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IN THE SUPREME COURT OF THE UNITED STATES

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ASHLEY SVEEN, ET AL.,)
 Petitioners,)
 v.) No. 16-1432
 KAYE MELIN,)
 Respondent.)

- - - - -

Washington, D.C.

Monday, March 19, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

ADAM G. UNIKOWSKY, ESQ., Washington, D.C.; on behalf of the Petitioners.

SHAY DVORETZKY, ESQ., Washington, D.C.; on behalf of the Respondent.

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

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument today in Case 16-1432, Sveen versus
5 Melin.

6 Mr. Unikowsky.

7 ORAL ARGUMENT OF ADAM G. UNIKOWSKY

8 ON BEHALF OF THE PETITIONERS

9 MR. UNIKOWSKY: Mr. Chief Justice, and
10 may it please the Court:

11 The question before the Court today is
12 whether the application of a
13 revocation-on-divorce statute to a life
14 insurance policy purchased before the enactment
15 of that statute violates the Contracts Clause.

16 JUSTICE KENNEDY: Could you just -- as
17 a preliminary matter, after the divorce but
18 before the owner of the policy died, did he pay
19 premiums?

20 MR. UNIKOWSKY: I -- I'd have to
21 check. I'm not -- I'm not sure if he did. He
22 did pay them before the divorce. I'm not sure
23 if the -- I -- I -- the policy was live at the
24 time of his death. I'm not sure -- I think it
25 may have been funded by the premiums that had

1 already been paid on the policy.

2 JUSTICE KENNEDY: That -- that was
3 just a factual question. You may want to
4 introduce your argument and tell us what your
5 --

6 MR. UNIKOWSKY: My understanding is --

7 JUSTICE KENNEDY: -- what your general
8 outline is going to be, but I --

9 MR. UNIKOWSKY: I'll just answer your
10 question. My understanding is that he had
11 already paid enough into the policy that the
12 policy itself paid the premiums at a certain
13 point.

14 JUSTICE KENNEDY: All right. That
15 could be.

16 MR. UNIKOWSKY: So I think that's --
17 so I don't think he actually paid any more
18 after the divorce. My understanding is that
19 that's what's in that.

20 JUSTICE KENNEDY: In the course of
21 your argument, suppose this were the first
22 statute on this subject. Would that make a
23 difference? And then I could add to the
24 hypothetical, suppose the empirical evidence
25 were such that most people assumed that divorce

1 would not change the beneficiary, would that
2 change -- but I interrupted you at the first.
3 You might have a broader outline you want to
4 give.

5 MR. UNIKOWSKY: No, I -- I -- I'm
6 happy to answer those questions at the outset.
7 So your first question is what if this was the
8 first statute on -- on this issue; in other
9 words, the first ever revocation-on-divorce
10 statute? Well, I'd point out that even when
11 the first of these statutes were enacted around
12 30 years ago, there already were a number of
13 statutes, almost universally, in fact, that
14 revorced -- that revoked wills upon divorce.

15 So, really, the -- the historic
16 purpose of these statutes, according to the
17 Uniform Probate Code, was to align the law of
18 life insurance policies with the law of wills.
19 So we would take the position that even the
20 first of these statutes that was enacted could
21 be applied to existing policies under the --
22 the Contracts Clause.

23 To turn to your second question, which
24 was what if, empirically speaking, someone
25 didn't know? So, first of all, I do think that

1 -- I don't mean to fight the hypothetical, but
2 in this case, I think the legislature made the
3 empirical determination that the typical person
4 designates a spouse as a beneficiary because
5 it's the spouse, and when the divorce happens,
6 the calculus changes. And --

7 JUSTICE SOTOMAYOR: On the basis of
8 what? Where in the record?

9 MR. UNIKOWSKY: I'm sorry, Your Honor?

10 JUSTICE SOTOMAYOR: Where in the
11 record is the basis for their empirical
12 finding?

13 MR. UNIKOWSKY: There's no -- the
14 legislative history doesn't include any surveys
15 or anything like that. I --

16 JUSTICE GINSBURG: They were picking
17 up off the Uniform Probate Code, weren't they?

18 MR. UNIKOWSKY: Yes.

19 JUSTICE GINSBURG: Minnesota was
20 picking up the model statute, and the model
21 statute started it off and then in another --

22 MR. UNIKOWSKY: That is correct. So
23 Minnesota, like numerous other states, simply
24 implemented the Uniform Probate Code. I don't
25 think that there's any hearings in the

1 legislative record regarding the empirical
2 findings underlying that -- that code. I
3 think --

4 JUSTICE GINSBURG: But there was --
5 there was a -- I mean, if there's -- the
6 supposition is, on divorce, the policyholder
7 will not want the ex-spouse to get the policy.
8 But, as has been pointed out, sometimes there
9 will be a desire that the beneficiary remain
10 unchanged.

11 It was suggested by the other side
12 that Minnesota could have accomplished this in
13 a much better way; that is, they could have
14 made it a condition of every divorce decree
15 that the judge tell the couple life
16 insurance -- do you have life insurance? Do
17 you want to leave it as it is, or do you want
18 to change it?

19 MR. UNIKOWSKY: Yeah, so, first of
20 all, no other statute actually does it that way
21 without a revocation-on-divorce statute.
22 Respondent does cite statutes like that from
23 Virginia and Utah, but those states also have
24 revocation-on-divorce statutes. These
25 notification requirements are -- are kind of a

1 supplement to that.

2 I guess Minnesota could have done
3 that, but I don't think it would accomplish the
4 goal of the statute, which was to align the law
5 of life insurance policies which -- with the
6 law of wills, which is what the Uniform Probate
7 Code said, because, again, wills automatically
8 -- excuse me, a divorce automatically revokes
9 depending --

10 JUSTICE GORSUCH: Well, I think,
11 counsel, Justice Ginsburg's question goes to
12 the -- the weighing that some of our cases
13 suggest that we have to do in these cases. And
14 if you concede, as I believe you have, that
15 Minnesota could achieve everything it wants to
16 achieve by prospectively applying this law and
17 then retroactively ordering courts to make sure
18 that this issue is dealt with in divorce
19 decrees, how does that inform our analysis as
20 to the legitimacy and need for overriding
21 contracts in these cases?

22 MR. UNIKOWSKY: So, first of all, I
23 would -- I don't agree with the premise that
24 Minnesota could have achieved all they wanted
25 to achieve just by this notice requirement.

1 First of all, I think that, again, the goal is
2 to align the law of life insurance policies
3 with the law of wills, and the will is revoked.
4 So Minnesota wanted to --

5 JUSTICE GORSUCH: Prospectively,
6 though, you acknowledge it could have achieved
7 all it wants to achieve?

8 MR. UNIKOWSKY: Yes, that's true.

9 JUSTICE GORSUCH: And, retroactively,
10 it could have done as Justice Ginsburg suggests
11 and told divorce courts that this is a matter
12 that they'd have to take up. So how is it that
13 they wouldn't be able to achieve all that they
14 wanted to achieve?

15 MR. UNIKOWSKY: Well, because, first
16 of all, I mean, the person might not do it and
17 you might get into all these disputes about
18 what -- what a decree means. One of the
19 reasons for this statute is that decrees were
20 often ambiguous in what they did, whether they
21 were intended to revoke the designation or not.
22 And this statute eliminates this ambiguity.

23 That ambiguity wouldn't go away if you
24 just told people don't forget, you have to
25 change your policy. They wouldn't do it, and

1 then you'd have a dispute over what the decree
2 means.

3 So I think that the reason that no
4 state has adopted that option without a
5 revocation-on-divorce statute is precisely
6 because those problems wouldn't be solved.

7 I want to make one other point about
8 the retroactivity issue, though, which is that,
9 first of all, I don't think that the arguments
10 that the -- that the statute doesn't really --
11 is inconsistent with the intent of a typical
12 spouse, I don't think that goes to the
13 retroactivity of a statute. It's more of an
14 argument that the statute's sort of a bad idea
15 both going backwards and going forwards.

16 And I don't think the Contracts Clause
17 is designed to protect against just bad
18 statutes generally. It's designed to protect
19 against unfairly retroactive statutes. And
20 here --

21 CHIEF JUSTICE ROBERTS: Well, does --
22 does the beneficiary on the policy -- is that
23 individual properly viewed as a third-party
24 beneficiary under contract law?

25 MR. UNIKOWSKY: No, Your Honor. It's

1 been conceded in this case that she --
2 Respondent had no contractual interest. That's
3 why the sole interest she's protecting is Mark
4 Sveen's interest under a theory of third-party
5 standing. I think that if she had a protected
6 interest, then this case would be very
7 different. And, by the way, the statute does
8 not apply if there's a protected interest.

9 CHIEF JUSTICE ROBERTS: But is that a
10 matter -- putting aside what you regard as a
11 concession, I don't know if your friend would
12 agree with that, but is it a uniform conclusion
13 under state law, the common law, that a
14 beneficiary is not -- I mean, they're called
15 the same thing, third-party beneficiary, under
16 contract law?

17 MR. UNIKOWSKY: Well, the relevant
18 question is whether that person has enforceable
19 vested rights in the contract. So you actually
20 can buy an insurance policy if you want to that
21 says that there's a third-party beneficiary who
22 -- who has a vested right, and you -- you can't
23 change it without the person's consent. You
24 can buy that kind of policy if you want to.
25 And this statute wouldn't apply by its terms to

1 such a policy.

2 But in this particular case, it was
3 agreed as the case was litigated that it was
4 Mark Sveen's rights at issue because she -- he
5 had the -- he has the right to change the
6 beneficiary days -- excuse me, decisions at
7 will.

8 JUSTICE KENNEDY: So do any states say
9 that the -- a person that is the named
10 beneficiary is a third-party beneficiary for
11 contract purposes? Do any states say that?

12 MR. UNIKOWSKY: I think that -- so my
13 understanding is they can be depending on what
14 the contract says. So you can always, right,
15 buy insurance if you want to --

16 JUSTICE KENNEDY: Well, that was --
17 that was your answer.

18 MR. UNIKOWSKY: -- that designates the
19 person as a third-party beneficiary with
20 enforceable rights at the time it's purchased.
21 You can do that in Minnesota or everywhere.
22 And in that case, the statute wouldn't apply.

23 But here in this case, as this case
24 reaches this Court, the argument is that it was
25 Mr. Sveen's, the decedent's, contractual rights

1 that were infringed. Respondent didn't have
2 any vested rights in the contract at the time
3 that Mark Sveen bought it because he had the
4 right to designate -- redesignate at will.

5 JUSTICE KAGAN: Mr. Unikowsky --

6 JUSTICE SOTOMAYOR: Could you just --

7 JUSTICE KAGAN: -- on the
8 retroactivity point, here, the statute precedes
9 both the divorce and the death. But what would
10 happen if the divorce happened first and then
11 the enactment of the statute and then the
12 death? Would the statute have applied?

13 MR. UNIKOWSKY: So that's an unsettled
14 question of state law. I think that there is a
15 -- there's an unpublished Minnesota decision
16 that says it would apply in that context
17 because the person can still redesignate. So I
18 think that does present some retroactivity
19 concerns, but I think it's retroactivity
20 concerns with respect to the divorce decree.
21 In other words, it seems to be altering an
22 employed term of the decree.

23 So I think the analysis in that case
24 would be kind of a due process analysis because
25 it's an issue of changing a judgment rather

1 than changing the preexisting contract.

2 JUSTICE GORSUCH: But your answer for
3 Contract Clause purposes would be the same?

4 MR. UNIKOWSKY: Yes. With respect to
5 the underlying insurance policy, yes. I think
6 that the retro- -- the reason that there would
7 be a retroactivity concern is that it would
8 interfere with settled expectations at the time
9 of the divorce.

10 JUSTICE GORSUCH: Based on the decree
11 rather than the contract?

12 MR. UNIKOWSKY: Yes, Your Honor. And
13 I think that's an important point in this case
14 because, again, the contracts clause protects
15 the reliance interest. Fundamentally, that's
16 why it distinguishes between contracts that are
17 signed before and after the statute's enacted.

18 And in a case like this, I think the
19 reliance interests really come into play at the
20 time of the divorce, because the statute is
21 inert until the divorce actually happens.

22 And that's when people are thinking
23 about this, because they're making a decision,
24 okay, there's this changed circumstance, I'm no
25 longer married to this person, do I want them

1 to stay the beneficiary or do I not want them
2 to stay the beneficiary?

3 And at the time that that decision is
4 made, the existence of the statute makes a
5 difference in what they do because, if they
6 know the statute's on the books, they don't
7 have to contact the insurance company and
8 change the designation. And in this case, the
9 statute was passed years before the divorce
10 occurred.

11 So I think it's --

12 JUSTICE SOTOMAYOR: Could you tell me,
13 what are the various ways that a -- an insured
14 who wants to keep his former wife as the
15 beneficiary, what would he have to do after the
16 divorce?

17 MR. UNIKOWSKY: Well, there -- first
18 --

19 JUSTICE SOTOMAYOR: I know he could --
20 the divorce decree could say yes or no. What
21 other ways could the insured --

22 MR. UNIKOWSKY: He just has to -- he
23 just has to send a letter to the company. So
24 this life insurance policy, as is typical, you
25 can change the beneficiary whenever you want.

1 JUSTICE SOTOMAYOR: No, let's assume
2 he doesn't want to.

3 MR. UNIKOWSKY: If he doesn't want to
4 change? So he just has to send -- so there's
5 an automatic revocation. So, if he wants to
6 redesignate the spouse, you send in a change of
7 beneficiary form. So --

8 JUSTICE SOTOMAYOR: How does the
9 insurance company know that there has been a
10 divorce so that they receive the letter and
11 sort of go: Why is he doing this? We already
12 have that beneficiary.

13 MR. UNIKOWSKY: Well, I mean, I assume
14 the -- the insurance company has -- has lawyers
15 who's aware that these statutes are -- are on
16 the books.

17 JUSTICE BREYER: Why does it matter?
18 The insurance company gets a letter saying I
19 want my wife to be the beneficiary, period. So
20 that's the beneficiary.

21 MR. UNIKOWSKY: Yeah, it would be on
22 the -- I mean, the insurance company has --

23 JUSTICE BREYER: It doesn't matter
24 whether they know about the divorce, don't know
25 about the divorce. Who cares?

1 MR. UNIKOWSKY: Right, so if the
2 agency --

3 JUSTICE BREYER: Is that right?

4 MR. UNIKOWSKY: -- gets a letter, I
5 assume that they'll just put it in the person's
6 file, it'll have a date on it, and then the
7 person -- the spouse will be re-added.

8 I think in many cases this is resolved
9 in the divorce decree, especially where here
10 the statute was on the books at the time of the
11 divorce. Any good divorce lawyer is going to
12 say, look, there's this revocation-on-divorce
13 statute. If you want to negotiate an agreement
14 where she's still the beneficiary --

15 JUSTICE SOTOMAYOR: So we have a
16 Supreme Court case because there was an
17 ineffective attorney?

18 MR. UNIKOWSKY: Or not. I mean, it's
19 quite possible that the attorney was perfectly
20 effective and advised Mr. Sveen you don't have
21 to change the beneficiary designation because
22 it's already happened.

23 And now that he's dead, it's somewhat
24 ironic that Respondent is trying to assert his
25 rights -- his rights to vindicate his intent

1 when he's not here to say whether he wants --

2 JUSTICE KENNEDY: Well, in most -- in
3 most cases, I think where there's a lot of
4 property, the insurance will be on the table
5 and they'll talk about it.

6 MR. UNIKOWSKY: Yes, absolutely.

7 JUSTICE KENNEDY: Your case applies to
8 really small divorces, I think. I don't know
9 which way that cuts.

10 MR. UNIKOWSKY: Well, I think that
11 it's quite possible that -- so, I mean, we
12 don't know what the agreement was. We don't
13 know what Mark Sveen wanted. He's not here.
14 He can't say what he wants. But --

15 JUSTICE GINSBURG: But there was --
16 there was a settlement in this divorce?

17 MR. UNIKOWSKY: Yes.

18 JUSTICE GINSBURG: And do we know what
19 the former wife got in that settlement? You're
20 urging that she doesn't get the proceeds of the
21 insurance policy. What did she get?

22 MR. UNIKOWSKY: I mean, the divorce
23 decree is -- is in the District Court record.
24 I -- I don't recall the -- the precise way that
25 the property distribution happened, but that's

1 all in the -- the divorce decree is in the
2 record. And as far as I know, there -- there
3 is no concern that there is some kind of unfair
4 distribution of property.

5 JUSTICE KENNEDY: The -- the cases
6 I've -- I've -- I've looked at are our cases,
7 Allied Steel and Home Savings and Loan,
8 Bastille and Bituminous Coal and so on.

9 Are -- are there in the circuits or in
10 the state courts analogous cases where
11 contracts are changed retroactively and
12 Contract Clause arguments have been rejected?
13 Are there -- are there any cases that you can
14 rely on out in the state courts that are
15 analogous to this?

16 MR. UNIKOWSKY: Yeah, so I think the
17 -- the -- the -- the best analogy maybe I'd
18 have are statutes that -- or, rather, statutes
19 that affected the way property was divided in
20 divorce. And this was the way I -- I started
21 out my remarks today.

22 JUSTICE KENNEDY: In divorce.

23 MR. UNIKOWSKY: So, you know, in the
24 1970s, there was a very dramatic revolution in
25 American divorce law. Before the '70s,

1 divorcing wives were left often destitute after
2 divorce. And a number of states -- actually,
3 all the states passed statutes that
4 fundamentally altered divorce and made the
5 distribution of assets more equitable. Women
6 still are statistically worse off in divorce,
7 but it's better now than it was in -- in 1950.

8 And many times divorcing husbands
9 would lodge due process and contracts clause
10 challenges to these statutes, essentially
11 saying that, when I bought the asset, I would
12 have kept it in a divorce. And, therefore, it
13 violates the contracts clause to change the
14 divorce laws.

15 And those -- those arguments were
16 rejected by state courts, essentially saying
17 it's -- it's -- it's a police power issue.
18 States are allowed to decide how assets are
19 distributed in divorce.

20 We view this as analogous because
21 really, again, the statute is inert until there
22 is a divorce, and even when there's a divorce,
23 all the statute does is it regulates --

24 JUSTICE GORSUCH: But, counsel, do we
25 know that the -- the dead husband here didn't

1 as part of the divorce wish this asset to
2 remain with his -- with his ex-wife? Sometimes
3 that is part of a divorce arrangement, that
4 certain assets stay with the spouse.

5 Is there any indication in this record
6 at all that the decedent wished this asset to
7 go anywhere else?

8 MR. UNIKOWSKY: I mean, we don't know.
9 All we know is that the statute was on the
10 books and there is a life -- there's a divorce
11 settlement and the settlement does not override
12 the default rule that perhaps the divorce
13 lawyers told them about. I mean, we don't know
14 what the divorce lawyers told them. That's all
15 we know.

16 So, no, I mean, we don't exactly know
17 what he wanted and we don't know at this point,
18 that's certainly the case. But I -- I think
19 that it's just hard to say there's an
20 impairment of his reliance interests when,
21 really, the reliance interests came to play
22 when the state --

23 JUSTICE GORSUCH: Does anyone pay life
24 insurance for the joy of paying life insurance?

25 MR. UNIKOWSKY: No.

1 JUSTICE GORSUCH: Isn't the
2 specification of the beneficiary pretty
3 important? I mean, Justice Washington in
4 Dartmouth College said, you know, the bounty of
5 a contract is -- is -- is essential to the
6 obligation.

7 MR. UNIKOWSKY: Absolutely, Your
8 Honor. Of course, the identity of the
9 beneficiary is very important. It's the key of
10 the policy.

11 But what this statute does is it
12 construes the divorce as an exercise, as an
13 option to change the beneficiary, which the
14 legislature has deemed that not everyone, but
15 most people want to do. And it still reserves
16 the option in the policyholder to -- to
17 redesignate the ex-spouse either in the divorce
18 decree itself. Excuse me.

19 JUSTICE GINSBURG: He had -- he had
20 already designated the contingent beneficiaries
21 were his children, right?

22 MR. UNIKOWSKY: Correct. So, yes, so
23 his -- so -- and that's another reason we think
24 that the statute isn't necessarily an
25 impairment, because when the -- the money goes

1 to -- it's not as though the insurer is
2 relieved of the obligation to pay. The money
3 simply goes to the contingent beneficiaries.

4 JUSTICE GORSUCH: Well, what -- what
5 if it didn't go to his contingent
6 beneficiaries? Then what?

7 MR. UNIKOWSKY: Well, if there's no
8 contingent beneficiary, it goes into the
9 estate, and it's -- it's -- the money is
10 distributed.

11 JUSTICE GORSUCH: Let's say the
12 statute said it -- it goes to a charity or --
13 or instead of the children, some -- some nice
14 thing for children. Would that be a contract
15 clause violation?

16 MR. UNIKOWSKY: I think that --

17 JUSTICE GORSUCH: And if not, why not?

18 MR. UNIKOWSKY: I think that would be
19 a -- a more difficult case for us.

20 JUSTICE GORSUCH: No, no, no, no, no,
21 not so easy.

22 (Laughter.)

23 MR. UNIKOWSKY: So I'm --

24 JUSTICE GORSUCH: Would that be a
25 Contract Clause violation?

1 MR. UNIKOWSKY: I'm going to stick to
2 my --

3 JUSTICE GORSUCH: Surely you've given
4 some thought to that.

5 MR. UNIKOWSKY: I'm going to stick to
6 my guns and say I don't think it was, but you
7 don't have to agree with me to vote for us in
8 this case. Okay?

9 So, first of all, I am going to stick
10 to my guns and say I don't think that would be
11 a contracts clause violation.

12 JUSTICE GORSUCH: So the state says,
13 contract, we don't care about your primary or
14 your contingent beneficiary. The money goes to
15 the state.

16 The Constitution of the United States
17 says that a state cannot impair the obligations
18 of a contract.

19 And -- and you don't think we have a
20 problem?

21 MR. UNIKOWSKY: I think that would be
22 a taking because it would violate the Con --

23 JUSTICE GORSUCH: No, no, no, no, a
24 Contract Clause.

25 MR. UNIKOWSKY: No, I don't think so.

1 That would be a taking because it would violate
2 the Constitution even going forwards.

3 JUSTICE GORSUCH: No, I'm asking you
4 about Contract Clause violation. You'd say
5 that's no Contract Clause violation. There's
6 no impairment of an obligation in that case?

7 MR. UNIKOWSKY: If the money just
8 escheats to the state --

9 JUSTICE GORSUCH: No, no, the statute
10 just says it goes to the -- goes to wherever,
11 to the state, a nice charitable organization
12 we'd all agree on that most people would
13 support, if not everybody, most people, just
14 like most people would want to change their
15 beneficiary here.

16 That there's no impairment of an
17 obligation in that case?

18 MR. UNIKOWSKY: Right, so we have the
19 broader arguments and the narrower arguments in
20 our brief. Under the broadest argument in my
21 brief, that's not an impairment, because it's
22 like a will. We make the argument this is
23 analogous to a will. A will isn't a contract.
24 It may be bad for money in a will to be
25 distributed to some party, but that's not a

1 contractual obligation.

2 But if you disagree with me, Your
3 Honor, we have several arguments in our brief
4 that distinguish this precise scenario you have
5 discussed. So one of our leading arguments in
6 our brief is that this is a mere default rule
7 and that's not an impairment when there's only
8 a paperwork burden.

9 That argument which we make which is
10 supported by numerous 19th Century cases, long
11 before Blaisell, would not apply to the
12 hypothetical you've just given.

13 So we cite a number of cases in which
14 there's these recording statutes that say, if
15 you don't submit a piece of paperwork to the
16 government, you lose your rights altogether.
17 They're extinguished.

18 And those statutes did not exist at
19 the time the contract was purchased.

20 And in a series of 19th Century cases,
21 from peak -- a peak era of enforcement of the
22 contracts clause, the Court had no difficulty
23 upholding those statutes saying it's just a
24 paperwork obligation and, therefore, there's no
25 impairment in the relevant sense.

1 And so --

2 JUSTICE GORSUCH: They also talked
3 about remedies, right, as being distinct from
4 obligations, didn't they?

5 MR. UNIKOWSKY: Some of those --
6 that's true. But I think that these were not
7 remedial statutes. I think that these
8 destroyed the obligations altogether. Like, if
9 you didn't submit the recording obligation, the
10 mortgage was wiped out.

11 So that's not -- I don't think it's a
12 remedial issue. I think that's wiping out the
13 rights.

14 I mean, for instance, the Gilfillan
15 case from the 19th Century is another good
16 example, that has nothing to do with
17 contractual remedies. That was a case
18 involving a bondholder settlement --

19 JUSTICE GORSUCH: The recording
20 statutes merely said that your -- your remedy
21 would be different if you didn't record, right?

22 MR. UNIKOWSKY: It wasn't -- no, the
23 rights were completely wiped out. You -- you
24 -- the land patent just ceased to exist. If
25 someone else bought the property, your

1 contractual rights were eliminated. I don't
2 think that's really remedial argument. It
3 would just completely destroy the rights of the
4 contract, period.

5 And maybe the Gilfillan case is a
6 better example, which is a good 19th Century
7 case which was not a case about remedies. That
8 was a case involving a corporate bondholder
9 settlement where the legislature was concerned
10 that -- that citizens wouldn't agree to the
11 settlement which might not leave the company
12 afloat. So it enacted this statute saying that
13 if you don't dissent affirmatively from the
14 settlement, you'll be deemed to have consented
15 to the settlement. And the Court had no
16 difficulty upholding the statute, saying it's a
17 mere paperwork obligation; all you have to do
18 is send a letter to the insurance company -- or
19 -- or to the -- to the company in that case;
20 there's no impairment of a contractual
21 obligation.

22 And that's the same -- excuse me,
23 that's the same impairment in this case.

24 CHIEF JUSTICE ROBERTS: You made the
25 point earlier that -- I understood you to make

1 the point that this would be outside the scope
2 of the Contract Clause because it was an
3 exercise of the state's police power?

4 MR. UNIKOWSKY: In the -- yes. That's
5 a different argument in the context of divorce.
6 Maybe I --

7 CHIEF JUSTICE ROBERTS: Yeah. But --
8 but is that true to the full extent of the
9 police power? Anything that we would
10 characterize as a police power authority would
11 be exempt from the scrutiny under the Contract
12 Clause?

13 MR. UNIKOWSKY: No, this is a -- an
14 argument of the sui generis nature of divorce.
15 So the relevant point for us is that even when
16 Mr. Sveen -- and I'm sorry to be jumping around
17 between these arguments -- but even when
18 Mr. Sveen purchased the insurance policy, the
19 state had the authority to decide what would
20 happen to that beneficiary designation in a
21 divorce. It's not like an ordinary contract
22 where courts are bound by the intent of the
23 parties. A divorce court, even at the time he
24 bought the policy, had the power to give the
25 policy to his ex-spouse as part of the

1 equitable distribution of property or force him
2 to keep paying proceeds to the ex-spouse as an
3 ancillary to an alimony order. So I think that
4 --

5 JUSTICE SOTOMAYOR: My problem with
6 the police power argument you're making is that
7 I don't think it stands alone, meaning you can
8 think that the state has a greater interest in
9 certain areas like divorce or others, regulated
10 fields like mineral, et cetera, but I don't
11 think that state police power gives unbounded
12 discretion to the state.

13 To some extent, it's intermixed with
14 what's the state's purpose and is it a
15 legitimate thing it's doing?

16 MR. UNIKOWSKY: Your Honor, we are not
17 arguing for unbounded state power. There's
18 this particular argument about divorce which is
19 premised on the fact even when Mr. Sveen bought
20 the policy, the divorce court had made -- it
21 was the divorce court's decision on what would
22 happen to that policy in a divorce.

23 JUSTICE SOTOMAYOR: Well, that goes
24 back to Justice Gorsuch's question, could the
25 state say, upon divorce, I'm giving the money

1 to the state or I'm giving it to a charity, et
2 cetera? And you said yes, but I wasn't quite
3 sure why.

4 It seems to me that, even under state
5 power, you have to be able to articulate some
6 fit between the need and the solution.

7 MR. UNIKOWSKY: Right. So my response
8 to Justice Gorsuch was about a different
9 argument about treating insurance policies like
10 wills. With regard to a divorce, I agree with
11 you that I don't think that just giving the
12 money to a charity or to the government could
13 conceivably be deemed as an exercise of
14 preexisting police power, because, at the time
15 Mark Sveen bought his policy, a divorce court
16 couldn't just randomly take the parties' assets
17 and give it to the government to discourage
18 divorce or something. That was not within the
19 repertoire of options for the divorce court.

20 But the divorce court could revoke
21 beneficiary designations. That happened all
22 the time. So I think that the difference
23 between that -- in the context of our divorce
24 argument, the difference between Justice
25 Gorsuch's hypothetical and this statute is that

1 this statute rec- -- reflects the exercise of a
2 preexisting power vested in courts and --

3 JUSTICE KAGAN: Please.

4 MR. UNIKOWSKY: No, go ahead, I'm
5 sorry.

6 JUSTICE KAGAN: So this might be an
7 unfair question, but one of the things that
8 struck me in reading your brief and now in
9 listening to you, it's a -- it's an unusual
10 thing we see in your brief, this kind of we
11 have five arguments in varying levels.

12 You know, it's -- it's the police
13 power; it's not a contractual obligation; it's
14 not an impairment at all; it's not a
15 substantial impairment; maybe it is, but it's
16 justified. Did I get all those five right?

17 MR. UNIKOWSKY: Yes, you did.

18 (Laughter.)

19 JUSTICE KAGAN: Really, which one do
20 you think?

21 (Laughter.)

22 JUSTICE KAGAN: Because, you know,
23 you're answering some of our questions like,
24 oh, that's an answer from column 1. And no,
25 now I can give you an answer from column 3.

1 But when we have to decide this case,
2 we presumably have to pick one. And if we were
3 to go with you, I mean, where do you really
4 think that the -- this -- this is -- the
5 question is here?

6 MR. UNIKOWSKY: I think that the --
7 the cleanest way to vote for us, and I hope you
8 do, is that it's just -- it's really just a
9 default rule and it's just a paperwork burden
10 and there's no interference with reliance
11 interests, because, really, the reliance
12 interests come into play at the time of the
13 divorce.

14 JUSTICE KENNEDY: So you're -- you're
15 saying it's not a substantial alteration; is
16 that the --

17 MR. UNIKOWSKY: That's right. So I
18 think there's --

19 JUSTICE KENNEDY: Is that the same
20 argument?

21 MR. UNIKOWSKY: Yes, I think so. And
22 there's really two pieces to that. One is that
23 you only have to send in a letter to the
24 company. This Court has said in a lot of cases
25 that that's not a sufficient impairment to

1 implicate the Contracts Clause. And also the
2 fact that the -- the goal of the Contracts
3 Clause is to protect reliance interests. And
4 here, realistically, the reliance interests
5 come to play at the time of the divorce because
6 the statute's inert until then.

7 CHIEF JUSTICE ROBERTS: When you say
8 it's not a substantial impairment, are you
9 acknowledging that it is an impairment? At
10 least in terms of ranking your -- your
11 arguments?

12 MR. UNIKOWSKY: I don't think it's an
13 impairment at all, but I think that because
14 this Court has held that insubstantial
15 impairments are not impairments at all, I think
16 that's sort of an easier way to get to where we
17 want. But, certainly, we argue in our brief,
18 and I -- I stick to our argument today, that
19 there's just not an impairment, period, because
20 it's simply the exercise of an option that
21 leaves the option to redesignate the
22 beneficiary by sending a letter.

23 I also think the divorce aspect of the
24 case is important. And I do think the
25 arguments sort of go together. The -- the

1 state has broad authority over divorce. It
2 always has. We quote Jame -- John Marshall and
3 James Kent, who have given broad powers to
4 legislature over divorce.

5 And if the Court is concerned that you
6 don't want to give the legislature unlimited
7 power over divorce, then you can say: Well,
8 the -- the legislature has broad powers to
9 legislate the effect of a divorce decree and
10 how -- you know, maybe even if that power is
11 not unlimited, it at least extends to imposing
12 this kind of paperwork burden, which, even
13 outside the divorce context, this Court has
14 already held does not constitute a substantial
15 impairment.

16 So I'd like to reserve my time if I
17 may.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Mr. Dvoretzky.

21 ORAL ARGUMENT OF SHAY DVORETZKY
22 ON BEHALF OF THE RESPONDENT

23 MR. DVORETZKY: Mr. Chief Justice, and
24 may it please the Court:

25 The Constitution forbids states from

1 passing any law impairing the obligation of
2 contracts. Here, Minnesota directly and
3 retroactively altered the contractual means by
4 which policy holders select who will receive
5 policy proceeds, and it did so even though it
6 had evident alternatives, such as requiring
7 notice of the revocation statute in divorce
8 decrees, to achieve its purposes equally well
9 but without impairing contractual obligations.

10 Minnesota, therefore, violated the
11 Contracts Clause's clear prohibition, whether
12 this Court returns to that clause's original
13 understanding, takes the smaller step of
14 treating impairments of public and private
15 contracts alike, or simply applies current
16 doctrine.

17 JUSTICE GINSBURG: The -- the court,
18 it has been pointed out, in a divorce setting
19 can say, presented with this very situation,
20 the children get the proceeds of this policy.
21 She's out. We've provided for equitable
22 division of other property.

23 If a divorce court can do that, why
24 can't the legislature make the same assessment?

25 MR. DVORETZKY: Because the Contracts

1 Clause applies to laws passed by legislatures
2 and not to the actions of courts.

3 Chief Justice Taft explained that in
4 an opinion long -- a long time ago, and that
5 opinion itself cited 20 other precedents of
6 this Court saying the same thing. It follows
7 from the text of the Contracts Clause that it
8 speaks only of laws. And it makes sense that
9 the Contracts Clause would apply to
10 legislatures rather than courts because courts
11 are constantly in the business of addressing
12 contractual disputes, and the framers did not
13 mean to constitutionalize every Contracts
14 Clause case. But when a state --

15 JUSTICE SOTOMAYOR: I'm sorry, judges
16 do what they do as a result of laws, meaning
17 they don't just decide to redistribute
18 insurance proceeds out of the kindness of their
19 heart or -- or -- they do it because there's a
20 specific law that gives them the right to do
21 that. So I'm not sure what the difference is.

22 MR. DVORETZKY: I think the --

23 JUSTICE SOTOMAYOR: If the law is
24 compelling it or the law is permitting it, then
25 it's the judge as well as the law.

1 MR. DVORETZKY: I think there's a
2 difference between courts exercising their
3 discretion and states enacting laws that have
4 this kind of --

5 JUSTICE KENNEDY: Well, but Justice
6 Sotomayor's point and Justice Ginsburg's point
7 is the same. Suppose the state said that, in a
8 divorce decree, the court will assume that the
9 intent is to leave the beneficiaries the same
10 or leave the beneficiaries different. And the
11 court acts under that statute.

12 Then you have a Contract Clause. Just
13 the fact that the court is implementing the
14 state's policy doesn't mean that it's a court
15 decree, not a state decree.

16 MR. DVORETZKY: I think there -- there
17 is -- there has historically been a fundamental
18 distinction, though, between what courts do and
19 what legislatures do. And that's a result,
20 again, both of precedent and of the commonsense
21 notion that the Contracts Clause can't apply to
22 what courts do, or else every time a court does
23 anything with respect to a contract, outside
24 the divorce context as well, every time a court
25 declares a contract unconscionable, that would

1 be a contracts violation. That just can't be.

2 But this Court has long recognized, as
3 the framers intended, that when a legislature
4 passes a law that impairs contract, that is
5 getting directly at the heart of what the
6 Contracts Clause was intended to cover.

7 JUSTICE BREYER: Well, I take it here
8 the contract is -- let's call him Mr. Smith --
9 he has a contract with an insurance company.
10 That contract provides that after a divorce the
11 money will still go to the designated
12 beneficiary.

13 They pass a law and it says it will
14 not go to the beneficiary that you initially
15 designated, unless you act affirmatively.
16 Right? That's the contract.

17 MR. DVORETZKY: That --

18 JUSTICE BREYER: That's the situation
19 in front of us?

20 MR. DVORETZKY: That's -- yes.

21 JUSTICE BREYER: Yes. Okay. Now I
22 found this -- three cases from the 19th
23 Century, 1870s, 1880s, 1923, not a period when
24 this Court was about to interpret the contracts
25 clause loosely. I think that's fair.

1 One of the cases says the legislature
2 passes a law after Smith, who is a bondholder
3 of a corporation, enters into a contract with
4 the corporation. Is this a contract, Smith and
5 the corporation? They have a bond.

6 The legislature passes a law that
7 makes that bond less valuable, less valuable.
8 All right? Applies it retroactively. And this
9 Court says: That's fine.

10 You know why? Because all that Smith
11 has to do in order to stop its value going
12 down, rejecting the change, is affirmatively
13 notify the company. And they say: No, that
14 isn't a big deal. Okay?

15 Case two: Smith buys property at a
16 tax sale, at a tax sale. All right? Now the
17 owners can get it back, by the way, if they pay
18 their taxes within a year or some period of
19 time. They pass a law retroactively saying:
20 Smith, you can't keep your property unless you
21 tell the owners they're about to lose it.

22 That would seem to make quite a
23 difference, because, after all, if they find
24 out, they might object and pay the back-taxes.

25 The court says: Not a big deal. It

1 doesn't violate the clause.

2 Case 3. Okay. What's case 3?
3 Conley. Yeah, Smith has an agreement with the
4 mortgage company. It says: Where there is
5 foreclosure, the mortgage company has to do A,
6 B, and C. Retroactively, the legislature says:
7 Oh, by the way, mortgage company, you also have
8 to do D, which is file an affidavit.

9 Surely an affidavit is no easier to
10 file than to write a letter to an insurance
11 company. The Court says: That is not an
12 obligation -- you have not violated the
13 contracts clause, because filing an extra
14 affidavit is not a big deal.

15 So, when I read those three cases, I
16 looked at what they said was not a big deal.
17 Then I looked at the obligation here, which is
18 simply write a letter to the insurance company,
19 if you don't like they're changing the
20 designation that I originally put out. And I
21 thought maybe this isn't a big deal.

22 (Laughter.)

23 JUSTICE BREYER: Which, of course, is
24 just what they're arguing. So I would like to
25 know, how do I, forgetting Blaisdell, hold for

1 you?

2 MR. DVORETZKY: First, Justice Breyer,
3 let me emphasize the -- the key term of this
4 contractual -- this contract, the life
5 insurance contract, provides precisely how the
6 policyholder is to designate the beneficiary
7 and, in turn, assures the policyholder that
8 that is the beneficiary that will be paid.

9 That is dif- --

10 JUSTICE BREYER: Just like the
11 mortgage contract.

12 MR. DVORETZKY: I disagree that it's
13 --

14 JUSTICE BREYER: So go ahead. Sorry.

15 MR. DVORETZKY: That is different than
16 the cases that --

17 JUSTICE BREYER: Okay. Okay. Go
18 ahead.

19 MR. DVORETZKY: That is different than
20 the cases that you were talking about. Let me
21 start with the Gilfillan case. That is the
22 case involving the bond and the -- the
23 retroactive -- retroactive change there.

24 The court went out of its way in the
25 Gilfillan opinion to point out that the -- the

1 bond contract there was a particular kind of
2 contract in which bondholders effectively
3 assume obligations to one another.

4 It's a type of contract where there is
5 like a good -- a duty of good faith and fair
6 dealing to your co-bondholders. That's very
7 different than our case, where the policyholder
8 has a direct and explicit assurance about the
9 beneficiary designation.

10 So there's a difference in the -- in
11 the nature of the impairment.

12 Moreover, in the Gilfillan case, the
13 court also focused on the practicalities and
14 whether or not it was still reasonably possible
15 for the bondholder to protect his original
16 contractual rights. And the court noted that
17 there was both actual notice of the change and
18 sufficient time to object to it.

19 Whereas, in this case, the entire
20 premise of the Minnesota law, according to the
21 Petitioners, is that policyholders are
22 inattentive to their beneficiary designations.

23 It is simply -- it's paradoxical to
24 expect an inattentive policyholder, somebody
25 who is presumed not to know about this or to be

1 paying attention to it, to protect their rights
2 by -- by being aware of the law and then
3 objecting to the change.

4 And so the practicalities here cut
5 exactly the opposite way as in --

6 JUSTICE KAGAN: Well, that might be
7 true -- I'm sorry to -- that might be true if
8 the divorce preceded the statute, right,
9 because, presumably, the time when even an
10 inattentive person is going to come upon this
11 problem is when the divorce occurs.

12 And as long as the divorce is
13 subsequent to the statute, I don't see how you
14 can make that argument.

15 MR. DVORETZKY: Well, I would agree
16 with you if Minnesota had taken the same kind
17 of step that Virginia has taken and actually
18 required the divorce decree to inform the
19 divorcing parties about the
20 revocation-on-divorce statute.

21 At least under modern doctrine, that
22 would solve our concerns because, at that
23 point, you're right, as part of the divorce,
24 the policyholder, the divorcing party, would be
25 aware of the change.

1 But there's no reason to presume that
2 as part of the divorce, absent such a notice
3 requirement, that the inattentive policyholder
4 is aware. Indeed, the whole premise of the
5 statute is that people do go through divorces,
6 but this issue of beneficiary designations is
7 not something that they are paying attention
8 to. And so --

9 JUSTICE GINSBURG: Do you think it's
10 not a fair assumption that most people when
11 they divorce do not want their former spouse to
12 be enriched beyond whatever the law requires,
13 if you have to make a guess?

14 You're talking about an impairment of
15 the policyholder's rights. But the Minnesota
16 legislature has said, not 100 percent, but most
17 cases of divorce, the spouse who is the
18 policyholder would not want the former spouse
19 to get the proceeds, would much prefer they go
20 to his children.

21 MR. DVORETZKY: Justice --

22 JUSTICE GINSBURG: Isn't that a
23 reasonable assumption for a legislature to
24 make?

25 MR. DVORETZKY: I -- I don't think

1 that it is, at least not without some evidence
2 in the record to that effect. And there's no
3 statement of legislative purpose. There's no
4 amicus support from Minnesota or from any other
5 states whose laws are at issue here, as to the
6 empirical assumption that your question
7 suggests.

8 I think that there are some people who
9 would want to keep -- who would want to change
10 beneficiary designations, but there are plenty
11 of reasons why people might not. That's why
12 the federal government and almost half the
13 states don't have this kind of a law. And if
14 --

15 JUSTICE GINSBURG: I'd like to ask the
16 question I asked Mr. Unikowsky. Do you know
17 what the settlement was in the divorce decree,
18 what Melin got out of the divorce?

19 MR. DVORETZKY: Justice Ginsburg, that
20 is in -- the district court docket for that is
21 45-3, and it spells out who got which car, and
22 I think there was a snowmobile and an ATV and
23 some other property. But it's all spelled out
24 at District Court 45-3.

25 But what the divorce decree -- two

1 things of note on the divorce decree.

2 One, it is silent about insurance, and
3 so we simply don't know one way or another
4 based on the divorce decree itself what Mr.
5 Sveen's intentions were.

6 We do know that Ms. Melin put an
7 affidavit in the record that they had
8 maintained -- that they had reached an oral
9 agreement to maintain one another as
10 beneficiaries.

11 JUSTICE GINSBURG: Yes, but that was
12 not approved.

13 MR. DVORETZKY: That's true. But the
14 only evidence in the record, one way or
15 another, that didn't satisfy Minnesota's clear
16 and convincing evidence standard for an oral
17 contract.

18 But -- but if Your Honor's question is
19 what evidence do we have, that's the only
20 evidence that we have. And she, in fact, kept
21 him as her policy beneficiary up until the time
22 of his death. The other --

23 JUSTICE ALITO: What if there were --
24 what if there was evidence that Mr. Sveen was
25 very well aware of this statute at the time of

1 the divorce but did nothing?

2 So suppose there was testimony by 10
3 witnesses that at the time of the divorce he --
4 he got a copy of the statute and he read it?

5 MR. DVORETZKY: I --

6 JUSTICE ALITO: Would that make a
7 difference?

8 MR. DVORETZKY: I still don't think it
9 would make a difference because the way the
10 Court has considered these sorts of impairment
11 questions and whether -- whether it is possible
12 to overcome the impairment by informing the
13 insurance company, has been on an
14 across-the-board basis, not based on the
15 particular facts of a case.

16 The McGahey case, which is from the
17 era that Justice Breyer was asking me about
18 earlier, is an example of this. That was the
19 case where, retroactively, the state required
20 bondholders to produce the original bond, and
21 not just the bond coupon, in order to collect.

22 And there were surely some -- some
23 bondholders who could have produced the
24 original bond but many who couldn't. And the
25 Court --

1 JUSTICE BREYER: Which is easier --
2 which is easier? To produce an original bond
3 that you bought, say, 20 years ago, and who
4 knows where it is, or to write a letter saying,
5 please, keep my wife as beneficiary? That's a
6 loaded question.

7 MR. DVORETZKY: Well --

8 (Laughter.)

9 MR. DVORETZKY: But -- but -- but I
10 think it's a loaded -- it's a loaded question
11 because it has a premise built into it that
12 it's only easy to file the form if you are
13 aware of the need to do so. And the whole
14 premise of the Minnesota law is that people are
15 not aware of the need to do so.

16 JUSTICE BREYER: Well, I said likely.
17 I mean, I don't know. I'm not a family law
18 expert, which family law is the most difficult
19 subject I think there is. It's horrible,
20 human, terrible. It's really difficult.

21 But if I were to guess, I would guess
22 that when there is a divorce proceeding,
23 there's a lawyer, quite often, usually, and he
24 discusses with his client, the lawyer, what --
25 that this is likely to affect property.

1 Now, I'm not saying which, but a lot
2 of people would think: Hmm, I have an
3 insurance policy. Now I don't know that that
4 happens, but I suspect.

5 MR. DVORETZKY: I suspect that
6 sometimes it does, but it doesn't always happen
7 because not everybody even --

8 JUSTICE BREYER: You're absolutely
9 right on that. I mean, that might not be a
10 fair question because sometimes people will and
11 sometimes they won't. And I think you're
12 originally saying often they won't think of it,
13 and that's true. And sometimes they will think
14 of it, that's true. I don't think actually
15 perhaps neither of us knows how often they
16 think of it.

17 MR. DVORETZKY: Right. But I think
18 the point is that what the contracts clause is
19 concerned with is the impairment of the rights
20 of those who weren't counseled, who are not
21 aware, who don't know --

22 JUSTICE KAGAN: But, Mr. Dvoretzky --

23 MR. DVORETZKY: -- that they need to
24 file a form.

25 JUSTICE KAGAN: -- if I could come

1 back to Justice Alito's question because in
2 answering Justice Alito, you say we don't look
3 to Mr. Sveen in particular, even if we know a
4 lot about him. We look to this broad class of
5 people who are in this situation.

6 And if that's true -- I mean, I guess
7 I had sort of conceptualized your argument as
8 the exact opposite. Well, we don't know
9 anything about Mr. Sveen, so even if it's true
10 that people generally want to give their life
11 insurance policy to their children, that
12 doesn't matter because we don't know that about
13 Mr. Sveen.

14 But if you're saying really we look to
15 the broad class of people, then why shouldn't
16 the broad class of people that we look to be,
17 you know, why shouldn't we make the same
18 judgment that the -- or that the legislature
19 made or at least accept that judgment that if
20 we look to the broad class of people, most of
21 them would rather give their life insurance
22 policy to their children than to their divorced
23 spouse?

24 MR. DVORETZKY: Because I think it's
25 indisputable that whether or not most would,

1 many would not. And -- and the contracts --

2 JUSTICE KAGAN: Well, but you just
3 said we're not -- I mean, if -- if -- if the
4 question is the class, rather than the
5 individual, then what option do we have other
6 than to say something in general about the
7 class?

8 MR. DVORETZKY: Because I think when
9 you speak about the class as a whole, you're
10 also encompassing some individual -- some
11 individuals within that class who aren't going
12 to want their rights to -- to be abrogated by
13 the legislature.

14 And what the contracts clause is
15 concerned with is making sure, even under this
16 Court's modern jurisprudence, that the
17 legislature doesn't abrogate the rights of
18 some, even if it's intending to benefit others
19 by effectuating their intent. And here --

20 JUSTICE ALITO: You keep saying --
21 your answer to me, to my question leads to the
22 conclusion that you are impairing the insured's
23 -- the obligations that the insured counts on
24 in relation to the contract.

25 There's a contract. The meaning of

1 the contract is determined by state law. The
2 insured knows at the time of the divorce that
3 under state law the meaning of the contract is
4 that the ex-spouse, the now ex-spouse, will not
5 be the beneficiary. The -- the alternative
6 beneficiaries will -- will receive the money.
7 And you're saying that doesn't matter that the
8 insured may have counted on this.

9 Still the -- the -- the -- the state
10 law dictating -- interpreting the contract is
11 overridden by the contracts clause.

12 MR. DVORETZKY: And that's because for
13 contracts clause purposes, the relevant law is
14 the time -- is the law that is in effect at the
15 time of the contract.

16 That's the -- the relevant law that
17 informs what the contractual terms mean.

18 JUSTICE ALITO: But the -- I thought
19 this statute was in place at the time of the
20 contract?

21 MR. DVORETZKY: No, it was not. The
22 statute was enacted in 2002.

23 JUSTICE ALITO: Okay.

24 MR. DVORETZKY: And the contract was
25 from 1998.

1 JUSTICE GINSBURG: But it was in place
2 at the time of the divorce?

3 MR. DVORETZKY: It was in place at the
4 time of the divorce. And, as we've been
5 discussing, there's simply no evidence one way
6 or another, besides the -- the conduct of the
7 parties after the divorce with respect to
8 Ms. Melin's beneficiary designation, no
9 evidence that Mr. Sveen either was or was not
10 aware of it.

11 The -- the divorce decree that I cited
12 earlier at 45-3 has a very long appendix with
13 various notices that Minnesota already requires
14 divorce courts to provide and divorce decrees
15 to include. The state has no interest that I
16 can fathom and certainly no interest that any
17 state has come forward to advance for why it
18 needed to achieve its purported goals in this
19 case the way it did.

20 And by -- by doing this the way it
21 did, it is impairing the contractual rights of
22 at least some policyholders, those who have
23 good reasons for not wanting to revoke their
24 beneficiary designations.

25 JUSTICE BREYER: Just one second. I

1 took -- I took Justice Alito as asking
2 something like this, but -- and I am curious.
3 A lot of people did buy life insurance policies
4 before 2002 which don't say anything about it,
5 right? They bought it before.

6 A lot of people probably were divorced
7 between 2002 and 2018. So what, if you win
8 this case, what happens to all those people who
9 were told by their lawyers that state law means
10 that your wife is no longer the beneficiary
11 unless you write a letter to the insurance
12 company? And they say: Good, I don't want her
13 to be. I want my children to be. Great.

14 What happens to those people if you
15 win this case?

16 MR. DVORETZKY: I think that their
17 beneficiary designations are determined in
18 accordance with the terms of their contract.

19 JUSTICE BREYER: I'm just saying
20 obviously the question is do all those people
21 who thought their children would get the money,
22 they're just out of luck? Is that right?

23 MR. DVORETZKY: They're out of luck
24 unless they redesignate --

25 JUSTICE GORSUCH: They have to write a

1 letter.

2 MR. DVORETZKY: Unless -- right,
3 exactly. Unless they redesignate the
4 beneficiary.

5 JUSTICE GORSUCH: Somebody has to
6 write a letter.

7 (Laughter.)

8 JUSTICE GORSUCH: Okay. I think we've
9 established that.

10 JUSTICE BREYER: They have to find out
11 about this case, if you win, and maybe they
12 just read Supreme Court cases.

13 (Laughter.)

14 MR. DVORETZKY: We all do.

15 JUSTICE GORSUCH: Hopefully, they read
16 --

17 JUSTICE KENNEDY: And they read -- and
18 they read the Contract Clause and they read the
19 Dartmouth College case.

20 (Laughter.)

21 JUSTICE GORSUCH: Either that or the
22 state statute rules.

23 Okay. My question for you, though, I
24 want to pick up where Justice Breyer left off,
25 and that's recording statutes. What do we do

1 about those? This Court has long held that
2 those are fine. And even though they pose some
3 limits on -- on contracting. And -- and your
4 colleague on the other side suggested that the
5 best line we draw is how substantial the
6 impairment is.

7 This Court has approved recording
8 statutes as an impairment. What do we do about
9 those?

10 MR. DVORETZKY: The recording statutes
11 are different for a few reasons. First, the
12 recording statutes don't directly change an
13 express term of the contract in the way that
14 this law does.

15 Here, we have a contract with a
16 beneficiary --

17 JUSTICE SOTOMAYOR: I'm sorry, it
18 takes away an express term of the contract. It
19 does away with the contract. You fail to
20 record, you get no protection.

21 MR. DVORETZKY: Well, first, though --

22 JUSTICE SOTOMAYOR: Here, you get a
23 beneficiary, one you've designated as an
24 alternative, so you get somebody. The money's
25 paid. That's a lot better than having your

1 rights revoked completely.

2 MR. DVORETZKY: First, Justice
3 Sotomayor, the contract in those cases didn't
4 speak one way or another to the recording
5 obligation. That was simply a procedural
6 change as to remedy that legislatures adopted
7 after the fact.

8 Second, the -- the recording statutes
9 don't leave the property owners without
10 recourse. If Mr. Smith, from Justice Breyer's
11 hypothetical, sells the same property twice,
12 only one of them can get the property, but the
13 other one still has recourse against Mr. Smith
14 for double-selling the property.

15 And so the recording statutes are
16 fundamentally different because they're not
17 acting directly on the contract in the same way
18 as the law that's at issue here, and there's
19 still -- there's still a remedy. It's not
20 nullifying the entire point of the contract,
21 which, in the life insurance context, is to
22 provide for a particular beneficiary.

23 I'd also suggest from -- again from
24 this era of cases, that the relevant analogues
25 are the Seibert and the McGahey cases, and

1 those two cases stand for -- for two
2 propositions.

3 One, Seibert stands for the
4 proposition that, when a legislature does
5 directly change a term of the contract, that in
6 that situation, the court has found -- has
7 found a contracts violation.

8 So, in Seibert, there was a bond that
9 provided for a particular procedure for
10 collecting the taxes that would be used to pay
11 the bonds. The legislature subsequently
12 changed that, and the Court found a violation.
13 That's analogous to the situation here where
14 you have a contractual provision about
15 beneficiary selection.

16 McGahey, as I was mentioning earlier,
17 that is the case where yet -- that is the case
18 where the bondholders had to produce the
19 original bond and the Court, looking at the
20 class of bondholders as a whole, recognized
21 that some bondholders might be able to meet
22 that requirement, but in order to protect the
23 rights of those who couldn't, and it was
24 impractical for those who couldn't to somehow
25 produce these bonds, the Court recognized there

1 was a Contract Clause violation.

2 JUSTICE SOTOMAYOR: But that goes back
3 to Justice Gorsuch's point, which is we look at
4 the nature of the impairment, how difficult is
5 it to do whatever is being changed? And
6 there's a big difference between producing
7 something you may have lost 20 years before and
8 writing a letter and -- to an insurance company
9 or including it in your divorce decree or
10 you're doing something else. It doesn't cost
11 you much to do.

12 MR. DVORETZKY: So, again, I think
13 those cases stand for the proposition that
14 there isn't -- the reason there wasn't an
15 impairment there is that the contract was not
16 being directly altered by the legislature in
17 the way that it is here.

18 Even if you look at it as a
19 practicability question, though, the practical
20 problem here is that policyholders are presumed
21 to be unaware. And, again, under the original
22 understanding of the Contracts Clause, any
23 impairment was sufficient. At a minimum, if
24 you -- if the Court were to equalize the
25 treatment of public and private contracts,

1 essentially ending the experiment begun in U.S.
2 Trust, the state here has a less restrictive
3 way of achieving its objectives simply by
4 providing notice.

5 And, lastly, even under the -- the
6 Court's more flexible modern precedents, if the
7 Contracts Clause means anything at all, it's
8 that the state can't impair a contractual
9 rights gratuitously. Where -- where there is
10 an alternative that works equally well, at a
11 minimum the state has to do that much.

12 And -- and even under the Court's
13 modern cases, the Court has said repeatedly
14 that the Contracts Clause is more than just
15 rational basis review. And so what does that
16 mean? At a minimum, it means, one, the state
17 -- litigants, after the fact, can't just come
18 in with conjecture about what the state
19 legislature was trying to achieve. There must
20 be some showing of that in the record. That's
21 what the Court said in Allied Structural.

22 And, second, where contractual rights
23 are impaired and there's a ready alternative,
24 at a minimum, the legislature ought to be
25 required to take that particular alternative.

1 Mr. Unikowsky suggested --

2 JUSTICE GINSBURG: May I -- what is
3 your position on a policy that's taken out
4 after the statute's enactment? Then it's okay,
5 right?

6 MR. DVORETZKY: Yes, that would -- if
7 the policy is taken out after the statute's
8 enactment, then the statute is not acting
9 retroactively on that policy.

10 JUSTICE ALITO: What about the
11 retroactive application of a slayer statute?

12 MR. DVORETZKY: So I think, under
13 modern Contracts Clause doctrine, that would
14 probably pass muster because the state's
15 interest in ensuring that murderers don't
16 collect life insurance proceeds is, I think,
17 both intuitively and --

18 JUSTICE ALITO: What about -- what
19 about the original understanding?

20 MR. DVORETZKY: So under the original
21 understanding, I think it's a harder question.
22 I think, arguably, if the slayer statute were
23 viewed as a form of punishment for murder, then
24 that could be within the very narrow original
25 understanding of the legislature's police

1 power. But that's very far removed from this
2 case, which doesn't address -- again, the
3 original understanding of the police power,
4 something had to be directly related to health,
5 safety, or morals.

6 So slayer statutes might survive under
7 the original understanding. I think they
8 almost surely would survive under the modern
9 understanding because the interest is much
10 greater than the minor interest that's at issue
11 here, and I don't think that just a -- a notice
12 requirement wouldn't be sufficient in that
13 case.

14 But it --

15 JUSTICE GINSBURG: It was also, I
16 think, in the example on the other side of a
17 change of status of adopted children to make
18 them, for all purposes, the same as biological
19 children.

20 MR. DVORETZKY: So I -- I think, under
21 the original understanding, that would be a
22 Contracts Clause violation. Under the modern
23 test, there is a -- a court -- there is a case
24 we cited in our brief that has found such a
25 change to be unconstitutional.

1 It would, however -- there would,
2 however, be a stronger case for its
3 constitutionality than there is here if, under
4 the modern approach, the state thought that it
5 had a strong policy interest in ensuring the
6 equal treatment of adopted children.

7 That, however, is fundamentally
8 different from this case, where -- where no one
9 has made any showing of a strong policy
10 interest in effectuating the presumed intent of
11 some policyholders at the expense of the intent
12 of others.

13 Mr. Unikowsky, in his argument, made a
14 few points as to why the Virginia alternative,
15 or a notice alternative, would not be
16 sufficient, that I'd just like to briefly
17 address.

18 One, the notice -- the notice that is
19 provided can exist alongside the
20 revocation-on-divorce statute. In other word,
21 a state is free to have, under the modern
22 approach, the revocation-on-divorce statute on
23 the books so long as it tells people. And --
24 and it's also free to do the same thing -- have
25 the same revocation-on-divorce statute for

1 wills and for life insurance policies, and also
2 to provide the same notice for wills and for
3 life insurance policies.

4 And so in that respect, that achieves
5 the goal that -- that Mr. Unikowsky posited of
6 achieving equal treatment of wills and life
7 insurance policies, so long as that is actually
8 what people want. As long as that is actually
9 what the -- the divorcing parties want.

10 As for disputes about what a decree --
11 a decree means, the revocation-on-divorce
12 statute can take effect so long as there is
13 notice. And so there doesn't need to be a
14 dispute about what the decree means if, in
15 fact, the -- the revocation-on-divorce statute
16 has simply taken effect.

17 If the Court has no further questions,
18 again, the Contracts Clause is absolute in its
19 language. Chief Justice Marshall recognized
20 long ago that this was a clause so clear that
21 it could hardly be misunderstood and recognized
22 that it applied to all manner of contracts.

23 We ask that the Court bear that
24 original understanding of the Contracts Clause
25 in mind in resolving this case. And even under

1 the more deferential modern approach, that
2 original understanding ought to inform the
3 approach, particularly where, as here, there's
4 a ready alternative to achieve all of the
5 state's objectives without impairing anybody's
6 contractual rights.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Five minutes, Mr. Unikowsky.

10 REBUTTAL ARGUMENT OF ADAM G. UNIKOWSKY

11 ON BEHALF OF THE PETITIONERS

12 MR. UNIKOWSKY: Thank you, Mr. Chief
13 Justice.

14 So there's been a lot of different
15 arguments floating around at the argument
16 today. There's arguments about divorces, about
17 wills, about reliance, and others. So I'd like
18 to just say a few words about what I think
19 would be a -- a kind of a clean way to resolve
20 this case narrowly that wouldn't open some of
21 the parade of horrors that some members of
22 the Court have been concerned about.

23 Some lower courts have conceptualized
24 life insurance policy beneficiary designations
25 as similar to wills. That's a broad argument

1 that produces some of the concerns that Justice
2 Gorsuch posed questions about.

3 We stick to that argument, but the
4 Court doesn't need to -- to decide that in
5 order to -- to vote in our favor today.

6 So I think -- I'm sorry. I think that
7 the first important principle is that this is a
8 divorce case. The Court isn't reaching out and
9 interfering with private relationships. The
10 statute only comes into effect when people come
11 to the court and invest the court with
12 jurisdiction to divide their assets.

13 And my colleague discussed what --
14 statements of Chief Justice Marshall. Chief
15 Justice Marshall himself said that the
16 Contracts Clause has never been understood to
17 restrict the general right of the legislature
18 to legislate on the subject of divorces. So I
19 think that we have a very strong originalist
20 argument that, specifically in the context of
21 divorce, the police power clearly --

22 JUSTICE GORSUCH: Isn't that because
23 Justice Marshall also said that marriage
24 contracts are not within the cognizance of the
25 Contract Clause? And I don't think anyone

1 disputes that life insurance policies are
2 within the cognizance of the Contracts Clause
3 or -- or do you?

4 MR. UNIKOWSKY: No, I -- certainly
5 they are. But the statement that Chief Justice
6 Marshall made is that the general right of the
7 legislature to legislate on the subject of
8 divorces has not been questioned.

9 And I think this is --

10 JUSTICE GORSUCH: Because marriage
11 contracts are not within the cognizance of the
12 clause.

13 MR. UNIKOWSKY: No, but I -- I think
14 this is --

15 JUSTICE GORSUCH: Right?

16 MR. UNIKOWSKY: -- an a fortiori case,
17 because that's not why, Your Honor. I don't
18 think so.

19 It's true he said that. I acknowledge
20 that in our brief, that that was the context in
21 which he was saying it. But I think this is an
22 a fortiori kind of case because if the
23 legislature has the power to sever a
24 contractual relationship -- a marriage
25 relationship all together, which will

1 necessarily have dramatic impacts on the
2 parties' property interests, I think it's a
3 much lesser power to simply regulate one way in
4 which a divorce decree severs that
5 relationship.

6 And I think that it's -- there's also
7 -- history provides a different lesson, which
8 is that there's never been a case ever, until a
9 few cases on the circuit split in this case,
10 where any court has held that a statute
11 regulating the effect of a divorce decree
12 violates the Contracts Clause. And it's not
13 for lack of opportunities because the law of
14 equitable distribution of property has changed
15 dramatically over the century -- over the two
16 centuries. And yet, this type of argument has
17 never succeeded.

18 So I think at a minimum, especially in
19 the context of a tradition of state law control
20 over divorce, there's a broad police power
21 there, but I -- I don't think the Court has to
22 hold that divorce courts have unlimited power.

23 I think that if divorce -- if the
24 police power over divorce means anything, it's
25 the power to enact this very narrow kind of

1 default rule.

2 You know, my colleague talks about the
3 Seibert and -- and McGahey cases from the 19th
4 century. Those were dramatically different.
5 Those were post-Civil War era cases where state
6 legislatures passed laws to prevented hated
7 out-of-state bondholders from being paid back.
8 That was the purpose of these laws.

9 Professor Ely's book about the
10 Contracts Clause, who wrote an amicus brief in
11 this case, discusses the Virginia statute where
12 there's a whole bunch of cases where the
13 Virginia legislature specifically tried to
14 prevent bondholders from being paid back by
15 putting these requirements they knew that they
16 couldn't meet.

17 And then there's the -- the Seibert
18 case, where there was a contractual right to
19 force courts to pay money on these bonds, which
20 was abrogated. The new law provided that the
21 prosecutor had to get the county court to pay
22 -- to raise taxes, which was never going to
23 happen.

24 So these were laws that were
25 specifically designed to prevent creditors from

1 being paid back. That can't be more different
2 from this case, which really is a paperwork
3 obligation, which is quite comparable to this
4 -- to the recording obligations that we talk
5 about.

6 In fact, I think that this is less of
7 a burden, because as Justice Sotomayor pointed
8 out, you don't submit that form, your land
9 patent is completely wiped out. You don't get
10 anything. That strikes me as a far greater
11 impairment than this case; where the failure to
12 submit a form is actually going to vindicate
13 the person's intent in the typical case.

14 So I think that when we talk about the
15 broad police power over divorce and then the
16 fact that it's only writing a letter, I think
17 the statute is constitutional, especially --
18 and the third thing I'd like to talk about is
19 the reliance issue because this is a case about
20 retroactivity.

21 The question is not whether the Court
22 agrees with the statute or not. The question
23 isn't even whether it typically vindicates the
24 intent of the spouse or not. That's a policy
25 question, both going forward or -- and

1 backwards.

2 The question is whether it
3 retroactively impairs a contractual obligation.
4 And the answer is no, because the reliance
5 interest, as I think even my colleague
6 conceded, really comes into play at the time of
7 the divorce.

8 That is when people are thinking about
9 this. The statute doesn't even do anything
10 until the divorce happens.

11 And I think that reliance is important
12 to the contracts clause because that's why the
13 clause distinguishes between statutes passed
14 before and after a contract, because of the
15 recognition that the contract itself generates
16 reliance interests.

17 And so, therefore, if it's essentially
18 undisputed that reliance interests really come
19 into play at the time of the divorce, rather
20 than at the time of contracting, it's just not
21 an impairment of contractual obligations in the
22 relevant sense.

23 The only thing that would be impaired,
24 the only reliance expectations that would be
25 impaired are those of Mark Sveen, who might not

1 be able to get the proceeds, or who might not
2 be able to distribute the proceeds as he
3 intended.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel. The case is submitted.

7 (Whereupon, 11:06 a.m., the hearing
8 concluded.)

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Official - Subject to Final Review

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