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No. 09-

IN THE

Supreme Court of the United States

LOUISIANA SAFETY ASSOCIATION OF TIMBERMEN – SELF INSURERS FUND,

Petitioner,

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The McCarran-Ferguson Act provides that no "Act of Congress" shall preempt "any law enacted by any State for the purpose of regulating the business of insurance," unless the Act of Congress "specifically relates to the business of insurance." 15 U.S.C. § 1012(b), App. 140a. Chapter 2 of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 201-08, App. 141a-142a, which implements the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, does not specifically relate to the business of insurance. The question presented is:

Whether Chapter 2 of the FAA is an "Act of Congress" subject to the anti-preemption provision of the McCarran-Ferguson Act.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Petitioner is the Louisiana Safety Association of Timbermen – Self Insurers Fund (LSAT). LSAT is a self-insurance fund formed and licensed under the laws of Louisiana. It has no parent corporation, and no publicly-held company owns 10 percent or more of LSAT's stock. Respondents are Certain Underwriters at Lloyd's, London; and Safety National Casualty Corporation.

The parties listed above include all the parties to the proceeding in the court of appeals.

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The McCarran-Ferguson Act provides that "[n]o Act of Congress" that does not "specifically relate[] to the business of insurance" shall be construed to preempt any State law enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b), App. 140a. In this case a divided Fifth Circuit, sitting *en banc*, held that Chapter 2 of the Federal Arbitration Act (FAA), which implements the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), is not an "Act of Congress" and therefore is not subject to the McCarran-Ferguson Act's anti-preemption provision. The Fifth Circuit acknowledged that its decision conflicts with the Second Circuit's decision in *Stephens v. American International Insurance Co.*, 66 F.3d 41 (2d Cir. 1995).

The Fifth Circuit's decision requires Louisiana policyholders to arbitrate disputes with foreign insurance companies, notwithstanding a Louisiana statute that invalidates arbitration agreements in insurance contracts. At least 16 States have enacted similar statutes. Certiorari is warranted to resolve the split in the circuits on an important and recurring issue. As the dissenting Fifth Circuit judges noted, "until [this Court] speak[s]," the conflicting lower court decisions "leave the state of the law in [Supremacy] Clause purgatory." App. 84a (quotation and citation omitted). Because this issue is almost always decided either in an unreviewable remand order or in a nonfinal order on arbitrability, this case presents a rare opportunity for the Court to

provide much-needed guidance to the lower courts on this important and recurring issue.

OPINIONS BELOW

The *en banc* opinion of the court of appeals (App. 1a-84a) is reported at 587 F.3d 714. The vacated panel opinion of the court of appeals (App. 85a-108a) is reported at 543 F.3d 744. The relevant orders of the district court (App. 109a-139a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2009. App. 2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1292(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1012(b) of the McCarran-Ferguson Act, Title 15, United States Code, App. 140a, provides, in relevant part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance . . . .

The other relevant provisions of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201-208, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, and the Louisiana Revised

Statutes are reproduced in the Appendix. App. 140a-148a.

STATEMENT OF THE CASE

1. The McCarran-Ferguson Act. Congress enacted the McCarran-Ferguson Act in 1945 in response to this Court's decision in *United States v. South-Eastern Underwriters Association*, which held that the business of insurance is subject to federal regulation under the Commerce Clause. 322 U.S. 533, 552-53 (1944). The McCarran-Ferguson Act restored the "virtually exclusive [regulatory] domain" that the States traditionally had exercised over the insurance industry prior to *South-Eastern Underwriters*. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 538-39 (1978).

The McCarran-Ferguson Act commits the regulation of insurance to state law by providing that any State law enacted for the purpose of regulating insurance will trump, or "reverse preempt," any contrary federal law that does not relate specifically to insurance. 15 U.S.C. § 1012(b), App. 140a.

By establishing a federal policy of deferring to State regulation of insurance matters, the McCarran-Ferguson Act "overturn[s] the normal rules of preemption." *U.S. Dep't of the Treasury v. Fabe*, 508 U.S. 491, 507 (1993). To supersede a State law that was enacted for the purpose of regulating insurance, a federal law must contain a "clear statement" that it is meant to apply to the insurance business. *Id.*; *see also* 15 U.S.C. § 1011, App. 140a ("[S]ilence on the part of Congress shall not be construed to impose any barrier to the regulation . . . of such business by the several States."). The

McCarran-Ferguson Act thus protects state regulation "against inadvertent federal intrusion . . . through enactment of a federal statute that describes an affected activity in broad, general terms, of which the insurance business happens to constitute one part." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 39 (1996).

2. Louisiana's Insurance Arbitration Statute. Louisiana, like other States, has enacted a statute that prohibits the enforcement of arbitration clauses in the context of insurance disputes. Lousiana Revised Statute § 22:868 (formerly designated § 22:629) provides that "[n]o insurance contract delivered or issued for delivery in this state and covering subjects located, resident or to be performed in this state . . . , shall contain any condition, stipulation, or agreement" that "[d]eprive[s] the courts of this state of the jurisdiction of action against the insurer." La. Rev. Stat. § 22:868, App. 148a. The Fifth Circuit has recognized that arbitration clauses in insurance contracts are unenforceable under this provision. *See McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 120 F.3d 583, 586 (5th Cir. 1997).

3. Chapter 2 of the Federal Arbitration Act. In 1925, Congress enacted Chapter 1 of the FAA, which sets forth a federal policy favoring arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985). The FAA is a statute of general applicability; it contains no statement that it is meant to apply to the insurance business. As a result, federal courts consistently have held that, pursuant to the McCarran-Ferguson Act, state laws prohibiting enforcement of arbitration

clauses in insurance contracts are not preempted or otherwise impaired by Chapter 1 of the FAA.[1]

In 1970, Congress amended the FAA by adding Chapter 2, which implements the Convention. *See* Pub. L. No. 91-368, 84 Stat. 692. Article II of the Convention reflects the same policy in favor of arbitration as the original provisions of the FAA. It provides that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them," and that "[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration." Convention, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, art. II, App. 144a. Like Chapter 1 of the FAA, Chapter 2 is a statute of general applicability that contains no statement that it is meant to apply to the insurance business. App. 10a.

4. The Insurance Dispute. Petitioner Lousiana Safety Association of Timbermen – Self-Insurers Fund (LSAT) is a self-insurance fund that provides

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[1] *See, e.g., Am. Bankers Ins. Co. v. Inman*, 436 F.3d 490, 494 (5th Cir. 2006) (addressing § 83-11-109 of the Mississippi Code); *McKnight v. Chicago Title Ins. Co.*, 358 F.3d 854, 859 (11th Cir. 2004) (per curiam) (addressing § 9-9-2(c) of the Georgia Code); *Standard Sec. Life Ins. Co. of New York v. West*, 267 F.3d 821, 823-24 (8th Cir. 2001) (addressing § 435.350 of the Missouri Statutes); *Mut. Reinsurance Bureau v. Great Plains Mut. Ins. Co.*, 969 F.2d 931, 934-35 (10th Cir. 1992) (addressing § 5-401 of the Kansas Statutes).

an approved statutory method by which its member employers may secure their workers' compensation obligations to injured workers under Louisiana law. App. 3a; *see* La. Rev. Stat. § 23:1195.A. Respondent Certain Underwriters at Lloyd's, London (Underwriters) provided excess insurance to LSAT for workers' compensation claims that exceeded the amount of LSAT's self-insurance retention. App. 3a. At least some of the specific excess policies contain arbitration provisions. *Id.* LSAT assigned its rights under those specific excess policies to Safety National Casualty Corporation (Safety National) in a loss portfolio transfer agreement. *Id.* The Underwriters refused to recognize that assignment. *Id.*

Safety National sued the Underwriters in federal district court seeking reimbursement for workers' compensation claims that exceeded the amount of LSAT's self-insurance retention. App. 122a. The Underwriters filed a motion to compel arbitration, which Safety National did not oppose. App. 123a. Later, the Underwriters sought to join LSAT as a party in the district court. *Id.* At the same time, LSAT moved to intervene in the action, and it moved to quash the arbitration. *Id.* LSAT argued that the arbitration clauses in the specific excess policies issued by the Underwriters are unenforceable because of Louisiana's insurance arbitration statute. *Id.*

5. The District Court's Order. The district court, rejecting a magistrate judge's recommendation, granted LSAT's motion to quash arbitration, finding that the arbitration provisions in the specific excess policies were unenforceable

pursuant to Louisiana law. App. 116a. The district court held that Lousiana's insurance arbitration statute regulates the business of insurance, and that because Chapter 2 of the FAA is an "Act of Congress," the Convention "must yield" to the Louisiana statute "by the plain language of the McCarran-Ferguson Act." *Id.*

In reaching this conclusion, the district court relied in part on the Second Circuit's decision in *Stephens v. American International Insurance Co.*, 66 F.3d 41 (2d Cir. 1995), which held that a Kentucky insurance arbitration statute takes precedence over the Convention pursuant to the McCarran-Ferguson Act. App. 117a. The district court concluded that when Congress enacted implementing legislation for the Convention in 1970, "it was aware of the existence of the McCarran-Ferguson Act." App. 118a. The court noted that "[i]f, in the interest of international comity, Congress [had] intended for the Convention to trump application of the McCarran-Ferguson Act, it would have so specified" in Chapter 2 of the FAA. *Id.*

Having noted in its decision that "the issue [wa]s a close one" (App. 117a), the district court later issued an order stating that it had "serious second thoughts" about its ruling on arbitrability (App. 112). After further briefing, the district court again concluded that the Louisiana insurance arbitration statute takes precedence over the Convention. App. 110a. The court then certified the question for interlocutory appeal, based on its conclusion that the ruling "involves a controlling question of law as to which there is substantial ground for difference of opinion." *Id.*

6. The Fifth Circuit Panel Opinion. The Fifth Circuit granted leave to appeal and a three-judge panel reversed the district court's decision, concluding that "Congress did not intend to include treaties" within the scope of McCarran-Ferguson. App. 92a. The panel assumed that the Convention was not self-executing, but concluded that "[i]mplementing legislation does not replace or displace a treaty," and "[a] treaty remains something more than an act of Congress." App. 96a.

The panel found it "unlikely that when Congress drafted the McCarran-Ferguson Act," it intended future treaties implemented by statute to be abrogated to the extent the treaty conflicted in some way with a state law regulating the business of insurance. App. 98a. The panel also pointed out that if a treaty were self-executing, it would not fall within the ambit of McCarran-Ferguson because it would not require an "Act of Congress" to be the basis for a rule of decision in United States courts. App. 99a. The panel said it could think of "no apparent reason" why Congress would have distinguished in the McCarran-Ferguson Act between treaties that are self-executing and treaties that are not self-executing. *Id.* The panel thus held that the McCarran-Ferguson Act does not cause the Louisiana insurance arbitration provision to preempt the Convention. App. 107a.

7. The Fifth Circuit *En Banc* Opinion.

a. The Majority Opinion. The Fifth Circuit granted *en banc* review and vacated the panel opinion. After further briefing and argument, a divided *en banc* court vacated the district court's

order, finding that the Convention supersedes the Louisiana statute. App. 2a-3a.

The majority described its task as "to determine if, in enacting the McCarran-Ferguson Act, Congress intended for state law to reverse-preempt federal law that has as its source an implemented non-self-executing treaty." App. 26a. It then engaged in a lengthy analysis of what Congress likely intended when it passed the McCarran-Ferguson Act in 1945. App. 15a-18a, 27a-30a.

The majority noted that the Underwriters did not challenge the district court's conclusion that the Louisiana statute regulates the business of insurance.[2] The court then assumed that the Convention is non-self-executing, but concluded that even if the Convention required implementing legislation to have effect in domestic courts, "that does not mean that Congress intended an 'Act of Congress,' as that phrase is used in the McCarran-Ferguson Act, to encompass a non-self-executing treaty that has been implemented with congressional legislation." App. 15a.

In attempting to discern Congress's intent, the majority could think of "no apparent reason" why, in enacting the McCarran-Ferguson Act, Congress would have passed a law that allowed non-self-executing treaties – but not self-executing treaties –

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[2] Courts of appeals consistently have held that State insurance anti-arbitration statutes regulate the business of insurance. *See, e.g.*, *Am. Bankers Ins. Co.*, 436 F.3d at 494; *Standard Sec. Life Ins. Co.*, 267 F.3d at 823; *Mut. Reinsurance Bureau*, 969 F.2d at 933; *McKnight*, 358 F.3d at 858.

to be subject to the Act. App. 16a-17a. The court found support for its conclusion in the 1970 implementing legislation for the Convention, in which Congress said that "'[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws *and treaties* of the United States.'" App. 18a (quoting 9 U.S.C. § 203) (emphasis added) (setting forth federal court jurisdiction over actions falling under the Convention). The majority also noted that because the Convention's implementing legislation cannot "operate without reference to the contents of the Convention," it is the Convention, rather than its implementing legislation, that is being "construed" to supersede state law. App. 19a-22a.

Citing this Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the majority found its decision "bolstered" by the "national policy favoring arbitration." App. 30a-33a. The court concluded it could "discern no . . . deducible intent in the McCarran-Ferguson Act" to limit Congress's general pro-arbitration policy. App. 33a.

The court acknowledged that "[w]e are aware that our decision conflicts with that of the Second Circuit in *Stephens v. American International Insurance Co.*," which held that Kentucky's insurance arbitration insurance statute is not preempted by the Convention. App. 34a. The court criticized the Second Circuit for failing to "answer the question of what Congress *intended*" regarding the preemptive effect of treaties when it passed the McCarran-Ferguson Act. App. 35a (emphasis added).

b. Judge Clement's Concurrence. Judge Clement concurred on the ground that Article II of the Convention is self-executing, and therefore it needs no "Act of Congress" to provide a rule of decision in United States courts. App. 38a. She noted that Article II of the Convention says "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them," and she concluded that "[t]reaty provisions setting forth international obligations in such mandatory terms tilt strongly toward self-execution." App. 41a, 43a.

c. The Dissenting Opinion. Judge Elrod, joined by Judges Smith and Garza, dissented. They concluded that the majority, in what should have been "an exercise in garden-variety statutory interpretation," has "muddied the waters of our statutory interpretation jurisprudence, by reasoning on an ad hoc basis from its own conception of what is 'reasonable' or '[]likely' for Congress to have intended, rather than looking to what Congress said." App. 50a, 83a-84a.

The dissenters observed that the McCarran-Ferguson Act is "a clearly worded statute," and stated that they would follow the Second Circuit's unanimous decision in *Stephens* to hold that "[i]n a domestic court, a treaty that Congress enacts is not law itself[.] . . . [I]t is the statute that counts and the statute amounts to a standard congressional act" subject to preemption by state insurance statutes under the McCarran-Ferguson Act. App. 80a.

The dissenting judges reasoned that "[f]rom the perspective of the Supremacy Clause, [the Louisiana

statute] applies unless the Underwriters carry the burden to show that some specific federal law preempts it." App. 52a. "If the proposed preemptive law is a statute like the Convention Act, then the McCarran-Ferguson Act applies. If the proposed preemptive law is the Convention itself, then the court is correct that McCarran-Ferguson does not apply. But there is still no preemption – and the district court must be affirmed – unless the Convention is actually capable of superseding [the Louisiana statute] as a matter of Supremacy Clause law. It is not." App. 52a-53a.

Citing this Court's recent decision in *Medellin v. Texas*, the dissent emphasized that "only self-executing treaties operate by their own force to provide a rule of decision in the courts," while non-self-executing treaties "'can only be enforced pursuant to legislation to carry them into effect.'" App. 53a (quoting 128 S. Ct. 1346, 1356 (2008)). The dissent concluded that "as a source of law, the implementing legislation is the alpha and omega of what may constitute a rule of decision in U.S. courts." App. 57a.

In addition to Supreme Court precedent, the dissent noted that the majority opinion ignores scholarly consensus on the status of a non-self-executing treaty, as well as case law from other circuits. App. 59a-61a. Along with the Second Circuit's decision in *Stephens*, 66 F.3d 41, the dissent pointed to the Third Circuit's decision in *Suter v. Munich Reinsurance Co.*, which "faced essentially the same issue" and "framed the preemption issue in terms of whether there was a conflict between 'the Convention Act' and an allegedly contrary New

Jersey statute." App. 62a-63a (citing 223 F.3d 150, 152, 160-62 (3d Cir. 2000)).

The dissent also noted that "[t]he notion that non-self-executing treaties are inapplicable in domestic courts finds support in other circuits as well." App. 63a. It cited *Hopson v. Kreps*, a Ninth Circuit opinion concluding that "'the issue in any legal action concerning a statute implementing a treaty is the intended meaning of the terms of the statute.'" *Id.* (quoting 622 F.2d 1375, 1380 (9th Cir. 1980)). Further, when the D.C. Circuit addressed the interpretation of a non-self-executing treaty, Judge Kavanaugh noted in concurrence that "'[s]trictly, it is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States. That is true even when a non-self-executing agreement is 'enacted' by, or incorporated in, implementing legislation.'" App. 64a (quoting *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006) (Kavanaugh, J., concurring)).

The dissent concluded that because Chapter 2 of the FAA is an "Act of Congress," "the court's exercise in statutory interpretation should have ended with the plain language of the statute, and its foray into the realm of policy considerations is improper." App. 76a. The dissent believed the majority's "fruitless search for Congress's true intent" ultimately "supplant[s] the plain meaning of the unambiguous term 'Act of Congress' with a strained interpretation aimed at protecting important federal policies." *Id.* The dissent pointed out that "even if such policy considerations were relevant . . . , the court's analysis barely acknowledges the state interest that was significant enough to give rise to the rare anti-

preemption provision of the McCarran-Ferguson Act in the first place." App. 80a.

The dissent concluded by saying: "The court today has declined the opportunity to align itself with the Second Circuit and the Supreme Court's jurisprudence in this area. . . . As a result, at least until our superiors speak, we leave the state of the law in [Supremacy] Clause purgatory." App. 83a-84a (quotation and citation omitted).

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision creates a circuit split on an important issue of federal law. The conflicting decisions will cause insurance policyholders to be treated very differently depending upon where their case arises. Some policyholders will receive the protection of state laws that restrict the enforceability of arbitration clauses in insurance contracts. Other policyholders will be forced into arbitration with foreign (but not U.S.-based) insurance companies, often under procedures governed by foreign law and in overseas venues, despite state laws designed to protect insurance buyers by limiting the enforceability of arbitration clauses in insurance contracts.

The issue in this case arises frequently in the lower courts, but it is seldom subject to review on appeal. This case thus presents a rare opportunity for the Court to resolve an important and recurring issue of federal law.

A. The Fifth Circuit's Decision Directly Conflicts With A Decision of the Second Circuit.

As the Fifth Circuit acknowledged, its decision conflicts with the Second Circuit's decision in *Stephens*, 66 F.3d 41. App. 34a. In *Stephens*, the Second Circuit held that a Kentucky insurance arbitration statute takes precedence over Chapter 2 of the FAA pursuant to the McCarran-Ferguson Act. 66 F.3d at 43. The Second Circuit rejected the insurance company's argument that the Convention is not an "Act of Congress" and therefore is not subject to the McCarran-Ferguson Act. The court held that "[t]his argument fails because the Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation." *Id.* at 45. The court held that the Convention has effect as a matter of domestic law only through Chapter 2 of the FAA, which is an "Act of Congress" subject to the McCarran-Ferguson Act's anti-preemption provision. *Id.*; *see also Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 152 (3d Cir. 2000) (framing preemption issue as whether there was a conflict between Convention's implementing legislation and an allegedly contrary New Jersey statute).

The Second Circuit's approach in *Stephens* is consistent with the analysis of other courts of appeals in cases involving non-self-executing treaty provisions and their implementing legislation. *See, e.g.*, *Hopson*, 622 F.2d at 1380 (concluding that "[t]he issue in any legal action concerning a statute implementing a treaty is the intended meaning of the terms of the statute"); *Fund for Animals, Inc.*, 472 F.3d at 879 (Kavanaugh, J., concurring)

("Strictly, it is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States. That is true even when a non-self-executing agreement is enacted by, or incorporated in, implementing legislation.") (citation and internal punctuation omitted).

The Fifth Circuit took a very different approach in this case, defining its task as "to determine if, in enacting the McCarran-Ferguson Act, Congress intended for state law to reverse-preempt federal law that has as its source an implemented non-self-executing treaty." App. 26a. In concluding that a statute that implements a treaty is not an "Act of Congress," the Fifth Circuit criticized the Second Circuit's decision in *Stephens* for failing "[to] answer the question of what Congress *intended*" regarding the preemptive effect of treaties when it passed the McCarran-Ferguson Act. App. 35a (emphasis added).

In addition to creating a direct circuit split over the applicability of the McCarran-Ferguson Act's anti-preemption provision to Chapter 2 of the FAA, the Fifth Circuit's decision cannot be reconciled with the uniform federal authority holding that Chapter 1 of the FAA does not preempt state laws prohibiting enforcement of arbitration clauses in insurance contracts pursuant to the McCarran-Ferguson Act.[3]

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[3] *See, e.g., Am. Bankers Ins. Co.*, 436 F.3d at 494 (addressing § 83-11-109 of the Mississippi Code); *McKnight*, 358 F.3d at 859 (addressing § 9-9-2(c) of the Georgia Code); *Standard Sec. Life Ins. Co.*, 267 F.3d at 823-24 (addressing § 435.350 of the Missouri Statutes); *Mut. Reinsurance Bureau*, 969 F.2d at 934-35 (addressing § 5-401 of the Kansas Statutes).

Thus, as a result of the court of appeals' decision in this case, U.S.-based insurers remain subject to State laws limiting the enforceability of arbitration clauses in insurance contracts, while foreign insurers can circumvent those laws in the Fifth Circuit (but not in the Second Circuit).

B. The Fifth Circuit's Decision Disregards Established Principles Of Statutory Interpretation.

This Court has stated repeatedly that "[t]he preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *BedRoc Ltd., LLC v. United States,* 541 U.S. 176, 183 (2004) (quoting *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992)). Accordingly, a court's statutory interpretation inquiry should "begin[] with the statutory text, and end[] there as well if the text is unambiguous." *Id.*

This core principle of statutory interpretation applies with full force to preemption provisions. "If [a] statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which, necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993); *see Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (in determining preemption question, the Court "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose") (citation and internal quotation marks omitted).

The McCarran-Ferguson Act provides, in pertinent part, that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b), App. 140a. As the Fifth Circuit majority acknowledged, a non-self-executing treaty has no effect in a domestic court "unless and until it is implemented by an act of Congress." App. 35a ("We agree, of course, that when provisions of a treaty are not self-executing, they cannot be enforced in a court in this country unless and until those provisions are implemented by Congress."). The federal law that provides the relevant rule of decision, therefore, is Chapter 2 of the FAA, not the Convention itself.[4]

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[4] Although the court of appeals said it would "assume" that the Convention was non-self-executing (App. 15a), there cannot be any plausible debate about that issue. In *Medellin v. Texas*, this Court expressly identified the Convention as an example of a non-self-executing treaty. *See* 128 S. Ct. 1346, 1366 (2008) (noting that "Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes," and citing the Convention as an example).

Moreover, it is clear that the Convention was not meant to "ha[ve] automatic domestic effect as federal law upon ratification." *Id.* at 1356 n.2. When President Johnson submitted the Convention to the Senate for ratification, he unambiguously stated that the United States would not deliver an instrument of accession until the entire Congress – not just the Senate – considered the Convention and passed a law through the traditional bicameral process incorporating the Convention's terms into the United States Code. *See* 114 Cong. Rec. S10488 (1968) (message of President Johnson) ("Changes in title 9 (arbitration) of the United States Code will be (...continued)

Chapter 2 of the FAA, which was required to give the Convention domestic effect, was passed by both houses of Congress just as any other federal statute is passed. It is therefore an "Act of Congress" within the meaning of the McCarran-Ferguson Act. As the dissent explained, because "no ambiguity on this point is cited by the court or by the parties," the majority's "exercise in statutory interpretation should have ended with the plain language of the statute" instead of embarking on a "foray into the realm of policy considerations." App. 75a-76a.

Rather than adhering to the plain language of the McCarran-Ferguson Act, the majority defined the task before it as "to determine if, in enacting the McCarran-Ferguson Act, Congress intended for state law to reverse-preempt federal law that has as its source an implemented non-self-executing treaty." App. 26a. The majority addressed this question by asking why the Congress that enacted the McCarran-Ferguson Act in 1945 would have wanted to distinguish between non-self-executing treaties

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required before the United States becomes a party to the convention. The United States instrument of accession to the convention will be executed *only after the necessary legislation is enacted.*") (emphasis added); *see also Medellin*, 128 S.Ct. at 1361 (President's view as to whether a treaty has immediate domestic effect or requires implementing legislation "is entitled to great weight") (citation and internal quotation marks omitted). Similarly, the Senate Report giving its advice and consent on the adoption of the treaty reiterates that "[c]hanges in the Federal Arbitration Act (title 9 of the United States Code) will be required *before the United States becomes a party to the convention.*" S. Exec. Rep. No. 90-10, at 2 (Sept. 27, 1968) (emphasis added).

(which would be subject to McCarran-Ferguson), and self-executing treaties (which would not). App. 16a. Because the majority could think of "no apparent reason" why Congress would have wanted to do so, it speculated that Congress must have intended to exclude "Acts of Congress" that implement treaties from the term "Acts of Congress" that it used in the McCarran-Ferguson Act's anti-preemption provision. App. 16a-17a.[5] The majority also believed that this interpretation furthered the federal policy favoring arbitration, even though this pro-arbitration policy does not apply to domestic insurers, on the basis that it could find "no . . . deducible intent in the McCarran-Ferguson Act" to overcome this pro-arbitration policy. App. 30a-33a.

By engaging in an avowedly extra-textual quest to discern the intent of the 1945 Congress, the majority disregarded the clearest evidence of congessional intent: the clear language of the McCarran-Ferguson Act. As the dissenting judges noted, the majority opinion "concludes that an Act of Congress is not really an Act of Congress." App. 50a; *see also* App. 76a (majority's "fruitless search for Congress's true intent" ultimately "supplants the plain meaning of the unambiguous term 'Act of Congress' with a strained interpretation aimed at protecting important federal policies"). The Fifth

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[5] On the other hand, the majority did not suggest any reason why the 1945 Congress would have intended to distinguish between U.S.-based insurance companies and foreign insurance companies in a way that allows foreign insurers doing business in Louisiana to escape state law limiting arbitration clauses in insurance contracts.

Circuit's decision is not only incorrect, but in conflict with this Court's prior decisions on statutory interpretation. *See BedRoc Ltd.*, 541 U.S. at 183; *CSX Transp., Inc.*, 507 U.S. at 664; *Morales*, 504 U.S. at 383. That conflict provides an additional reason to grant review in this case.

C. The Federal Issue Is Important.

The federal question presented in this case is extremely important. At least 13 states have enacted laws that prohibit enforcement of arbitration clauses in insurance disputes.[6] At least 3 other

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[6] *See* Ark Code Ann. § 16-108-201(b) (arbitration provisions "shall have no application to . . . any insured or beneficiary under any insurance policy"); Ga. Code Ann. § 9-9-2(c)(3) (arbitration provisions "shall not apply" to "[a]ny contract of insurance"); Haw. Rev. Stat. § 431:10-221 (prohibiting insurance policies from "[d]epriving the courts of this State of the jurisdiction of actions against the insurer"); Kan. Stat. Ann. § 5-401(c) (provisions of arbitration act "shall not apply to . . . [c]ontracts of insurance"); Ky. Rev. Stat. Ann. § 417.050(2) (disputes under "insurance contracts" not arbitrable); La. Rev. Stat. Ann. § 22:868 ("[n]o insurance contract . . . shall contain any . . . agreement . . . [d]epriving the courts . . . of the jurisdiction of action against the insurer"); Mo. Ann. Stat. § 435.350 (arbitration provisions invalid for "contracts of insurance"); Neb. Rev. Stat. Ann. § 25-2602.01(f)(4) ("does not apply to . . . any agreement . . . relating to an insurance policy other than a contract between insurance companies including a reinsurance contract"); R.I. Stat. Ann. § 10-3-2 (allowing arbitration at the option of the insured); S.C. Code Ann. § 15-48-10(b)(4) ("shall not apply to . . . any insured or beneficiary under any insurance policy"); S.D. Codified Laws § 21-25A-3 (state arbitration statute "does not apply to insurance policies"); Va. Code Ann. § 38.2-312 (prohibiting any insurance policy from "[d]epriving the courts of this Commonwealth of jurisdiction in actions against the insurer"); Wash. Rev. Code § 48.18.200(1)(b) (prohibiting insurance policies from "[d]epriving the courts of this state of the jurisdiction of actions against the insurer").

states have enacted laws that prohibit or limit enforcement of arbitration clauses in certain types of insurance disputes.[7]

The Fifth Circuit's decision throws into doubt the validity of these state laws in all cases in which a policyholder contracts with a foreign insurance company. The invalidation of these state laws undermines the States' important interests – interests that the McCarran-Ferguson Act advances even at the expense of important federal interests. As this Court has noted, "[u]nder the terms of the McCarran-Ferguson Act, . . . federal law must yield to the extent the [state] statute furthers the interests of policyholders." *Fabe*, 508 U.S. at 502.

Statutes enacted by Louisiana and other States further the intersts of policyholders by preventing insurers from forcing their insureds into arbitration. *See McKnight*, 358 F.3d at 858; *Standard Sec. Life Ins. Co.* 267 F.3d at 824 (by introducing the possibility of jury verdicts into the equation, state insurance arbitration provisions are designed to affect the process for resolving disputed insurance claims). As a result of the court of appeals' holding, policyholders whose claims are not paid by foreign insurers under preprinted form policies will be

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[7] *See* Cal. Health & Safety Code § 1363.1 (requiring specific disclosure requirements before an arbitration clause in certain health insurance contracts may be enforced); Md. Insur. Admin. § 31.11.10.07 (prohibiting mandatory binding arbitration for disputes involving health insurance contracts); Miss. Code Ann. § 83-11-109 (prohibiting arbitration of uninsured motorist claims); 23 Wyo. Code R. § 9 (prohibiting mandatory arbitration of uninsured motorist claims).

compelled to arbitrate their disputes, potentially in distant locales with no meaningful connection to the underlying coverage dispute. This is precisely the type of result that the McCarran-Ferguson Act seeks to avoid by encouraging local regulation of the insurance business. *See Fabe*, 508 U.S. at 502.

That foreign insurance companies intend to force policyholders into arbitration to avoid subjecting their claims handling decisions to the judgment of juries is clear from the frequency with which arbitration clauses appear in insurance contracts. Many modern insurance contracts follow the "Bermuda Form," a preprinted insurance contract developed by major Bermuda-based insurance companies that emerged to provide liability insurance to U.S.-based policyholders in the mid-1980s during a period of contraction in insurance capacity in U.S. markets. *See* Richard Jacobs et al., *Liability Insurance in International Arbitration: The Bermuda Form* ix (2004). The Bermuda Form "is now of enormous importance commercially, in use not only by those for whom it was originally created, but by other insurers as well." *Id.* The Bermuda Form provides for arbitration of disputes in London, because "[t]he insurance companies were anxious to avoid United States courts which were perceived, rightly or wrongly, as too pro-policyholder." *Id.* § 3.02.[8] According to an article published last month:

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[8] Unlike the Bermuda Form, the specific excess policies in this case do not specify where disputes are to be arbitrated.

> Arbitration is certainly being used more frequently to resolve disputes in the insurance coverage arena. . . . From the policyholder perspective, this increase relates at least in part to insurers trying to avoid or minimize the impact of unfavorable legal precedent and contract interpretation principles that have been developed through court decisions that are not as favorable to insurers. Insurers may believe that such legal precedent is less likely to be strictly applied in arbitration proceedings that are less subject to appellate review.

Tyrone R. Childress, *The Use of Arbitration in Insurance Coverage Disputes: A Policyholder Perspective*, *in* Emerging Applications for ADR: Leading Lawyer on Utilizing Alternative Dispute Resolution in New Ways and Testing Innovative Approaches (Jan. 2010), *at* 2010 WL 384497; *see also* Susan Randall, *Mandatory Arbitration in Insurance Disputes: Inverse Preemption of the Federal Arbitration Act*, 11 Conn. Ins. L.J. 253, 253-54 (2004-2005) ("[A]rbitration provisions are appearing with increasing frequency in all types of insurance policies . . . . [C]oncern over the fairness of arbitration, especially in consumer contracts, is magnified in the insurance context.").

D. The Fifth Circuit's Decision Provides An Excellent Vehicle For This Court's Review.

This case provides an excellent vehicle for this Court to review the question decided by the court of

appeals. Because the question arises frequently in the lower courts but rarely makes its way to a court of appeals, let alone this Court, the opportunity for review of an important federal issue, based on fully-reasoned majority and dissenting opinions of an *en banc* court, is a rare opportunity for this Court to provide much-needed guidance to the lower courts.

The issue presented in this case arises frequently in district courts, where it has given rise to division and confusion. The district court in this case, after describing the question as a "close one," determined that the Louisiana statute should be enforced pursuant to McCarran-Ferguson, but admitted it was "vacillat[ing]" on the issue, and ultimately certified the question for an interlocutory appeal after requiring the parties to complete two rounds of briefing. App. 110a, 112a, 117a; *see also Murphy Oil USA, Inc. v. SR Int'l Bus. Ins. Co. Ltd.*, No. 07-cv-1071, 2007 WL 2752366, at *3 (W.D. Ark. 2007) (finding *Stephens* unpersuasive and holding that "the New York Convention must be enforced according to its terms over all prior inconsistent rules of law") (quotations and citation omitted); *PinnOak Res., LLC v. Certain Underwriters at Lloyd's, London*, 394 F. Supp. 2d 821, 828 (S.D. W. Va. 2005) (noting that "the decisions are split" on whether state laws can invalidate agreements to arbitrate with foreign insurers pursuant to McCarran-Ferguson and retaining jurisdiction because "[i]n view of this split of authority, this court concludes that [the] removal petition presents a substantial question of federal law"); *Transit Casualty Co. v. Certain Underwriters at Lloyd's of London*, No. 96-4173-cv-2, 1996 WL 938126, at *2 (W.D. Mo. 1996) (finding chapter 2 of

FAA does not preempt Missouri's insurance arbitration statute because "neither the Convention nor the Federal Arbitration Act specifically relate to the business of insurance"). This Court's review is warranted to resolve the continuing division and confusion over a recurring and important federal issue, involving the intersection between competing federal policies favoring arbitration clauses in commercial agreements and local state regulation of the business of insurance.

There are two ways in which the issue typically arises in the lower courts: (1) a foreign insurance company files a motion to compel arbitration, based on Chapter 2 of the FAA; or (2) a foreign insurance company removes a state court action to federal court based on Chapter 2 of the FAA. In both situations – and regardless of how the district court rules on the motion presenting the issue – the district court's ruling rarely is subject to appellate review.

This case presents an example of the first way that the anti-preemption issue arises. Safety National filed this case in federal court based on diversity jurisdiction, and the Underwriters filed a motion to compel arbitration. App. 123a. LSAT moved to quash the arbitration motion, arguing that the state law is subject to the McCarran-Ferguson Act's anti-preemption provision, and therefore is not invalidated by Chapter 2 of the FAA. *Id.* A court presented with these arbitrability motions will either decide that Chapter 2 of the FAA preempts the state law and stay the case while the parties submit to arbitration, or it will decide that Chapter 2 of the FAA does not preempt the state law and allow the

case to proceed in federal district court. Either way, the order is nonfinal, and cannot be appealed unless the district court certifies the question to the court of appeals and the court of appeals accepts certification. *See, e.g.*, 28 U.S.C. § 1292(b).

In this case, the district court decided that Chapter 2 of the FAA does not preempt the Louisiana insurance arbitration statute, and it was prepared to allow the case to proceed in federal court until it certified the issue for an interlocutory appeal based on its perception that it may have answered the question incorrectly. App. 110a, 117a. The district court in *Stephens* ruled the opposite way on the motion – it concluded that Chapter 2 of the FAA preempted Kentucky's insurance arbitration provision – and that case also made its way to the Second Circuit through certification of an interlocutory appeal. *See* 66 F.3d at 43 (district court granted insurer's motion to compel arbitration, and Second Circuit accepted interlocutory appeal under § 1292).

The second way this issue arises is through the federal courts' removal jurisdiction. A policyholder will file an insurance coverage lawsuit in state court, and the foreign insurance company defendant may remove the case to federal court, asserting that the dispute is subject to an arbitration provision that "falls under the Convention." *See* 9 U.S.C. § 205 ("Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant . . . may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States."). The

policyholder then raises the McCarran Ferguson Act issue in a motion to remand the case to state court for lack of federal jurisdiction.

If the district court finds that Chapter 2 of the FAA supersedes the contrary state law and federal question jurisdiction therefore exists, the ruling would again be nonfinal, and only subject to appeal through certification under § 1292(b). If the district court agrees that Chapter 2 of the FAA is subject to the McCarran-Ferguson Act's anti-preemption provision, it will issue an order remanding the case to state court for lack of federal jurisdiction. That order will be unreviewable pursuant to 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.").

This is precisely what happened in *Transit Casualty Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619 (8th Cir. 1997). The policyholder filed suit in state court, and the foreign insurance company removed the case to federal court and sought to compel arbitration. *See* 1996 WL 938126, at *1 (W.D. Mo. 1996). The policyholder moved to remand to state court based on Missouri's insurance arbitration statute, and the district court remanded the case, holding that "neither the Convention nor the Federal Arbitration Act specifically relate to the business of insurance." *Id.* at *2. When the foreign insurance company appealed that decision, the Eighth Circuit determined that under 28 U.S.C. § 1447(d), it had no jurisdiction to review the district court's order remanding the case for lack of jurisdiction. *Transit Cas. Co.*, 119 F.3d at 624.

Because the procedural posture in which this recurring issue arises rarely results in appellate review, this case presents an ideal vehicle for this Court to resolve the question presented. The district court, having found the question a "close one" (App. 117a), certified it for an interlocutory appeal (App. 110a). The Fifth Circuit accepted certification of the issue, subjected the panel's decision to *en banc* review, and published majority and dissenting opinions that thoroughly set forth both sides of the issue. The Court should grant the petition in order to resolve the split in the circuits on an important issue addressing the proper intersection between the McCarran-Ferguson Act and the Convention's implementing legislation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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