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 Writ of Certiorari to the Supreme Court of the State of Oklahoma

REPLY BRIEF OF PETITIONER

Jay P. Walters
Counsel of Record
Kevin R. Donelson
Kelli M. Masters
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, PC
100 N. Broadway, Suite 1700
Oklahoma City, OK 73102
(405) 232-0621
jwalters@fellerssnider.com

Counsel for Petitioner

August 30, 2012

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

REPLY BRIEF OF PETITIONER

Respondents' Opposition does not suggest that the Supreme Court of Oklahoma's decision is consistent with this Court's longstanding rule that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 445-46 (2006). The state court disregarded the arbitration agreement when it held that Oklahoma law and public policy invalidated the contract as a whole,[1] including the arbitration clause.

After first waiving its right to oppose the Petition, Respondents now argue the federal issue was not fairly raised by Nitro-Lift or resolved by the Oklahoma court. Respondents misstate the record and the decision below. The Oklahoma Supreme Court dispelled most of Respondents' arguments when it stated:

> Nitro-Lift argues that the issue of the validity of the covenants not to compete is for the arbitrator**. In doing so, the employers rely upon United States Supreme Court jurisprudence.**

---

[1] Respondents' waiver argument is curious given the Oklahoma Supreme Court's opinion applying 15 O.S. § 219A was not based upon any arguments made by Respondents. *Okla. Sup. Ct. Order* (October 19, 2011) ("Neither of the parties addressed the effect that 15 O.S. 2001 § 219A . . .might have upon the resolution of the cause."). The Oklahoma Supreme Court *sua sponte* raised the issue. App. 4a n.1, *Howard v. Nitro-Lift Technologies, L.L.C.*, 273 P.3d 20, 26 (Okla. 2011).

App. 13a, 273 P.3d at 26 (emphasis supplied). The premise and holding of the Supreme Court cases cited by Nitro-Lift and discussed by the court involve the preemptive scope of the Federal Arbitration Act ("FAA"). Respondents attempt to recast this statement by the Oklahoma court to suggest that federal authority was cited "*only as guidance*." (Opp. P. 6). However, the lower court's own description of the case shows that it considered the same issue and argument Nitro-Lift raised in the Petition. Respondents' waiver argument is meritless.

I. The Oklahoma Supreme Court's Rejection Of Decades Of Federal Arbitration Jurisprudence Was Fairly Presented Below And Addressed By The State Court.

A federal issue conferring jurisdiction on the Court to review a state court decision under 28 U.S.C. § 1257(a) may arise if it "was either addressed by **or** properly presented to the state court that rendered the decision". *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (citing cases; emphasis supplied). In this case, the Court has jurisdiction because the state court directly addressed the federal issue and Nitro-Lift raised the issue below.

A. The Oklahoma Supreme Court Directly Addressed The Question Presented And Rejected This Court's Federal Arbitration Jurisprudence.

"There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436

(1959). "It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667-68 (1991) (citing cases).

Whether a federal issue was fairly raised in the lower court is a federal question. *Street v. New York*, 394 U.S. 576, 583 (1969). The state court may not evade review by labeling the decision as based on an adequate and independent state ground or by burying the federal issue in its opinion. "[A]mbiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Florida v. Powell*, 130 S. Ct. 1195, 1201 (2010). In *Michigan v. Long,* 463 U.S. 1032, 1040-41 (1983), the Court held that when a state-court decision "fairly appears" to be "interwoven with the federal law," and "when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," the Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it do so."[2]

The Oklahoma Supreme Court here acknowledged Nitro-Lift raised and argued federal authority from FAA arbitration decisions of this Court (App. 13a), and then it proceeded to reject those arguments. The court

---

[2] "[W]hatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.).

discussed that it was rejecting the same case law and authority raised by Nitro-Lift in its Petition. App. 15a. The primary Oklahoma case upon which it relied has since been effectively overruled by this Court's decision in *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. __, 132 S. Ct. 1201 (2012) (per curiam) (summarily reversing enforcement of West Virginia statute barring arbitration in personal injury nursing home cases).

In rejecting application of the FAA and this Court's arbitration decisions, the Oklahoma decision states as follows:

> Most instructive on Nitro-Lift's arguments is *Bruner v. Timberlane Manor Ltd. P'ship,* 2006 OK 90, 155 P.3d 16. *Bruner* contains an exhaustive overview of the United States Supreme Court decisions construing the Federal Arbitration Act (Federal Act), 9 U.S.C. §§ 1, *et seq*. and state arbitration law. [FN20]. The **Supreme Court decisions** discussed therein, and relied upon by Nitro-Lift here, **were found not to inhibit our review of the underlying contract's validity.**[FN21].

App. 15a., 273 P.3d at 26 & nn. 20-21 (court's emphasis). The court's reference to *Bruner* and the accompanying footnotes dispel any notion that the Oklahoma Supreme Court failed to pass on Nitro-Lift's FAA preemption arguments.

In *Bruner,* the Oklahoma Supreme Court stated that the "**dispositive question on appeal is whether the Federal Arbitration Act applies to the nursing home's admission contract.**" 155 P.3d

at 19 (emphasis supplied). There, the court applied the Oklahoma Uniform Arbitration Act (OUAA) and conducted an analysis to determine whether the anti-arbitration provision in Oklahoma's Nursing Home Care Act was preempted by the FAA. Ultimately, the court concluded that the FAA was not applicable, primarily because it found nursing home admission contracts do not involve interstate commerce. *Id.* at pp. 21-31. As a secondary ruling, the *Bruner* court held that even if the nursing home contract did involve interstate commerce, the FAA's mandate (which would otherwise preempt the anti-arbitration act) was overridden by a contrary congressional command allowing states to create appeal procedures for nursing home transfers, 42 U.S.C. § 1396r(c)(2). *Id.* at pp. 31-32.

Of course, in *Marmet*, this Court, in a unanimous, *per curium* opinion, rejected a nearly identical anti-arbitration statute upheld by the West Virginia Supreme Court of Appeals on nearly identical bases as those relied upon in *Bruner*. 132 S. Ct. 1201-03. The only reasonable interpretation of the Oklahoma's court's focused reliance on *Bruner* here is that the court believed *Bruner's* FAA analysis was sufficient to defeat any reliance upon FAA preemption in this case. Merely because the court used the now-overruled decision in *Bruner* as a substitute for a more detailed FAA analysis does not mean that the federal issue addressed in Nitro-Lift's Petition for Certiorari was not fairly raised and addressed in this case.

Lest there be any doubt, in footnote 20 of the Oklahoma Supreme Court's decision here, the court found: "Among the cases discussed [in *Bruner*] are

three Supreme Court cases **on which the employers rely**: *Prima Paint Corp. v. Flood & Conklin Mfg. Co*, 388 U.S. 395 (1967); *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006); and *Southland Corp. v. Keating*, 465 U.S. 1 (1984)." App. 15a n. 20, 273 P.3d at 26 n.20 (emphasis supplied). The court discussed the holding in *Prima Paint*. Each of these cases cited by the court addressed FAA preemption of state law limits on the arbitrability of a particular dispute. *Buckeye Check Cashing*, 546 U.S. at 444-448 ("severability" of contract and arbitration clause is federal substantive law and validity of underlying contract to be decided by arbitrator); *Southland Corp.*, 465 U.S. at 10-14 (FAA is federal substantive law "applicable in state and federal courts;" rejecting view that state law could bar enforcement of FAA even for state-law claims in state court); *Prima Paint,* 388 U.S. at 400-403 ("severability" is not a question of state law). The court in this case (and in *Bruner*) raised and passed on these core federal issues and thereby conferred jurisdiction on this Court.[3]

Further, in footnote 21, the court acknowledged that the FAA preempted and displaced anti-arbitration statutes. App. 15a n. 21, 273 P.3d at 26 n. 21. However, relying on *Bruner*, the court analogized this case to *Bruner* and found that the specific statute addressing "non-competition" agreements governed "over the more general statute favoring arbitration."

---

[3] Where, as here, the state court's decision is preempted by the FAA and this Court's federal authority, simple logic precludes finding an adequate and independent state-law ground based on the very state-law authority that is preempted.

Id. at n. 21. In its motion to reconsider, Nitro-Lift asked the court to clarify whether it was referencing the FAA (which it was discussing at that point in the opinion) as the more general statute or another statute. *Defendant/Appellee Nitro-Lift Technologies, L.L.C.'s Pet. for Clarification And/Or Reh'g* at p. 3 (Dec. 12, 2011). However, the court refused to clarify this hopelessly ambiguous statement.[4]

The state supreme court in this case directly addressed and passed on the federal arbitration issue raised in the Petition and this Court has jurisdiction under 28 U.S.C. § 1257(a). Further, when, as here, the state court's decision relies upon its own cases, which, in turn, rely upon federal authorities, the cases are not being used merely as "guidance" and the state law is "interwoven with federal law" such that the "adequacy and independence of any possible state law ground is not clear from the face of the opinion." *See Pennsylvania v. Labron*, 518 U.S. 938, 941 (1996). In these circumstances, the Court's jurisdiction is "secure." *Id.*

[4] The Supremacy Clause preempts any state attempt to recognize a more specific statute as overriding established federal law. U.S. Const. Art. VI, cl. 2.

B. Nitro-Lift Fairly Raised And Preserved The Federal Issues.

Alternatively, Nitro-Lift fairly raised the federal issues in the lower courts. The Supreme Court of Oklahoma acknowledged as much when it stated that Nitro-Lift raised federal issues relating to the FAA and Supreme Court authority regarding the preemption of state law. App. 13a, 15a & nn. 20,21, 273 P.3d at 26 & nn. 20,21.

To preserve a federal issue,

> "[n]o particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision 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 Shipping Center v. Robins, 447 U.S. 74, 85 n.9 (1980)(quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)); *see also Eddings v. Okla.*, 455 U.S. 104, 113 n.9 (1982) ("jurisdiction does not depend on citation to book and verse.").

Respondents' contention that Nitro-Lift did not raise the federal issue until after the ruling by the Oklahoma Supreme Court is wrong. While Nitro-Lift cited the OUAA and the corresponding Louisiana arbitration act in the lower courts, Respondents' contention that Nitro-Lift only cited federal authority as "guidance" to interpret those statutes is not

supported by the record. Nitro-Lift made alternative arguments under each of these three sources to both the trial court and the state supreme court and specifically addressed the question presented in the Petition. In its first argument in response to Respondents' application for a temporary restraining order and temporary injunction, Nitro-Lift stated as follows:

> Plaintiffs incorrectly state that the validity of the Agreements must be determined as "an initial matter," and that "there is nothing to arbitrate if this Court finds that the non-compete provisions [are] void as a matter of law." In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) and *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the U.S. Supreme Court established three propositions concerning challenges to arbitration agreements. **First, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause alone, the issue of the contract's validity is to be considered by the arbitrator in the first instance. Third, this arbitration law applies in both state and federal courts**. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).
>
> Therefore, challenges to the validity of an entire contract, such as the challenge made by Plaintiffs in the present action, are to be considered by the arbitrator, not the Court. *Prima Paint,* 388 U.S. at 402; *Buckeye Check Cashing*, 546 U.S. at 1208-1209.

Defendant Nitro-Lift Technologies, L.L.C.'s Response to Application for Temporary Restraining Order and Temporary Injunction and Brief in Support, p. 4 (Nov. 9, 2010).

Nitro-Lift raised the same argument in its Motion to Dismiss before the trial court. *Defendant Nitro-Lift Technologies, L.L.C.'s Motion to Dismiss and Brief in Support*, p. 7 (Nov. 9, 2010). The state-court appeal proceeded under the expedited procedures of Okla. Supr. Ct. R. 1.36, which meant the parties' briefs in the trial court served as their briefs on appeal. When the Oklahoma Supreme Court *sua sponte* raised the application of 15 O.S. § 219A and requested briefing, Nitro-Lift addressed that issue and argued again that under *Prima Paint*, *Southland,* and *Buckeye Check Cashing*, these authorities applied in both state and federal courts and the decision was one for the arbitrator and not the court. *Nitro-Lift's Brief to Show Cause Regarding the Application of 15 O.S. 2001 § 219A,* p. 7 (Oct. 31, 2011).

Nitro-Lift repeatedly raised and argued below the very question presented to this Court for resolution. This Court has jurisdiction.

II. Other Issues Which May Require Further Consideration On Remand Are Not An Obstacle To Review.

Respondents contend that potential unconscionability litigation on remand is an obstacle to review. (Opp. pp. 12-13). Respondents also note that there may be an issue as to whether Howard had a second term of employment not covered by the

arbitration agreement. (Opp. p. 2 n. 1). If the potential for additional litigation on remand were an obstacle to review, this Court's certiorari jurisdiction would be uselessly narrow.

The possibility of post-remand validity litigation did not hinder this Court's review in *Perry v. Thomas*, 482 U.S. 483, 492 (1987). In *Perry*, the Court reversed the state court and held the FAA preempted the state statute. The Court declined to review Plaintiff's alternative arguments because they "may be resolved on remand". *Id.* at 492. Likewise, with regard to unconscionability, the court held that the "issue was not decided below . . . and may likewise be considered on remand." *Id.* at n. 9; *see also Doctor's Assocs. v. Casarotto*, 517 U.S. 68 (1996) (court held FAA preempted Montana notice provision notwithstanding contention that one petitioner was not entitled to enforce the arbitration provision); *KPMG LLP v. Cocchi*, 565 U.S. ___, 132 S. Ct. 23 (2011) (summary reversal of state court decision refusing to refer case to arbitration because two claims may not be arbitrable, and remanding to state court to decide the issue).

Respondent cannot prevent review of the facially erroneous decision of the Oklahoma court based upon speculation the court on remand might invalidate the arbitration provision on other grounds.

III. Conclusion

The question presented in the Petition was passed upon by the Oklahoma court and fairly raised by Nitro-Lift. This Court has jurisdiction under 28 U.S.C. § 1257(a).

This case is an ideal candidate for review and summary reversal. The Supreme Court of Oklahoma's repeated holding was extraordinarily broad: **"We determine that the existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement."** App. 6a, 16a, 273 P.3d at pp. 23, 27. (emphasis supplied). The court's decision cites and rejects this Court's FAA jurisprudence in reaching this decision and places great emphasis on its prior decision in *Bruner*, which has been summarily rejected by this Court in *Marmet*. Without corrective action from this Court, the Oklahoma decision will be cited and relied upon by parties to avoid arbitration in a wide variety of cases. The decision – if left unreviewed – will "encourage and reward forum shopping" contrary to the pronounced goals of the FAA. *See Southland*, 465 U.S. at 15; *see, e.g., Rainbow Health Care Ctr. v. Crutcher*, 07-cv-194-IHP, 2008 WL 268321 at *6 (N.D. Okla. Jan. 29, 2008) (rejecting *Bruner's* FAA analysis and enjoining state health care department from enforcing the anti-injunction provision in Oklahoma's Nursing Home Care Act).

The Petition for a Writ of Certiorari should be granted and the decision of the Oklahoma Supreme Court deserves summary reversal.

Respectfully submitted,

Jay P. Walters
Counsel of Record
Kevin R. Donelson
Kelli M. Masters
FELLERS SNIDER BLANKENSHIP BAILEY
& TIPPENS, PC
100 N. Broadway
Suite 1700
Oklahoma City, OK 73102
(405) 232-0621
jwalters@fellerssnider.com

Counsel for Petitioner