No. 11-1377

IN THE

Supreme Court of the United States

NITRO-LIFT TECHNOLOGIES, L.L.C.,

Petitioner,

v.

EDDIE LEE HOWARD and
SHANE D. SCHNEIDER,

Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court has jurisdiction to review a state supreme court decision construing only state law when all parties argued before that court that state law applied to the issues in this case and no party claimed that federal law applied until after the state supreme court ruled based on Oklahoma law.

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INTRODUCTION

This case involves a decision by the Oklahoma Supreme Court construing Oklahoma law. Petitioner would have this Court believe that the Oklahoma Supreme Court ignored the decisions of this Court construing the Federal Arbitration Act ("FAA"). The application of the FAA, however, was not presented to the Oklahoma Supreme Court until after that court had already ruled on the merits based on state law. At every level of this proceeding, Petitioner argued that state law (namely, the Oklahoma Uniform Arbitration Act) applied to the arbitration clause in this case. This Court has no jurisdiction over the petition because no federal law issues were decided below or preserved by the Petitioner for review.

STATEMENT

Petitioner paints a misleading picture for the Court. Eddie Howard and Shane Schneider are not sophisticated professional employees. Respondents are oil field workers. Their primary duties, while employed with Petitioner, were to watch the gauges on a truck in the oil field. Neither employee has a college degree or specialized certificate because their job with Petitioner did not require it. Neither employee received any specialized training or confidential information from Petitioner because their job with the Petitioner did not require it.

Both of the Respondent employees are Oklahoma residents. They both applied for a job at Petitioner's offices in Tishomingo, Oklahoma, and during their employment, they worked primarily in Oklahoma. *See Verified Application for Temporary Restraining Order and Temporary Injunction and Supporting*

Brief and Supporting Affidavits of Eddie Howard at ¶1-8 and Shane Schneider at ¶¶1-8 (October 14, 2010).

Petitioner required its employees to sign a form entitled "Confidentiality/Non-Compete Agreement" ("agreement"*),* which does not reference the FAA, and prohibits the employees: (1) from working for a competitor anywhere in the world for a period of two-years following termination of employment, (2) from soliciting Petitioner's employees and customers for a competitor or supplier, and (3) from loaning money to a business engaged in the same business as Petitioner.[1] The agreement states that Louisiana law applies to the employment relationship and that disputes regarding the agreement must be submitted by employees to arbitration in Houston, Texas, over 300 miles away from Respondents' homes in Oklahoma. The agreement also allows Petitioner to file claims against employees in court. *Application for Temporary Restraining Order, Temporary Injunction and Supporting Brief and Supporting Affidavit of Eddie Howard and Shane Schneider* (October 14, 2010).

Because of a dispute concerning work hours and pay, Respondents quit their jobs with Petitioner and went to work for a competitor who paid overtime.

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[1] Eddie Howard left his employment with Petitioner and when he was re-hired by Petitioner a short time later, he did not sign a new agreement. *Application for Temporary Restraining Order, Temporary Injunction, Supporting Brief, and Supporting Affidavit of Eddie Howard at ¶5.* (October 14, 2010). There is an unresolved issue as to whether an employee is bound by a document signed during a previous term of his employment.

Petitioner filed an arbitration proceeding in Houston, Texas, pursuant to the Commercial Rules of Arbitration of the American Arbitration Association. Respondents dispute the unverified facts alleged by Petitioner, including but not limited to the allegation that it paid all of the arbitration fees. In response, Respondents filed a Petition for Declaratory Judgment and Application for Temporary Restraining Order and Temporary Injunction in the District Court of Johnston County, Oklahoma, seeking to enjoin Petition from proceeding with the arbitration. *Petition for Declaratory Judgment, Application for Temporary Restraining Order and Temporary Injunction and Supporting Brief* (Oct. 14, 2010).

Initially, the District Court granted a temporary restraining order staying the arbitration. After hearing arguments of counsel, the District Court denied the temporary injunction, finding that the noncompete agreement was reasonable and the arbitration agreement was valid under state law. *Order of the District Court of Johnston County, Oklahoma* (Nov. 23, 2010). Respondents appealed to the Oklahoma Supreme Court. The Oklahoma Supreme Court held as a matter of Oklahoma law that the fact that the agreement contained an arbitration clause did not, under Oklahoma's Uniform Arbitration Act, prevent the Oklahoma Supreme Court from reviewing the validity of the agreement, and in doing so, found that the noncompete agreement was void and unenforceable as against the public policy of the State of Oklahoma as articulated by the Oklahoma Legislature in 15 O.S §219A. This holding was premised on the Petitioner's own arguments that the arbitration clause was governed by state law. Because no federal issues were argued, the Oklahoma Su-

preme Court based its ruling on both the effect of the arbitration clause and the underlying agreement on Oklahoma law.

The Oklahoma Supreme Court's ruling that the agreement was void rested on the Oklahoma Legislature's clear declaration of Oklahoma public policy as related to noncompetition and non-solicitation agreements in 15 O.S. § 219A:

> A. A person who makes an agreement with an employer, whether in writing or verbally, not to compete with the employer after the employment relationship has been terminated, shall be permitted to engage in the same business as that conducted by the former employer or in a similar business as that conducted by the former employer as long as the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer.
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> B. Any provision in a contract between an employer and an employee in conflict with the provisions of this section shall be void and unenforceable.

15 O.S. §219A.

REASONS FOR DENYING THE WRIT

I. No Federal Question Is Properly Presented by This Case Because No Issue of Federal Law Was Decided by, or Properly Raised Before, the Oklahoma Supreme Court.

The Petition for Certiorari should be denied because there is no federal question for this Court to review. The Federal Arbitration Act, 9 U.S.C. §1, *et seq*. ("FAA") was not raised by the Petitioner until after the Oklahoma Supreme Court decided the appeal on the merits of the state law issues. Only after the Supreme Court had issued a decision on the merits did the Petitioner, as part of a petition for rehearing, raise the FAA. This Court has stated on numerous occasions that it has no jurisdiction unless a federal question has been both raised and decided in the state court below. *Safeway Stores, Inc., v. Oklahoma Retail Grocers Assn., Inc.*, 360 U.S. 334, 342 at n. 7 (1959) ("The United States Supreme Court will not decide an issue raised for the first time on review of a state court decision). This Court does not review state court decisions in circumstances, like this case, when the federal law was not invoked or briefed by the parties, or addressed by the state court below. "[T]his rule applies whether the state law ground is substantive or procedural." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). Moreover, in a case like the instant case, on direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. *Herndon v. Georgia*, 295 U.S. 441 (1935). ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its

views of federal laws, our review could amount to nothing more than an advisory opinion.") *Herb v. Pitcairn*, 324 U.S. 117 (1945).

In the Oklahoma District Court, Petitioner began by arguing that Oklahoma law, including the Oklahoma Uniform Arbitration Act, 12 O.S. §1851 *et seq.*, and Oklahoma cases construing the Oklahoma statute, applied to the arbitration clause in this case. *See Defendant Nitro-Lift Technologies, L.L.C.'s Brief in Support of its Motion to Dismiss* (Nov. 9, 2012). Petitioner next argued that either the Oklahoma or Louisiana Uniform Arbitration Act, La. Rev. Stat. §9:4201 *et seq*. applied. In the briefing in the District Court, Petitioner argued, "Whether the court applies Oklahoma law or Louisiana law to the issues before it the outcome should be the same." Petitioner cited United States Supreme Court decisions, *only as guidance* in construing the state arbitration acts, stating, "Louisiana courts will look to federal law to interpret the Louisiana Arbitration Law, since it is substantially identical to the UAA." *Defendant Nitro-Lift Technologies, L.L.C.'s Supplemental Brief in Support of its Motion to Dismiss, pp. 1 (Nov. 22, 2010).*[2]

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[2] Petitioner filed three briefs at the District Court level (1) *Nitro-Lift's Response to Application for Temporary Restraining Order and Temporary Injunction and Brief in Support* (Nov. 9, 2010) (2) *Nitro-Lift Technologies, L.L.C.'s Motion to Dismiss and Brief in Support* (Nov. 9, 2010), and (3) *Nitro-Lift Technologies, L.L.C.'s Supplemental Brief in Support of its Motion to Dismiss* (Nov. 22, 2010). Each pleading urged the court to follow Oklahoma or Louisiana law to interpret the arbitration provision.

At the hearing on November 23, 2011, Petitioner again invoked only state law, stating, "We submitted a supplemental brief to you regarding the applicable Louisiana law which is, in essence, identical to Oklahoma law that applies to arbitration." *Transcript of Hearing before the Hon. Robert Highsmith, Johnston County, District Court, State of Oklahoma, pp. 15*, ls. 18-22 (Nov. 23, 2010). In sum, Petitioner's overriding theme in the District Court was that either Oklahoma law or Louisiana law applied to this case.

In the Oklahoma Supreme Court, Petitioner again filed pleadings and briefs asserting that state law applied to the agreement. Up to the moment the Oklahoma Supreme Court issued its decision, Petitioner did not once assert that the FAA applied to the arbitration clause in this case or otherwise seek to invoke federal law as the basis for its assertion that the question whether the agreement was void must be decided in arbitration rather than by the court. Instead, Petitioner consistently argued that the state arbitration laws of Oklahoma or Louisiana required that result. *Nitro-Lift's Response to Petition for Certiorari before the Oklahoma Supreme Court* and *Brief to Show Cause Regarding Application* of 15 O.S. 2001 §219A (Oct. 31, 2011).

As a result of Petitioner's framing of the issue, the Oklahoma Supreme Court decision did not purport to construe the FAA and did not even determine the

proprietary of arbitration under state law.[3] Instead, the Oklahoma Supreme Court reasoned that it did not need to reach that issue because it found that the underlying non-competition covenants "void and unenforceable as against Oklahoma's public policy expressed by the Legislature's enactment of 15 O.S. §219A". *Howard v. Nitro-Lift Tech., L.L.C.*, 273 P.3d 20. Thus, the Oklahoma Supreme Court concluded that determining the validity of the arbitration provision would represent purely "an advisory opinion." *Howard v. Nitro-Lift Tech., L.L.C.*, 273 P.3d 20, 23 at n. 1.

The only arbitration issue raised was whether Oklahoma's Uniform Arbitration Act precluded a state court from determining the validity of the agreement to be arbitrated. *Howard,* 273 P.3d 20, 26 at n. 19. While the Oklahoma Supreme Court considered FAA cases in construing how the Oklahoma Uniform Arbitration Act should be applied, the Oklahoma Supreme Court expressly stated that it was merely considering, not applying or construing, FAA precedent when it determined, based on established Oklahoma precedents, that it would not construe its own Arbitration Act in the same way this Court construed the FAA in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967); *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440 (2006):

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[3] The Court initially retained jurisdiction "[t]o determine whether Oklahoma's public policy prohibited enforcement of an employment agreement providing that arbitration should take place in another jurisdiction with the application of yet a different state's law." *Howard v. Nitro-Lift Tech., L.L.C.*, 273 P.3d 20, 23 at n. 1.

> In reaching our decision today, we consider extant federal and state precedent. Nevertheless, our determination rests squarely within Oklahoma law which provides bona fide, separate, adequate, and independent grounds for our decision. *Michigan v. Long*, 463 U.S. 1032 (1983).

Howard, 273 P.3d 20, 23 at n. 5.

State courts are under no obligation to interpret their own arbitration statutes in the same way this Court has construed the FAA, nor are they foreclosed from applying state arbitration statutes when parties have chosen to rely on them instead of on the FAA. This Court recognized in *Volt Info. Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468 (1988), that parties to an arbitration agreement do not have to use the FAA to carry out agreements to arbitrate and may instead rely on state laws to govern the procedures under which arbitration agreements will be enforced (or not enforced):

> Just as they may limit by contract the issues which they will arbitrate, see *Mitsubishi*, supra at 628, so too may they specify by contract the rules under which that arbitration will be conducted. Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitra-

> tion is stayed where the [FAA] would otherwise permit it to go forward.

Volt Info. Sciences, Inc. v. *Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 477; *see also Mastrobuono* v. *Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 57, (1995) (The FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties).[4]

Thus, the Oklahoma Supreme Court's decision rests solely on state law; therefore, it does not present a federal question or any question within the jurisdiction of this Court. *State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945) ("[since] the [State] Supreme Court did not pass on the question, we may not do so."); *Hill v. California*, 401 U.S. 797, 805-806 (1971); *Crowell v. Randell,* 35 U.S. 368 (1836); *McGoldrick v. Compagnie Generale Transatlantic*, 309 U.S. 430, 434-435 (1940) ("in the

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[4] Petitioner's failure to argue the applicability of the FAA and its reliance on state arbitration laws was not necessarily a mere oversight. Petitioner apparently believes that Respondents are exempt from the FLSA under the Federal Motor Carrier Act as workers employed in connection with interstate operation of motor vehicles. If that were the case, their employment contracts would not be subject to the FAA, which excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §1. This Court held in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001), that this provision "exempts from the FAA . . . contracts of employment of transportation workers." Petitioner's theory that it was not required to pay overtime to Respondents is thus flatly at odds with its belated reliance in this case on the FAA, and consistent with its initial approach of relying solely on state arbitration laws as authority for the enforcement of its arbitration agreement.

exercise of its appellate jurisdiction . . . [i]n cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review.").

The record before this Court shows that the Oklahoma Supreme Court was not called upon to construe or apply federal law until after it already reached its decision on independent state law grounds. Only after receiving an unfavorable opinion did Petitioners decide to try a new tactic and claim that federal law applied to the arbitration clause and that the FAA precluded the Oklahoma courts from addressing the validity of the agreement. In doing so, Petitioner asked the Oklahoma Supreme Court to rule on an issue that Petitioner had not previously briefed or presented to that court or to the trial court.

In Oklahoma, however, a party seeking a rehearing cannot make a new claim if the argument could have been raised before the appeal was resolved. In that regard, the Oklahoma Supreme Court has stated, "[i]n civil cases it is a well recognized rule that questions not advanced on the original hearing will not be considered on petition for rehearing, except in unusual circumstances or where fundamental or jurisdictional error is involved." *Pointer v. Hill*, 536 P.2d 358,361 (Okla. 1975); *see Pirrong v. Pirrong*, 552 P.2d 383 (Okla. 1976) (denying rehearing because the allegation of discrimination was not raised in the original hearing). Furthermore, a petition for rehearing is not granted for presenting points which the "losing party overlooked, misapprehended, or failed to fully address." *Tomahawk Resources, Inc. v.*

Craven, 130 P.3d 222, 225 (Okla. 2005); *see also Adams v. Robertson*, 520 U.S. 83, 86-87 (1997). ("When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented."). The Oklahoma Supreme Court's denial of rehearing did not comment on the federal-law issue Petitioner belatedly sought to raise; thus, it cannot be interpreted as having decided that issue.

II. Even if the FAA Were Implicated, this Court Would Still Have to Remand to the Oklahoma Supreme Court to Determine the Validity of the Arbitration Agreement.

Although Respondents maintain that there is no federal question to support this Court's jurisdiction, as a matter of caution, Respondents must point out that even if the FAA had been properly invoked, the Oklahoma Supreme Court would clearly still have jurisdiction to determine the validity of the arbitration agreement. Under the FAA, 9 U.S.C. §2, arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." "If a party challenges the validity under §2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under §4." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. __, 130 S. Ct. 2772, 2779-2780 (2010).

Arbitration clauses are like any other contract and "may be invalidated by general applicable contract defenses such as fraud, duress, or unconscionability." *Doctors Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996). This is an issue for the court to decide.

Even though parties can delegate to the arbitrator the authority to determine this issue, this Court has clearly stated that "courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e] evidence that they did so." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); *AT & T Technologies, Inc. v. Communication 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.").

Rent-A Center v. Jackson contained specific language delegating to the arbitrator the exclusive authority to resolve any dispute related to the enforceability of the arbitration agreement, 561 U.S. __, 130 S. C. 2772, 2777. Unlike the circumstances in *Rent-A-Center*, the arbitration clause here does not provide that issues of enforceability are to be decided by the arbitrator. Accordingly, because the arbitration clause did not reserve to the arbitrator the issues of enforceability or validity, the enforceability of the arbitration clause is itself subject to judicial review by the Oklahoma Supreme Court.

Respondents argued in the District Court and on appeal that the arbitration agreement itself was unconscionable because of the forum selection clause, the choice of Louisiana law, the unilateral right of Petitioner to file in court as well as the substantial cost involved to Respondents (especially when imposed on hourly workers). Additionally, Eddie Howard's affidavit shows that Petitioner's representative's misrepresented the terms of the Agreement when presented to him during his first term of employment. *See Petition for Declaratory Judgment, Re-*

sponse to Motion to Dismiss, and Verified Application for Temporary Restraining Order and Temporary Injunction and Supporting Brief and Supporting Affidavits of Eddie Howard at ¶1-12 and Shane Schneider at ¶¶1-12 (October 14, 2010).

Without ruling, the Oklahoma Supreme Court recognized that a forum selection cause may be unconscionable and in doing so, stated:

> [A] forum selection clause [in an arbitration agreement] may be so unreasonable that it will be gravely difficult and inconvenient resulting in a party being deprived of a day in court. If so, it could be declared unenforceable.

Howard, 273 P.3d 20, 22 at n. 1, *citing M/S Breman v. Zapata Off-Shore, Co.*, 407 U.S. 1 (1972).

Because the Oklahoma Supreme Court did not reach this issue (determining it was mooted by the substantive ruling), even if the Petitioner were correct, the matter would still have to be remanded to the Oklahoma Supreme Court for a determination on the merits of the validity of the arbitration clause itself because a court cannot conclude that a party truly agreed to arbitrate until it decides whether the agreement is unconscionable or not. The likelihood that the Oklahoma court would hold the arbitration clause unconscionable and would thus reach exactly the same result on remand provides an additional reason why review of the issue posed by the Petitioner (even if it were properly presented) does not rise to

the level of importance necessary to justify granting a writ of certiorari. [6]

Finally, Petitioners are incorrect in asserting that the Oklahoma Supreme Court's decision conflicts with *Marmet v. Health Care Ctr., Inc. v. Brown*, __ U.S. __, 132 S. Ct. 1201. *Marmet* held that if a state law prohibits outright the arbitration of a particular type of claim it is displaced by the FAA. *Id.* at 1203. The Oklahoma Court's decision relies on 15 O.S. §219A, which applies to all contracts. The statute does not single out or treat arbitration clauses differently; it treats an arbitration clause the same as any other contract. Section 219A does not even forbid arbitration of non-competition agreements; it merely declares when a non-competition agreement is or is not valid.

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[6] Moreover, the ultimate conclusion that the noncompete agreement at issue in this case is unenforceable under Oklahoma law, as the Oklahoma Supreme Court held, is so clear that even if that issue were sent to arbitration, any arbitrator who in good faith attempted to follow the law would have to hold the noncompete agreement unenforceable, rendering Petitioner's insistence on conducting an arbitration of the issue in a distant and inconvenient forum still more of a waste of time for all concerned, including this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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