No. 12-1429

In The Supreme Court of the United States

IMAD BAKOSS, M.D.,

Petitioner,

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NO. 0510135,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AMICUS CURIAE INDEPENDENCE INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

The Independence Institute is a public policy research organization created in 1984, and founded on the eternal truths of the Declaration of Independence. The Independence Institute has participated as an amicus or party in many constitutional cases in federal and state courts. Its amicus briefs in *District of Columbia v. Heller* and *McDonald v. Chicago* (under the names of lead amicus ILEETA, the International Law Enforcement Educators & Trainers Association) were cited in the opinions of Justices Alito, Breyer, and Stevens. The Independence Institute's briefs in *NFIB v. Sebelius* explicated the original constitutional structure of federalism.

SUMMARY OF THE ARGUMENT

The Second Circuit erred in holding that federal common law, rather than state law, should supply the definition of the word "arbitration" to the Federal Arbitration Act. As detailed in Part IV, the Federal

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. All parties have consented to the filing of this brief. Those consents are being lodged herewith. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Arbitration Act embodies the unusual decision not to define the key word of the federal statute. Instead, Congress chose to leave the definition of "arbitration" to State law, which had been defining the term for many years even prior to U.S. independence, as described in Part III.

Federalism is a cornerstone of the American system of governance (Part I) which is why this Court has created a "presumption against pre-emption." (Part II). That presumption applies with particular vigor to a subject of "traditional state concern," such as contract law in general, and the definition of "arbitration" in particular.

ARGUMENT

The Second Circuit held that the definition of "arbitration" in cases governed by the Federal Arbitration Act is to be provided by federal common law, rather than state law. *Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*, 707 F.3d 140 (2d Cir. 2013). This decision fails to give due regard to state prerogatives and thus fundamentally violates this Court's guarded approach to federal object pre-emption.

I. HISTORICALLY, A CORNERSTONE OF FEDERALISM AND LIMITED GOVERNMENT HAS ALWAYS BEEN A HEALTHY REGARD FOR STATE SOVEREIGNTY.

In the United States, our federal system of government depends upon dual sovereignty of the federal and state governments. When this nation was less than 100 years old, this Court described our federal system in the following way:

> [T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. . . . '[W]ithout the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869) (quoting *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)).

This balance between State and Federal power is enshrined in the United States Constitution: "The

powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. 10. So today, "[w]e begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

When the Constitution was before the People for ratification, James Madison explained that the proposed Constitution would leave intact State sovereignty over most ordinary concerns:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

THE FEDERALIST, No. 45 at 292-93 (James Madison) (Clinton Rossiter ed., 1961). This system of dual sovereignty has many benefits.

> It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and

> experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry."

Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (citation omitted).

A key and frequently celebrated value of federalism is that it enables states to serve as "laboratories for experimentation" in policy matters. *See United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Courts must be careful not to inappropriately infer federal pre-emption, for pre-emption stifles state law "experimentation" – not only by nullifying state laws on the books, but also by discouraging proposals to change the law.

For example, the National Conference of Commissioners on Uniform State Laws was considering addressing issues relating to adhesive arbitration agreements in its Revised Uniform Arbitration Act, but determined that "the preemptive effect of the Federal Arbitration Act . . . dramatically limits meaningful choices for drafters addressing adhesion contracts. . . ." NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAW, ADHESION ARBITRATION AGREEMENTS AND THE RUAA, *available at* http://www.uniformlaws.org/shared/docs/arbitration/arbpswr.pdf.

II. RESPECT FOR STATE PREROGATIVES LED THE COURT TO ADOPT A "PRE-SUMPTION AGAINST PRE-EMPTION" OF STATE LAW.

In order for the nation to reap federalism's benefits, the powers of the States must be respected. This is particularly true in light of the fact that:

> The Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause. U.S. CONST., art. VI, cl. 2. As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly.

Gregory v. Ashcroft, 501 U.S. at 460. This assumption is the basis for what has become known as the "pre-sumption against pre-emption" of state law.

This presumption was first explicitly articulated in *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218 (1947). There, this Court addressed the regulation of grain warehouses, an area Congress had power to regulate under the Commerce Clause, but also an area traditionally left to the States. *Id.* at 229-30. In such cases, this Court held that the proper approach was to "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and

manifest purpose of Congress." *Id.* at 230 (citations omitted).

This presumption against pre-emption has been reiterated numerous times. If Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985); *see also Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984); *United States v. Bass*, 404 U.S. 336, 349-50 (1971).

The presumption against pre-emption was reiterated in *Wyeth v. Levine*, 555 U.S. 555 (2009). In *Wyeth*, a drug manufacturer was sued under a state failure-to-warn cause of action, and argued that this cause of action was preempted because compliance with the state's failure-to-warn policies was inconsistent with FDA labeling guidelines. *Id.* at 558-65. The Court outlined its approach to pre-emption as follows:

> First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted); see *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). Second, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . .

> we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" Lohr, 518 U.S., at 485 (quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947)).

Id. at 565.

Moreover, the *Wyeth* Court specifically rejected the notion that long-standing involvement in a subject should weaken the presumption against pre-emption. The drug manufacturer had argued that

> the presumption against pre-emption should not apply to this case because the Federal Government has regulated drug labeling for more than a century. That argument misunderstands the principle: We rely on the presumption because respect for the States as "independent sovereigns in our federal system" leads us to assume that "Congress does not cavalierly pre-empt state-law causes of action." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). The presumption thus accounts for the historic presence of state law but does not rely on the absence of federal regulation.

Id. at 565 n.3.

In addition, the dissent argued that the presumption against pre-emption should not apply to claims of implied conflict pre-emption; but the majority noted that "Court has long held to the contrary."

Id. (citing *California v. ARC America Corp.*, 490 U.S. 93, 101-02, (1989); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716, (1985); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002)).

As is detailed *infra*, defining "arbitration" is historically a matter of state concern, and Congress intended the Federal Arbitration Act to incorporate those definitions, rather than supersede them. Certainly Congress did not express the "unmistakable" intent to pre-empt state definitions of arbitration necessary to overcome the presumption against pre-emption.

III. CONTRACT LAW – INCLUDING DEFINING WHAT TYPES OF ALTERNATIVE DISPUTE-RESOLUTION COUNT AS "ARBITRATION" – TRADITIONALLY HAS BEEN A MATTER OF STATE CONCERN.

"[C]ontract is a matter of traditional state concern. . . ." *United States v. Alabama*, 691 F.3d 1269, 1296 (11th Cir. 2012); see also *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820, 853 (4th Cir. 1999), *aff'd sub nom. United States v. Morrison*, 529 U.S. 598 (2000) (contract law is an "area of traditional state concern.").

Arbitration is "fundamentally a matter of contract." *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772, 2776 (2010). Therefore it should come as no surprise that states were developing bodies of law

regarding arbitration during the Founding Era. *See Aspinwall v. Tousey*, 2 Tyler 328 (Vt. 1803) (discussing enforcement of an arbitration clause signed in 1795).

One of the core issues addressed by the early state arbitration decisions was what constitutes "arbitration"? In Pennsylvania, this question was addressed by statute early in the colony's history. *See Carey v. Commissioners of Montgomery County*, 19 Ohio 245, 253 (1850) (discussing 1705 Pennsylvania arbitration statute). Similarly, in *Larkin v. Robbins*, 2 Wend. 505 (N.Y.Sup.Ct. 1829), a court determined what constituted an "arbitration" sufficient to oust the court of jurisdiction over the substantive dispute.

As is amply illustrated in the Petition, these cases are not outliers. The Colonies and then the States had well-developed bodies of arbitration law, and including state common-law (and sometimes statutory) definitions of what constituted "arbitration." Three centuries of state contract law certainly constitute a "traditional area of state concern," so the presumption against pre-emption should apply with full force to state definitions of arbitration.

IV. CONGRESS INTENDED FOR THE FEDERAL ARBITRATION ACT TO INCORPORATE THOSE DEFINITIONS, NOT TO SUPERSEDE THEM.

This Court's jurisprudence makes clear that the Federal Arbitration Act preempts state law only to

the extent that it conflicts with the FAA. In *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468 (1988), the parties signed a standard form arbitration agreement used in construction contracts. Included in this agreement was a sentence calling for the application of state law. In upholding the stay of arbitration and refusing to find the local California procedural law to be pre-empted, Chief Justice Rehnquist observed that state arbitration law would be pre-empted only when it "stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress." *Id*. at 477. "The FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Id*.

In *Southland Corp. v. Keating*, Justice Stevens "agree[d] with most of the Court's reasoning" except for "its conclusion concerning the enforceability of the arbitration agreement." *Southland Corp. v. Keating*, 465 U.S. 1, 21 (1984) (Stevens, J., concurring in part and dissenting in part). While the particular issues in Southland are not relevant to the instant case, Justice Stevens' explication of the FAA speaks directly to the instant Petition. As he ably explained, Congress did not intend for the FAA to pre-empt complementary state law:

> The limited objective of the Federal Arbitration Act was to abrogate the general common law rule against specific enforcement of arbitration agreements, S.Rep. No. 536, 68th

Cong., 1st Sess., 2-3 (1924), and a state statute which merely codified the general common law rule – either directly by employing the prior doctrine of revocability or indirectly by declaring all such agreements void – would be preempted by the Act. However, beyond this conclusion, which seems compelled by the language of § 2 and case law concerning the Act, it is by no means clear that Congress intended entirely to displace State authority in this field. Indeed, while it is an understatement to say that "the legislative history of the . . . Act . . . reveals little awareness on the part of Congress that state law might be affected," it must surely be true that given the lack of a "clear mandate from Congress as to the extent to which state statutes and decisions are to be superseded, we must be cautious in construing the act lest we excessively encroach on the powers which Congressional policy, if not the Constitution, would reserve to the states." *Metro Industrial Painting Corp. v. Terminal Construction Co*., 287 F.2d 382, 386 (CA2 1961) (Lumbard, C.J., concurring).

* * *

The existence of a federal statute enunciating a substantive federal policy does not necessarily require the inexorable application of a uniform federal rule of decision notwithstanding the differing conditions which may exist in the several States and regardless of the decisions of the States to exert police powers as they deem best for the welfare of

> their citizens. *Cf. Wallis v. Pan American Petroleum Corp*., 384 U.S. 63, 69 (1966); *see generally, Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 671-672 (1979); *United States v. Kimbell Foods, Inc*., 440 U.S. 715 (1979); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). Indeed, the lower courts generally look to State law regarding questions of formation of the arbitration agreement under § 2, *see*, *e.g.*, *Comprehensive Merchandising Cat. Inc. v. Madison Sales Corp*., 521 F.2d 1210 (CA7 1975), which is entirely appropriate so long as the state rule does not conflict with the policy of § 2.

Southland Corp. v. Keating, 465 U.S. at 17-20 (1984) (Stevens, J., concurring in part and dissenting in part). Justice Stevens felt that pre-emption was particularly inappropriate "in a field traditionally occupied by State law" such as the definition of "arbitration." *See id*. at 18.

Significantly, the Federal Arbitration Act does not include a definition of "arbitration." This is an unusual drafting choice, to omit the definition of the key word in a statute, especially when that word is known to have varying definitions. *Contrast*, *e.g*., National Firearms Act of 1934, 26 U.S.C. § 5845(a) (defining "firearm"). Congress is presumed to have been aware that state laws had provided varying definitions of "arbitration," but chose not to create a national definition of the term. *See In re Price*, 562 F.3d 618, 624 (4th Cir. 2009) (state law controlled bankruptcy term because "Congress, presumably

aware that its prior use of this term of art had led courts to resort to state law . . . once again used this term of art without providing a federal definition or any interpretive guidance.") (quoting *Peaslee v. GMAC, LLC*, 547 F.3d 177, 184 n.13 (2d Cir. 2008)).

The omission of a definition of "arbitration" from the Federal Arbitration Act thus reflects an intentional congressional decision to not define the key word that is the subject of the statute, and thus to leave the definition of that word where it had always been: in the hands of the States. Even if this Court employed a doctrinal presumption *for* pre-emption, this drafting decision in the Federal Arbitration Act would be strong evidence against that presumption.

As with questions of contract formation under § 2 of the Act, questions of whether an agreement is an "arbitration" agreement should be left to state law. Nothing in the FAA or this Court's pre-emption jurisprudence requires application of a uniform definition of "arbitration" across all jurisdictions. Such an approach is inconsistent with congressional intent, fundamental principles of federalism, and the United States Constitution.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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