NO- 22-758

IN THE SUPREME COURT OF THE

UNITED STATES

DR. APARNA VASHISHT-ROTA, an individual, and
AUGUST EDUCATION GROUP LLC

Petitioner,

v.

HOWELL MANAGEMENT SERVICES,

Respondents.

On Petition for Rehearing to the

United States Supreme Court

DR. APARNA VASHISHT-ROTA
PETITION FOR REHEARING

Pro Se Petitioner
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San Diego, California 92129
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TABLE OF CONTENTS

TABLE OF CITED AUTHORITES

PETITION FOR A REHEARING

Petitioner Aparna Vashisht-Rota respectfully requests the issuance of a writ of certiorari to review the judgment of the Utah Court of Appeals.

DECISION BELOW

The SCOTUS denied Cert on April 17, 2023.

JURISDICTION

The Court of Appeals of Utah entered judgment on November 1, 2022. This Court's jurisdiction is invoked under 28 U.S.C. §1257

STATE RULES

QUESTION PRESENTED

1. Whether §925 (B) makes the Utah jurisdiction voidable by a primarily California resident that works and lives in California when 100% of the work and events took place in California.

Pursuant to Rule 44, Petitioner moves the Court to consider §925 (b) that she filed in federal Court to void Utah having declared under oath that there are no Utah agreements on July 23, 2019 and she invoked §925 in 2017. She can't be forced to litigate her CA claims in Utah. The parties have the UT agreements for 100% of the work done in California. Plaintiff exercises §925 (b) to use California law for the dispute. With few exceptions not applicable here, California law provides that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Cal. Bus. And Prof. Code § 16600. This provision includes customer non- solicitation agreements. *See Dowell v. Biosense Webster, Inc.*, 179 Cal. App. 4th 564, 575 (2009). To prevent employers from using choice of law provisions in employment contracts to avoid California law, California enacted an anti-waiver statute, effective January 1, 2017, that provides:

An employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would do either of the following:

(1) Require the employee to adjudicate outside of California a claim arising in California.

(2) Deprive the employee of the substantive protection of California law with respect to a controversy arising in California.

California Labor Code § 925.

Agreements:

1. Authorized Representative Agreement dated as of about November 30, 2015;

2. Authorized Representative Agreement dated as of about January 10, 2016;

3. Authorized Representative Agreement dated as of about August 3, 2016;

4. Authorized Representative Agreement dated as of about April 24, 2017; (Void Utah)

5. Authorized Representative Agreement dated as of about May 5, 2017. (Void Utah)

Court to Void: The panel held that § 1404(a) and *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), did not broadly preempt all state laws controlling how parties may agree to or void a forum-selection clause. Using the factors in *C.H. Robinson Worldwide, Inc. v. Traffic Tech.*, CIVIL 19-902 (MJD/DTS) (D. Minn. Sep. 22, 2021), 1) choice of law; 2) whether §925 applies to Plaintiff's complaint; 3) 3. Whether Contracts are Enforceable Under California Law; 4. Application of California Law Does Not Violate Due Process.

1) Choice of law: A federal court sitting in diversity applies the choice of law rules of the forum state. *Highwoods Props., Inc. v. Exec. Risk Indem., Inc.*, 407

F.3d 917, 920 (8th Cir. 2005). Minnesota's choice of law principles therefore control. Under Minnesota law, courts generally honor the parties' contractual choice of law provisions, so long as the parties are acting in good faith and without the intent to evade the law. *Menzies Aviation (USA), Inc. v. Wilcox*, 978 F. Supp.2d 983, 996 (D. Minn. 2013) (citing *Combined Ins. Co. of Am. v. Bode*, 247 Minn. 458, 77 N.W.2d 533, 536 (1956) and *Milliken & Co. v. Eagle Packaging Co.*, 295 N.W.2d 377, 380, n.1 (Minn. 1980)); *Hagstrom v. Am. Circuit Breaker Corp.*, 518 N.W.2d 46, 48 (Minn. Ct. App. 1994)). "However, parties do not have unchecked power to choose their own law, particularly where the State has 'expressed an intent to protect its citizens with its own laws by voiding . . . choice of law provisions. . . "*Hedding o/b/o Hedding Sales & Serv. v. Pneu Fast Co.*, 18-cv-1233, 2019 WL 79006 at *3 (D. Minn. Jan. 2, 2019) (quoting *Banbury v. Omnitrition Intern., Inc.*, 533 N.W.2d 876, 880 (Minn. Ct. App. 1995)). Accordingly, "the law of the state chosen by the parties will be applied unless to do so 'would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issues. . . '" *Id.*

To assist in determining whether to enforce a choice of law provision over an anti-waiver statute, the Eighth Circuit cited with approval a four-factor test used by the Sixth Circuit in *Tele-Save Merchandising Co. v. Consumers Distributing Co.*, 814 F.2d 1120 (6th Cir. 1987). *Modern Computer Systems v. Modern Banking Systems, Inc.*, 871 F.2d 734, 738 (8th Cir. 1989) (en banc). These factors consider 1) whether the parties agreed in advice to the law to be applied in future disputes; 2) whether the contacts between the parties were fairly evenly divided between the state selected in the contract and the state that has enacted

the anti- waiver statute; 3) the parties' relative levels of bargaining power; and 4) whether application of the law chosen in the contract is repugnant to the public policy of the state that has enacted the anti-waiver statute. *Id.;* see also *JRT, Inc. v. TCBY Systems, Inc.*, 52 F.3d 734, 739 (8th Cir. 1995) (noting that the Eighth Circuit adopted *Tele-Save in Modern Computer*); *Banek Inc. v. Yogurt Ventures U.S.A.*, 6 F.3d 357, 360 (6th Cir. 1993) (noting the determination of the applicability of an anti-waiver statute is the first of three separate, sequential questions).

As to the first factor, there is no dispute that the parties entered into the first 3 agreements. The last two Utah agreements are disputed. The Utah agreements contain a mandatory Utah forum.

As to the division of contacts, 100% of the work was done in California. The parties met in CA. As to the division of contacts between the parties, the Court looks to the parties' contacts between the two potential forum states. *Modern Computer*, 871 F.2d at 739. Plaintiff lives and works in California and the division of contacts weighs in favor of California.

As to unequal bargaining power, Petitioner is a new entrant in a niche market. Everyone has been paid from her work except her. Petitioner was offered an adhesion contract, take it or leave it, and could not negotiate the rates. A contract of adhesion – a take it or leave it form contract between parties of unequal bargaining power -would likely not be enforced under

Minnesota law. *Menzies Aviation (USA), Inc. v. Wilcox,* 978 F. Supp. 2d 983, 997 (D. Minn. 2013) (citing Cell v. Moore & Schley Sec. Corp., 449 N.W.2d 144, 147 (Minn. 1989). Accordingly, this factor weighs in favor of applying California law.

Finally, the Court considers whether California public policy overrides the choice of law provision. California law clearly evinces a public policy against restrictive covenants in employment agreements. Section 16600 *Dowell*, 179 Cal. App. 4th at 575. California Labor Code § 925 was enacted as further protection of California citizens by eliminating an employer's ability to use a choice of law provision in order to designate a state with more favorable non-compete laws.

Because Minnesota law also disfavors non-compete agreements, the Court finds that application of California state law is not repugnant to Minnesota's public policy concerning such agreements. See *Matson Logistics, LLC v. Smiens*, Civil No. 12-400, 2012 WL 2005607, at *3 (D. Minn. June 5, 2012) (noting that Minnesota law disfavors non-compete agreements). Based on the above, the Court finds that application of California's anti-waiver statute would be appropriate under the facts presented.

2) Whether §925 applies to Plaintiff's complaint;

Next, the Court must determine whether the California anti-waiver statute applies to the claims asserted

against the individual defendants.

As the statutory language makes clear, § 925 applies to an employee who primarily resides and works in California; to controversies that arise in California; and to a contract entered into, modified or extended on or after January 1, 2017.

"A claim arises in any district in which a substantial part of the acts, events, or omissions occurred that gave rise to the claim." *Decker Coal Co. v. Commonwealth Edison Co.,* 805 F.2d 834, 842 (9th Cir. 1986). For a claim based on breach of contract, the claim arises in the place of intended performance rather than the place of repudiation. Id. Here, the individual defendants were hired in California and lived and worked in California during their entire employment with CHR. Accordingly, the Court finds that the claims asserted against the individual defendants arose in California. Cf. *Bromlow v. D & M Carriers LLC*, 438 F. Supp.3d 1021, 1030 (N. 22 D. Cal. 2020) (finding § 925 does not apply when the employee did not live or work in California).

As noted, Plaintiff lives in California and the agreements are April and May 2017. She meets this factor.

3) Whether Contracts are Enforceable Under California Law;

Alleged Utah Agreements:

2. **Non-Solicitation and Non-Competition.**

2.1. Non-Solicitation of Clients/Customers. For the duration of this agreement and for twelve (12)

months thereafter, irrespective of whether this agreement is terminated voluntarily or involuntarily, for any reason or no reason, Representative agrees not to, directly or indirectly, solicit, accept business from, or perform services for any HMS customer or client, encourage any customer or client of HMS to cease doing business with HMS or to engage in business with any entity or individual competitive with HMS, or otherwise interfere with any of HMS's client and customer relationships. HMS customers and clients include both individuals seeking placement at universities or colleges in the U.S.A. as well as HMS' college and university partners.

2.2. Non-Solicitation of Vendors and Employees. For the duration of this agreement and for twelve (12) months thereafter, irrespective of whether this agreement is terminated voluntarily or involuntarily, for any reason or no reason, Representative agrees not to solicit, divert or induce, directly or indirectly, any of HMS' contractors, vendors, or employees to terminate any relationship with HMS.

2.3. Restrictions Reasonable. Representative and HMS agree that the restrictive covenants provided herein are reasonable and necessary for the protection of HMS' business, goodwill, confidential and proprietary information. If any of the provisions of this Section 2 are held to be unenforceable, the remaining provisions shall nevertheless remain enforceable, and the court making such determination shall modify, among other things, the scope, duration, or geographic area of this Section to preserve the enforceability hereof to the maximum extent permitted by law.

California Law: California has ruled that one-year post employment covenants are unenforceable time and again. *AMN Healthcare, Inc. v. Aya Healthcare*

Services, Inc., a California appellate court invalidated a post-employee non-solicitation provision on the grounds that it restrained trade in violation of Section 16600. 28 Cal. App. 5th 923 (2018). *Edwards v. Anderson.* In Edwards, the California Supreme Court held any restraint on a person's ability to engage in their profession is impermissible, even a reasonable or narrow one. 44 Cal. 4th 937 (2008). *Barker v. Insight Global, LLC,* a federal district court in the Northern District of California similarly held a provision restricting a regional director from soliciting employees or contractors during his employment and one year thereafter was unenforceable. 2019 WL 176260 (N.D. Cal. Jan. 11, 2019). The court held it was "convinced by the reasoning in *AMN* that California law is properly interpreted post- Edwards to invalidate employee non-solicitation provisions." California Law does not allow any trade restrictions.

Utah Law. "In *Tahitian Noni International v. Dean,* the US District Court for the District of Utah found the geographical scope of a non- compete between a multilevel marketing company and its employee unreasonable where the provision barred the employee from working for any other network marketing companies in the world for a period of three years. The court looked at the geographic and subject scope in connection with the time limitations and found that the three-year restriction was particularly unreasonable because of the nature of the marketing industry in which individuals derive income from other salespeople they recruit. Over three years, the former employee would lose all contacts because he was restricted from the entire industry globally and his former salespeople would be forced to sign contracts

with other individuals. (No. 2:09-CV-51, 2009 WL 197525, at * 3,*4 (D. Utah Jan. 26, 2009).)" unenforceable.

The Court finds that these non-solicitation clauses are very broad. The clauses are not limited to the protection of confidential information and together operate to restrict the individual defendants from contacting any CHR customer, vendor, partner or carrier. As such, the non-solicitation clauses unreasonably restrict the individual defendants' ability to engage in their lawful profession. Accordingly, the Court finds the non-solicitation clauses are unenforceable under California law. *C.H. Robinson Worldwide, Inc. v. Traffic Tech.*, CIVIL 19-902 (MJD/DTS) (D. Minn. Sep. 22, 2021),

4. Application of California Law Does Not Violate Due Process

"The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996) (finding "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasor's lawful conduct in other States."); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 409 (2003) (finding $145 million punitive damages award under Utah law violated Due Process as award was based in part on out-of-state conduct that was lawful where it occurred).

Further, § 925 does not interfere with CHR's ability to manage its workforce – it is free to hire employees of its choice, open offices of its choice and make sales and profits in California. The only restriction concerns how post-employment activities are governed for employees

that live and work in California, and the Court finds this is not a burden on interstate commerce that outweighs California's strong, legitimate interest in regulating the employment of its citizens. See *Application Group, Inc. v. Hunter Group*, 61 Cal. App. 4th 881, 900 (Cal. Ct. App. 1998) (finding no reason why California employee's interests should not be deemed paramount to the competitive business interests of out-of-state as well as in-state employers). In Utah, the trial and Appellate over-sanctioned her without a hearing.

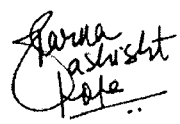
The Court finds that § 925 regulates evenhandedly. If CHR hires employees in California, it is subject to the laws of California just like every other employer that employs individuals in California. See *Yoder v. Western Express, Inc.*, 181 F. Supp.3d 704 (C.D. Cal. 2015) (finding application of California's wage and hour laws would not violate dormant Commerce Clause); *Waguespack v. Medtronic, Inc.*, 185 F. Supp.3d 916, 927 (M.D. La. 2016) (finding Louisiana law that prohibits forum selection and choice of law clauses in employment contracts, unless the clauses are expressly, knowingly and voluntarily entered into and ratified after the occurrence of injury, did not violate dormant Commerce Clause because any burden on Defendant was incidental and because Louisiana law effectuated a legitimate local interest). Because Section 925 does not discriminate between out-of-state employers and in-state employer, it must be upheld unless the burden imposed on commerce is clearly excessive in relation to the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This requires the Court to balance California's public interest against any incidental burdens on interstate commerce. *Id.*

As mentioned, none of the work was in Utah and HMS met Plaintiff in California. Under 9 U.S.C. Code §205, 9 U.S. Code § 205 - Removal of cases from State courts, Where the subject matter of an action or proceeding pending in a state court [...] For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed. Using §925 b, Plaintiff moves the Court to void Utah forum. In doing so, it must allow prior two cases for wages and harassment to proceed under the California agreements or strike Utah from the alleged Utah agreements and allow all claims to continue in California. Prior §1404 (a) did not factor §925 and there *Howmedica Osteonics Corp., Petitioner v. DePuy Synthes Sales, Inc.*, et al., in which the California court refused to enforce a forum selection clause based on §925.

The third case was filed before the district court in Utah ruled on September 2, 2020 but Utah does not have jurisdiction as of Dkt. 80 Third Amended Complaint Grant on November 30, 2020. Case 3:20-cv-00321-RBM-KSC Document 126 Filed 11/30/20 PageID.7205 Page 1 of 2. HMS failed to timely appeal that Order. "And the district court did not lose jurisdiction after the Texas Supreme Court denied Miller's petitions. See *Exxon Mobil*, 544 U.S. at 292 ("[N]either Rooker nor Feldman supports the notion that properly invoked concurrent jurisdiction vanishes if a state court reaches judgment on the same or related question while the case remains sub judice in a federal court."); id. at 294 (noting *Rooker-Feldman* "did not emerge to vanquish jurisdiction after *ExxonMobil* prevailed in the Delaware courts"), *Dunn v. Miller*, 2022.

CONCLUSION

Petitioner did not have counsel during the contract negotiations; 100% of the events took place in California; the alleged Utah agreements are April 24th, 2017 and May 5th, 2017. She can void the agreements with an out of state forum for litigating 100% California work. Petitioner has no connection to Utah. *C.H. Robinson Worldwide, Inc. v. Traffic Tech.*, CIVIL 19-902 (MJD/DTS) (D. Minn. Sep. 22, 2021) granted summary judgment in favor of the fact that covenants such as Utah forum aren't enforceable as a matter of law. Utah judgements are void due to preclusive effect of the statute "whereas this case presents the question of what preclusive effect a statute has before a final judgment is entered." *LGCY Power, LLC v. The Superior Court*, 75 Cal.App.5th 844, 291 Cal. Rptr. 3d 50 (Cal. Ct. App. 2022).



/s/ Aparna Vashisht-Rota

Pro Se Petitioner
12396 Dormouse Road,
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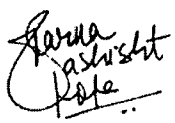
(858) 348-7068

April 17, 2023

Certificate of Compliance

I hereby certify that: This brief complies with the word limits set forth in Supreme Court Rule 33.1, because this brief contains 2,950 words, excluding the parts of the brief exempted by United States' Supreme Court R. 33.

DATED this April 17, 2023



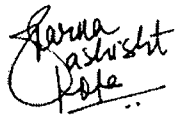
/s/ Aparna Vashisht-Rota

Certificate of Good Faith

Petitioner, relying on the cases cited and others similarly situated, affirms that this Petition is brought in good faith, after careful due diligence, and that the instant petition is grounded in established and recognized legal precedent.

Petitioner, Dr. Aparna Vashisht-Rota, hereby certifies that this Petition for Rehearing is presented in good faith, and that the Petition is not for the purpose of delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

DATED AND SIGNED: April 17, 2023



/s/ Aparna Vashisht-Rota

Certificate of Service

This is to certify that on the April 17, 2023, I caused the corrected Petition for Rehearing of the *Writ of Certiorari of Petitioner Aparna Vashisht Rota* to be served via email on:

Mr. Jeff Shields

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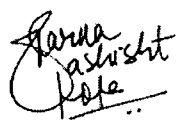
Attorneys for Howell Management Services, LLC and Chris Howell

DATED this April 17, 2023



/s/ Aparna Vashisht-Rota

No. 22-758

IN THE SUPREME COURT OF THE UNITED STATES

Dr. Aparna Vashisht-Rota, an individual; &
August Education Group, LLC

_____ — PETITIONER
(Your Name)

VS.

Howell Management Services — RESPONDENT

PROOF OF SERVICE

I, Dr. Aparna Vashisht-Rota, do swear or declare that as required by Supreme Court Rule 29, I have served the Petition for Rehearing under Rule 44 on each party to the above proceeding or that party's counsel, and on every other person required to be served, by email to on April 18th, 2023 and mail at the address below.

Email. Jshields@rqn.com
Attorneys for Howell Management Services, LLC

Howell Management Services/Jeff Shields
PO Box 45385
Salt Lake City UT 84145-0385

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 18th, 2023

Dr. Aparna Vashisht-Rota
(Signature)

State of California

LABOR CODE

Section 925

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925. (a) An employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would do either of the following:

(1) Require the employee to adjudicate outside of California a claim arising in California.

(2) Deprive the employee of the substantive protection of California law with respect to a controversy arising in California.

(b) Any provision of a contract that violates subdivision (a) is voidable by the employee, and if a provision is rendered void at the request of the employee, the matter shall be adjudicated in California and California law shall govern the dispute.

(c) In addition to injunctive relief and any other remedies available, a court may award an employee who is enforcing his or her rights under this section reasonable attorney's fees.

(d) For purposes of this section, adjudication includes litigation and arbitration.

(e) This section shall not apply to a contract with an employee who is in fact individually represented by legal counsel in negotiating the terms of an agreement to designate either the venue or forum in which a controversy arising from the employment contract may be adjudicated or the choice of law to be applied.

(f) This section shall apply to a contract entered into, modified, or extended on or after January 1, 2017.

(Added by Stats. 2016, Ch. 632, Sec. 1. (SB 1241) Effective January 1, 2017.)