No. S277736

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JINSHU "JOHN" ZHANG,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES,

Respondent,

DENTONS U.S. LLP;
MICHAEL T. MCNAMARA; EDWARD J. REICH,

Real Parties in Interest.

ANSWER TO PETITION FOR REVIEW

After an Opinion Denying a Petition for a Writ of Mandate by the
Court of Appeal, Second Appellate District, Division Eight,
No. B314386
Los Angeles County Superior Court, No. 21STCV19442
The Hon. David Sotelo

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INTRODUCTION

There is no basis for this Court to review the Court of Appeal's opinion, which turns on the familiar proposition that parties can agree to arbitrate not just their substantive disputes, but also disputes over what is and isn't arbitrable.

This case arises from a settlement that Dentons won for a client, resulting in a large contingency fee. (Vol. 2, Ex. 17, p. 801.) Mr. Zhang is a former full-equity partner of Dentons who worked on the case. (Vol. 1, Ex. 3, p. 91.) He went behind the firm's back and negotiated directly with the client to divert nearly the whole fee directly to his own bank account. (Vol. 1, Ex. 3, p. 93.) Dentons' inevitable refusal to accept that side deal prompted Mr. Zhang to hurl baseless accusations of impropriety against the firm's leadership. (Vol. 1, Ex. 8, p. 147.) Dentons' Board then voted to terminate Mr. Zhang for cause. (Vol. 1, Ex. 3, p. 92.) In an effort to protect its interest in the contingency fee and to prevent Mr. Zhang from disseminating confidential firm information, Dentons initiated an arbitration in New York—the dispute-resolution method and forum that the parties specifically chose in their partnership agreement. (Vol. 1, Ex. 2, p. 19; Ex. 3, pp. 91-92.)

Mr. Zhang has spent almost two years trying to prevent the arbitrator from deciding anything at all. He filed this satellite suit in California in an effort to stop the arbitration in its tracks, claiming he was an employee of Dentons and therefore empowered by Labor Code section 925 to void the forum-selection clause in the parties' agreement calling for arbitration in New York. Dentons

moved to compel arbitration in New York and then moved to stay this California litigation under Code of Civil Procedure section 1281.4, which requires California courts to stay a case when an issue it presents is the subject of a motion to compel arbitration before any "court of competent jurisdiction, whether in this State or not."

The case proceeded on parallel tracks from there. The New York court granted Dentons' motion to compel arbitration, deciding that it had jurisdiction to do so because the parties expressly agreed that they could bring motions to compel arbitration in New York. The trial court below stayed this case, and for an uncontroversial reason: When, as they did here, parties have delegated all questions of arbitrability to an arbitrator, that includes the question of *where* the arbitration should take place. Applying that principle, the court concluded that only an arbitrator could decide whether Mr. Zhang was an employee for purposes of section 925.

In response, Mr. Zhang sought writ review in California and pursued an appeal in New York. After the Court of Appeal summarily denied his writ petition, this Court granted Mr. Zhang's petition for review and transferred the case for full briefing and argument in the Court of Appeal. The court issued a published opinion denying Mr. Zhang's writ petition for the same reason the trial court granted his stay motion, following a long line of cases holding that delegation clauses are independently enforceable under the Federal Arbitration Act. Just a few days ago, the Appellate Division in New York similarly relied on the delegation clause in the parties' agreement in affirming the trial court's order there and

holding that that court had the power to order the parties to arbitrate the question whether Mr. Zhang is an employee for purposes of section 925. (*Dentons US LLP v. Zhang*, (N.Y. App. Div. Dec. 29, 2022) — N.Y.S.3d —, 2022 WL 17981407.)

In short, every judicial officer to issue a decision in this case—two trial-court judges in California, three justices of the Court of Appeal, and a trial-court judge and five justices of the Appellate Division in New York—has rightly focused on the parties' delegation of all questions of arbitrability, including *where* the arbitration should take place.

Review of this consistent and straightforward application of longstanding arbitration law is unnecessary either to "secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) A decision enforcing a clear and unmistakable delegation clause could not conflict with other cases or implicate an unsettled question because the U.S. Supreme Court has consistently held that such clauses *must* be enforced, and that contrary statutes and judicial rules are preempted by the FAA. (E.g., *Henry Schein, Inc. v. Archer & White Sales, Inc.* (2019) 139 S.Ct. 524.) The Court of Appeal faithfully applied those principles here. It correctly decided that the parties had entered into an enforceable agreement to delegate all questions of arbitrability, and it explained that if Mr. Zhang were right that the mere invocation of Labor Code section 925 voided that delegation clause, then section 925 would be preempted by the FAA. (Opn. at pp. 16-24.)

Mr. Zhang has claimed in both of his petitions for review that review is necessary to "harmonize" section 925 and section 1281.4.

(E.g., Pet. at pp. 8-9, 39-40.) The Court of Appeal did just that, interpreting and applying the statutes to avoid FAA preemption, promote comity between courts of different states, and ensure that each party's substantive rights are fully respected. The decision below makes clear that the New York court had the jurisdiction to compel arbitration of at least one threshold question—whether Mr. Zhang was an employee of Dentons. If the arbitrator decides he was an employee, then section 925 would apply, and any other questions of arbitrability will be decided by an arbitrator in California. If, however, the arbitrator decides that Mr. Zhang wasn't an employee, then all other questions (as to both arbitrability and the merits) will be decided by an arbitrator in New York. Either way, the parties will get the decisionmaker they bargained for, and Mr. Zhang will have an opportunity to argue he is entitled to whatever protections California law may afford him.

Mr. Zhang's theory, by contrast, turns section 925 into a wrecking ball, destroying an arbitration agreement, forum-selection clause, or delegation clause whenever someone claiming to be a California employee invokes it, and requiring California courts to tell the courts of other states that normal jurisdiction rules don't apply.

The Court should deny the petition.

REASONS FOR DENYING REVIEW

I. Review is not necessary to secure uniformity of decision.

There is no split in decisions of the Court of Appeal that might warrant review. (See Cal. Rules of Court, rule 8.500(b)(1).)

Labor Code section 925 has been cited in some 109 decisions. Apart from the Court of Appeal's opinion in this case, not one of those decisions cites Code of Civil Procedure section 1281.4. So the first issue presented by Mr. Zhang's petition, which addresses the intersection of those two statutes, has not even *arisen* in other cases, much less generated conflicting opinions.

Mr. Zhang points, in passing, to *LGCY Power, LLC v. Superior Court* (2022) 75 Cal.App.5th 844. (Pet. at pp. 36-37.) But there is no tension between *LGCY Power* and the opinion in this case—let alone any conflict. And the court below explained why. It acknowledged the point Mr. Zhang makes in his petition for review: that *LGCY* says that cases satisfying the criteria of section 925 should be decided in California whenever possible. (Opn. at p. 15, fn. 3.) But the court also explained that here, the parties dispute whether Mr. Zhang satisfies those criteria because they don't agree whether he was an employee—and "who is to decide whether" he was. (*Ibid.*)

It's curious that Mr. Zhang would again rely on *LGCY* in an effort to manufacture a supposed conflict because the court below explained why *LGCY* undermines his entire case. Mr. Zhang's theory is that the moment he invoked section 925 in response to Dentons' stay motion, he immediately and conclusively became a former "employee" of Dentons and could unilaterally void the forum-

selection clause in the parties' agreement. (See, e.g., Pet. at p. 7 ["When an employee invokes Section 925's protections, Section 925(b) mandates that the dispute 'shall' be adjudicated in California."]; *id.* at p. 30 [lamenting that he must invoke section 925 "in the forum [it] expressly permits the employee to avoid"]; *id.* at p. 39 [arguing courts below should not have looked to "*the voided forum selection clause*," bolding omitted].) The court below noted that *LGCY* said just the opposite: "'a violative clause does not become void simply by the employee declaring an intent to void it.'" (Opn. at p. 11, quoting *LGCY*, 75 Cal.App.5th at p. 864.) Another Court of Appeal similarly decided that a plaintiff cannot void a forum-selection clause simply by invoking section 925 when his only relevant relationship with the defendant was as a shareholder, even if he was also once its employee. (*Grove v. Juul Labs, Inc.* (2022) 77 Cal.App.5th 1081, 1095-1096.) Because section 925 doesn't apply automatically, someone must decide whether it does—and it must be the arbitrator, the decisionmaker the parties bargained for. (E.g., Opn. at pp. 8, 11, 14, 23.)

For that reason, the second issue Mr. Zhang presents—whether California courts may rely on section 925 to defeat delegation clauses—couldn't possibly be the basis of a conflict in the lower courts. The U.S. Supreme Court has repeatedly held that delegation clauses are independently enforceable under the FAA. (E.g., *Henry Schein, Inc. v. Archer & White Sales, Inc.* (2019) 139 S.Ct. 524, 529; *Rent-A-Center West, Inc. v. Jackson* (2010) 561 U.S. 63, 71-73; *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 934-944.) And the Court of Appeal correctly decided that

construing section 925 to override an otherwise enforceable delegation clause would put that statute on a needless collision course with the FAA. (Opn. at pp. 20-24.)

II. Review is not necessary to settle any important and recurring question of law.

The Court of Appeal needed to answer only one question to resolve Mr. Zhang's petition: Who should decide whether section 925 applies—the trial court or the arbitrator? Relying on the broad delegation clause in the parties' agreement, the court decided it was the arbitrator. That decision was correct, and Mr. Zhang's various efforts to call it into question are wrong and not worthy of this Court's review.

Courts have "consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence.'" (*Henry Schein*, 139 S.Ct. at p. 530; accord, e.g., *Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 557; *Blanton v. Domino's Pizza Franchising LLC* (6th Cir. 2020) 962 F.3d 842, 846 [collecting authorities].) Here, as the trial court and Court of Appeal both correctly concluded, the parties did clearly and unmistakably delegate questions of arbitrability to the arbitrator: Their agreement calls for all disputes to be resolved under arbitral rules giving the arbitrator the power to decide all questions about the scope and validity of his own jurisdiction. (Opn. at p. 17; Vol. 1, Ex. 3, pp. 91-92.)

That straightforward application of a straightforward rule resolves this dispute, especially because Mr. Zhang has never

seriously argued that the delegation clause itself is unenforceable. He briefly argued as much below, but the Court of Appeal was unpersuaded (Opn. at pp. 17-19), and Mr. Zhang doesn't renew his arguments in his petition. Even more so than below, then, Mr. Zhang "evades articulating the fundamental issue" (*id.* at p. 12)—whether he and Dentons agreed to have an arbitrator resolve threshold arbitrability questions. They did, and Mr. Zhang has identified no good reason why courts should ignore that agreement and require the parties to spend years litigating a threshold issue that they agreed to submit to speedy and inexpensive resolution by an arbitrator.

Instead of engaging with the actual holding of the decisions below, Mr. Zhang offers six unrelated reasons why the Court of Appeal's decision is supposedly worthy of this Court's review. None of them justifies the Court's intervention.

1. Mr. Zhang is wrong that the Court of Appeal's decision is a "roadmap to evade Section 925." (Pet. at p. 9, bolding omitted.) Nobody is evading section 925. The upshot of the Court of Appeal's decision is that an arbitrator *must* decide whether the statute applies. This dispute is not about *whether* section 925 will be addressed, but *by whom*.

Mr. Zhang also says that if an arbitrator decides he was, in fact, an employee, then the New York court couldn't have had jurisdiction to order him to arbitration in the first place. (Pet. at pp. 7, 10, 30-31.) But that argument is just another reflection of Mr. Zhang's focus on the wrong issue. The question for the courts below, under Civil Procedure Code section 1281.4, was whether a

New York court had jurisdiction to enforce the parties' arbitration agreement, including the delegation clause. They correctly held that it did; the New York trial and appellate courts themselves reached the same conclusion. What the arbitrator decides about section 925 won't change that. When an arbitrator decides that a dispute isn't arbitrable, that doesn't mean the court that sent the question of arbitrability made a mistake or lacked jurisdiction to do what it did. If that were true, then delegation clauses would be enforceable only if the party favoring arbitration could prove the arbitrability of the dispute to the court; in other words, courts would have to decide the very question that the parties agreed to send to the arbitrator—rendering the delegation clause "meaningless." (*Bossé v. New York Life Insurance Co.* (1st Cir. 2021) 992 F.3d 20, 30; accord, e.g., *Communications Workers of America v. AT&T Inc.* (D.C. Cir. 2021) 6 F.4th 1344, 1347-1348.)

2. Mr. Zhang is wrong when he argues that the Court of Appeal inappropriately favored arbitration over litigation. (Pet. at pp. 10-11, 32-33.) All the Court of Appeal did is hold Mr. Zhang to the delegation agreement that he freely entered into—and that he doesn't attack in his petition as unenforceable. Because of that agreement, he isn't in the same position as someone who never agreed to arbitration in the first place, or even someone who claims the parties never agreed to delegate all questions of arbitrability to an arbitrator.

As the Court of Appeal explained, the U.S. Supreme Court has made clear that the FAA "'*protects a right to enforce arbitration agreements*,'" and "[t]hat 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." (Opn. at pp. 20-21, quoting *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, 1917-1918.) Mr. Zhang's argument to the contrary runs headlong into a large body of cases holding that various California statutes and court decisions dishonoring arbitration clauses were preempted by the FAA. (E.g., *Lamps Plus, Inc. v. Varela* (2019) 139 S.Ct. 1407; *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333; *Perry v. Thomas* (1987) 482 U.S. 483.)

Preston v. Ferrer (2008) 552 U.S. 346 is right on point. There, too, the question was who should decide a threshold dispute about the nature of the plaintiff's job. The plaintiff was either a talent agent (in which case the parties' contract would be unenforceable because he lacked a license required by California's Talent Agencies Act) or a personal manager (in which case the parties' contract would be binding). (*Id.* at p. 352.) The Court of Appeal decided the Talent Agencies Act required the Labor Commissioner to decide all issues disputed by the parties, even though they had an arbitration agreement and even though it was unclear whether the plaintiff was a talent agent in the first place. (*Id.* at p. 351.) The U.S. Supreme Court held that the Court of Appeal had put the cart before the horse. Because the parties had delegated all questions of arbitrability, only an arbitrator could decide what job the plaintiff had. (*Id.* at p. 352.) The question was "not whether the FAA preempts the TAA wholesale," but "simply who decides whether [the plaintiff] acted as personal manager or as talent agent." (*Ibid.*) And

arbitrating that "question concerning the forum in which the parties' dispute w[ould] be heard" would not require any party to "'forgo the substantive rights afforded by the [California] statute; it only submit[ted] their resolution in an arbitral . . . forum.'" (*Id.* at p. 359.)

The same is true here. The Court of Appeal's decision is correct and consistent with *Preston* and the U.S. Supreme Court's other arbitration-related cases.

3. Mr. Zhang's assertion that review is necessary to ensure he will get the full protections of California law is unfounded. (Pet. at pp. 11, 34-35.) There is nothing unusual about an arbitrator, rather than a court, deciding threshold questions—where the arbitration should be located, for example, or whether the arbitration clause is unenforceable. That's why so many cases turn on the question *whether* the parties included a valid delegation provision in their arbitration agreement. If they did, then all disputes about arbitrability—including whether the agreement is unenforceable under *Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83—must be decided by the arbitrator. (E.g., *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 238-241.) If the parties didn't include a valid delegation provision in their agreement, then a court must decide those questions. (E.g., *Nelson v. Dual Diagnosis Treatment Center, Inc.* (2022) 77 Cal.App.5th 643, 657-659.)

In his petition, Mr. Zhang doesn't argue that the Court of Appeal got it wrong in deciding that the delegation clause in the parties' agreement is valid and enforceable. Instead, he is urging

this Court just to treat the delegation clause as if it didn't exist. That's precisely what the U.S. Supreme Court has repeatedly held courts cannot do, even if they think the answer to the arbitrability question is obvious. (E.g., *Henry Schein*, 139 S.Ct. at p. 529; *Rent-A-Center West*, 561 U.S. at pp. 71-73; *First Options*, 514 U.S. at pp. 934-944.) It is also why the Court of Appeal several times explained that Mr. Zhang, in describing delegation as irrelevant, is missing the point. (E.g., Opn. at pp. 22-23 [he "evades the fundamental question of who is to decide whether he is an employee"].)

4. Mr. Zhang says many times that courts need "guidance" on how to apply section 925. (Pet. at pp. 12, 22, 35-37, 42.) But that's precisely what the Court of Appeal provided. What's more, the alternative rule Mr. Zhang seeks would contradict established law. For example, he laments that there is no exception to delegation clauses—not even when the argument in favor of arbitration is "wholly groundless." (Pet. at p. 30.) But the U.S. Supreme Court squarely held as much in *Henry Schein*, 139 S.Ct. at 531, and for good reason—when parties agree an arbitrator should decide threshold questions, that's the end of the matter. Neither party should later be able to rip up the agreement to delegate whenever the other side's argument for arbitration is supposedly too weak to bother an arbitrator with.

Mr. Zhang suggests that some employers might demand arbitration even when it's abundantly obvious that the other party is a current or former employee. (Pet. at p. 30.) But the Legislature deterred exactly that sort of behavior by including a one-sided fee-

shifting provision that authorizes fees to any "employee who is enforcing his or her rights." (Labor Code, § 925, subd. (c).) In any event, Mr. Zhang—a full-equity partner at Dentons—certainly isn't describing *this* case. The arbitrator will decide whether he was an employee, and *Henry Schein* makes clear there is no further guidance the courts can or should offer on that score.

5. Mr. Zhang's statements that section 925 "represents a fundamental public policy of California" that "should not be understated or ignored" and must be enforced "*from the beginning of a case*" have no bearing on the issue before the Court. (Pet. at pp. 12, 37-39, bolding omitted.) Nobody is understating or ignoring section 925. All the Court of Appeal did is enforce an agreement to delegate questions of arbitrability—expressly holding that an arbitrator *would* decide the applicability of section 925 at the outset of the arbitration.

Whether section 925 reflects the "fundamental policy" of California may have mattered in some choice-of-law cases that Mr. Zhang believes were wrongly decided. (Pet. at p. 38.) There is always a risk that courts will apply familiar local law even when another state's important policies and weightiest interests are at stake. But this is a delegation case, not a choice-of-law case, so the question whether section 925 qualifies for the pantheon of fundamental California policies is irrelevant. The court below explained as much: the Legislature may very well have intended section 925 to apply broadly, "but that intent does not bear on the question of who is to decide whether petitioner is an employee entitled to invoke section 925." (Opn. at p. 15, fn. 3.)

6. Finally, Mr. Zhang says that the questions he presents can be answered only on writ review. (Pet. at p. 13.) But they *were* answered. He just doesn't like those answers.

The Court of Appeal held only that the broad delegation clause in the parties' agreement requires an arbitrator rather than a court to decide whether section 925 applies. That result is sensible and consistent with a large and longstanding body of arbitration law, not wrong or novel enough to warrant this Court's intervention.

III. There is no need for the Court to enter a stay.

Mr. Zhang claims he will suffer irreparable harm by being "forced to commence arbitrating this case in New York" before this Court rules on his petition. (Pet. at p. 41.) But he can identify no specific harm from resuming the arbitration over the next several weeks. As a practical matter, all that might happen in the near term is that the parties will hold a hearing to schedule briefing and argument on the threshold question whether section 925 applies. The expense of going through that process is de minimis and could never be irreparable harm in any event. Section 925 itself addresses that concern, as noted above: It authorizes "an employee who is enforcing his or her rights under this section" to pursue "reasonable attorney's fees." (Labor Code, § 925, subd. (c).)

CONCLUSION

The Court should deny Mr. Zhang's petition.

DATED: January 4, 2023

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Richard J. Doren
Richard J. Doren

Attorneys for Real Parties in Interest

CERTIFICATE OF COMPLIANCE

I certify, under rule 8.504(d)(1) of the California Rules of Court, that this answer contains 3,730 words, as counted by Microsoft Word, excluding the tables, this certificate, and the signature blocks.

DATED: January 4, 2023 GIBSON, DUNN & CRUTCHER LLP

By: /s/ Richard J. Doren
Richard J. Doren

Attorneys for Real Parties in Interest

PROOF OF SERVICE

I, Daniel Adler, declare as follows:

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years, and I am not a party to this action. My business address is 333 South Grand Avenue, Los Angeles, California 90071-3197. On January 4, 2023, I served:

ANSWER TO PETITION FOR REVIEW

on the parties stated below, by the following means of service:

SEE ATTACHED SERVICE LIST

☑ **BY ELECTRONIC SERVICE:** A true and correct copy of the above-titled document was electronically served on the persons listed on the attached service list.

☑ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 4, 2023.

Daniel R. Adler

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