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IMMEDIATE STAY REQUESTED
Of 8/17/2021 Order Vacating
Preliminary Injunction
[Cal. Lab. Code 925(c)]

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

JINSHU "JOHN" ZHANG Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, Respondent.	S. Ct No. _____ Court of Appeal No. B314386 Los Angeles Superior Court Case No. 21STCV19442 The Hon. David Sotelo Los Angeles Superior Court Dept. 40 Telephone: (213) 633-0160
DENTONS U.S. LLP; MICHAEL T. MCNAMARA; EDWARD J. REICH Real Parties in Interest.	

PETITION FOR REVIEW

From a Published Opinion Denying a Petition for a Writ of Mandate by the Court of Appeal, Second Appellate District, Division 8

After an Order of the Los Angeles Superior Court
Date of Order: August 17, 2021
Proceeding Held: Motion to Stay Litigation

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, rule 8.208)

There are no interested entities or persons to list in this certificate (Cal. Rules of Court, rule 8.208(e)(3)).

Respectfully submitted,

Dated: December 15, 2022

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ISSUE PRESENTED

For employment disputes that arise in California, Labor Code section 925 protects California employees by empowering them to void forum-selection clauses in adhesive employment contracts that select a state other than California. When an employee invokes Section 925's protections, Section 925(b) mandates that the dispute "shall" be adjudicated in California.

Code of Civil Procedure section 1281.4, on the other hand, permits an employer to file a petition to compel arbitration in any court of "competent jurisdiction" and, once filed, requires a mandatory stay of related California proceedings. This petition presents two issues:

I. If an employer files a motion to compel arbitration in a non-California forum pursuant to a contractual forum-selection clause and seeks to stay related California litigation under Section 1281.4, but the employee raises Section 925 as a defense to the stay motion to void the forum-selection clause, is a court in the non-California forum one of "competent jurisdiction" requiring a stay of the California proceedings?

II. Does the presence of a "delegation clause" in an employment contract delegating issues of arbitrability to an arbitrator prohibit a California court from enforcing Section 925 in opposition to the employer's stay motion?

THE COURT SHOULD GRANT REVIEW TO SETTLE THESE IMPORTANT QUESTIONS OF LAW

Petitioner Jinshu "John" Zhang first brought this case to this Court's attention in a separate Petition For Review dated December 7, 2021. This Court granted that petition and transferred the matter to the Court of Appeal on February 16, 2022. After this Court's transfer, the Court of Appeal again denied petitioner's writ petition, this time in a published opinion (the "Opinion"), which is the subject of this new Petition For Review.

Often, employment contracts include a forum-selection clause requiring adjudication of employment disputes outside of California. California Labor Code section 925 ("Section 925"), enacted in 2016, protects California employees from adhesive forum-selection clauses by giving employees the right to void them and mandates that employment-related disputes "shall" be adjudicated in California.

But employment contracts also often include arbitration clauses, and Code of Civil Procedure section 1281.4 ("Section 1281.4") requires that California trial courts issue a mandatory stay when a petition to compel arbitration is pending in any court of "competent jurisdiction." This petition raises the novel issue of how trial courts should harmonize Section 925 with Section 1281.4 when an employer seeks to enforce a forum selection clause by seeking a stay under Section 1281.4 in favor of a non-

California forum and an employee opposes the stay by asserting Section 925 as a defense to the stay motion.

Rather than harmonize Section 1281.4 with Section 925, the Opinion held that courts in the selected forum are "obviously" of competent jurisdiction. (Attachment A at p. 10.) The Opinion then refused to consider Section 925's impact ***at all***, holding that a delegation clause in the employment contract prohibits a court from considering Section 925 as a defense to the stay motion. (*Id.* at pp. 12–13.) The conclusion is particularly troubling here given that Dentons did not assert any delegation clause to the trial court in its stay motion. (Pet. For Rehearing at p. 4.) Despite purporting to delegate Section 925's applicability to the arbitrator, the Opinion *de facto* rejected Zhang's Section 925's challenge to the forum-selection clause's validity and determined that the New York courts are of competent jurisdiction. The Opinion then ***enforced*** the forum selection clause, stayed the California case, and sent petitioner to New York—precisely what Section 925 prohibits.

This Court should grant review to settle the two issues presented for the following reasons:

1. **The Opinion provides employers with a roadmap to evade Section 925**. Section 925 was specifically drafted to ensure that California employees can elect to adjudicate their employment claims in California—whether in court or arbitration. (Lab. Code § 925(d).) But the Opinion mandates that trial courts enforce contractual forum

selection clauses without regard to the clauses' validity, stay the California litigation, and leave Section 925's applicability to the foreign court or, if there is an accompanying delegation clause, to the foreign arbitrator. Thus, for any California employee whose employment contract contains such clauses, the Opinion strips them of their right to adjudicate employment disputes in California. Not only does the Opinion defeat Section 925's purpose, it also creates a logical vortex: if the foreign adjudicator determines that Section 925 applies, that means that the adjudicator lacked jurisdiction to rule in the first place.

2. **Unequal Treatment**. Invoking the Federal Arbitration Act ("FAA"), the Opinion revokes Section 925's protections for all California employees whose out-of-state employer happens to include a delegation clause in their employment contract—finding that the FAA would preempt Section 925's application by a California court. (Attachment A at pp. 22–23.) Through this reasoning, the Opinion condones the unfair result of permitting employers to *enforce* a forum-selection clause to obtain a stay while simultaneously prohibiting employees from challenging that same forum-selection clause's validity under the guise of delegation. This outcome also effectively splits California employees into two categories depending on whether the contract has an arbitration and delegation clause. Employees engaged in litigation still retain their full statutory rights under Section 925 but those whose

employment contracts involve arbitration are hamstrung and are forced to persuade foreign courts to grant them the rights California law provides—the precise unfairness the Legislature sought to remedy in enacting Section 925. Yet just this past term, the United States Supreme Court confirmed that the FAA mandates *equal treatment* for litigation and arbitration, not different treatment simply because arbitration is involved. (*Morgan v. Sundance* (2022) 142 S. Ct. 1708, 1713.) Whether the FAA preempts a California statute is a matter of statewide importance warranting review by this Court.

3. **Section 1281.4 stay motions will deprive California employees of the full protections of California law**. By permitting employers to compel arbitration in the forbidden forum, California employees will be deprived of the protection California law affords its employees when defending against a motion to compel arbitration—in particular, the important and mandatory protections this Court outlined in *Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*). The non-California forum will not apply *Armendariz* (or Section 925, for that matter), unless the employee successfully navigates that forum's choice of law analysis, which typically favors the application of local law over California's.

4. **Trial courts need guidance on how to apply Section 925 at the start of litigation**. Section 925 applies to "employees," but whether a plaintiff is an employee under California law is often the ultimate issue in employment cases. Yet because Section 925 is meant to apply throughout all stages of a case, the trial courts need a clear instruction on what to do when the existence of an employment relationship is disputed. No published California decision instructs how trial courts should address Section 925's applicability under these circumstances.

5. **Section 925 represents a fundamental public policy of California**. As one district court recently observed, Section 925 "expresses California's strong public policy that prevents contractual circumvention of its labor laws." (*O'Connell v. Celonis, Inc.* (N.D. Cal. Aug. 22, 2022) 2022 U.S. Dist. Lexis 150484, at *23.) While one California court instructs that this policy requires courts to apply Section 925 even if an out-of-state court in parallel litigation refuses to do so, the Opinion instructs otherwise—that "comity" requires deference to the foreign court's determination. (*Compare LGCY Power, LLC v. Superior Court* (2022) 75 Cal.App.5th 844, 862–63 (*LGCY*) *with* Attachment A at pp. 19–20.) Parallel litigation is increasingly common and the clear trend in out-of-state cases is *not* to apply Section 925. The Opinion reinforces this trend and undermines Section 925's importance by

deferring to the foreign litigation. This Court's review of Section 925 will inform all courts of Section 925's fundamental importance.

6. **Writ review is the only means to review the interplay between Sections 925 and 1281.4**. "The proper interpretation of a statute presents a matter of public interest." (*Leenay v. Superior Court* (2022) 81 Cal.App.5th 553, 573 (*Leenay*).) When an employer brings a successful Section 1281.4 motion, a California employee cannot challenge the ruling through a later appeal. Thus, writ review is the only means through which this Court can properly construe and harmonize Sections 1281.4 and 925. Real Parties conceded as much in their preliminary opposition filed with the Court of Appeal—calling later review "unlikely." (Prelim. Opp. at p. 25.)

This case has received significant publicity and out-of-state employers are watching. The Opinion gives these employers a foolproof method for circumventing Section 925. All employers must do is include arbitration and delegation clauses in their employment contracts and then, if sued in California, initiate a parallel proceeding and file a Section 1281.4 stay motion. If the Opinion stands, employees have no option other than to litigate Section 925 in a foreign forum—where it will be subject to the vagaries of that forum's choice-of-law analysis. That outcome is directly contrary to the purpose, spirit, and text of Section 925.

Legal commentators are already independently reaching that same conclusion: "This ruling potentially undermines the protections of Labor Code Section 925" and offers "practical guidance to practitioners" drafting agreements with out-of-state forum and choice of law provisions.[1]

If the Opinion is left to stand, the rights of California employees will be easily circumvented. The Court should grant review.

SUMMARY OF RELEVANT FACTS AND PROCEDURE

While the full factual and procedural history are somewhat complex, for purposes of the questions presented here, petitioner provides a focused summary.[2]

A. The Parties

Real party in interest Dentons US LLP is the defendant in a wrongful termination suit pending in respondent Superior Court of the State of California for the County of Los Angeles, entitled *Jinshu "John" Zhang v. Dentons US LLP, et al.*, Case No. 21STCV19442. (Attachment A at p. 2.) Real parties in interest

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[1] https://www.natlawreview.com/article/arbitrator-should-decide-whether-ny-or-ca-law-should-apply (last visited on December 6, 2022).

[2] The Exhibits filed in the Court of Appeal are comprised of five consecutively-paginated volumes. The exhibits are true and correct copies of documents filed in the trial court. Exhibits are cited in "[volume] PE [page(s)]" format, e.g., 2 PE 727. Petitioner filed volumes 1–2 and 4–5; real parties filed volume 3, which petitioner cites in "3 RE [page(s)]" format.

Michael T. McNamara (Dentons' former Chief Executive Officer) and Edward J. Reich (Dentons' General Counsel) are also defendants.

Petitioner Jinshu "John" Zhang is the plaintiff in the underlying dispute. Zhang is an attorney "who worked and resided in California" and, during the relevant period, was a "full interest" partner at Dentons. (*Id.* at p. 3.)

B. Dentons Wrongfully Terminates Zhang's Employment

In 2018, Zhang brought an important client to Dentons (the "Client"). Zhang and Dentons agreed to represent the Client for a fee contingent on the matter's outcome (the "Contingency Fee"). (*Id.* at p. 4.) Zhang resolved the Client's matter, and Dentons was therefore entitled to a substantial Contingency Fee subject to several restrictions. (*Ibid.*)

Sometime in April 2021, McNamara and Reich directed Dentons' attorneys to submit a stock transfer request to a third-party issuer, purporting to come from the Client's representative (the "Forgery"). (Attachment A at pp. 4–5.) The Forgery instructed the Issuer to transfer certain Client-held securities worth tens of millions of dollars directly to Dentons. (*Id.* at pp. 4–5.)

On April 30, 2021, Zhang reported the Forgery to the Dentons US Board (the "DUS Board") and demanded McNamara's termination. (*Id.* at p. 5.) Five days later, on May 5, 2021, the DUS Board terminated Zhang's employment for

cause. (*Ibid.*) That same day, Dentons initiated an arbitration against Zhang for breach of fiduciary duty and other causes of action (the "New York Arbitration"). (*Ibid.*) Dentons then sought and obtained various forms of emergency relief from an emergency arbitrator (the "Emergency Arbitrator"). (*Ibid.*)

Zhang understands that in January 2022, immediately upon the expiration of various restrictions, the Client paid Dentons the full amount of the enormous Contingency Fee.

C. Filings Relevant To This Petition For Review

On May 24, 2021, Zhang filed this action in Los Angeles Superior Court for wrongful termination and for declaratory relief challenging the Emergency Arbitrator's jurisdiction on various grounds, including by challenging whether a valid delegation clause exists in petitioner's employment agreement. (Attachment A at p. 5; 1 PE 153, ¶69.) Zhang filed his First Amended Complaint several days later on May 26, 2021, when the Emergency Arbitrator refused to stay the Emergency Arbitration pending Zhang's court challenge to his jurisdiction and instead issued three "emergency" awards against Zhang. (Attachment A at pp. 5–6; 1 PE 154, ¶70.)

The Emergency Arbitrator's rulings set off a flurry of procedural moves by Dentons across multiple jurisdictions, including in the Southern District of New York (1 PE 301–04) and Central District of California (1 PE 373–78) federal courts, the Los Angeles Superior Court, and New York state court. The latter-two courts are the focus of this petition.

On June 1, 2021, Zhang filed an application for a TRO and order to show cause why a preliminary injunction should not issue to restrain the New York Arbitration. (Attachment A at p. 6.) On the eve of the TRO hearing, June 14, 2021, Dentons filed a competing parallel action in New York state court seeking to confirm the Emergency Arbitrator's awards (the "New York Action"). (*Ibid*.) On June 15, 2021, Zhang obtained a temporary restraining order in the Writs & Receivers department of the Los Angeles Superior Court (Department 85, the Honorable James C. Chalfant) enjoining the New York Arbitration pending a ruling on the emergency arbitrator's jurisdiction and the delegation clause. (*Ibid*.)

On June 28, 2021, Dentons filed in the New York Action a petition to compel this case to arbitration. (Attachment A at p. 6.) Dentons then simultaneously filed with the trial court here a noticed motion to stay the proceedings pursuant to Code of Civil Procedure section 1281.4. (*Id.* at p. 6.) Dentons did not raise the delegation clause as a basis for its stay motion. (Pet. for Rehearing at p. 4; return to OSC at p. 17, ¶37 [admitting allegations in petition at p. 23, ¶37, that in Dentons' stay motion, "Nor did Dentons make any argument addressing whether a valid delegation clause exists in the Partnership Agreement"].) In opposition, Zhang asserted Section 925 as a defense and argued that the statute rendered the New York forum selection clause invalid—meaning the New York courts were not of "competent jurisdiction" to adjudicate Dentons' motion to compel

arbitration. (Attachment A at p. 2.) Dentons did not raise the delegation clause in reply either. (Return to OSC at p. 17, ¶37.)

On July 13, 2021, Judge Chalfant held the OSC and issued a preliminary injunction enjoining the New York Arbitration, until the independent calendar court determined whether the delegation clause in the Dentons Partnership Agreement is clear and unmistakable. (Attachment A at p. 6.) Judge Chalfant also found that, were he to consider Section 925, Zhang was likely to establish that he is an employee subject to Section 925's protections. (1 PE 530–31.)

D. The Trial Court (Judge Sotelo) Grants Dentons' Section 1281.4 Stay Motion

On August 17, 2021, the trial court (Department 40, the Honorable David Sotelo) issued an order granting Dentons' stay motion pursuant to Section 1281.4 (the "Order"). (Attachment A At p. 7.) In its Order, and without briefing from either party, the trial court ruled that it could not consider Zhang's Section 925 defense, *i.e.*, whether the New York court was one of competent jurisdiction, because of a delegation clause in the Partnership Agreement. (Pet. For Rehearing at p. 4.) The trial court stayed this case pending the outcome of the motion to compel arbitration filed in the New York Action and lifted Judge Chalfant's preliminary injunction. (Attachment A at pp. 3, 7.)

E. The New York Trial Court Compels Arbitration

On August 20, 2021, the New York trial court held a hearing on Dentons' motion to compel this California action to

arbitration. At the hearing, Dentons' emphasized the importance of the trial court's Order: "[T]he events in California happening in realtime have a profound effect on these proceedings." (3 RE 901.) The New York court agreed:

> You raised that issue in a California court which would presumably be quite familiar with requirements of 925, and the California court said your client is appropriately before the New York Court. So why should I overrule [a] California Trial Court decision that rejected the argument that you made based on California Law?

(*Id.* at p. 906.)

Relying on the trial court's Order finding that the New York trial court is one of "competent jurisdiction" under Section 1281.4, the New York court found that it had personal jurisdiction over petitioner, ordered this California case to arbitration, and confirmed three emergency awards rendered against petitioner. In so ruling, the court emphasized, "I do find the August 4 [sic, 3] and August 17 decisions of the California Superior Court to be material in connection with rendering the rulings that I have just rendered." (3 RE 916–17.)

F. The Court of Appeal Summarily Denies Writ Review After Full Preliminary Briefing

Two days after the trial court issued its order granting a stay—on August 19, 2021—petitioner filed a petition for writ of mandate and sought a stay of the trial court's order pursuant to Section 925(c).

On November 30, 2021, after granting an initial stay and requesting preliminary opposition, the Court of Appeal summarily denied Zhang's petition.

G. This Court Grants Review And Transfers The Matter Back To The Court Of Appeal, And The Court Of Appeal Again Denies The Writ Petition

On February 17, 2022, this Court granted review and transferred the matter back to the Court of Appeal with directions that it vacate its order summarily denying mandate and to instead issue and order to show cause. The Court also granted Zhang's request for a stay of the trial court's Order. (Attachment A at p. 8.)

After receiving further briefing, the Court of Appeal held oral argument on October 26, 2022. Soon after, on November 9, 2022, the Court again denied Zhang's petition in a published Opinion.

The Opinion denied the writ petition on several grounds. First, the Court held that by signing a partnership agreement that expressly vests jurisdiction in the New York Courts, petitioner consented to jurisdiction in New York and New York "is obviously a court of competent jurisdiction." (Attachment A at p. 10.) The Opinion rejected petitioner's argument that because he invoked Section 925 in opposition to the stay to void the forum selection clause, the New York court is not of "competent jurisdiction" to order arbitration of this dispute. (*Id.* at pp. 3, 11.)

Second, the Opinion held that Section 925's application is a "question of arbitrability" and, because the Partnership Agreement includes a delegation clause, the trial court could not rule on Section 925's applicability, even in response to Dentons' request to enforce the clause by seeking a stay under Section 1281.4. (*See* Attachment A at pp. 12–15.) In so holding, the Opinion rejected petitioner's argument that the existence of a contested delegation clause was both irrelevant and improper to consider in the context of a Section 1281.4 stay motion. (Attachment A at pp. 12, 14–15.)

Third, the Opinion held that rejecting petitioner's attempt to invoke Section 925 was necessary to preserve "principle of comity, under which judges decline to exercise jurisdiction when matters are more appropriately adjudicated elsewhere." (Attachment A at pp. 19–20.)

Fourth, the Opinion held that allowing Zhang to void the New York forum selection clause "would be inconsistent with the principles underlying the FAA." Although the Opinion acknowledges that Section 925 does not violate the FAA's "equal-treatment principle," (Attachment A at p. 20), it concluded that permitting Zhang to raise Section 925 would stand as an obstacle to arbitration in violation of the FAA. (*Id.* at pp. 22–23.)

Finally, the Opinion rejected Zhang's argument that arbitrability was not at issue in this proceeding because the underlying motion was a stay motion and not a motion to compel arbitration. (*Id.* at p. 22.)

H. Zhang Files A Petition For Rehearing, Which Is Denied

On November 17, 2022, Zhang filed a petition for rehearing in the Court of Appeal. Of note here, the petition highlighted that the Opinion did not mention or analyze the effect of Dentons' failure to raise the delegation clause in its motion. (Pet. For Rehearing at p. 4.) The petition also highlighted that the Opinion may be read to suggest that Judge Chalfant "handed off" the preliminary injunction ruling to Judge Sotelo, and that Judge Sotelo then picked it up in the Section 1281.4 stay motion, when in fact, there was no "hand off" and the two motions were subject to separate briefing sequences and analyses. (*Id.* at pp. 4–5.)

The Court of Appeal denied the petition for rehearing on November 18, 2022.

REVIEW IS WARRANTED TO ISSUE STATEWIDE GUIDANCE ON SECTION 925

Section 925's plain language and the express legislative history establish that it was designed with the specific purpose of ensuring that California employees can adjudicate employment disputes in a California forum. Section 925 is only effective when enforced at the start of litigation. As this case illustrates, though, California courts need guidance on how to apply Section 925 when faced with a motion to compel arbitration pending in another state and an accompanying stay motion pursuant to Section 1281.4.

Reconciling the interplay between these two statutes will have a profound impact on California employees statewide. The Opinion effectively repeals Section 925 in any case involving an arbitration clause by holding that courts in the voidable-jurisdiction are nonetheless of "competent jurisdiction" under Section 1281.4. Further, the Opinion creates novel, one-way delegation clauses that *prevent* California employees from enforcing Section 925 at this initial stage while simultaneously *allowing* employers to enforce the very forum selection clauses that Section 925 allows the employees to void.

Unless this Court intervenes, California's employees working for employers who include out-of-state arbitration provisions in their employment contracts will be powerless to stop the practice and will be forced to adjudicate important and potentially outcome-determinative portions of their employment disputes outside of California—including whether their claims should be arbitrated at all.

I. THE OPINION EXPRESSLY PERMITS EMPLOYERS TO EVADE SECTION 925

To illustrate the scope and magnitude of the Opinion's impact, we first provide an overview of Sections 925 and 1281.4. We then explain how the Opinion unwinds the Legislature's efforts in this important area.

A. Overview of Labor Code section 925

Section 925 regulates forum-selection clauses and choice-of-law provisions included in California-based employees'

employment contracts. Pertinent here, Section 925 provides (emphasis in italics added):

> (a) An employer *shall not* require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would do either of the following:
>
> (1) Require the employee to adjudicate outside of California a claim arising in California.
>
> (2) Deprive the employee of the substantive protection of California law with respect to a controversy arising in California.
>
> (b) Any provision of a contract that violates subdivision (a) is voidable by the employee, and if a provision is rendered void at the request of the employee, *the matter shall be adjudicated in California* and California law shall govern the dispute.
>
> (c) In addition to injunctive relief and any other remedies available, a court may award an employee who is enforcing his or her rights under this section reasonable attorney's fees.
>
> (d) For purposes of this section, adjudication includes litigation and arbitration.

This "language clearly evinces a legislative intent that *all cases and controversies* that fall within section 925's purview be litigated in California." (*LGCY, supra*, 75 Cal.App.5th at p. 862, emphasis added.) Consistent with this interpretation, the *LGCY* court concluded that Section 925 contains *no exceptions*, "even for instances in which the employer has already filed a pending action against the employee in another state." (*Ibid.*) Although Section 925 does not state how an employee may void a forum-

selection clause or choice-law-law provision, a recent decision noted that the phrase "rendered void at the request of the employee" means "an employee is required to request a court to render a decision that the offending clause is void." (*LGCY, supra*, 75 Cal.App.5th at p. 864.)

By limiting Section 925's applicability to "a claim arising in California" under Section 925, subdivision (a)(1), Section 925 targets claims where the employee would be subject to personal jurisdiction *only in California* but for the offending forum-selection clause. (*Cf. Ford Motor Co. v. Mont. Eighth Judicial Dist. Court* (2021) 141 S. Ct. 1017, 1025 (*Ford Motor*) ["[T]here must be 'an . . . activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.'"].) Absent an offending forum-selection clause, the Due Process Clause would prohibit the employer from suing a California employee in another forum for claims arising out of that employee's California-based employment.

B. Section 925's Legislative History

"It is evident from the text of Section 925 that the statute's intent is to provide a California-based employee with a California forum to litigate employment-related claims." (*Midwest Motor Supply Co. v. Superior Court* (2020) 56 Cal.App.5th 702, 710.) The legislative history supports this observation. As the Assembly Judiciary Committee explained:

> **The problem that this bill seeks to fix**: According to the author of the bill, an increasing number of businesses and employers are imposing contractual

> provisions on Californians in order to evade California law. These contractual provisions allow businesses and employers to pick laws or venues of another state (and even another country) that are favorable to the business interest to govern a legal dispute if one should arise. Accordingly, Californians who are forced to agree to these contractual terms must travel to other states or countries in order to litigate or arbitrate legal claims. Given the expense and burden of going to another forum, this ultimately means that an employee is unlikely to vindicate his or her legal rights.

(1 PE 493.)[3]

With respect to employers selecting favorable fora for adjudicating employment disputes, the Legislature expressed strong concerns surrounding arbitration agreements found in adhesive contracts. The Assembly Judiciary Committee specifically found that "most arbitration is created by entering into a contract (usually a contract that is adhesive or take-it-or-leave it)," and further commented upon a three-part series published by The New York Times "[e]xamining how arbitration clauses buried in contracts deprives Americans of their fundamental constitutional rights." (1 PE 492.)

But the Legislature also recognized the Federal Arbitration Act's requirements, and carefully met those requirements by treating litigation and arbitration identically. "Since this bill

[3] Later amendments to SB 1241 narrowed its application to employees and excluded consumers from Section 925's protection. (1 PE 490.) The full legislative history of Section 925 is in the record at 1 PE 445–508.

applies to all contracts involving employees, this bill does not appear to violate the [FAA]." (1 PE 495.)

Finally, some opponents of SB 1241 complained that it would benefit highly paid and sophisticated employees. (1 PE 473.) The Legislature addressed this concern: "[T]his bill exempts contracts where an employee is individually represented by legal counsel in negotiating terms of an agreement that designate venue or choice of law." (1 PE 500.)

The end result:

> This bill . . . seeks to ensure that California employees cannot be forced to litigate or arbitrate their California-based claims outside of California, under out-of-state laws, as a condition of an employment contract. Specifically, this bill authorizes an employee who resides and works in California to render void any provision required by an employer in violation of this bill . . . . Under this bill, if such a provision is rendered void at the employee's request, then the matter must be adjudicated (meaning litigated or arbitrated) *in California* and California law shall govern the dispute.

(1 PE 506, emphasis added.)

C. Overview of Code of Civil Procedure section 1281.4

Code of Civil Procedure section 1281.4 provides,

> If an application has been made to a court of competent jurisdiction, whether in this State or not, for an order to arbitrate a controversy which is an issue involved in an action or proceeding pending before a court of this State and such application is undetermined, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until the application for an order to arbitrate is determined and, if arbitration

> of such controversy is ordered, until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies.

When it applies, Section 1281.4 requires a stay. The purpose of Section 1281.4 "is to protect the jurisdiction of the arbitrator by preserving the status quo until arbitration is resolved." (*MKJA, Inc. v. 123 Fit Franchising, LLC* (2011) 191 Cal.App.4th 643, 658.)

Section 1281.4 is not self-executing. Instead, before the trial court may order a stay, the party seeking a stay must (1) file a motion to compel arbitration in a court of "competent jurisdiction"; and (2) file a "motion" for a stay in the California trial court. (*See Leenay, supra*, 81 Cal.App.5th at p. 567.)

D. The Opinion Permits Employers To Evade Section 925.

By the simple expedient of filing a motion to compel arbitration in an employer's preferred, home forum, and then filing in California a motion to stay under Section 1281.4, the Opinion permits an employer to easily evade the employee protections established in Section 925. This result forces California employees to litigate an often-critical pretrial motion—a petition to compel arbitration—outside of California and without the full protections of California law. (*See* 1 PE 506 [employers impose forum-selection clauses to "ensure that any disputes are decided in a forum that is most favorable to the employer"].) Whether this practice is permitted will have a

profound impact on employment litigation and impact the statutory rights of millions of employees statewide.

As the statute's plain language and the legislative history both make clear, Section 925 was enacted to ensure that litigation *and* arbitration of employment disputes occurred entirely in California. This includes motions to compel arbitration. The Legislature specifically discussed arbitration clauses embedded in adhesive, "take-it-or-leave-it" employment contracts and the problems inherent in such contracts. (*See e.g.*, 1 PE 445–46, 469–70.)

The Legislature's focus is hardly surprising. Motions to compel arbitration are a routine part of litigating employment claims—particularly because a plaintiff is always free to file a lawsuit in court and place the burden on the employer to compel arbitration. As the Second District explained,

> [A]n arbitration agreement requires a party to submit a dispute to arbitration *if ordered by a court to do so*—but it does not preclude a party from initiating a civil action or asking a court to resolve disputed issues over an arbitration agreement's applicability or enforceability. To the contrary, the Act expressly protects a party's right to do so.

(*Sargon Enterprises, Inc. v. Browne George Ross LLP* (2017) 15 Cal.App.5th 749, 769 (*Sargon*).)

Because a motion to compel arbitration is a prerequisite to arbitration itself (absent an employee voluntarily filing an arbitration demand), the only plausible way to reconcile the two statutes is to conclude that Section 925 requires that a motion to

compel arbitration be filed in California. Conversely, if the employer files a motion to compel arbitration utilizing a non-California forum that is only available to the employer because of the voided forum-selection clause, that non-California court is not a court of "competent jurisdiction" under Section 1281.4 unless the employer can show that Section 925 does not apply.

Paradoxically, the Opinion turns Section 925 on its head by forcing California employees to assert Section 925 in the forum Section 925 expressly permits the employee to avoid. This result, which places Section 925's applicability in the hands of a foreign court or arbitrator, is contrary to Section 925's plain language and the Legislature's intent in enacting it. And because there is no "wholly groundless" exception to delegation clauses, the Opinion removes Section 925's protections from *all* employees—not just those where the employer disputes the existence of an employment relationship. (*See Henry Schein, Inc. v. Archer & White Sales, Inc.* (2019) 139 S. Ct. 524, 528.)

This result also creates more uncertainty. If the foreign court or arbitrator agrees with the employee that Section 925 applies, then that would mean that the same court or arbitrator lacked jurisdiction to make the ruling in the first place. One commentator has recognized this problem, noting that the Opinion creates a "logical gyre."[4] This "circularity" problem should be avoided—the decision-maker must definitively have

[4] https://www.jdsupra.com/legalnews/court-holds-that-arbitrator-must-decide-3505016/ (last visited on December 9, 2022).

jurisdiction before deciding any issues, including Section 925. (*Cf. Sargon, supra*, 15 Cal.App.5th at p. 770 n.4.)

Finally, this case has received nationwide attention and involves several national law firms. Other out-of-state employers will surely take notice.[5] The Opinion sends a clear message to them that the best way to avoid Section 925 is to willfully ignore it: Let the California employee sue in state court and simply file a motion to compel arbitration in the forbidden jurisdiction.[6]

If Section 1281.4 requires a stay despite an employee asserting Section 925 as a defense, then this Court should say so.

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[5] Examples of national coverage of the Section 925 issue in this case includes (links last visited on December 9, 2022):
https://news.bloomberglaw.com/business-and-practice/dentons-loses-arbitration-question-in-ex-partner-fee-dispute;
https://www.law.com/therecorder/2021/09/03/california-appellate-court-halts-arbitration-in-ex-dentons-partners-suit-against-firm;
https://www.law360.com/articles/1419017/ex-dentons-partner-wins-round-in-fight-over-firing;
https://www.reuters.com/legal/litigation/ex-dentons-partner-cant-dodge-arbitration-by-claiming-he-was-employee-calif-2022-11-10/;
https://news.bloomberglaw.com/us-law-week/dentons-35-million-ex-partner-dispute-sent-back-to-arbitration.

[6] Avoiding Section 925 was in the national discourse even before this case (links last visited on December 9, 2022):
https://www.natlawreview.com/article/california-labor-code-section-925-and-how-employers-can-avoid-it;
https://www.martindale.com/legal-news/article_sheppard-mullin-richter-hampton-llp_2542267.htm.

Doing so provides important notice to the bench, bar, employers, and employees and will help save precious resources that might otherwise be spent fighting these forum battles absent this Court's final say-so. An adverse ruling would put the Legislature on notice that it may need to amend the statutes to conform to its intent. Giving the Legislature that opportunity further serves the public interest and is another reason for this Court to grant review.

II. THE OPINION TREATS LITIGATION AND ARBITRATION UNEQUALLY

The FAA has a "policy favoring arbitration." (*Morgan, supra*, 142 S. Ct. at p. 1713.) But that policy is "merely an acknowledgement of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitration and to place such agreements upon the same footing as other contracts." (*Ibid.*) For this reason, "a court may not devise novel rules to favor arbitration over litigation." (*Ibid.*)

Disregarding this precept, the Opinion creates a novel, one-way delegation rule: it holds that, in determining whether to grant a stay under Section 1281.4, courts are prohibited from considering whether a forum selection clause is valid under section 925 if the employment contract contains a delegation clause. The Opinion reasons that whether Section 925 applies is a "question of arbitrability" that can only be answered by an arbitrator—and that an approach permitting trial courts to consider Section 925 in that circumstance would be preempted by

the FAA. It does so by expanding the Supreme Court's definition of such questions well-beyond "whether the parties have submitted the particular dispute to arbitration." (*Howsam v. Dean Witter Reynolds* (2002) 537 U.S. 79, 83.)

If the Opinion stands, it is precedent for the proposition that delegation clauses can prohibit courts from examining ***any issue*** that might overlap with the merits of a particular case. Further, the delegation the Opinion mandates only works in one direction: Dentons was able to ***enforce*** the forum selection clause and get a stay while Zhang was ***prohibited*** from challenging the validity of the clause at all. That is not delegation; it is enforcement.

More alarming is the Opinion's conclusion that, in the presence of a delegation clause, the FAA preempts Section 925's application—even when the California court's only task is to determine the jurisdiction of another *court*. Thus, the Opinion creates precedent for the proposition that any issue overlapping with the merits of the dispute creates FAA preemption—but only for the employee; the employer faces no such hurdle. We cannot locate any authority for that sweeping proposition—especially where, as here, Dentons did not ask that the 925 issue be delegated and instead asked the trial court to decide whether it was entitled to a stay. The Opinion should not stand without this Court's careful review.

III. THE OPINION DEPRIVES CALIFORNIA EMPLOYEES OF THE PROTECTION CALIFORNIA LAW PROVIDES

As Section 925's legislative history states plainly, one purpose of enacting the statute was to ensure that anyone who "works in California is not forced to arbitrate or litigate in a different state; and give up protections afforded under California law." (1 PE 472.) But one important impact of permitting employers to file motions to compel arbitration in foreign fora and get a stay is this: the stay immediately tips the balance of power in favor the employer's favor because the merits of the motion to compel arbitration are themselves substantially impacted by the law applied. Employers elect to litigate in their home-states precisely because they consider their home states' laws more favorable to them.

Particularly in the employment context, California law offers robust protection to California employees against unconscionable contracts—including unconscionable arbitration clauses. (*See Armendariz, supra*, 24 Cal.4th 83.) An employee's statutory discrimination and wrongful termination in violation of public policy claims "are arbitrable if the arbitration agreement meets certain minimum requirements and is not so one sided as to be unconscionable." (*Ramos v. Superior Court* (2018) 28 Cal.App.5th 1042, 1054.) But *Armendariz's* protections will not be available to California employees who are forced to litigate motions to compel arbitration in another state under that state's laws. The Legislature specifically discussed this concern in

enacting Section 925: "Those workers that do have the resources and ability to travel might well find that the protection that they had under California law does not exist, or is not as comprehensive, in the jurisdiction that will be deciding their dispute." (1 PE 507.)

The ability to evade *Armendariz* is a strong incentive for employers to circumvent Section 925 and file parallel actions in other states. The paramount importance of *Armendariz* to protecting California's employees from unconscionable contracts is a further reason this Court should grant review.

IV. CALIFORNIA COURTS NEED GUIDANCE ON HOW TO APPLY SECTION 925 IN EARLY LITIGATION

One practical reason for this Court to grant review is to give trial courts guidance on how to apply Section 925 in the early stages of a case. The principal issue on which this Court should provide guidance is how courts should determine whether a plaintiff is an "employee" entitled to Section 925's protections in cases where the plaintiff's employee status is disputed. No such guidance currently exists.

While no California decision has addressed the issue with respect to Section 925 specifically, one line of cases has addressed how to apply *Armendariz* in cases where employment status is disputed. Under that test, the plaintiff may assert *Armendariz* upon showing a "power imbalance" between the plaintiff and the employer. (*Ramos v. Superior Court* (2018) 28 Cal.App.5th 1042, 1056 & n.2 (*Ramos*).)

In contrast, some federal district courts in California apply a "plausibility" test in applying Section 925 in early forum battles. If the plaintiff can plausibly allege or establish that the plaintiff is an employee under the applicable test (Lab. Code section 2750.3 or *Borello*), then these district courts apply Section 925. (*See e.g., McKellar v. Mithril Capital Management LLC*, (N.D. Cal. Mar. 13, 2020) 2020 U.S. Dist. Lexis 44080, at pp. *19–20.) The test is an attempt to balance the risk of frivolous claims of an employment relationship with the general presumption in favor of an employment relationship under California law. (*See Yeomans v. World Financial Group Ins. Agency, Inc.* (N.D. Cal. Nov. 6, 2019) 2019 U.S. Dist. Lexis 193100, at pp. *11–12.) Determining which test is necessary and appropriate for resolving early motions involving Section 925 will have an immediate and meaningful impact on litigation throughout California, both in state and federal courts. It will also provide meaningful assistance to foreign courts weighing whether to apply Section 925.

Equally important is for this Court to provide guidance on how to deal with parallel litigation, especially when foreign courts refuse to apply Section 925. The case law illustrates a disturbing trend among out-of-state employers to willfully flout Section 925's mandate by initiating out-of-state litigation in the employers' home states. (*See e.g., LGCY, supra*, 75 Cal.App.5th at pp. 852–53 [employer sued California employees in Utah]; *Jurek v. Pillar USA, Inc.* (S.D. Cal. Jul. 13, 2021) 2021 U.S. Dist. Lexis 130404, at pp. *3–4 [employer sued California employee in

New York *after* employee filed suit in California]; *Lyon v. Neustar, Inc.* (E.D. Cal. May 3, 2019) 2019 U.S. Dist. Lexis 75307, at *10 [employers sued California employee in Virginia after employee sued in California].)

One published California decision instructs that a foreign court's refusal to apply Section 925 has no bearing on a California court's duty to apply it in every case or controversy. *(LGCY, supra*, 75 Cal.App.5th at pp. 862–63.) The Opinion, on the other hand, instructs that "principles of comity" counsel against second-guessing a foreign court's refusal to apply Section 925 in determining whether it has personal jurisdiction over the California employee. (*See* Exh. A at pp. 19–20.) At best, *LGCY* and the Opinion provide inconsistent guidance and, at worst, are irreconcilable. This Court should provide definitive guidance on how to navigate such complex parallel proceedings.

V. SECTION 925 REPRESENTS A FUNDAMENTAL CALIFORNIA PUBLIC POLICY

Section 925 is a legislative enactment reflecting and incorporating a fundamental California public policy. It is critical that California courts enforce it consistently and, equally important, at the start of litigation. Section 925's purpose is to provide a California forum and ensure the protections of California law to employment disputes arising in California *from the beginning of a case*. Both purposes are eviscerated when the courts permit employers to force expensive foreign litigation with Section 1281.4. At least one non-California court has recognized

and respected Section 925 as a fundamental public policy. (*Focus Fin. Partners, LLC v. Holsopple* (Del. Ch. 2020) 241 A.3d 784, 821 (*Holsopple*) [recognizing that "Section 925 embodies a fundamental public policy of the State of California" and quashing service for lack of personal jurisdiction]). But many other courts simply avoid Section 925 through the application of nearly impenetrable choice-of-law analyses. (*See e.g. Ronnoco Coffee, LLC v. Castagna* (E.D. Mo., Mar. 5, 2021) 2021 U.S. Dist. Lexis 41707, at pp. *17–*18 ["the Court notes that district courts outside of California considering choice of law provisions and forum selection clauses have refused to apply § 925 when another state's law has been chosen by the parties"].)

As other courts around the country continue to encounter Section 925 cases, it is imperative that the California courts project an unqualified message that Section 925 reflects a fundamental public policy of this state that should not be understated or ignored. But by refusing to apply Section 925 based on "principles of comity," (Exh. A at pp. 19–20), the Opinion tells out-of-state courts that disregarding Section 925 is an acceptable outcome—to which California courts will defer.

As explained above, that message is inconsistent with *LGCY's* conclusions that such decisions from foreign courts have no bearing on Section 925's applicability. *(See LGCY, supra*, 75 Cal.App.5th at pp. 862–63 [foreign court's refusal to enforce section 925 has no bearing on California court's duty to enforce section 925 in every case or controversy].) For those employers desiring to keep their disputes as far away from California as

possible, the Opinion will embolden them to circumvent Section 925. This outcome harms California employees and violates California's public policy.

VI. THE PROPER CONSTRUCTION OF SECTIONS 925 AND 1281.4 ARE MATTERS OF STATEWIDE IMPORTANCE

Whether the Opinion's result is correct raises a question of statutory construction—harmonizing Section 1281.4 with Section 925. Harmonizing the statutes requires the Court construe two aspects of Section 1281.4.

First, the Court should construe the term "competent jurisdiction." Construing that term to mean a court that has both subject matter jurisdiction over the action and personal jurisdiction over the California employee ***independent of the voided forum selection clause*** would harmonize the statute with Section 925 and permit trial courts to inquire into the validity of the forum selection clause before finding that Section 1281.4's criteria have been satisfied.

Doing so would also avoid the FAA in its entirety. The only reason the Opinion considered the FAA was because it decoupled whether the New York court was of "competent jurisdiction" from whether the forum selection clause is valid. Construing the term to require adjudicating both issues avoids the FAA altogether. That construction would also recognize that the employer is the moving party who bears the burden of proving that the foreign court is of competent jurisdiction.

Second, the Court should determine whether Section 1281.4 permits the trial court to wade into the merits of the motion to compel arbitration pending in the out-of-state court that triggered the stay request. The purpose of Section 1281.4 is to preserve the status quo, in theory, to permit the out-of-state court to rule on the motion to compel arbitration. Yet the Opinion held that the trial court could break the status quo and rule on the out-of-state motion's merits in determining whether a stay was appropriate. (Attachment A at pp. 14–15.) If the purpose of the stay is to allow the foreign court to rule on the motion, then the Opinion undermines that purpose by allowing the trial court to issue a stay ***and*** rule on a merits issue purportedly reserved for the foreign court.

Section 1281.4 serves an important public policy by preserving the status quo while arbitration is pursued. Section 925 likewise serves an important public policy by ensuring a local forum for California's employees to adjudicate employment disputes. Harmonizing these two statutes will further both policies, support the Legislature's clear intent, and resolve a question of statewide importance.

VII. THE COURT SHOULD GRANT AN IMMEDIATE TEMPORARY STAY OF THE TRIAL COURT'S ORDER PENDING ITS DETERMINATION OF THIS PETITION

As noted above, the trial court's Order lifted the injunction against the New York Arbitration. That Order has been stayed several times, including most recently by this Court when it

granted review on February 17, 2022. The Opinion affirmed the trial court's order and once again lifted the injunction.

Labor Code section 925, subdivision (c) authorizes California courts to employ "injunctive relief and any other remedies available" to assist an employee in enforcing his or her rights under Section 925. To preserve the status quo and avoid the potential for irreparable harm while this Court reviews this petition, petitioner respectfully requests that the Court temporarily stay the trial court's August 17, 2021 Order—which would have the effect of maintaining the preliminary injunction against the New York Arbitration—or enjoin the New York Arbitration directly.

Without the requested stay, petitioner will be forced to commence arbitrating this case in New York even though this Court's ruling could serve to divest the arbitration of jurisdiction. Moreover, real parties in interest will not be materially prejudiced. If real parties ultimately prevail before this Court, the arbitration will proceed in New York; if they lose, the case will then proceed in California. The only thing lost is time. While litigants always have some interest in resolving the underlying dispute, that interest is greatly outweighed by the potential prejudice to petitioner of commencing a foreign arbitration that, ultimately, may lack jurisdiction over the dispute.

As reflected in this petition, enforcing Section 925 already has proven to be an expensive and time-consuming battle. If the

rights embodied in Section 925 are to have any meaning or force, California courts must enforce them using all tools available and early in the litigation. A temporary stay ensures that, if this Court grants review, Zhang will have the ability to fully exercise and obtain the benefits of these rights.

CONCLUSION

This Court is the ultimate protector of the fundamental statutory rights held by California employees embodied in Section 925. The Court should accept review and delineate the scope of these rights. Doing so will provide invaluable guidance to the bench and bar on how to navigate early forum battles involving Section 925, conserve precious court resources by providing further certainty in the law and streamlining future disputes, and give notice to the Legislature of any deficiency or unanticipated outcomes in the application of Sections 925 and 1281.4 that may need its attention.

Respectfully submitted,

Dated: December 15, 2022

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.504(d)(1), I certify that this **PETITION FOR REVIEW** contains 8,122 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Respectfully submitted,

Dated: December 15, 2022

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Attachment A

OPINION

Filed 11/9/22 – Transferred from the Supreme Court

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JINSHU "JOHN" ZHANG, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent, DENTONS U.S. LLP, et al., Real Parties in Interest.	B314386 Los Angeles County Super. Ct. No. 21STCV19442

ORIGINAL PROCEEDINGS in mandate. David Sotelo, Judge. Petition denied.

Murphy Rosen, Paul D. Murphy and Daniel N. Csillag for Petitioner.

No appearance for Respondent.

Gibson, Dunn & Crutcher, Richard J. Doren, James P. Fogelman, Kahn A. Scolnick, Dione Garlick and Daniel R. Adler for Real Parties in Interest.

SUMMARY

Petitioner Jinshu "John" Zhang was an equity partner in Dentons U.S. LLP (real party in interest or Dentons), a major law firm with offices throughout the United States. A dispute arose between them over a multimillion dollar contingency fee from a client whom petitioner brought to the firm. The partnership agreement contains a clause providing for arbitration of all disputes in Chicago or New York. The partnership agreement also contains a clause delegating all questions of arbitrability to the arbitrator (delegation clause).

Dentons terminated petitioner for cause, asserting a breach of fiduciary duty, and initiated an arbitration in New York. Petitioner then sued Dentons for wrongful termination and other causes of action in Los Angeles Superior Court. Petitioner obtained a temporary restraining order (TRO) and then a preliminary injunction, enjoining the New York arbitration until the court could decide whether there was a clear and unmistakable delegation clause.

After the TRO was issued, Dentons filed a motion under Code of Civil Procedure section 1281.4, seeking a mandatory stay of the case based on its motion to compel arbitration that was then pending in a New York court, which the New York court later granted. In opposition, petitioner argued he was Dentons's employee, and Labor Code section 925 "render[ed] the courts of New York incompetent to rule on Dentons' motion to compel arbitration." Section 925 prohibits an employer from requiring an employee who resides and works in California to agree to a provision requiring the employee to adjudicate outside California a claim arising in California.

Judge Sotelo granted Dentons's motion to stay petitioner's action in superior court pending completion of arbitration in New York. The court ruled the arbitration agreement clearly and unmistakably delegated arbitrability issues to the arbitrator, including the applicability of Labor Code section 925 to the dispute.

Petitioner sought a writ of mandate, which we denied. The Supreme Court granted review and transferred the case back to us, directing us to issue an order to show cause. We did so, and now again deny the petition. We agree with the trial court that the parties delegated questions of arbitrability to the arbitrator. The arbitrability issues in this case include whether petitioner is an employee who may invoke Labor Code section 925 and require the merits of the dispute to be resolved in California instead of New York. We reject petitioner's contention that, because he invoked section 925, the New York court is not "a court of competent jurisdiction" (Code Civ. Proc., § 1281.4) that can order arbitration of this dispute.

FACTUAL AND PROCEDURAL BACKGROUND

1. Background Facts

Petitioner was a "full interest partner" in Dentons who worked and resided in California. He is a signatory to Dentons's partnership agreement. The partnership agreement has a broad arbitration clause. It covers "all disputes relating to the validity, breach, interpretation or enforcement of this Agreement, as well as all disputes of any kind between or among any of the Partners and/or the Partnership relating to the Partnership and/or the Business, including statutory claims of any kind . . . ." Those disputes "shall be resolved in accordance with the CPR Rules of Non-Administered Arbitration," and the place of arbitration

"shall be either Chicago, Illinois or New York, New York." (CPR is the International Institute for Conflict Prevention & Resolution.) The CPR Rules also authorize the arbitrator to decide issues of arbitrability.

In 2018, petitioner brought a client to Dentons whom the firm agreed to represent for a fee contingent on the outcome. Petitioner was principally responsible for the matter and resolved it successfully in February 2021, entitling Dentons to the contingency fee. The fee could not be collected until a later date when certain transfer restrictions were to be removed and Dentons's exact percentages would become ascertainable. The fee is substantial; according to petitioner's complaint, when collected "it will be the single biggest contingency fee Dentons has ever earned."

Petitioner, whose compensation was determined by the Dentons board, believed the contingency fee "presented an opportunity to negotiate his compensation as it related to the Contingency Fee," but Dentons's chief executive officer, Michael McNamara, told him he would have to wait to negotiate his compensation until the Dentons board undertook its annual compensation review.

Matters thereafter deteriorated. Dentons asserts petitioner demanded that Dentons guarantee him 90 percent of the contingency fee and place him on the board, and when Dentons declined, petitioner "covertly went to the Client and negotiated an agreement to receive personally 85% of the proceeds of the contingency fee award, contrary to the terms of the Partnership Agreement." Petitioner asserts that at the end of April 2021, Mr. McNamara and Edward Reich, Dentons's general counsel, arranged the creation of a forgery, purporting to be a letter from

the client's representative directing a third party to transfer certain client-held securities worth tens of millions of dollars directly to Dentons. Petitioner reported the alleged forgery to the board on April 30, 2021, demanding Mr. McNamara's immediate termination.

On May 5, 2021, the Dentons board voted unanimously to terminate petitioner's status as a partner for cause, and initiated an arbitration the same day, alleging petitioner breached the partnership agreement and his fiduciary duty of loyalty to Dentons.

2. Arbitration Proceedings in New York and Court Proceedings in California

Litigation in New York and California developed.

On May 14, 2021, Dentons requested an emergency arbitrator from CPR, the arbitral body. An emergency arbitrator was appointed, and a hearing was scheduled for May 24 to discuss petitioner's objections to jurisdiction. The emergency arbitrator issued several emergency awards over the following two weeks or so. Among other things, these awards rejected petitioner's challenges to jurisdiction; the final emergency award on June 10, 2021, required petitioner to make certain disclosures to Dentons about his efforts to collect the contingency fee and prohibited him from misusing confidential information.

Meanwhile, on May 24, 2021, petitioner filed a wrongful termination complaint in Los Angeles Superior Court, naming Dentons, Mr. McNamara and Mr. Reich as defendants. The next day, he notified the emergency arbitrator he was withdrawing from the arbitration and would apply to a court to stay the arbitration. On May 26, 2021, petitioner filed a first amended

complaint that included a challenge to the arbitrator's jurisdiction.

On June 1, 2021, petitioner filed an application for a TRO and order to show cause why a preliminary injunction should not issue to restrain the New York arbitration. Among the grounds were that only a court could decide the parties' dispute over whether the partnership agreement contained a valid delegation clause, and that Labor Code section 925 prohibits Dentons from arbitrating claims arising from petitioner's California employment in a New York arbitration.

On June 14, 2021, Dentons filed a petition to confirm the three emergency awards in a New York court.

On June 15, 2021, after various proceedings unnecessary to relate, Judge James C. Chalfant issued a TRO enjoining the New York arbitration.

On June 28, 2021, Dentons moved in the New York court to compel arbitration.

That same day, Dentons moved in the Los Angeles Superior Court to stay this case under Code of Civil Procedure section 1281.4. Section 1281.4 requires the court, upon motion, to stay a pending action if an application has been made to "a court of competent jurisdiction" for an order to arbitrate a controversy that is an issue in the pending action.

On July 13, 2021, Judge Chalfant granted petitioner's application for a preliminary injunction of the New York arbitration, stating: "The arbitration in New York is enjoined until the [independent calendar] court acts on [petitioner's] arbitrability claims that the delegation clause is not clear and unmistakable."

On August 17, 2021, the independent calendar court (Judge Sotelo) granted Dentons's motion to stay petitioner's lawsuit. The court concluded the arbitration agreement "clearly and unmistakably delegate[s] arbitrability issues to the arbitrator," and "[u]nder this Partnership Agreement, this Court has no jurisdiction to consider Partner Zhang's arguments against enforcement."

The court also ruled that Labor Code section 925 does not require the arbitration to occur in California instead of New York, rejecting petitioner's claim that New York is not a court of competent jurisdiction. The court explained it need not determine whether petitioner "was an employee or something else in his relationship as a Partner at Dentons, because the Partnership Agreement clearly states that 'all disputes relating to the validity, breach, interpretation or enforcement' are to be resolved by the arbitrator." The court further observed that a motion to compel arbitration was currently pending "before a court of competent jurisdiction in New York, New York," and "New York is a court of competent jurisdiction because the Partnership Agreement itself contains a venue provision allowing Dentons to bring an action there." The court also lifted and vacated the preliminary injunction.

3. The Writ Proceedings

On August 19, 2021, petitioner challenged Judge Sotelo's order staying the matter by filing a petition for writ of mandate with this court. The petition asked us to hold that Labor Code section 925 "renders out-of-state courts not competent for purposes of [Code of Civil Procedure section] 1281.4," so that an employer's motion to compel arbitration filed in a foreign court does not trigger a mandatory stay under section 1281.4. After

receiving preliminary briefing, we concluded petitioner had not established entitlement to extraordinary relief, and denied the petition.

Petitioner sought review in the Supreme Court, and on February 16, 2022, the Supreme Court granted the petition. The court transferred the matter to us with directions to vacate our order denying mandate and issue an order to show cause why the relief sought should not be granted. The court also granted a stay of the trial court's order lifting its injunction against the New York arbitration, subject to our further consideration. We issued an order to show cause and received further briefing. We again deny the petition.

DISCUSSION

The New York court is a court of competent jurisdiction to rule on Dentons's motion to compel arbitration. The proposition that Labor Code section 925, when invoked by a plaintiff, automatically strips another state's courts of jurisdiction is unsupported by legal authority, is antithetical to notions of comity, and is at odds with the animating purpose of the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.).

The parties to the partnership agreement clearly and unmistakably delegated questions of arbitrability to the arbitrator. A solid body of law provides that delegation clauses are enforceable. Consequently, the New York arbitrator must decide whether petitioner is an employee and therefore entitled to the protections of Labor Code section 925.

If the arbitrator decides petitioner is an employee for purposes of Labor Code section 925, then (as Dentons concedes), "none of his claims against Dentons, or Dentons' claims against him, would ever be adjudicated outside of California." If the

arbitrator decides petitioner is not an employee, section 925 has no application, and the merits of the parties' dispute will be decided by arbitration in New York, as agreed.

1. The Statutes

For ease of reference, we set out the pertinent texts of the two relevant statutory provisions.

Code of Civil Procedure section 1281.4 provides in part: "If an application has been made to a court of competent jurisdiction, whether in this State or not, for an order to arbitrate a controversy which is an issue involved in an action or proceeding pending before a court of this State and such application is undetermined, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until the application for an order to arbitrate is determined and, if arbitration of such controversy is ordered, until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies."[1]

Labor Code section 925 provides in part: "(a) An employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would do either of the following: [¶] (1) Require the employee to adjudicate outside of California a claim arising in California. [¶] (2) Deprive the employee of the substantive

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[1] A similar provision applies "[i]f a court of competent jurisdiction, whether in this State or not, has ordered arbitration of a controversy . . . ." (Code Civ. Proc., § 1281.4.) The parties inform us the New York court granted Dentons's motion to compel arbitration, and petitioner filed a notice of appeal of that order.

protection of California law with respect to a controversy arising in California. [¶] (b) Any provision of a contract that violates subdivision (a) is voidable by the employee, and if a provision is rendered void at the request of the employee, the matter shall be adjudicated in California and California law shall govern the dispute."[2]

2. The New York Court Is a Court of Competent Jurisdiction.

Petitioner contends that "when an employee invokes [Labor Code section] 925, a foreign court is not one of 'competent jurisdiction' under [Code of Civil Procedure section] 1281.4." This is wrong for multiple reasons.

"A court of competent jurisdiction is a court with the power to adjudicate the case before it." (*Lightfoot v. Cendant Mortgage Corp.* (2017) 580 U.S. 82, 91.) By signing the partnership agreement which expressly vests jurisdiction in New York courts, petitioner consented to the jurisdiction of the New York court. It is obviously a court of competent jurisdiction. As petitioner's counsel stated to the New York court that granted Dentons's motion to compel arbitration, "in 99 percent of cases [an agreement] constitutes consent to jurisdiction." It does so here as well.

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[2] Labor Code section 925 also allows the court to award an employee reasonable attorney fees (*id.,* subd. (c)); states that "adjudication includes litigation and arbitration" (*id.*, subd. (d)); and does not apply to a contract with an employee who is represented by legal counsel in negotiating the terms of an agreement to designate venue or forum or choice of law provisions (*id.,* subd. (e)).

Petitioner insists that Labor Code section 925 changes that jurisdictional principle "when an employee invokes Section 925." But Dentons disputes that petitioner is an employee. As the trial court below stated, "no case indicates that [section] 925 applies automatically." Section 925, subdivision (b) states that a clause requiring an employee to adjudicate claims outside California is voidable by the employee, "and if a provision is rendered void at the request of the employee," the matter must be adjudicated in California. We agree with the Fifth District that "the most plausible interpretation of this language is that an employee is required to request a court to render a decision that the offending clause is void." (*LGCY Power, LLC v. Superior Court* (2022) 75 Cal.App.5th 844, 864 (*LGCY*).) In other words, "a violative clause does not become void simply by the employee declaring an intent to void it." (*Ibid.*)

But we need not decide whether an employee can simply declare a provision void, because this is a case where petitioner's status as an employee is a substantial issue. Petitioner's theory that he may unilaterally deprive the New York courts of jurisdiction to rule on a motion to compel arbitration, by merely invoking Labor Code section 925, finds no support in law and (as we discuss later) is contrary to principles of comity and to the principles underlying the FAA.

Of course, as Dentons admits, it would be equally wrong to assume that petitioner is *not* an employee, as that would allow an employer to evade Labor Code section 925 entirely. At issue here is only the question of *who is to decide* whether petitioner is an employee. As we discuss below, the parties delegated questions of arbitrability to the arbitrator, and petitioner's status is one of those questions.

3. The Parties Delegated Arbitrability Issues to the Arbitrator

a. Petitioner's irrelevance claim

Preliminarily, petitioner contends the trial court erred "in considering the existence of a delegation clause" in connection with Dentons's motion for a stay of litigation under Code of Civil Procedure section 1281.4. He contends the delegation clause is irrelevant, because the question "whether the New York court is of competent jurisdiction to compel arbitration" is not a question of arbitrability. Petitioner is mistaken.

Throughout his briefing, petitioner evades articulating the fundamental issue. When Dentons filed its motion to stay the litigation here, petitioner opposed that motion with the claim that Labor Code section 925, by permitting an employee to void a clause selecting a foreign forum, renders the New York court not competent to compel arbitration. That claim necessarily raises the question whether petitioner is an employee entitled to void the clause in the first place. And that question in turn necessarily requires a ruling on who is to decide whether petitioner is entitled to void the clause: the trial court or the arbitrator. The trial court here clearly understood this, as did Judge Chalfant when he enjoined the New York arbitration "until the [independent calendar] court acts on [petitioner's] arbitrability claims that the delegation clause is not clear and unmistakable."

Several courts have held the applicability of Labor Code section 925 is a question of arbitrability that may be delegated to the arbitrator. For example, *Ratajesak v. New Prime, Inc.* (C.D.Cal. Mar. 20, 2019, No. SA CV 18-9396-DOC (AGRx)) 2019 U.S.Dist. Lexis 70506 (*Ratajesak*) involved motions to compel

arbitration of various wage claims on an individual basis under arbitration agreements the defendant contended were governed by Missouri law. (*Id.* at p. *9.) The plaintiffs claimed the agreements could not be enforced under California Labor Code provisions, including section 925. (*Ratajesak,* at pp. *10, *15.) The court "decline[d] to address California policy governing arbitration of unpaid wages when, as here, the parties contracted to delegate questions of arbitrability to the arbitrator." (*Id.* at p. *13.)

Specifically, *Ratajesak* found the agreements clearly and unmistakably provided that disputes, including arbitrability of disputes between the parties, would be resolved by arbitration, and both Missouri and California law required enforcement of the delegation clause. (*Ratajesak, supra,* 2019 U.S.Dist. Lexis 70506 at pp. *13–*14.) The court concluded: "[The] Plaintiffs' arguments regarding the scope of the arbitration agreement; the application of California Labor Code Section 925; and the application [of]California Labor Code Section 229 may well render the claims unarbitrable. *But under the contract, the parties clearly and unmistakably delegated this question to the arbitrator*." (*Id.* at p. *15, italics added; see also *Smith v. Nerium International, LLC* (C.D.Cal. Sept. 10, 2019, No. SACV 18-01088JVS(PLAx) 2019 U.S.Dist. Lexis 222601, p. *17 ["arguments as to the effect of [Labor Code section 925]—if any—on the arbitration provision are properly reserved for the arbitrator to whom the parties delegated the question of arbitrability"]; *Pacelli v. Augustus Intelligence, Inc.* (S.D.N.Y. 2020) 459 F.Supp.3d 597, 617 ["The applicability of Section 925 is a question of the forum provision's 'enforceability,' " and "[t]he enforceability of a contract is a threshold issue that 'parties may

agree to arbitrate' "; California courts have determined that "whether Section 925 is a question of arbitrability" is an issue that can be delegated to the arbitrator].)

Petitioner says that *Ratajesak* "proves the point" that Dentons's motion to stay did not present an arbitrability question. This is a mystifying contention, in support of which petitioner simply repeats his claim that, unlike *Ratajesak*, arbitrability is "not the issue in this proceeding." As we have explained, petitioner's claim to be an employee who can automatically void an agreement to arbitrate in a foreign court is precisely the issue, and in the posture of this case, petitioner's status as an employee (or not) is necessarily a gateway question of arbitrability.

Petitioner claims, "separately," that the trial court "lacked jurisdiction to determine whether a delegation clause exists"; the trial court "was deeply confused about the issues before it," and "under well-established law, it lacked the authority" to analyze the delegation and arbitration clauses in a Code of Civil Procedure section 1281.4 motion to stay. This claim is equally fruitless. Petitioner cites only *MKJA, Inc. v. 123 Fit Franchising, LLC* (2011) 191 Cal.App.4th 643, which held that "a party's inability to afford to pay the costs of arbitration is not a ground on which a trial court may lift a stay of litigation that was imposed pursuant to section 1281.4." (*Id.* at p. 647.) The case has no relevance, except for the general point that the purpose of the stay " 'is to protect the jurisdiction of the arbitrator by preserving the status quo until arbitration is resolved.' " (*Id.* at p. 658.) Petitioner does not cite the "well-established law" under

which he claims the court "lacked the authority" to rule on the delegation clause.[3]

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[3] Petitioner also relies on the legislative history of Labor Code section 925, and a number of cases, arguing that the Legislature intended to ensure that California employees cannot be forced to litigate or arbitrate their California-based claims outside of California, and intended section 925 to apply "in every case or controversy in which its criteria are satisfied." (*LGCY, supra*, 75 Cal.App.5th at p. 863.) We do not disagree, but that intent does not bear on the question of who is to decide whether petitioner is an employee entitled to invoke section 925. Other cases petitioner cites include *Midwest Motor Supply Co. v. Superior Court* (2020) 56 Cal.App.5th 702, 706, 715 (a forum non conveniens case holding section 925 is triggered by any modification to an employment contract occurring after the statute's effective date); *Lyon v. Neustar, Inc.* (E.D.Cal. May 3, 2019, No. 2:19-cv-00371-KJM-KJN) 2019 U.S.Dist. Lexis 75307, pp. *2, *22 (preliminarily enjoining the defendant from further pursuing litigation or arbitration against the plaintiff outside of California; the plaintiff was likely to succeed on the merits because the employment agreement, as modified to require resolution of all disputes in Virginia, ran afoul of section 925); *Focus Financial Partners, LLC v. Holsopple* (Del.Ch. 2020) 241 A.3d 784, 792, 822 (concluding, "[a]fter a lengthy choice-of-law analysis," that Delaware forum provisions in several employment-related agreements could not support jurisdiction in Delaware, because applying Delaware law "would offend a fundamental policy of the State of California on a matter where California has a materially greater interest"; the defendant employee was entitled to void the Delaware forum and Delaware law provisions under section 925). None of these cases involved the delegation clause of an arbitration agreement.

b. The delegation clause is clear and unmistakable.

As described in part 1 of the Facts, *ante*, the arbitration clause in the partnership agreement covers "all disputes relating to the validity, breach, interpretation or enforcement of this Agreement," and requires those disputes to be resolved "in accordance with the CPR Rules of Non-Administered Arbitration then currently in effect."

Judge Sotelo's decision granting Dentons's motion to stay first quotes rule 8.1 of the CPR Rules as stating "that '[t]he Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement. This authority extends to jurisdictional challenges with respect to both the subject matter of the dispute and the parties to the arbitration.' " The court further stated that there "appears to be no ambiguity that the Partnership Agreement also clearly and unmistakably delegates arbitrability issues to the arbitrator."

There is no dispute over the applicable principles of law on questions of arbitrability. " 'Under California law, it is presumed the judge will decide arbitrability, unless there is clear and unmistakable evidence the parties intended the arbitrator to decide arbitrability.' " (*Nelson v. Dual Diagnosis Treatment Center, Inc.* (2022) 77 Cal.App.5th 643, 654 (*Nelson*).) Federal law is the same. (*Henry Schein, Inc. v. Archer & White Sales, Inc.* (2019) ___U.S.___ [139 S.Ct. 524, 530]; *ibid.* ["But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue."].)

"[T]he best indicator of the parties' intent in a written contract is the words they chose for the agreement." (*Nelson, supra,* 77 Cal.App.5th at p. 654.) " 'Even broad arbitration clauses that expressly delegate the enforceability decision to arbitrators may not meet the clear and unmistakable test, where other language in the agreement creates an uncertainty in that regard.' " (*Id.* at p. 656.)

Here, we have a broad arbitration clause that expressly delegates the enforceability decision to the arbitrator. In addition, the CPR Rules to which the parties agreed are crystal clear on the point. "[W]here the Contract provides for arbitration in conformance with rules that specify the arbitrator will decide the scope of his or her own jurisdiction, the parties' intent is clear and unmistakable, even without a recital in the contract that the arbitrator will decide any dispute over arbitrability." (*Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 557.)

In his reply, petitioner asserts that the partnership agreement "also empowers courts to adjudicate issues," suggesting those provisions create the uncertainty referred to in *Nelson,* and he has been "denied . . . his right to make these arguments." Petitioner says he cited five provisions of the partnership agreement in his reply to Dentons's preliminary opposition. He does not describe or discuss those provisions in his reply to Dentons's return, requiring us to consult his reply to Dentons's preliminary opposition to find out what they are. We have done so, and our review of the partnership agreement provisions petitioner cited confirms those provisions do not create the "uncertainty" to which *Nelson* refers.[4]

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[4] In his reply to Dentons's preliminary opposition, petitioner cites a provision (§ 12.5) on litigation expenses that requires each

Nelson and the other cases petitioner cites involve express statements in the arbitration agreement showing or suggesting "dual delegation." In *Nelson*, the incorporation in the agreement of arbitration rules authorizing the arbitrator to determine arbitrability did not result in a clear and unmistakable delegation, because the agreement itself contained a "simultaneous express statement of broad judicial power to hold 'any provision' of their agreement 'invalid or unenforceable for any reason.' " (*Nelson, supra,* 77 Cal.App.5th at p. 657; *ibid.* ["At best, the dual delegation presented by the facts here—to the

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party to pay the party's own attorney fees if any party brings "any legal action, arbitration, or other proceeding with respect to the breach, interpretation, or enforcement of this Agreement." He cites a provision (§ 12.6) on the severability of any provision that is "adjudicated to be void, illegal, invalid, or unenforceable." He cites the dispute resolution provision itself (§ 12.10), which states that the arbitrator "shall have no power or authority to add to, amend, modify or disregard any of the provisions of this Agreement." He cites a section of the dispute resolution provisions entitled "Determinations by the DUS Board" (§ 12.10.1) that states all issues and disputes "relating to the construction and interpretation" of the partnership agreement are to be determined by the board, and refers to "any arbitration or other legal proceeding" concerning such determinations by the board. Finally, he cites the "Confidentiality" section of the dispute resolution provisions (§ 12.10.3) that deems all proceedings and documents concerning any arbitration to be "Confidential Information," and goes on to say that all "documents filed in any federal or state court in connection with the enforcement, interpretation or breach of any provision of this Agreement to be filed under seal." None of these provisions creates any uncertainty about whether the arbitrator—and not the court—is empowered to determine arbitrability issues.

arbitrator by reference to AAA rules, and to the court expressly—created uncertainty."].)

Similarly, we held in *Dennison v. Rosland Capital LLC* (2020) 47 Cal.App.5th 204 that "[w]here . . . a contract includes a severability clause stating a court of competent jurisdiction may excise an unconscionable provision, there is no clear and unmistakable delegation to the arbitrator to decide if the arbitration agreement is unconscionable." (*Id.* at pp. 209–210.) And in *Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, the contract contained a broad agreement to submit controversies including the scope or applicability of the agreement to the arbitrator, but also contained a severability provision authorizing " 'a trier of fact of competent jurisdiction' " to determine the enforceability of any provision of the agreement. (*Id.* at pp. 1565–1566.) The use of the phrase "a trier of fact of competent jurisdiction" instead of "arbitration panel" or similar language used in the arbitration provisions of the agreement "suggests the trial court also may find a provision, including the arbitration provision, unenforceable," so there was no clear and unmistakable delegation to the arbitrator. (*Id.* at p. 1566.)

There is no such ambiguity or uncertainty in this case (see fn. 4, *ante*), so petitioner's claim he was "denied . . . his right to make these arguments" is meritless.

4. Other Considerations: Comity and Preemption

As previously mentioned (see fn. 1, *ante,* at p. 9), the New York court granted Dentons's motion to compel arbitration on August 20, 2021, expressly finding it had jurisdiction over petitioner by virtue of his execution of the partnership agreement. Our conclusion the arbitrator must decide whether the arbitration may proceed in New York preserves principles of

comity, under which judges decline to exercise jurisdiction when matters are more appropriately adjudicated elsewhere. Indeed, we find it difficult to imagine, in the circumstances here, how a California court could justify overriding the New York court's order compelling arbitration.

More important, however, is that petitioner's proposed construction of Labor Code section 925—allowing petitioner to unilaterally void an agreement to arbitrate gateway issues of arbitrability in New York—would be inconsistent with the principles underlying the FAA. Petitioner insists the trial court erred by ruling it could not consider section 925 because of the delegation clause, and that we should decide that issue now, or if not, remand the matter to the trial court to rule on section 925 in the first instance. But the notion that the court may rule on an issue the parties delegated to an arbitrator seems to us to present the kind of obstacle to arbitration that the FAA has long condemned.

The high court's most recent discussion of FAA preemption appears in *Viking River Cruises, Inc. v. Moriana* (2022) ___U.S.___ [142 S.Ct. 1906] (*Viking*). The court recites the fundamental principles with which we are all familiar, including the FAA's " 'equal-treatment principle,' " under which "the FAA 'preempts any state rule discriminating on its face against arbitration.' " (*Viking,* at p. 1917.) That principle is not at issue here, because Labor Code section 925 applies to both litigation and arbitration. But *Viking* also explains: "[U]nder our decisions, even rules that are generally applicable as a formal matter are not immune to preemption by the FAA. [Citations.] Section 2's mandate *protects a right to enforce arbitration*

agreements." (*Viking,* at pp. 1917–1918, italics added.)[5] That mandate would be seriously compromised if we were to conclude that the invocation of section 925 permits a party to disregard his agreement that the arbitrator is to decide all issues of arbitrability.

Viking explains the point. "The FAA's mandate is to enforce '*arbitration agreements*.' [Citation.] And as we have described it, an arbitration agreement is 'a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.' [Citations.] An arbitration agreement thus does not alter or abridge substantive rights; it merely changes how those rights will be processed. And so we have said that ' "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral . . . forum." ' " (*Viking, supra,* 142 S.Ct. at p. 1919, quoting *Preston v. Ferrer* (2008) 552 U.S. 346, 359; see *Preston,* at p. 359 ["So here, Ferrer relinquishes no substantive rights . . . California law may accord him. But under the contract he signed, he cannot escape resolution of those rights in an arbitral forum."]; *id.* at pp. 349–350 ["when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA"].)

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[5] The FAA's section 2 states: "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . , or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . . ." (9 U.S.C. § 2.)

Here, our enforcement of the parties' agreement to delegate arbitrability decisions to the arbitrator does not "alter or abridge" petitioner's substantive rights under Labor Code section 925; "it merely changes how those rights will be processed." (*Viking, supra,* 142 S.Ct. at p. 1919.) Section 925 presents no conflict with the FAA when we give effect to the parties' agreement to delegate arbitrability issues to the arbitrator. The arbitrator will decide, as agreed, all issues of arbitrability, including whether petitioner is an employee who is entitled to invoke the protections of section 925.

But if Labor Code section 925 were construed, as petitioner would have us do, as enabling him to avoid his agreement to delegate arbitrability issues to the arbitrator by unilaterally declaring himself an employee, and in so doing deprive a foreign court of jurisdiction to compel arbitration, the statute may well " 'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives' " of the FAA. (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 352.) The question whether section 925 applies was, as we have held, an arbitrability issue. It cannot be decided by a court because the parties agreed otherwise. Any other conclusion would "unduly circumscribe[] the freedom of parties to determine 'the issues subject to arbitration' . . . ." (*Viking, supra,* 142 S.Ct. at p. 1923.)

Petitioner insists "[t]here is no credible preemption issue here," because the "issue underlying the stay motion is whether the New York court is a court of competent jurisdiction," and "*not* whether the dispute is arbitrable or even whether there is a delegation clause." As already discussed at length, petitioner's articulation of the issue is simply wrong. He once again evades the fundamental question of who is to decide whether he is an

employee entitled to the protections of Labor Code section 925. Instead, he would have us ignore his agreement to delegate arbitrability issues to the arbitrator and conclude that section 925 automatically renders a New York court incompetent to decide a motion to compel arbitration. That would erect an obstacle to arbitration that is inconsistent with the FAA's principle that parties are free to determine the issues subject to arbitration and that FAA section 2's mandate "protects a right to enforce arbitration agreements." (*Viking, supra,* 142 S.Ct. at pp. 1923, 1918.)

Petitioner points out Labor Code section 925 "applies equally to litigation and arbitration," and asserts there is no preemption issue because "Dentons can still file a petition to compel arbitration" but must do so in California. This ignores the posture of the case, and is just another way of avoiding the central issue. Dentons initiated arbitration in New York as authorized by the partnership agreement. Petitioner resists arbitration by contending that section 925 deprives New York courts of jurisdiction to compel arbitration and asks the California *court* to decide an issue the parties agreed would be decided by the arbitrator.

Finally, petitioner cites *Depuy Synthes Sales, Inc. v. Howmedica Osteonics Corp.* (9th Cir. 2022) 28 F.4th 956, describing it as "a similar preemption challenge to Section 925." There is no real similarity. *Depuy* concerns Labor Code section 925, but it does not involve the FAA or arbitration. *Depuy* held that section 925, "which grants employees the option to void a forum-selection clause under a limited set of circumstances, determines the threshold question of whether [the employee's] contract contains a valid forum-selection clause." (*Id.* at p. 964.)

Depuy rejected the claim that a federal law on change of venue (28 U.S.C. § 1404(a)) preempted section 925, stating that nothing in high court decisions "creates a federal rule of contract law that preempts a state law like § 925 from addressing the upstream question of whether the contract sought to be enforced includes a viable forum-selection clause." (*Depuy,* at p. 964.) *Depuy* is not relevant here.

To summarize the point: We agree with Dentons that Labor Code section 925 on its face does not conflict with the FAA. But under petitioner's reading, his invocation of section 925 strips the arbitrator of the authority to decide whether he is an employee entitled to void his agreement to arbitrate in New York, and vests that authority in California courts instead. At a minimum, that result would circumscribe "the freedom of parties to determine 'the issues subject to arbitration' " (*Viking, supra,* 142 S.Ct. at p. 1923) and consequently undermine the animating principles of the FAA.

CONCLUSION

In sum: New York is a court of competent jurisdiction. The parties delegated questions of arbitrability to the arbitrator. The arbitrator in New York must decide if petitioner is an employee. If the arbitrator decides petitioner is an employee, the merits of the dispute must be decided in California. If the arbitrator decides petitioner is not an employee, then the merits of the dispute must be arbitrated in New York, as agreed. These conclusions preserve comity and avoid undermining the freedom of parties to determine the issues they agree to arbitrate, in consonance with longstanding FAA principles.

DISPOSITION

The petition is denied. Costs are awarded to Dentons.

GRIMES, J.

WE CONCUR:

STRATTON, P. J.

WILEY, J.

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

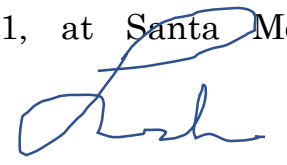
I, Leslie Maytorena, declare that I am, and was at the time of service of the papers herein referred to, over the age of 18 and not a party to the within action or proceedings. My business address is 100 Wilshire Boulevard, Suite 1300, Santa Monica, CA 90401, which is located in the county in which the within-mentioned mailing occurred. On December 15, 2022, I served: **PETITION FOR REVIEW** in the manner specified below on the interested parties listed on the SERVICE LIST.

[X] BY ELECTRONIC TRANSMISSION: The above-referenced document listed above was posted directly on the TrueFiling website at https://www.truefiling.com via electronic transmission for service on counsel at the electronic-email addresses indicated in the attached Service List.

[X] BY FEDERAL EXPRESS

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on December 15, 2021, at Santa Monica, California.



Leslie Maytorena

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