

No. 17-254

IN THE
Supreme Court of the United States

PRUDENTIAL OVERALL SUPPLY,

Petitioner,

v.

ROBERTO BETANCOURT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA
COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

REPLY BRIEF FOR PETITIONER

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Respondent does not dispute that the sweeping *Betancourt* rule of the Court of Appeal below invalidates millions of employment arbitration agreements in California in cases filed under PAGA, and that PAGA claim filings have skyrocketed in recent years. Pet. 21-23.

Respondent offers nothing to dispute Prudential's showing that the Court of Appeal's *Betancourt* rule violates FAA § 2's plain text. Knowing the *Betancourt* rule cannot survive a decision on the merits by this Court, Respondent instead fabricates erroneous procedural arguments to avoid a decision on the merits. Respondent's arguments are meritless. This case squarely presents the FAA preemption issue. The Court of Appeal flouted the FAA and ignored this Court's prior decisions by creating a rule that PAGA claims cannot be arbitrated under a pre-dispute arbitration agreement. Respondent fails to justify allowing the important FAA preemption issue that the *Betancourt* rule presents to continue to go unresolved.

A. Respondent's Presentment Argument Is Meritless.

Respondent's presentment argument (Resp't Opp. 10-17) is meritless. Throughout this lawsuit, Prudential has cited and relied upon this Court's precedents and asserted the federal claim that the FAA preempts any state law rule that attempts to exempt PAGA claims from arbitration and requires the enforcement of the parties' arbitration agreement. *See* Resp't Appx. 12a-14a, 25a-28a, 62a-63a, 66a, 74a-76a. "[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 330-31 (2010) (quoting

Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 379 (1995)); *cf. Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 20-21 (2012) (per curiam) (discussing raising federal issue under the FAA). Prudential properly raised the claim of FAA preemption in the lower courts and thus “possesses the ability to frame the question to be decided in any way [it] chooses, without being limited to the manner in which the question was framed below.” *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

Respondent erroneously contests jurisdiction under 28 U.S.C. § 1257(a). The statute says that the Court may review by writ of certiorari “[f]inal judgments or decrees rendered by the highest court of a State.” This does not mean that the entire state court proceeding must be complete, but only that the federal issue must be finally decided. The seminal case is *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975). In *Cox*, the Court delineated four categories of cases “in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts.” *Id.* at. 477. The fourth category was described as follows:

Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the

relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Cox Broad. Corp. v. Cohn, 420 U.S. 469, 482–83 (1975). This case reasonably fits into all of the *Cox* categories, but the Court’s precedent has applied the fourth category. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984) (applying the fourth *Cox* category to review the denial of enforcement of an arbitration contract). As the Court explained:

“The judgment of the California Supreme Court with respect to this claim is reviewable under *Cox Broadcasting*, *supra*. 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 statute does not conflict with the Federal Arbitration Act. *Id.*, at 485, 95 S.Ct., at 1041. On the other hand, reversal of a state court judgment in this setting will terminate litigation of the merits of this dispute. Finally, the failure to accord immediate review of the decision of the California Supreme Court might ‘seriously erode federal policy.’” *Southland Corp. v. Keating*, 465 U.S. 1, 6-7 (1984).

Respondent's attempt to distinguish *Southland* is unavailing. In *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 467 (2015), the Court addressed a denial of a Petition to Compel Arbitration following the California Supreme Court's denial of review. Clearly, California state appellate court refusals to enforce arbitration agreements, as required by the FAA, are the type of judgment this Court considers sufficient to establish jurisdiction. California's Supreme Court now has twice refused to correct two separate Courts of Appeal that have defied this Court's precedents by holding that PAGA claims are exempt from arbitration based on the fiction of State consent being required. Pet'r Appendix B; *Tanguilig v. Bloomingdales*, 5 Cal. App. 5th 665, 677-678 (2016) (*review denied* March 1, 2017); *see also*, *Richard Esparza v. KS Industries, L.P.*, No. F072597, 2017 WL 3276363, at *1 (Cal. Ct App. Aug. 2, 2017) ("The State of California is not a party to the agreement and, thus, [PAGA] claims brought by it or on its behalf are not subject to arbitration.").

Respondent's argument that Prudential did not raise the federal issue of FAA preemption and the conflict between this Court's precedents and the type of overly broad rule exempting PAGA claims from arbitration in all cases involving predispute arbitration agreements is false and is refuted by Respondent's own appendices.

To challenge a state law, "[no] particular form of words or phrases is essential, but only that the claim of invalidity on the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 85 n.9 (1980) (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)). Proper presentment occurs under a wide variety of circumstances. *See, e.g., Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm’n*, 461 U.S. 375, 382 n.6 (1983) (preemption argument raised with state supreme court even though done “half-heartedly”); *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000). Here, Prudential prominently raised the FAA issue at every stage of the lower court proceedings. Resp’t Appx. 4a, 11a-16a, 18a-19a, 25a-28a, 29a-32a, 54a-59a, 62a, 66a, 74a-76a.

Prudential fairly raised the claim of FAA preemption with the California Supreme Court. Resp’t Appx. 62a, 66a, 74a-76a. That court simply passed on review. Respondent’s reliance upon *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) is misplaced, because in that case, petitioner did not present his case to the state supreme court as one arising under federal law. “Petitioner’s brief in the State Supreme Court did not properly present his claim as one arising under federal law. In the relevant argument, he did not cite the Constitution or even any cases directly construing it, much less any of this Court’s cases.” *Howell v. Mississippi*, 543 U.S. 440, 443 (2005). In this case, Petitioner presented the issues regarding arbitrability of the PAGA claims as arising under federal law from the very beginning, in the Petition to Compel Arbitration itself, and cited this Court’s cases in every pleading filed since then, including in the Petition for Review filed with the California Supreme Court.

Underlying much of Respondent’s opposition is the suggestion that this case is not a good vehicle because

it arises from a state court. But that has never been an obstacle to this Court's review. On the contrary, because "[s]tate courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act", "[i]t is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift, supra*, 568 U.S. at 17-18. This Court has made clear that when it "has fulfilled its duty to interpret" the FAA, "a state court may not contradict or fail to implement the rule so established." *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531 (2012). The only way for this Court to correct errant state court decisions that violate the FAA and this Court's precedents is to grant review. Indeed, this Court has regularly taken summary action and plenary review of state-court decisions applying the FAA. *Kindred Nursing Ctrs. Ltd.P'ship v. Clark*, 137 S. Ct. 1421 (2017); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Nitro-Lift*, 568 U.S. 17; *Marmet*, 565 U.S. 530; *KPMG LLP v. Cocchi*, 565 U.S. 18 (2011); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (per curiam); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Perry*, 482 U.S. 483; *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

B. Respondent Has No Cogent Response On The Merits

Remarkably, Respondent has almost *nothing* to say on the merits of Prudential's arguments showing the direct conflict between the *Betancourt* rule and the FAA and this Court's precedents. Resp't Opp., 24-25.

Respondent's argument that the *Betancourt* rule is not a sweeping exemption from arbitration of a particular type of claim is refuted by the Court of Appeal opinion itself. The Court of Appeal stated:

Prudential cannot rely on the predispute agreement with Betancourt to compel arbitration. . . . , relying on a predispute agreement with a private party will not suffice to compel arbitration of a PAGA claim.

Pet'r Appendix A at 9a. The Court of Appeal's prohibition on arbitrating PAGA claims in all cases involving a predispute agreement to arbitrate could hardly be clearer.

Respondent directs the Court to *Mohamed v. Uber Technologies, Inc., et al.*, 836 F.3d 1102, 1113-14 (9th Cir. 2016), suggesting that the Ninth Circuit has agreed with the *Betancourt* rationale and arguing that no conflict exists between the federal courts and California on this issue. But that case stands only for the unremarkable proposition that a waiver of the right to pursue a PAGA action will not be enforced under California law as stated by *Iskanian*. This does not change the fact that the Ninth Circuit already rejected the exact rule proffered by the Court of Appeal below in this case. *Valdez v. Terminix Int'l Co. Ltd. P'ship*, 681 F. App'x 592 (9th Cir. 2017). As the Ninth Circuit stated:

Iskanian and *Sakkab* clearly contemplate that an individual employee can pursue a PAGA claim in arbitration, and thus that individual employees can bind the state to an arbitral forum. *** Accordingly, an individual employee,

acting as an agent for the government, can agree to pursue a PAGA claim in arbitration. *Iskanian* does not require that a PAGA claim be pursued in the judicial forum; it holds only that a complete waiver of the right to bring a PAGA claim is invalid.

Valdez, supra, 681 F. App'x at 594 (internal citations omitted, emphasis added). The conflict could hardly be clearer.

Respondent fails to acknowledge, let alone justify, the *Betancourt* rule's prohibition of enforcement of pre-dispute arbitration agreements in all PAGA cases filed and prosecuted solely by the signatory employee against the signatory employer, which contravenes the plain text of FAA § 2: "A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy *thereafter arising* out of such contract * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract * * * 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). By its express terms, the FAA requires the enforcement of both pre-dispute and post-dispute arbitration agreements and mandates that they be treated equally.

Respondent's invocation of *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) misses the mark entirely. In that case, the federal agency was an actual party to the lawsuit against the employer and directly controlled the litigation, so the employee's arbitration agreement with the employer did not bar the government from pursuing

its own action in court. This Court concluded that the EEOC was not required to arbitrate, because the EEOC, not the employee was the actual party to the litigation. *See Preston, supra*, 552 U.S. at 359 (explaining “in *Waffle House* . . . the Court addressed the role of an agency . . . as prosecutor, pursuing an enforcement action in its own name.”). The Court explained that the result would be different if “the EEOC could prosecute its claim only with [the employee’s] consent” or “if its prayer for relief could be dictated by [the employee].” *Waffle House, supra*, 534 U.S. at 291. Here, that very difference is present.

The Court of Appeal’s reasoning here that the State is the real party in the PAGA action and that Betancourt is not a party is in direct contravention of the rationale of *Waffle House*, because here Betancourt is the named party to the lawsuit and he controls the litigation in its entirety.

Respondent has no response to the proposition that once the State fails to pursue a PAGA claim the employee plaintiff who files a civil action under PAGA is the only actual party. *Villacres v. ABM Indus. Inc.*, 189 Cal. App. 4th 562, 592 (2010) (“[Plaintiff] contends the State of California is, as a legal matter, the actual plaintiff here. Not so. The PAGA authorized [the employee] to file this action ‘on behalf of himself . . . and other current and former employees.’”). Betancourt filed the lawsuit; he is thus a party to it and the State is not. State consent is therefore irrelevant.

Nor does Respondent dispute that California law generally allows enforcement of other types of agreements against a private plaintiff, even where that plaintiff filed the action in a private attorney general capacity

authorized by statute, and even if the agreement would not have been enforceable against the State, had the State brought an action. *Net2Phone, Inc. v. Superior Court*, 109 Cal. App. 4th 583, 587-588 (2003) (“[t]he filing of a UCL action by a private plaintiff does not confer on that plaintiff the stature of a prosecuting officer, and the fact that the plaintiff may be acting as a so-called private attorney general is irrelevant for purposes of the issue presented here.”). The inconsistency highlights the suspect nature of the *Betancourt* rule, and warrants this Court’s review. See, e.g., *Kindred, supra*, 137 S.Ct. at 1427; *Imburgia, supra*, 136 S. Ct. at 470-71. Respondent offers no meaningful defense of the Court of Appeal decision, which is plainly incorrect and concocted only to evade FAA preemption. The court below flatly violated the FAA’s mandate that courts must “place [] arbitration contracts on equal footing with all other contracts.” *Id.* at 468 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)); see also *Perry, supra*, 482 U.S. at 492 n. 9.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal, or vacatur for reconsideration in light of *Kindred Nursing Centers, Imburgia*, and *Concepcion*.

Respectfully submitted,

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