No. 06-__

IN THE
Supreme Court of the United States

ARNOLD M. PRESTON,

Petitioner,

v.

ALEX E. FERRER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act and *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 126 S.Ct. 1204 (2006) preempt the holding in this case, voiding an interstate arbitration agreement under the California Talent Agencies Act?

PARTIES

The parties to this proceeding are Petitioner Arnold M. Preston and Respondent Alex E. Ferrer.

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TABLE OF AUTHORITIES

Petitioner Arnold M. Preston respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the California Court of Appeal, *review denied* by the California Supreme Court, on the issue of Federal preemption.

OPINIONS BELOW

The *Order Denying Review* by the California Supreme Court is set forth at Petitioner's Appendix ("Pet. App.") 1a.

The *Majority Opinion* of the California Court of Appeal was reported as *Ferrer v. Preston* (2006) 145 Cal.App.4th 440, 51 Cal.Rptr.3d 628. The Opinion is set forth hereinbelow at Pet. App. 2a–12a.

The *Dissenting Opinion* of the Hon. Miriam A. Vogel, Justice, California Court of Appeal, is set forth at Pet. App. 12a–18a.

The *Memorandum Decision* by the Hon. Haley J. Fromholz, Judge, Los Angeles Superior Court, is set forth at Pet. App. 18a–27a.

JURISDICTION

The decision of the California Courts was final upon the denial of review by the California Supreme Court, entered on February 14, 2007. (Pet. App. 1a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a), as it involves an issue of Federal preemption under the Supremacy Clause of the U.S. Constitution (Article VI, clause 2) and the Federal Arbitration Act, 9 U.S.C. §2. *See, Southland Corp. v. Keating,* 465 U.S. 1, 104 S.Ct. 852 (1984).

STATUTES

The Federal Arbitration Act, 9 U.S.C. §2, states, in pertinent part:

> "A written provision in any...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."

The California Talent Agencies Act, Labor Code §1700.44(a), states, in pertinent part:

> "In cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard *de novo*."

STATEMENT OF THE CASE

Respondent Alex E. Ferrer ("Judge Ferrer") is a former Florida Circuit Court Judge who now makes his living as the star of *Judge Alex*, a television program syndicated nationwide by Twentieth Century Fox, in which Judge Ferrer arbitrates petty civil disputes as a form of entertainment. (Pet. App. 3a).

Petitioner Arnold M. Preston ("Preston") is an attorney, who now makes his living as an Artist's Manager, advising and

counseling artistic personnel in the motion picture/television industry. (Pet. App. 12a).

Mr. Preston and Judge Ferrer entered into a written contract ("Management Agreement") which provides for payment of a 12% fee on Judge Ferrer's earnings from *Judge Alex*. (Pet. App. 3a). The Management Agreement included a standard American Arbitration Association provision calling for arbitration of disputes. (Pet. App. 6a). The arbitration clause specifically provided that disputes about the "validity" and "legality" of the contract would be subject to arbitration. (Pet. App. 6a).

Judge Ferrer resides in Florida and tapes the *Judge Alex* television program in Texas. Mr. Preston had his office in California. (Pet. App. 11a). As it happened, Judge Ferrer was in Nevada when he signed the Management Agreement. (Pet. App. 11a). As such, the *interstate* nature of the contract has never been in dispute.

When *Judge Alex* went on the air, Judge Ferrer refused to pay the management fee, so Mr. Preston commenced a proceeding with the American Arbitration Association in Los Angeles, California. (Pet. App. 3a). Ferrer responded by filing an action with the California Labor Commissioner, challenging the legality of the *entire management contract* under the California Talent Agencies Act, and based thereon, he asked the Labor Commissioner to stay the arbitration. (Pet. App. 3a).

The Labor Commissioner's hearing officer determined she lacked the power to stay the pending arbitration, so Judge Ferrer filed an action in the Los Angeles Superior Court, seeking an injunction against the arbitration. (Pet. App. 4a). The Superior Court issued the injunction, stayed the arbitration, and ordered that the legality of the entire contract under the

Talent Agencies Act would be decided by the Labor Commissioner, not the Arbitrator. (Pet. App. 4a). There was no challenge to the arbitration clause itself and Judge Ferrer initialed every page of the contract. (Pet. App. 13a, 14a).

The California Court of Appeal affirmed in a 2-1 decision. The dissenting opinion by Justice Miriam A. Vogel argued that the Federal Arbitration Act (9 U.S.C. §2) and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204 (2006) ("*Buckeye*") preempted the majority decision, stating:

> "Because it is undisputed (correctly) that the contract before us is governed by the FAA...it follows necessarily that the arbitrator and not the court must determine the gateway issues. My colleagues' contrary conclusion – based on the fact that the *Buckeye* court did not consider whether the issue should go first to a state administrative agency – ignores *Buckeye's* holding that its rules trump conflicting state procedures." (Pet. App. 16a; *Ferrer v. Preston, supra*, 145 Cal.App.4th at 451 n.3, 51 Cal.Rptr.3d at 637 n.3).

The majority of the Court of Appeal did not dispute the applicability of the Federal Arbitration Act, but distinguished *Buckeye* on the grounds that the Talent Agencies Act vests initial jurisdiction in an *administrative agency* , whereas *Buckeye* involved an attempt to avoid arbitration by filing a lawsuit in a Court:

> "[Preston] argues that the Federal Arbitration

> Act...preempts California law requiring the Commissioner to first adjudicate the legality of the contract....¶*Buckeye* is inapposite...[because it] did not involve an administrative agency...[and] did not consider whether the FAA preempts application of the exhaustion doctrine." (Pet. App. 10a; *Ferrer v. Preston, supra*, 145 Cal.App.4th at 441, 51 Cal.Rptr.3d at 633–634)

The California Supreme Court denied Mr. Preston's Petition for Review without issuing an opinion. (Pet. App. 1a).

Decisions of the California Labor Commissioner are subject to a trial *de novo* in the Superior Court pursuant to California Labor Code §§ 98.2 and 1700.44(a). See, *Sinnamon v. McKay* (1983) 142 Cal.App.3d 847. As such, the Labor Commissioner hearing is just an *initial step* in a protracted adjudication process which usually winds up, like this case did, in the California Court system.

As it stands, pursuant to the California decision this case would be remanded to the Labor Commissioner, where an administrative hearing would be conducted on the legality of the entire contract, followed by a trial *de novo* in the Superior Court on the same issue, followed by another appeal.

Thus, absent a writ of certiorari, Mr. Preston's arbitration will ultimately take place *four to five years* after filing his original petition, and only after incurring oppressive legal fees litigating before the Labor Commissioner, *de novo* in the Superior Court, and a second time before the California appellate courts.

REASONS FOR GRANTING CERTIORARI

Since the Court of Appeal's decision was published, and review was denied by the California Supreme Court, this established a *controlling precedent* in California which effectively renders arbitration agreements in Artist's Manager contracts unenforceable.

The Artist's Manager profession is engaged in interstate commerce because the entertainment industry is national. As such, the anti-arbitration ruling in this case impacts the entire profession, including Artist's Managers located outside of California who represent clients who reside in California or obtain employment in California. Since a very large part of the entertainment industry is centered in California, this means that Artist Managers *nationwide* are adversely affected by California's anti-arbitration ruling.

The reasoning of the Court of Appeal also sets a precedent which can negate *Buckeye* and invalidate arbitration agreements under state law merely by inserting an administrative proceeding ahead of a decision by the Courts.

Nothing in *Buckeye* supports the Court of Appeal's conclusion that preemption under the Federal Arbitration Act vanishes merely because there is an administrative tribunal which acts as a precursor to litigation in the Courts. In the present case, the "exhaustion" doctrine means only that an expensive administrative proceeding will be conducted *before* the matter starts winding its way through the California Courts.

Petitioner submits the Court of Appeal's rationale is simply not a logical basis for avoiding Federal preemption. As stated in *Buckeye*, 546 U.S. 440, 126 S.Ct. at 1209:

> "[A]n arbitration provision is severable from the remainder of the contract....[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance....[T]his arbitration law applies in state as well as federal courts....[B]ecause respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court."

See, also, *Southland Corp. v. Keating,* 465 U.S. 1, 104 S.Ct. 852 (1984)(California law voiding arbitration clause preempted by Federal Arbitration Act); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801 (1967).

This Petition involves a matter of great importance to the *entire profession of Artist's Managers*, who are engaged in interstate commerce but have now been deprived of their right to arbitrate under the Federal Arbitration Act.

Congress' goal in enacting the Federal Arbitration Act was to provide for the efficient, expeditious, and economical resolution of disputes. As illustrated by this case, that goal is utterly defeated by denying the arbitral forum based on state law. As stated by Justice Vogel, in her dissent:

> "When a former judge and a lawyer enter a contract in which they agree that any dispute about that contract will be resolved by arbitration, I think they ought to be bound by that agreement....¶Instead of the speedy, efficient, and relatively inexpensive procedure

> contemplated by the parties' contract, my colleagues have permitted Ferrer to cause a delay of years and triple or quadruple the parties' expenditures....That is not how it is supposed to work." (Pet. App. 12a, 17a)

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal and the Supreme Court of California

Respectfully submitted,

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