

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: DOCTOR'S ASSOCIATES, INC. AND NICK LOMBARDI,

Petitioners v. PAUL CASAROTTO, ET UX.

CASE NO: 95-559

PLACE: Washington, D.C.

DATE: Tuesday, April 16, 1996

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DOCTOR'S ASSOCIATES, INC. AND :

4 NICK LOMBARDI, :

5 Petitioners :

6 v. : No. 95-559

7 PAUL CASAROTTO, ET UX. :

8 - - - - -X

9 Washington, D.C.

10 Tuesday, April 16, 1996

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:04 a.m.

14 APPEARANCES:

15 MARK R. KRAVITZ, ESQ., New Haven, Connecticut; on behalf
16 of the Petitioners.

17 MS. LUCINDA A. SIKES, ESQ., Washington, D.C.; on behalf of
18 the Respondents.

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1 PROCEEDINGS

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 85 -- 95-559, Doctor's Associates, Inc., v.
5 Paul Casarotto.

6 Mr. Kravitz.

7 ORAL ARGUMENT OF MARK R. KRAVITZ

8 ON BEHALF OF THE PETITIONER

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

11 Section 2 of the Federal Arbitration Act makes
12 written provisions valid, irrevocable, and enforceable
13 except for grounds that apply for the revocation of any
14 contract.

15 In this case, however, the Montana supreme court
16 refused to enforce the parties' agreement to arbitrate
17 because it failed to comply with the heightened notice
18 statute that, by its plain language, applies only to
19 arbitration agreements and not to other contracts.

20 Respondents thus have tried to recast Montana's
21 notice statute as codifying some general principle of
22 unexpectedness, but that effort fails for two reasons.
23 First, Montana's law does no such thing, since it applies
24 to only one type of provision, arbitration agreements, and
25 it applies to them whether they're unexpected or not.

1 Second, the FAA prevents a court from refusing
2 to enforce the parties' agreement to arbitrate on the
3 basis of a State law principle that turns on the fact that
4 the subject matter involved is arbitration. Thus, under
5 the FAA, a State may not decide, as Montana has decided
6 here, that a contract is fair enough to enforce its basic
7 terms but not fair enough to enforce its arbitration
8 clause.

9 Congress enacted the Federal Arbitration Act to
10 clear away judicial and legislative suspicion of
11 arbitration, in and so doing, Congress decided for itself
12 to determine the circumstances under which arbitration
13 clauses would be enforceable, unencumbered by State law
14 constraints.

15 To that end, the text of section 2 alone
16 determines the enforceability of an arbitration agreement,
17 and that text provides that arbitration provisions are
18 enforceable and valid and irrevocable, save for one
19 explicit, and explicitly limited, exception: upon grounds
20 that exist for the revocation of any contract.

21 We believe that in determining whether or not a
22 State law or principle fits within that savings clause,
23 two considerations are paramount. First, the savings
24 clause is an exception to a sweeping general rule of
25 enforcement. Therefore, the Court must be on its guard

1 not to allow the exceptions to swallow or undercut the
2 general rule.

3 Second, section 2 establishes a principle of
4 what I'll call rigorous equality for arbitration clauses.
5 They may be no less valid, no less enforceable, and no
6 less irrevocable than other contract terms under State
7 law.

8 As a result, this Court has identified two tests
9 that State laws or principles must pass before a law fits
10 within the savings clause. First, the law must be one of
11 general application. That is to say, it must apply to
12 contracts generally. Secondly, even if it is in theory a
13 general principle of law, the particularized application
14 of that general principle cannot turn on the fact that the
15 subject matter involved is arbitration.

16 QUESTION: Suppose that the State had a statute
17 which said that the following terms have to be in bold
18 face type: price, term of the contract, choice of law,
19 add a few more if you can think of them, and arbitration.
20 Would that be a valid State law that's enforceable?

21 MR. KRAVITZ: Depending upon the law, the nature
22 of the law and the things that are included, I think not,
23 and I think it would fail really under two principles.
24 First, unless the list was quite long, it would not apply
25 to contracts generally but just apply to a few things, and

1 secondly --

2 QUESTION: No, this -- no -- well, I'll amend
3 the hypothetical, then. It applies to contracts
4 generally, it says.

5 MR. KRAVITZ: Right. Well, it applies to all
6 written contract terms?

7 QUESTION: All written contracts.

8 MR. KRAVITZ: Okay, and does it apply to --

9 QUESTION: You have to bold face type -- bold
10 face type for price, terms of the contract, choice of law,
11 arbitration.

12 MR. KRAVITZ: Okay. Then I think you have to
13 ask yourself really the second --

14 QUESTION: And whether or not attorney's fees
15 are allowed.

16 (Laughter.)

17 MR. KRAVITZ: Of course, the more things you put
18 in it, the more it looks like a general principle, but
19 then you have to ask yourself, it seems to me, the second
20 test, which is, why does it make the list?

21 Why does arbitration make the list, and if it's
22 making the list because, of course, the court feels that
23 they're concerned about people arbitrating as opposed to
24 litigating disputes, they think that they're giving up an
25 especially important right, then, depending upon the size

1 of that list, it may still fail to pass the second
2 principle, that the court has --

3 QUESTION: Mr. Kravitz, suppose it were
4 concentrated, the clause were concentrated on the forum
5 and were general. Suppose it read, no choice of forum or
6 choice of law clause in any forum contract will be
7 enforced unless notice of the chosen forum is typed in
8 underlined capital letters. So it's general, all
9 contracts, it's any choice of forum, any choice of law
10 clause.

11 MR. KRAVITZ: Well, certainly if that -- if -- I
12 just have to ask one more question about that. If that
13 law applies only to choice of forums that are in
14 arbitration agreements --

15 QUESTION: It applies to all contracts. If you
16 have a choice of law or choice of forum, including
17 arbitration, you could pick the --

18 MR. KRAVITZ: Right.

19 QUESTION: -- commercial court in Zurich.

20 MR. KRAVITZ: Sure.

21 QUESTION: It would be the same thing as -- any
22 choice of forum in a forum contract, so it's not all
23 contracts, its just in forum contracts.

24 MR. KRAVITZ: That's --

25 QUESTION: Would that be --

1 MR. KRAVITZ: Well, it would -- for -- I believe
2 it would cause the same problems that we're addressing, if
3 I may explain. Assuming that it applies just to both
4 litigation and arbitration, it begins to look more
5 general.

6 However, what the State is saying in that
7 circumstance, the circumstance you're positing, is, okay,
8 well, we'll let you arbitrate, but you have to do it under
9 our rules, and I believe that when the court -- when the
10 States are permitted to start tinkering with the parties'
11 choices about how they wish to arbitrate, it raises many
12 of the same concerns. For example, if the court --

13 QUESTION: Suppose -- do you have any doubt
14 about whether such a provision would be valid as to choice
15 of a court? Suppose the State said, any choice of a
16 judicial forum --

17 MR. KRAVITZ: Right.

18 QUESTION: -- any choice of law to govern this
19 contract has to be put in -- on page 1?

20 MR. KRAVITZ: The FAA does not speak to such
21 clauses, and certainly that would not run afoul of the
22 Federal Arbitration Act. Whether there's anything else --

23 QUESTION: Well then, you seem to be saying the
24 Arbitration Act, far from allowing laws of general
25 application to apply, says a law of general application

1 about choice of forum can apply to all other contracts but
2 not to arbitration contracts.

3 MR. KRAVITZ: What I'm saying is, Your Honor,
4 and obviously the hypothetical you're posing is very
5 different from the statute, what I'm saying is that as the
6 States begin to tinker with the parties' choices of the
7 rules under which they'll conduct their arbitration, you
8 begin to raise the same issues.

9 For example, if I may, if a State said, okay,
10 you can arbitrate, but you have -- the arbitrators have to
11 be chosen from the voter rolls in a certain town, and you
12 have to have 12 arbitrators, and all the rules of evidence
13 have to apply --

14 QUESTION: What does that have to do with saying
15 choice of forum has to be on page 1?

16 MR. KRAVITZ: Because I think that to the extent
17 that one is tinkering with the choice that the parties
18 made of the method in which they're going to resolve their
19 dispute, that it raises the issue as to whether or not one
20 is trying to interfere with the parties' choice of
21 arbitration, or one is trying to do something else.

22 QUESTION: Isn't the --

23 QUESTION: Of course, one of the underlying
24 issues here is that in these cases typically one party
25 will say, I didn't make this choice. I didn't know

1 anything about it. I signed this thing.

2 If we are concerned that this is happening more
3 and more, do the Federal courts have the authority to
4 develop a law of adhesion of contracts so that as a matter
5 of Federal common law, I suppose under the Arbitration
6 Clause, the courts could develop certain rules to protect
7 the parties?

8 MR. KRAVITZ: Well, Your Honor, I believe that
9 the text of section 2 provides the answer to that, and
10 that text says that the written provisions are valid,
11 irrevocable, and enforceable, whether in State court or
12 Federal court, save upon grounds that exist for the
13 revocation of any contract, which is to say contracts
14 generally.

15 Now, this Court in Perry and in First Options
16 has said that you look to State rule, has made the choice
17 that -- let me step back, said as a matter of Federal law,
18 therefore, the arbitration agreement is valid and
19 enforceable.

20 The court has then looked to State principles of
21 general application on revocability, but it has done that
22 because the statute so provides, so I think that the court
23 would be prohibited from developing specialized rules
24 under some sort of Federal common law designed to impose
25 on arbitration agreements limitations that are not

1 applicable to clauses generally.

2 QUESTION: Even though the evil sought to be
3 cured is peculiarly related to arbitration contracts.

4 MR. KRAVITZ: Yes, even though the evil
5 thought --

6 QUESTION: There's something of a vacuum then,
7 isn't there.

8 MR. KRAVITZ: Well, but the law generally, of
9 course, is that all of the terms in a forum contract, an
10 adhesion contract are, in fact, presumptively valid, if
11 you put your signature on it, so that in fact the law of
12 contracts generally would say these are valid, and that
13 law of contracts generally is being skewed solely -- it's
14 singling out arbitration, and solely because of the fact
15 that it's arbitration involved as opposed to something
16 else.

17 And one must ask oneself, why is one skewing the
18 law that way, and it is because one is making a value
19 judgment that arbitration is perhaps less good than a
20 court proceeding, or the like, precisely the value
21 judgment Congress sought to take the way from both Federal
22 courts and State courts and State legislatures when it
23 enacted the FAA.

24 QUESTION: But going back to Justice Ginsburg's
25 question, if we knew for a fact that her choice of forum

1 limitation did not -- did not really bear on, or have
2 application to arbitration agreements to any degree beyond
3 their application to any other choice of forum agreements,
4 if we knew that there was no reason to suppose that it was
5 aimed at arbitration agreements, that it was being
6 enforced sort of evenhandedly with all choice of forum
7 agreements, and that there were plenty of choice of forum
8 agreements which were not arbitration agreements, in that
9 case we would say, that's general enough, and that
10 wouldn't violate the FAA --

11 MR. KRAVITZ: Certainly -- certainly as you
12 posit it, Justice Souter, it sounds general enough, but I
13 would ask the Court to --

14 QUESTION: So should -- may it --

15 MR. KRAVITZ: -- what principal -- I'm sorry.

16 QUESTION: No, you go ahead.

17 MR. KRAVITZ: Well, I would ask the question,
18 what principle, then, would determine overriding the
19 parties' choice of where they arbitrate in that case from
20 choosing the AAA rules, which provide, for example, for
21 the rules of evidence don't apply, and where do you draw
22 the line --

23 QUESTION: It's not overriding the choice, it's
24 simply a notice requirement.

25 MR. KRAVITZ: I'm sorry.

1 QUESTION: It's simply a notice requirement that
2 you notify the -- in the forum contract you put certain
3 things on page 1, and one is choice of forum.

4 MR. KRAVITZ: I'm sorry.

5 QUESTION: -- so we're not talking anything
6 about the rules --

7 MR. KRAVITZ: Okay, I'm sorry. I thought that
8 you were talking about that you could not arbitrate
9 outside the State, and certainly a rule such as that --

10 QUESTION: No, there's --

11 MR. KRAVITZ: -- would cause those problems.

12 QUESTION: It's a -- it says that choice of
13 forum and choice of law go on page 1.

14 MR. KRAVITZ: Mm-hmm. Mm-hmm. Well, again,
15 I --

16 QUESTION: Well, the problem you're confronting
17 is --

18 MR. KRAVITZ: -- that's not the statute here.

19 QUESTION: -- that as far as its generality is
20 concerned --

21 MR. KRAVITZ: Right.

22 QUESTION: -- that is no different from a
23 provision that says choice of forum provisions are
24 invalid.

25 MR. KRAVITZ: I think that that's --

1 QUESTION: As far as its generality is
2 concerned, the one is the same as the other.

3 MR. KRAVITZ: That is correct.

4 QUESTION: And you would certainly not assert
5 that the latter is okay under the FAA, would you?

6 MR. KRAVITZ: No, I would not, and indeed, just
7 to follow up on that point, it has been argued by the
8 respondents that this is just a notice statute. This
9 doesn't affect the enforceability of these clauses. But
10 that argument is simply not so.

11 This law, which is labeled a notice law, says
12 that arbitration clauses containing agreement without
13 notice are not enforceable, whereas the other terms in the
14 same agreement, without notice, are enforceable, so this
15 statute, which is nominally denominated in a notice
16 statute does, in fact, go to the enforceability of the
17 arbitration clause.

18 QUESTION: Are there other provisions -- what
19 other statutes or rules of law in Montana require other
20 kinds of clauses besides arbitration clauses to be typed
21 in underlying capital letters on the first page of a
22 contract?

23 MR. KRAVITZ: There are a few isolated examples.

24 QUESTION: What are they?

25 MR. KRAVITZ: Pardon?

1 QUESTION: What are they?

2 MR. KRAVITZ: Actually, I'm not sure that any
3 actually requires an underline on the first page. There
4 are -- as you might imagine, the UCC, for example, says
5 that a disclaimer of implied warranties has to be
6 "conspicuous." That's a heightened notice statute.

7 I believe the respondents make reference to
8 retail instalment contracts requiring certain disclosures.
9 I don't believe they're underlined in capital letters.

10 But basically, we're talking about not the law
11 generally in Montana.

12 QUESTION: Well, I mean, that would be the
13 question. If there are a whole lot of provisions like
14 this, and this is not different, then I guess it isn't
15 just for arbitration, and if, in fact, this seems to be
16 quite different, or there are only a handful, then it does
17 seem different just for arbitration.

18 MR. KRAVITZ: I would agree with you.

19 QUESTION: So which is it? I mean, I'm sure I'm
20 going to hear the argument, in a few minutes, that there
21 are a lot of other things.

22 MR. KRAVITZ: It is certainly just a handful.

23 QUESTION: Yes.

24 MR. KRAVITZ: It is certainly just a handful,
25 but I would suggest that even if it were 5 or 10, and I

1 don't believe it is, but let's say it was even 5 or 10,
2 we're not talking about a coherent body of general law
3 applicable generally, we're talking about things that are
4 singled out, and why -- and they're singling out
5 arbitration in this statute in the same way in which
6 they're singling out other things and not applying the law
7 generally, because the law generally says that these
8 clauses, even if it's in an adhesion contract, even if
9 there's unequal bargaining power, if the signature's on
10 it, these clauses are -- everything else in that contract
11 is presumptively valid.

12 QUESTION: You're saying that if there are
13 several other examples, but in separate part of the
14 statutes it still shows kind of an ad hoc approach to each
15 particular thing rather than a general feeling that all of
16 these particular things should be subject to heightened
17 notice.

18 MR. KRAVITZ: Exactly, Mr. Chief Justice.

19 QUESTION: Well, are you saying, then, that
20 there can be no -- there can be no general rule within the
21 meaning of the statute that refers to, in substantive
22 terms to the kind of provision that it applies to?

23 In other words, the State law says, no
24 agreements without offer and acceptance. We can certainly
25 find that an arbitration agreement fails for lack of

1 offer, or lack of acceptance.

2 MR. KRAVITZ: Okay, but when you're --

3 QUESTION: But --

4 MR. KRAVITZ: If that were the general principle
5 announced, then you'd go to the second prong of our test,
6 which is, is it's application in that particular
7 circumstance, does it turn on the fact that it's
8 arbitration, and the answer is no. It turns on the fact
9 that there's no acceptance.

10 QUESTION: But then it becomes complicated when
11 you get to examples in which there's a whole series of
12 terms upon which it may turn, and I think you're saying,
13 but I'm not sure, no matter how long that series might be,
14 as in Justice Breyer's example, as long as there is a
15 substantive reference to arbitration, that it would fail.
16 Are you saying that?

17 MR. KRAVITZ: Yes -- I would say again, does it
18 go back to our -- the two tests that this Court has
19 identified? If the list is long, maybe it then qualifies
20 as a law of general application, but it's -- the second
21 part is, why does it -- why is it being applied in this
22 circumstance, and in this case, as you posit, it's making
23 that list because it's arbitration.

24 QUESTION: Suppose I didn't agree with you about
25 that. Suppose I thought that just, well, look at the

1 other things on the list, and if there are a lot of things
2 on the list, maybe it's just treating them like that, and
3 if there are only one or two or three, and they look
4 different, then they're singling out arbitration.

5 All right, on that assumption, how would you
6 argue this? I mean, I'm --

7 MR. KRAVITZ: Under that assumption, we'd still
8 prevail in this case.

9 QUESTION: Because --

10 MR. KRAVITZ: Because this law only applies to
11 arbitration, one. Secondly, under the general law in
12 Montana, as reflected in the cases, all the other terms
13 are valid, and third, even though they may be able to
14 point to a few instances in which other things have been
15 singled out, as arbitration is being singled out here,
16 they're not talking about the laws that apply to contracts
17 generally, they're talking about a handful of other things
18 that simply don't meet the test.

19 QUESTION: The other things being --

20 MR. KRAVITZ: So even under that construct it
21 fails.

22 QUESTION: What are those? I mean, do you want
23 to say anything else about those other things?

24 MR. KRAVITZ: I know the UCC -- I'm aware
25 because of their footnote that they're retail installment

1 contracts, but that's all I'm aware of.

2 For example, Justice Breyer, I'm not aware of
3 any principle in Montana law that waiving any
4 constitutional right requires any special notice on the
5 first page.

6 You can waive a jury trial -- you can waive
7 these things under Montana law, and nothing special is
8 required, but something is specially required of
9 arbitration under Montana law, and it -- and the court
10 explained why something special was required, and that was
11 because the court itself and the legislature were
12 concerned about citizens in Montana agreeing to a
13 procedure that that court felt was devoid of all
14 procedural protections.

15 QUESTION: The other things you can waive, one
16 is jury trial. Are there other important things you want
17 to list that they can waive in Montana?

18 MR. KRAVITZ: To be honest, Justice Breyer, we
19 have looked to see whether there are special rules for
20 waiving any constitutional rights in Montana, and we could
21 not find any, so its -- rather than having a list of
22 things that you can, I haven't found any in our review --
23 in our review of the law.

24 QUESTION: Mr. Kravitz, you answered the
25 question to Justice Breyer that it would be the same

1 outcome. Suppose you had answered the other way to my
2 question. You'd say, choice of forum as a general matter
3 is one thing. That's not what this Montana law says. It
4 says arbitration.

5 MR. KRAVITZ: Right. Your Honor, I guess I
6 should have said at the outset, I have the view that I
7 have about your question, but the answer, whether I accept
8 your view or don't accept your view, to your question
9 doesn't decide this case, because this case doesn't deal
10 with choice of forum. It doesn't deal with litigation and
11 arbitration, it only deals with arbitration, and it only
12 requires arbitration to be on the first page, and it only
13 says -- and it says that only arbitration is not
14 enforceable if it's not on the first page, so while we
15 may --

16 QUESTION: So are you saying I'm raising an
17 academic question?

18 MR. KRAVITZ: Yes, Your Honor.

19 (Laughter.)

20 MR. KRAVITZ: It certainly is not a question
21 that the answer for which determines this case at all,
22 because of the focused nature of the statute, and I think
23 that the courts -- it's important, under the savings
24 clause, I believe, to interpret it and to enforce it and
25 to apply it in the way in which, the manner in which this

1 Court has done in its cases, which is to say, insist, as
2 the language does, that only laws or principles that apply
3 to contracts generally can be used to revoke an
4 arbitration clause, and it's important for really two
5 reasons.

6 The first is that, if you want to allow States
7 to add additional limitations, their own special rules or
8 processes for arbitration agreements, it inevitably
9 undercuts the enforceability of arbitration, and it makes
10 them -- puts them on a different footing than other
11 contracts, so it impairs not only the words -- violates
12 the words as such, but impairs Congress' intent that this
13 Court has recognized to treat arbitration agreements like
14 any other contract.

15 QUESTION: Under that formulation, what about
16 our decision in Volt?

17 MR. KRAVITZ: Well, Your Honor, to be honest,
18 we -- I think that Volt is about the oddest place to find
19 support for the Montana supreme court. Volt enforced the
20 parties' choice of law. Volt enforced the arbitration
21 agreement.

22 In this case, the Montana supreme court refused
23 to enforce the parties' choice of law and refused to
24 enforce the arbitration agreement. Volt really was no
25 different --

1 QUESTION: That's one way of characterizing it,
2 but it did stay the arbitration pending judicial
3 proceedings --

4 MR. KRAVITZ: But it didn't say --

5 QUESTION: -- as I recall the case, and I'm --
6 it's not clear to me whether or not those judicial
7 proceedings would have been binding on the arbitrator.

8 MR. KRAVITZ: Well --

9 QUESTION: But let's for a moment assume that
10 they would have been, which I think was quite a plausible
11 conclusion.

12 MR. KRAVITZ: Well, but you're assuming, I
13 think, in the question that the parties intended something
14 different, and that's what Volt is all about. In fact,
15 the parties intended that that was the result.

16 It was -- Volt -- I mean, really Volt is no
17 different than if the parties had in their arbitration
18 agreement spelled out and said, when there is litigation
19 pending with someone else, this is how we'll handle it,
20 and the Court in Volt said that the -- it took the
21 California supreme court's interpretation of the contract
22 as the effective equivalent to what I've just posed and
23 said, well, the FAA is about enforcing parties' choices,
24 and we need to enforce those choices, but that's not the
25 situation here.

1 And here we have a situation where the parties
2 have said, Connecticut law governs, and we want to
3 arbitrate, and the Court wiped away the Connecticut choice
4 of law and then applied the Montana statute to eliminate
5 the parties choice.

6 QUESTION: And if the parties had chosen Montana
7 law what would your result --

8 MR. KRAVITZ: I don't think the result -- in the
9 ordinary case the result wouldn't be different, and I say
10 that for this reason. Certainly --

11 QUESTION: Then Volt becomes a harder case for
12 you.

13 MR. KRAVITZ: Well, under Volt, then, you're
14 trying to determine the intent of the parties. However,
15 this Court this last term in the Mastrobuono case said --
16 recognized it's a cardinal principle of statutory
17 interpretation that two clauses shouldn't be seen to
18 intrude on one another.

19 And one would ask the question then if the court
20 finds that the choice of law clause is meant to actually
21 render completely invalid another clause in the contract,
22 are they applying principles of contract construction in
23 an evenhanded manner, or are they applying them in a
24 manner that's skewed against arbitration?

25 And in Perry the Court said, in construing an

1 arbitration clause, the court must do so the same way it
2 would a nonarbitration clause, and so if, in fact, the
3 court were overriding one clause of the agreement with
4 another clause of the agreement and doing so because
5 arbitration was involved as opposed to some other term,
6 then that would run afoul of the FAA in the same
7 circumstance, even when they chose Montana law in that
8 circumstance.

9 And you wouldn't ordinarily expect that the
10 parties in one clause would say, we'll arbitrate, and in
11 another clause say, no, you know, we're not going to
12 arbitrate.

13 But I must say, as the amicus brief points out,
14 that is what courts have been doing with Volt, contrary, I
15 think, to the intent of Volt, is that they have been using
16 a choice of law clause to say, well then, if you've chosen
17 Montana law, we'll just throw out the entire arbitration
18 agreement.

19 That's not what happened in Volt. I don't think
20 that's what Volt stands for. It certainly isn't what the
21 Court explained it stood for in Mastrobuono, but yet that
22 has been happening in courts below.

23 Of course, here again, the parties chose
24 Connecticut law, and under Connecticut law this
25 arbitration agreement is fully enforceable and fully

1 valid, and the court then used the notice statute to void
2 the parties' choice of law, the same notice statute it
3 used to void the parties' choice of arbitration.

4 Just Ginsburg.

5 QUESTION: Could there be an arbitration clause
6 in a forum contract that could be held unconscionable?

7 MR. KRAVITZ: Well, let me say two things.
8 First, I want to make clear that this statute isn't
9 limited to forum contracts or adhesion contracts or
10 anything else.

11 Going to your hypothetical, I believe the answer
12 is no, if you are saying holding the fact of arbitration
13 unconscionable. If you're striking down the entire
14 contract, that would be acceptable under the construct
15 that I've proposed, because then you would be fairly
16 assured that what's happening is a principle of general
17 application, not something that is targeted to
18 arbitration, so striking down the entire --

19 QUESTION: I don't understand that.

20 MR. KRAVITZ: I'm sorry, Justice Scalia.

21 QUESTION: You say if you have an arbitration
22 clause the State can invalidate the whole contract because
23 the arbitration --

24 MR. KRAVITZ: Oh, no, I --

25 QUESTION: -- clause is unconscionable?

1 MR. KRAVITZ: No, I didn't mean to say that --

2 QUESTION: Oh, okay.

3 MR. KRAVITZ: -- and let me make myself clear.

4 If they're striking down the entire contract because there
5 happens to be an arbitration clause in the contract, that
6 would be invalid under Volt.

7 What I'm saying is, the Court might decide that
8 all of the terms of this forum contract fell --

9 QUESTION: Or enough of them.

10 MR. KRAVITZ: -- because they're unconscionable,
11 wholly apart from whether it has an arbitration clause.
12 For example, that --

13 QUESTION: Or that the arbitration clause itself
14 got in there because of unconscionable contracts.

15 MR. KRAVITZ: Fraud in the inducement, for
16 example.

17 QUESTION: Yes. Yes.

18 MR. KRAVITZ: Or if the arbitration clause got
19 in there because of fraud in the inducement, in that
20 case -- in that case, there would be general principle,
21 fraud in the inducement, and it would be determined not
22 because the subject matter is arbitration, but because
23 there was a fraud that went on about a material term, so
24 it would meet both of our tests in that regard.

25 Unless the Court has further questions, I would

1 like to reserve my time.

2 QUESTION: Very well, Mr. Kravitz.

3 Ms. Sikes, we'll hear from you.

4 ORAL ARGUMENT OF LUCINDA A. SIKES

5 ON BEHALF OF THE RESPONDENTS

6 MS. SIKES: Mr. Chief Justice, may it please the
7 Court:

8 The issue presented in this case is whether a
9 Montana notice statute, a statute which is aimed at
10 ensuring that parties know that they're signing a contract
11 that includes an arbitration provision, is preempted by
12 the Federal Arbitration Act.

13 The Montana notice requirement is different from
14 all the State requirements that this Court has preempted
15 in the past because its function is not to prevent
16 arbitration but to help ensure that arbitration is
17 consensual.

18 The statutes preempted in Southland, in Perry,
19 and in Terminex prevented the enforcement of arbitration
20 agreements so that there was nothing a person who wanted
21 to enforce arbitration could do to make sure that it would
22 be enforced.

23 Here, on the other hand, it's in the total
24 control of the person drafting the agreement to make sure
25 that the arbitration provision will be enforced.

1 QUESTION: But you want to make the arbitration
2 agreement more consensual than other forms of the con --
3 other elements of the contract, that's your problem, not
4 that they want to make it consensual, but they want to
5 make it more consensual, hyperconsensual, isn't that your
6 difficulty?

7 MS. SIKES: I don't think that's what Montana is
8 doing. Let me explain why it falls within the savings
9 clause of section 2 of the Federal Arbitration Act.

10 Suppose for a moment that Montana had not
11 adopted the statutory notice requirement, but we had
12 similar facts, so that the plaintiff had tried to sue --
13 had filed a suit in court, the defendant had sought to
14 stay litigation in order to compel arbitration, then the
15 plaintiff could have gone into court and said that the
16 arbitration was invalid under general contract principles
17 that unexpected clauses in contracts need to be
18 conspicuous.

19 And in that case, I don't think that would have
20 been prevented by the Federal Arbitration Act, because
21 what the Court would be doing in that case is applying a
22 general contract principle of unexpected -- of reasonable
23 expectations doctrine to the arbitration provision and
24 invalidating it, and that that's simply what the Montana
25 court is doing --

1 QUESTION: But I --

2 MS. SIKES: -- the Montana legislature did in
3 enacting this statute.

4 QUESTION: But I don't think we can really deal
5 with that hypothesis based on what you give us, because if
6 we -- if it were shown on the record that this concept of
7 the unexpected turned out to be a concept which is either
8 applied in sort of an undisciplined fashion by courts so
9 that it could be used to single out arbitration, or if it
10 was shown that it was applied in a way which, by whatever
11 set of principles, the State courts were -- tended to fall
12 heavily on arbitration, or if it could be shown that it
13 was intended as a common law rule really to apply to
14 arbitration and make it more difficult, we would say that
15 there was not, in fact, a sufficient generality there, and
16 that therefore the rule, the unexpectedness concept would
17 fail because it wasn't sufficiently general, and we just
18 don't know enough, I guess, even if we had the case that
19 you hypothesize, to know how we would rule on that.

20 MS. SIKES: Well, I think what the Montana --
21 the Montana court has adopted the reasonable expectations
22 doctrine, and they've spelled out how they apply the
23 doctrine in two cases involving arbitration, and I think
24 if you look at that doctrine, it could have been applied
25 in this case.

1 QUESTION: But it wasn't.

2 QUESTION: Yes, but it wasn't.

3 MS. SIKES: No, it wasn't applied in this case.

4 QUESTION: They applied the statute.

5 MS. SIKES: Right, but my argument is, is that
6 if it would have been okay for the Montana court to have
7 invalidated it under those general contract principles, it
8 should also be okay for the Montana legislature to do the
9 same thing.

10 QUESTION: But Ms. Sikes, can you explain to me
11 why it's unexpected? Arbitration clauses are used in all
12 manner of formal contracts. It's not immediately obvious
13 that that would fit within the definition of unexpected
14 terms.

15 MS. SIKES: The notice provision, the notice
16 requirement was enacted at the same time that -- in 1985,
17 when Montana was changing their entire law, and for the
18 100 years previously it had been Montana -- in Montana's
19 statute that arbitration agreements weren't going to be
20 enforced, so I think it was perfectly reasonable for the
21 Montana legislature to assume that it would be -- it
22 wasn't a background knowledge that people had in Montana,
23 because --

24 QUESTION: But isn't there a policy answer to
25 that? In other words, shouldn't we say, just on the

1 hypothesis that you give us, that we would not -- we
2 should not recognize a State policy which brands as
3 unexpected a form of adjudication -- adjudication which
4 it is Federal law and policy to promote?

5 MS. SIKES: But the statute itself does not
6 discourage arbitration, and it doesn't prevent the
7 enforcement of arbitration.

8 QUESTION: Well, yes, but on your assumption,
9 your assumption is that the arbitration clause may
10 properly be found to be unexpected within the meaning of
11 the Montana, either common law rule or statutory rule, and
12 it seems to me that that, in and of itself, is at odds
13 with Federal policy.

14 MS. SIKES: Well, that --

15 QUESTION: It's not a question whether it
16 discourages arbitration under the section 2. The thing
17 has to be put on such grounds as exist in law or equity
18 for the revocation of any contract.

19 MS. SIKES: That's right, and that provision has
20 to mean something, and if there is a doctrine that says
21 that -- the unexpected terms and standardized form
22 contract doctrine is not only applied to arbitration
23 provisions, it's applied to terms and standardized form
24 contracts that the person signing the agreement might not
25 expect.

1 QUESTION: But the Montana supreme court didn't
2 apply that judge-made doctrine here, did it?

3 MS. SIKES: No. No, it did not, but what the
4 Montana legislature was doing in enacting the notice
5 requirement in statute was essentially the same thing.

6 QUESTION: Well, except apparently it thought
7 that only arbitration would ever be unexpected.

8 MS. SIKES: No, that's not true. There are some
9 other examples --

10 QUESTION: There's no generality to the statute.
11 It simply singles out arbitration.

12 MS. SIKES: It does single out arbitration, but
13 it's -- but the Montana -- under Montana law, other
14 provisions in a contract could be invalidated if they
15 weren't conspicuous under this general common law that's
16 also in Montana, and what the legislature is doing is
17 simply creating a bright line rule that actually helps
18 people who are drafting agreements to know, okay, if I'm
19 going to put an arbitration provision in, it needs to be
20 conspicuous, and this is how I need to make sure it's
21 going to be conspicuous.

22 QUESTION: Well, why didn't it help other people
23 who were drafting other kinds of unexpected provisions?

24 MS. SIKES: Well, you have to look at the reason
25 that the legislature was doing it. It wasn't saying,

1 okay, what are the unexpected provisions out there? It
2 was done in a context of considering arbitration, and I
3 don't think a legislature has to do everything in order to
4 do anything. It was identifying --

5 QUESTION: Was this done simultaneously with
6 the --

7 MS. SIKES: Yes, exactly. In 1985, as a result
8 of Southland, for the first time in Montana arbitration
9 agreements became enforceable, and at that same time, the
10 Montana legislature required there to be a notice given so
11 that people knew that they were now signing a contract
12 that included an arbitration provision.

13 QUESTION: You want us to look at Montana law as
14 a whole, and not at the statutory law separately from the
15 judge-made law, and you're saying --

16 MS. SIKES: Exactly. Exactly.

17 QUESTION: If you look at the whole ball of wax,
18 this is just one piece of a general rule requiring notice
19 of surprising provisions.

20 MS. SIKES: Exactly. That's exactly --

21 QUESTION: And the other members of that class
22 are?

23 MS. SIKES: The other members of the class in
24 statute are terms and retail -- retail installment
25 contracts, part of the UCC requirements that petitioner

1 was talking about.

2 QUESTION: And the ones that are in --

3 MS. SIKES: But then also in common law Montana
4 has invalidated certain provisions in insurance contracts,
5 and also, Montana doesn't have a huge body of case law.
6 They do look to California, because they adopted their
7 code from California, so they also looked to the
8 California common law, where there's been several other
9 types of provisions --

10 QUESTION: I mean, is that listed in your --
11 what I'd need would be, if we're to look at it as a whole,
12 is the list of provisions that don't have to do with
13 arbitration, where the law of Montana, whether judge-
14 made --

15 MS. SIKES: Yes. Yes. Yes.

16 QUESTION: -- or legislature-made, does, in
17 fact, require notice roughly similar to underlined capital
18 letters on the first page of a contract, not that that has
19 to be just in those words.

20 MS. SIKES: Right. It --

21 QUESTION: Where is that list? I found a few
22 things.

23 MS. SIKES: Yes. There's not a comprehensive
24 list. There's some cases.

25 QUESTION: My guess is -- I would assume,

1 perhaps, that since you went through this, that the reason
2 that there isn't a comprehensive list is you weren't able
3 to find many things.

4 MS. SIKES: There aren't very many cases in
5 Montana.

6 QUESTION: Or in the incorporation of California
7 law, or any place -- I mean, you've looked at this pretty
8 thoroughly -- it's a good brief -- and so my guess is,
9 there just aren't that many things.

10 MS. SIKES: Well, I also would like to point out
11 that in terms of arbitration agreements, they -- before
12 1985 they were invalidated for a whole lot of other
13 reasons, and so you'd only be looking at a short period of
14 time, anyway.

15 I wanted to go back to --

16 QUESTION: May I ask you a question before you
17 leave the question Justice Breyer raised, and that is, in
18 giving the answer that you could to his question, you were
19 giving some examples that at least -- perhaps I didn't
20 understand what you were saying, but they didn't seem to
21 suggest to me that they would be an appropriate part of
22 the series of unexpected terms.

23 For example, you mentioned the terms of a retail
24 installment contract. What would be unexpected in buying
25 a refrigerator on the installment plan in the fact that

1 there were terms governing the installment payments?
2 What's unexpected about that? It seems to me that the
3 concept these examples are pointing to is something other
4 than unexpectedness.

5 MS. SIKES: I think that the rationale behind
6 what the Montana legislature was doing in that is based on
7 the understanding that people don't necessarily read form
8 contracts carefully, and so --

9 QUESTION: That's not the same thing as being
10 unexpected.

11 MS. SIKES: Well, I think that the terms that
12 need -- in the statute have to do with the high interest
13 rates that are in retail installment contracts, and so it
14 wouldn't be within the reasonable expectations of a person
15 signing a retail installment contract that there were
16 going to be such high interest rates applied --

17 QUESTION: But if that is an example of the
18 series, then it seems to me that arbitration is being
19 analogized with high, if not quite unconscionable
20 interest, and it sounds to me like a series -- whatever
21 the adjective the State uses, it sounds like a series of
22 disfavored terms, not unexpected terms.

23 MS. SIKES: It's not that the term is
24 disfavored, because if that were the case -- well,
25 obviously --

1 QUESTION: Well, they're not --

2 MS. SIKES: -- under the Federal law they
3 couldn't do that.

4 QUESTION: They're not incompatible categories,
5 are they? The State can disfavor that which is
6 unexpected --

7 MS. SIKES: Exactly.

8 QUESTION: -- I assume, for the obvious reasons
9 that parties will have their legitimate expectations, or
10 what they felt were legitimate expectations.

11 MS. SIKES: Exactly. I think that's right, and
12 I think it's important also to note that the way that that
13 statute's been applied in Montana is that if -- that shows
14 that it's really a notice requirement and nothing more is
15 the Chor case, that's cited in our brief.

16 In that case, Ms. Chor signed a contract that
17 included an arbitration provision. She said that she
18 understood at the time she signed the contract that the
19 arbitration, that her -- any disputes under the contract
20 would have to be arbitrated, and even though the notice
21 requirement wasn't on the front page of that contract, the
22 Montana supreme court went ahead and compelled
23 arbitration.

24 I think that shows that in Montana it really is
25 an informed consent provision. If the parties consent to

1 arbitrate, then the court is going to enforce it.

2 QUESTION: Well, how did the supreme court of
3 Montana avoid the statute in that case?

4 MS. SIKES: It just kind of ignores it,
5 actually. It doesn't really explain it. It recognizes
6 that the statute exists, but then -- then --

7 QUESTION: Well then, our invalidation of it
8 would make no difference, would it?

9 (Laughter.)

10 QUESTION: Ms. Sikes, suppose we had a case of,
11 instead of arbitration, there was an equipment -- there
12 were some -- Montana, some farmers -- I know Michigan
13 does. That's where this case came from. There's a rental
14 equipment thing that they sign with some company in New
15 York, and they get into a big dispute, and then they find
16 out this contract says they've consented to be sued in the
17 State courts in New York.

18 Under your view of what the Montana law is,
19 would that be -- fall under this generally unexpected, so
20 it would be no good?

21 MS. SIKES: Well, it actually would do more than
22 that, because Montana has a statute -- I wanted to point
23 this out to Justice Breyer, too, that for bids, legal
24 contracts from restraining legal -- from putting any
25 restraints on legal proceedings, so forum selection

1 clauses that are outside the State in Montana are void as
2 a matter of the statute, as would jury trial, so there's
3 no need to require notice of those waiver type provisions,
4 because you just can't waive your legal rights, except for
5 arbitration.

6 That statute then, the --

7 QUESTION: Forum selection clauses that are
8 consented to? You --

9 MS. SIKES: Right. You can't consent to forum
10 selection clauses that are outside of the State in
11 Montana. You can't --

12 QUESTION: And then, how about choice of law?

13 MS. SIKES: Well, the statute -- it says
14 restraints upon legal proceedings are void, so any -- it's
15 been used to -- every stipulation or condition in a
16 contract by which any party thereto is restricted from
17 enforcing his rights under the contract by the usual
18 proceedings in the ordinary tribunals, or which limits the
19 time within which he may thus enforce his rights, is void,
20 and it's been used -- it now has an exception, so it
21 doesn't invalidate arbitration agreements.

22 That was what -- it was amended in 1985. Before
23 1985, it was used to apply to arbitration provisions, but
24 since then, it also has been applied for forum selection
25 clauses, for statute of limitations --

1 QUESTION: But if litigation is actually begun
2 in the forum selected --

3 MS. SIKES: Well, in that case --

4 QUESTION: Montana would have no choice but to
5 recognize it.

6 MS. SIKES: Oh, right. Right. Absolutely.
7 Absolutely.

8 It seems to me that what the petitioner's basic
9 argument is is that whenever a court or legislature
10 applies a general contract principle in a case involving
11 an arbitration clause, that violates the Federal
12 Arbitration Act because it singles out an arbitration --
13 because by singling out the arbitration clause it shows
14 hostility toward arbitration.

15 QUESTION: Well, we don't have to deal with
16 that, of course --

17 MS. SIKES: Okay. No --

18 QUESTION: -- here, do we? I mean, all we have
19 to deal with, I suppose, is whether this particular law of
20 Montana is valid or invalid under the Federal Arbitration
21 Act provision.

22 MS. SIKES: I think that's right, and I -- but
23 my point is is that Congress said that arbitration
24 agreements can be invalidated upon grounds that exist for
25 the revocation of any contract, and that, the savings

1 clause has to mean something, and if it doesn't mean that
2 a State can't invalidate an unexpected clause in a
3 standardized form contract and use that general principles
4 and apply it specifically to arbitration clauses, then I
5 don't think section 2 means anything.

6 QUESTION: Well, what are the other -- you're
7 talking about the other unexpected things other than
8 arbitration, and has the supreme court of Montana said
9 that things other -- provisions other than Montana, other
10 than arbitration must be displayed on the first page of
11 the contract in capital letters, or have they simply
12 invalidated those provisions?

13 MS. SIKES: They've invalidated them.

14 QUESTION: Well then, that isn't the same
15 treatment.

16 MS. SIKES: But what the Montana -- the doctrine
17 of how you determine whether or not something is within
18 the reasonable expectations of someone signing the
19 contract also has to go to whether it's conspicuous or
20 not. The common law has developed that way, so if it's on
21 the front page of a contract you can't argue any more that
22 you didn't expect to see it because it's there, it's in
23 capital letters, and you see it, so you can no longer say,
24 well, I didn't know what I was signing.

25 QUESTION: And so that's how the unexpectedness

1 doctrine works out in practice?

2 MS. SIKES: Yes.

3 QUESTION: To avoid it, you put it on the front
4 page.

5 MS. SIKES: Yes. Yes. You make sure it's
6 conspicuous.

7 QUESTION: Then you put, actually the important
8 terms of the contract on the other pages.

9 (Laughter.)

10 MS. SIKES: Well, the people would be looking
11 for those, and the common law doesn't say it has to be on
12 the front page, but -- which is why I think the statute
13 actually benefits parties, because it sets out what the
14 person drafting the agreement has to do in order to make
15 sure that their provision is conspicuous enough.

16 So it sets out a bright line rule. Once it's on
17 the front page, they don't have to worry. They know it's
18 going to be enforced in Montana.

19 Montana has, since Southland, time after time,
20 enforced arbitration agreements. It's not a State that's
21 refusing to enforce arbitration agreements. They've only
22 refused twice, once in this case and the other one, which
23 was based on Volt, and all that the -- the statute doesn't
24 create any burden, any significant burden on a business to
25 comply with it. It simply requires them to look in the

1 statute, see what's required, put it on the --

2 QUESTION: Ms. Sikes, how about the problem that
3 a Nationwide merchant has, and Montana says page 1 in
4 capital letters, and suppose Nevada says, page 3 and bold
5 face -- these are form contracts that are prepared so they
6 could be used in every State.

7 MS. SIKES: Well, that's why I think that the
8 Chor case is important, because it shows that in Montana
9 technical noncompliance isn't going to mean that the
10 arbitration provision is going to be thrown out, so that
11 if -- if, in Montana, you had a -- if you made sure that
12 the arbitration provision was conspicuous in some other
13 way, the evidence from Chor would be that the Montana
14 supreme court would go ahead and enforce it, and I'd also
15 just like to say that -- I mean --

16 QUESTION: But there you said it was -- she knew
17 about it.

18 MS. SIKES: Right. She did know about it. She
19 did --

20 QUESTION: All right. Suppose the merchant has
21 complied with California law, which requires on the first
22 page but in ordinary type, and the person never read the
23 contract, never knew anything about arbitration.

24 MS. SIKES: I think that the -- that businesses
25 who transact in interstate commerce -- Doctor's Associates

1 has 10,000 franchisees across the country, and for each
2 of -- they have to comply with all sorts of different
3 State laws as it is, so this is not a significant burden
4 on them. For example, 12 States have franchise --

5 QUESTION: Well, that's a different answer than
6 the one you gave me before.

7 MS. SIKES: Yes. I think --

8 QUESTION: Now you're saying they must comply
9 with divergent laws --

10 MS. SIKES: I --

11 QUESTION: -- so they can't use the one form.

12 MS. SIKES: I think that there's evidence, given
13 the Chor case, that the Montana court, if the provision
14 was conspicuous, wouldn't hold the party to such an
15 exacting requirement as notice, because if it had been
16 conspicuous in some other way, the purpose of the statute,
17 of providing informed consent, would have been given.

18 QUESTION: That's remarkable, given the terms of
19 the statute, that unless such notice is displayed, the
20 contract may not be subject to arbitration. The court
21 just says, well, that's what it says, but we don't --

22 MS. SIKES: But the --

23 QUESTION: That's a little harsh, and we're not
24 going to do that.

25 MS. SIKES: Well, I wish --

1 QUESTION: They're different out there in
2 Montana, I guess.

3 (Laughter.)

4 MS. SIKES: I think there's two -- there's two
5 points to your question. First, I'm not sure that, given
6 the Chor case, the Montana court wouldn't have gone ahead
7 and enforced an arbitration agreement anyway, but even if
8 they were -- looked at the Montana notice statute and
9 said, it's not the way we require, we're going to
10 invalidate the arbitration provision.

11 It's not a tremendous burden on an interstate --
12 on a business transacting business across the country to
13 make sure that they comply with the different requirements
14 of each State.

15 As I was saying, there's 12 States that have
16 these franchise registration and disclosure requirements.
17 Franchisers have to know what those are, and they have to
18 comply with them. This is just a insignificant burden
19 compared to all the other State laws that someone has to
20 comply with. All it does is, it requires -- it's just to
21 ensure that a person signing a contract knows that it
22 includes an arbitration provision. It doesn't discourage
23 arbitration in any way, and it is easy for someone
24 drafting the agreement to comply with it. It's not a
25 difficult process at all.

1 I also just want to --

2 QUESTION: The selected forum was Connecticut,
3 right? They were going to have arbitration in
4 Connecticut.

5 MS. SIKES: Yes.

6 QUESTION: Could a Connecticut court, State or
7 Federal, if there's diversity, instruct the parties to
8 cease and desist from continuing that legislation in
9 Montana because they have bound themselves to a clause
10 that says arbitration?

11 Would a Connecticut court that -- whose law is,
12 we give effect to these agreements, say to the parties
13 over whom it has jurisdiction, stop litigating in Montana
14 on pain of contempt of the Connecticut court?

15 MS. SIKES: I don't know. That's a -- would be
16 a matter of -- I don't think that that's specific to this
17 particular situation. That would be in any case where
18 there was -- parties were trying to proceed in Montana and
19 Connecticut thought that they had more jurisdiction over
20 the case. I don't -- that isn't specific to whether
21 arbitration is involved.

22 QUESTION: Well, maybe it suggests that under
23 the Federal Arbitration Act this contract has to be
24 treated the same way in every State.

25 MS. SIKES: Right, and so -- well, I -- the --

1 I'm not sure I understand exactly what your question is.

2 QUESTION: Well, I'm trying to suggest that
3 this -- there could be an unseemly confrontation among
4 States that are proarbitration and States that are a
5 little slow at getting there unless there's a uniform
6 interpretation to the Federal law, so that --

7 MS. SIKES: But the Federal Arbitration Act did
8 leave for the States the ability to invalidate arbitration
9 agreements under general grounds that would apply to the
10 revocation of any contract.

11 QUESTION: Yes, but the question is, how can you
12 really argue that something that says arbitration is
13 general grounds?

14 MS. SIKES: Well, I -- if you can't say that,
15 then I don't see that the savings clause in section 2
16 means anything, because by singling -- you'd always be
17 singling out an arbitration provision in any kind of case
18 where you were looking at the validity of the making of
19 that agreement.

20 QUESTION: May I ask you a question? I don't
21 mean to interrupt your -- but I --

22 MS. SIKES: My time is limited. What --

23 QUESTION: You may welcome a different question.
24 Is it your view --

25 (Laughter.)

1 QUESTION: -- that the -- upon remand, supposing
2 we agree with your opponent that the statute is
3 unenforceable because it clearly singles out arbitration
4 agreements. Is it your view that on remand the Montana
5 supreme court could reinstate its order saying the case
6 may go forward in Montana on the ground that we have a
7 common law principle that unexpected provisions have to be
8 conspicuous, and this isn't conspicuous?

9 MS. SIKES: Yes. Yes.

10 QUESTION: So that this may not end the lawsuit
11 even if you lose.

12 MS. SIKES: Right. I think -- and if that is
13 true that that's okay, which I think it has to be under
14 the savings clause, then what the Montana legislature did
15 should also be okay, because it was essentially doing the
16 same thing.

17 QUESTION: What the Montana legislature did
18 under your view of Montana law was just superfluous, that
19 they could have --

20 MS. SIKES: Yes.

21 QUESTION: -- simply repealed the prohibition
22 against arbitration agreements and the Montana supreme
23 court would have decided this case precisely the same way
24 on this background principle of common law that they never
25 mentioned.

1 MS. SIKES: Yes, and so what they were doing was
2 simply creating this bright line rule that actually
3 benefits arbitration because it gives people that rule
4 that they know they have to comply with.

5 QUESTION: Well, do you have in your brief on
6 this the list of other cases decided on this basis, or
7 this background rule, so that we're -- I mean, this
8 started with Terminex --

9 MS. SIKES: Let me --

10 QUESTION: Like the termites, it keeps sort of
11 coming back. What I --

12 MS. SIKES: In case I don't, there's
13 Transamerica v. Royale, which is the case where the
14 Montana court adopted the reasonable expectations
15 doctrine. That's at 656 P.2d 820 at 824. Then it's
16 discussed again in Passage and Chor, which are both cited
17 in my brief, State Farm v. Estate of Braun, which is 793
18 P.2d 253. It's discussed again in Wellcome, with two L's,
19 v. Home Insurance Company, 849 P.2d 190.

20 And I think it's also important, though, to --

21 QUESTION: Those are surely not cases which say
22 that the provision in question must be typed in underlined
23 capital letters on the first page of the contract.

24 MS. SIKES: No.

25 QUESTION: There are a lot of other ways of

1 making it prominent.

2 MS. SIKES: Right.

3 QUESTION: Like if you wave it in the face of a
4 plaintiff --

5 MS. SIKES: That's --

6 QUESTION: -- or do all sorts of things. It
7 would not be this statute --

8 MS. SIKES: No, that's --

9 QUESTION: -- that is being applied.

10 MS. SIKES: That's correct. That's correct, but
11 what the statute does is, it tells the party drafting the
12 agreement how to be sure that it's going to meet the
13 requirements that --

14 QUESTION: This is a proarbitration statute.

15 (Laughter.)

16 MS. SIKES: Right. It encourages -- it makes
17 sure that, unlike, as I said, all the other statutes that
18 this Court has preempted, this one is easy to comply with.
19 In all the other cases, there was nothing someone who
20 wanted to arbitrate could do to ensure that their
21 arbitration agreement would be enforced. In this case,
22 all they have to do is comply with this requirement, which
23 is an insignificant burden. They just need to put it on
24 the front page.

25 QUESTION: Are you going to advise the Montana

1 supreme court to go ahead and strike it down under a
2 common law rule? Do you think that would be good legal
3 advice?

4 I mean, you say they may.

5 MS. SIKES: Well --

6 QUESTION: Are you sure they may? Should they
7 be sure that they may?

8 MS. SIKES: I think they can, because if --

9 QUESTION: They can decree that arbitration
10 agreements are unexpected.

11 MS. SIKES: Not as a general -- I -- they would
12 be looking to the --

13 QUESTION: You surely will make the same
14 argument to them that you made to us. I don't know why
15 you'd be ashamed of doing that.

16 MS. SIKES: No. No, I wouldn't.

17 I'd better sit down.

18 QUESTION: Thank you, Ms. Sikes.

19 MS. SIKES: Thank you.

20 Mr. Kravitz, you have 3 minutes remaining.

21 REBUTTAL ARGUMENT OF MARK R. KRAVITZ

22 ON BEHALF OF THE PETITIONERS

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

24 I want to make two points in my rebuttal, if I
25 may, just so that I'm clear about what our position is.

1 The first is this, and it was the second point
2 that I made in my opening. Regardless of whether or not
3 this statute merely codifies some general principle of
4 expectedness, which I don't think it does, but assuming
5 for a moment that it does, as Ms. Sikes has said, it still
6 falls under the FAA, so it would not be possible on remand
7 for the Montana supreme court to decide we're now going to
8 apply a general principle. The general principle is
9 adhesion.

10 We're not going to call it a statute, we're
11 going to call it a general principle, and we're going to
12 find that this is unexpected because Montana has outlawed
13 arbitration for 100 years, and therefore no one in Montana
14 would expect such a clause, and this Court dealt with
15 precisely that issue in Perry.

16 In footnote 9 in Perry the Court said, you
17 cannot have a statute that singles out arbitration, but it
18 didn't stop there. It went on and said, but there's one
19 thing more. If you're applying a State law principle of
20 general applicability, and in that case it was the law of
21 unconscionability, one can -- a State cannot decide that a
22 principle is violated on the basis of the fact that
23 arbitration is involved because after all, if that's what
24 could be done, then the courts could do that which this
25 Court has said the legislatures may not do.

1 QUESTION: Mr. Kravitz, isn't there another
2 answer to my suggestion, namely that your opponent is
3 suing on the contract, aren't they? They're claiming a
4 breach of the contract.

5 MR. KRAVITZ: That's correct.

6 QUESTION: So they can't very well say the
7 contract's invalid. They're really just attacking the
8 arbitration clause.

9 MR. KRAVITZ: They're just attacking -- you're
10 absolutely right, Justice Stevens, and let me say one
11 other thing.

12 The second point I wanted to make was that this
13 statute, Ms. Sikes says it's easy to comply with. I
14 suggest to the court that the test that this Court has
15 announced is not whether it's easy to comply with, but you
16 have looked at what is required of other terms in the
17 contract.

18 And looked at from that point of view, which is
19 the point of view that the FAA requires, other terms in
20 this particular contract don't have to be in underlined
21 capital letters, it's only the arbitration clause that
22 must be, and so the fact that we might be able to comply
23 for this one clause doesn't satisfy the test. The lens
24 that this Court has to look through is the lens as to how
25 other clauses are treated.

1 I would also say, incidentally, that the
2 obstacles to complying with these State laws are great,
3 and to follow up on Justice Ginsburg supposition, it's not
4 a supposition. Missouri requires the notice to be right
5 above the signature. Montana says it's on the first page.
6 Texas says it has to be initialed by a lawyer. Iowa says
7 it has to be signed by a party. California says its 10-
8 point type, and New York says its 12-point type.

9 It's impossible to comply with all those things,
10 and the Nationwide uniformity that Congress sought to
11 achieve with the Federal Arbitration Act is destroyed by
12 allowing States to do this.

13 One final note is this. This Court will read
14 the Chor decision. The Chor decision, one can read it
15 from the front end to the back end, and the majority
16 doesn't even mention the notice statute, so the
17 supposition that my opponent supposes that this law,
18 technical noncompliance doesn't make sense.

19 CHIEF JUSTICE REHNQUIST: Thank you,
20 Mr. Kravitz.

21 MR. KRAVITZ: Thank you.

22 CHIEF JUSTICE REHNQUIST: The case is submitted.

23 (Whereupon, at 12:04 p.m., the case in the
24 above-entitled matter was submitted.)
25

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:

DOCTOR'S ASSOCIATES, INC. AND NICK LOMBARDI, Petitioners v. PAUL CASAROTTO, ET UX.

CASE NO: 95-559

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

BY Ann Marie Federico

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