No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

IVETH RODRIGUEZ LOPEZ,

PETITIONER,

v.

READYONE INDUSTRIES, INC.,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Texas Supreme Court has held the Federal Arbitration Act (FAA) has preemptive effect over incompatible state law when the parties have agreed the FAA governs as a matter of contract interpretation under state contract law, irrespective of whether the arbitration agreement *in fact* falls within the coverage requirements of Section 2 of the FAA.

The question presented is whether an arbitration agreement must *in fact* be part of a "contract evidencing a transaction involving commerce" in order to be within coverage of Section 2 of the FAA, which only then preempts incompatible state law by virtue of the Supremacy Clause, and which under this Court's decisions in *Bernhardt* and *Lopez*, requires evidence that while performing her employment duties Lopez's activities "substantially affect" interstate commerce.

Alternatively, the Court should reconsider its interpretation of "a contract evidencing a transaction involving commerce" under Section 2 of the FAA and conclude the FAA preempts incompatible state law only with evidence that while performing her employment duties Lopez's activities "substantially affect" interstate commerce.

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OPINION BELOW

The opinion of the Eighth District Court of Appeals, El Paso, Texas, is reported at *ReadyOne Industries, Inc. v. Lopez,* 551 S.W.3d 305 (Tex. App. - El Paso 2018, pet. denied). *See* Appendix A-2-14. The other decisions of the trial court, appellate court, and supreme court are unreported.

JURISDICTION

The Eighth District Court of Appeals, El Paso, Texas, entered its judgment and opinion on April 25, 2018 (App. A-2-14), and denied the motion for rehearing on July 31, 2018 (App. A-15). On October 26, 2018, the Supreme Court of Texas denied a timely filed petition for review (App. A-16). The Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

APPLICABLE LAWS

The Supremacy Clause (Article VI, Clause 2) of the Constitution of the United States provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST., Article VI, Cl. 2.

1. **The Federal Arbitration Act, 9 U.S.C. §1:**

> § 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title
>
> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

2. **The Federal Arbitration Act, 9 U.S.C. §2:**

> § 2. Validity, irrevocability, and enforcement of agreements to arbitrate
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy

thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

3. **Texas Arbitration Act; Texas Civil Practice & Remedies Code § 171.001:**

§ 171.001. Arbitration Agreements Valid

(a) A written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate is a controversy that:

(1) exists at the time of the agreement; or

(2) arises between the parties after the date of the agreement.

(b) A party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a contract.

4. **Texas Arbitration Act; Texas Civil Practice & Remedies Code § 171.002:**

§ 171.002. Scope of Chapter

(a) This chapter does not apply to:

. . . .

(3) a claim for personal injury, except as provided by Subsection (c);

. . . .

(c) An agreement described by Subsection (a)(3) is subject to this chapter if:

(1) the parties to the agreement agree in writing to arbitrate; and

(2) the agreement is signed by each party and each party's attorney.

STATEMENT OF THE CASE

A. Facts and Judicial Proceedings.

On April 22, 2014, Petitioner Iveth Rodriguez Lopez ("Lopez") brought a non-subscriber negligence case against her employer, ReadyOne Industries, Inc. ("ReadyOne"), after suffering repetitive trauma injuries to her hands, wrists, and other parts of her body. (App. A-3-5). On May 21, 2014, ReadyOne answered and on July 1, 2014, filed its Motion to Compel Arbitration and Stay Proceedings Pending Arbitration ("Motion to Compel Arbitration"), contending the parties had entered into a valid and enforceable agreement to arbitrate the claims that are the subject of Lopez's suit. (App. A-3-5). After hearing, the 346th Judicial District Court denied ReadyOne's Motion to Compel Arbitration by order signed March 17, 2015 (App. A-1).

ReadyOne appealed pursuant to Section 51.016

of the Texas Civil Practices and Remedies Code (permitting interlocutory appeal from the denial of a motion to compel arbitration). (App. A-3). On April 25, 2018, the Eighth District Court of Appeals, El Paso, Texas, reversed the trial court's order and remanded to the trial court with instructions to enter an order granting ReadyOne's Motion to Compel Arbitration in accordance with the court's opinion. *ReadyOne Industries, Inc. v. Lopez,* 551 S.W.3d 305 (Tex. App. – El Paso 2018, pet. denied); App. A-2 (judgment); App. A-3-14 (opinion). On July 31, 2018, the court of appeals denied Lopez's motion for rehearing. (App. A-15). On October 26, 2018, the Supreme Court of Texas denied Lopez's petition for review. (App. A-16-17).

B. Establishing the Court's Jurisdiction of the Question Presented.

This Court has jurisdiction over the question presented by this petition. In concluding the FAA preempted Texas state law that would otherwise render the arbitration provision unenforceable, the court of appeals' opinion states:

> We begin our review by examining whether the FAA is applicable. Citing *Bernhardt v. Polygraphic Company of America,* 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 (1956). Lopez argues that the FAA does not govern the MAA because there is no evidence she was personally engaged in interstate commerce . . .
>
> . . . .

> The instant case is distinguishable from *Bernhardt* because the MAA specifically provides that ReadyOne is engaged in commerce as that term is defined in Section 2 of the Federal Arbitration Act and the "FAA governs all aspects of this Agreement." It is well established that parties may expressly agree to arbitrate under the FAA. *In re Rubiola,* 334 S.W.3d 220, 223 (Tex. 2011); *Lucchese, Inc. v. Solano,* 388 S.W.3d 343, 348 (Tex. App. – El Paso 2012, no pet.). Further, ReadyOne submitted evidence that it was regularly engaged in interstate commerce in that it purchases and receives goods and services from outside the state of Texas and it manufactures goods that are shipped and used outside of the state. We conclude that the FAA applies to the MAA.

See App. A-9-10. Lopez made the argument to the trial court, the court of appeals, and supreme court that she makes in this petition to this Court.

There are no adequate and independent state grounds for the state court decisions sought to be reviewed, because if the FAA does not preempt state law in this case, the arbitration agreement is unenforceable under Texas state law. *See In re Olshan Foundation Repair,* 328 S.W.3d 883, 890-92 (Tex. 2010).

ARGUMENT

I. An arbitration agreement must *in fact* be a "contract evidencing a transaction involving commerce" to fall within coverage of Section 2 of the FAA, which requires evidence that Lopez's employment activities "substantially affect" interstate commerce.

The Texas Supreme Court has held the Federal Arbitration Act (FAA) has preemptive effect over incompatible state law when the parties have agreed the FAA governs as a matter of contract interpretation under state contract law, irrespective of whether the arbitration agreement *in fact* falls within the coverage requirements of Section 2 of the FAA. *See In re Rubiola*, 334 S.W.3d 220, 223 (Tex. 2011); *In re AdvancePCS Health L.P.,* 172 S.W.3d 603, 605-06 & n. 3 (Tex. 2005); *see also ReadyOne Industries, Inc. v. Flores,* 460 S.W.3d 656, 662 (Tex. App. – El Paso 2014, pet. denied) (stating "[i]t is well established that parties may expressly agree to arbitrate under the FAA" and concluding FAA therefore has preemptive effect over Texas law (citing *Rubiola*).

However, the question of what law the parties may have agreed to govern as a matter of *contract interpretation* under state contract law is not the same as whether a case *in fact* falls within coverage of Section 2 of the FAA, which only then preempts incompatible state law by virtue of the Supremacy Clause.

This Court has stated for the FAA to have preemptive effect, a "contract evidencing a transaction involving commerce" must *in fact* involve interstate commerce to fall within coverage of the FAA. *See Allied-Bruce Terminix Co. v. Dobson,* 513 U.S. 265, 279-83, 115 S.Ct. 834, 843-43, 130 L.Ed. 2d 753 (1995) ("[f]or these reasons, we accept the 'commerce in fact' interpretation, reading the [FAA's] language as insisting that the 'transaction' in fact 'involv[e]' interstate commerce, even if the parties did not contemplate an interstate commerce connection"); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S.395, 405, 87 S.Ct. 1801, 1806-07, 18 L.Ed. 2d 1270 (1967) (". . it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty'")(citation omitted); *Southland Corp. v. Keating,* 465 U.S. 1, 14-15, 104 S.Ct. 852, 860, 79 L.Ed. 2d 1 (1984) (". . . [w]e therefore view the 'involving commerce' requirement in § 2, not as an inexplicable limitation on the power of the federal courts, but as a necessary qualification on a statute intended to apply in state and federal courts.").

This Court has also noted "[t]he FAA contains no express provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *See Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 477, 109 S.Ct. 1248, 1255, 103 L.Ed. 2d 488 (1989), citing *Bernhardt v. Polygraphic Co.,* 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 (1956) (upholding application of state law to arbitration provision in

contract not covered by FAA)); *see also Gregory v. Ashcroft,* 501 U.S. 452, 460, 111 S.Ct. 2395, 2400, 2403, 115 L.Ed. 2d 410 (1991) (federal statutes that are ambiguous are not read to displace state law and courts must be "absolutely certain" Congress intended federal preemption of state law "in areas traditionally regulated by the States").

Section 2 of the FAA provides:

> [a] written provision in any maritime transaction or a *contract evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole, or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). Thus, for the FAA to preempt state law, there must exist (1) a written provision in a contract (2) evidencing a transaction involving commerce. The "transaction" limitation of the FAA is not found in other commerce clause legislation, and is an additional limitation found in the FAA.

In *Bernhardt,* the Court concluded the arbitration provision contained in an employment agreement did not fall within coverage of Section 2 of the FAA and so did not preempt Vermont state law that rendered the provision unenforceable:

> Section 2 of [the FAA] makes 'valid, irrevocable, and enforceable' provisions for arbitration in certain classes of contracts . . . [s]ection 2 makes 'valid, irrevocable, and enforceable' only two types of contracts: those relating to a maritime transaction and those involving commerce. No maritime transaction is involved here. Nor does this contract evidence 'a transaction involving commerce' within the meaning of s 2 of the Act. There is no showing that petitioner while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions.

Bernhardt, 350 U.S. at 200-01, 76 S.Ct. at 274-75 (underline added) (footnotes omitted). The Court concluded "[s]ince no transaction involving commerce appears to be involved here, we do not reach the further question whether in any event petitioner would be included in 'any other class of workers' within the exceptions of [section] 1 of the Act." *Id.* at fn. 3. The Court did not look to the interstate

activities of the employer, but looked to whether the *employee,* Mr. Bernhardt, was engaged in interstate commerce "while performing his duties under the employment contract." *See Bernhardt,* 350 U.S. at 200-01, 76 S.Ct. at 274-75; *compare with Dobson,* 513 U.S. at 276-77, 115 S.Ct. at 840-41 (in interpreting "involving commerce" of FAA, Supreme Court noted "*Bernhardt* does not require us to narrow the scope of the word 'involving.' And, we conclude that the word 'involving,' like 'affecting,' signals an intent to exercise Congress' commerce power to the full.").

Bernhardt and *Dobson* must also be read in view of the Court's decision in *United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed. 2d 626 (1995), which suggests that even under the fullest reach of the commerce clause, ReadyOne must show that while performing her duties, Lopez's activities "substantially affect" interstate commerce. *See Lopez,* 514 U.S. at 558, 115 S.Ct. at 1624 (in upholding constitutional challenge to federal act that prohibited possession of a firearm in designated school zones, Court noted three areas of regulation under the commerce clause: (1) regulation of use of "channels of interstate commerce"; (2) regulation of "instrumentalities of commerce" or persons or things in interstate commerce, and (3) other activities having a "substantial relation to interstate commerce").

ReadyOne failed to show the arbitration provision is a contract "evidencing a transaction involving commerce" as the Court has interpreted

those terms under the commerce clause and Section 2 of the FAA. *See Lopez,* 514 U.S. at 558, 115 S.Ct. at 1624; *Bernhardt*, 350 U.S. at 200-01, 76 S.Ct. at 274-75. If the arbitration agreement in Mr. Bernhardt's employment contract is not a "contract evidencing a transaction involving commerce" under the FAA – which involved a New York resident who entered into an employment agreement with a New York corporation in New York, then moved to Vermont and worked as a superintendent of the corporation's lithograph plant in Vermont -- then the arbitration provision as part of Lopez's at-will employment with ReadyOne is not a "contract evidencing a transaction involving commerce" under the FAA.

Since the FAA does not preempt state law, Texas law is not displaced and the arbitration provision is unenforceable under Texas law. *See In re Olshan Foundation Repair,* 328 S.W.3d at 890-92 (as to arbitration agreement where only TAA applied, "[b]ecause the TAA would render the [ ] arbitration agreement unenforceable [under § 171.002(a)(2) and (b)] . . . the trial court correctly denied Olshan's plea in abatement, seeking to compel arbitration . . . ").

II. Alternatively, in view of *Lopez,* the Court should reconsider its interpretation of section 2 of the FAA in *Southland* and *Dobson* and conclude the FAA does not apply in this case.

For reasons noted above, the FAA does not preempt state law in this case and the arbitration

agreement is unenforceable under Texas law. In the event this Court conclude otherwise, Lopez alternatively requests the Court reconsider its interpretation of "a contract evidencing a transaction involving commerce" in section 2 of the FAA, and conclude the FAA does not preempt state law in this case because there is no evidence that in performing her employment duties, Lopez's activities "substantially affect" interstate commerce. *See Lopez,* 514 U.S. at 558, 115 S.Ct. at 1624; *Bernhardt*, 350 U.S. at 200-01, 76 S.Ct. at 274-75. *see also* 28 U.S.C. § 1257(2); *Bailey v. Anderson,* 326 U.S. 203, 207, 66 S.Ct. 66, 68, 90 L.Ed. 3 (1945).

CONCLUSION AND PRAYER

The Court should grant the petition for a writ of certiorari to the Texas Supreme Court and reverse the decision of the court of appeals and affirm the trial court's order denying the motion to compel arbitration.

Respectfully submitted,

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