

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ALLIED-BRUCE TERMINIX COMPANIES, INC. AND
TERMINIX INTERNATIONAL COMPANY, Petitioners,
v. G. MICHAEL DOBSON, ET AL.

CASE NO: No. 93-1001

PLACE: Washington, D.C.

DATE: Tuesday, October 4, 1994

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ALLIED-BRUCE TERMINIX :

4 COMPANIES, INC. AND TERMINIX :

5 INTERNATIONAL COMPANY, :

6 Petitioners, :

7 v. : No. 93-1001

8 G. MICHAEL DOBSON, ET AL. :

9 -----X

10 Washington, D.C.

11 Tuesday, October 4, 1994

12 The above-captioned matter came on for oral
13 argument before the Supreme Court of the United States on
14 Tuesday, October 4, 1994.

15 H. BARTOW FARR, III, ESQ., Washington, D.C.; on behalf of
16 the Petitioners.

17 ALLAN R. CHASON, ESQ., Bay Minette, Alabama; on behalf of
18 the Respondents.

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

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 93-1001, Allied-Bruce
5 Terminix Companies, Inc. v. Michael Dobson.

6 Mr. Farr.

7 ORAL ARGUMENT OF H. BARTOW FARR

8 ON BEHALF OF THE PETITIONERS

9 MR. FARR: Thank you, Mr. Chief Justice, may it
10 please the Court:

11 The Alabama law applied by the courts below
12 declaring all predispute arbitration agreements to be
13 unenforceable as a matter of public policy, embodies
14 precisely the sort of hostility to arbitration that
15 prompted Congress to enact a Federal arbitration act in
16 the first place.

17 Nevertheless, the Alabama courts held that the
18 Federal law did not apply to this case, saying that the
19 reach of the act is limited to transactions in which the
20 parties contemplated substantial interstate activity. We
21 think this reading of Federal law is too narrow, for
22 several reasons.

23 First, the best reading of the language and
24 history of the act indicates that Congress meant to
25 exercise its Commerce power fully, except as it is

1 specifically provided in the definitions and the
2 exceptions contained in section 1 of the act, and second,
3 the benefits to commerce that Congress sought to obtain
4 through enforcement of arbitration agreements -- greater
5 certainty in dealings, lower litigation costs, fewer
6 litigation delays, and ultimately the lower cost of goods
7 and services -- apply to all transactions within the scope
8 of the Commerce power, not just to some of them.

9 QUESTION: Mr. Farr, I suppose -- now, this act
10 was adopted in what year?

11 MR. FARR: 1925, Justice O'Connor.

12 QUESTION: Right, and as of that time, I suppose
13 we didn't have as broad a view of Commerce power as we
14 have today?

15 MR. FARR: Well, Your Honor, the best evidence I
16 think that we have of that in 1925 is first of all
17 Congress' own view as reflected briefly in the House
18 report, which indicated that the Commerce power extended
19 to all contracts relating to interstate commerce.

20 QUESTION: Well, you would acknowledge, though,
21 that we had a narrower view of the Commerce Clause power
22 in 1925 than we have today?

23 MR. FARR: Just O'Connor, I think it was not
24 uniformly as broad as it is today. I would certainly
25 admit that.

1 However, if one looks, for example, at the brief
2 that was submitted on behalf of the ABA to Congress in
3 1924, actually, I believe, that refers to a very broad
4 definition of the Commerce power, indicating that it
5 reached not just matters that in fact involved the
6 crossing of State lines, but purely intrastate matters
7 that had an effect on interstate commerce.

8 QUESTION: Well, of course, my view, as
9 expressed in the Southland case, is that Congress didn't
10 intend to do more in this Federal Arbitration Act than
11 affect what happens in Federal courts. This Court has
12 rejected that view.

13 I still think that was correct, but faced with
14 Southland, do you think that we should properly give some
15 meaning to the words that Congress used involving
16 Commerce, evidencing, the word evidencing -- do the use of
17 those words indicate some narrower reach of the statute
18 than you would have us adopt?

19 There are many laws out there among the States
20 that try to protect consumer contracts from having
21 arbitration clauses, and preserving the rights of people
22 to sue, and your view would sweep all of those aside, and
23 I'm concerned that that wasn't what Congress had in mind.

24 MR. FARR: Well, Justice O'Connor, let me make
25 two points, if I may. Of course I would say that the

1 Court ought to give meaning to the words that Congress
2 used, as I hope to explain this morning. I don't think
3 that those words support a narrow interpretation of the
4 act.

5 But before, perhaps, I turn to that, I'd like to
6 make clear that the issue regarding the construction of
7 the scope of the act overlaps with but is not the same
8 issue, precisely, as the issue whether the act preempts
9 State law.

10 The Court has said that the Federal act does not
11 occupy the field, and does not preempt all State law. For
12 example, I think it is understood now that State laws of
13 general applicability can be applied to arbitration
14 agreements and, indeed, the language of section 2 itself,
15 which provides that they can be provoked on grounds
16 applicable to any contract would suggest that, and the
17 court in the Stanford University case indicated that the
18 parties could in fact incorporate State law.

19 QUESTION: Mr. Farr, can I ask -- this is a very
20 interesting point that you're making. If Alabama had a
21 statute similar to, say, I think Georgia has one of these
22 statutes that, there's a dollar limit and they exclude
23 consumer contracts of this kind. Would you say, then, the
24 Federal act would not apply here, if Alabama had a statute
25 like that, rather than just a 100 percent policy

1 against --

2 MR. FARR: No, I would say, without knowing
3 exactly the details of the transaction, the act might well
4 apply but would not necessarily preempt whatever the State
5 law is.

6 QUESTION: Where the State law says certain
7 contracts are not subject to arbitration, certain consumer
8 contracts are not, how could it apply without preempting
9 it? That's what I don't quite understand.

10 MR. FARR: Well, if that's -- if the definition
11 of the law is a very narrow law that is aimed at
12 arbitration agreements itself, I think in fact it probably
13 would be preempted --

14 QUESTION: I see.

15 MR. FARR: -- to the extent the Federal act
16 applies.

17 But the point that I'm making is that State law
18 as a whole is not preempted by the Federal Arbitration
19 Act. There may be particular State laws --

20 QUESTION: You mean, the rules of whether the
21 company is liable on the merits are not preempted, you
22 mean.

23 MR. FARR: Well, I mean, perhaps even rules that
24 go to the construction of the contract, or rules that deal
25 with --

1 QUESTION: The rules that deal with whether or
2 not the Arbitration Clause is enforceable would always be
3 preempted, I would think.

4 MR. FARR: Well, let me try to use an example.

5 If, for example, a contract was signed by
6 someone representing that they have authority to sign for
7 a corporation and they do not, that can be applied to make
8 the arbitration agreement, as well as any other parts of
9 the contract, unenforceable.

10 It's possible if a State law, for example,
11 had -- a State had a law that said, all provisions that
12 are not on the face of the contract must be separately
13 initialed by the parties, then it seems to me that one
14 could say that's not something that aims at arbitration,
15 not something that is intended to make arbitration more
16 difficult itself.

17 QUESTION: If the State law, as I think the
18 Georgia law does say, said that for an arbitration clause
19 to be enforceable that paragraph of the contract has to be
20 initialed, even though nothing else has to, that would be
21 unenforceable.

22 MR. FARR: That would be. That would be
23 preempted by the Federal, no question, and I should make
24 clear to -- just by way of clearing up any of this
25 introduction, as far as this case is concerned there is no

1 question in our mind that the Alabama law being applied
2 here has to be preempted. This is -- the Alabama law that
3 we are talking about here says, we do not enforce
4 arbitration agreements simply because they're an
5 arbitration agreement.

6 QUESTION: Mr. Farr, may I ask you to be
7 entirely clear about this? I believe that Justice Stevens
8 was referring to his position in Southland that the State
9 could carve out certain kinds of contracts like franchise
10 agreements, and you have given, do I understand you
11 correctly, to say no, that can't be done?

12 MR. FARR: I think I can't give an absolutely
13 clear answer for every case, because it depends on the
14 particular nature of the State law. At least the way I
15 believe the correct analysis would be is that one would
16 look at the nature of the State law, how broadly does the
17 State law apply? If it applies to all the agreements,
18 including arbitration agreements, that seems to me it puts
19 it on the side where it is not preempted. If it applies
20 exclusively to arbitration agreements, it clearly puts it
21 on the side of the line where it is preempted.

22 QUESTION: Why is that, Mr. Farr? I mean, it
23 seems to me the conflict with Federal policy is just as
24 severe in either case. Whether it's sort of a penalty
25 against a State for singling out arbitration agreements, I

1 mean, as far as the conflicts with Federal law is
2 concerned, whether it's a general law or a specific law
3 addressed to arbitration agreements, it has the same
4 result.

5 MR. FARR: But I think one starts with the
6 language of section 2, and the language of section 2 says
7 that agreements to arbitrate, within the field, which I
8 will discuss this morning, are enforceable save on grounds
9 that are sufficient for revocation of any contract and,
10 therefore, it seems to me that, when one is looking at
11 State law seeking to be applied to an arbitration
12 agreement and seeking to say that it makes it enforceable,
13 one -- the first inquiry, naturally, one makes is, is this
14 grounds for revocation of any contract?

15 QUESTION: Then the answer to the question I
16 posed is, you cannot carve out from arbitration specific
17 kinds of contracts. You can't carve out consumer
18 contracts, franchise contracts, particular categories of
19 contracts to exempt them from arbitration.

20 MR. FARR: From arbitration specifically, I do
21 not believe that you can consistently with the Federal
22 act.

23 QUESTION: Mr. Farr, given the language of
24 section 2, though, the key language seems to be a contract
25 evidencing a transaction involving commerce.

1 You wouldn't say that that language would cover
2 everything that Congress might have covered had it wished
3 to exercise its Commerce Clause power to the limit, would
4 you?

5 MR. FARR: Well, this, I should point out, is
6 not a statute in which Congress has made specific findings
7 to which the Court has to defer saying that we believe a
8 specific activity affects interstate commerce and then
9 directly regulates that activity.

10 With that exception, though, however, we do
11 believe that the correct reading of this language in fact
12 does indicate that Congress intended to reach all
13 contracts that are within its power under the Commerce
14 Clause. The word "involving" commerce, for example, the
15 word "involving" is, among its meanings, synonymous with
16 the word "affecting."

17 QUESTION: But it's certainly, it can also be
18 read to be less sweeping than "affecting."

19 MR. FARR: It could, I agree.

20 QUESTION: "Affecting" has been almost a word of
21 art in our Commerce Clause jurisdiction, whereas
22 "involving" hasn't.

23 MR. FARR: Well, Mr. Chief Justice, the fact is
24 that if one goes back, I think one cannot fairly say that
25 the use of the word "affecting" as a term of art was

1 common and recognized in 1925. I don't think that can
2 fairly be attributed to Congress until sometime, probably
3 after Schechter and perhaps even further after that, in
4 the late 1930's.

5 So if one is looking here -- and the first thing
6 one notices is that Congress, of course, did not use the
7 word "in" commerce, even though that is, in fact, used in
8 section 1 of the act at a different point. It used the
9 word "involving," and the Court in 1923, in a case cited
10 in our brief, United States v. Luskey, at least gave that
11 word quite a generous reading in another context.

12 Furthermore, it seems, quite frankly, that when
13 the House report talks about having relied on the
14 interstate commerce power, it talked about that power, as
15 I mentioned before, extending to contracts relating to
16 interstate commerce, and on the two occasions, it seems to
17 me, where the Court has given some indication of how it
18 was reading that language, it seems apparent on both
19 occasion that it read it very, very broadly.

20 QUESTION: What about Bernhardt v. Polygraphic?
21 It didn't seem to read it very, very broadly there.

22 MR. FARR: Well, Justice Ginsburg, I think in
23 fact it did read the language broadly, if one looks at the
24 inquiry that the Court made. It said, we first look to
25 whether the -- essentially the duties this person were

1 performing were in commerce, whether the person was
2 producing goods for commerce, or whether the person was
3 engaged in activities that affected commerce, which is
4 precisely the test that we think is the right test.

5 QUESTION: Well, it didn't really say it had to
6 do, it said it did not do any of those three things.

7 But you would not deny, would you, that that
8 contract could be regulated by the Federal -- under the
9 Commerce power, the contract involved in Bernhardt.

10 MR. FARR: Well, the contract involved in
11 Bernhardt, it's not clear from that, there's almost no
12 discussion of what the facts are as to what the duties
13 were that the person undertook.

14 My own view is that Bernhardt on the facts would
15 come out the other way, but I think the test, at least the
16 inquiry, is exactly the right inquiry that the Court
17 should apply, whether in fact it's either in commerce,
18 whether it's producing goods for commerce, or whether the
19 activity affects commerce.

20 QUESTION: Well, that's not the way Justice
21 Douglas stated the question.

22 Let me ask you this: are there any appellate
23 court decisions or are there a significant number -- the
24 act's been on the books now for 70 years. Have there been
25 consumer contracts that appellate courts have said are

1 subject to this statute?

2 MR. FARR: I don't think, at least in one's that
3 I'm aware of, that there are decisions about consumer
4 contracts one way or the other.

5 QUESTION: Mr. Farr, as I understand your
6 proposal, you would decide whether this contract involves,
7 or whether it evidences a transaction involving commerce
8 ex post. That is, if there's a contract for the purchase
9 a sale of widgets, you wouldn't look at that contract to
10 see whether it specifically contemplates the
11 transportation of widgets interstate commerce, but rather
12 you'd look to see what actually transpired, isn't that
13 right?

14 MR. FARR: That's correct.

15 QUESTION: So at the time you sign the contract,
16 you don't really know whether it's going to be arbitrable
17 under the Federal law or not, do you?

18 MR. FARR: Well, when you're signing the
19 contract you are agreeing to arbitrate your disputes under
20 the agreement, and I think the natural presumption is that
21 you are in fact intending to go ahead and agree.

22 QUESTION: Yes, but one side can be rolling the
23 dice and saying, you know, there is -- I'm signing this
24 standard form contract that has an arbitration provision,
25 but inasmuch as I don't intend this contract to actually

1 involve interstate materials, my contemplation is that
2 this thing won't be covered.

3 It seems like a very strange test as to whether
4 a contract is enforceable, or as to what it imposes on the
5 parties, to look to later events and see what happens
6 later, but that is really what you're proposing.

7 If it turns out that the contract involves
8 interstate commerce, we will retroactively say that
9 Federal law requires the arbitration agreement to be
10 enforced despite State law. If it turns out that it
11 doesn't involve interstate commerce, then we won't.

12 I find that -- I don't know of any other
13 instance in the law where we sit around and wait to decide
14 whether the provision is valid or not.

15 MR. FARR: Well, Justice Scalia, it seems to me
16 that in fact when Congress includes a reference to
17 interstate commerce as a jurisdictional nexus in a
18 statute, that the rule frankly is exactly the opposite. I
19 am not aware of any Federal statute in which Congress
20 requires a nexus to interstate commerce for jurisdictional
21 reasons in which Congress requires the person subjected to
22 the law to have an intent about interstate commerce --

23 QUESTION: But they are not laws --

24 MR. FARR: -- in order to be covered.

25 QUESTION: But they are not laws involving

1 contracting. This is a law specifically involving
2 contracting. It validates and renders enforceable despite
3 State law the particular contractual provision, and you
4 usually don't validate or invalidate contracts ex post.

5 MR. FARR: Well, it involves contracts which
6 relate to transactions involving commerce, so one is
7 looking --

8 QUESTION: More precisely, it involves contracts
9 evidencing a transaction involving commerce, which could
10 be read to mean that the contract must show on its face
11 that it involves interstate commerce, so if the contract
12 says, I will buy and sell widgets now located in Ohio
13 which will be brought to me in Pennsylvania, then it would
14 qualify, but if it just says, I will buy and sell widgets,
15 it doesn't qualify. That's a possible reading.

16 MR. FARR: I agree it's a possible reading.
17 What I'm saying is that I really don't think the reading
18 makes any sense, because what that attributes to Congress
19 is an intent, first of all, as I say, to require some sort
20 of subjective intention about interstate commerce, which I
21 think would be unprecedented with respect to any Federal
22 law, and the second thing --

23 QUESTION: Not a subjective intention at all, an
24 objective one, one that is recited in the contract. If
25 it's not recited, it's not there. Whatever their

1 subjective intentions were, we don't care. Does the
2 contract evidence interstate commerce? If it does not
3 evidence it, the FAA doesn't apply.

4 MR. FARR: But what's lacking from all of
5 that -- I mean, this in a sense is perhaps a variation of
6 what the Alabama court applied as its test and what Judge
7 Lumbard applied -- is any explanation for why, in fact,
8 Congress would want to put that kind of limitation into
9 the act, to make the coverage of the act turn on what's on
10 the face of the contract or, as the Alabama courts would
11 have it, the subjective intention.

12 QUESTION: So you could know at the outset
13 whether this provision that you're agreeing to is
14 enforceable or not.

15 MR. FARR: But that assumes --

16 QUESTION: That's a good reason.

17 MR. FARR: But that assumes an intention on the
18 part of someone who is signing the contract to say, I am
19 signing on the face of the contract an agreement that in
20 the event disputes arise between us we will go to
21 arbitration.

22 However, my secret, undisclosed knowledge, is
23 that I believe this to be an intrastate transaction and
24 therefore this will be unenforceable in certain States.
25 I -- it makes no sense to me, frankly --

1 QUESTION: Mr. Farr, if it's --

2 MR. FARR: -- to think Congress wanted to pin it
3 onto that.

4 QUESTION: If it's a question of what's recited
5 on the face of a contract, and this is a form contract,
6 the person, in this case Terminix, drawing the contract,
7 would say on the face of it this is a contract involving
8 commerce, and I guess the consumer wouldn't have much of a
9 choice about what the contract says.

10 MR. FARR: Well, Justice Ginsburg, I believe
11 that's correct, but in a way that seems to me to point up
12 why the real question ought to be whether the transaction
13 does, in fact, involve interstate commerce.

14 I don't think that Congress wanted people to be
15 able to enforce arbitration agreements outside what
16 Congress' power would typically be simply by making a
17 recitation in the contract, so the question would still
18 be, even if there was the recitation in the contract, does
19 the contract in fact involve interstate commerce, and I
20 think that's what the test ought to be even if there is no
21 recitation in the contract about what --

22 QUESTION: Why did you say earlier that it's
23 entirely an after-the-fact determination? There certainly
24 were elements in this case where one could say, I mean,
25 the company being from out of State, the contract having

1 been purportedly executed out of State --

2 MR. FARR: Well, that's correct, Justice
3 Ginsburg. I mean, the contract here does in fact show an
4 agreement between Terminix International, which is a
5 national company headquartered in Tennessee, and the --

6 QUESTION: Mr. Farr, if it were in all other
7 respects --

8 MR. FARR: -- respondents, located in Alabama.

9 QUESTION: -- a local agreement, would you say
10 the fact that a parent company of a contracting party is
11 an out-of-State concern would be sufficient to make the
12 act applicable?

13 MR. FARR: It -- I think it might depend on what
14 particular duties they are undertaking under the contract.
15 Now, here --

16 QUESTION: Say they guarantee performance of the
17 contract.

18 MR. FARR: If they're guaranteeing performance
19 of the contract, I think that an arbitration agreement in
20 that should be enforceable as a matter of Federal law, and
21 would be within the coverage.

22 QUESTION: If we were to say, as we've sometimes
23 suggested in the antitrust area, that the contract must
24 have a substantial effect on interstate commerce, do you
25 have any idea how this case would come out?

1 MR. FARR: I mean, if one is looking to this
2 particular transaction, I mean, it is a transaction of
3 relatively modest size, I suppose. I mean, I think it is
4 directly within the flow of interstate commerce.

5 Virtually any test you can use, frankly, I think
6 reaches this contract, because it is an interstate
7 agreement, there are materials moving across State lines
8 in order to perform the contract -- I would be hard-
9 pressed to say that one contract viewed in isolation has a
10 substantial effect on interstate commerce, but I don't
11 think that that is what Congress is requiring, again, when
12 it is using the term, transactions involving commerce. I
13 mean, the --

14 QUESTION: You mentioned at the start of your
15 argument that in many statutes Congress makes findings
16 that the particular activity affects commerce.

17 Actually, the result of your argument here is
18 just as if Congress did make those findings in this case.
19 That's the purport of your argument, is it not, i.e. that
20 arbitration contracts affect interstate commerce? I mean,
21 that --

22 MR. FARR: Well, I -- no, I think particular --
23 particular arbitration contracts are found within that
24 definition.

25 For example, Congress has criminal laws that

1 apply to transactions in or affecting commerce, and the
2 courts must decide whether in fact a particular
3 transaction involves -- I mean, excuse me, is in or
4 affecting commerce based on that standard.

5 Now, the courts apply a generous standard,
6 assuming, I think correctly in those cases, as we think
7 here, that Congress is intending to exercise its power to
8 the fullest extent.

9 QUESTION: Suppose we replicate a situation like
10 Wickard v. Filburn, where one farmer in Ohio agrees with
11 his neighbor to sell him 50 bushels of wheat, and they
12 have an arbitration agreement in it, and nobody claims
13 that the wheat ever went anywhere except across the local
14 road, but I suppose if you apply Wickard v. Filburn you'd
15 say, well, if he hadn't sold that 50 bushels of wheat to
16 his neighbor, he might have sold it to somebody else that
17 might have baked some bread that went in interstate
18 commerce.

19 Now, is that contract subject to the Federal
20 Arbitration Act?

21 MR. FARR: Mr. Chief Justice, I don't think so,
22 in the absence of congressional findings. I think there,
23 the relationship by any of the normal standards that the
24 court applies without findings would be too attenuated.

25 Let me point out --

1 QUESTION: Mr. Farr, may I ask you a related
2 question? If the clause in question is not to be regarded
3 as an implicit finding, what does it add? In other words,
4 why is the act any different with this clause from what it
5 would be without it?

6 Because if the act did not have this arguable
7 limitation on it, and it were applied to a transaction
8 which is claimed not to involve commerce in any way, that
9 would be the defense to the attempt to enforce the
10 arbitration agreement, which will be the case here.

11 So if it simply is a jurisdictional statement,
12 but it is not a finding by Congress that all arbitration
13 are within the jurisdiction, I don't see what function it
14 has.

15 MR. FARR: Well, Your Honor, I think, again, it
16 serves the same function as defining the class of
17 contracts that Congress was intending to reach, just as,
18 when Congress uses the terms, affecting commerce in
19 criminal statutes, it is indicating what particular acts
20 and transactions it's trying to reach by those statutes,
21 and if one steps back for a second and --

22 QUESTION: But in fact unless parties attempted
23 to apply the arbitration agreement and to enforce the
24 Federal act in cases which clearly did, or in cases which
25 did not in fact involve commerce, the functioning of the

1 act would be no different.

2 MR. FARR: Well, if one looks back --

3 QUESTION: In other words, Congress -- you're
4 saying, in effect, that Congress is saying to the Federal
5 courts, when -- and parties, I suppose, when you refuse to
6 apply this agreement to contracts that do not involve
7 commerce, you're right. That's basically the function of
8 the provision.

9 MR. FARR: The Congress is saying, we did not
10 intend to, but I think that's important, because in 1925,
11 when Congress was enacting this legislation, it was
12 enacting it against a background of hostility towards
13 enforcement of arbitration agreements, hostility from the
14 very courts that were going to have to interpret the act.

15 QUESTION: In your judgment, in the absence of
16 this limitation, would there have been a risk of facial
17 invalidity to the statute?

18 MR. FARR: Oh, I think there would have been a
19 very definite risk in 1925.

20 QUESTION: So you think that's what they were
21 guarding against.

22 MR. FARR: I mean, Congress was very concerned
23 in 1925, and I think Judge Medina says this many years
24 later in Robert Lorange, that unless it was very careful
25 and put this on sound jurisdictional grounds, the courts,

1 which did not want to enforce arbitration agreements,
2 would invalidate it as beyond the scope of Congress'
3 power.

4 QUESTION: Mr. Farr, can I just ask you one --
5 maybe you want to answer it on your reply. Are you sure
6 about your answer to the Chief Justice's question? You
7 really don't think that would be enforceable, an
8 arbitration clause in the example he gave you?

9 MR. FARR: That -- my reaction to it is that if
10 one applies the test that the Court applied in Bernhardt,
11 that that would be found to be too attenuated. That is my
12 position.

13 QUESTION: But you said before --

14 QUESTION: But you think that's correct, though?
15 That's your position --

16 MR. FARR: In the absence of findings.

17 QUESTION: -- and if so, how do you distinguish
18 that contract from this one?

19 MR. FARR: Because this one, in fact, does
20 involve interstate commerce, that you are dealing with
21 out-of-State dealers. I mean, this is not, in fact, a
22 contract where one has to say this is, everything about it
23 looks local, does it have an effect, it's an agreement
24 with a national company to provide services to someone in
25 another State, and that seems to me is on its face within

1 the Commerce power. The question posed --

2 QUESTION: But the services -- it isn't where
3 the service is, but where the owner of -- anyway, I won't
4 take any more of your time.

5 MR. FARR: I'd like to reserve the rest of my
6 time, if I --

7 QUESTION: Then you're saying it doesn't go the
8 full length of congressional power, because the Chief is
9 giving you an example of something that was held to be
10 within the Commerce power.

11 MR. FARR: Based on the findings that Congress
12 made.

13 Congress made findings and then regulated a
14 specific activity, and I think that falls in a different
15 category.

16 QUESTION: Very well, Mr. Farr.

17 Mr. Chason, we'll hear from you.

18 ORAL ARGUMENT OF ALLAN R. CHASON

19 ON BEHALF OF THE RESPONDENTS

20 MR. CHASON: Mr. Chief Justice, and may it
21 please the Court:

22 Justice O'Connor asked Mr. Farr if the -- a
23 broad reading of the statute would in fact sweep away State
24 law. That is our position exactly, that a broad reading
25 of section 2, particularly to the limits of the

1 constitutional powers of Congress, would, in fact, sweep
2 away a great amount of State law and, in fact, we cannot
3 imagine congressional intent in 1925 for Congress to
4 regulate contracts where people in a city arrange to have
5 insects in their home sprayed. We cannot imagine a
6 congressional intent to reach that far into traditionally
7 State matters.

8 I would like to turn first in this question of
9 statutory construction to the express language of the act.
10 I would like to draw into that the legislative history,
11 because we draw different conclusions from the legislative
12 history as the ones that Mr. Farr has outlined for you.

13 First, the choice of the word "involving"
14 commerce we believe is important, because, as the Chief
15 Justice has mentioned, traditionally the word "affecting"
16 commerce has been used when Congress wanted to use all of
17 its constitutional power.

18 The question was asked whether that was a term
19 of art in 1925. Well, we don't -- we can't look into the
20 minds of the Congressmen that voted on that act, but we -
21 - what we can say is that they were aware that they had
22 less than -- that they had more power than to only
23 regulate contracts which were directly in commerce, and
24 the reason I say that is that our cite in footnote 17 of
25 our brief to two cases of that era, and as the Will v.

1 Department of State Police case tells us, that's what we
2 look to, are the authorities of the era.

3 We don't know, as Justice Scalia mentioned
4 yesterday, exactly what these Congressmen were thinking
5 about in 1925, or whether they read Supreme Court
6 precedent, but nevertheless, in trying to give some
7 meaning to the word "involving" commerce and what Congress
8 might have thought it meant, we cite Your Honors to the
9 Coronado Coal Company case, which was decided in 1922.

10 QUESTION: You cite the case to Our Honors, I
11 think, you don't cite Our Honors to the case, but that's
12 all right.

13 MR. CHASON: Yes, sir. Excuse me.

14 The Coronado Coal Company case, and also to the
15 United Leather Workers case in 1924, both of which
16 preceded the passage of the act in 1925, and the reason
17 that we believe that those cases are important is that
18 they very clearly draw a distinction between the two kinds
19 of powers which the -- which Congress had under the
20 Commerce Clause.

21 That case talked about the fact that on the one
22 hand Congress had power to regulate matters which were in
23 the current or flow of commerce, and in talking about what
24 was in the current or flow of commerce, they used the
25 words, matters which involve commerce intrinsically,

1 involving commerce intrinsically.

2 Now, whether that was a specific language that
3 Congress had reference to 2 years later when they passed
4 this act, we cannot know, but that was an authority of the
5 era, and the same language was used again in the United
6 Leather Workers case 2 years later.

7 Now --

8 QUESTION: Why doesn't it involve commerce, why
9 isn't it in commerce if I contract with someone to bring
10 in some individuals from out of State to perform services
11 in this State in spraying bugs, and to use bug spray that
12 is manufactured by that company in another State, and will
13 be brought across State lines for the purpose of spraying?
14 That would be involving commerce, wouldn't it? It would
15 be in commerce. I mean --

16 MR. CHASON: Justice Scalia, that's a difficult
17 question, whether simply the fact that crossing State
18 lines is commerce.

19 Now, we cited in footnote 16 of our brief the
20 Ware and Leland case and cases which hold that the mere
21 residence of the parties does not amount --

22 QUESTION: No, but I'm not talking about
23 residence. I'm talking about a contract that specifically
24 says, on its face, you know, party A will send from
25 Pennsylvania into Ohio a workman who will spray the bugs

1 and then go back to Pennsylvania, and they will use for
2 that purpose --

3 MR. CHASON: I don't know the answer to that
4 question.

5 QUESTION: Well, sure you do. Why isn't that a
6 contract involving commerce? It clearly is.

7 MR. CHASON: My difficulty with your
8 hypothetical, Justice Scalia, is that again it is hard to
9 imagine, particularly if the performance of the contract
10 involved consumers, that Congress could have intended to
11 regulate that kind of transaction.

12 QUESTION: Well, but that's a different point.
13 That's a different point, and the point you were making, I
14 thought, was that this contract did not -- was not in
15 commerce, did not involve commerce. Now, maybe it didn't
16 if you just look at its face, but if you look at the way
17 it played out, what was actually performed, surely that
18 involved commerce.

19 MR. CHASON: The way this contract was performed
20 was that Terminix, through its local office in the same
21 community where these people lived, sent a truck just a
22 matter of a few blocks, or maybe miles, over to spray
23 insects in their home, and Terminix can only point to two
24 things which might offer some connection with interstate
25 commerce.

1 They say that the pesticides that were sprayed
2 were made in States other than Alabama and sent there --
3 we have no way of knowing whether that is true or not --
4 and then that the companies were organized in States other
5 than Alabama, and we just think that those tenuous kinds
6 of connections with interstate commerce is not what
7 Congress intended.

8 QUESTION: But that's not tenuous. I mean, when
9 you spray bugs you use two things, you use people to spray
10 and you use the spray. If the spray is coming from
11 another State, surely that's a contract involving
12 interstate commerce.

13 MR. CHASON: Well, if Your Honor is speaking of
14 the way that the contract was actually performed, we had
15 no way of knowing that. It could not have been within the
16 reasonable expectations of the parties, and I think --

17 QUESTION: What about, wasn't the original
18 seller of the home didn't say something about, wasn't
19 there testimony, I want to go with a national company
20 instead of a local company?

21 MR. CHASON: Yes, Your Honor, the --

22 QUESTION: And may I ask you what you make of
23 this Court's statement in Perry v. Thomas that the FAA
24 embodies Congress' intent to provide for the enforcement
25 of arbitration agreements within the full reach of the

1 Commerce Clause? Did we just get it wrong?

2 MR. CHASON: Your Honor, I would feel that in
3 the first place that statement in Perry v. Thomas is
4 dictum because it was a State court case where that
5 finding was not necessary to the holding of the case.

6 Now, questions about the purposes for which --
7 the breadth of the purposes of liberal Federal policy and
8 so forth might fairly be applied to questions like in
9 Perry v. Thomas, where the issue is not so much what is
10 the jurisdictional reach of the statute, but, rather, the
11 question is, given that the statute reaches this problem,
12 what is the scope of the arbitration agreement?

13 We would submit that those are two very
14 different inquiries, that the jurisdictional reach of the
15 statute involves matters of federalism which this Court in
16 the Gregory v. Ashcroft line of cases has in recent years
17 relied on, requiring a plain statement rule that
18 Congress --

19 QUESTION: That was soundly rejected by the
20 Court majority in Southland so far as the Federal
21 Arbitration Act is concerned, any concept of federalism.
22 It was held the Federal Arbitration Act applies in State
23 courts as well as Federal courts.

24 QUESTION: And you're not suggesting that the
25 reach should be different in Federal and State courts, are

1 you? You're saying that this agreement, whether this case
2 were brought in the State court or the Federal court, that
3 the result should be the same here.

4 MR. CHASON: I think that the Court needs to
5 resolve the question concerning the jurisdictional reach
6 of the statute, whether the statute applies in State or
7 Federal court. That question needs to be answered.

8 QUESTION: Well, the text of the statute doesn't
9 draw any distinction between State or Federal courts if
10 it's applicable. Is there some different test for one
11 where suit is brought in State court? Is that what you're
12 arguing?

13 MR. CHASON: Justice O'Connor, our reading of
14 the legislative history is that first it was intended to
15 apply as a procedural matter in Federal court, but given -
16 -

17 QUESTION: Well, are you arguing that Southland
18 be overruled?

19 MR. CHASON: Yes, Your Honor. That is one of
20 the issues that we have raised, and the brief that has
21 been joined in by the Attorneys General of 20 States, in
22 which we join.

23 QUESTION: Then you would have a different
24 result, if that's your theory, if the, say Gwins, who are
25 also defendants, if they moved to a State outside Alabama

1 so you would have a diversity case, so the defendants
2 could have removed -- if you make a difference between the
3 substantive law applicable in State and Federal court, and
4 the, then you get into the whole mess that Erie was
5 intended to eliminate, right?

6 MR. CHASON: I would admit, Justice Ginsburg,
7 that there are difficulties in the application of this
8 act, as was fully pointed out in the majority and
9 dissenting opinion in Southland. We feel like Southland
10 was wrongly decided, and I -- there's not -- I can't say
11 too much to add to what has already been said in the amici
12 brief which was filed by the States Attorney generals or
13 in the dissenting opinion in that case.

14 QUESTION: It was a square holding. It would be
15 sort of hard to overrule it without upsetting a lot of
16 reliance, I suppose, upon it. There have to be a lot of
17 contracts in which arbitration provisions have been
18 inserted with the full expectation, in light of Southland,
19 that they'd be valid.

20 MR. CHASON: Justice Scalia --

21 QUESTION: It's precisely the kind of a case
22 where it's, especially in a field involving contracting,
23 it's very hard to go back and overrule a prior decision
24 without upsetting a lot of reliance.

25 MR. CHASON: Justice Scalia, the only thing I

1 can say to you in response to that is that I don't believe
2 that the significance of Southland was fully appreciated
3 until cert was granted in this case. Now, whether that's
4 an answer to your question or not, I don't know, but I
5 truly believe that, and that was the point made by the
6 Attorneys General in their brief.

7 QUESTION: Is one of the implications of your
8 position that it is within the control of the parties to
9 determine whether the Federal act is going to apply
10 because they simply can be explicit in their original
11 contract as to whether they understand that commerce will
12 be affected or implicated?

13 MR. CHASON: Yes, Your Honor. We feel that the
14 contemplation of the parties test says something about the
15 reasonable expectations of the parties at the time they
16 entered into the contract.

17 QUESTION: Well, is their statement of that
18 contemplation in the original contract going to be
19 conclusive, on your theory? If, you know, if a restaurant
20 owner in Iowa contracts with a fish supplier for lobsters,
21 and they put in the contract the performance of this
22 contract will in no way implicate interstate commerce,
23 does that control?

24 QUESTION: Are these out-of-State lobsters
25 you're talking about?

1 QUESTION: Well, I left that term unstated. I
2 wanted to leave some sport in the question.

3 (Laughter.)

4 QUESTION: Is that provision going to be
5 conclusive as to the applicability of the Federal act?

6 MR. CHASON: If I understand your question,
7 Justice Souter, it would be that the parties contemplate
8 interstate commerce but in fact there is none?

9 QUESTION: Well, no. I was thinking that they
10 would like to live in a dream world in which there are
11 Iowa lobsters --

12 (Laughter.)

13 QUESTION: -- and in fact there aren't any, and
14 it might even be suggested that no reasonable restaurant
15 owner or fish supplier could so assume, but they put that
16 in their contract very explicitly. Nothing, no
17 implications on interstate commerce in the performance of
18 this contract. Is that going to be conclusive, on your
19 theory?

20 MR. CHASON: I don't know the answer to your
21 question, and if I could be permitted to explain why I
22 don't know, I can say that we view the contemplation of
23 the parties test as an attempt to look at the practical
24 consequences of what happened in the transaction under
25 inquiry, and to give effect to what the reasonable

1 expectations of the parties were.

2 QUESTION: Well, if it's reasonable
3 expectations, then I suppose the answer to my question is
4 no, that's not going to be conclusive.

5 MR. CHASON: The notions of foreseeability, Your
6 Honor, are not foreign to our --

7 QUESTION: So there's no way, I guess what I'm
8 getting at is, there's no way, I gather, then, to simplify
9 the administration that your position would sort of foist
10 upon the courts, because no matter, no matter what the
11 statement by the parties in their contract about what they
12 contemplate, any one of them would be free at any time, I
13 suppose, to say well, that just wasn't reasonable, and
14 therefore I shouldn't be bound by it.

15 MR. CHASON: One of the -- one of the objections
16 that Terminix --

17 QUESTION: Well, is it -- do you agree? Do you
18 agree? A party could always wiggle out by saying that
19 just was not reasonable.

20 MR. CHASON: Not if the test is objective, which
21 we say that it is. Not if the contemplation of the
22 parties is evidenced by the contract, as --

23 QUESTION: Then isn't it much too easy, in a
24 form contract, for the party who is writing the contract
25 just to put in anything? We contemplate interstate

1 commerce, and then the person, the homeowner really
2 doesn't have any choice about what the contract's going to
3 say on its face.

4 MR. CHASON: Again, we get back to questions
5 about, what are the reasonable expectations of the
6 parties, and what could they foresee, what could they
7 reasonably foresee?

8 QUESTION: But if you're going to go by what's
9 on the face of the contract, isn't it so that in the case
10 of a form contract, the party who writes the contract can
11 put anything they want on the face of it?

12 MR. CHASON: Yes, Your Honor.

13 QUESTION: If you have an objective test, that
14 will be the end of it. The contract says this contract
15 contemplates interstate commerce, and if this contract
16 says that, then what happens to the contemplation of
17 commerce test? Is the only thing -- this case can't
18 simply be about that the form left out one sentence.

19 MR. CHASON: I agree with that, Your Honor. I
20 think there are some -- the contemplation of the parties
21 test is a judge-made rule made in 1961, and it seems to me
22 that it is a different question from the jurisdictional
23 question that is first, that the first -- that the Court
24 would come to first.

25 We do not embrace every construction, every

1 comma in the contemplation of the parties test. We
2 recognize that there are possibly some difficulties with
3 it, and that's the reason I tried to answer Justice
4 Souter's question in terms of, it's hard to say on a
5 particular hypothetical fact situation that yes, this
6 would or would not pass the test.

7 QUESTION: But it should be easy to say. The
8 whole reason people enter into an arbitration agreement
9 is, they don't want to litigate.

10 You've destroyed arbitration agreements of all
11 of their value if you're saying any time you sign one
12 you're going to have to litigate about what the reasonable
13 expectation of the parties was. Even if it's set forth in
14 writing, that won't govern. We need a lawsuit about what
15 our reasonable expectation was. You've destroyed
16 arbitration agreements.

17 MR. CHASON: Well, Terminix makes that argument,
18 Your Honor, that a practical solution to this problem is
19 just to broadly construe the jurisdictional reach of the
20 statute, and then you don't have to worry about tests, and
21 for practical purposes maybe not all, but almost all
22 contracts would be drawn within the purview of the
23 statute, and we don't think, absent a clear congressional
24 statement, that that was their intent.

25 QUESTION: You need a clear congressional

1 statement for the proposition that Congress surely could
2 not have intended that every such agreement as this would
3 give rise to a potential lawsuit over arbitration, which
4 was the point of Justice Scalia's question. I mean, do we
5 need a clear statement from Congress to assume that that
6 at least was not in Congress' contemplation?

7 MR. CHASON: To cover transactions like the one
8 here?

9 QUESTION: Or any transaction in which there
10 can, there is an invitation to litigation over what is in
11 the contemplation of the parties, or the reasonable
12 contemplation of the parties.

13 MR. CHASON: Your Honor, my answer to your
14 question is yes, that I do believe you need a clear
15 statement of congressional intent, and I would cite Your
16 Honor to the Gulf Oil v. Copp Paving case, which I believe
17 is very important to our -- the analysis that we would
18 urge this Court to take here.

19 That case was decided in 1974, and it involved
20 section 2 of the Robinson-Patman Act, and we don't cite it
21 to the Court for the statute that was being reviewed
22 there, but, rather, for the reasons, and that case
23 involved an asphalt plant in California, and the asphalt
24 was going on interstate highways which were contended to
25 be instrumentalities of commerce.

1 And in the Copp Paving case the Court discussed
2 that those were merely nominal connections with interstate
3 commerce, and that Congress never intended to get involved
4 in those kinds of details, and I believe, Justice Souter,
5 that the Copp Paving case can be read as holding that
6 before Congress will be permitted to get involved in those
7 kinds of essentially local matters, there must be some --

8 QUESTION: Yes, but that case involved the, that
9 statute deals with transactions in commerce as opposed to
10 the affecting commerce standard in the Sherman Act.

11 MR. CHASON: Yes, Your Honor.

12 QUESTION: I really don't think, are you saying
13 this should be read as in commerce and excluding
14 everything affecting commerce?

15 MR. CHASON: No, Your Honor, the -- it -- as I
16 remember the language of that, of section 2, it was
17 engaged in commerce, and the Court read engaged in to mean
18 the same thing as in.

19 QUESTION: They same point they made in the
20 Bunte case, yes.

21 MR. CHASON: Yes, sir.

22 QUESTION: Do you agree with the Bernhardt
23 formula? Mr. Farr said the formula was right, although in
24 his judgment the result on the facts was wrong. Do you
25 accept that as a proper formula for involving commerce?

1 MR. CHASON: No, Your Honor, we don't -- we
2 don't -- we rely on the facts of Bernhardt. We feel that
3 this Court would need to overrule Bernhardt on its facts.

4 QUESTION: But as far as Douglas' statement of
5 what is involving commerce, do you accept that as a proper
6 statement of the law?

7 MR. CHASON: No, Your Honor. We would not think
8 that affects commerce is the proper test.

9 QUESTION: So you think that the Court got it
10 wrong on the law but right on the facts in that case, is
11 that --

12 MR. CHASON: We think it was right on the facts.
13 We think the facts are what the Court should look to,
14 because the facts are clear that it would have been within
15 the Commerce power of Congress to regulate that
16 transaction. Now, whether that part of the test was
17 dicta, I can't say, but we would not accept the test.

18 QUESTION: It was a declaration of what those
19 words meant in the statute.

20 MR. CHASON: I can't -- I can't express an
21 opinion on exactly --

22 QUESTION: You said that the Perry words, that
23 that was dictum, and the Douglas formula was wrong in
24 Bernhardt, so where did the Court have a right answer in
25 the majority opinion?

1 MR. CHASON: The answer that I would give you,
2 Justice Ginsburg, is that the facts in that case speak
3 very loudly, very clearly, that when a New York company is
4 hiring a New York employee to go to Vermont and run their
5 plant, that if the act reaches as broad as
6 constitutionally permissible, that transaction must be
7 regulated, and that is the position of Terminix in this
8 case, is that's the reach which should be given to this
9 act, and Mr. Farr has admitted that in his statements and
10 in his brief.

11 QUESTION: Well, no. He says the 50 bushels of
12 wheat transaction would not be covered.

13 MR. CHASON: If I remember the facts of Wickard
14 v. Filburn, Justice Stevens, one of the relevant facts in
15 that case was that there was some machinery used from out
16 of State.

17 QUESTION: Well, whether that --

18 QUESTION: That was not recapitulated in my
19 hypothetical.

20 (Laughter.)

21 MR. CHASON: If I could make one point about --

22 QUESTION: The case isn't famous for that,
23 anyway.

24 (Laughter.)

25 QUESTION: I don't recall that machinery.

1 QUESTION: It's famous for what the Chief, how
2 the Chief Justice described it.

3 MR. CHASON: If I could make a point about the
4 legislative history, that I really would like to say to I
5 think draw the case into focus, at least as far as the
6 legislative history that Terminix relies on, I think that
7 it's very important -- we don't know exactly what Congress
8 thought or understood about the word "involving" in 1925,
9 but what we do know is that we have these two cases that
10 were on record before them.

11 We also know that in the subcommittee hearings
12 there was a brief filed by Julius Cohen, who was the
13 principal draftsman of the act. In that brief, he
14 included a section which discussed Congress' authority to
15 do what they were doing. In the brief, he used the words
16 "affecting."

17 He told Congress about the two kinds of Commerce
18 power that it had. He explained to them that they had
19 this narrower view of commerce, and that they also have
20 control over matters, I believe he used the word
21 "affecting" commerce in one place, and "relating to"
22 commerce in another place.

23 At the time that he wrote that brief -- and let
24 me also say that after he submitted that brief, there was
25 a House report filed which drew the same distinction. It

1 noted that Congress not only had the power to regulate
2 actual, physical movement of goods in interstate commerce,
3 but it also had the power over contracts which affect
4 commerce.

5 Now, at the time that that report was written,
6 the bill covered any contracts. The original bill, the
7 language of section 2, covered any contracts. I don't
8 know what happened after that time, but I do know that
9 Congress was informed of the, at least -- I can't say that
10 Congress was informed of the full breadth of the Commerce
11 power, but I do know that they were informed that they had
12 something more than just to regulate transactions in
13 commerce.

14 Now, after they were informed of that, the bill
15 was amended. The bill was amended 90 days later in the
16 Senate.

17 QUESTION: Mr. Farr's answer to that is, they
18 were worried about facial invalidity.

19 MR. CHASON: Well, we don't know why -- what
20 they were worried about. As Justice O'Connor wrote for
21 the Court in the Gregory case, the way Federalism is
22 supposed to work is that it is the power of the ballot
23 box, that is, the political process reigns in Congress
24 when it tries to intrude onto State affairs, provided the
25 Court does not do that, interfere with that effort.

1 I think an equally likely explanation, Justice
2 Souter, is that during the -- this bill was under, had
3 been filed the previous term. It was under submission in
4 Congress for 2 years.

5 Now, I don't know what happened during that 2
6 years, but I would suggest to you that an equally likely
7 possibility is that the people in those congressional
8 districts, or in those Senate districts, objected to the
9 breadth of including any contracts in the bill, and that
10 it was amended to narrow the scope of what section 2 would
11 do. I don't have any concrete proof that that happened,
12 but I would suggest to you that that's just as likely as
13 his explanation for what happened.

14 QUESTION: But you don't dispute that the main
15 focus of Congress was what the Federal courts were doing
16 in rejecting arbitration agreements, the Federal courts'
17 hostility to arbitration agreements under the era of Swift
18 v. Tyson, when they were declaring general common law. I
19 mean, we're way back in pre-Erie days. It was the
20 hostility of the Federal courts to arbitration that was
21 the principal reason for the Federal Arbitration Act.

22 MR. CHASON: I would agree with that, Your
23 Honor. I would agree with that, but if I could explain
24 further, if you read the legislative history, if there's
25 one thing that comes out clear, it is that the principal

1 support for the legislation came from trade associations
2 and merchants, and people who would be in the flow of
3 commerce. I cannot imagine that in 1925 Congress intended
4 the jurisdictional reach of this act to cover transact --
5 spraying insects in Fairhope, Alabama.

6 Sure there was a purpose to change the common
7 law rule. I don't deny that, but I don't believe that
8 that answers the question. The question is over what
9 jurisdictional field, or what was the jurisdictional reach
10 of the act.

11 Now, our principal point in contradiction to the
12 one that Terminix has made is that we know, whatever the
13 reach of the act it was something less than affecting
14 commerce.

15 Now, exactly what it was, we have a difficulty
16 defining a rule to describe it. Now, the contemplation-
17 of-parties test is an effort to do that. That's a judge-
18 made rule. We would suggest that if the jurisdictional
19 inquiry is made, and once the Court gives some definition
20 to the term, involving commerce, then the Court could
21 fashion a rule or a test if it's dissatisfied with the
22 contemplation- of-the-parties test to properly define the
23 jurisdiction of section 2.

24 QUESTION: Do you have any second choice, other
25 than the contemplation-of-the-parties test?

1 MR. CHASON: I have not suggested one exactly.
2 I would think that it ought to go something like, or
3 something -- it ought to incorporate notions of reasonable
4 expectations of the parties, and foreseeability of the
5 timely entering into the contract, and not, as the
6 question that was asked by Justice Scalia, that the
7 validity of contracts can only be determined ex post.
8 That can't be the way the rule works. It must -- whether
9 the contract is subject to the act must be capable of
10 determination at the time the contract is made, not ex
11 post.

12 QUESTION: So your second choice is your first
13 choice.

14 MR. CHASON: Your Honor, I'm sorry, I don't have
15 all the answers to the questions of exactly what the test
16 would say, and part of that difficulty is that, at least
17 the way I see this case, the first question that the Court
18 needs to address is, what is the jurisdictional reach of
19 the act, and to my way of thinking about it, it seems to
20 me that normally what this Court has done is first
21 determine what the jurisdictional reach of the statute is
22 and then, secondly, try to fashion a test that will lead
23 courts which inquire about that in the right direction,
24 and we feel like something akin to, if not exactly like,
25 the contemplation of the parties test would lead in that

1 direction if the Court construes the jurisdictional reach
2 of the act as we think it should.

3 QUESTION: Thank you, Mr. Chason.

4 Mr. Farr, you have 3 minutes remaining.

5 REBUTTAL ARGUMENT OF H. BARTOW FARR, III

6 ON BEHALF OF THE PETITIONERS

7 MR. FARR: Thank you, Mr. Chief Justice.

8 I have just two points that I would like to
9 make. First, with respect to the contemplation of the
10 parties, it has yet at least been explained to my ear why
11 Congress would want the scope of the act to turn on the
12 parties' contemplation about interstate commerce.

13 The logic of this argument, as I understand it,
14 is that even though the parties solemnly agree in a
15 written contract to arbitrate their disputes, if they do
16 not, on the face of the same contract, say something about
17 interstate commerce, it means that they are not intending
18 Federal law to apply.

19 In the first place, I don't think that is a
20 logical inference to draw from it and, secondly, I can't
21 imagine that Congress would intend that that undisclosed
22 inference be the basis for deciding whether Federal law
23 applied or not.

24 The second point I'd like to make is that one
25 has to look, I think, at the reasons that Congress wanted

1 to make arbitration agreements enforceable. They had
2 several thoughts in mind, 1) that it would provide some
3 sort of greater certainty in dealings, but in particular
4 that it would lower the cost of litigation, it would lower
5 delays, or reduce delays that were associated with
6 disputes that arise out of agreements.

7 Now, what you have in this particular case is
8 simply a contract for the sale of goods and services, a
9 standard, garden-variety contract, one that we believe
10 involves interstate commerce, for sale of a service
11 involving goods to a citizen in another State.

12 Now, what is there about that contract that
13 makes it inappropriate for arbitration, as Congress viewed
14 arbitration? Indeed, the legislative history talks about
15 dealings such as a farmer selling his potatoes to an out-
16 of-State dealer, and makes reference to that clearly, I
17 think, suggesting that that would be within the coverage
18 of the act.

19 Now, this may seem like a mundane transaction,
20 if one thinks of interstate commerce in some grand sense,
21 but in fact, arbitration in contracts like this also can
22 reduce costs, can reduce the burden on the courts, and
23 ultimately can reduce prices to the very consumers who
24 sign contracts like this, and those policies clearly apply
25 to what everybody agrees is the scope of the act.

1 Thank you.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Farr.

3 The case is submitted.

4 (Whereupon, at 11:02 a.m., the case in the
5 above-entitled matter was submitted.)

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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:

ALLIED-BRUCE TERMINIX COMPANIES, INC. AND
TERMINIX INTERNATIONAL COMPANY, Petitioners,
v. G. MICHAEL DOBSON, ET AL.

CASE NO.:93-1001

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

BY Ann Marie Federico

(REPORTER)