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IN THE SUPREME COURT OF THE UNITED STATES

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HENRY SCHEIN, INC.,)

Petitioner,)

v.) No. 19-963

ARCHER AND WHITE SALES, INC.,)

Respondent.)

- - - - -

Washington, D.C.

Tuesday, December 8, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:26 a.m.

APPEARANCES:

KANNON K. SHANMUGAM, ESQUIRE, Washington, D.C.;

on behalf of the Petitioner.

DANIEL L. GEYSER, ESQUIRE, Dallas, Texas;

on behalf of the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	KANNON K. SHANMUGAM, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	DANIEL L. GEYSER, ESQ.	
7	On behalf of the Respondent	35
8	REBUTTAL ARGUMENT OF:	
9	KANNON K. SHANMUGAM, ESQ.	
10	On behalf of the Petitioner	68
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

(11:26 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 19-963, Henry Schein versus Archer and White Sales.

Mr. Shanmugam.

ORAL ARGUMENT OF KANNON K. SHANMUGAM
ON BEHALF OF THE PETITIONER

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

This case presents an important question concerning the interpretation of agreements that delegate questions of arbitrability to the arbitrator.

In its decision on remand, the court of appeals recognized that the arbitration agreements here contained a valid delegation, but it held that because the agreements also contained a carveout provision, they divided up responsibility for arbitrability between the arbitrator and the court.

The court of appeals proceeded to decide the arbitrability question for itself, thus effectively negating the delegation altogether. That reasoning cannot possibly be

1 correct, and Respondent does not seriously
2 defend it.

3 This Court should once again vacate
4 the court of appeals' judgment. To do so, the
5 Court need only apply two settled principles.
6 First, a delegation is simply an antecedent
7 agreement that is subject to the rules governing
8 arbitration agreements more generally. Second,
9 any doubts concerning the scope of arbitration
10 agreements are resolved in favor of arbitration.

11 And under that presumption, a carveout
12 provision that does not speak to who should
13 decide questions of arbitrability cannot
14 restrict the parties' delegation of those
15 questions to the arbitrator.

16 Respondent primarily focuses not on
17 the question presented but on another question,
18 whether the incorporation of arbitration rules
19 that authorize the arbitrator to resolve
20 questions of arbitrability constitutes a valid
21 delegation.

22 But the Court correctly declined to
23 add that question at the certiorari stage
24 because 12 circuits have held without conflict
25 that the incorporation of arbitration rules is

1 sufficient. That holding is plainly correct,
2 and overturning those decisions without the
3 benefit of full briefing on both sides would
4 work an avulsive change in the law.

5 The Court should stick to the question
6 it agreed to decide, and it should decide that
7 question in Petitioner's favor. The judgment of
8 the court of appeals should be vacated.

9 I welcome the Court's questions.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 When you look at the pertinent clause
13 at issue here, one thing that's clear is that
14 they did not want actions seeking injunctive
15 relief to be arbitrated. They -- they say that
16 expressly right at the outset. As soon as they
17 say any dispute, they have the carveout right
18 there. So they didn't want arbitrators dealing
19 with actions seeking injunctive relief.

20 Now, if that's the case and it was
21 important enough for -- for them to spell it out
22 right at the outset, wouldn't the last thing
23 you'd think they would want is for an arbitrator
24 to decide which disputes qualify?

25 I mean, that would seem to follow a

1 fortiori. They don't want arbitrators deciding
2 this. Why would they want arbitrators to decide
3 who gets to decide it?

4 MR. SHANMUGAM: Mr. Chief Justice, I
5 agree with you that the carveout provision
6 plainly carves out actions seeking injunctive
7 relief from the scope of the arbitration
8 agreement.

9 But the question we're talking about
10 this morning is a different one. It's whether
11 they intended to carve out disputes about who
12 decides whether something falls within the
13 carveout --

14 CHIEF JUSTICE ROBERTS: No, no, that
15 was my precise question. If they don't want
16 arbitrators around injunctive actions, why would
17 they want arbitrators to decide who gets to
18 decide that?

19 MR. SHANMUGAM: Well, I think that
20 that's because it is highly unlikely that
21 parties would ever want to divide up
22 responsibility for arbitrability.

23 After all, the whole point of a
24 delegation is to resolve the who decides
25 question. It's to streamline the process by

1 having the arbitrator decide the scope of the
2 arbitration agreement.

3 And I think that the court of appeals'
4 opinion in this case well illustrates the
5 problem here because the court of appeals,
6 having said that the plain language of the
7 agreement divided up responsibility for
8 arbitrability, proceeded itself to resolve that
9 very arbitrability question.

10 CHIEF JUSTICE ROBERTS: Well, but they
11 divided up -- they divided up the universe of
12 actions here between some that will be
13 arbitrated and some that won't be. And I don't
14 know why you'd have such a presumption against
15 doing the same with respect to arbitrability.

16 MR. SHANMUGAM: Because arbitrability
17 is different, Mr. Chief Justice. It's the
18 question of who decides. And where you have a
19 dispute, it would be very strange to say that
20 the question of who decides is itself divided
21 because somebody would have to resolve that
22 doubly antecedent question.

23 And I would be content to argue that
24 our reading is the better reading of the
25 agreement as a matter of common sense, but our

1 submission here is simple. It's that the
2 presumption of arbitrability should apply, and
3 the court of appeals erred by failing to apply
4 it here as a matter of federal law.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas.

8 JUSTICE THOMAS: Thank you, Mr. Chief
9 Justice.

10 Mr. Shanmugam, the -- it sounds as
11 though you think this is -- that the delegation
12 of arbitrability is -- is all or nothing. How
13 would you draft this provision so that it can
14 divide the ability to -- the authority to
15 arbitrate?

16 MR. SHANMUGAM: Justice Thomas, we
17 don't think it's all or nothing, though, again,
18 we think it is highly unlikely that the parties
19 would want to divide up responsibility.

20 But suppose that you had a provision
21 much like the provision at page 27 of
22 Respondent's brief that said something along the
23 lines of except for an action seeking injunctive
24 relief, the arbitrator shall decide whether the
25 parties' dispute is subject to arbitration.

1 There, the carveout clearly and
2 unambiguously would operate on the question of
3 arbitrability. But we'd still be left with the
4 problem that I was just discussing with the
5 Chief Justice. In that circumstance, someone
6 would still have to decide whether the action
7 is, in fact, an action seeking injunctive
8 relief. Someone would have to decide where
9 there is a dispute over whether the arbitrator
10 or the court should decide arbitrability.

11 And, again, the court of appeals'
12 decision well illustrates the problem because,
13 having held that the parties divided up
14 responsibility, the court of appeals proceeded
15 to decide the question of who decides for itself
16 and thus effectively negated the delegation
17 altogether.

18 JUSTICE THOMAS: Could you just give
19 me -- help me with the delegation language in
20 this contract, this arbitration agreement.

21 Where is it? I don't see the word
22 "delegation" at all or a verb "delegate" at all.
23 Would you walk me through that?

24 MR. SHANMUGAM: Sure. And, Justice
25 Thomas, this goes to the question that

1 Respondent is seeking to insert into the case,
2 but I'm happy to address the merits of it
3 directly.

4 The question is whether the
5 incorporation of arbitration rules that
6 authorize the arbitrator to resolve questions of
7 arbitrability constitutes a valid delegation.
8 Here, the incorporation is the reference to the
9 arbitration rules of the American Arbitration
10 Association. That's quite common in agreements
11 between sophisticated commercial parties like
12 the parties here. And among the relevant rules
13 is Rule 7A, which authorizes the arbitrator to
14 make that determination.

15 And this Court has never required
16 magic words on the face of the agreement.
17 Instead, all that the Court has said is that you
18 have to have clear and unmistakable evidence.

19 And under ordinary objective
20 principles of contract formation, the
21 incorporation of a document suffices in order to
22 render that document part of the contract.

23 JUSTICE THOMAS: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Breyer.

1 JUSTICE BREYER: The experience of
2 arbitration in the labor area for this question,
3 I assume that George Burton's brief makes a big
4 argument about the AAA, and -- but I won't
5 accept that for purposes of this question.

6 Assume there is clear and unmistakable
7 evidence of delegating the arbitration matter to
8 the arbitrator in general, okay? You've got the
9 assumption?

10 MR. SHANMUGAM: Sure.

11 JUSTICE BREYER: Now I also think that
12 First Options rests heavily and basically
13 repeats AT&T, so I've read AT&T about five
14 times. What it seems to say is, if you have a
15 question, parties, or one of them, whether this
16 dispute falls under the terms of the contract
17 that have arbitration for 1 -- paragraphs 1
18 through 7 or is rather a Section 10 dispute,
19 where there is no arbitration clearly, you don't
20 know if it's a Section 8 or a Section 10, well,
21 what happens?

22 What AT&T says is, but that is a
23 question of arbitrability. It is a question
24 whether this dispute is arbitrable. So it's for
25 the judge.

1 But where there is an arbitration
2 clause in the contract, as there was in First
3 Options as far as the owners knew, but where
4 there is a -- where there is an arbitration
5 clause, then there is a presumption of
6 arbitrability. All right?

7 So that seems to me, Judge, you
8 decide. You decide whether this particular
9 dispute is sent to an arbitrator or -- or for
10 the court, i.e., is it arbitrable, you decide,
11 Judge, but if there's an arbitration clause in
12 the contract, you decide with the presumption of
13 arbitrability that it will normally be
14 arbitrable. That's what it seems to say.

15 And so the judge was right to decide
16 it below, but he didn't decide it right because
17 he should have given it a presumption of
18 arbitrability.

19 Now that's how I read those two cases,
20 but also in the back of my mind is what in
21 heaven's name happens in labor arbitration. In
22 the ordinary labor arbitration case -- and
23 that's where all this law comes from -- where --
24 one party, the labor union, says this is a
25 Section 8 agreement, arbitrate it. No, says the

1 employer. It is a Section 10 kind of situation
2 grievance and, therefore, it falls within the
3 exception, don't arbitrate it.

4 How do they decide that? The scope --
5 see, that's like the scope of the -- of the
6 arbitration clause in the -- in -- in the
7 agreement. Do -- do you see what -- did you
8 follow that?

9 MR. SHANMUGAM: I -- I did, Justice
10 Breyer, and let me attempt to answer it very
11 briefly, and I'll make two points.

12 The first is that the First Options
13 rule, with which I know you are well familiar,
14 does come from the labor context, but I think it
15 operates in the same way. And I think --

16 JUSTICE BREYER: Yes.

17 MR. SHANMUGAM: -- it's easiest to
18 understand this conceptually if you think about
19 the delegation as a kind of miniature contract
20 formation, in other words, was there a meeting
21 of the minds that the arbitrator should decide
22 questions concerning the scope of the
23 arbitration agreement, and that's precisely why
24 we think an incorporation is sufficient because,
25 under ordinary principles of contract formation,

1 that is enough.

2 And then, once you have that clear
3 evidence, the presumption flips to the normal
4 presumption because you treat the delegation
5 like an arbitration agreement, you apply the
6 presumption of arbitrability.

7 JUSTICE BREYER: Absolutely.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 JUSTICE BREYER: But who does that,
11 the judge or the arbitrator?

12 MR. SHANMUGAM: If there's a
13 delegation, it's for the arbitrator to make the
14 determination --

15 JUSTICE BREYER: Where have you got
16 any --

17 MR. SHANMUGAM: -- per the agreement.

18 JUSTICE BREYER: -- where have you got
19 the precedent for that? Because, when I read
20 the five paragraphs in -- on -- in AT&T, it
21 seemed to say, yes, that's the rule you apply,
22 but the judge should apply it because it's a
23 question of arbitrability.

24 MR. SHANMUGAM: Then, of course --

25 CHIEF JUSTICE ROBERTS: Very brief --

1 briefly, counsel.

2 MR. SHANMUGAM: If you don't have a
3 delegation, then, of course, it's a question for
4 the court to decide.

5 CHIEF JUSTICE ROBERTS: Justice Alito.

6 JUSTICE ALITO: Oh, what do you
7 understand to be the basis for the presumption
8 of arbitrability? It was recognized, I think,
9 the first time in *Moses Cohen*, and the Court
10 said that it was based on the federal policy
11 favoring arbitration, and it cited Section 2 of
12 the Federal Arbitration Act.

13 But the Federal Arbitration, Section
14 2, we have also said, requires equal treatment
15 of arbitration contracts and other contracts.
16 So what -- what is the basis for saying that
17 there is this federal policy that produces the
18 presumption that you rely on?

19 MR. SHANMUGAM: It's a good question,
20 Justice Alito, and I'm not sure that the Court
21 has ever spoken to it, so let me offer a
22 potential explanation.

23 As you rightly point out, this Court
24 has repeatedly said that Section 2 of the
25 Arbitration Act, along with other sections,

1 establishes the principle that arbitration
2 agreements should be enforced according to their
3 terms.

4 But I think this Court has also
5 recognized the presumption in favor of
6 arbitration as flowing from the policy
7 underlying the Arbitration Act as a whole.

8 And that presumption, in turn, to pick
9 up where Justice Breyer left off, seems to come
10 from the labor context, where, of course, under
11 federal law, you have the -- the Labor
12 Arbitration Act, and you have in that Act, in
13 the NLRA, a -- a -- a recognition that federal
14 courts can recognize federal common law.

15 So I think, if I were pressed, I would
16 say it's probably ultimately a matter of federal
17 common law, but it also appears to flow from the
18 terms in the -- and -- and the structure of the
19 statutes themselves.

20 JUSTICE ALITO: Okay. And very, very
21 quickly, I have basically the same question as
22 the Chief Justice. This case comes to us in a
23 rather artificial posture, so we're required to
24 assume that the contract incorporates -- that
25 the contract provides for the arbitration of the

1 who decides question across the board.

2 And, of course, if that's true, then
3 the answer to the question that we're supposed
4 to decide is foreordained, but if we put -- but
5 isn't that artificial? When you have a carveout
6 and the parties have taken pains to say this
7 subject, we don't want the arbitrator to have
8 anything to do with this subject, we want the
9 judge to decide this because the judge -- we
10 want -- this is something that needs to be
11 decided in accordance with the law, and we know
12 that arbitrators have a lot more leeway in
13 interpreting -- in interpreting contracts.

14 Isn't that relevant to the question of
15 the scope of the -- of the delegation of the --
16 the power to decide who decides?

17 MR. SHANMUGAM: That is the very
18 question before the Court. And, very briefly,
19 Justice Alito, our interpretation makes complete
20 sense because, under our interpretation, the
21 carveout operates as only a carveout from the
22 scope of the arbitration agreement. It gives
23 the Court the power to enter preliminary
24 injunctive relief pending an arbitration.

25 But the question of who decides is a

1 discrete one, and it wouldn't make any sense for
2 the parties to carve out from that, absent a
3 clear indication to that effect.

4 JUSTICE ALITO: All right. Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Sotomayor.

7 JUSTICE SOTOMAYOR: Counsel, you make
8 much of the fact that we didn't grant cert on
9 the cross-petition. But, in your opposition to
10 the cross-petition and even in your reply on the
11 merits, you say we can reach the issue.

12 In fact, you admitted in your
13 cross-petition that we could affirm on
14 alternative grounds and that it was incorporated
15 and you encouraged us not to grant it.

16 So I don't understand how you can tell
17 us that we have to assume there was a clear
18 delegation of both the exception and all other
19 disputes. So sort of educate me as to, having
20 said we could, why you're saying we can't now.

21 MR. SHANMUGAM: Justice Sotomayor,
22 you, of course, could decide the incorporation
23 question, and I don't think we've ever disputed
24 that.

25 Our submission today, as in our

1 earlier brief, is simply that the Court
2 shouldn't. And, very briefly, to go back to
3 what we said at the cert stage, we said that a
4 cross-petition was unnecessary, but then we
5 proceeded to devote, I believe, six pages of our
6 opposition to the cross-petition in explaining
7 why the Court shouldn't add the incorporation
8 question to our cert petition --

9 JUSTICE SOTOMAYOR: All right.
10 Counsel --

11 MR. SHANMUGAM: -- namely, because
12 there was not a circuit conflict.

13 JUSTICE SOTOMAYOR: All right. May I
14 just ask a question? First Options makes it
15 very clear that we have to have a clear
16 delegation.

17 But I think what the court below said
18 was what is unclear is whether the form of the
19 delegation here was intended to be included in
20 that arbitrability section. There's a very
21 limited holding saying where a party says I will
22 -- I will arbitrate all disputes except a
23 particular one, the issue is whether a
24 particular one was delegated to the arbitrator
25 in the following arbitration agreement.

1 It seems pretty logical, not a -- a --
2 not an argument that the court below adopted.
3 It doesn't seem to be irrational or even
4 nonsensical. It seems -- it seems fairly
5 natural to me.

6 MR. SHANMUGAM: Justice Sotomayor --

7 JUSTICE SOTOMAYOR: So, if I believe
8 -- if I believe there's ambiguity in what was
9 intended to be delegated or not, how do I rule
10 in your favor?

11 MR. SHANMUGAM: Because of the
12 presumption of arbitrability. And that is where
13 the court of appeals went wrong. The court of
14 appeals did think that the scope of the
15 delegation was unclear.

16 But, once you have a delegation, this
17 Court's decisions make clear that you treat that
18 like an arbitration agreement, and at that
19 point, you have to apply the presumption of
20 arbitrability.

21 JUSTICE SOTOMAYOR: Thank you,
22 counsel.

23 CHIEF JUSTICE ROBERTS: Justice Kagan.

24 JUSTICE KAGAN: Mr. Shanmugam, you
25 acknowledged, I think to the Chief Justice, that

1 however likely or unlikely you think it might
2 be, however logically flawed or completely
3 natural you think it might be, that parties can
4 divide up arbitrability questions and give some
5 to judges and some to arbitrators. Is that
6 right?

7 MR. SHANMUGAM: Yes, though I -- if I
8 could say one thing?

9 JUSTICE KAGAN: It's just a yes or no.

10 MR. SHANMUGAM: The answer is --

11 JUSTICE KAGAN: So let's assume that
12 -- the following: Let's assume a provision that
13 says except for actions seeking injunctive
14 relief, we, the parties, agree that we'll,
15 number one, arbitrate any dispute arising under
16 this agreement and, number two, that the
17 arbitrator will decide all questions of
18 arbitrability.

19 Now wouldn't it be clear on its face
20 of that that the parties had given questions of
21 arbitrability to the courts in actions seeking
22 injunctive relief?

23 MR. SHANMUGAM: I -- I think that
24 that's a closer question because of the way that
25 you've modified the provision, because --

1 JUSTICE KAGAN: I don't think I've
2 modified the provision at all. I mean, I
3 basically turned the reference to the AAA rules
4 into a delegation, which is what you want me to
5 do. And then I suggested that the reading of
6 this provision -- that the "except" clause
7 applies both to the agreement to arbitrate
8 disputes and to the delegation.

9 MR. SHANMUGAM: I -- I think you've
10 made a subtle but important change because, in
11 this provision, the relevant incorporation is
12 introduced by "in accordance with." And in our
13 view, the carveout really operates only on what
14 is subject to arbitration.

15 Now, even if you disagree with me on
16 that, I think I would be left with my point that
17 it is unlikely and it's even my view absurd to
18 think that the parties would define a carveout
19 that is coterminous both with regard to what is
20 subject to arbitration and with regard to what
21 is subject to the delegation. And I think --

22 JUSTICE KAGAN: Well, Mr. Shanmugam, I
23 think it's not absurd for exactly the reason
24 that the Chief Justice said, that once you
25 decide that certain questions should be in the

1 court, here, you know, suits involving -- that
2 certain suits should be in the court, here suits
3 seeking injunctive relief, you're not going to
4 want to go to the arbitrator to decide whether
5 suits plausibly seeking injunctive relief are,
6 in fact, that. You would just want to keep this
7 in the courts generally.

8 MR. SHANMUGAM: I think --

9 JUSTICE KAGAN: So there's nothing
10 unnatural or logically flawed to say, look, if
11 you have something which at least arguably seeks
12 injunctive relief, the court should deal with
13 the question of whether it does and then should
14 go on to decide the issue.

15 MR. SHANMUGAM: Justice Kagan, you
16 could say the same thing regardless of whether
17 an arbitration agreement contains a carveout.
18 And so suppose you had this very provision
19 without a carveout. Any dispute arising under
20 this agreement shall be resolved by arbitration
21 in accordance with the AAA rules.

22 If you have a dispute about whether
23 something is, in fact, arising under the
24 agreement, in our view, that should go to the
25 arbitrator by virtue of the incorporation.

1 The mere fact that --

2 JUSTICE KAGAN: Thank you,
3 Mr. Shanmugam.

4 CHIEF JUSTICE ROBERTS: Justice
5 Gorsuch.

6 JUSTICE GORSUCH: Mr. Shanmugam, I'd
7 like to return to the line of questions Justice
8 Alito was pursuing, and that is the -- the
9 presumption in favor of arbitration and the
10 exception for clear and unmistakable delegations
11 of arbitrability.

12 These presumptions that we recognized
13 in our case law you indicated had both a
14 statutory and a common law basis. I'm -- I -- I
15 -- I want to understand your statutory argument
16 better because, for the moment, assume I'm --
17 I'm going to put the common law ones aside.

18 You pointed us to Section 2, but
19 Section 2 seems to suggest we follow normal
20 contract rules in trying to discern the parties'
21 intentions. What am I missing?

22 MR. SHANMUGAM: I don't think you're
23 missing anything, Justice Gorsuch, because I
24 really do think that the Court has never spoken
25 to this.

1 But I think, quite frankly, that the
2 origins of what we refer to as the First Options
3 presumption, but it really originates in the
4 Court's labor cases, are -- are -- are, frankly,
5 somewhat more nebulous. If you trace that back,
6 it really traces back to a footnote in one of
7 the Steelworkers cases that, in turn, relies on
8 a law review article written by Dean Cox.

9 Now there's no better person to have
10 write a law review article than Dean Cox, but,
11 ultimately, I think that that presumption just
12 rests on a -- an empirical presumption that
13 parties often don't focus on arbitrability.

14 I think, by contrast, the presumption
15 in favor of arbitration is a venerable one often
16 reaffirmed and applied by this Court, and it's
17 one that applies across the board. And, again,
18 it simply reflects the strong federal policy in
19 favor of arbitration.

20 JUSTICE GORSUCH: I -- I -- I -- I'm
21 still waiting for a statutory argument, though.
22 I get that there are venerable law review
23 articles and -- and lots of statements in our
24 cases, but is there indeed any statutory basis
25 for any of these?

1 MR. SHANMUGAM: Well, I -- I -- I
2 think I can't do really much better than
3 Section 2. And as I acknowledged earlier, I
4 think that there is, you know, some tension
5 between the principle that applies according to
6 its terms and the presumption in favor of
7 arbitration.

8 My point, Justice Gorsuch, is simply
9 that all that the Court needs to do in this case
10 is to apply the presumption in favor of
11 arbitration to the delegation to rule in our
12 favor. And what the Court shouldn't do is what
13 Respondent suggests, which is to extend the
14 First Options presumption beyond the context of
15 whether or not there is a delegation to the
16 scope of the delegation.

17 The latter is a question of contract
18 interpretation, and it should be governed by
19 whatever the general rules are that govern the
20 interpretation of arbitration agreements.

21 JUSTICE GORSUCH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh.

24 JUSTICE KAVANAUGH: Thank you, Chief
25 Justice.

1 Good morning, Mr. Shanmugam. I want
2 to make sure I have the roadmap clear here with
3 you. The premise of the case as you're
4 presenting it to us is that this contract
5 language expressly delegates the question of
6 arbitrability to the arbitrator, correct?

7 MR. SHANMUGAM: Yes, that's right. Or
8 by incorporation, to be sure, but that's right.

9 JUSTICE KAVANAUGH: Yeah, by
10 incorporation. And you -- you say if we want to
11 figure out whether the AAA rules actually are an
12 express delegation, we should grant cert on that
13 question at some point and decide that, but, for
14 here, we can assume express delegation, correct?

15 MR. SHANMUGAM: Correct.

16 JUSTICE KAVANAUGH: Okay. And then
17 your point is that the Fifth Circuit -- I think
18 this is your argument -- confused the question
19 of -- of arbitrability, namely, what subjects
20 are decided by an arbitrator and what subjects
21 are decided by a court -- confused that question
22 with the question of who decides arbitrability,
23 is that right?

24 MR. SHANMUGAM: Yes, also correct.

25 JUSTICE KAVANAUGH: Okay. And then,

1 in the real world -- I want to pick up on some
2 of Justice Kagan's questions -- kind of
3 real-world, how people draft these contracts,
4 what they expect, my understanding was that the
5 question of who decides arbitrability, the who
6 decides question, is almost never divided
7 between a court and an arbitrator because that
8 would be almost nonsensical in the real world
9 because you need one person to decide, and it's
10 either going to be the court or the arbitrator,
11 not both the court and the arbitrator.

12 Is that correct?

13 MR. SHANMUGAM: That's correct. And
14 I'm aware of no examples of such a division.

15 JUSTICE KAVANAUGH: Right. Nor am I.
16 Okay. And then, in considering the
17 effect of a carveout, I guess that would apply,
18 as -- as I understand it, to every arbitration
19 contract or virtually every arbitration contract
20 because every arbitration contract specifies
21 either limits or has carveouts.

22 And so, if that alone means the Court
23 decides what is arbitrable, then the Court will
24 always decide arbitrability and really eradicate
25 the idea that arbitrators can ever decide

1 arbitrability. Is that accurate, or am I
2 missing something?

3 MR. SHANMUGAM: Yes, that's correct.
4 And that gets to the point that I made in
5 response to Justice Kagan.

6 If you take a look at page 119 of the
7 Joint Appendix, you'll see the AAA's model
8 arbitration clause, and that provision is very
9 similar to the provision at issue here except
10 that it lacks the "except for" language.

11 And as I indicated, you would have
12 exactly the same question when you have a
13 dispute about whether a claim is, in fact,
14 arising under the contract or out of the
15 contract.

16 JUSTICE KAVANAUGH: Right.

17 MR. SHANMUGAM: And under Respondent's
18 --

19 JUSTICE KAVANAUGH: Can I ask one last
20 question, Mr. Shanmugam?

21 MR. SHANMUGAM: Sure.

22 JUSTICE KAVANAUGH: I think this picks
23 up on maybe the premise of the Chief Justice's
24 question. What if the arbitrator does something
25 crazy and says, actually, a clause for

1 injunctive relief doesn't mean what it says or a
2 carveout for injunctive relief doesn't mean what
3 it says and I'm going to have an injunctive
4 claim decided by the arbitrator? What happens
5 then?

6 MR. SHANMUGAM: That would be subject
7 to very limited judicial review under the
8 Federal Arbitration Act and under Section 10,
9 but, of course, that's just by virtue of the
10 operation of the Arbitration Act that that
11 review is so limited.

12 JUSTICE KAVANAUGH: But there is
13 judicial review at least of some sort if that
14 happened?

15 MR. SHANMUGAM: It -- it -- it -- I
16 think most courts of appeals have said that
17 there would be under those circumstances.

18 JUSTICE KAVANAUGH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett.

21 JUSTICE BARRETT: Mr. Shanmugam, I
22 really just have one question and it goes to
23 the -- the premise of your argument, which is
24 that there was a clear and unmistakable
25 delegation of all questions of arbitrability in

1 the first place, because, you know, basically,
2 as I understand it, your argument is, given that
3 clear and unmistakable delegation, the
4 presumption was flipped, and so the Fifth
5 Circuit was wrong to read this carveout as a
6 carveout from arbitrability as well as to the --
7 the what in the subject matter of the dispute.

8 Let's say that we're not going to
9 address the question on which we denied cert,
10 which is, you know, whether reference to the AAA
11 rules suffices to be that clear and unmistakable
12 arbitrability -- delegation of arbitrability.

13 Here, as you point out, this carveout,
14 you -- you say that it would be nonsensical --
15 even though parties can do it because they can
16 contract and agree to what they want to, that it
17 would be nonsense -- nonsensical to carve up
18 arbitrability questions.

19 If that's true, why isn't that reason
20 to interpret this clause as not being a clear
21 and unmistakable delegation of all questions of
22 arbitrability? I mean, is just the invocation
23 of the AAA rules enough given the inclusion of
24 what you say would be a pretty odd -- pretty odd
25 language?

1 MR. SHANMUGAM: Justice Barrett, I --
2 I -- I think the problem with that argument is
3 that the agreement incorporates by its terms all
4 of the AAA rules, not just some of them, as
5 Respondent suggests. And so the carveout would,
6 at most, limit the substantive scope of any
7 delegation.

8 And I -- I -- I -- I want to make one
9 further point about the relationship between
10 these two questions because I think a number of
11 the questions this morning have touched on this.

12 Even Respondent concedes that the
13 incorporation question is discrete from the
14 carveout question. Indeed, in an earlier filing
15 in response to our stay motion, Respondent said
16 that the Court need not reach the incorporation
17 question in order to resolve the carveout
18 question.

19 So I do think that it is appropriate
20 for the Court to assume, as 12 circuits without
21 conflict have held, that --

22 JUSTICE BARRETT: But let me interrupt
23 you just for one second, Mr. Shanmugam. Is it
24 enough just to incorporate and invoke the AAA
25 rules? Does that in and of itself constitute a

1 clear and unmistakable delegation no matter what
2 else the provision may say?

3 MR. SHANMUGAM: I -- I -- I think that
4 it is enough for there to be a delegation by
5 virtue of Rule 7A.

6 As a matter of contract formation,
7 there is an agreement to arbitrate
8 arbitrability. At that point, Justice Barrett,
9 everything else that we're talking about is a
10 question of interpretation. It's a question of
11 the scope of the delegation. And this Court in
12 Rent-A-Center and its earlier decision in this
13 case said that at that point, the rules
14 applicable to arbitration agreements and the
15 interpretation of arbitration agreements apply.

16 The court of appeals' legal error here
17 was in failing to apply the presumption of
18 arbitrability.

19 JUSTICE BARRETT: Thank you.

20 CHIEF JUSTICE ROBERTS: A minute to
21 wrap up, Mr. Shanmugam.

22 MR. SHANMUGAM: Thank you, Mr. Chief
23 Justice.

24 This is an unusual case because
25 Respondent makes no real effort to defend the

1 reasoning of the court of appeals in the
2 decision below.

3 Instead, Respondent is really asking
4 the Court to decide this case based on a
5 different question, the incorporation question.
6 And that would be a bold strategy in any case,
7 but I would submit it's a particularly bold
8 strategy here because Respondent asked the Court
9 to decide that question at the cert stage, and
10 the Court seemingly consciously made the
11 decision not to add it.

12 Now that question in our view doesn't
13 warrant the Court's review and it doesn't
14 warrant the Court addressing it here in light of
15 the overwhelming consensus of the lower courts
16 on that question.

17 But, if the Court were to reach that
18 question anyway and to reject the consensus
19 view, it would have dramatic consequences for
20 innumerable commercial contracts that are worded
21 much like the contracts here.

22 All that the Court need do in this
23 case is to hold that the court of appeals'
24 actual reasoning is inconsistent with this
25 Court's decisions applying familiar Federal

1 Arbitration Act principles, and for that reason,
2 the court of appeals' judgment should be
3 vacated.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Geysler.

7 ORAL ARGUMENT OF DANIEL L. GEYSER

8 ON BEHALF OF THE RESPONDENT

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

11 The arbitration clause here does not
12 delegate any gateway questions to the
13 arbitrator, and even if it did, the parties'
14 contract clearly exempts this dispute from the
15 scope of any delegation. Petitioner's contrary
16 contention is incompatible with the FAA, this
17 Court's authority, the agreement's plain
18 language, and simple common sense.

19 We submit that the Court should affirm
20 for two independent reasons. First, the mere
21 incorporation of the AAA rules is not clear and
22 unmistakable evidence that the parties agreed to
23 arbitrate arbitrability.

24 This Court applies an interpretive
25 rule based on reasonable assumptions about the

1 parties' likely intent and presumed
2 expectations. Yet the arbitration clause here
3 is silent on delegation. It does not utter one
4 syllable about it.

5 Anyone actually aware of this arcane
6 issue would address the subject expressly on the
7 face of the agreement. And that is especially
8 so against the backdrop of this Court's
9 heightened standard and how easy it is to
10 address the question directly.

11 It is simply not plausible that anyone
12 would recognize this issue and choose to resolve
13 it by relying on an oblique reference to the AAA
14 rules rather than a simple, explicit sentence
15 delegating the gateway issue.

16 Second, even if there is a delegation
17 clause, it does not reach this dispute.
18 Petitioner says the delegation is hidden in the
19 AAA rules, but those rules do not even apply
20 unless the action falls within the category of
21 disputes subject to arbitration.

22 If an action falls within the
23 carveout, then it is not subject to arbitration
24 and it is not subject to arbitration under the
25 AAA rules.

1 It makes no difference what those
2 rules say because the condition for activating
3 them is unmet. Once the contract is read to
4 mean what it so plainly says, all the confusion
5 disappears. It provides for arbitration
6 generally, it exempts certain types of actions
7 from arbitration, and it requires that any
8 arbitration be conducted under the AAA rules.

9 The only reason Petitioner finds this
10 simple language bizarre, confusing, or circular
11 is because Petitioner is trying to smuggle in a
12 delegation clause where it so plainly does not
13 exist.

14 CHIEF JUSTICE ROBERTS: Counsel, I
15 think the most important question for you is a
16 challenge that your -- your friend on the other
17 side has really laid down clearly and was the
18 one that Justice Kavanaugh was -- was talking
19 about.

20 How do you distinguish a situation we
21 call the run-of-the-mill situation where there
22 is no express carveout? Just say that the
23 agreement applies to all labor disputes within
24 the factory, and there's a storage facility
25 right next door where they keep things that are

1 used in the factory, but they also keep other
2 stuff, and the union says we want to arbitrate a
3 dispute about that building, and the factory
4 owner comes in and says, no, no, that's not
5 within the arbitration agreement, that's not
6 part of the fact -- of the factory.

7 Now why isn't that analyzed the same
8 way you analyze your contract and say, well,
9 that's a question of arbitrability, and that
10 should be decided by a court? What makes that
11 situation different?

12 MR. GEYSER: Well, I -- I -- I think
13 that what would make it different is if there is
14 an express delegation provision. And, normally,
15 when parties include an express delegation
16 provision, it's unconditional and it's
17 categorical. It's not like what you have here.

18 And if parties are simply referencing
19 the AAA rules, they're presume -- presumably
20 doing that or --

21 CHIEF JUSTICE ROBERTS: I -- I wish
22 you'd just leave the AAA rules out of it. I
23 think that's what we tried to do when we denied
24 cert on that question.

25 It -- it -- it's just -- I mean, the

1 argument on the other side is that the issue
2 that you're trying to elevate outside the normal
3 situation comes up all the time, because
4 arbitrators are always deciding whether
5 something is within the scope of -- of
6 arbitration or not and that that issue has never
7 been treated as a question of who decides.

8 But why is your case different?

9 MR. GEYSER: Well, I -- no, Your
10 Honor, I think that that typically is a question
11 of -- of arbitrability, and -- and the default
12 is that the court decides that issue.

13 The only time an arbitrator decides
14 whether a dispute falls within the scope of the
15 agreement is if there is, in fact, a delegation
16 provision. If -- if there is one and -- then
17 the question becomes did the parties expressly
18 carve out certain disputes from the delegation
19 or from the scope of arbitration.

20 We absolutely concede that if the
21 exception is limited solely to the scope of
22 arbitration and there is a separate
23 unconditional delegation provision, that the
24 arbitrator gets to make that determination.

25 The problem here is that my -- my

1 friend's reading is profoundly atextual. If, in
2 fact, the delegation is in the AAA rules and the
3 -- the sentence says on its face that some
4 disputes but not others, those seeking
5 injunctive relief, are subject to arbitration
6 under the AAA rules.

7 If this is one of the other disputes,
8 then it's not subject to arbitration and it's
9 not subject to the AAA rules, and the court gets
10 to make that -- that predicate determination.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Thomas.

14 JUSTICE THOMAS: Thank you, Mr. Chief
15 Justice.

16 Counsel, let's assume an express
17 delegation here. Would you be able to make the
18 same argument if there were an express
19 delegation?

20 MR. GEYSER: If -- it depends on what
21 that express delegation is. If there --

22 JUSTICE THOMAS: Well, let's just take
23 the AAA. Of course, we're not arguing about
24 that, but basically the same thing, except that
25 you use the term "expressly" dealt -- expressly

1 delegates the authority to the arbitrator
2 pursuant to the rules set out in AAA.

3 MR. GEYSER: Sure, Your Honor. And I
4 don't mean to quibble, but I -- but I do think
5 the phrasing matters. If it says that any
6 dispute shall be resolved by binding arbitration
7 and the arbitrator decides arbitrability, then
8 -- then, in fact, the arbitrator gets to decide
9 it, but if you have the exceptions that are
10 listed here, so it says any dispute except for
11 actions seeking injunctive relief are decided by
12 arbitration under the AAA rules, which means the
13 arbitrator decides arbitrability, the -- the
14 clause for activating the delegation does not
15 apply because the carveout would apply to the
16 scope of the delegation.

17 It's only when the carveout is limited
18 to the scope of arbitration. And that -- that
19 really isn't so unusual because most contracts
20 with an express delegation clause -- let's say
21 you had this -- the exact contract at issue in
22 this case, but then there was the second
23 sentence that said the arbitrator shall decide
24 arbitrability.

25 In that case, we would lose because

1 there would be an express unconditional
2 delegation of the issue of arbitrability to the
3 arbitrator. The problem here is that the
4 exceptions to -- to the disputes subject to
5 arbitration and subject to the supposed
6 delegation are limited, and the carveout applies
7 to the category of disputes that otherwise would
8 be subject to a delegation.

9 JUSTICE THOMAS: So, if I understand
10 you then, you -- your argument is that -- well,
11 who determines that? Would that then be the
12 court?

13 So you -- you would actually say that
14 with respect to the carveout, the court makes
15 the determination. Well, it seems to me you're
16 taking it away from the arbitrator then.

17 MR. GEYSER: Well, Your Honor, unless
18 there's clear and unmistakable evidence that the
19 parties wanted the arbitrator to decide
20 arbitrability, then the default is with the
21 court, and the court has to first identify a
22 delegation agreement and identify any limits to
23 that delegation agreement.

24 And I don't think there's any anything
25 at all unusual about that. In fact, it reflects

1 the traditional presumption about the likely
2 expectations and intent of the parties, and it
3 reflects the plain text of -- of the Federal
4 Arbitration Act in Sections 3 and 4. Gateway
5 matters are typically resolved by the courts
6 unless the parties expressly say otherwise.

7 JUSTICE THOMAS: Well, it's still --
8 it seems it -- it's a limitation on the
9 authority of the arbitrator who in our -- which
10 seems to be that normally the arbitrator would
11 determine arbitrability -- arbitrability.

12 And, here, you're taking it away. So
13 I see what the rub is. I don't know how you can
14 have it both ways. You can say he has the
15 authority, and in these limited circumstances,
16 he doesn't.

17 MR. GEYSER: Well, Your Honor, I -- I
18 don't think so unless the Court wishes to adopt
19 a binary rule that says all delegations are all
20 or nothing, but the Court has never said that.

21 Parties are perfectly free under the
22 Federal Arbitration Act to delegate some issues
23 to arbitration and to delegate some
24 arbitrability issues to arbitration. And when
25 the parties phrase the contract the way this is

1 phrased, where they place a limit at the outset
2 on the scope of disputes that are subject to the
3 AAA rules -- this contract does not say that all
4 disputes are subject to the AAA rules, even
5 though some are not subject to arbitration.

6 CHIEF JUSTICE ROBERTS: Justice
7 Breyer.

8 JUSTICE BREYER: All right. I had a
9 hard time because of the words "arbitration,"
10 "arbitrability," it's sort of like it's hard to
11 keep all this in my mind, okay? So please
12 follow precisely.

13 Assume you're wrong about the AAA, so
14 we assume it is a clear delegation, okay?
15 Assume that.

16 MR. GEYSER: Okay.

17 JUSTICE BREYER: Now let's assume the
18 Chief Justice's example that, if, in fact, there
19 were a clause in the arbitration clause which
20 says we delegate gateway matters to the
21 arbitrator, it would be the arbitrator who
22 decided whether his second warehouse fell within
23 or outside the clause, right?

24 MR. GEYSER: That's correct, because
25 it would be --

1 JUSTICE BREYER: Okay.

2 MR. GEYSER: -- an unconditional
3 delegation.

4 JUSTICE BREYER: Okay. Okay. And in
5 doing that, the arbitrator should apply the
6 fourth rule in AT&T Technologies, namely, a
7 strong assumption in favor of arbitration,
8 right? I think that's right. All right.

9 MR. GEYSER: Well --

10 JUSTICE BREYER: Now what he's saying
11 is, your friend on the other side, look, take a
12 list of 100 disputes between employer and
13 worker. All kinds of things don't go to the
14 arbitrator.

15 Now one thing on that list of 100 is
16 who should decide the gateway matter of
17 arbitrability. And we have in this contract, it
18 is a -- there is a -- it is a contract that
19 contains an arbitration clause and that
20 arbitration clause deals with gateway matters,
21 and it sends them to the arbitrator.

22 So precisely the same way that we
23 would tell an arbitrator that you decide matters
24 of -- where you decide the warehouse is or is
25 not, use the presumption of arbitrability. If

1 the whole thing were clear, we should do the
2 same thing here, apply the presumption of
3 arbitrability on the gateway matters because
4 there is a general delegation question of
5 arbitrability to the arbitrator, a general
6 delegation of the gateway matter to the
7 arbitrator, and Section 4 says -- I mean the
8 fourth principle of AT&T says where that's so,
9 you use an assumption, a presumption, in favor,
10 in this case, of arbitrability of the gateway
11 matter.

12 Now I think that's what he's saying,
13 but I'm not 100 percent positive. If you
14 understood the question, which I hope I did,
15 what's the answer?

16 MR. GEYSER: I -- I -- I think I did
17 understand it, and I -- I -- I have two answers.
18 The -- the first is that this is not a general
19 delegation to the arbitrator because it's not
20 unconditional. It doesn't say that the AAA
21 rules apply to all disputes.

22 If this is a dispute falling within
23 the carveout, then it is not subject to the AAA
24 rules. You don't even get there. It's as if
25 you, my friend likes to say, reproduced the

1 language into the contract itself.

2 But that's not -- that's not a
3 complete answer. You would reproduce it with
4 the introductory phrase that says the following
5 paragraph shall not apply in actions seeking
6 injunctive relief. So you don't even look at
7 what that paragraph might say. You don't even
8 get to the AAA rules or any supposed delegation.

9 My second point is I think my friend's
10 attempt to flip the -- the First Options
11 standard on its head doesn't work. It's not
12 consistent with this Court's decision in
13 Rent-A-Center. Rent-A-Center made clear that
14 typically the court decides the gateway matter.

15 Now it did say that a delegation
16 clause -- a delegation agreement is treated the
17 same as any other agreement, but it dropped a
18 footnote that said except when you're deciding
19 what -- if that agreement exists and what it is.
20 And --

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Alito.

24 JUSTICE ALITO: Mr. Geyser, I want to
25 ask you for help with a problem that is not at

1 all your fault; it's our fault because we didn't
2 -- anyway, it's our responsibility -- I won't
3 say fault -- because we didn't grant the
4 cross-petition, but because we didn't grant the
5 -- the cross-petition, I want you to assume that
6 we are not going to decide the question that you
7 wanted us to decide in the cross-petition.

8 And if we make that assumption, I
9 really don't know how to answer the question
10 that we granted review on, because it does seem
11 to turn on the degree of the delegation to the
12 arbitrator of the power to decide whether the
13 arbitrator can decide.

14 If -- if I'm required to assume that
15 all of that was delegated to the arbitrator,
16 well, then the answer is clear. If I'm required
17 to assume only that part of it was delegated to
18 the arbitrator, then maybe, under First Options,
19 the answer is -- is also clear.

20 So, as I said, if -- if you just want
21 to say, look, this is your problem, not mine,
22 that's fine, but if you can help me with how I
23 could deal with this within the constraints that
24 I've outlined, that would be of assistance.

25 MR. GEYSER: Sure, Your Honor. And --

1 and the first is I -- I think it'll be very
2 difficult to intelligently decide this question
3 in anything but the most abstract and artificial
4 way without deciding whether, in fact, this is a
5 delegation provision, because you're effectively
6 taking a single sentence. You're assuming a
7 counterfactual for what half of it means.

8 My friend is now saying you should,
9 you know, construe any ambiguity in this
10 sentence in a way that's profoundly atextual in
11 order to accommodate this fictional delegation.

12 And if the Court later decides the
13 delegation question and determines, in fact, as
14 -- as I think we've shown, that this is not a
15 clear and unmistakable delegation, they would
16 have to overrule this -- this case if you go
17 against us.

18 So I -- I do think it's very
19 difficult. You could dismiss the case as
20 improvidently granted. You could request
21 additional briefing, though I do think the
22 question is fully briefed.

23 But, with all that aside, I still
24 think that we can prevail in this case by simply
25 following the absolute plain, unambiguous

1 language of what this contract says.

2 I think that my friend's contention is
3 that the case should come on the presumption
4 that incorporating the AAA rules is a Delegation
5 Clause. It's like a term of art.

6 Now I think that's wrong for lots of
7 reasons. But, if it is a term of art, the term
8 of art does not apply here to any disputes
9 falling within the carveout.

10 And so, once the Court construes this
11 agreement to mean just what it says on its face,
12 some disputes are subject to the -- are subject
13 to the AAA rules, but other disputes, those
14 following in the parenthetical, are not. And if
15 they're not subject to the AAA rules, they're
16 not subject to any delegation. And that's just
17 a plain text reading of this agreement with or
18 without any presumptions.

19 And I think it's the -- the most
20 straightforward way to affirm in this case.

21 JUSTICE ALITO: All right. Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor.

24 JUSTICE SOTOMAYOR: I've -- counsel,
25 I've been confused because -- perhaps it's

1 because, as you should, you should give us a lot
2 of alternative ways for you to win. But I would
3 like to break them down to understand them
4 better.

5 It seemed to me as I read your brief
6 that you were taking the position that
7 incorporating a set of arbitration rules can
8 never amount to a clear and unmistakable
9 delegation. Is that your position?

10 MR. SHANMUGAM: Our position is that
11 the -- the mere use of this text is
12 insufficient. Now parties could establish
13 through extrinsic evidence, for example, that
14 you have two arbitration scholars. This is
15 their fifth agreement. They always use this
16 language. They always should be involved.

17 JUSTICE SOTOMAYOR: All right. So
18 let's -- let's -- are you saying that this
19 particular AA language is insufficient --

20 MR. GEYSER: We're -- we're saying
21 that --

22 JUSTICE SOTOMAYOR: -- or are you --

23 MR. GEYSER: I'm sorry.

24 JUSTICE SOTOMAYOR: Let me -- stop.
25 Let me finish, that this particular set of AAA

1 language is insufficient or that you can never
2 incorporate an abundantly clear language like
3 the JAMS rules?

4 I think they say arbitrability
5 disputes shall be submitted to and ruled on by
6 the arbitrator. That seems pretty -- as direct
7 as you could get.

8 MR. GEYSER: Your Honor --

9 JUSTICE SOTOMAYOR: If that was part
10 of -- if that was the AA rule, for example, are
11 you saying that that itself would not be clear
12 enough?

13 MR. GEYSER: We are saying that this
14 linguistic formulation is not sufficiently clear
15 because the reason parties would predominantly
16 include this language is for an independent and
17 obvious reason, to set the ground rules for the
18 arbitration. Our --

19 JUSTICE SOTOMAYOR: I still don't
20 think -- counsel, please just answer my
21 question. I gave you a clearer statement.

22 If that was the rule, could you never
23 incorporate it?

24 MR. GEYSER: Not using this language,
25 Your Honor. This language --

1 JUSTICE SOTOMAYOR: Not using --

2 MR. GEYSER: -- in itself --

3 JUSTICE SOTOMAYOR: -- not using the
4 exception language, that's what you're saying?

5 MR. GEYSER: Without just merely
6 referencing the -- the rule, if you replaced
7 arbitration rules of the AAA here with
8 arbitration rules of JAMS, it would still be
9 insufficiently clear and unmistakable.

10 JUSTICE SOTOMAYOR: Okay, because of
11 the exception. Then I did understand you right.

12 I -- I understand the argument. I'm
13 not sure it gets you where you want to be for
14 all the reasons that my colleagues have said,
15 that where someone clearly has set forth that
16 scope of arbitration, which is the AAA rule,
17 it's up to the arbitrator, then I don't see why
18 we shouldn't honor that explicit request.

19 MR. GEYSER: Well, Your Honor, first,
20 here, all we know from the parties is that they
21 were referencing the rules for the independent
22 purpose of having -- knowing where to show up
23 for the arbitration and who to pay.

24 There's no indication that the parties
25 hid an elephant in a mouse hole and intended the

1 AAA rules themselves to supply this separate
2 contract, which is what it is, to delegate
3 arbitrability.

4 But -- but, again --

5 JUSTICE SOTOMAYOR: It does -- it does
6 seem to me that I don't see any way to avoid
7 that your position basically says, as long as --
8 that every arbitrability issue has to be decided
9 by the Court, because every single arbitration
10 agreement has limitation.

11 Almost all agreements say any disputes
12 related to this contract are -- are -- are
13 subject to arbitration. And almost inevitably,
14 a party will come in and say this dispute is not
15 related to a contract.

16 And what would you have a Court do?
17 Decide that issue and then send it to
18 arbitration, even when a contract says all
19 disputes involving arbitrability go to the
20 arbitrator?

21 CHIEF JUSTICE ROBERTS: Briefly,
22 counsel.

23 MR. GEYSER: Sure. If there is an
24 express delegation provision that's
25 unconditional, so, again, the same sentence

1 here, there's a separate sentence that says the
2 arbitrator shall decide arbitrability, then the
3 arbitrator would make those determinations.

4 But where the delegation, as here, is
5 limited, the exceptions apply to the delegation,
6 then the Court necessarily has to make that
7 determination.

8 CHIEF JUSTICE ROBERTS: Justice Kagan.

9 JUSTICE KAGAN: Mr. Geyser, I -- I'd
10 like to ask you about the Petitioner's view of
11 the presumptions here.

12 As I understand it, it goes like this:
13 First, we have a presumption that's in favor of
14 arbitration. Then we have an exception to that
15 presumption, which is the First Options rule.
16 When the matter deals with arbitrability, we
17 actually presume that the Court is supposed to
18 decide those gateway questions.

19 So, for whatever reason, we have those
20 presumptions. The Court has said many times
21 that we have those presumptions.

22 Then, as I understand what the
23 Petitioner is saying, he's saying, now let's add
24 a third presumption. The third presumption is,
25 if we see evidence of any delegation, then we

1 should assume that the parties meant to delegate
2 all arbitrability questions.

3 So, if there's any delegation of
4 arbitrability, there's complete delegation of
5 arbitrability. That's the presumption. And he
6 says that presumption should operate because it
7 wouldn't make sense to do partial delegations of
8 arbitrability. So I would like to hear what
9 your response is to that argument.

10 MR. GEYSER: Sure. I -- Your Honor, I
11 -- I don't think that that argument follows, and
12 I -- it's partly because the presumption in
13 favor of the Court deciding the gateway issue is
14 designed to keep that most important issue
15 before the Court. That's traditionally what
16 parties expect. That's what this Court has said
17 repeatedly is the likely intent of the parties.

18 It provides a critical judicial
19 safeguard, and it avoids a situation where the
20 arbitrator is deciding the scope of his or her
21 own jurisdiction.

22 And there's every reason to assume
23 that parties, again, under the Federal
24 Arbitration Act, can delegate certain issues but
25 not others to the arbitrator.

1 And knowing that the -- the strong
2 default is in favor of courts making those
3 determinations, it does not make sense to say
4 that, once there is any inkling that the parties
5 wanted something delegated, that everything is
6 delegated.

7 It makes more sense to say that,
8 unless parties clearly and unmistakably override
9 the strong presumption in favor of courts acting
10 as gatekeepers, that Congress imagined in the
11 Federal Arbitration Act, in Sections 3 and 4,
12 that, in fact, the courts keep that gateway
13 role.

14 JUSTICE KAGAN: So, you know, I mean,
15 on its face, it seems as though if you delegate
16 -- if -- if you -- if you say the courts should
17 deal with the existence of a delegation, then
18 the court should also deal with the breadth of
19 the -- the delegation.

20 But I think he thinks that the problem
21 is, if you give that question to the court, you
22 force the court to decide what is arbitrable
23 before decide -- before the court decides who
24 gets to decide that issue.

25 MR. GEYSER: Your Honor, the only time

1 that's true is where the parties have drafted
2 the agreement in that fashion. But, again, the
3 only reason that seems unusual here is because
4 we're dealing with smuggling in a delegation
5 where it doesn't actually belong. The parties
6 didn't contemplate it.

7 JUSTICE KAGAN: But assuming --
8 assuming as -- as we assumed that the AAA
9 reference is a delegation.

10 MR. GEYSER: Yes, Your Honor. And --
11 and, again, assuming that, it's still the case,
12 and the parties are perfectly free to do this,
13 they can decide we will not bifurcate certain
14 issues between the court and the arbitrator.

15 And injunctive relief is actually a
16 primary candidate for not wanting to bifurcate
17 because it doesn't do parties much good in terms
18 of the goals of arbitration of efficiency and
19 expediency to have to go to the arbitrator to
20 get an order for injunctive relief, go back to
21 the court and seek to enforce that order before
22 the court. It makes more --

23 JUSTICE KAGAN: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Gorsuch.

1 JUSTICE GORSUCH: Thank you, Chief,
2 I'll pass.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh.

5 JUSTICE KAVANAUGH: Thank you, Chief
6 Justice.

7 And, Mr. Geyser, good afternoon.
8 First, picking up on Justice Sotomayor's
9 questions on the incorporation of the AAA rules,
10 you -- that's not the issue before us, but just
11 to pause on that for a second, you referred to
12 it as an elephant in a mouse hole. But it's
13 really an elephant in an elephant hole. When
14 you look at the AAA rules, Rule 7(a) says, "the
15 arbitrator shall have the power to rule on his
16 or her own jurisdiction, including the
17 arbitrability of any claim or counterclaim."

18 That's very broad language, which is
19 probably why every court of appeals to address
20 this said that the AAA rules are an express
21 delegation. But, again, we don't have to decide
22 that here. That's just the premise.

23 But I wanted to just pause on the
24 elephant in -- in a mouse hole point. Here's --
25 here's the problem I think I have with your

1 argument, and you've made it very cleverly and
2 persuasively, but the problem is that you are
3 suggesting that the way parties divide up
4 arbitration -- namely, some subjects will be
5 subject to arbitration and decided by an
6 arbitrator and some subjects won't -- also
7 applies to the question of who decides
8 arbitrability.

9 So courts will decide whether certain
10 things are arbitrable or not, and arbitrators
11 will decide whether other things are arbitrable.
12 I think that's what you're saying.

13 But that's just not how it works in
14 the real world, nor could it realistically work
15 that way in the real world. I don't think any
16 contract says arbitrability shall be -- of
17 certain subjects shall be decided by the
18 arbitrator and others -- of other subjects by
19 the court.

20 Can you help me on that? Am I wrong?

21 MR. GEYSER: Well, I -- I -- I -- I
22 think so, Your Honor. I'd like to address the
23 -- the first question first.

24 I -- I don't think this is -- this is,
25 in fact, an elephant in a mouse hole, and the

1 best proof of that is parties use the same
2 linguistic formulation when they have express --

3 JUSTICE KAVANAUGH: Okay. Can you --

4 MR. GEYSER: -- delegation clauses.

5 JUSTICE KAVANAUGH: -- can you just go
6 to the second question since time's limited?

7 MR. GEYSER: Sure. The -- in the real
8 world, parties sometimes do limit a delegation.
9 They might say that the court decides whether
10 class arbitration is appropriate. And parties
11 are perfectly free to do that.

12 And, here, if the parties decide --
13 and I think, on the face of this agreement,
14 aside from just saying it's absurd, so we're
15 going to toss aside the plain language of what
16 the parties actually wrote, in -- in the context
17 of the Federal Arbitration Act, which is trying
18 to enforce contracts according to their terms --

19 JUSTICE KAVANAUGH: Well, I think it's
20 -- just to interrupt, I think what we're trying
21 to figure out, does the carveout apply to what
22 subjects go to arbitration, or does the carveout
23 also apply to who decides arbitrability?

24 And I think, to the extent there's any
25 ambiguity on that, the alleged absurdity seems

1 quite relevant to deciding that question.

2 MR. GEYSER: That -- that's -- that's
3 fair, Your Honor, but, again, I don't see any
4 way to read the actual text of this agreement to
5 say that the carveout wouldn't include a
6 carveout to the AAA rules.

7 Again, it would be different if the
8 parties said the trip -- all disputes are
9 subject to the AAA rules even though only some
10 disputes are subject to arbitration. That's
11 simply not what they wrote. I -- I don't see
12 any way to say that -- that that parenthetical
13 carveout applies, you know, to anything other
14 than the disputes that are then subject to
15 arbitration under the AAA rules. If -- if it's
16 not one of those disputes, it's not subject to
17 arbitration under the AAA rules.

18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett.

20 JUSTICE BARRETT: So, counsel, I feel
21 a little bit like Justice Sotomayor. You know,
22 this -- this case feels like it's a little bit
23 all over the map because you've offered us
24 several different ways to rule in your favor.

25 And I -- I just want to be sure that I

1 understand your argument. And so the -- you
2 should take as your premise that we're not
3 addressing the question on which we denied cert
4 in your cross-petition on whether incorporating
5 the AAA rules by reference constitutes a
6 delegation.

7 Is it your argument that, first of
8 all, there is no clear and unmistakable
9 delegation here at all, so you win, or,
10 alternatively, that even if there was a general,
11 clear, and unmistakable delegation, that the
12 carveout provision carved out arbitrability as
13 well as subject matter?

14 MR. GEYSER: Well, Your Honor, I -- I
15 think our first position is there is no clear
16 and unmistakable delegation at all. But the
17 second is -- and -- and most of that argument,
18 just to be, you know, perfectly candid, is
19 premised on the idea that the mere incorporation
20 of the AAA rules is insufficient.

21 But setting that aside, I do think
22 that once you have a dispute that falls within
23 the carveout --

24 JUSTICE BARRETT: Okay, okay. So your
25 -- so I have correctly understood your argument?

1 MR. GEYSER: I believe you have.

2 JUSTICE BARRETT: Okay. So, on the
3 first point -- and you said to be candid, that
4 most of that argument does turn on the AAA
5 rules, the incorporation of them not
6 constituting a delegation. If we don't address
7 that question, and if we just decide this case
8 assuming that it can be, do you lose on the
9 first point?

10 MR. GEYSER: I -- I don't think so,
11 Your Honor. I just want to be very careful in
12 how I answer this.

13 We -- we do lose in the sense of if
14 you're presuming that referencing the AAA rules
15 means that there -- there is some form of
16 delegation to the arbitrator, but we don't lose
17 in the sense that there are still limits on the
18 scope of that delegation.

19 JUSTICE BARRETT: Okay. I -- I didn't
20 mean -- so you're referring to your second way,
21 second route to victory, right? I -- I'm -- I'm
22 just asking on the first point, do you lose on
23 your argument that there was no clear and
24 unmistakable delegation at all if we, declining
25 to get into the question that we denied cert on,

1 assume that incorporating the AAA rules by
2 reference is enough to constitute a clear and
3 unmistakable delegation, do you lose on your
4 first argument if that's how we approach it?

5 MR. GEYSER: I -- I think -- I think
6 we likely do. I mean, there are multiple layers
7 of that argument, but I -- but I think, in the
8 interest of time, we likely do.

9 JUSTICE BARRETT: So it's not your
10 position that it's possible to incorporate the
11 AAA rules by reference but still, through the
12 context of the language in the provision, not
13 intend simply by reference -- by incorporating
14 the AAA rules to clearly and unmistakably
15 delegate? You don't have kind of a halfway
16 position --

17 MR. GEYSER: Oh.

18 JUSTICE BARRETT: -- on your first
19 argument?

20 MR. GEYSER: No, no, no, Your Honor,
21 and I'm sorry, I misunderstood then the -- the
22 as to what -- what you were asking me to
23 concede.

24 Part of our reason that we don't think
25 that this language is clear and unmistakable is

1 precisely because it is ambiguous whether the
2 parties included that language because they just
3 wanted to set the -- the procedures for the
4 arbitration or whether they were actually trying
5 to address and focus on the concept of
6 delegation in this, you know, subpart of a
7 single rule out of 58 rules that happens to have
8 anything that remotely resembles delegation.

9 So I do think that you can say, in
10 theory, Rule 7(a) -- again, we disagree with
11 this, but it's a delegation provision despite
12 not having exclusive language and precluding the
13 court from addressing it, and you can still say
14 that just as parties adopt the same linguistic
15 formulation when they want to delegate or not
16 delegate or before Rule 7(a) even existed, the
17 bare use of this, you know, boilerplate is not
18 enough to show that the parties had any
19 intention whatsoever to delegate.

20 CHIEF JUSTICE ROBERTS: You have a
21 minute to wrap up, counsel.

22 MR. GEYSER: Thank you, Your Honor.

23 The -- I think the ultimate problem --
24 and I realize what -- what the Court is
25 struggling with, and we're -- we apologize for

1 trying to get the Court back into an issue that
2 maybe it doesn't wish to address.

3 But I think it is very difficult to
4 construe this language, especially against a
5 presumption that the reason you should not
6 simply read the contract language on its face is
7 to avoid, you know, a potentially circular
8 result that the parties actually wanted an
9 arbitrator to decide arbitrability, and so it
10 doesn't make sense to say then the Court would
11 have to construe the carveout.

12 Again, that -- that is just asking for
13 a profoundly atextual construction of the plain
14 text of this agreement in order to embrace a
15 counterfactual about whether a delegation
16 actually exists. And I think it would be very
17 difficult to construe this language in a
18 sensible way without getting into the
19 delegation.

20 But, again, if the Court does -- does
21 wish to try that anyway, we still do think that
22 that carveout is clear and unmistakable in
23 saying that only some disputes are subject to
24 the AAA rules, and if this is not one of those
25 disputes, then it is not subject to the AAA

1 rules, and it's not subject to any delegation,
2 and it's ultimately up to the Court in its
3 traditional gatekeeping role to construe that
4 language and say what it means.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Rebuttal, Mr. Shanmugam.

8 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM
9 ON BEHALF OF THE PETITIONER

10 MR. SHANMUGAM: Thank you, Mr. Chief
11 Justice.

12 Respondent's entire argument this
13 afternoon keeps coming back to the premise that
14 there is not a clear and unmistakable delegation
15 by virtue of the incorporation of the AAA rules.

16 But Respondent has conceded that the
17 Court can decide this case on the premise that
18 the incorporation is sufficient. The Court can
19 and therefore should assume that the parties
20 agree to delegate at least some questions
21 concerning whether a dispute is subject to
22 arbitration to the arbitrator.

23 Now Respondent contends that a court
24 should decide the scope of the delegation
25 agreement. And, Justice Breyer, of course, we

1 agree with that. Our submission is simply that
2 when a court is making that determination, the
3 presumption of arbitrability should apply.

4 And if it is ambiguous that a carveout
5 applies to the delegation, a court should hold
6 that it does not, especially given how unlikely
7 it is that the parties would divide up
8 responsibility in that fashion.

9 The purpose of delegation provisions
10 is to assign clear responsibility where there is
11 a dispute about the scope of an arbitration
12 agreement. Now that dispute can be a dispute
13 about an express carveout, so, as here, whether
14 the action at issue constitutes an action
15 seeking injunctive relief, or not, so, as in my
16 hypothetical from earlier, whether a dispute
17 simply arises under the parties' agreement.

18 It would effectively defeat a
19 delegation to accept Respondent's view because
20 someone would have to decide when there is a
21 dispute about whether the arbitrator or the
22 court should decide arbitrability.

23 And it's one thing to say that parties
24 may want to divide up responsibility for
25 different types of questions of arbitrability,

1 such as who is subject to the arbitration
2 agreement or whether a class action waiver is
3 valid, but, as I pointed out in my earlier
4 colloquy with Justice Kavanaugh, we are not
5 aware of any actual agreement in the real world
6 that divides up responsibility for a particular
7 question of arbitrability and in particular the
8 paramount question of the scope of the
9 arbitration agreement.

10 Justice Kagan, we are decidedly not
11 asking the Court to recognize a third
12 presumption here. Instead, our point is simply
13 that once the First Options presumption has been
14 satisfied, because there is clear and
15 unmistakable evidence of a delegation, it falls
16 out of the equation and the ordinary presumption
17 in favor of arbitrability applies.

18 And that is because, in the words of
19 this Court's decision in *Rent-A-Center*, "an
20 agreement to arbitrate a gateway issue is simply
21 an additional antecedent agreement," and the FAA
22 operates on that additional arbitration
23 agreement just as it does in any other.

24 In closing, all we're asking the Court
25 to do today is what the Court ordinarily does,

1 to resolve a circuit conflict on the question
2 presented and to correct the legal error on the
3 part of the court of appeals.

4 Having held that there was a valid
5 delegation, the court of appeals failed to apply
6 the presumption of arbitrability to the
7 delegation agreement. This Court's decisions
8 make clear that the presumption applies, and
9 that is all that the Court need say in a brief
10 and narrow opinion applying settled law in order
11 to vacate the court of appeals' judgment. Thank
12 you.

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

15 (Whereupon, at 12:36 p.m., the case
16 was submitted.)

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Official - Subject to Final Review

1	10 35:1 43:4,22 56:24 57:11 61:17 acting [1] 57:9 action [8] 8:23 9:6,7 36:20,22 69:14,14 70:2 actions [10] 5:14,19 6:6,16 7:12 21:13,21 37:6 41:11 47:5 activating [2] 37:2 41:14 actual [3] 34:24 62:4 70:5 actually [11] 27:11 29:25 36:5 42:13 55:17 58:5,15 61:16 66:4 67:8,16 add [4] 4:23 19:7 34:11 55:23 additional [3] 49:21 70:21,22 address [9] 10:2 31:9 36:6,10 59:19 60:22 64:6 66:5 67:2 addressing [3] 34:14 63:3 66:13 admitted [1] 18:12 adopt [2] 43:18 66:14 adopted [1] 20:2 affirm [3] 18:13 35:19 50:20 afternoon [2] 59:7 68:13 agree [5] 6:5 21:14 31:16 68:20 69:1 agreed [2] 5:6 35:22 agreement [49] 4:7 6:8 7:2,7,25 9:20 10:16 12:25 13:7,23 14:5,17 17:22 19:25 20:18 21:16 22:7 23:17,20,24 32:3 33:7 36:7 37:23 38:5 39:15 42:22,23 47:16,17,19 50:11,17 51:15 54:10 58:2 61:13 62:4 67:14 68:25 69:12,17 70:2,5,9,20,21,23 71:7 agreement's [1] 35:17 agreements [11] 3:13,17,18 4:8,10 10:10 16:2 26:20 33:14,15 54:11 Alito [10] 15:5,6,20 16:20 17:19 18:4 24:8 47:23,24 50:21 alleged [1] 61:25 almost [4] 28:6,8 54:11,13 alone [1] 28:22 alternative [2] 18:14 51:2 alternatively [1] 63:10 altogether [2] 3:25 9:17 ambiguity [3] 20:8 49:9 61:25 ambiguous [2] 66:1 69:4 American [1] 10:9 among [1] 10:12 amount [1] 51:8 analyze [1] 38:8 analyzed [1] 38:7 another [1] 4:17 answer [10] 13:10 17:3 21:10 46:15 47:3 48:9,16,19 52:20 64:12 answers [1] 46:17 antecedent [3] 4:6 7:22 70:21 anyway [3] 34:18 48:2 67:21 apologize [1] 66:25 appeals [13] 3:16,22 5:8 7:5 8:3 9:14 20:13,14 30:16 34:1 59:19 71:3,5 appeals' [7] 4:4 7:3 9:11 33:16 34:23 35:2 71:11	2	3	4	5	6	7	8	A	B	
1 [2] 11:17,17 10 [4] 11:18,20 13:1 30:8 100 [3] 45:12,15 46:13 11:26 [2] 1:16 3:2 119 [1] 29:6 12 [2] 4:24 32:20 12:36 [1] 71:15 19-963 [1] 3:4	2 [6] 15:11,14,24 24:18,19 26:3 2020 [1] 1:12 27 [1] 8:21	3 [3] 2:4 43:4 57:11 35 [1] 2:7	4 [3] 43:4 46:7 57:11	58 [1] 66:7	68 [1] 2:10	7 [1] 11:18 7(a [3] 59:14 66:10,16 7A [2] 10:13 33:5	8 [3] 1:12 11:20 12:25	a.m [2] 1:16 3:2 AA [2] 51:19 52:10 AAA [52] 11:4 22:3 23:21 27:11 31:10,23 32:4,24 35:21 36:13,19,25 37:8 38:19,22 40:2,6,9,23 41:2,12 44:3,4,13 46:20,23 47:8 50:4,13,15 51:25 53:7,16 54:1 58:8 59:9,14,20 62:6,9,15,17 63:5,20 64:4,14 65:1,11,14 67:24,25 68:15 AAA's [1] 29:7 ability [1] 8:14 able [1] 40:17 above-entitled [1] 1:14 absent [1] 18:2 absolute [1] 49:25 Absolutely [2] 14:7 39:20 abstract [1] 49:3 absurd [3] 22:17,23 61:14 absurdity [1] 61:25 abundantly [1] 52:2 accept [2] 11:5 69:19 accommodate [1] 49:11 accordance [3] 17:11 22:12 23:21 according [3] 16:2 26:5 61:18 accurate [1] 29:1 acknowledged [2] 20:25 26:3 across [2] 17:1 25:17 Act [13] 15:12,25 16:7,12,12 30:8,	10 35:1 43:4,22 56:24 57:11 61:17 appearing [1] 1:18 appears [1] 16:17 Appendix [1] 29:7 applicable [1] 33:14 applied [1] 25:16 applies [11] 22:7 25:17 26:5 35:24 37:23 42:6 60:7 62:13 69:5 70:17 71:8 apply [24] 4:5 8:2,3 14:5,21,22 20:19 26:10 28:17 33:15,17 36:19 41:15,15 45:5 46:2,21 47:5 50:8 55:5 61:21,23 69:3 71:5 applying [2] 34:25 71:10 approach [1] 65:4 appropriate [2] 32:19 61:10 arbitrability [83] 3:14,20,23 4:13,20 6:22 7:8,9,15,16 8:2,12 9:3,10 10:7 11:23 12:6,13,18 14:6,23 15:8 19:20 20:12,20 21:4,18,21 24:11 25:13 27:6,19,22 28:5,24 29:1 30:25 31:6,12,12,18,22 33:8,18 35:23 38:9 39:11 41:7,13,24 42:2,20 43:11,11,24 44:10 45:17,25 46:3,5,10 52:4 54:3,8,19 55:2,16 56:2,4,5,8 59:17 60:8,16 61:23 63:12 67:9 69:3,22,25 70:7,17 71:6 arbitrable [7] 11:24 12:10,14 28:23 57:22 60:10,11 arbitrate [10] 8:15 12:25 13:3 19:22 21:15 22:7 33:7 35:23 38:2 70:20 arbitrated [2] 5:15 7:13 arbitration [114] 3:16 4:8,9,10,18,25 6:7 7:2 8:25 9:20 10:5,9,9 11:2,7,17,19 12:1,4,11,21,22 13:6,23 14:5 15:11,12,13,15,25 16:1,6,7,12,25 17:22,24 19:25 20:18 22:14,20 23:17,20 24:9 25:15,19 26:7,11,20 28:18,19,20 29:8 30:8,10 33:14,15 35:1,11 36:2,21,23,24 37:5,7,8 38:5 39:6,19,22 40:5,8 41:6,12,18 42:5 43:4,22,23,24 44:5,9,19 45:7,19,20 51:7,14 52:18 53:7,8,16,23 54:9,13,18 55:14 56:24 57:11 58:18 60:4,5 61:10,17,22 62:10,15,17 66:4 68:22 69:11 70:1,9,22 arbitrator [69] 3:14,21 4:15,19 5:23 7:1 8:24 9:9 10:6,13 11:8 12:9 13:21 14:11,13 17:7 19:24 21:17 23:4,25 27:6,20 28:7,10,11 29:24 30:4 35:13 39:13,24 41:1,7,8,13,23 42:3,16,19 43:9,10 44:21,21 45:5,14,21,23 46:5,7,19 48:12,13,15,18 52:6 53:17 54:20 55:2,3 56:20,25 58:14,19 59:15 60:6,18 64:16 67:9 68:22 69:21 arbitrators [10] 5:18 6:1,2,16,17 17:12 21:5 28:25 39:4 60:10 arcane [1] 36:5 ARCHER [2] 1:6 3:5 area [1] 11:2 arguably [1] 23:11 argue [1] 7:23	arguing [1] 40:23 argument [33] 1:15 2:2,5,8 3:4,7 11:4 20:2 24:15 25:21 27:18 30:23 31:2 32:2 35:7 39:1 40:18 42:10 53:12 56:9,11 60:1 63:1,7,17,25 64:4,23 65:4,7,19 68:8,12 arises [1] 69:17 arising [4] 21:15 23:19,23 29:14 around [1] 6:16 art [3] 50:5,7,8 article [2] 25:8,10 articles [1] 25:23 artificial [3] 16:23 17:5 49:3 aside [5] 24:17 49:23 61:14,15 63:21 assign [1] 69:10 assistance [1] 48:24 Association [1] 10:10 assume [21] 11:3,6 16:24 18:17 21:11,12 24:16 27:14 32:20 40:16 44:13,14,15,17 48:5,14,17 56:1,22 65:1 68:19 assumed [1] 58:8 assuming [5] 49:6 58:7,8,11 64:8 assumption [4] 11:9 45:7 46:9 48:8 assumptions [1] 35:25 AT&T [6] 11:13,13,22 14:20 45:6 46:8 atextual [3] 40:1 49:10 67:13 attempt [2] 13:10 47:10 authority [5] 8:14 35:17 41:1 43:9,15 authorize [2] 4:19 10:6 authorizes [1] 10:13 avoid [2] 54:6 67:7 avoids [1] 56:19 avulsive [1] 5:4 aware [3] 28:14 36:5 70:5 away [2] 42:16 43:12	back [7] 12:20 19:2 25:5,6 58:20 67:1 68:13 backdrop [1] 36:8 bare [1] 66:17 Barrett [13] 30:20,21 32:1,22 33:8,19 62:19,20 63:24 64:2,19 65:9,18 based [3] 15:10 34:4 35:25 basically [6] 11:12 16:21 22:3 31:1 40:24 54:7 basis [4] 15:7,16 24:14 25:24 becomes [1] 39:17 behalf [8] 1:20,22 2:4,7,10 3:8 35:8 68:9 believe [4] 19:5 20:7,8 64:1 belong [1] 58:5 below [4] 12:16 19:17 20:2 34:2 benefit [1] 5:3 best [1] 61:1 better [5] 7:24 24:16 25:9 26:2 51:4 between [8] 3:20 7:12 10:11 26:5

Official - Subject to Final Review

<p>28:7 32:9 45:12 58:14 beyond [1] 26:14 bifurcate [2] 58:13,16 big [1] 11:3 binary [1] 43:19 binding [1] 41:6 bit [2] 62:21,22 bizarre [1] 37:10 board [2] 17:1 25:17 boilerplate [1] 66:17 bold [2] 34:6,7 both [7] 5:3 18:18 22:7,19 24:13 28:11 43:14 breadth [1] 57:18 break [1] 51:3 Breyer [17] 10:25 11:1,11 13:10,16 14:7,10,15,18 16:9 44:7,8,17 45:1, 4,10 68:25 brief [6] 8:22 11:3 14:25 19:1 51:5 71:9 briefed [1] 49:22 briefing [2] 5:3 49:21 briefly [5] 13:11 15:1 17:18 19:2 54:21 broad [1] 59:18 building [1] 38:3 Burton's [1] 11:3</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>call [1] 37:21 came [1] 1:14 candid [2] 63:18 64:3 candidate [1] 58:16 cannot [2] 3:25 4:13 careful [1] 64:11 carve [4] 6:11 18:2 31:17 39:18 carved [1] 63:12 carveout [40] 3:19 4:11 5:17 6:5, 13 9:1 17:5,21,21 22:13,18 23:17, 19 28:17 30:2 31:5,6,13 32:5,14, 17 36:23 37:22 41:15,17 42:6,14 46:23 50:9 61:21,22 62:5,6,13 63: 12,23 67:11,22 69:4,13 carveouts [1] 28:21 carves [1] 6:6 Case [30] 3:4,11 5:20 7:4 10:1 12: 22 16:22 24:13 26:9 27:3 33:13, 24 34:4,6,23 39:8 41:22,25 46:10 49:16,19,24 50:3,20 58:11 62:22 64:7 68:17 71:14,15 cases [4] 12:19 25:4,7,24 categorical [1] 38:17 category [2] 36:20 42:7 cert [9] 18:8 19:3,8 27:12 31:9 34: 9 38:24 63:3 64:25 certain [8] 22:25 23:2 37:6 39:18 56:24 58:13 60:9,17 certiorari [1] 4:23 challenge [1] 37:16 change [2] 5:4 22:10 CHIEF [47] 3:3,9 5:10 6:4,14 7:10, 17 8:5,8 9:5 10:24 14:8,25 15:5 16:22 18:5 20:23,25 22:24 24:4 26:22,24 29:23 30:19 33:20,22 35:</p>	<p>4,9 37:14 38:21 40:11,14 44:6,18 47:21 50:22 54:21 55:8 58:24 59: 1,3,5 62:18 66:20 68:5,10 71:13 choose [1] 36:12 circuit [4] 19:12 27:17 31:5 71:1 circuits [2] 4:24 32:20 circular [2] 37:10 67:7 circumstance [1] 9:5 circumstances [2] 30:17 43:15 cited [1] 15:11 claim [3] 29:13 30:4 59:17 class [2] 61:10 70:2 clause [22] 5:12 12:2,5,11 13:6 22: 6 29:8,25 31:20 35:11 36:2,17 37: 12 41:14,20 44:19,19,23 45:19,20 47:16 50:5 clauses [1] 61:4 clear [41] 5:13 10:18 11:6 14:2 18: 3,17 19:15,15 20:17 21:19 24:10 27:2 30:24 31:3,11,20 33:1 35:21 42:18 44:14 46:1 47:13 48:16,19 49:15 51:8 52:2,11,14 53:9 63:8, 11,15 64:23 65:2,25 67:22 68:14 69:10 70:14 71:8 clearer [1] 52:21 clearly [7] 9:1 11:19 35:14 37:17 53:15 57:8 65:14 cleverly [1] 60:1 closer [1] 21:24 closing [1] 70:24 Cohen [1] 15:9 colleagues [1] 53:14 colloquy [1] 70:4 come [4] 13:14 16:9 50:3 54:14 comes [4] 12:23 16:22 38:4 39:3 coming [1] 68:13 commercial [2] 10:11 34:20 common [7] 7:25 10:10 16:14,17 24:14,17 35:18 complete [3] 17:19 47:3 56:4 completely [1] 21:2 concede [2] 39:20 65:23 conceded [1] 68:16 concedes [1] 32:12 concept [1] 66:5 conceptually [1] 13:18 concerning [4] 3:12 4:9 13:22 68: 21 condition [1] 37:2 conducted [1] 37:8 conflict [4] 4:24 19:12 32:21 71:1 confused [3] 27:18,21 50:25 confusing [1] 37:10 confusion [1] 37:4 Congress [1] 57:10 consciously [1] 34:10 consensus [2] 34:15,18 consequences [1] 34:19 considering [1] 28:16 consistent [1] 47:12 constitute [2] 32:25 65:2 constitutes [4] 4:20 10:7 63:5 69: 14 constituting [1] 64:6</p>	<p>constraints [1] 48:23 construction [1] 67:13 construe [5] 49:9 67:4,11,17 68:3 construes [1] 50:10 contained [2] 3:17,19 contains [2] 23:17 45:19 contemplate [1] 58:6 contends [1] 68:23 content [1] 7:23 contention [2] 35:16 50:2 context [5] 13:14 16:10 26:14 61: 16 65:12 contract [36] 9:20 10:20,22 11:16 12:2,12 13:19,25 16:24,25 24:20 26:17 27:4 28:19,19,20 29:14,15 31:16 33:6 35:14 37:3 38:8 41:21 43:25 44:3 45:17,18 47:1 50:1 54: 2,12,15,18 60:16 67:6 contracts [8] 15:15,15 17:13 28:3 34:20,21 41:19 61:18 contrary [1] 35:15 contrast [1] 25:14 correct [11] 4:1 5:1 27:6,14,15,24 28:12,13 29:3 44:24 71:2 correctly [2] 4:22 63:25 coterminous [1] 22:19 counsel [19] 5:11 8:6 14:9 15:1 18: 7 19:10 20:22 35:5 37:14 40:12, 16 47:22 50:24 52:20 54:22 62:20 66:21 68:6 71:14 counterclaim [1] 59:17 counterfactual [2] 49:7 67:15 course [8] 14:24 15:3 16:10 17:2 18:22 30:9 40:23 68:25 COURT [112] 1:1,15 3:10,15,21,22 4:3,4,5,22 5:5,8 7:3,5 8:3 9:10,11, 14 10:15,17 12:10 15:4,9,20,23 16:4 17:18,23 19:1,7,17 20:2,13, 13 23:1,2,12 24:24 25:16 26:9,12 27:21 28:7,10,11,22,23 32:16,20 33:11,16 34:1,4,8,10,14,17,22,23 35:2,10,19,24 38:10 39:12 40:9 42:12,14,21,21 43:18,20 47:14 49: 12 50:10 54:9,16 55:6,17,20 56: 13,15,16 57:18,21,22,23 58:14,21, 22 59:19 60:19 61:9 66:13,24 67: 1,10,20 68:2,17,18,23 69:2,5,22 70:11,24,25 71:3,5,9,11 Court's [10] 5:9 20:17 25:4 34:13, 25 35:17 36:8 47:12 70:19 71:7 courts [11] 16:14 21:21 23:7 30:16 34:15 43:5 57:2,9,12,16 60:9 Cox [2] 25:8,10 crazy [1] 29:25 critical [1] 56:18 cross-petition [9] 18:9,10,13 19: 4,6 48:4,5,7 63:4</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C [2] 1:11,19 Dallas [1] 1:21 DANIEL [3] 1:21 2:6 35:7 deal [4] 23:12 48:23 57:17,18 dealing [2] 5:18 58:4</p>	<p>deals [2] 45:20 55:16 dealt [1] 40:25 Dean [2] 25:8,10 December [1] 1:12 decide [66] 3:23 4:13 5:6,6,24 6:2, 3,17,18 7:1 8:24 9:6,8,10,15 12:8, 8,10,12,15,16 13:4,21 15:4 17:4,9, 16 18:22 21:17 22:25 23:4,14 27: 13 28:9,24,25 34:4,9 41:8,23 42: 19 45:16,23,24 48:6,7,12,13 49:2 54:17 55:2,18 57:22,23,24 58:13 59:21 60:9,11 61:12 64:7 67:9 68: 17,24 69:20,22 decided [10] 17:11 27:20,21 30:4 38:10 41:11 44:22 54:8 60:5,17 decidedly [1] 70:10 decides [23] 6:12,24 7:18,20 9:15 17:1,16,25 27:22 28:5,6,23 39:7, 12,13 41:7,13 47:14 49:12 57:23 60:7 61:9,23 deciding [7] 6:1 39:4 47:18 49:4 56:13,20 62:1 decision [7] 3:15 9:12 33:12 34:2, 11 47:12 70:19 decisions [4] 5:2 20:17 34:25 71: 7 declined [1] 4:22 declining [1] 64:24 default [3] 39:11 42:20 57:2 defeat [1] 69:18 defend [2] 4:2 33:25 define [1] 22:18 degree [1] 48:11 delegate [15] 3:13 9:22 35:12 43: 22,23 44:20 54:2 56:1,24 57:15 65:15 66:15,16,19 68:20 delegated [6] 19:24 20:9 48:15,17 57:5,6 delegates [2] 27:5 41:1 delegating [2] 11:7 36:15 delegation [111] 3:17,24 4:6,14,21 6:24 8:11 9:16,19,22 10:7 13:19 14:4,13 15:3 17:15 18:18 19:16, 19 20:15,16 22:4,8,21 26:11,15,16 27:12,14 30:25 31:3,12,21 32:7 33:1,4,11 35:15 36:3,16,18 37:12 38:14,15 39:15,18,23 40:2,17,19, 21 41:14,16,20 42:2,6,8,22,23 44: 14 45:3 46:4,6,19 47:8,15,16 48: 11 49:5,11,13,15 50:4,16 51:9 54: 24 55:4,5,25 56:3,4 57:17,19 58:4, 9 59:21 61:4,8 63:6,9,11,16 64:6, 16,18,24 65:3 66:6,8,11 67:15,19 68:1,14,24 69:5,9,19 70:15 71:5,7 delegations [3] 24:10 43:19 56:7 denied [4] 31:9 38:23 63:3 64:25 depends [1] 40:20 designed [1] 56:14 despite [1] 66:11 determination [7] 10:14 14:14 39: 24 40:10 42:15 55:7 69:2 determinations [2] 55:3 57:3 determine [1] 43:11 determines [2] 42:11 49:13</p>
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Official - Subject to Final Review

<p>devote ^[1] 19:5 difference ^[1] 37:1 different ^[9] 6:10 7:17 34:5 38:11, 13 39:8 62:7,24 69:25 difficult ^[4] 49:2,19 67:3,17 direct ^[1] 52:6 directly ^[2] 10:3 36:10 disagree ^[2] 22:15 66:10 disappears ^[1] 37:5 discern ^[1] 24:20 discrete ^[2] 18:1 32:13 discussing ^[1] 9:4 dismiss ^[1] 49:19 dispute ^[28] 5:17 7:19 8:25 9:9 11:16,18,24 12:9 21:15 23:19,22 29:13 31:7 35:14 36:17 38:3 39:14 41:6,10 46:22 54:14 63:22 68:21 69:11,12,12,16,21 disputed ^[1] 18:23 disputes ^[28] 5:24 6:11 18:19 19:22 22:8 36:21 37:23 39:18 40:4,7 42:4,7 44:2,4 45:12 46:21 50:8,12,13 52:5 54:11,19 62:8,10,14,16 67:23,25 distinguish ^[1] 37:20 divide ^[7] 6:21 8:14,19 21:4 60:3 69:7,24 divided ^[7] 3:19 7:7,11,11,20 9:13 28:6 divides ^[1] 70:6 division ^[1] 28:14 document ^[2] 10:21,22 doing ^[3] 7:15 38:20 45:5 door ^[1] 37:25 doubly ^[1] 7:22 doubts ^[1] 4:9 down ^[2] 37:17 51:3 draft ^[2] 8:13 28:3 drafted ^[1] 58:1 dramatic ^[1] 34:19 dropped ^[1] 47:17</p>	<p>33:4 52:12 65:2 66:18 enter ^[1] 17:23 entire ^[1] 68:12 equal ^[1] 15:14 equation ^[1] 70:16 eradicate ^[1] 28:24 erred ^[1] 8:3 error ^[2] 22:15 66:10 especially ^[3] 36:7 67:4 69:6 ESQ ^[3] 2:3,6,9 ESQUIRE ^[2] 1:19,21 establish ^[1] 51:12 establishes ^[1] 16:1 even ^[17] 18:10 20:3 22:15,17 31:15 32:12 35:13 36:16,19 44:4 46:24 47:6,7 54:18 62:9 63:10 66:16 everything ^[2] 33:9 57:5 evidence ^[8] 10:18 11:7 14:3 35:22 42:18 51:13 55:25 70:15 exact ^[1] 41:21 exactly ^[2] 22:23 29:12 example ^[3] 44:18 51:13 52:10 examples ^[1] 28:14 except ^[9] 8:23 19:22 21:13 22:6 29:9,10 40:24 41:10 47:18 exception ^[7] 13:3 18:18 24:10 39:21 53:4,11 55:14 exceptions ^[3] 41:9 42:4 55:5 exclusive ^[1] 66:12 exempts ^[2] 35:14 37:6 exist ^[1] 37:13 existed ^[1] 66:16 existence ^[1] 57:17 exists ^[2] 47:19 67:16 expect ^[2] 28:4 56:16 expectations ^[2] 36:2 43:2 expediency ^[1] 58:19 experience ^[1] 11:1 explaining ^[1] 19:6 explanation ^[1] 15:22 explicit ^[2] 36:14 53:18 express ^[14] 27:12,14 37:22 38:14,15 40:16,18,21 41:20 42:1 54:24 59:20 61:2 69:13 expressly ^[7] 5:16 27:5 36:6 39:17 40:25,25 43:6 extend ^[1] 26:13 extent ^[1] 61:24 extrinsic ^[1] 51:13</p>	<p>falls ^[8] 6:12 11:16 13:2 36:20,22 39:14 63:22 70:15 familiar ^[2] 13:13 34:25 far ^[1] 12:3 fashion ^[2] 58:2 69:8 fault ^[3] 48:1,1,3 favor ^[18] 4:10 5:7 16:5 20:10 24:9 25:15,19 26:6,10,12 45:7 46:9 55:13 56:13 57:2,9 62:24 70:17 favoring ^[1] 15:11 federal ^[17] 8:4 15:10,12,13,17 16:11,13,14,16 25:18 30:8 34:25 43:3,22 56:23 57:11 61:17 feel ^[1] 62:20 feels ^[1] 62:22 fell ^[1] 44:22 fictional ^[1] 49:11 Fifth ^[3] 27:17 31:4 51:15 figure ^[2] 27:11 61:21 filing ^[1] 32:14 finds ^[1] 37:9 fine ^[1] 48:22 finish ^[1] 51:25 First ^[30] 4:6 11:12 12:2 13:12,12 15:9 19:14 25:2 26:14 31:1 35:20 42:21 46:18 47:10 48:18 49:1 53:19 55:13,15 59:8 60:23,23 63:7,15 64:3,9,22 65:4,18 70:13 five ^[2] 11:13 14:20 flawed ^[2] 21:2 23:10 flip ^[1] 47:10 flipped ^[1] 31:4 flips ^[1] 14:3 flow ^[1] 16:17 flowing ^[1] 16:6 focus ^[2] 25:13 66:5 focuses ^[1] 4:16 follow ^[4] 5:25 13:8 24:19 44:12 following ^[5] 19:25 21:12 47:4 49:25 50:14 follows ^[1] 56:11 footnote ^[2] 25:6 47:18 force ^[1] 57:22 foreordained ^[1] 17:4 form ^[2] 19:18 64:15 formation ^[4] 10:20 13:20,25 33:6 formulation ^[3] 52:14 61:2 66:15 forth ^[1] 53:15 fortiori ^[1] 6:1 fourth ^[2] 45:6 46:8 frankly ^[2] 25:1,4 free ^[3] 43:21 58:12 61:11 friend ^[4] 37:16 45:11 46:25 49:8 friend's ^[3] 40:1 47:9 50:2 full ^[1] 5:3 fully ^[1] 49:22 further ^[1] 32:9</p>	<p>gave ^[1] 52:21 general ^[6] 11:8 26:19 46:4,5,18 63:10 generally ^[3] 4:8 23:7 37:6 George ^[1] 11:3 gets ^[8] 6:3,17 29:4 39:24 40:9 41:8 53:13 57:24 getting ^[1] 67:18 GEYSER ^[43] 1:21 2:6 35:6,7,9 38:12 39:9 40:20 41:3 42:17 43:17 44:16,24 45:2,9 46:16 47:24 48:25 51:20,23 52:8,13,24 53:2,5,19 54:23 55:9 56:10 57:25 58:10 59:7 60:21 61:4,7 62:2 63:14 64:1,10 65:5,17,20 66:22 give ^[4] 9:18 21:4 51:1 57:21 given ^[5] 12:17 21:20 31:2,23 69:6 gives ^[1] 17:22 goals ^[1] 58:18 Gorsuch ^[8] 24:5,6,23 25:20 26:8,21 58:25 59:1 got ^[3] 11:8 14:15,18 govern ^[1] 26:19 governed ^[1] 26:18 governing ^[1] 4:7 grant ^[5] 18:8,15 27:12 48:3,4 granted ^[2] 48:10 49:20 grievance ^[1] 13:2 ground ^[1] 52:17 grounds ^[1] 18:14 guess ^[1] 28:17</p>
E		F	
<p>earlier ^[6] 19:1 26:3 32:14 33:12 69:16 70:3 easiest ^[1] 13:17 easy ^[1] 36:9 educate ^[1] 18:19 effect ^[2] 18:3 28:17 effectively ^[4] 3:24 9:16 49:5 69:18 efficiency ^[1] 58:18 effort ^[1] 33:25 either ^[2] 28:10,21 elephant ^[6] 53:25 59:12,13,13,24 60:25 elevate ^[1] 39:2 embrace ^[1] 67:14 empirical ^[1] 25:12 employer ^[2] 13:1 45:12 encouraged ^[1] 18:15 enforce ^[2] 58:21 61:18 enforced ^[1] 16:2 enough ^[8] 5:21 14:1 31:23 32:24</p>	<p>FAA ^[2] 35:16 70:21 face ^[8] 10:16 21:19 36:7 40:3 50:11 57:15 61:13 67:6 facility ^[1] 37:24 fact ^[17] 9:7 18:8,12 23:6,23 24:1 29:13 38:6 39:15 40:2 41:8 42:25 44:18 49:4,13 57:12 60:25 factory ^[4] 37:24 38:1,3,6 failed ^[1] 71:5 failing ^[2] 8:3 33:17 fair ^[1] 62:3 fairly ^[1] 20:4 falling ^[2] 46:22 50:9</p>	G	<p>half ^[1] 49:7 halfway ^[1] 65:15 happened ^[1] 30:14 happens ^[4] 11:21 12:21 30:4 66:7 happy ^[1] 10:2 hard ^[2] 44:9,10 head ^[1] 47:11 hear ^[2] 3:3 56:8 heaven's ^[1] 12:21 heavily ^[1] 11:12 heightened ^[1] 36:9 held ^[5] 3:18 4:24 9:13 32:21 71:4 help ^[4] 9:19 47:25 48:22 60:20 HENRY ^[2] 1:3 3:4 hid ^[1] 53:25 hidden ^[1] 36:18 highly ^[2] 6:20 8:18 hold ^[2] 34:23 69:5 holding ^[2] 5:1 19:21 hole ^[5] 53:25 59:12,13,24 60:25 Honor ^[18] 39:10 41:3 42:17 43:17 48:25 52:8,25 53:18,19 56:10 57:25 58:10 60:22 62:3 63:14 64:11 65:20 66:22 hope ^[1] 46:14 however ^[2] 21:1,2 hypothetical ^[1] 69:16</p>
I		I	
i.e ^[1] 12:10			

Official - Subject to Final Review

<p>idea ^[2] 28:25 63:19 identify ^[2] 42:21,22 illustrates ^[2] 7:4 9:12 imagined ^[1] 57:10 important ^[5] 3:11 5:21 22:10 37:15 56:14 improvidently ^[1] 49:20 INC ^[2] 1:3,6 include ^[3] 38:15 52:16 62:5 included ^[2] 19:19 66:2 including ^[1] 59:16 inclusion ^[1] 31:23 incompatible ^[1] 35:16 inconsistent ^[1] 34:24 incorporate ^[4] 32:24 52:2,23 65:10 incorporated ^[1] 18:14 incorporates ^[2] 16:24 32:3 incorporating ^[5] 50:4 51:7 63:4 65:1,13 incorporation ^[2] 4:18,25 10:5,8, 21 13:24 18:22 19:7 22:11 23:25 27:8,10 32:13,16 34:5 35:21 59:9 63:19 64:5 68:15,18 indeed ^[2] 25:24 32:14 independent ^[3] 35:20 52:16 53:21 indicated ^[2] 24:13 29:11 indication ^[2] 18:3 53:24 inevitably ^[1] 54:13 injunctive ^[2] 5:14,19 6:6,16 8:23 9:7 17:24 21:13,22 23:3,5,12 30:1, 2,3 40:5 41:11 47:6 58:15,20 69:15 inkling ^[1] 57:4 innumerable ^[1] 34:20 insert ^[1] 10:1 Instead ^[3] 10:17 34:3 70:12 insufficient ^[4] 51:12,19 52:1 63:20 insufficiently ^[1] 53:9 intelligently ^[1] 49:2 intend ^[1] 65:13 intended ^[4] 6:11 19:19 20:9 53:25 intent ^[3] 36:1 43:2 56:17 intention ^[1] 66:19 intentions ^[1] 24:21 interest ^[1] 65:8 interpret ^[1] 31:20 interpretation ^[7] 3:12 17:19,20 26:18,20 33:10,15 interpreting ^[2] 17:13,13 interpretive ^[1] 35:24 interrupt ^[2] 32:22 61:20 introduced ^[1] 22:12 introductory ^[1] 47:4 invocation ^[1] 31:22 invoke ^[1] 32:24 involved ^[1] 51:16 involving ^[2] 23:1 54:19 irrational ^[1] 20:3 isn't ^[5] 17:5,14 31:19 38:7 41:19 issue ^[22] 5:13 18:11 19:23 23:14</p>	<p>29:9 36:6,12,15 39:1,6,12 41:21 42:2 54:8,17 56:13,14 57:24 59:10 67:1 69:14 70:20 issues ^[4] 43:22,24 56:24 58:14 it'll ^[1] 49:1 itself ^[8] 3:23 7:8,20 9:15 32:25 47:1 52:11 53:2</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>JAMS ^[2] 52:3 53:8 Joint ^[1] 29:7 judge ^[8] 11:25 12:7,11,15 14:11, 22 17:9,9 judges ^[1] 21:5 judgment ^[4] 4:4 5:7 35:2 71:11 judicial ^[3] 30:7,13 56:18 jurisdiction ^[2] 56:21 59:16 JUSTICE ^[159] 3:3,10 5:10 6:4,14 7:10,17 8:5,7,8,9,16 9:5,18,24 10:23,24,24 11:1,11 13:9,16 14:7,8, 10,15,18,25 15:5,5,6,20 16:9,20, 22 17:19 18:4,5,5,7,21 19:9,13 20:6,7,21,23,23,24,25 21:9,11 22:1, 22,24 23:9,15 24:2,4,4,6,7,23 25:20 26:8,21,22,22,24,25 27:9,16,25 28:2,15 29:5,16,19,22 30:12,18,19, 19,21 32:1,22 33:8,19,20,23 35:4, 10 37:14,18 38:21 40:11,13,14,15, 22 42:9 43:7 44:6,6,8,17 45:1,4, 10 47:21,23,24 50:21,22,22,24 51:17,22,24 52:9,19 53:1,3,10 54:5, 21 55:8,8,9 57:14 58:7,23,24,24 59:1,3,3,5,6,8 61:3,5,19 62:18,18, 20,21 63:24 64:2,19 65:9,18 66:20 68:5,11,25 70:4,10 71:13 Justice's ^[2] 29:23 44:18</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kagan ^[16] 20:23,24 21:9,11 22:1, 22 23:9,15 24:2 29:5 55:8,9 57:14 58:7,23 70:10 Kagan's ^[1] 28:2 KANNON ^[5] 1:19 2:3,9 3:7 68:8 Kavanaugh ^[18] 26:23,24 27:9,16, 25 28:15 29:16,19,22 30:12,18 37:18 59:4,5 61:3,5,19 70:4 keep ^[6] 23:6 37:25 38:1 44:11 56:14 57:12 keeps ^[1] 68:13 kind ^[4] 13:1,19 28:2 65:15 kinds ^[1] 45:13 knowing ^[2] 53:22 57:1</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>labor ^[9] 11:2 12:21,22,24 13:14 16:10,11 25:4 37:23 lacks ^[1] 29:10 laid ^[1] 37:17 language ^[27] 7:6 9:19 27:5 29:10 31:25 35:18 37:10 47:1 50:1 51:16,19 52:1,2,16,24,25 53:4 59:18 61:15 65:12,25 66:2,12 67:4,6,17 68:4 last ^[2] 5:22 29:19 later ^[1] 49:12</p>	<p>latter ^[1] 26:17 law ^[14] 5:4 8:4 12:23 16:11,14,17 17:11 24:13,14,17 25:8,10,22 71:10 layers ^[1] 65:6 least ^[3] 23:11 30:13 68:20 leave ^[1] 38:22 leeway ^[1] 17:12 left ^[3] 9:3 16:9 22:16 legal ^[2] 33:16 71:2 light ^[1] 34:14 likely ^[6] 21:1 36:1 43:1 56:17 65:6, 8 likes ^[1] 46:25 limit ^[3] 32:6 44:1 61:8 limitation ^[2] 43:8 54:10 limited ^[9] 19:21 30:7,11 39:21 41:17 42:6 43:15 55:5 61:6 limits ^[3] 28:21 42:22 64:17 line ^[1] 24:7 lines ^[1] 8:23 linguistic ^[3] 52:14 61:2 66:14 list ^[2] 45:12,15 listed ^[1] 41:10 little ^[2] 62:21,22 logical ^[1] 20:1 logically ^[2] 21:2 23:10 long ^[1] 54:7 look ^[7] 5:12 23:10 29:6 45:11 47:6 48:21 59:14 lose ^[6] 41:25 64:8,13,16,22 65:3 lot ^[2] 17:12 51:1 lots ^[2] 25:23 50:6 lower ^[1] 34:15</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>made ^[5] 22:10 29:4 34:10 47:13 60:1 magic ^[1] 10:16 many ^[1] 55:20 map ^[1] 62:23 matter ^[14] 1:14 7:25 8:4 11:7 16:16 31:7 33:1,6 45:16 46:6,11 47:14 55:16 63:13 matters ^[6] 41:5 43:5 44:20 45:20, 23 46:3 mean ^[13] 5:25 22:2 30:1,2 31:22 37:4 38:25 41:4 46:7 50:11 57:14 64:20 65:6 means ^[5] 28:22 41:12 49:7 64:15 68:4 meant ^[1] 56:1 meeting ^[1] 13:20 mere ^[4] 24:1 35:20 51:11 63:19 merely ^[1] 53:5 merits ^[2] 10:2 18:11 might ^[4] 21:1,3 47:7 61:9 mind ^[2] 12:20 44:11 minds ^[1] 13:21 mine ^[1] 48:21 miniature ^[1] 13:19 minute ^[2] 33:20 66:21 missing ^[3] 24:21,23 29:2 misunderstood ^[1] 65:21</p>	<p>model ^[1] 29:7 modified ^[2] 21:25 22:2 moment ^[1] 24:16 morning ^[3] 6:10 27:1 32:11 Moses ^[1] 15:9 most ^[9] 30:16 32:6 37:15 41:19 49:3 50:19 56:14 63:17 64:4 motion ^[1] 32:15 mouse ^[4] 53:25 59:12,24 60:25 much ^[5] 8:21 18:8 26:2 34:21 58:17 multiple ^[1] 65:6</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>name ^[1] 12:21 namely ^[4] 19:11 27:19 45:6 60:4 narrow ^[1] 71:10 natural ^[2] 20:5 21:3 nebulous ^[1] 25:5 necessarily ^[1] 55:6 need ^[5] 4:5 28:9 32:16 34:22 71:9 needs ^[2] 17:10 26:9 negated ^[1] 9:16 negating ^[1] 3:24 never ^[8] 10:15 24:24 28:6 39:6 43:20 51:8 52:1,22 next ^[2] 3:4 37:25 NLRA ^[1] 16:13 nonsense ^[1] 31:17 nonsensical ^[4] 20:4 28:8 31:14, 17 Nor ^[2] 28:15 60:14 normal ^[3] 14:3 24:19 39:2 normally ^[3] 12:13 38:14 43:10 nothing ^[4] 8:12,17 23:9 43:20 number ^[3] 21:15,16 32:10</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>objective ^[1] 10:19 oblique ^[1] 36:13 obvious ^[1] 52:17 odd ^[2] 31:24,24 offer ^[1] 15:21 offered ^[1] 62:23 often ^[2] 25:13,15 okay ^[17] 11:8 16:20 27:16,25 28:16 44:11,14,16 45:1,4,4 53:10 61:3 63:24,24 64:2,19 once ^[9] 4:3 14:2 20:16 22:24 37:3 50:10 57:4 63:22 70:13 one ^[25] 5:13 6:10 11:15 12:24 18:1 19:23,24 21:8,15 25:6,15,17 28:9 29:19 30:22 32:8,23 36:3 37:18 39:16 40:7 45:15 62:16 67:24 69:23 ones ^[1] 24:17 only ^[11] 4:5 17:21 22:13 37:9 39:13 41:17 48:17 57:25 58:3 62:9 67:23 operate ^[2] 9:2 56:6 operates ^[4] 13:15 17:21 22:13 70:22 operation ^[1] 30:10 opinion ^[2] 7:4 71:10</p>
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Official - Subject to Final Review

<p>opposition ^[2] 18:9 19:6 Options ^[10] 11:12 12:3 13:12 19:14 25:2 26:14 47:10 48:18 55:15 70:13 oral ^[5] 1:15 2:2,5 3:7 35:7 order ^[7] 10:21 32:17 49:11 58:20, 21 67:14 71:10 ordinarily ^[1] 70:25 ordinary ^[4] 10:19 12:22 13:25 70:16 originates ^[1] 25:3 origins ^[1] 25:2 other ^[15] 13:20 15:15,25 18:18 37:16 38:1 39:1 40:7 45:11 47:17 50:13 60:11,18 62:13 70:23 others ^[3] 40:4 56:25 60:18 otherwise ^[2] 42:7 43:6 out ^[16] 5:21 6:6,11 15:23 18:2 27:11 29:14 31:13 38:22 39:18 41:2 61:21 63:12 66:7 70:3,16 outlined ^[1] 48:24 outset ^[3] 5:16,22 44:1 outside ^[2] 39:2 44:23 over ^[2] 9:9 62:23 override ^[1] 57:8 overrule ^[1] 49:16 overturning ^[1] 5:2 overwhelming ^[1] 34:15 own ^[2] 56:21 59:16 owner ^[1] 38:4 owners ^[1] 12:3</p>	<p>per ^[1] 14:17 percent ^[1] 46:13 perfectly ^[4] 43:21 58:12 61:11 63:18 perhaps ^[1] 50:25 person ^[2] 25:9 28:9 persuasively ^[1] 60:2 pertinent ^[1] 5:12 petition ^[1] 19:8 Petitioner ^[10] 1:4,20 2:4,10 3:8 36:18 37:9,11 55:23 68:9 Petitioner's ^[3] 5:7 35:15 55:10 phrase ^[2] 43:25 47:4 phrased ^[1] 44:1 phrasing ^[1] 41:5 pick ^[2] 16:8 28:1 picking ^[1] 59:8 picks ^[1] 29:22 place ^[2] 31:1 44:1 plain ^[7] 7:6 35:17 43:3 49:25 50:17 61:15 67:13 plainly ^[4] 5:1 6:6 37:4,12 plausible ^[1] 36:11 plausibly ^[1] 23:5 please ^[4] 3:10 35:10 44:11 52:20 point ^[18] 6:23 15:23 20:19 22:16 26:8 27:13,17 29:4 31:13 32:9 33:8,13 47:9 59:24 64:3,9,22 70:12 pointed ^[2] 24:18 70:3 points ^[1] 13:11 policy ^[4] 15:10,17 16:6 25:18 position ^[7] 51:6,9,10 54:7 63:15 65:10,16 positive ^[1] 46:13 possible ^[1] 65:10 possibly ^[1] 3:25 posture ^[1] 16:23 potential ^[1] 15:22 potentially ^[1] 67:7 power ^[4] 17:16,23 48:12 59:15 precedent ^[1] 14:19 precise ^[1] 6:15 precisely ^[4] 13:23 44:12 45:22 66:1 precluding ^[1] 66:12 predicate ^[1] 40:10 predominantly ^[1] 52:15 preliminary ^[1] 17:23 premise ^[7] 27:3 29:23 30:23 59:22 63:2 68:13,17 premised ^[1] 63:19 presented ^[2] 4:17 71:2 presenting ^[1] 27:4 presents ^[1] 3:11 pressed ^[1] 16:15 presumably ^[1] 38:19 presume ^[2] 38:19 55:17 presumed ^[1] 36:1 presuming ^[1] 64:14 presumption ^[45] 4:11 7:14 8:2 12:5,12,17 14:3,4,6 15:7,18 16:5, 8 20:12,19 24:9 25:3,11,12,14 26:6,10,14 31:4 33:17 43:1 45:25 46:2,9 50:3 55:13,15,24,24 56:5,6,12</p>	<p>57:9 67:5 69:3 70:12,13,16 71:6,8 presumptions ^[5] 24:12 50:18 55:11,20,21 pretty ^[4] 20:1 31:24,24 52:6 prevail ^[1] 49:24 primarily ^[1] 4:16 primary ^[1] 58:16 principle ^[3] 16:1 26:5 46:8 principles ^[4] 4:5 10:20 13:25 35:1 probably ^[2] 16:16 59:19 problem ^[12] 7:5 9:4,12 32:2 39:25 42:3 47:25 48:21 57:20 59:25 60:2 66:23 procedures ^[1] 66:3 proceeded ^[4] 3:22 7:8 9:14 19:5 process ^[1] 6:25 produces ^[1] 15:17 profoundly ^[3] 40:1 49:10 67:13 proof ^[1] 61:1 provides ^[3] 16:25 37:5 56:18 provision ^[24] 3:19 4:12 6:5 8:13, 20,21 21:12,25 22:2,6,11 23:18 29:8,9 33:2 38:14,16 39:16,23 49:5 54:24 63:12 65:12 66:11 provisions ^[1] 69:9 purpose ^[2] 53:22 69:9 purposes ^[1] 11:5 pursuant ^[1] 41:2 pursuing ^[1] 24:8 put ^[2] 17:4 24:17</p>	<p>real-world ^[1] 28:3 realistically ^[1] 60:14 realize ^[1] 66:24 really ^[12] 22:13 24:24 25:3,6 26:2 28:24 30:22 34:3 37:17 41:19 48:9 59:13 reason ^[11] 22:23 31:19 35:1 37:9 52:15,17 55:19 56:22 58:3 65:24 67:5 reasonable ^[1] 35:25 reasoning ^[3] 3:25 34:1,24 reasons ^[3] 35:20 50:7 53:14 REBUTTAL ^[3] 2:8 68:7,8 recognition ^[1] 16:13 recognize ^[3] 16:14 36:12 70:11 recognized ^[4] 3:16 15:8 16:5 24:12 refer ^[1] 25:2 reference ^[9] 10:8 22:3 31:10 36:13 58:9 63:5 65:2,11,13 referencing ^[4] 38:18 53:6,21 64:14 referred ^[1] 59:11 referring ^[1] 64:20 reflects ^[3] 25:18 42:25 43:3 regard ^[2] 22:19,20 regardless ^[1] 23:16 reject ^[1] 34:18 related ^[2] 54:12,15 relationship ^[1] 32:9 relevant ^[4] 10:12 17:14 22:11 62:1 relief ^[19] 5:15,19 6:7 8:24 9:8 17:24 21:14,22 23:3,5,12 30:1,2 40:5 41:11 47:6 58:15,20 69:15 relies ^[1] 25:7 rely ^[1] 15:18 relying ^[1] 36:13 remand ^[1] 3:15 remotely ^[1] 66:8 render ^[1] 10:22 Rent-A-Center ^[4] 33:12 47:13,13 70:19 repeatedly ^[2] 15:24 56:17 repeats ^[1] 11:13 replaced ^[1] 53:6 reply ^[1] 18:10 reproduce ^[1] 47:3 reproduced ^[1] 46:25 request ^[2] 49:20 53:18 required ^[4] 10:15 16:23 48:14,16 requires ^[2] 15:14 37:7 resembles ^[1] 66:8 resolve ^[8] 4:19 6:24 7:8,21 10:6 32:17 36:12 71:1 resolved ^[4] 4:10 23:20 41:6 43:5 respect ^[7] 7:15 42:14 Respondent ^[16] 1:7,22 2:7 4:1, 16 10:1 26:13 32:5,12,15 33:25 34:3,8 35:8 68:16,23 Respondent's ^[4] 8:22 29:17 68:12 69:19 response ^[3] 29:5 32:15 56:9 responsibility ^[10] 3:20 6:22 7:7</p>
<p style="text-align: center;">P</p> <p>p.m ^[1] 71:15 PAGE ^[3] 2:2 8:21 29:6 pages ^[1] 19:5 pains ^[1] 17:6 paragraph ^[2] 47:5,7 paragraphs ^[2] 11:17 14:20 paramount ^[1] 70:8 parenthetical ^[2] 50:14 62:12 part ^[6] 10:22 38:6 48:17 52:9 65:24 71:3 partial ^[1] 56:7 particular ^[7] 12:8 19:23,24 51:19, 25 70:6,7 particularly ^[1] 34:7 parties ^[51] 6:21 8:18 9:13 10:11, 12 11:15 17:6 18:2 21:3,14,20 22:18 25:13 31:15 35:22 38:15,18 39:17 42:19 43:2,6,21,25 51:12 52:15 53:20,24 56:1,16,17,23 57:4,8 58:1,5,12,17 60:3 61:1,8,10,12,16 62:8 66:2,14,18 67:8 68:19 69:7, 23 parties' ^[6] 4:14 8:25 24:20 35:13 36:1 69:17 partly ^[1] 56:12 party ^[3] 12:24 19:21 54:14 pass ^[1] 59:2 pause ^[2] 59:11,23 pay ^[1] 53:23 pending ^[1] 17:24 people ^[1] 28:3</p>	<p>per ^[1] 14:17 percent ^[1] 46:13 perfectly ^[4] 43:21 58:12 61:11 63:18 perhaps ^[1] 50:25 person ^[2] 25:9 28:9 persuasively ^[1] 60:2 pertinent ^[1] 5:12 petition ^[1] 19:8 Petitioner ^[10] 1:4,20 2:4,10 3:8 36:18 37:9,11 55:23 68:9 Petitioner's ^[3] 5:7 35:15 55:10 phrase ^[2] 43:25 47:4 phrased ^[1] 44:1 phrasing ^[1] 41:5 pick ^[2] 16:8 28:1 picking ^[1] 59:8 picks ^[1] 29:22 place ^[2] 31:1 44:1 plain ^[7] 7:6 35:17 43:3 49:25 50:17 61:15 67:13 plainly ^[4] 5:1 6:6 37:4,12 plausible ^[1] 36:11 plausibly ^[1] 23:5 please ^[4] 3:10 35:10 44:11 52:20 point ^[18] 6:23 15:23 20:19 22:16 26:8 27:13,17 29:4 31:13 32:9 33:8,13 47:9 59:24 64:3,9,22 70:12 pointed ^[2] 24:18 70:3 points ^[1] 13:11 policy ^[4] 15:10,17 16:6 25:18 position ^[7] 51:6,9,10 54:7 63:15 65:10,16 positive ^[1] 46:13 possible ^[1] 65:10 possibly ^[1] 3:25 posture ^[1] 16:23 potential ^[1] 15:22 potentially ^[1] 67:7 power ^[4] 17:16,23 48:12 59:15 precedent ^[1] 14:19 precise ^[1] 6:15 precisely ^[4] 13:23 44:12 45:22 66:1 precluding ^[1] 66:12 predicate ^[1] 40:10 predominantly ^[1] 52:15 preliminary ^[1] 17:23 premise ^[7] 27:3 29:23 30:23 59:22 63:2 68:13,17 premised ^[1] 63:19 presented ^[2] 4:17 71:2 presenting ^[1] 27:4 presents ^[1] 3:11 pressed ^[1] 16:15 presumably ^[1] 38:19 presume ^[2] 38:19 55:17 presumed ^[1] 36:1 presuming ^[1] 64:14 presumption ^[45] 4:11 7:14 8:2 12:5,12,17 14:3,4,6 15:7,18 16:5, 8 20:12,19 24:9 25:3,11,12,14 26:6,10,14 31:4 33:17 43:1 45:25 46:2,9 50:3 55:13,15,24,24 56:5,6,12</p>	<p>qualify ^[1] 5:24 question ^[88] 3:12,23 4:17,17,23 5:5,7 6:9,15,25 7:9,18,20,22 9:2,15, 25 10:4 11:2,5,15,23,23 14:23 15:3,19 16:21 17:1,3,14,18,25 18:23 19:8,14 21:24 23:13 26:17 27:5, 13,18,21,22 28:5,6 29:12,20,24 30:22 31:9 32:13,14,17,18 33:10,10 34:5,5,9,12,16,18 36:10 37:15 38:9,24 39:7,10,17 46:4,14 48:6,9 49:2,13,22 52:21 57:21 60:7,23 61:6 62:1 63:3 64:7,25 70:7,8 71:1 questions ^[24] 3:13 4:13,15,20 5:9 10:6 13:22 21:4,17,20 22:25 24:7 28:2 30:25 31:18,21 32:10,11 35:12 55:18 56:2 59:9 68:20 69:25 quibble ^[1] 41:4 quickly ^[1] 16:21 quite ^[3] 10:10 25:1 62:1</p>	<p style="text-align: center;">Q</p> <p>qualify ^[1] 5:24 question ^[88] 3:12,23 4:17,17,23 5:5,7 6:9,15,25 7:9,18,20,22 9:2,15, 25 10:4 11:2,5,15,23,23 14:23 15:3,19 16:21 17:1,3,14,18,25 18:23 19:8,14 21:24 23:13 26:17 27:5, 13,18,21,22 28:5,6 29:12,20,24 30:22 31:9 32:13,14,17,18 33:10,10 34:5,5,9,12,16,18 36:10 37:15 38:9,24 39:7,10,17 46:4,14 48:6,9 49:2,13,22 52:21 57:21 60:7,23 61:6 62:1 63:3 64:7,25 70:7,8 71:1 questions ^[24] 3:13 4:13,15,20 5:9 10:6 13:22 21:4,17,20 22:25 24:7 28:2 30:25 31:18,21 32:10,11 35:12 55:18 56:2 59:9 68:20 69:25 quibble ^[1] 41:4 quickly ^[1] 16:21 quite ^[3] 10:10 25:1 62:1</p> <p style="text-align: center;">R</p> <p>rather ^[3] 11:18 16:23 36:14 reach ^[4] 18:11 32:16 34:17 36:17 read ^[8] 11:13 12:19 14:19 31:5 37:3 51:5 62:4 67:6 reading ^[5] 7:24,24 22:5 40:1 50:17 reaffirmed ^[1] 25:16 real ^[7] 28:1,8 33:25 60:14,15 61:7 70:5</p>

Official - Subject to Final Review

<p>8:19 9:14 48:2 69:8,10,24 70:6 restrict [1] 4:14 rests [2] 11:12 25:12 result [1] 67:8 return [1] 24:7 review [8] 25:8,10,22 30:7,11,13 34:13 48:10 rightly [1] 15:23 roadmap [1] 27:2 ROBERTS [30] 3:3 5:10 6:14 7:10 8:5 10:24 14:8,25 15:5 18:5 20:23 24:4 26:22 30:19 33:20 35:4 37:14 38:21 40:11 44:6 47:21 50:22 54:21 55:8 58:24 59:3 62:18 66:20 68:5 71:13 role [2] 57:13 68:3 route [1] 64:21 rub [1] 43:13 Rule [20] 10:13 13:13 14:21 20:9 26:11 33:5 35:25 43:19 45:6 52:10,22 53:6,16 55:15 59:14,15 62:24 66:7,10,16 ruled [1] 52:5 rules [63] 4:7,18,25 10:5,9,12 22:3 23:21 24:20 26:19 27:11 31:11,23 32:4,25 33:13 35:21 36:14,19,19,25 37:2,8 38:19,22 40:2,6,9 41:2,12 44:3,4 46:21,24 47:8 50:4,13,15 51:7 52:3,17 53:7,8,21 54:1 59:9,14,20 62:6,9,15,17 63:5,20 64:5,14 65:1,11,14 66:7 67:24 68:1,15 run-of-the-mill [1] 37:21</p> <hr/> <p style="text-align: center;">S</p> <p>safeguard [1] 56:19 SALES [2] 1:6 3:5 same [14] 7:15 13:15 16:21 23:16 29:12 38:7 40:18,24 45:22 46:2 47:17 54:25 61:1 66:14 satisfied [1] 70:14 saying [16] 15:16 18:20 19:21 45:10 46:12 49:8 51:18,20 52:11,13 53:4 55:23,23 60:12 61:14 67:23 says [28] 11:22 12:24,25 19:21 21:13 29:25 30:1,3 36:18 37:4 38:2,4 40:3 41:5,10 43:19 44:20 46:7,8 47:4 50:1,11 54:7,18 55:1 56:6 59:14 60:16 SCHEIN [2] 1:3 3:4 scholars [1] 51:14 scope [26] 4:9 6:7 7:1 13:4,5,22 17:15,22 20:14 26:16 32:6 33:11 35:15 39:5,14,19,21 41:16,18 44:2 53:16 56:20 64:18 68:24 69:11 70:8 Second [11] 4:8 32:23 36:16 41:22 44:22 47:9 59:11 61:6 63:17 64:20,21 Section [14] 11:18,20,20 12:25 13:1 15:11,13,24 19:20 24:18,19 26:3 30:8 46:7 sections [3] 15:25 43:4 57:11 see [10] 9:21 13:5,7 29:7 43:13 53:17 54:6 55:25 62:3,11</p>	<p>seek [1] 58:21 seeking [14] 5:14,19 6:6 8:23 9:7 10:1 21:13,21 23:3,5 40:4 41:11 47:5 69:15 seeks [1] 23:11 seem [4] 5:25 20:3 48:10 54:6 seemed [2] 14:21 51:5 seemingly [1] 34:10 seems [15] 11:14 12:7,14 16:9 20:1,4,4 24:19 42:15 43:8,10 52:6 57:15 58:3 61:25 send [1] 54:17 sends [1] 45:21 sense [10] 7:25 17:20 18:1 35:18 56:7 57:3,7 64:13,17 67:10 sensible [1] 67:18 sent [1] 12:9 sentence [7] 36:14 40:3 41:23 49:6,10 54:25 55:1 separate [3] 39:22 54:1 55:1 seriously [1] 4:1 set [6] 41:2 51:7,25 52:17 53:15 66:3 setting [1] 63:21 settled [2] 4:5 71:10 several [1] 62:24 shall [10] 8:24 23:20 41:6,23 47:5 52:5 55:2 59:15 60:16,17 SHANMUGAM [58] 1:19 2:3,9 3:6,7,9 6:4,19 7:16 8:10,16 9:24 11:10 13:9,17 14:12,17,24 15:2,19 17:17 18:21 19:11 20:6,11,24 21:7,10,23 22:9,22 23:8,15 24:3,6,22 26:1 27:1,7,15,24 28:13 29:3,17,20,21 30:6,15,21 32:1,23 33:3,21,22 51:10 68:7,8,10 shouldn't [4] 19:2,7 26:12 53:18 show [2] 53:22 66:18 shown [1] 49:14 side [3] 37:17 39:1 45:11 sides [1] 5:3 silent [1] 36:3 similar [1] 29:9 simple [4] 8:1 35:18 36:14 37:10 simply [14] 4:6 19:1 25:18 26:8 36:11 38:18 49:24 62:11 65:13 67:6 69:1,17 70:12,20 since [1] 61:6 single [3] 49:6 54:9 66:7 situation [6] 13:1 37:20,21 38:11 39:3 56:19 six [1] 19:5 smuggle [1] 37:11 smuggling [1] 58:4 solely [1] 39:21 somebody [1] 7:21 someone [4] 9:5,8 53:15 69:20 sometimes [1] 61:8 somewhat [1] 25:5 soon [1] 5:16 sophisticated [1] 10:11 sorry [2] 51:23 65:21 sort [3] 18:19 30:13 44:10 Sotomayor [20] 18:6,7,21 19:9,13</p>	<p>20:6,7,21 50:23,24 51:17,22,24 52:9,19 53:1,3,10 54:5 62:21 Sotomayor's [1] 59:8 sounds [1] 8:10 specifies [1] 28:20 spell [1] 5:21 spoken [2] 15:21 24:24 stage [3] 4:23 19:3 34:9 standard [2] 36:9 47:11 statement [1] 52:21 statements [1] 25:23 STATES [2] 1:1,16 statutes [1] 16:19 statutory [4] 24:14,15 25:21,24 stay [1] 32:15 Steelworkers [1] 25:7 stick [1] 5:5 still [12] 9:3,6 25:21 43:7 49:23 52:19 53:8 58:11 64:17 65:11 66:13 67:21 stop [1] 51:24 storage [1] 37:24 straightforward [1] 50:20 strange [1] 7:19 strategy [2] 34:6,8 streamline [1] 6:25 strong [4] 25:18 45:7 57:1,9 structure [1] 16:18 struggling [1] 66:25 stuff [1] 38:2 subject [39] 4:7 8:25 17:7,8 22:14,20,21 30:6 31:7 36:6,21,23,24 40:5,8,9 42:4,5,8 44:2,4,5 46:23 50:12,12,15,16 54:13 60:5 62:9,10,14,16 63:13 67:23,25 68:1,21 70:1 subjects [7] 27:19,20 60:4,6,17,18 61:22 submission [3] 8:1 18:25 69:1 submit [2] 34:7 35:19 submitted [3] 52:5 71:14,16 subpart [1] 66:6 substantive [1] 32:6 subtle [1] 22:10 suffices [2] 10:21 31:11 sufficient [3] 5:1 13:24 68:18 sufficiently [1] 52:14 suggest [1] 24:19 suggested [1] 22:5 suggesting [1] 60:3 suggests [2] 26:13 32:5 suits [4] 23:1,2,2,5 supply [1] 54:1 suppose [2] 8:20 23:18 supposed [4] 17:3 42:5 47:8 55:17 SUPREME [2] 1:1,15 syllable [1] 36:4</p> <hr/> <p style="text-align: center;">T</p> <p>Technologies [1] 45:6 tension [1] 26:4 term [4] 40:25 50:5,7,7 terms [7] 11:16 16:3,18 26:6 32:3 58:17 61:18</p>	<p>Texas [1] 1:21 text [5] 43:3 50:17 51:11 62:4 67:14 themselves [2] 16:19 54:1 theory [1] 66:10 there's [15] 12:11 14:12 19:20 20:8 23:9 25:9 37:24 42:18,24 53:24 55:1 56:3,4,22 61:24 therefore [2] 13:2 68:19 thinks [1] 57:20 third [3] 55:24,24 70:11 Thomas [11] 8:7,8,16 9:18,25 10:23 40:13,14,22 42:9 43:7 though [9] 8:11,17 21:7 25:21 31:15 44:5 49:21 57:15 62:9 time's [1] 61:6 today [2] 18:25 70:25 toss [1] 61:15 touched [1] 32:11 trace [1] 25:5 traces [1] 25:6 traditional [2] 43:1 68:3 traditionally [1] 56:15 treat [2] 14:4 20:17 treated [2] 39:7 47:16 treatment [1] 15:14 tried [1] 38:23 trip [1] 62:8 true [3] 17:2 31:19 58:1 try [1] 67:21 trying [7] 24:20 37:11 39:2 61:17,20 66:4 67:1 Tuesday [1] 1:12 turn [4] 16:8 25:7 48:11 64:4 turned [1] 22:3 two [8] 4:5 12:19 13:11 21:16 32:10 35:20 46:17 51:14 types [2] 37:6 69:25 typically [3] 39:10 43:5 47:14</p> <hr/> <p style="text-align: center;">U</p> <p>ultimate [1] 66:23 ultimately [3] 16:16 25:11 68:2 unambiguous [1] 49:25 unambiguously [1] 9:2 unclear [2] 19:18 20:15 unconditional [6] 38:16 39:23 42:1 45:2 46:20 54:25 under [24] 4:11 10:19 11:16 13:25 16:10 17:20 21:15 23:19,23 29:14,17 30:7,8,17 36:24 37:8 40:6 41:12 43:21 48:18 56:23 62:15,17 69:17 underlying [1] 16:7 understand [14] 13:18 15:7 18:16 24:15 28:18 31:2 42:9 46:17 51:3 53:11,12 55:12,22 63:1 understanding [1] 28:4 understood [2] 46:14 63:25 union [2] 12:24 38:2 UNITED [2] 1:1,16 universe [1] 7:11 unless [5] 36:20 42:17 43:6,18 57:8</p>
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Official - Subject to Final Review

<p>unlikely ^[5] 6:20 8:18 21:1 22:17 69:6</p> <p>unmet ^[1] 37:3</p> <p>unmistakable ^[22] 10:18 11:6 24:10 30:24 31:3,11,21 33:1 35:22 42:18 49:15 51:8 53:9 63:8,11,16 64:24 65:3,25 67:22 68:14 70:15</p> <p>unmistakably ^[2] 57:8 65:14</p> <p>unnatural ^[1] 23:10</p> <p>unnecessary ^[1] 19:4</p> <p>unusual ^[4] 33:24 41:19 42:25 58:3</p> <p>up ^[23] 3:19 6:21 7:7,11,11 8:19 9:13 16:9 21:4 28:1 29:23 31:17 33:21 39:3 53:17,22 59:8 60:3 66:21 68:2 69:7,24 70:6</p> <p>using ^[3] 52:24 53:1,3</p> <p>utter ^[1] 36:3</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vacate ^[2] 4:3 71:11</p> <p>vacated ^[2] 5:8 35:3</p> <p>valid ^[5] 3:17 4:20 10:7 70:3 71:4</p> <p>venerable ^[2] 25:15,22</p> <p>verb ^[1] 9:22</p> <p>versus ^[1] 3:5</p> <p>victory ^[1] 64:21</p> <p>view ^[7] 22:13,17 23:24 34:12,19 55:10 69:19</p> <p>virtually ^[1] 28:19</p> <p>virtue ^[4] 23:25 30:9 33:5 68:15</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>waiting ^[1] 25:21</p> <p>waiver ^[1] 70:2</p> <p>walk ^[1] 9:23</p> <p>wanted ^[6] 42:19 48:7 57:5 59:23 66:3 67:8</p> <p>wanting ^[1] 58:16</p> <p>warehouse ^[2] 44:22 45:24</p> <p>warrant ^[2] 34:13,14</p> <p>Washington ^[2] 1:11,19</p> <p>way ^[15] 13:15 21:24 38:8 43:25 45:22 49:4,10 50:20 54:6 60:3,15 62:4,12 64:20 67:18</p> <p>ways ^[3] 43:14 51:2 62:24</p> <p>welcome ^[1] 5:9</p> <p>whatever ^[2] 26:19 55:19</p> <p>whatsoever ^[1] 66:19</p> <p>Whereupon ^[1] 71:15</p> <p>whether ^[37] 4:18 6:10,12 8:24 9:6,9 10:4 11:15,24 12:8 19:18,23 23:4,13,16,22 26:15 27:11 29:13 31:10 39:4,14 44:22 48:12 49:4 60:9,11 61:9 63:4 66:1,4 67:15 68:21 69:13,16,21 70:2</p> <p>WHITE ^[2] 1:6 3:5</p> <p>whole ^[3] 6:23 16:7 46:1</p> <p>will ^[12] 3:3 7:12 12:13 19:21,22 21:17 28:23 54:14 58:13 60:4,9,11</p> <p>win ^[2] 51:2 63:9</p> <p>wish ^[3] 38:21 67:2,21</p> <p>wishes ^[1] 43:18</p>	<p>within ^[13] 6:12 13:2 36:20,22 37:23 38:5 39:5,14 44:22 46:22 48:23 50:9 63:22</p> <p>without ^[8] 4:24 5:2 23:19 32:20 49:4 50:18 53:5 67:18</p> <p>word ^[1] 9:21</p> <p>worded ^[1] 34:20</p> <p>words ^[4] 10:16 13:20 44:9 70:18</p> <p>work ^[3] 5:4 47:11 60:14</p> <p>worker ^[1] 45:13</p> <p>works ^[1] 60:13</p> <p>world ^[6] 28:1,8 60:14,15 61:8 70:5</p> <p>wrap ^[2] 33:21 66:21</p> <p>write ^[1] 25:10</p> <p>written ^[1] 25:8</p> <p>wrote ^[2] 61:16 62:11</p>
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