had waived a federal constitutional claim by failing to raise it at trial. And the Court -- and whether that was an adequate and independent state ground to sustain the Court's judgment and deprive this Court jurisdiction to review.

And the Court undertook to examine the Oklahoma decisions, went back and examined the Oklahoma decisions and said, well, it's true that that would ordinarily be an adequate and -- adequate and independent state ground, but since it appears that it is the Oklahoma law that so-called fundamental errors cannot be waived by not being raised at trial and since it appears also under Oklahoma law that so-called --

that constitutional errors are not -- are fundamental errors that cannot be waived, therefore it appears that the state court's decision whether this -- this claim should have been deemed waived by failing to raise it at trial was logically dependent on an initial determination of whether this was a constitutional error. And since that's a federal question, the state court's ground for -- or rather, the -- the state court's decision was logically dependent on determination of a question of federal law and therefore could not be an adequate and independent state ground.

And that's the point I'm making here -- I -- is simply that in order to decide that -- the meaning of that phrase in reference to -- to the question of whether federal law was one of this group of laws that's specified within this clause, one has to decide whether federal law applies at that place. And that's a federal question.

QUESTION: You're arguing -- you're just arguing jurisdiction right now. All you have to do --

MR. HARRINGTON: Right.

QUESTION: -- is to say there was a colorable issue of federal law to sustain jurisdiction. But that doesn't mean that you're right.

MR. HARRINGTON: Right on the merits.

QUESTION: On the merits, yes.

MR. HARRINGTON: Oh, that's correct. I'm starting with the jurisdictional question.

QUESTION: Yes.

MR. HARRINGTON: Well, to turn then -- so, the first -- the first and I think the narrowest ground is to follow the, the approach that has been followed in Ake and Oklahoma and other cases such as United Airlines against Main, that the -- the state court's analysis and interpretation of the phrase was bottomed on a determination of whether federal law applies at that place. And that's a federal question.

But to turn then to a -- the second alternative --

QUESTION: I hate to -- I don't mean to hold you on this point too long. But why is that a federal question?

MR. HARRINGTON: Whether federal law --

QUESTION: If a contract between two California parties provided that we shall have this contract -- all issues under this contract shall be determined by the law of Vermont, say.

MR. HARRINGTON: Uh-hum.

QUESTION: Or it's arguable whether it means Vermont or Massachusetts, one of the two. Why is the

question of what that means a question of Vermont or Massachusetts law?

MR. HARRINGTON: Oh, it would be in that case.

QUESTION: Well, because of the fact --

MR. HARRINGTON: In this case it said law of the place where the project is located, and the question has to be answered --

QUESTION: I see.

MR. HARRINGTON: -- in order to interpret the clause, what is the law of the place where the project is located? And since the issue in this case was -- was whether federal law is encompassed within the meaning of that phrase, anyone who sets out to interpret that phrase has to say, well, is federal law one of the laws of that place?

QUESTION: Well, I know, but that --

MR. HARRINGTON: And in order to answer that, you --

QUESTION: That just renders that phrase meaningless. It renders it meaningless. Why have it in, in at all?

MR. HARRINGTON: Well, you mean to have -- to designate the law at all.

QUESTION: You mean at least it would narrow what you say to California or United States law. Is

that it?

MR. HARRINGTON: No. The point of having it in there is to -- is to distinguish -- as this Court indicated in de la Cuesta, the typical -- which we've discussed in our briefs, the decision in de la Cuesta. The normal reason for these types of choice-of-law clauses is to make sure that California law applies as opposed to the law of other states in situations in which there isn't any federal law, which is most situations that are going to arise on a -- on a construction project.

California law, of course, would govern 99 percent of the problems that would arise on this project, but in the case of arbitration, we have federal law here. And so --

QUESTION: You're going to get to the merits.

MR. HARRINGTON: I hope so, Mr. Justice Blackmun.

QUESTION: In that connection, where did this California statute come from? Is there some history behind it? It seems to fit the case like a glove.

MR. HARRINGTON: There's about a -- oh, it does. It does. There's about a half -- half a page of history that's uninformative, Justice Blackmun. It -- I would -- of course, it, it, it reaches a contrary result

on how to handle this type of situation from what this Court reached in Dean Witter against Byrd and the Moses Cone case and what most courts have reached. But we could get into the wisdom of --

QUESTION: If, if the parties had said that the California Code of Civil Procedure shall govern the enforcement of arbitration award, I take it you wouldn't be here, that you would concede that the federal law is displaced, or would you?

MR. HARRINGTON: I would -- if it said California -- well, let me take it in three steps. If it said California law, I would agree with the dissenting Justice below that California law means that federal law is an inherent part of California law. If it said the California Code of Civil Procedure, I would agree that it should be interpreted to exclude federal law.

But for reasons I'll get to in a moment, I think there would be an argument there. And there's a stronger argument in our case. There would be an argument there that perhaps that should be held unenforceable because -- by -- because the parties may not really have known what they were doing in, in adopting a body of law that had the effect of nullifying their agreement to arbitrate and that that fact might

have offended the federal policy again favoring the arbitration of private disputes.

Turning then to a second and considerably broader rationale which might be used to uphold the Court's jurisdiction, I would submit to the Court that the -- the choice-of-law issue resolved by the court of appeal, besides being dependent on federal law in the way I've mentioned and in the various other ways we've described in our briefs, was itself a pure question of federal law in the -- in the last analysis because the issue ultimately decided by the court was the inherently federal question of whether federal law should apply to this case. And, and this Court has often stated that the issue of whether federal law applies to a particular case is, is itself always a federal question.

QUESTION: So, if the parties deliberately exclude federal law, as they have in Justice Kennedy's hypothesis -- they say the arbitration shall be governed by the California Code of Civil Procedure -- that becomes a federal question?

MR. HARRINGTON: Oh, no. No, because there, there I don't think the, the Court ever faces the -- that's a clear -- as I conceded in response to Justice Kennedy's question, I don't think the question would even be argued or presented that that clause -- that the

interpretation of that clause would lead to an application of federal law.

QUESTION: But, but -- give me again then the situation where you say it does present a federal question.

MR. HARRINGTON: Well, our case where it says law of the place where the project is located. Additionally, a case in which --

QUESTION: Well, why is that different legally from Justice Kennedy's hypothesis? Each of them is trying to state the agreement of the parties about what law shall govern their, their contract or their arbitration. One chooses one set of words, another chooses another more precise set of words. But that doesn't make it not a, a question of fact or a question of what these parties meant, perhaps a question of law in the sense you used it earlier.

MR. HARRINGTON: Right. Well, in -- in our case, it has to be interpreted. In that case, although I guess technically it has to be interpreted, the meaning is so obvious I don't think there would be much argument about it.

QUESTION: What about the law of Vermont? Go, go back to that earlier example. You said very clearly that's, of course, not a federal question. Why

isn't it? Federal law is law in Vermont. Why isn't there an ambiguity there? Why doesn't that raise a federal question?

MR. HARRINGTON: If the contract specified the law of Vermont?

QUESTION: This contract shall be governed by the law of Vermont.

MR. HARRINGTON: Oh, yes. I, I would think that federal law --

QUESTION: That's a federal question then.

MR. HARRINGTON: That the meaning of the contract is a federal question?

QUESTION: Yes.

MR. HARRINGTON: Yes, that it would be a federal question -- no. It is not a federal question of what that means in most situations. It is a federal question --

QUESTION: Why not?

MR. HARRINGTON: Because -- because federal law would just have nothing to do with the whole --

QUESTION: Federal law is law -- it governs in Vermont. Why isn't it possible to interpret that saying all the law of Vermont, including the law of the United States, which is law in Vermont? Isn't that argument available?

MR. HARRINGTON: Yes, yes.

QUESTION: So, therefore, there's a federal question raised.

MR. HARRINGTON: I think that -- that -- well, let me -- yes, I think that's correct. That's correct. If it said the law of Vermont, and one could -- one could say that --

QUESTION: A lot of contracts --

MR. HARRINGTON: -- in several lower courts --

QUESTION: -- are going to be raising federal questions.

MR. HARRINGTON: Several of the lower courts have said that that type of choice-of-law specification includes the laws of the federal government because they're an inherent part of the law of every state. And -- and it would be -- since the -- if the argument in the case -- that's where I got off on your question, Justice Scalia.

I think that -- it's -- it's -- the interpretation of the choice-of-law clause will be a federal question only if the question in the case is whether that choice-of-law clause encompasses federal law or whether it precludes the application of federal law. And that's my second ground that I was about to get into.

In other words, I think what we -- the Court has often used the "interwoven" in its adequate and independent state ground cases, if the state ground is so interwoven with federal law. I think we have a situation in here, in this case, in which the -- the state ground is interwoven at both ends of the analysis.

In the first place, my first point was that you can't really decide what the phrase means unless the initial step in your syllogism is that federal law is the law of the place where -- is or isn't a law of the place where the project is located, and that's a federal question.

And the whole aim of the court's analysis -- in between there, there's a contract interpretation, but the ultimate thing the court is after -- the court of appeal -- in trying to decide what this thing means, what this provision means, in relation to the application of federal law is whether federal law should be applied to the case. Sort of at both ends it's interwoven with the federal question of whether federal law applies at a particular place.

Now, I, I think the federal -- the -- excuse me. The Court has often stated in its decisions that the question of whether federal law applies in a

particular case is, is itself a federal question. And I would submit that this general principle should not be rendered any less applicable simply because the question comes presented to the Court in the guise of a contract interpretation of a choice-of-law problem.

In the first place when the so-called choice-of-law problem is a choice between the law of the United States and the law of a state, it's not the ordinary kind of choice-of-law problem, but is instead simply a, a question of federal supremacy or federal preemption. And I don't think the -- the state courts clearly should not have the final say in resolving that kind of choice-of-law problem unless they are to be given the final say over all Supremacy Clause issues.

And secondly, I would submit that this conclusion is not altered by the fact that the state court's choice between state and federal law may have been implemented by means of a -- of an interpretation of a choice-of-law provision in a contract between the parties. Although the immediate question addressed by the state court in such a case is the state law matter of interpreting a contract, the ultimate issue decided by the Court is whether federal law shall apply to the case, and that I would submit is, is a federal issue on which this Court and not the state court should have the

last word.

In fact, I think that any other conclusion would -- would erode to a significant extent this Court's position as the, the final arbiter of all issues of preemption and of the application of the Supremacy Clause.

Choice-of-law clauses are used with increasing frequency in commercial contracts, and any -- therefore, any rule that would accord the state courts final authority to determine whether such provisions foreclose the application of federal law and prevent federal preemption of state statutes would give the state courts the power of final disposition of a very large proportion of Supremacy Clause and preemption cases.

QUESTION: You're giving that to the parties. I mean, you're by definition dealing with situations in which the parties, if they speak clearly enough, can oust federal law.

MR. HARRINGTON: That's correct.

QUESTION: Well, why -- why should it be so terrible that the states should be given the interpretation of those provisions? You're, you're allowing individuals to oust federal law. What's so horrible about allowing a state to oust federal law by interpreting the contract?

MR. HARRINGTON: Simply because this Court has jealously guarded over the decades its right to determine the application of the Supremacy Clause and decide when -- when federal law shall apply to a case and when state law shall be preempted. If, if -- you know, if the matter -- if the parties do it and the matter never reaches a court, it's not a legal issue at all I suppose. But as between who has the power, as between this Court and the state courts, to decide whether federal law governs a case, I would submit it's this Court.

Now, I emphasize this is the broadest rationale we've offered. We've offered several narrower rationales in our briefs for sustaining the court's jurisdiction in this case. And one of those I think is the logical dependence argument I mentioned at the outset.

I'm not -- I sense that Justice Scalia is still having trouble with that argument, but I --

QUESTION: (Inaudible) any trouble with it at all.

(Laughter.)

MR. HARRINGTON: I don't know how to take that.

Finally, in any case I would submit whatever might be the proper disposition of this issue in the

general run of cases, I -- federal law should at least be deemed to govern the question whether -- the question of the effect of a choice-of-law clause on the application of federal law when the state court's interpretation of the clause does not depend upon or even implicate any, any general state law principles of the law of contracts, but instead consists simply of a conclusory pronouncement that we have no doubt that a certain kind of choice-of-law clause excludes federal law.

In that kind of a case at the least I would submit that the state court's so-called interpretation of the contract really amounts to nothing more than a naked declaration by the state court whether federal law shall or shall not apply to the states. And, and that question is certainly not one of state law, but one that this Court should have jurisdiction to review and decide.

As to the state of the, the state of the authorities on this issue, the Court has never expressly or directly addressed the question of whether federal law should, should govern the effect of a choice-of-law clause on federal preemption. But I think the Court has given two very strong indications in its recent decisions that this issue should, indeed, be governed by, by federal law.

One of these appears in the Court's recent decision in Mitsubishi Motors v. Soler Chrysler-Plymouth where the Court expressly suggested that a choice-of-law clause that might preclude the application of federal law should be treated as an -- as the practical equivalent of a waiver or a release of a party's federal rights. And if that is so, then it would follow the interpretation of such a clause would be a federal question since the effect of a waiver or release has long been recognized as presenting a federal question.

More importantly, in the Court's 1982 decision in the de la Cuesta case, the Court actually decided, albeit implication -- albeit by implication that the -- the very issue presented in this case is, indeed, a federal question that it has jurisdiction to review. As the Court recalls in that case, the Court undertook to interpret for itself a choice-of-law clause virtually identical to the one involved in this Volt-Stanford contract even though the state court of appeal in that case had -- had previously arrived at a precisely contrary interpretation of the clause. I think by undertaking to interpret that clause in that case without indicating any doubt about its jurisdiction to do so --

QUESTION: (Inaudible) the word "place" used?

MR. HARRINGTON: The word used there was "jurisdiction."

QUESTION: It was used in a -- used in a federal regulation.

MR. HARRINGTON: Oh, no. It was in a private contract --

QUESTION: Was it?

MR. HARRINGTON: -- that the parties were not required to use. That's -- I -- in fact, one of the contracts in the case -- in one of the contracts in the case, the parties didn't use it. And then the Court even indicated in its opinion in de la Cuesta that they could modify the terms of that contract. It was a form prepared by the federal government, but it was entered into by private parties voluntarily.

QUESTION: It may be, but it was a -- it was a kind of a contract that was required by a federal regulation.

MR. HARRINGTON: I -- as I read the opinion, of course, I -- I've never had access to the record, but the opinion indicates that the parties were not required to enter into that contract. And, in fact, in one of the transactions --

QUESTION: It was a federal form nevertheless, wasn't it?

MR. HARRINGTON: It was? Pardon me?

QUESTION: Who, who -- was it a form contract prepared by -- by whom?

MR. HARRINGTON: It was promulgated by, by the Federal Home Loan Bank Board, but the parties were free to --

QUESTION: And that's why the word "place" -- so, I would --

MR. HARRINGTON: Well, I, I know from my own experience in the construction area, you know, the federal government promulgates construction contracts, and then those frequently end up being used between the contractor and his subcontractors. But nobody contends that those are federal contracts or mandate the application of federal law if they're not contracts with the federal government.

Just because the parties used a form that came from the federal government, I don't think it would distinguish the de la Cuesta case.

QUESTION: Well, I -- I thought in that case, the contract --

MR. HARRINGTON: It was --

QUESTION: -- it was a form that was mandated by the --

MR. HARRINGTON: Well, the way it -- it was --

it was -- if the -- if the -- the homeowner wanted to sell the mortgage or, or -- excuse me. If the lender wanted to sell the mortgage to other federal agencies, they would only buy it if it -- if it was on that form.

But the contract was not required to be used in order to make a mortgage by a federal S&L. And in one of the cases it was not used, and the Court actually indicated in its opinion that the parties could have modified its terms if they pleased.

QUESTION: All right.

MR. HARRINGTON: So, at any rate, my second point is de la Cuesta.

And I -- it appears I'm going to have to leave the other points unless the -- the other three issues because I'd like to save at least a couple of minutes for rebuttal unless any member of the Court has questions. I think we've gotten into the actual merits of the interpretation.

QUESTION: Very well, Mr. Harrington.

MR. HARRINGTON: Thank you, Mr. Chief Justice.

QUESTION: Mr. Heilbron, we'll hear now from you.

ORAL ARGUMENT OF DAVID M. HEILBRON

ON BEHALF OF THE RESPONDENT

MR. HEILBRON: Thank you, Mr. Chief Justice,

and may it please the Court:

We had a flesh and blood problem here. Volt charged that Stanford was liable because the project manager mismanaged the job and the engineer designed it badly. Now, if Volt hurt itself -- and Stanford thought it did -- it ought to suffer its losses. And if the project manager and the engineer hurt Volt, they ought to pay for its losses. But no way, either way ought Stanford to have to pay for them.

However, if Volt's claim against Stanford were arbitrated alone, Volt might win it, and if Stanford's claim over as against the project manager and the engineer were litigated alone, they might win it. And so, Stanford could lose both ways with the consequence that it would have to pay for those losses it ought in no way to have to pay for. And that result would be very unjust and the statute, 1281.2(c), as Justice Blackmun I believe observed, is really made for just exactly that unjust case.

QUESTION: Has this situation arisen before that brought this statute into being?

MR. HEILBRON: Yes, Your Honor. It is not a matter of record before the Court here. My recollection is that the statute was proposed by the state bar about six or seven years ago, and its purpose -- and this is

again not in the record. Its purpose is to avoid piecemeal litigation and the wasted time and resources that it causes and the conflicting rulings of common -- as to common questions of law and fact that it permits. So, that's where the statute came from, Your Honor.

QUESTION: Well, if somehow you were subject to the federal Act -- to the Federal Arbitration Act, you -- you would not have had the option that the California Code of Civil Procedure gives you I take it, or would you?

MR. HEILBRON: Well, for openers the answer is that we agree that California law was to govern here. The court found that there was no doubt about the fact that place meant what the court found --

QUESTION: If the agreement had not had a place provision in it, and --

MR. HEILBRON: Had the agreement not spoken to California law --

QUESTION: -- and Volt had gone to a federal court, I assume you would have been forced to arbitrate.

MR. HEILBRON: Had Volt -- had there been no agreement, had the agreement not met what the court found it to have meant, and had we been in a federal court, the answer to your question is yes. But had we been in a state court, the answer to your question is

no. And we were in a state court.

And the reason, getting ahead of the story a little bit, is that Sections 3 and 4 of the Federal Arbitration Act have never been held by this Court to apply in state court, and they never should be.

QUESTION: On, on that point, if in this case under this contract, say it were just Volt and Stanford, just two parties involved, you had gone to arbitration --

MR. HEILBRON: Yes.

QUESTION: -- under this contract --

MR. HEILBRON: Yes.

QUESTION: -- could the prevailing party have gone to federal court to seek enforcement of the award under the Federal Arbitration Act?

MR. HEILBRON: Had we gone to arbitration, just the two of us?

QUESTION: Yes, and then you seek to enforce the award. Could you go under the federal Act?

MR. HEILBRON: Do we by this hypothesis have the agreement that we had?

QUESTION: Yes, and you have the finding that you have by the state court.

MR. HEILBRON: Well, we believe that the thrust of what the parties said here -- that is, that California law was to obtain -- would cause them rightly

to go into the state court to have the award enforced. But whether the thrust of the agreement was as broad as Your Honor's question suggests it was was a question not canvassed in the court below because it didn't have to be. The core point --

QUESTION: So, you don't read the opinion as making the Federal Arbitration Act completely irrelevant to this contract?

MR. HEILBRON: No. What, what we read the Court's decision to be -- its finding as to what the parties meant to be -- is that the California law, including 1281.2(c), was to apply to the parties' agreement and to the arbitration called for by the agreement or not dependent upon how 1281.2(c) --

QUESTION: In your view that would not encompass enforcement?

MR. HEILBRON: It may well, and it is our view that it does. But it is also our view that the court didn't reach the question. It wasn't argued below because we didn't have to. But it would be our view, yes, that it would -- it would catch -- the agreement would -- all of California law which really went to the substance of the agreement to arbitrate, including 1281.2(c). And whether in a federal court, were one to go in there and ask to seek to have an award enforced,

one could say in a federal court, well, the mechanism as to how you enforce the agreement was not something that the parties cared about is something, as I say, we did not face in the court below because it wasn't present in the case.

I'm not sure I've been clear to Your Honor.

Well, assuming that the agreement meant what the court found it to mean, the question is whether the FAA really forces private people who agree to arbitrate in accordance with state law to arbitrate in accordance with federal law instead. And specifically, does the FAA prohibit a state court from enforcing the agreement that these parties made to solve the problem they had in the common sense way that state law does?

Now, that's a federal question. That is a federal question. But the answer to it is very clear. The answer is plain no.

Arbitration is a matter of agreement. That's the most basic, most cherished principle of arbitration law, federal and state. Parties can agree to arbitrate in any way they want. They can agree to arbitrate in some circumstances and not all, some disputes and not all, or not at all. And the court cannot force parties to arbitrate a dispute they haven't agreed to arbitrate or in the way or under circumstances in which they have

not agreed to arbitrate.

QUESTION: May I ask a question, kind of a preliminary question?

There was mention made by your opponent of the fact no evidence was introduced on the meaning and the parties and so forth. Did anyone seek to offer any evidence, or was it agreed by the parties that the contract would speak for itself in effect?

MR. HEILBRON: There was no extrinsic evidence offered. It was agreed in, in essence that the contract was there to be interpreted by the court in the common sense way that it did. We argued about what it meant.

But one should have an -- in mind that there was a factual backdrop here, and that was that the year before this contract was made, the California Court of Appeal in the Garden Grove case had interpreted essentially the same provision in essentially the same contract in essentially the same way as this Court did. And the parties, the court found, could be taken to have known about that and, therefore, to have had in mind when they struck the deal that they struck, that that's what the words meant.

So, it was not as if this was kind of out of the blue and there was no history here. There was a clear history. The court of appeal was clear as to it

and thought it meant something.

Now, before I, I leave the question of jurisdiction — and I want to talk just a moment about the proposition that arbitration of agreement. But before leaving the question of jurisdiction to come back at it when we get to what the contract means, I'd like to remind the Court that this purports to be a 1257(2)appeal. This is not an appeal.

The appellant, so he calls himself, has made it very clear to this Court that what's really on his mind is what this contract meant and why it really doesn't mean what the court found it means. And what a contract means is not a question which goes to the validity of a statute, and consequently it does not give rise to a 1257(2) appeal.

The federal question that we've got here is, is, is a question, all right, but there is nothing to it. There's no substance to it, and therefore it's not the kind of question that this Court ought to review under its certiorari jurisdiction, and the case simply ought to go away.

Now, just a — just a few words more about the proposition that arbitration is a matter of agreement. Nothing in the FAA obviously changes that proposition. The FAA puts arbitration agreements on the same footing

as other contracts but not more so. It's meant to enforce parties' agreements according to their terms, whatever their terms are, no less but no more than they are. And those are familiar principles to the Court, of course. Every case from Prima Paint through Perry says exactly that. No case says otherwise, and Dean Hitter sums it up. That's the preeminent purpose of the Act. The Act does not mandate people to arbitrate. It just says that it wants to enforce agreements that parties have made.

And the liberal policy favoring arbitration that Mr. Harrington referred to is, as the Mitsubishi case puts it, just at bottom a policy guaranteeing the enforcement of private agreements. This, this court -- this court simply interpreted the parties' agreement in accordance with its terms, exactly what it ought to have done under this court's principles of law, exactly what the letter and the spirit of the FAA command, and there's simply nothing to argue about here.

And finally, as to that point, they proved it today. They proved it in their brief, but they proved it again today. The question was put to Mr. Harrington, look, if the parties had clearly agreed to be bound by state law, would that be okay? And he said yes.

In their brief they said, you know, you could

have accomplished what you say you accomplished longhand just by in so many words setting forth 1281.2(c), but you didn't do that, and in the process proving again that there's simply nothing of substance at issue here because if you can achieve the goal longhand, what earthly difference does it make whether you achieve it, as we did, shorthand?

QUESTION: (Inaudible). As I understand the decision, the California courts said the word -- when you say the law of the place, you mean the law of the state --

MR. HEILBRON: That's true.

QUESTION: -- and not the federal government --

MR. HEILBRON: That's true.

QUESTION: -- or anything else.

MR. HEILBRON: That is true.

QUESTION: Now, why -- why isn't that the end of the case because surely California should be able to interpret the word "place" as -- and construe that contract?

MR. HEILBRON: Why, we think that's absolutely right, Your Honor. There's, there's just no question about it. I mean, when it -- when it comes down to it at the end, they say the reason why the contract, assuming it made -- it meant what we have just been

assuming it meant, is unenforceable is because maybe we really didn't know what we were doing. That was the ultimate proposition put on oral argument and really just beside the point.

It is the case that it's a California question what the word "place" means in a contract made between citizens of California. And it having made the judgment -- the court -- finding without doubt that the contract word "place" meant the laws of the place California where the project was located, and they having agreed that that agreement, if we made it, is okay, that's really all there is to the case.

QUESTION: Of course, there remains a federal question, does -- although you say it's one that admits of a very easy answer -- whether that sort of an agreement in a contract can prevent the -- can result in the operation of California arbitration law as opposed to federal arbitration law.

MR. HEILBRON: Absolutely, Your Honor. That is a federal question. We grant that it is, and the answer to it is obviously yes. Certainly parties can agree to arbitrate in any way in the world they want to agree to arbitrate or they can agree not to arbitrate at all. And if what they agree to do is to arbitrate in accordance with California law, there's no federal

interest that says they can't do that. Indeed, the federal interest is to the contrary. The federal interest is enforcing their agreement in accordance with its terms, and that's what the court below did.

QUESTION: Well, I suppose there either has to be an arbitration clause in the contract or you don't have to arbitrate.

MR. HEILBRON: That is true.

QUESTION: And there was an arbitration clause in this contract.

MR. HEILBRON: That is correct.

QUESTION: What if it just happened to turn out, although the lawyers should have been pretty dumb if -- what if it turned out that California had a law against any arbitration at all?

MR. HEILBRON: Well --

QUESTION: And then -- but there was still a -- a provision for arbitration.

MR. HEILBRON: Are we assuming in this hypothetical, Your Honor, that there is an agreement?

QUESTION: There's this -- they say that the -- this contract shall be construed and enforced in accordance with the law of the place where it's made.

MR. HEILBRON: Yes.

QUESTION: And then they have an arbitration

clause, too.

MR. HEILBRON: Okay.

QUESTION: And it turns out that California doesn't allow any arbitration.

MR. HEILBRON: And the question is whether the agreement would still mean what we say it meant?

QUESTION: Well, the question is must you arbitrate?

MR. HEILBRON: Well, the answer is that if the parties meant to incorporate that provision of California law that said there shall be no arbitration -- that's what they meant -- then that's what should happen because a court cannot enforce the parties to do something they have not agreed to do.

QUESTION: Well, but they've agreed to arbitrate.

MR. HEILBRON: So, if the court in construing the clause has in mind the illogic of what Your Honor is pointing to and decides as a matter of fact that these parties really could not have intended that in the setting that Your Honor puts, then the court comes to the judgment that's not what the choice-of-law clause means here. Again, a state law question to be answered by state law and perhaps differently from the way in which this state court answered this state question.

A few more words about what the agreement means. Now, they say that the reason why this is a federal question here is that federal law kind of applies every place, and that if one doesn't interpret this contract in accordance with that literal meaning of the word "place," you're going to sort of undo the Supremacy Clause. You will no longer be, I think it was said today, the final arbiter of questions of federal supremacy. And that's a fear one can be disabused of. We believe in the Supremacy Clause. We admire it like everybody else. We have no seditious purpose in respect to it. Obviously federal law is supreme.

It's also obviously the case that the Supremacy Clause really doesn't have anything to do with the issue at hand and neither does the literal meaning of the words and neither does basic tenets of federalism they refer to many times in their brief because the question is just what the parties meant here. The answer turns on intent not the Constitution. And the Supremacy Clause doesn't tell parties what they intend, and what they intend doesn't effect the Supremacy Clause.

State law ought to determine what the parties meant here for the same common sense reasons it ordinarily does, as they agree. The state is close to

what's going on in the state, to the contracts that are made there, and to the words that people use there.

QUESTION: We, we can and do reach questions of state contract interpretation and reexamine them here if they're a bar to the assertion of a federal right such as the right not to have your contracts impaired.

MR. HEILBRON: Yes.

QUESTION: Indiana v. Brand.

Could the -- could Volt make the argument here -- I suppose it does make the argument here -- that there is a federal policy in favor of federally enforced arbitration and that we're, therefore, entitled to reach the state question in order to make sure that that policy is not thwarted?

MR. HEILBRON: Well, I think that Volt could make the argument, if they made it, that the state court's interpretation of the state law question was, for want of a better word, kind of wild, so unfounded in the words of the Demorest and Enterprise Irrigation cases, so certainly unfounded that what the court did may properly be regarded as essentially arbitrary or a mere device, you know, kind of a way to evade, manipulate around the application of a federal right. And if there were that going on here, I think the answer to Your Honor's question would be, yes, you could call a

halt to it, blow a whistle. But there's nothing like that remotely that went on here.

Really all that happened was that against a backdrop of commonly looked-to California rules of how you interpret contracts, the court interpreted a contract. And the common rule is -- the very common sense rule -- that words are to be interpreted in accordance with their popular meaning not in their strict legal sense, and they are supposed to be interpreted in accordance with local usage. Obviously, that's the way things ought to be. I mean, there's no sense interpreting words used one place the way they're used some other place.

And so, the court against that backdrop simply interpreted the common sense word "place" before it and reached the judgment that, you know, place where the project is located means California, the place where the project is located, a matter which really ought not to have to occupy this Court. Really what the words, you know, seem naturally to say -- a long list of federal statutes that use them in essentially the same way, and that case, Garden Grove, that I referred to earlier had interpreted them exactly the same way the year before.

Now, when you come down to it, it seems to us a very telling point here, it has to do with what it is

that they are asking you to do in respect to this kind of earthy little state law question. I mean, what really are they asking you to do here? To reinterpret the choice-of-law clause in this private contract, hold that the words mean what Volt says they mean in this private contract, in all private contracts in California and everywhere else, hold that because that's the ordinary meaning of the words in California or everywhere else, hold that whether that's the ordinary meaning of the words in California or anywhere else? And it really would be unprincipled for the Court to undertake to do that.

They point to no rule. There obviously is none that says that you're supposed to interpret popular words in an unpopular way, and there's nothing before the Court to suggest to it that people have ever used the words that were used here in the way that Volt says they were used here in the entire history of the State of California.

So much for what the -- the contract means.

QUESTION: I suppose we could adopt a theory that whether in a particular contract parties have contracted out of federal law --

MR. HEILBRON: Yes.

QUESTION: -- which would otherwise be

applicable is itself a question of federal law. I don't know any case that has ever held that, but, but --

MR. HEILBRON: Neither do they.

QUESTION: -- it's thinkable.

MR. HEILBRON: Neither do they. They have suggested that that might be so, but cited no rule. That would be a rather odd thing, with great respect, Justice Scalia, to hold. I mean, the whole backdrop of contract law in the United States is that private parties make contracts with reference to state law for the very good reason that there is no general federal contract law. Swift and Tyson is long dead.

And among the things that states are ordinarily equipped to do and do is to interpret choices-of-law clauses in agreements. This agreement like any other -- there's nothing special about it.

QUESTION: Well, let's say -- let's say the issue in a state case is whether -- state criminal cases -- whether the defendant waived a particular federal constitutional right that is waivable. We would -- we would examine that as a federal -- whether he voluntarily gave away that federal entitlement. We would consider that a question of federal law. And you can say this is the same thing here. Did these parties voluntarily contract out of their otherwise applicable

federal entitlements?

MR. HEILBRON: Well, I think that the -- that the applicable rule would be -- if you were worrying about whether somebody lost a federal right because he had messed up in respect to a state procedural rule, I think the applicable rule would be is that state procedural rule a sound rule that's generally followed or is it a mechanism to kind of take away a federal right.

QUESTION: I'm talking about a state procedural rule. I'm talking about a, a statement that the individual made saying I don't want an attorney.

MR. HEILBRON: Oh, I see what you're saying.

QUESTION: Something like that.

MR. HEILBRON: Okay.

QUESTION: What was the meaning of that statement? That's the issue in the case. Did he really say he didn't want an attorney or did it mean something else? We've had some cases recently that involved this kind of question. We certainly consider that a federal question even though it arises in a state proceeding. It's just a meaning -- interpretation of language.

MR. HEILBRON: Well --

QUESTION: But since it affects federal rights, we say it's a federal question.

MR. HEILBRON: I think it is quite a different thing to say that it's a federal question as to whether a confession, for example, is coerced. So, you look at the facts to find out whether they fit the federal rule. I think that's quite different from the case where parties choose a body of law to have their problems resolved under. And when they choose it, they certainly do not expect that the jurisdiction whose laws they have not chosen is going to determine the meaning of the words they used under the laws of the jurisdiction that they did choose.

QUESTION: It isn't just a matter of choosing. It's a matter of contracting out of federal law. The preexisting state of the world is that the Federal Arbitration Act governs, and the issue is whether the parties have contracted out of the Federal Arbitration Act. I don't think it's unthinkable to hold that the question of whether they have contracted out of the Federal Arbitration Act is a federal question.

MR. HEILBRON: Well, it's thinkable in the sense that I can certainly entertain the thought, and we have as we talk with one another, but unthinkable in -- in this sense, that you are still dealing with a state law contract between local parties using local words in a local setting. And what those words mean in that

local setting is really a local question. And for this Court, so far away, if I may say so, from that local setting to determine what those locally said words meant locally is a difficult thing to do. And it's for that reason that just as a matter of common sense state contract provisions are interpreted in accordance with state law, this one as any other.

I'd like to spend a word or two, if I might, in respect to Sections 3 and 4 of the Act and whether they really apply here, whether or not had we not had any agreement at all it would make really any difference, the question that Justice Kennedy posed when we began. And the answer is no. Three and 4 would not apply and neither would Moses H. Cone's piecemeal litigation apply in this state court proceeding.

This Court has never held ever that Sections 3 and 4 of the Act apply in a state court proceeding, and it ought not to hold that they do this time around for at least three reasons.

Number one, Sections 3 and 4 of the Act make it perfectly clear on the face -- on their face that they apply to United States' courts, United States' district courts, not state courts.

And second, the legislative history shows that Congress meant exactly what it said. There's an

argument in the brief that says, well, you know, so what. You ought to apply Sections 3 and 4 in state courts in order to achieve the goals of the Act, but you don't achieve the goals of the Act by doing the opposite of what Congress said and meant.

And it really would be most surprising and intrusive had Congress meant otherwise, that is, had it meant those procedural rules of the Act to apply in state court because it's well-known that federal law generally takes state courts as it finds them and the remedies that a forum provides are ordinarily the business of the forum that provides them. That's just the way the system works.

QUESTION: (Inaudible) as a forum selection clause and -- but with an arbitration clause, the state courts must provide for arbitration.

MR. HEILBRON: That is a true statement, but the --

QUESTION: Right, right. All right, but -- but they can't prevent arbitration. They, they can't refuse in the face of the Federal Arbitration Act to order arbitration.

MR. HEILBRON: Under the procedural remedies that they make available in general.

QUESTION: Right, right.

MR. HEILBRON: Absolutely right.

The proposition here is simply this. The procedural remedy that this state court provided was a order to compel, but the court said, look, we're not going to issue it where its effect will be to cause duplicative litigation, piecemeal litigation, maybe inconsistent judgments, unfair results. The rule makes sense. It's solves the flesh and blood problem that we talked about at the beginning, and its purpose is benign.

And the FAA does not forbid it, and it would be astonishing if it did because why would Congress in 1925 or, for that matter, ever want to force state courts to issue orders to compel duplicative, piecemeal litigation effecting inconsistent judgments contrary to sensible state rules? And the answer is there is no way that Congress would have meant to do that, and this Court ought not, 60 years out, after the fact and in the age of the litigation explosion, hold that it did.

But to end at the beginning, the Court really didn't -- needn't reach the question. We've got a state law contract here. It was interpreted properly in accordance with state law principles by the state court. Local words were looked at by a local court to find out what they meant. The court enforced the parties' agreement in accordance with its terms, exactly

what the court was supposed to have done under every case this Court has ever laid down in respect to the FAA. And should this Court hold that it ought not have done that, it would really turn the FAA upside down.

Thank you very much.

QUESTION: Thank you, Mr. Heilbron.

Mr. Harrington, you have one minute remaining.

REBUTTAL ARGUMENT OF JAMES E. HARRINGTON

MR. HARRINGTON: A one-sentence response to the last point. A state statute which states that an arbitration agreement shall not be enforced at all in certain circumstances is not a procedural provision; it's a substantive obstacle to arbitration of precisely the same kind that was held preempted by this Court in Southland and Perry. And that's what this state statute says. It says you can't enforce arbitration at all in certain circumstances.

Second point, Mr. Heilbron has made much of what the parties agreed to, but it's clear what the parties agreed to in this content -- in this context in any ordinary layman sense was to agree to arbitrate their disputes with no exceptions, qualifications, whatever. All disputes are to be arbitrable.

The -- this, this clause was custom-drafted by Stanford with -- with a clear awareness of this very

situation involving third-party disputes in mind and yet it was drafted in such a way that the duty to arbitrate would remain intact in that situation though Stanford had the opportunity, which was taken by the parties in the Garden Grove case Mr. Heilbron referred to, to exempt themselves from arbitration if there were third party disputes. That wasn't done. The parties deliberately agreed to arbitrate in that situation.

Stanford now claims that they should be relieved of that because they --

CHIEF JUSTICE REHNQUIST: Your time has expired, Mr. Harrington.

The case is submitted.

(Whereupon, at 2:48 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 87-1318 - VOLT INFORMATION SCIENCES, INC., Petitioner V. BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher

(REPORTER)