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

BRIEF OF RESPONDENTS CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

Whether the Fifth Circuit correctly held that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a treaty ratified by the President with the advice and consent of the Senate under Article II of the Constitution, is a treaty rather than an Act of Congress for purposes of the McCarran-Ferguson Act.

PARTIES

Petitioner is Louisiana Safety Association of Timbermen—Self Insurers Fund.

Respondents submitting this Brief in Opposition are Certain Underwriters at Lloyd's, London, subscribing to Certificate Nos. TNC0145/91/110, TNC0146/91/105, TNC0302/91/104, TNC0369/91, TNC0145/92/114, TNC0146/92/106, TNC0147/92/-103, TNC0302/92/107, TNC0370/92/105, TNC0145/-93/114, TNC0146/93/104, TNC0147/93/102, TNC-0302/93/104, TNC0370/93/102, TNC0145/94/108, TNC0146/94/104, TNC0147/94/101, TNC0302-/94/106, TNC0370/94/103, TNC0145A/95/105, TNC0145B/95/104 and TNC0693/96 ("Underwriters"). Underwriters are not a corporation.

Safety National Casualty Corporation was an additional party below, and petitioner named it as an additional respondent in the petition, but it did not participate in the rehearing *en banc* and took no position on the issue presented by the petition.

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STATEMENT OF THE CASE

A. The Reinsurance Agreements.

Beginning in 1991, Louisiana Safety Association of Timbermen–Self Insurers Fund ("LSAT") approached respondents Certain Underwriters at Lloyd's, London ("Underwriters"), to obtain reinsurance for LSAT's self-insured workers' compensation trust. App. 3a, 122a; 3d Suppl. & Am. Compl. ¶¶ 3, 8 (No. 02-cv-1146) (filed Sept. 20, 2005).[1] LSAT thereby chose to seek reinsurance in the London market—not only outside Louisiana but outside the United States. LSAT was represented in the negotiations by Braxton Reinsurance Brokers, Inc., a U.S. reinsurance broker, and Stirling Cooke, a U.K. reinsurance broker. Underwriters were represented by their Lloyd's syndicate managers, based in London. LSAT, initially through Braxton and Stirling, made a presentation of the risk to Underwriters. As a result, following negotiations, Underwriters and LSAT agreed to enter into various contracts, providing coverage (subject to the terms and conditions thereof) if losses exceeded LSAT's retention. Each contract contained an arbitration clause, requiring that all disputes arising under the contract be resolved by binding arbitration.

LSAT subsequently entered into an agreement titled "Loss Portfolio Transfer Agreement" with

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[1] The Louisiana Supreme Court has held that coverage of the type at issue here, whereby the LSAT fund ceded part of its risk to another insurer, "presents a classic instance of reinsurance, not excess insurance." *La. Safety Ass'n of Timbermen—Self Insurers Fund v. La. Ins. Guar. Ass'n*, 17 So. 3d 350, 359 (La. 2009).

Safety National Casualty Corporation ("Safety National"), by which LSAT transferred certain risks to Safety National. Because of that agreement, Safety National laid claim to any reinsurance proceeds from Underwriters. Underwriters have disputed and continue to dispute the validity of the purported loss portfolio transfer.

B. Proceedings in the District Court.

Disputes arose between the parties as to the interpretation and application of certain provisions of the reinsurance contracts, including the commutation clauses and sunset clauses. As a result, three suits were filed, all of which have been consolidated in the United States District Court for the Middle District of Louisiana.

Underwriters sought to compel arbitration under the reinsurance agreements, but LSAT challenged the enforceability of the agreements to arbitrate. The district court held that the arbitration clauses were unenforceable because of a Louisiana statute, La. Rev. Stat. § 22:868 (formerly § 22:629), which LSAT contends bars the enforcement of arbitration clauses in insurance contracts. The district court recognized that such a state law would ordinarily be preempted as inconsistent with Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (the "New York Convention" or "Convention"), which requires the enforcement of arbitration clauses in international contracts. The district court held, however, that Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), shielded the Louisiana state law from preemption, and allowed it to reverse-preempt the New York

Convention. App. 119a. In relevant part, Section 2(b) of the McCarran-Ferguson Act states that

> 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 [of Congress] specifically relates to the business of insurance. . . .

15 U.S.C. § 1012(b).

Recognizing that there was substantial ground to differ with his arbitration decision, the district judge certified the issue for interlocutory appeal under 28 U.S.C. § 1292(b). App. 109a. The Fifth Circuit granted permission to appeal. App. 5a, 89a.

C. Proceedings in the Court of Appeals.

After briefing and argument, a panel of the Fifth Circuit reversed the district court, reasoning that the New York Convention is a treaty, not an Act of Congress, and therefore not subject to reverse preemption by the plain terms of the McCarran-Ferguson Act. App. 85a. LSAT then petitioned for rehearing *en banc*, which was granted. App. 5a n.7.

After further briefing and reargument, the *en banc* court, by a vote of 15 to 3, reached the same result as the panel. The majority opinion, written by Judge Owen for 14 members of the court, observed that the McCarran-Ferguson Act applies only to Acts of Congress, not to treaties such as the New York Convention.

LSAT had argued that the New York Convention was entirely non-self-executing, that as a

result, the requirement to enforce the arbitration agreement arose from the implementing legislation, *see* 9 U.S.C. §§ 201-208, rather than the treaty itself, and that, as such, the controlling law was an "Act of Congress." The *en banc* court, however, held that it was irrelevant whether the Convention or any part of the Convention was self-executing. The court recognized that, regardless of whether the relevant provision of the Convention was self-executing, the implementing legislation did not prescribe the substantive standards for enforcing agreements to arbitrate, but instead directed courts to enforce the Convention itself. Specifically, the court noted that the implementing legislation states that "the Convention 'shall be enforced in United States courts in accordance with this chapter.'" App. 19a (quoting 9 U.S.C. § 201). The court further pointed out that the implementing legislation referred to international arbitration agreements as "fall[ing] ... under *the Convention*," rather than as falling under the implementing legislation, App. 20a (quoting 9 U.S.C. § 202) (court's emphasis), and that actions to enforce arbitration in international contracts should be "deemed to arise under the laws *and treaties* of the United States," App. 20a (quoting 9 U.S.C. § 203) (court's emphasis). Thus, the court reasoned that Congress's intent, as reflected in the implementing legislation, was that the New York Convention was to be enforced *as a treaty*, not as an Act of Congress. App. 20a-22a.

On that basis, the majority, consisting of 14 of the 18 judges sitting *en banc*, held that the McCarran-Ferguson Act did not apply as a matter of statutory interpretation, and that it was unnec-

essary to reach the question of whether any provision of the Convention was self-executing. The court noted that it had reached a different result from the Second Circuit in *Stephens v. American International Insurance Co.*, 66 F.3d 41 (2d Cir. 1995) ("*Stephens*"), but pointed out that the Second Circuit itself had called *Stephens* into question in *Stephens v. National Distillers & Chemical Corp.*, 69 F.3d 1226 (2d Cir. 1995) ("*National Distillers*"). App. 34a-36a.

Judge Clement wrote a separate opinion, for herself only, concurring in the judgment. Judge Clement concluded that, under this Court's analysis in *Medellín v. Texas*, 552 U.S. 491 (2008), Article II(3) of the New York Convention is plainly self-executing, because the Convention by its terms addresses judicial authorities rather than the political branches of government. App. 38a. Thus, she concluded, the requirement to enforce the arbitration agreement must arise from the Convention itself. The Second Circuit's contrary decision in *Stephens*, Judge Clement observed, "undertook no textual analysis and set forth no reasons to support its conclusion," and "was decided before *Medellín*, which provides critical guidance to lower courts for determining when treaty provisions are self-executing." App. 48a. Disagreeing with the dissent, Judge Clement also concluded that the issue of whether the Convention was self-executing had been properly preserved for review. App. 39a n.2.

Judge Elrod wrote a dissenting opinion, joined by two other members of the court. The dissenters took the view that, unless the Convention is self-executing, the legal requirements to enforce an

arbitration clause can arise only under the implementing legislation, and therefore are subject to the McCarran-Ferguson Act. App. 50a. Judge Elrod, however, found it unnecessary to actually decide whether the Convention was self-executing, because she concluded that Underwriters had waived the point. App. 81a n.31.

In accordance with the *en banc* majority opinion, the district court's order was vacated and the case remanded for further proceedings. LSAT filed a petition for certiorari, which Underwriters now oppose.

REASONS FOR DENYING THE WRIT

I. No Genuine Conflict Among the Circuits Exists.

A. The Second Circuit's Decision in *Stephens v. American International* Did Not Address the Grounds on Which the Fifth Circuit Majority Relied Below.

For its claim of a circuit split, LSAT relies on the Second Circuit's 15-year-old decision in *Stephens*. That decision, however, does not present a true conflict with the decision below.

In *Stephens*, the Second Circuit held, with little explanation, that the New York Convention was non-self-executing, and that as a result, the McCarran-Ferguson Act protected from preemption a state law barring certain insurance arbitrations. 66 F.3d at 45. But the decision did not address the ground on which the Fifth Circuit *en banc* majority relied: specifically, regardless of

whether the treaty is self-executing, the implementing legislation directs courts to apply the treaty as a treaty and does not thereby convert the treaty to an Act of Congress. *See* App. 19a-22a. Conversely, the Fifth Circuit found irrelevant, and hence did not decide, the issue that the *Stephens* court decided: specifically, whether the Convention is self-executing. *See* App. 15a.

The principal issue on which the Second Circuit focused in *Stephens* was "whether an anti-arbitration provision in the Kentucky Insurers Rehabilitation and Liquidation Law is enacted 'for the purpose of regulating the business of insurance' " for the purpose of the McCarran-Ferguson Act. 66 F.3d at 42. The discussion of self-execution, at the end of the decision, appears as almost an afterthought, occupying only half a page, nearly half of which is consumed by a lengthy quotation from *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 313-14 (1829), *overruled on other grounds by United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). *See Stephens*, 66 F.3d at 45. The Second Circuit assumed, without explanation, that non-self-execution meant that the courts were only applying the implementing legislation, not the treaty. *Stephens* did not even address the express words of the implementing legislation, which make clear, as the Fifth Circuit held in the present case, that courts must apply the Convention according to its terms. Thus, the circuit split that appears at first blush does not in fact exist.[2]

[2] LSAT also cites *Suter v. Munich Reinsurance Co.*, 223 F.3d 150 (3d Cir. 2000). Pet. 15. However, contrary to the impression that LSAT's brief attempts to create, the Third Circuit in *Suter* also did not reach *either* the question

Further, 14 of the 18 judges of the *en banc* Fifth Circuit found the statutory language controlling on the point that *Stephens* did not address. There is no reason to doubt that the Second Circuit would also reach the same result, were the Second Circuit to consider the point in light of the Fifth Circuit's decision below. That expectation is reinforced by the results reached in the federal district courts, as all but one of the district courts in other circuits to have decided the question since *Stephens* have concluded, as did the Fifth Circuit, that the McCarran-Ferguson Act does not permit state law to preempt the New York Convention. *See Certain Underwriters at Lloyd's, London v. Simon*, No. 1:07-cv-0899-LJM-WTL, 2007 WL

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that the Fifth Circuit decided in the present case *or* the question that the Second Circuit decided in *Stephens*. Rather, *Suter* merely rejected an argument that the state insurance law was inconsistent with the Convention's implementing legislation. *Id.* at 161-62. It therefore was unnecessary for the Third Circuit to consider—and that court did not address—whether the Convention should be treated as a treaty separate from its implementing legislation. LSAT also cites language in *Hopson v. Kreps*, 622 F.2d 1375, 1380 (9th Cir. 1980), and a concurring opinion in *The Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006) (Kavanaugh, J., concurring). Pet. 15-16. However, the point that those opinions addressed has nothing to do with the McCarran-Ferguson Act, the New York Convention or the New York Convention's implementing legislation; they instead considered whether implementing legislation that is *inconsistent* with a treaty (in *Fund for Animals*, the Migratory Bird Treaty, and in *Hopson*, the International Whaling Convention), should be allowed to supersede the treaty itself, an issue not present here. Finally, the academic commentary cited by the Fifth Circuit dissent, App. 59a-61a, is irrelevant, because it also does not address the McCarran-Ferguson Act or the particular language of the New York Convention's implementing legislation.

3047128, at *4-*7 (S.D. Ind. Oct. 18, 2007); *Murphy Oil USA, Inc. v. SR Int'l Bus. Ins. Co.*, No. 07-CV-1071, 2007 WL 2752366, at *3-*4 (W.D. Ark. Sept. 20, 2007) (finding reasoning of *Stephens* "doubtful"); *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co. I*, 466 F. Supp. 2d 1293, 1304-06 & n.9 (N.D. Ga. 2006) (finding *Stephens* "unpersuasive"); *Antillean Marine Shipping Corp. v. Through Transport Mut. Ins., Ltd.*, No. 02-22196-Civ, 2002 WL 32075793, at *3 (S.D. Fla. Oct. 31, 2002). *But see Transit Cas. Co. v. Certain Underwriters at Lloyd's of London*, No. 96-4173-cv-2, 1996 WL 938126, at *2 (W.D. Mo. June 10, 1996) (not considering whether a treaty should be regarded differently from an Act of Congress). And none of these courts has held that the outcome turns on self-execution or non-self-execution.

In short, the Fifth Circuit is the only federal court of appeals to have directly ruled on the dispositive issue below, and there is no real conflict among the courts of appeals. Hence, there is no reason for this Court to take up the question before the other circuits have had a chance to consider the Fifth Circuit's forceful and well-reasoned exposition of the issues. The lower courts do not need this Court's guidance at this point, and this Court has no reason to take up the question now.

B. The Second Circuit's Decision in *Stephens v. American International* Does Not Reflect That Court's Current Thinking.

In any event, *Stephens* does not represent the current state of Second Circuit law. The very same year that *Stephens* was decided, another panel of the Second Circuit Court of Appeals called the

reasoning of that decision into question. In its detailed and carefully reasoned opinion in *National Distillers*, the Second Circuit held that the McCarran-Ferguson Act did not permit states to reverse-preempt the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 ("FSIA").

In *National Distillers*, the Second Circuit held that the McCarran-Ferguson Act simply does not apply to "a federal law that clearly intends to preempt all other state laws." 69 F.3d at 1233. Further, the Second Circuit reasoned that

> the international-law origins of the FSIA, so different from the kind of congressional statutory action that the McCarran-Ferguson Act was enacted to deal with, virtually compel the conclusion that the McCarran-Ferguson Act should not be interpreted to exclude insurance companies from the FSIA's requirements of sovereign immunity.

Id. at 1231.

The *National Distillers* panel noted the tension between this holding and the result in *Stephens*. The panel concluded, however, that it "need not consider whether the [holding] is in conflict with the holding of [*Stephens*]," because the *National Distillers* holding was also supported by an alternative ground, namely that the state insurance law would have been preempted by federal law even prior to the enactment of the McCarran-Ferguson Act. *Id.* at 1233 n.6; *see id.* at 1233-34. The inconsistency between the two results, however, is undeniable: if a rule of "international-law origins," embodied in legislation, does not trigger the McCarran-Ferguson Act, *National Distillers*, 69

F.3d at 1231, then *Stephens*, which failed to consider the issue, was wrong that a state law can reverse-preempt either the New York Convention or its implementing legislation, and the Fifth Circuit in the present case plainly reached the right result.[3]

This Court has recognized that an inconsistency between two or more panels in the same circuit is not a sufficient reason for this Court to grant certiorari. *See* Sup. Ct. R. 10(a); *see also Davis v. United States*, 417 U.S. 333, 340 (1974); *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (*per curiam*). Rather, "contrary decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself." Justice John M. Harlan, *Manning the Dikes*, 13 RECORD OF ASS'N OF BAR OF CITY OF N.Y. 541, 552 (1958).

The Second Circuit should be allowed to resolve the split between its own panels in an appropriate future case. After more careful consideration than it was able to devote in *Stephens*, the Second Circuit may well follow the reasoning of *National*

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[3] The result in *Stephens* also is in tension with the later decision in *Smith/Enron Cogeneration Limited Partnership, Inc. v. Smith Cogeneration International, Inc.*, 198 F.3d 88, 96 (2d Cir. 1999). That case held, outside the McCarran-Ferguson Act context, that state law has no application in cases that fall within the federal courts' jurisdiction by reason of the New York Convention's implementing legislation. *See id.* at 96 ("When we exercise jurisdiction under Chapter Two of the FAA, we have compelling reasons to apply federal law . . . to the question of whether an agreement to arbitrate is enforceable.").

Distillers and reach the same result as the Fifth Circuit reached here. Should a real conflict between the Second and Fifth Circuits eventually emerge, the Court will be able to consider whether the case warrants review at that time.

C. No Current Conflict Exists on the Self-Execution Issue.

Even if LSAT is correct in its view that self-execution or non-self-execution is relevant here, the Second Circuit's opinion on this issue in *Stephens* predated recent developments in the law. In particular, *Stephens* was decided without the benefit of this Court's decision in *Medellín v. Texas*, 552 U.S. 491 (2008), which substantially clarified the test for determining whether treaties are self-executing—that is, enforceable as domestic law in the U.S. courts. *Stephens* failed to apply the analysis that this Court later adopted in *Medellín*.

In *Medellín*, this Court was confronted with the question of whether Article 94 of the United Nations Charter was self-executing. That article provides that each member of the United Nations "undertakes to comply" with judgments of the International Court of Justice. The Court held that "[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text," *Medellín*, 552 U.S. at 506, and that courts should look to the text of a treaty to determine whether it contains a direction for judicial enforcement or a call for future legislative action, *id.* at 508. The Court in *Medellín* concluded that the words "undertakes to comply" in UN Charter Article 94 imply an agreement to take future action, not a

direction to the courts to apply International Court of Justice judgments directly. *Id.*

In the present case, as Judge Clement pointed out in her concurrence, the Convention contains an express direction to the courts of each state party. In particular, the New York Convention provides, in relevant part, 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." New York Convention, Art. II(3) (emphasis added). As Judge Clement aptly stated, "[t]he terms of Article II do not merely describe arbitration rights which are of a nature to be enforced in a court of justice, but expressly instruct courts to enforce those rights by referring the parties to arbitration." App. 45a (internal quotation marks omitted). Under *Medellín*, that direction to the courts establishes that the treaty provision is self-executing. 552 U.S. at 508.

This is not a point that the Second Circuit has ever had a chance to consider. The Second Circuit in *Stephens* relied on language in *Foster v. Neilson* that a treaty is self-executing "*whenever it operates of itself*, without the need of any legislative provision," and from that language concluded that the mere existence of implementing legislation made the treaty non-self-executing. *Stephens*, 66 F.3d at 45 (quoting *Foster*, 27 U.S. (2 Pet.) at 313-14) (court's emphasis). However, the question of whether the mere existence of implementing legislation makes a treaty wholly non-self-executing simply was not at issue in *Foster*, which involved a treaty for which Congress had failed to

enact implementing legislation. *Foster*, 27 U.S. (2 Pet.) at 315. Nor did the Second Circuit undertake the analysis now mandated by *Medellín*, which requires a court to look to the words of the treaty itself to determine if it is self-executing. *Medellín*, 552 U.S. at 506. Petitioner contends that language in *Medellín* supports the conclusion that the New York Convention is non-self-executing. Pet. 18 n.4 (citing 552 U.S. at 521-22). *But see infra* Part III.D. That language, however, has never been considered by the Second Circuit or any other federal court of appeals, including the court below.

Under Second Circuit case law, a panel of that court has authority to "reconsider a prior panel's holding if . . . an intervening Supreme Court decision . . . casts doubt on [the earlier panel's] controlling precedent." *Loyal Tire & Auto Center, Inc. v. Town of Woodbury*, 445 F.3d 136, 145 (2d Cir. 2006). Were the Second Circuit to revisit the issue in light of this Court's subsequent decision in *Medellín*, it could well agree with Judge Clement's conclusion in her concurrence that Article II(3) of the New York Convention is self-executing, and that its own earlier decision in *Stephens* is therefore wrong. The Second Circuit should be given an opportunity to consider, in the first instance, whether its own earlier precedent in *Stephens* is inconsistent with this Court's holding in *Medellín*.

II. This Case Is an Inappropriate Vehicle for Deciding the Question Presented.

A. Issues of Waiver Interfered with the Fifth Circuit's Consideration of the Question Presented and, in the Fifth Circuit Dissenters' View, Could Prevent This Court from Reaching the Question.

The Fifth Circuit majority held that self-execution was not relevant to the issues before it. App. 15a. However, the Fifth Circuit dissenters agreed with LSAT's view that self-execution or non-self-execution was dispositive. App. 66a; LSAT En Banc Br. 27-45. The dissenters further took the view that Underwriters had waived the argument that the Convention was self-executing. App. 81a n.31. As a result of their views on waiver, the dissenters stated that "[t]he question of whether or not the treaty is self-executing is not before the court," App. 50a n.1, and accordingly did not answer the question whether any part of the Convention was self-executing. Rather, the dissenters concluded that they were constrained to answer a hypothetical question: *Assuming* that the New York Convention is wholly non-self-executing, *would* the McCarran-Ferguson Act bar enforcement of the Convention? *See* App. 81a n.31. The concurring judge, Judge Clement, also had to consider the waiver issue before reaching the issue of self-execution. App. 39a n.2.

Thus, if the dissenters are correct (which Underwriters dispute), this case does not squarely present the question that LSAT now portrays as warranting this Court's review. If the Court were to decide—like the dissent below—that it cannot

reach the issue of whether the New York Convention is self-executing, but were to agree with LSAT and the dissent that the issue is dispositive, then it will be unable to resolve either the question that LSAT presents in its petition or the alleged inconsistency between the Fifth Circuit's decision below and the Second Circuit's decision in *Stephens*. In that circumstance, this Court's decision could end up having no application in *any* future case. This Court does not generally grant certiorari to resolve academic or hypothetical questions, or to decide issues that may be unique to the parties in a particular case.

Moreover, partly because of the waiver issue, only *one* of the 18 judges on the Fifth Circuit, Judge Clement, actually decided whether the relevant provision of the New York Convention is self-executing. But that is the question that LSAT contends is dispositive. Courts of appeals in future cases will have an opportunity to consider that question, if it is relevant, without the complications created by the alleged waiver here, with which the Fifth Circuit concurrence and dissent both struggled. This Court will then have the benefit of the reasoning of the courts of appeals in considering the question that LSAT is attempting to present. If, as LSAT states, the question raised by its petition is "important and recurring," Pet. 2, then this Court will have ample opportunity to address it in future cases that are better postured for review.

B. The Question Presented Arises Only Infrequently in the District Courts, but Should It Recur, There Would Be No Impediments to Appellate Review.

Apparently anticipating a challenge to the suitability of this case for review, LSAT argues that the interaction between the McCarran-Ferguson Act and the New York Convention "frequently" arises at the district court level, Pet. 14, but seldom makes it to the court of appeals level because it is often addressed in a "nonfinal" or "unreviewable" order. Pet. 1. LSAT is incorrect, both as to the frequency with which the issue arises and the availability of appellate review.

Despite LSAT's repeated claim that the relationship between the McCarran-Ferguson Act and the New York Convention "arises frequently," LSAT only cites two district court cases in which the issue was decided. Pet. 25 (citing *Murphy Oil*, 2007 WL 2752366, at *3; *Transit Casualty*, 1996 WL 938126, at *2). Underwriters are aware of only three additional district court cases outside the Fifth Circuit, not cited by LSAT but all decided adversely to LSAT, which reached the issue in the 15 years since the *Stephens* decision. *Simon*, 2007 WL 3047128, at *4-*7; *Goshawk*, 466 F. Supp. 2d at 1304-05 & n.9; *Antillean Marine*, 2002 WL 32075793, at *3. LSAT therefore has no basis to claim that the issue "arises frequently" in the federal district courts. Pet. 25.

LSAT also has no basis for its argument that the issue is likely to evade appellate review. Pet. 26-29. An issue involving arbitration can reach the appellate level at least as readily, if not more so, than other legal issues.

First, a party aggrieved by the denial of a motion to compel arbitration may take an immediate interlocutory appeal, as a matter of right, to the court of appeals. *See* 9 U.S.C. § 16(a)(1); *Arthur Andersen LLP v. Carlisle*, 556 U.S. —, 129 S. Ct. 1896, 1900 (2009). Petitioner simply ignores Section 16(a)(1), instead stating incorrectly that such an order "cannot be appealed" unless the district court certifies and the court of appeals accepts an interlocutory appeal under 28 U.S.C. § 1292(b). Pet. 27. Although the procedure under 28 U.S.C. § 1292(b) was followed in this case, that step was not necessary.

Second, a final judgment granting a motion to compel arbitration also is immediately appealable. *See* 9 U.S.C. § 16(a)(3). Since this Court's decision in *Green Tree Financial Corp.–Alabama v. Randolph*, 531 U.S. 79 (2000), a final appealable judgment arises not only every time a district court decides an "independent" proceeding to compel arbitration, but also when a district court dismisses an action with an "embedded" arbitration issue on the ground that the claims are subject to arbitration. *Id.* at 87-89. Again, petitioner simply ignores the express statutory authorization provided by Section 16(a)(3).

Third, as with any other issue, the issue of whether the New York Convention preempts state insurance law can be raised on appeal from a final judgment on the merits. In particular, a party resisting arbitration may appeal from a final judgment enforcing an arbitration award. *See* 9 U.S.C. § 16(a)-(b); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 948 (1995). Once again, petitioner fails to acknowledge that prospect.

Fourth, even if the arbitration issue is addressed in "an order remanding the case to state court for lack of federal jurisdiction [which is] unreviewable pursuant to 28 U.S.C. § 1447(d)," Pet. 28, the federal court's decision is final only as to the question of its own jurisdiction. The state courts can revisit the substantive issue of whether the New York Convention preempts state law. *See, e.g., Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398, 405 (7th Cir. 2001) (after remand, state court is not bound to follow substantive rulings underlying district court's remand decision); *In re Loudermilch*, 158 F.3d 1143, 1147 (11th Cir. 1998) (same); *BT Sec. Corp. v. W.R. Huff Asset Mgmt. Co.*, 891 So. 2d 310, 316 & n.1 (Ala. 2004) (same; holding state law preempted, contrary to federal court's remand decision). This Court can then review the issue by certiorari from a final judgment of the highest appellate court of the state. Yet again, petitioner fails to acknowledge this route to appellate review and review by this Court.

Finally, as petitioner does acknowledge, if the issue is controlling and unsettled, the district court may certify an interlocutory appeal under 28 U.S.C. § 1292(b), precisely as it did here.

LSAT's assertion that the question it seeks to present arises frequently in the district courts, but somehow will evade appellate review, is therefore wholly unfounded. Should the issue recur as LSAT predicts, then this Court will have additional opportunities to review it, after further percolation in the lower courts.

III. The Petition Raises No Important Federal Question, Because the Decision Below Is Plainly Correct.

In the end, the decision of the *en banc* Fifth Circuit is straightforward and follows directly from statutory language and this Court's precedents, as the Fifth Circuit's near-unanimity suggests. Petitioner argues that the Fifth Circuit did not properly interpret the New York Convention's implementing legislation and the McCarran-Ferguson Act. Pet. 17-21. Petitioner, however, fails to take adequate account of the plain statutory language or give any weight to the facts that the Convention is an Article II treaty, that the Convention's implementing legislation applies only to international commercial contractual relationships, and that the McCarran-Ferguson Act only overcomes domestic legislation under Article I and does not impair the federal government's ability to negotiate and enforce agreements with foreign nations. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 428 (2003).

A. The Decision Below Follows Easily from the Plain Language of the Statutes and Treaty.

As LSAT concedes, in interpreting a statute, a court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (plurality opinion). The same is true of the text of a treaty. *Medellín*, 552 U.S. at 506. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*,

503 U.S. 249, 253-54 (1992) (quoted in Pet. 17). Contrary to what LSAT argues, that is exactly what the Fifth Circuit did.

The court's careful analysis of the text of the Convention, its implementing legislation, and the McCarran-Ferguson Act all led to the conclusion that the McCarran-Ferguson Act does not authorize Louisiana to reverse-preempt Article II(3) of the Convention. App. 6a, 15a-22a. The Fifth Circuit observed that "[t]he Convention contemplates enforcement in a signatory nation's courts, directing that courts 'shall' compel arbitration when requested by a party to an international arbitration agreement." App. 8a. The Fifth Circuit analyzed the text of the Convention's implementing legislation, which "states that *the Convention* 'shall be enforced in United States courts in accordance with this chapter.' " *Id.* (emphasis added). And the Fifth Circuit reviewed the language of the McCarran-Ferguson Act, which it quoted as saying:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> . . .
>
> 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, or which imposes a fee or tax upon such

> business, unless such Act specifically relates to the business of insurance. . . .

App. 9a (quoting 15 U.S.C. §§ 1011, 1012(b)).

Thus, by applying the plain statutory text, the Fifth Circuit correctly concluded that the only issue to determine was "whether Louisiana law overrides the Convention's requirement that the present dispute be submitted to arbitration because [the court] construe[s] an act of Congress to invalidate, impair, or supersede state law." App. 12a. And, based on the plain text of the McCarran-Ferguson Act as well as "the terms of the Convention Act," the court held that "Congress did not intend the term 'Act of Congress,' as used in the McCarran-Ferguson Act, to reach a treaty such as the Convention." App. 18a.

LSAT argues that, because the treaty was implemented by a statute, courts are necessarily enforcing *only* the statute and not the treaty. But legislative implementation of a treaty does not make the treaty itself a statute. Nothing in the New York Convention's implementing legislation purports to supplant the operative terms of the treaty with the terms of the statute. For example, the New York Convention's implementing legislation does not contain substantive domestic-law provisions intended to satisfy a general standard prescribed in a treaty. Rather, the implementing legislation simply provides that the "Convention . . . *shall be enforced*." 9 U.S.C. § 201 (emphasis added). The substantive standards to be applied are set forth in the Convention itself, not in the implementing legislation. *See id.*; *see also id.* § 207. The implementing legislation merely adds jurisdictional and procedural provisions, designed

to bring Convention cases into the federal courts and prescribe the technical form of the proceedings. *See id.* §§ 203-208.[4] Thus, a court in a New York Convention case is construing the Convention itself, not the implementing legislation. LSAT's position therefore is flatly inconsistent with the language of the McCarran-Ferguson Act, which only purports to limit decisions "construe[ing]" Acts of Congress, 15 U.S.C. § 1012(b), not decisions construing treaties, regardless of whether those treaties are being applied under the direction of an Act of Congress or of their own force.

B. The Decision Below Also Follows Easily from the History and Purpose of the McCarran-Ferguson Act and This Court's Decision in *American Insurance Association v. Garamendi*.

If there were any doubt about the meaning of the text of the relevant statutes and treaty, the history and purpose of the McCarran-Ferguson Act would make the result plain. As this Court has repeatedly recognized, when a court finds a statute ambiguous, it should consider the history and purpose of the legislation in determining the

[4] The only arguably substantive provision in the implementing legislation, 9 U.S.C. § 202, defines what it means for an arbitration in the United States to be "domestic" and therefore not subject to the Convention, because that is a point on which the New York Convention looks to domestic law. *See* New York Convention Art. I(1) (Convention "shall . . . apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought"). That provision is not at issue in the present case.

meaning of the statute. *See, e.g.*, *Corley v. United States*, 556 U.S. —, 129 S. Ct. 1558, 1568-1570 (2009) (reviewing drafting history and other indications of legislative purpose to determine Congress's intent to limit *McNabb-Mallory* rule); *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229, 2243 (2008) (considering "litigation history that prompted Congress to enact" the Military Commissions Act of 2006).

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, was adopted in 1945 in response to this Court's decision in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), which held for the first time that the interstate business of insurance was "commerce." *See Humana Inc. v. Forsyth*, 525 U.S. 299, 306 (1999). Concerned that Acts of Congress regulating interstate commerce might inadvertently undermine state regulation of the business of insurance, Congress enacted the McCarran-Ferguson Act. *Id.* at 306. Section 2(b), the part of the Act at issue in this case, "ensured that federal statutes not identified in the Act or not yet enacted would not automatically override state insurance regulation." *Humana*, 525 U.S. at 306. As one of the Act's sponsors explained in debate on the Senate floor, "[w]hat we have in mind is that the insurance business, being interstate commerce, if we merely enact a law relating to interstate commerce, or if there is a law now on the statute books relating in some way to interstate commerce, it would not apply to insurance." 91 Cong. Rec. 1487 (1945) (remarks of Sen. Ferguson).

However, it was always the case that treaties entered into by the United States—and legislation

enacted by Congress to implement treaties—could preempt state laws, even if no commerce was involved. *See Missouri v. Holland*, 252 U.S. 416, 433 (1920) (holding that Congress's power to implement treaties was not confined by the commerce power); *see also United States v. Pink*, 315 U.S. 203, 229-31 (1942) (holding that state insurance law is preempted by federal foreign-affairs power). In acting to protect state insurance regulation from inadvertent preemption by general federal regulation of commerce, Congress clearly did not mean to give each state new authority to override international agreements entered into under the Article II treaty power. As the Fifth Circuit concluded:

> [It is] unlikely that when Congress crafted the McCarran-Ferguson Act, it intended any future treaty implemented by an Act of Congress to be abrogated to the extent that the treaty conflicted in some way with a state law regulating the business of insurance if Congress's implementing legislation did not expressly save the treaty from reverse-preemption by state law. If this had been Congress's intent, it seems probable that Congress would have included a term such as "or any treaty requiring congressional implementation" following "Act of Congress" and "such Act" in the McCarran-Ferguson Act. There is no indication in the McCarran-Ferguson Act that Congress intended, through the preemption provision and the use of the term "Act of Congress," to restrict the United States' ability to negotiate and

> implement fully a treaty that, through its application to a broad range of international agreements, affects some aspect of international insurance agreements.

App. 29a-30a.

In *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), this Court made clear that the McCarran-Ferguson Act ends where the foreign-relations power begins. In *Garamendi*, the Court held that certain executive agreements between the United States and European countries, which recognized an exclusive forum and remedy for Holocaust-era insurance claims, preempted a California statute requiring insurers doing business in the state to disclose information about policies sold in Europe between 1920 and 1945. In reaching this holding, this Court rejected California's argument that Congress, through the McCarran-Ferguson Act, had authorized state laws such as the one at issue:

> As the text itself makes clear, the point of McCarran-Ferguson's legislative choice of leaving insurance regulation generally to the States was to limit congressional preemption under the commerce power, whether dormant or exercised. . . . [A] federal statute directed to *implied* preemption by *domestic commerce legislation* cannot sensibly be construed to address preemption by executive conduct in foreign affairs.

539 U.S. at 428 (emphasis added).

The reasoning of *Garamendi* directly applies here. A ratified treaty, made by the President

with the advice and consent of the Senate as specified in Article II of the Constitution, involves "executive conduct in foreign affairs," *Garamendi*, 539 U.S. at 428, even more clearly than the informal executive agreements on Holocaust reparations that were at issue in *Garamendi*. The fact that the President ratified the treaty with the consent of the Senate as specified in Article II *and* Congress implemented it by legislation under Article I should only strengthen, not weaken, the enforceability of the treaty. *See Medellín*, 552 U.S. at 527. In light of the holding of *Garamendi*, LSAT cannot seriously suggest that the McCarran-Ferguson Act, designed to limit "implied preemption by domestic commerce legislation," *Garamendi*, 539 U.S. at 428, was meant to allow states to override the concerted foreign policy efforts of the executive and legislative branches.

LSAT's proposed distinction between implemented and unimplemented treaties would allow the McCarran-Ferguson Act to override a treaty if both houses of Congress enact a statute that directs courts to enforce the treaty, but would allow the treaty to prevail if the Senate alone, in its resolution consenting to ratification, declared that the treaty should be enforced by the courts without implementing legislation. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004) (enforcing Senate declaration that treaty was non-self-executing); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111(4)(b), 303 cmt. d, 314 cmts. b & d (1987) (stating that such declarations are binding). In both cases, the intent and effect should be the same: the competent political branch of government is directing the courts to enforce an inter-

national obligation embodied in a treaty. LSAT's formalistic attempt to draw a distinction between these two situations makes no practical sense. If anything, a treaty that has *both* been ratified by consent of two-thirds of the Senate *and* been implemented by legislation passed by both houses of Congress should have a *stronger* claim to enforcement than a treaty that has been approved by the Senate alone.

C. LSAT's Argument Misstates the Impact of the Fifth Circuit's Decision and Fails to Take Account of the International Character of the Transaction.

LSAT also argues that the Fifth Circuit's decision means that an alien insurer could come to Louisiana and impose a "preprinted form polic[y]," with a clause calling for arbitration in a distant place, on an unsophisticated consumer. Pet. 22-23. In fact, LSAT is not a consumer but a large entity that itself is in the insurance business. LSAT's suggestion that the decision below will affect consumers is simply not true, as nothing in the decision in any way addresses Louisiana's authority to regulate ordinary insurance transactions within its borders. If a foreign or alien insurer is admitted to issue insurance in Louisiana, nothing in the decision below "throws into doubt," Pet. 22, Louisiana's ability to require it to comply with state laws dictating the content of insurance contract forms. The decision below is relevant to, at most, reinsurance and excess and surplus lines insurance (whether written on the "Bermuda Form" or otherwise) purchased from a non-admitted insurer located overseas. Moreover, the United

States, as authorized by Article I(3) of the Convention, has specifically limited its application to "commercial" contracts. *See* 9 U.S.C. § 202.

Moreover, in seeking to inflate the impact of the Fifth Circuit's decision, LSAT asserts that "[a]t least 13 states have enacted laws that prohibit enforcement of arbitration clauses in insurance disputes." Pet. 21 & n.6. LSAT is incorrect. The contract between LSAT and Underwriters is a contract of reinsurance, not primary insurance. *See La. Safety Ass'n of Timbermen—Self Insurers Fund v. La. Ins. Guar. Ass'n*, 17 So. 3d 350, 359 (La. 2009). Only six of the state laws that LSAT cites, counting Louisiana's, could by their terms potentially apply to a reinsurance contract like the one between LSAT and Underwriters. *See* Ark. Code Ann. § 16-108-201(b)(2); Haw. Rev. Stat. § 431:10-221; La. Rev. Stat. Ann. § 22:868; S.C. Code Ann. § 15-48-10(b)(4); Va. Code Ann. § 38.2-312; Wash. Rev. Code § 48.18.200. Seven others specifically exclude reinsurance from their scope. Ga. Code Ann. § 9-9-2; Kan. Stat. Ann. § 5-401; Ky. Rev. Stat. Ann. § 417.050; Mo. Rev. Stat. § 435.350; Neb. Rev. Stat. § 25-2602.01; R.I. Gen. Laws § 10-3-2;[5] S.D. Codified Laws § 21-25A-3. LSAT also cites four others, but acknowledges that they apply only to health and auto insurance. Pet. 22 n.7.

LSAT also attempts to obscure the international character of its transaction with Underwriters. LSAT sought out reinsurance not only outside of

[5] The Rhode Island statute permits arbitration clauses even in primary insurance contracts, as long as formal requirements regarding placement of the arbitration clause are satisfied. R.I. Gen. Laws § 10-3-2.

Louisiana but outside the United States. It approached Underwriters in London, England, through two sophisticated intermediaries, including one based in the United Kingdom. As a result, the parties entered into a negotiated transaction that included a mutually agreed arbitration clause. Having sought the benefits of doing business in the international market, LSAT cannot now insist on the "parochial concept that all disputes must be resolved under our laws and in our courts." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). Even if LSAT's arguments for the application of state law had merit in regard to domestic transactions, they could not apply to the "truly international agreement" that LSAT entered into with Underwriters. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515 (1974). As this Court has held,

> concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement [to submit disputes to arbitration], *even assuming that a contrary result would be forthcoming in a domestic context.*

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985) (emphasis added). Thus, LSAT's repeated reliance on case law under Chapter 1 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16, which deals with domestic arbitration, *see, e.g.*, Pet. 5 n.1, completely misses the point.

Furthermore, this case involves not only an international contract but a treaty obligation. This Court has repeatedly recognized that Congress is presumed to intend to comply with international obligations, and that an Act of Congress—such as the McCarran-Ferguson Act here—should not be construed to override an international treaty obligation, self-executing or otherwise, if another construction is possible. *See, e.g.*, *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). "If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements." *Vimar*, 515 U.S. at 539.

Even more clearly, Congress cannot have intended to authorize the individual states to create havoc with national foreign policy by allowing them to opt out, on a piecemeal basis, from treaty obligations that the United States entered into with foreign nations and explicitly directed the federal courts to enforce. This Court has long recognized that "'[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.'" *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 448 (1979) (quoting *Bd. of Trs. of Univ. of Ill. v. United States*, 289 U.S. 48, 59 (1933)). And as discussed, this Court recognized in *Garamendi* that the McCarran-Ferguson Act does not permit the states to interfere with the conduct of

United States foreign policy through international agreements. *Garamendi*, 539 U.S. at 428. LSAT's attack on the Fifth Circuit's *en banc* decision disregards this fundamental principle.

For these reasons, nothing in the decision below calls into question Louisiana's authority to protect local consumers and businesses involved in common domestic insurance transactions in Louisiana, even with insurers based out of state or overseas. Of course, if LSAT's hypothetical parade of horribles somehow did come to pass in the future, nothing would prevent this Court from reviewing the issue at that time. The Fifth Circuit's decision below presents none of those concerns.

D. If Self-Execution Is Relevant, Article II(3) of the New York Convention Is Clearly Self-Executing.

Finally, as Judge Clement concluded in her opinion concurring in the judgment, Article II(3) of the New York Convention plainly is self-executing. Judge Clement also correctly concluded that the issue of self-execution was preserved for *en banc* review because it was fairly encompassed in Underwriters' brief to the three-judge panel, treated by the panel as having been presented, and addressed by LSAT in its *en banc* brief. App. 39a n.2.

By its unambiguous language, Article II(3) is addressed in mandatory terms to "[t]he court of a Contracting State." New York Convention, Art. II(3). That provision is expressly a "directive to domestic courts," not to a legislature or executive. *Medellín*, 552 U.S. at 508. Thus, under this

Court's decision in *Medellín*, it is self-executing. *Id.* The fact that Congress thought implementing legislation was desirable to provide federal jurisdiction for New York Convention cases, or may even have thought implementing legislation necessary to give effect to other provisions of the Convention besides Article II(3), *see* Pet. 19 n.4, has nothing to do with whether Article II(3) of the Convention would have been operative on its own in the absence of implementing legislation.

LSAT points to language in *Medellín* that "Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes. . . . The judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress," followed by a citation to, among other provisions, the implementing legislation for the New York Convention. *Medellín*, 552 U.S. at 521-22, *quoted in* Pet. 18 n.4. However, the self-executing nature of the New York Convention was not at issue before the Court in *Medellín*; rather, the Court was simply making the point that Congress had provided by statute for the enforcement of arbitral awards in various contexts. As this Court has cautioned in the past, passing comments in the Court's opinions cannot bear the heavy weight that parties sometimes seek to put on them. *See, e.g., Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008); *Rivet v. Regions Bank of La.*, 522 U.S. 470, 477 (1998).

Moreover, the quoted language from *Medellín* makes clear that the Court was referring to the enforcement of "judgments" of international tri-

bunals—that is, the enforcement under Articles III-VI of the Convention of final arbitral *awards*, not the enforcement under Article II of *agreements to arbitrate*. Article II, which imposes the obligation to recognize and enforce qualifying agreements to arbitrate, contains an express reference to "court[s]." By contrast, the award-enforcement provisions of the Convention never mention the word *court*, but only refer to the "competent authority" and leave to each country's own law the task of designating that authority. New York Convention Art. V(1)-(2), VI. Because the provision at issue here, Article II(3), refers explicitly to "court[s]," it is self-executing under the test that this Court articulated in *Medellín*.

The legislative history cited by LSAT, even if relevant, does not suggest otherwise. The Department of State's testimony in support of ratification of the Convention merely stated that implementing legislation was "desirable." S. Exec. Rep. No. 90-10, App., at 5 (1968) (testimony of Amb. Richard D. Kearney of the State Department's Office of the Legal Advisor). The message from the President to the Senate, paraphrased in the Committee report, stated that "[c]hanges in title 9 . . . will be required before the United States becomes a party to the [C]onvention." 114 Cong. Rec. 10488 (1968) (message from the President), *cited in* S. Exec. Rep. No. 90-10, *supra*, at 2. However, the State Department made clear that the reason legislation was needed was "to insure the coverage of the [Federal Arbitration Act] extends to all cases arising under the treaty" and "to take care of related venue and jurisdictional requirement problems"—not because the Convention would have been inoperative in the absence of legisla-

tion. S. Exec. Rep. No. 90-10, *supra*, App., at 6. And in fact, all that the implementing legislation did was to bring Convention cases under the procedures of the Federal Arbitration Act, 9 U.S.C. §§ 206-208, prescribe a statute of limitations for enforcement of awards, *id.* § 207, and take care of federal jurisdiction and venue uncertainties, *id.* §§ 203-205. For substantive provisions, it refers the courts to the treaty itself. *Id.* §§ 201, 207; *see supra* Part III.A. LSAT's assumption that the mere existence of implementing legislation necessarily means that each and every provision of the treaty is non-self-executing—in other words, that it would have no force without the legislation—is therefore unfounded.

LSAT has conceded that, if the relevant provision of the New York Convention is self-executing, then it is not an "Act of Congress," the McCarran-Ferguson Act does not apply, and Louisiana's anti-arbitration law is preempted. *See* Pet. 19-20; *see also id.* at 15-16, 18; LSAT En Banc Br. at 44-45; *Garamendi*, 539 U.S. at 428. The self-executing character of Article II(3) of the Convention thus removes the underlying premise of LSAT's petition.

CONCLUSION

For all of the foregoing reasons, Underwriters request that the petition be denied.

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