No. 18-319

IN THE

Supreme Court of the United States

E. & J. GALLO WINERY, A CALIFORNIA CORPORATION; STAR H-R, INC., A CALIFORNIA CORPORATION,

Petitioners,

v.

REFUGIO ARREGUIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

REPLY BRIEF

JENNIFER E. DOUGLAS
DICKENSON, PEATMAN & FOGARTY, P.C.
100 B Street, Suite 320
Santa Rosa, CA 95401
(707) 524-7000

Counsel for Petitioner Star H-R, Inc.

PAUL W. CANE, JR.
Counsel Of Record
NANCY L. ABELL
DEBORAH S. WEISER
PAUL HASTINGS LLP
101 California Street, 48th Floor
San Francisco, CA 94111
(415) 856-7000
paulcane@paulhastings.com

Counsel for Petitioner E. & J. Gallo Winery

286015

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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A. This Court Has Jurisdiction Under Well-Established Finality Rules.

Arreguin principally contends that the California decision lacks finality (Opp. at 1-2, 10-18), but this Court's teaching (subsection 1 below), and Arreguin's own representations to the California trial court (subsection 2) show that he is wrong.

1. This Court's cases explain why the issue is ripe for determination.

Arreguin contends that petitioners should ask the arbitrator to decide in the first instance whether the arbitration agreement permits class actions, and then relitigate that issue thereafter in the California courts. (Opp. at 2, 12-17.) Arreguin is incorrect.

a. *Southland* resolved the finality issue more than 30 years ago.

Southland Corp. v. Keating, 465 U.S. 1 (1984), a Federal Arbitration Act case emanating from California state court, explains why the decision here is final. A franchisor and its franchisees disputed arbitrability. The franchisees, appellees in this Court, asserted that the California state court decision lacked finality because further proceedings remained following the disputed arbitration order. The appellant franchisor might prevail in those further proceedings, the franchisees argued, thereby making it unnecessary for this Court to consider

the arbitration issue. Because the arbitration order in question contemplated those further proceedings, the argument went, the order was not final.

This Court rejected that argument and found the order final under 28 U.S.C. section 1257(2). "Under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975), judgments of state courts that finally decide a federal issue are immediately appealable when 'the party seeking review here might prevail . . . on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court . . . . ," this Court held. 465 U.S. at 6. "In these circumstances, we have resolved the federal issue 'if a refusal immediately to review the state-court decision might seriously erode federal policy.'" *Id.*, *quoting Cox Broadcasting*, 420 U.S. at 483. On a Federal Arbitration Act issue such as this one, "Without immediate review of the California holding by this Court there may be no opportunity to pass on the federal issue and as a result 'there would remain in effect the unreviewed decision of the State Supreme Court' holding that the California [rule] does not conflict with the Federal Arbitration Act." *Id.* (quoting *Cox Broadcasting*, 420 U.S. at 485). "[T]he failure to accord immediate review of the decision of the California Supreme Court might 'seriously erode federal policy,'" because any other course "could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Id.* at 7, *quoting Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). "For us to delay review of a state judicial decision . . . would defeat the core purpose of a contract to arbitrate. We hold that the Court has jurisdiction to decide whether the Federal Arbitration Act pre-empts [the California doctrine]." *Id.* at 7-8.

Arreguin contends that *Southland* involved an order *denying* a petition to compel arbitration (Opp. at 15-16), but that is a distinction without a difference. *Southland* held that this Court has jurisdiction to review immediately arbitration-related decisions that implicate FAA-protected rights. Three FAA-protected rights are at issue here: (i) the right to engage in individualized dispute resolution, *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350-51 (2011); *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l, Corp.*, 559 U.S. 662, 684 (2010); (ii) the right to a *prompt* determination of substantive rights in the agreed-upon arbitral forum, *see Preston v. Ferrer*, 552 U.S. 346, 359 (2008); and (iii) as the federal courts of appeals (cited in the petition and Supplemental Authorities Brief) have overwhelmingly held, the right to have a court (and not an arbitrator) resolve the gateway question of whether class arbitration is permissible.

Southland therefore makes the decision at issue final under 28 U.S.C. section 1257. If petitioners are correct — as the majority of federal courts of appeals hold — then the class-action question is not one for the arbitrator. It of course is possible that the arbitrator, if asked, might resolve the issue correctly, but that is not a reason to ask the arbitrator a question not within the arbitrator's purview to answer.

b. Finality additionally exists under the rule of *Mercantile Bank v. Langdeau*.

Even laying aside *Southland*'s rule of finality in Federal Arbitration Act cases, this Court has been mindful that finality principles should not inflict on parties unnecessary delay in resolving a federal question.

In *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), for example, this Court treated as final a venue order that implicated a federal statute; venue was "a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 557-58. Resolving venue promptly "serves the policy underlying the requirement of finality in 28 U.S.C. § 1257"; otherwise, the parties would be "subject . . . to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed." 371 U.S. at 558.

So, too, here. Consider what has occurred to date. Arreguin sued in 2014 over his three-month stint of work in 2013. The trial court denied the motion to compel arbitration on June 10, 2015. The California court of appeal ruled on March 28, 2018, and the California Supreme Court denied review on July 11, 2018. If Arreguin's argument were correct, the parties now would have to ask the arbitrator to decide whether the parties' agreement permitted a class action. If the arbitrator ruled in plaintiffs' favor, according to plaintiffs' theory, petitioners then would have to ask the California trial court to set that ruling aside. Any party aggrieved with that ruling would have to appeal *again* to the California Court of Appeal, Arreguin contends, and then petition *again* to the California Supreme Court, asking it *again* to overrule *Sandquist* (which it already refused to do), and then petition *again* to this Court. Those proceedings (if the prior timetable were replicated) would not conclude for three to four years, so the issue would not come before this Court until approximately the year 2022 or 2023 — in a case concerning the arbitrability of a dispute over Arreguin's three-month work stint 10 years earlier.

Arreguin's Opposition concedes that, under the Federal Arbitration Act, "the parties are presumed to desire speed and efficiency in bargaining for arbitration" (Opp. at 28), but his Opposition does not even attempt to explain how the do-over he espouses — requiring the parties to repeat anew the arguments already presented to and rejected by the California courts over the last several years — is consistent with the speed and efficiency that the parties desire, the FAA requires, and the finality principles set forth in *Southland* and *Mercantile Bank v. Langdeau* ensure.

c. Arreguin's reliance on the AAA Rules rests on circular reasoning.

Arreguin erroneously invokes the American Arbitration Association's Supplemental Rules for Class Arbitration. (Opp. at 2, 12.) Those Rules invite a "clause construction" ruling from an arbitrator on the issue of the availability of class arbitration. Arreguin's reasoning is circular, however, because the AAA's Class Action Rules *assume* the very principle that petitioners here *dispute*: that the *Bazzle* plurality is authoritative. As the AAA explained: "On October 8, 2003, in response to the ruling of the United States Supreme Court in *Green Tree Financial Corp v. Bazzle*, the American Arbitration Association issued its Supplementary Rules of Class Arbitrations .... In *Bazzle*, the Court held that . . . an arbitrator, and not a court, must decide whether class relief is permitted." *AAA Policy on Class Arbitrations*, AMERICAN ARBITRATION ASS'N (July 14, 2005), *reprinted at* https://www.adr.org/sites/default/files/document_repository/AAA%20Policy%20on%20Class%20Arbitrations.pdf.

The petition here contends (and seven federal courts of appeals have held), however, that the *Bazzle* plurality is *not* authoritative. The decision at issue here therefore is final, because if this Court now overrules the *Bazzle* plurality, there will be no "clause construction" ruling, and the portions of the AAA's Supplemental Rules that Arreguin now invokes will be obsolete.

2. Arreguin's finality argument conflicts with what he has told the California courts.

In a trial-court Case Management Conference Statement dated November 20, 2018, Arreguin (correctly) told the California trial court: "Defendants are now petitioning the U.S. Supreme Court. *This matter should remain stayed at the trial court level*" until "Defendants' . . . appellate practice" is complete. (Emphasis added.) Arreguin said substantially the same thing in Case Management Conference statements dated September 11, 2018, and May 17, 2018.[1]

Simply put, Arreguin repeatedly acknowledged that this Court should act before any further proceedings in California occur.

1. This Court previously directed the California courts to transmit to this Court the record in this case, so the quoted Case Management Conference statements should be in this Court's possession. If for some reason that is not the case, undersigned counsel can supply them upon request.

B. This Case Is An Excellent Vehicle To Resolve The Question Presented.

Arreguin does not deny the profound conflict in the cases. He contends, however, that this case is not a suitable vehicle to resolve the conflict. Arreguin is incorrect.

1. That this case arises from California state court is not a reason to deny certiorari.

Arreguin is correct (Opp. at 3, 19-20) that Justice Thomas in some but not all[2] of this Court's cases has adhered to his previously expressed view that the FAA does not apply in state courts. That, however, is not a reason to deny certiorari.

First, this Court has had no difficulty deciding FAA cases arising from state courts, as the cases cited in footnote 2 show. *In DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), for example, Justice Breyer wrote for a six-Justice majority. Here, particularly given that "every federal court of appeals to have considered the question anew since *Stolt-Nielsen* [*v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010)], has determined that class availability is a fundamental question of arbitrability" for the court, not an arbitrator, *JPay, Inc. v. Kobel*, 904 F.3d 923, 935 (11th Cir. 2018), there is no reason to believe that the views of any one Justice might be outcome-determinative.

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2. *See, e.g., Marmet Health Care Ctr. v. Brown*, 565 U.S. 530 (2012) (unanimous per curiam decision reversing the West Virginia Supreme Court); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17 (2012) (unanimous per curiam decision reversing the Oklahoma Supreme Court).

Second, that this case arises from *California* state court supplies an additional reason to grant certiorari. This Court over the years has noted California courts' particular propensity to resist this Court's FAA teaching. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340, 342 (2011) ("[I]t is worth noting that California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts."); *see also Imburgia*, 136 S. Ct. at 471 (reversing the California Court of Appeal; California's analysis was FAA-preempted); *Preston v. Ferrer*, 552 U.S. 346, 349-50, 357-58 (2008) (holding preempted a California rule requiring resort to an administrative agency); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (California may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable . . . .").

In this very case, the California Court of Appeal "lament[ed] . . . the recent march of our nation's [arbitration] jurisprudence." Pet. App. 17a (citation and internal quotation marks omitted). A California state-court case is an ideal vehicle to articulate and enforce Federal Arbitration Act principles.

2. The question presented is important and regularly recurring.

It certainly is true, as Arreguin contends (Opp. at 29), that *some* arbitration agreements now include express class-action waivers, and that such express waivers could obviate the question presented. But many agreements do not have an express waiver, such as the agreement in this case and that in *Lamps Plus, Inc. v. Varela* now before this Court (No. 17-988). Because of the prevalence of

such agreements (as the Opposition itself concedes), "the issue of who decides whether an agreement permits class arbitration . . . appears to be frequently litigated," even to this day. (Opp. at 18.) The issue therefore remains vital for this Court to decide.

3. Nothing in the drafting of the agreement makes this case unsuitable for review.

Arreguin contends that this case is fact-bound, but he is incorrect.

a. That the arbitration agreement invokes the AAA Rules supplies an additional reason to grant certiorari.

Arreguin suggests that the case is inappropriate for review because the arbitration agreement here invokes the AAA Rules. (Opp. at 2-6, 21-27.) In fact that feature of the agreement provides an *additional* reason to grant certiorari.

There are three irreconcilable lines of Federal Arbitration Act cases. We have:

- The rule applied by the California courts and the Fifth and arguably the First circuits, that relies upon the *Bazzle* plurality and assigns to the arbitrator the question of the availability of class litigation.

- The majority rule, rejecting the *Bazzle* plurality and holding that only the clearest contractual language can delegate to the arbitrator the class-action question.

- The rule followed by the Second and Eleventh circuits, finding that the incorporation of rules or use of other oblique contractual language sufficed to delegate to the arbitrator the class-action question.

Whatever may be the correct rule, the instant case is the ideal vehicle to establish it. The instant case, unlike some others, presents all of the issues that produced the three-way circuit split. The agreement is silent on the issue of class actions, *and* it invokes AAA Rules. Deciding this case not only will resolve whether the class-action issue is a gateway question of arbitrability for the court, but also whether commonly incorporated rules *unmistakably* delegate that gateway question to the arbitrator. This Court very recently noted the issue of incorporation of rules, but "express[ed] no view about" its proper resolution. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. ___ (2019) (slip op. at 8).

The rules incorporated here make this case an excellent vehicle for decision rather than an undesirable one.

b. The agreement here does not contain a "general" or "express" delegation clause.

It certainly is true, as this Court has held, that parties can delegate to the arbitrator questions that otherwise would be for the Court. *E.g.*, *Henry Schein*, slip op. at 1 ("The [Federal Arbitration] Act allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions . . . ."). The arbitration agreement here, however, did not do that.

This Court repeatedly has held that parties must use *clear and unmistakable* language to delegate gateway questions of arbitrability. *Id.* at 8 ("Under our cases, courts 'should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.'") (citation omitted); *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (same); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 79 (2010) (same); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1995) (same; "ambiguity" is not enough to send the issue to the arbitrator).

Nothing in the agreement here suggests that the arbitrator had authority to determine whether the agreement permits class actions, let alone delegates the issue clearly and unmistakably. The agreement simply identified the kinds of employment claims that would be arbitrable, including "sexual discrimination, sexual harassment, age discrimination and discrimination based on disability," "claims based on state, federal or local regulations or decrees" (but not "workers compensation insurance and unemployment" claims), and claims over a "specific or implicit contract."[3] (Pet. App. 31a.)

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3. Implied employment-contract claims sometimes are recognized under California state law, hence the reference to both express and "implicit" contract claims. *See, e.g., Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 676-77 (1988); *Guz v. Bechtel Nat'l Inc.*, 24 Cal 4th 317, 345 (2000).

This case presents in one place the three issues potentially litigated in cases like this one:

- Whether the availability of class litigation is a gateway question of arbitrability for the Court;

- Whether the rules incorporated by reference delegate to the arbitrator that gateway question; and

- Whether the language found in virtually any contract containing an arbitration clause — requiring arbitration of claims arising under the agreement — delegates to the arbitrator the gateway question of the availability of class actions.

This case therefore is an ideal vehicle to consider the questions presented.

4. This case is a superior vehicle to *Spirit Airlines, Inc. v. Maizes* (No. 18-617).

Spirit Airlines presents one of the issues here but not all of them. That case presents the question whether incorporation of the AAA Rules assigns to an arbitrator the class-action question. *Spirit Airlines* does not, however, squarely present the threshold question whether the *Bazzle* plurality is authoritative, because all parties to that case agreed "that the availability of class arbitration is a question of arbitrability" for the court. 899 F.3d 1230, 1233 n.l (11th Cir. 2018). The Eleventh Circuit therefore "assume[d] it [to be so] without deciding." *Id.*

Here, by contrast, the parties disputed the issue, so this case and not that one squarely presents the question whether the *Bazzle* plurality survives. Accordingly, this Court should grant this petition even if that one were denied, or alternatively grant both petitions and hear the cases in tandem.

II. CONCLUSION

The California Supreme Court's application of the Federal Arbitration Act, though consistent with the rule in the Fifth and (arguably) First circuits, conflicts with decisions of seven other federal circuit courts of appeals. This Court should grant certiorari.

Respectfully submitted.

JENNIFER E. DOUGLAS
DICKENSON, PEATMAN
& FOGARTY, P.C.
100 B Street, Suite 320
Santa Rosa, CA 95401
(707) 524-7000

Counsel for Petitioner
Star H-R, Inc.

PAUL W. CANE, JR.
Counsel Of Record
NANCY L. ABELL
DEBORAH S. WEISER
PAUL HASTINGS LLP
101 California Street, 48th Floor
San Francisco, CA 94111
(415) 856-7000
paulcane@paulhastings.com

Counsel for Petitioner
E. & J. Gallo Winery

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