S277736

SUPREME COURT OF THE STATE OF CALIFORNIA

JINSHU "JOHN" ZHANG,

Petitioner,

v.

SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES,

Respondent.

After a Decision by the Court of Appeal, Second Appellate District Division Eight, B314386
Los Angeles Superior Court Case No. 21STCV19442
Judge David Sotelo

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENT and AMICUS BRIEF IN SUPPORT OF RESPONDENT

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APPLICATION OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community, including questions regarding arbitration agreements and delegation clauses in particular. (E.g., *Bielski v. Coinbase, Inc.* (9th Cir., argued Feb. 14, 2023) No. 22-15566; *Caremark, LLC v. Chickasaw Nation* (9th Cir. 2022) 43 F.4th 1021; *Henry Schein, Inc. v. Archer & White Sales, Inc.* (2019) 139 S. Ct. 524; *Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63.)

Many members of the Chamber and the broader business community have found that arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation in court. Accordingly, these businesses routinely include arbitration provisions as standard features of their business contracts. Based on the legislative policy reflected in the Federal Arbitration Act ("FAA") and the

Document received by the CA Supreme Court.

United States Supreme Court's consistent endorsement of arbitration for the past half-century, Chamber members have structured millions of contractual relationships around arbitration agreements. Many members also routinely include delegation clauses in their arbitration agreements in order to avoid time-consuming litigation over the scope and enforceability of those agreements. The business community has a broad and overarching interest in ensuring that the FAA is appropriately applied and that businesses and those with whom they deal can rely upon stable arbitration precedent.

The Chamber thus has a strong interest in this case and in affirmance of the judgments below.

The accompanying brief may aid the Court in several ways. The brief first explains why the venue question under Labor Code section 925 falls within the delegation clause at issue, whether or not that clause encompasses gateway issues. The brief then explains why a clear and unmistakable delegation of gateway issues to the arbitrator is not undone by references in other provisions to the possibility that a court may pass upon some aspect of the arbitration agreement—a risk that any prudent drafter would address. The brief explains why a stay of proceedings under Code of Civil Procedure section 1281.4 was necessary here under the language of the statute, principles of comity, and the compulsion of the Full Faith and Credit Clause of the United States Constitution. Finally, the brief explains why treating Labor Code section 925 as a jurisdictional provision would unduly impair the use of forum-selection provisions.

Document received by the CA Supreme Court.

No party or counsel for a party authored this brief in whole or in part. No person or entity other than the Chamber, its members, or its counsel in this matter has made any monetary contributions intended to fund the preparation or submission of this brief. (See Cal. Rules of Court, rule 8.520, subd. (f)(4).)

CONCLUSION

The Court should grant this application and permit the Chamber to file the attached *amicus curiae* brief.

Dated: August 18, 2023

Respectfully submitted.

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Document received by the CA Supreme Court.

TABLE OF CONTENTS

Page

Document received by the CA Supreme Court.

TABLE OF AUTHORITIES

Cases **Page(s)**

Document received by the CA Supreme Court.

Document received by the CA Supreme Court.

Constitutional Provisions **Page(s)**

Statutes and Rules **Page(s)**

Secondary Sources **Page(s)**

Document received by the CA Supreme Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although the parties agreed to arbitrate their disputes and thus avoid the delay and expense of litigation in court, this case has spread to three different tribunals: the New York courts, a New York arbitrator affiliated with the International Institute for Conflict Prevention & Resolution ("CPR"), and the California courts. At issue is which tribunal can decide which issues, and what rulings control the venue for the resolution of this dispute. It appears that, one way or another, a CPR arbitrator will decide the merits.

The practical point of dispute is instead whether a court or an arbitrator will decide whether that CPR arbitration will take place in New York (as the parties agreed) or in California (as Zhang maintains that California law requires). And the question directly presented here is whether a California court must stay judicial proceedings in light of a New York court's order—here affirmed on appeal—compelling arbitration of the same venue dispute.

The parties' arbitration agreement answers the first question. As the Court of Appeal and Superior Court determined, the arbitration provision here delegates arbitrability issues to the arbitrator. The delegation language encompasses "challenges to [the arbitration panel's] jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement," and "jurisdictional challenges with respect to both the subject matter of the dispute and the parties to the

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arbitration." (Ct. App. Opn. p. 16 [85 Cal.App.5th at p. 180] [quoting CPR rules incorporated by reference].)

Indeed, because only the arbitration clause's venue provision is at issue—a procedural question addressing *how* rather than *whether* the arbitration will go forward—the delegation would be effective here even if the delegation provision did not include issues of jurisdiction and arbitrability. The arbitrator decides the venue issue whether it is viewed as a gateway issue of arbitrability or a procedural issue within the scope of the arbitration itself.

The text of Code of Civil Procedure section 1281.4 answers the second question, reinforced by principles of interstate comity and, in this case, by the Full Faith and Credit Clause. The statute requires a California court to stay its hand when another "court of competent jurisdiction," whether in California or another State, has ordered arbitration of the same dispute. Here, a New York court ordered arbitration of this dispute. There is no serious argument that the New York court lacked "competent jurisdiction" as that term is commonly understood. Nor does Zhang contend that the exercise of jurisdiction violated due process, or that the New York court acted beyond its jurisdiction under New York law. If the New York court had not agreed that the venue question was for the arbitrator, that court undoubtedly had jurisdiction to determine whether Labor Code section 925 required that the dispute be arbitrated in California. But principles of comity require the California courts to avoid interfering with the New York court's order. And the Full Faith

Document received by the CA Supreme Court.

and Credit Clause reinforces that obligation, especially now that Zhang has exhausted his appellate options without success.

Finally, in accord with established principles favoring the enforcement of reasonable forum-selection provisions, this Court should construe Labor Code section 925 to present a venue question that any court or arbitrator of competent jurisdiction can determine, rather than as an effort to deprive other sovereigns' courts of jurisdiction.

The judgment of the Court of Appeal should be affirmed.

ARGUMENT

A. The Issue of Venue Is Delegated to the Arbitrator.

This Court has long recognized the "'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.'" (*OTO, LLC v. Kho* (2019) 8 Cal.5th 111, 125) [quoting *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9].) In some cases, parties try to increase the speed and decrease the expense of the process by delegating questions to the arbitrator. This case reflects such an effort to minimize the scope and length of any preliminary detour to a court.

1. Venue Issues Are for the Arbitrator, Whether or Not a Delegation Clause Encompasses Gateway Issues.

An arbitrator normally has whatever substantive authority an arbitration agreement provides, along with the power to determine how arbitration will proceed. Parties may delegate additional authority to an arbitrator, including the ability to determine gateway issues of arbitrability—such as whether an arbitration agreement is valid and enforceable, and what claims

Document received by the CA Supreme Court.

come within its scope. Although this Court has not directly addressed an agreement to delegate gateway issues to an arbitrator, the U.S. Supreme Court has enunciated the governing principles under the Federal Arbitration Act ("FAA") (which applies here).

"[T]he question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter." (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 943.) Consistent with that principle, parties may "agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes." (*Henry Schein, Inc. v. Archer & White Sales, Inc.* (2019) 139 S.Ct. 524, 527.) Under such delegation clauses, "parties may agree to have an arbitrator decide not only the merits of a particular dispute but also 'gateway' questions of 'arbitrability[.]'" (*Id.* at p. 529 [quoting *Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 68-69].) Such an "agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." (*Ibid.* [quoting *Rent-A-Center, supra*, 561 U.S. at p. 70].) If the parties agree "clear[ly] and unmistakabl[y]" to "delegate threshold arbitrability questions to the arbitrator," then the FAA requires that courts honor the agreement and defer arbitrability to the arbitrator. (*Id.* at p. 530.) That remains the case "even if the court thinks that a

Document received by the CA Supreme Court.

party's claim on the merits is frivolous" or that their "argument for arbitration is wholly groundless." (*Ibid.*)

A court must tread lightly when an issue is delegated to the arbitrator. It cannot "short-circuit the process" (*Henry Schein*, *supra*, 139 S.Ct. at p. 527) by "consider[ing] for itself" the validity "of the arbitration agreement and delegation clause in order to determine whether the dispute should be submitted to the arbitrator." (*Bossé v. New York Life Insurance Co.* (1st Cir. 2021) 992 F.3d 20, 30.) That would produce a "circular" result, where the court would "consider for itself whether a particular claim falls within the scope of the arbitration agreement and delegation clause in order to determine whether the dispute should be submitted to the arbitrator to determine its arbitrability." (*Ibid.*) Because "the arbitrability question" would "already be[] answered by the court, … the delegation clause [would be] rendered meaningless." (*Ibid.*)

Thus, if the delegation clause here facially encompasses gateway issues, as it appears to do, and the venue question is even arguably a gateway issue of arbitrability, then the arbitrator should determine whether the venue question is delegated and, if so, where the arbitration should be conducted.

Here, however, the delegation of the venue issue to the arbitrator is valid whether or not the delegation provision expressly encompasses gateway issues of arbitrability. There is no serious question that the parties agreed to arbitrate their dispute, but only a question as to where and how that agreement will be enforced. The dispute will be arbitrated by a neutral from

Document received by the CA Supreme Court.

CPR, the provider selected in the agreement. The only issue is whether that CPR neutral will conduct proceedings in New York or California.

And that will depend on whether and how Labor Code section 925 applies to this case. But Section 925 is a venue rule that does not purport to confer exclusive jurisdiction on the California courts (or any court). On the contrary, the venue rule of Section 925 applies only to an "employee," and only to "a claim arising in California." (Labor Code § 925, subd. (a).) Thus, if an employee-employer lawsuit involved some claims "arising in California" and some claims arising in other States, Section 925 would at most require the former claims to be adjudicated in California. The claims arising out of state could be adjudicated in any forum with jurisdiction over the parties and the subject matter. No language in Section 925 even arguably removes the venue issue from the scope of arbitration where parties have agreed to delegate arbitrability issues—or even procedural issues—to the arbitrator.

And if Section 925 *did* attempt to deprive arbitrators of the power to determine this venue issue, the FAA would preempt that aspect of the statute. As this Court has recognized, under *Preston v. Ferrer* (2008) 552 U.S. 346, 349-350, "the FAA preempts state laws that lodge in a judicial or administrative forum primary jurisdiction over claims the parties have agreed to arbitrate." (*McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 963.) A petition to compel arbitration "presents precisely and only a question concerning the forum in which the parties' dispute will

Document received by the CA Supreme Court.

be heard." (*Ibid.* [quoting *Preston*, *supra*, 552 U.S. at p. 359].) A party who agrees to arbitrate, and delegates gateway authority to the arbitrator, "does not forgo the substantive rights afforded by the statute," but "cannot escape resolution of those rights in an arbitral ... forum." (*Ibid.* [quoting *Preston*, *supra*, 552 U.S. at p. 359] (cleaned up).)

In that light, the venue issue is not properly a gateway issue requiring a clear and unmistakable delegation, but rather a question of "procedure" that is among the "many … features of arbitration" that "the FAA lets parties tailor … by contract." (*Hall Street Assocs., LLC v. Mattel, Inc.* (2008) 552 U.S. 576, 586 (2008).). As this Court put it in another context, the venue "question is of the 'what kind of proceeding' sort that arises subsequent to the gateway issue of whether to have an arbitral proceeding at all," and thus rests with the arbitrator even without a contractual provision delegating gateway issues to the arbitrator. (*Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 253.) Thus, the venue question falls even more clearly to the arbitrator. No court, therefore, has the power to decide the question.

2. Whether Zhang Comes Within the Scope of Labor Code section 925 Is Manifestly Inappropriate for Judicial Resolution Here.

Battling against *Sandquist* and *Henry Schein*, Zhang asks this Court to decide the merits of Zhang's claim to be an employee on the ground that there is no "genuine dispute over Zhang's employment status." (RBM p. 9.) But that effort to "short-circuit the process" (*Henry Schein*, *supra*, 139 S.Ct. at p. 527) closely

Document received by the CA Supreme Court.

parallels the argument—that the assertion of arbitrability was "wholly groundless"—that the U.S. Supreme Court held insufficient to escape the reach of a delegation clause in *Henry Schein*. A court cannot decide a delegated issue because it views one side's arguments as not subject to "genuine dispute" any more than it can decide an issue because it assesses a position as "wholly groundless." And whether a law firm partner is the law firm's employee is an unsettled and frequently contested question where the answer depends on specific facts about the partner's relationship with the firm.

Section 925, in any event, is not a statute that permits snap judgments. Unless the parties agree about a worker's (or partner's) status, section 925 can void a forum-selection provision only if a court finds that the necessary preconditions have been established. (See, e.g., *Depuy Synthes Sales, Inc. v. Howmedica Osteonics Corp*. (9th Cir. 2022) 28 F.4th 956, 965 [noting that "the district court found that [a party] satisfied all the prerequisites of § 925"].) Here, the parties' briefing reflects a legitimate dispute over Zhang's status, and thus over the application of the statute. That is not surprising. For decades, partners and law firms have litigated whether partners are employees under a variety of statutory and common-law standards. (See, e.g., Fink, *A Crumbling Pyramid: How the Evolving Jurisprudence Defining "Employee" Under the ADEA Threatens the Basic Structure of the Modern Large Law Firm* (2010) 6 Hastings Bus. L.J. 35; McGinley, *Functionality or Formalism? Partners and Shareholders as "Employees" Under the*

Document received by the CA Supreme Court.

Anti-Discrimination Laws (2004) 57 SMU L. Rev. 3.) And the results vary from case to case. (See, e.g., *Lemon v. Myers Bigel, P.A.* (4th Cir. 2021) 985 F.3d 392 [partner was not law firm employee under federal law].) So there should be no doubt that Zhang's status as an employee—which determines only the venue of the arbitration, not its existence or the identity of the arbitration provider—must be arbitrated in accordance with the contract.

3. Strong Policy Reasons Support Enforcement of Delegation Provisions in Arbitration Agreements.

In addition to controlling law, sound public policy weighs in favor of enforcing delegation clauses without imposing artificial impediments. Many businesses have entered into contracts that seek to maximize the efficiencies of arbitration by delegating both merits questions and threshold questions of arbitrability to the arbitrator. These businesses rely on U.S. Supreme Court precedent—and decisions of this Court such as *Sandquist*—that support arbitral determination of significant delegated issues. Resolving these disputes in arbitration can help avoid a slow and costly detour through the courts.

The entire point of a delegation clause is to "insulate and protect the arbitration process" from costly rounds of pre-arbitration litigation. (1 Martin Domke et al., Domke on Commercial Arbitration (June 2023 update) § 15:11.50.) As this Court has recognized, "[t]ypically, those who enter into arbitration agreements expect that their dispute will be resolved without necessity for any contact with the courts." (*Sandquist*,

Document received by the CA Supreme Court.

supra, 1 Cal.5th at p. 247 [quoting *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 402, fn. 5].) In that light, when the parties' arbitration agreement includes a delegation clause,

> to resolve the "who decides" question in favor of a court would contravene that expectation and impose substantial additional cost and delay, requiring the parties to stay matters before the arbitrator, proceed to a courthouse for a construction of their arbitration agreement, perhaps continue through appellate review of that construction, and only then return back to arbitration for further dispute resolution.

(*Ibid.*)

Channeling venue or gatekeeping disputes through the courts despite a delegation clause thus "sacrifices the principal advantage of arbitration" by "mak[ing] the process slower, more costly, and more likely to generate procedural morass." (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 348.) In such circumstances, "[e]ven if arbitration is given a green light at the end of the judicial proceeding, the party seeking to arbitrate may have already spent many times the cost of an arbitral proceeding just enforcing the arbitration clause." (*In re American Express Merchants Litigation* (2d Cir. 2012) 681 F.3d 139, 145 (Jacobs, J., dissenting from denial of rehearing en banc); accord *American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. 228, 238-39 [vindicating Judge Jacobs' view].)

That result deters the use of arbitration by injecting "uncertainty as to procedure and outcome," which intensifies the perceived "risk [of] using arbitration clauses due to the uncertainty present." Cook & Brennan, *The Enforceability of Class Action Waivers in Consumer Agreements* (2008) 40 UCC

Document received by the CA Supreme Court.

L.J. 331, 333, 348. Such deterrence would frustrate the purpose of the FAA and the California Arbitration Act, and would undermine the interests of the business community and of Californians in general.

* * * * *

Just as this Court "resolve[d] all doubts in favor of arbitration" by sending the procedural issue to the arbitrator in *Sandquist*, *supra*, 1 Cal.5th at p. 247, the Court should do the same for the procedural question of venue here.

B. Courts Should Not Nullify a Clear and Unmistakable Delegation Clause by Reference to Language in Fail-Safe Provisions Recognizing the Possibility of Judicial Involvement.

To the extent the Court decides whether the delegation clause in the Agreement is clear and unmistakable, the Court should disapprove Court of Appeal decisions that refuse to enforce clear delegation clauses whenever other provisions of an arbitration agreement acknowledge the possibility that, notwithstanding the delegation provision, courts may decide some issues relating to an arbitration provision or an underlying contract.

Zhang's argument here raises this issue when he insists that other provisions of the parties' contract render the delegation clause ambiguous (OBM pp. 54-56), relying on Court of Appeal decisions that seize upon language addressing other issues to undercut the clarity of the parties' delegation. For example, Zhang identifies the use of the word "adjudicated" in the severability provision. (OBM p. 55.) While recognizing that arbitrators as well as judges "adjudicate" (*ibid.*), Zhang suggests

Document received by the CA Supreme Court.

that the failure to explicitly exclude the possibility that a court might pass upon some aspect of the arbitration clause renders the delegation less than clear and unmistakable. (*Ibid.* [citing *Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, 1565–66 [use of "trier of fact" held to undercut delegation provision]].) Zhang similarly points to the litigation expense provision of the contract, which applies when a party "bring[s] any legal action, arbitration, or other proceeding with respect to the breach, interpretation, or enforcement of this Agreement." (OBM p. 55.) Other cited provisions supposedly curtail the arbitrator's powers, though how this supposed curtailment makes the delegation less clear is difficult to see. Delegation cannot go beyond the text of the agreement, but there is no sound basis to hold that some agreements are less susceptible to delegation than others.

The exercise that Zhang invites this Court to undertake rests on *Parada*, *supra*, and related decisions such as *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 792, *Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 240, and *Nelson v. Dual Diagnosis Treatment Center, Inc.* (2022) 77 Cal.App.5th 643, 654. Those decisions endorse a process under which a court can ignore a delegation provision as insufficiently clear and unmistakable whenever any other provision in the arbitration agreement—or in the contract as a whole—recognizes that courts might address some issues notwithstanding the delegation clause. This anti-enforcement rule may apply (as in *Parada*) even where the supposedly invalidating reference uses a neutral term (like "adjudicate" or "trier of fact") that fully applies

Document received by the CA Supreme Court.

to an arbitrator, so long as the agreement does not expressly exclude any implicit possibility of court involvement. To forestall confusion in the lower courts, and ensure uniform and sound enforcement of delegation clauses, this Court should disapprove those decisions.

Those decisions not only undermine contracting parties' intent to delegate issues to the arbitrator, but also disregard the need for commercial contracts to anticipate events beyond a party's control. A prudent drafter of an arbitration agreement must account for the possibility that courts will decide some issues relating to arbitration despite comprehensive and clear delegation of issues to the arbitrator. That may happen if one party resists arbitration, and the other must invoke judicial compulsion to enforce the arbitration agreement. A court that hears a motion to compel arbitration may well pass upon—and interpret—some terms in the arbitration provision in deciding whether to enforce it. Similarly, a court asked to enforce an arbitration award may address the arbitration agreement, for example, in determining whether the arbitrators acted beyond the scope of their powers.

Moreover, not all courts honor delegation clauses, especially at the stage of a motion to compel; instead (as indicated by the many appellate reversals in the authorities cited here and in the parties' briefs), those courts decide threshold issues that the pertinent agreement delegated to the arbitrator. Indeed, the U.S. Supreme Court noted in *Henry Schein* that such disregard occurred with some frequency. (See 139 S.Ct. at pp.

Document received by the CA Supreme Court.

527-28.) A court that did not enforce a delegation provision likely would ignore a severance provision (for example) that expressly applied only to determinations by the arbitrator.

That a drafter anticipated this possibility of judicial overreaching, along with the issues (such as enforcing arbitration awards) that are legitimate subjects for judicial resolution, should not nullify the effect of a delegation clause that is clear and unmistakable in its own right. Properly construed, other provisions in an arbitration agreement that merely assume the possibility of judicial action do not render ambiguous the parties' inherently "antecedent agreement" to delegate threshold questions of arbitrability to the arbitrator. (*Rent-A-Center supra*, 561 U.S. at p. 70.)

This straightforward approach is especially important here given that the U.S. Supreme Court has repeatedly disapproved decisions that distort California law to avoid enforcing arbitration agreements protected by the Federal Arbitration Act. (E.g., *DirecTV, Inc. v. Imburgia* (2015) 577 U.S. 47 [rejecting Court of Appeal's unique construction of choice-of-law provision disfavoring arbitration]; *Lamps Plus Inc. v. Varela* (2019) 139 S.Ct. 1407 [rejecting Ninth Circuit interpretation of California contract law to impose class arbitration based on ambiguity in contract rather than clear statement].)

This Court thus should disapprove the decisions of the Court of Appeal that seize on any reference to a court, no matter how prudent, to ignore otherwise clear and unmistakable agreements to delegate gateway issues to the arbitrator. Like the

Document received by the CA Supreme Court.

"wholly groundless" exception rejected in *Henry Schein*, reading an agreement's various fail-safe provisions to displace a clear delegation of threshold questions of arbitrability improperly thwarts the parties' intent and expectation "that their dispute will be resolved without necessity for any contact with the courts." (*Sandquist*, *supra*, 1 Cal.5th at p. 247 [quoting *Blanton*, *supra*, 38 Cal.3d at p. 402, fn. 5].)

C. A Stay Under Section 1281.4 Is Necessary when a Court With Jurisdiction over the Parties and the Subject Matter Has Ordered Arbitration.

A stay is clearly warranted here. The text of Code of Civil Procedure section 1281.4 is clear: a California court must stay proceedings when another "court of competent jurisdiction," within or outside of California, has ordered that the underlying dispute be arbitrated. Section 1281.4 is designed to insulate the arbitration process from judicial interference, but Zhang would turn the statute into a means to bring into court issues that he agreed to arbitrate.

On the contrary, the Court of Appeal has repeatedly acknowledged, "[t]he purpose of the statutory stay is to protect the jurisdiction of the arbitrator by preserving the status quo until arbitration is resolved." (*Federal Insurance Co. v. Superior Court* (1998) 60 Cal.App.4th 1370, 1374; see also *MKJA, Inc. v. 123 Fit Franchising, LLC* (2011) 191 Cal.App.4th 643, 660.) The Legislature recognized that "ensuring that litigation will be stayed is essential to the enforceability of arbitration agreements generally." (*MKJA*, *supra*, 191 Cal.App.4th at p. 661.) "In the absence of a stay, the continuation of the proceedings in the trial

Document received by the CA Supreme Court.

court disrupts the arbitration proceedings and can render them ineffective." (*Federal Insurance*, *supra*, 60 Cal.App.4th at p. 1375.) Thus, the statutory stay "remedies a breach of an arbitration agreement and promotes enforcement of it." (*Leenay v. Superior Court* (2022) 81 Cal.App.5th 553, 569.)

The threshold—and dispositive—issue under section 1281.4 here is whether the New York court is a "court of competent jurisdiction." It is.

As the U.S. Supreme Court has recognized, "[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.) That is, "a court of competent jurisdiction is a court with a grant of subject-matter jurisdiction covering the case before it." (*Id.* at p. 92.) At times the phrase has been construed to mean a court with both subject-matter jurisdiction and personal jurisdiction over the parties. (See *id.* at p. 95.) But the definition does not go beyond that. (*Ibid.*) This Court similarly defines a "court of competent jurisdiction" as "any court having jurisdiction" to decide a particular question. (*San Diego & Arizona Ry. v. State Board of Equalization* (1913) 165 Cal. 560, 566.)

Here, there is no serious argument that the New York court lacked subject-matter jurisdiction over this partnership dispute. Nor does (or could) Zhang contend that the New York court lacked personal jurisdiction over him for this purpose, let alone that personal jurisdiction was inconsistent with due process. Setting aside his contacts with the law firm, Zhang agreed to the

Document received by the CA Supreme Court.

New York forum, and consent is sufficient to confer personal jurisdiction. (E.g., *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinée* (1982) 456 U.S. 694, 703-04 ["express or implied consent" to "personal jurisdiction" may arise from "contract," "stipulation," or "agreement[] to arbitrate," among other means].)

Zhang nevertheless suggests that Labor Code section 925 deprives otherwise-competent courts of their jurisdiction over matters involving California employees whose claims fall within the scope of the statute. As explained above, however, nothing on the face of Labor Code section 925 purports to deprive any court of jurisdiction. The statute only renders certain contractual forum-selection provisions "voidable," and only by an "employee." (Labor Code § 925 subd. (b).) The forum-selection provisions are not even void *ab initio*, but are void only if (1) a party chooses to challenge them, and if (2) the challenger is in fact an employee, and if (3) the pertinent "claim aris[es] in California." (*Id.*, subd. (a).) These threshold issues must be adjudicated (see *Depuy*, *supra*, 28 F.4th at p. 965-966), which returns the analysis to the threshold issue of who decides.

Given that legal framework, Zhang's argument on its face makes no sense. If Section 925 somehow deprives all courts outside California of jurisdiction, no such court could apply section 925 to a case before it—as it might be called to do in the absence of an arbitration agreement. Yet the venue shield provided by Section 925 does not impair a court's jurisdiction any more than a forum-selection provision eliminates the jurisdiction

Document received by the CA Supreme Court.

of the court that may be called upon to transfer the case to the selected forum. Just as substantive immunity does not deprive a court of jurisdiction (see *Quigley v. Garden Valley Fire Protection District* (2019) 7 Cal.5th 798 [governmental tort immunity does not eliminate the jurisdiction of courts to hear tort claim])—even if jurisdiction allows the court only to evaluate and enforce immunity from suit—a statutory venue provision does not deprive a court of jurisdiction to evaluate and, if appropriate, apply the provision to the case before it.

There are additional reasons to recognize the competent jurisdiction of the New York courts here. For example, under the doctrine of comity, a court "should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." (*Rhines v. Weber* (2005) 544 U.S. 269, 274 (cleaned up).) That doctrine surely applies here, where the New York court has already ordered the same dispute into arbitration. To conclude that the New York court was incompetent to decide the matter also would violate basic principles of federalism given that subject-matter jurisdiction is patent and personal jurisdiction indisputably comports with due process.

Finally, under the circumstances of this case, it appears that the Full Faith and Credit Clause (U.S. Const., art. IV, § 1) precludes the California courts from revisiting whether the venue issue under Labor Code section 925 was delegated to the arbitrator. That Clause requires "each State to recognize and

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give effect to valid judgments rendered by the courts of its sister States." (*V.L. v. E.L.* (2016) 577 U.S. 404, 407-408.) A state is not "free to ignore obligations created … by the judicial proceedings of the other[]" States. (*Id.* at p. 408 [quoting *Milwaukee County v. M.E. White Co.* (1935) 296 U.S. 268, 277].)

It appears that the New York trial and appellate courts have decided that the venue question under Section 925 is delegated to the arbitrator, and that no further appeal is possible. (See *Dentons US LLP v. Zhang* (N.Y. App. Div. 2022) 211 A.D.3d 631 [181 N.Y.S.3d 62].) While the Chamber takes no position in the parties' dispute over whether the decision of the New York Appellate Division is indeed final and dispositive on that issue, if the decision is what it appears, the ruling is entitled to full faith and credit and is not subject to challenge in the California courts.[1] (Cf. *Southeast Resource Recovery Facility Authority v. Montenay Int'l Corp.* (9th Cir. 1992) 973 F.2d 711, 713 ["[A]n order compelling arbitration … is entitled to full faith and credit."] [applying 28 U.S.C. § 1738, which "implements the full faith and credit clause" (*People v. Laino* (2004) 32 Cal.4th 878, 888)]; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano* (7th Cir. 1993) 999 F.2d 211, 216 [same]; *Wheeler v. Kidder Peabody & Co.* (5th Cir. 1993) 8 F.3d 21 [unpub. opn.] [same].)

[1] The only conceivable means for the California courts to revisit the issue would be if an action to enforce the arbitration award came before those courts, and Zhang contended that the arbitration tribunal acted beyond its powers. For purposes of this case, the Chamber takes no position on whether a court could legitimately second-guess the arbitrator's ruling in that circumstance.

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This Court "need not resolve those issues in this case, however, because 'a statute must be construed, if reasonably possible, in a manner that avoids a serious constitutional question.'" (*People v. Chandler* (2014) 60 Cal.4th 508, 524 [quoting *People v. Engram* (2010) 50 Cal.4th 1131, 1161]; see *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1201 [this Court "[c]ertainly … would not construe a statute in a manner that raised serious constitutional questions if the statute's language reasonably permitted any other construction"].) Section 1281.4 easily permits a construction under which the New York courts are "of competent jurisdiction" and have "ordered arbitration of" the underlying "controversy." (Code Civ. Proc. § 1281.1.) Under that construction, the New York orders satisfy the statutory requirements for a stay of the California litigation whether or not the Constitution requires the same result.

D. Transforming Section 925 into a Provision That Strips Jurisdiction from Courts and Arbitrators in Other States Would Unduly Impair Forum-Selection Provisions.

As explained above, Labor Code section 925 is not a jurisdictional provision and should not be construed to deprive courts of other states of jurisdiction over disputes where one party claims to be an employee subject to that section. A contrary ruling not only would be wrong but would unduly impair the use of forum-selection provisions.

Forum-selection provisions confer important benefits on businesses, their contracting parties, and their customers. Forum-selection clauses allow businesses to select in advance and limit the fora in which disputes can be litigated. Forum selection

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achieves substantial efficiencies by limiting litigation costs—which ultimately reduces the costs of goods and services to consumers. Impediments to forum selection ultimately impair economic activity, as businesses may decide against expanding their activities into other jurisdictions. Small businesses in particular are vulnerable to the costs of litigation in forums across the country.

State and federal law both favor the use of forum-selection clauses. As a matter of federal law, forum-selection clauses are "prima facie valid." (*Bremen v. Zapata Off-Shore Co.* (1972) 407 U.S. 1, 10.) The U.S. Supreme Court explained why: "The enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system." (*Atlantic Marine Construction Co. v. U.S. District Court* (2013) 571 U.S. 49, 63 (cleaned up).) A plaintiff who "agrees by contract to bring suit only in a specified forum" does so "presumably in exchange for other binding promises." (*Ibid.*) "In all but the most unusual cases, therefore, the interest of justice is served by holding parties to their bargain." (*Id.* at p. 66 (cleaned up).) Accordingly, "a valid forum selection clause should be given controlling weight in all but the most exceptional cases." (*Id.* at p. 63 (cleaned up)).

As this Court, too, has "made clear …, 'No satisfying reason of public policy has been suggested why enforcement should be denied a forum selection clause appearing in a contract entered into freely and voluntarily by parties who have negotiated at arm's length.'" (*Nedlloyd Lines B.V. v. Superior Court* (1992) 3

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Cal.4th 459, 464 [quoting *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 495-496].) "California favors contractual forum selection clauses so long as they are entered into freely and voluntarily, and their enforcement would not be unreasonable." (*America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 11.) Indeed, the Court of Appeal has recognized that "[f]orum selection clauses are important in facilitating national and international commerce, and as a general rule should be welcomed.'" (*Id.* at p. 12 (cleaned up).)

This Court should construe Labor Code section 925 to accord with these principles. The Legislature has made the judgment that California employees should be able to litigate California-based employment disputes in California. As noted above, however, that judgment applies only when a party establishes that he or she is a California employee and that the dispute arises from events in California.

Section 925 should not cast a shadow over forum-selection provisions unless and until the statute's prerequisites have been established. Thus a forum-selection provision is presumptively valid, even if possibly subject to voiding under Section 925. Recognizing that presumptive validity—and the jurisdiction of out-of-state tribunals to determine whether Section 925 applies—sets the proper balance between the public policy favoring forum selection clauses generally and the limited statutory exception.

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CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: August 18. 2023

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

In compliance with California Rules of Court, Rule 8.520(c), I hereby certify that this Brief of Amicus Curiae contains 5,550 words, including footnotes but excluding the items referenced in California Rules of Court, Rule 8.520(c)(3), as calculated by the word processing software used to prepare this Brief of Amicus Curiae.

Dated: August 18, 2023

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CERTIFICATE OF ELECTRONIC SERVICE

I am over the age of 18 and not a party to this action. My business address is Four Embarcadero Center, Suite 1400, San Francisco, CA 94111. On August 18, 2023, I electronically served the above APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENT and AMICUS BRIEF IN SUPPORT OF RESPONDENT on the following counsel via TrueFiling:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
Executed on August 18, 2023.

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