No. 20-35428

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLMS Management Services Limited Partnership; Roundhill I LP,

Plaintiffs-Appellants,

v.

Amwins Brokerage of Georgia LLC, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Washington
Case No. 3:19-cv-05785-RBL
The Honorable Ronald B. Leighton

Brief of Amicus Curiae United Policyholders
in Support of Appellants

David S. Watnick
COVINGTON & BURLING LLP
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, CA 94105
Telephone: (415) 591-6000

Mark W. Mosier
Jordan V. Hill
COVINGTON & BURLING LLP
One CityCenter, 850 Tenth Street NW
Washington, DC 20001
Telephone: (202) 662-6000

Counsel for Amicus Curiae United Policyholders

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Pursuant to Federal Rule of Appellate Procedure 26.1, United Policyholders certifies that it is a non-profit 501(c)(3) organization with no parent company and no publicly traded stock.

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae United Policyholders ("UP") is a non-profit 501(c)(3) organization founded in 1991 whose mission is to serve as a trustworthy and useful information resource and as an effective voice for a broad range of insurance policyholders throughout the United States.[1] UP is funded by donations and grants and does not sell insurance or accept money from insurance companies. UP's work is divided into three program areas: Roadmap to Recovery™ (disaster recovery and claim help for victims of wildfires, floods, pandemics, and other disasters); Roadmap to Preparedness (insurance and financial literacy and disaster preparedness); and Advocacy and Action (advancing pro-consumer laws and public policy).

Because UP routinely assists and informs individual and commercial policyholders with regard to every type of insurance product and insurance claim, it has a strong interest in the orderly development of insurance law and has been granted leave to submit amicus curiae briefs in more than 400 matters across the country. UP has a particular interest in the question presented in this case because it has supported the enactment of state laws prohibiting mandatory arbitration clauses in insurance

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), UP affirms that no counsel for a party authored this brief in whole or in part and that no person other than UP or its counsel made any monetary contributions intended to fund the preparation or submission of this brief. UP has received written consent of all parties to submit this brief.

policies, and thus it is interested in ensuring that such state laws apply to both domestic and foreign insurers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Like twelve other states, Washington has chosen to regulate its insurance market and protect its resident policyholders by prohibiting insurers from including mandatory arbitration provisions in their insurance policies. By ensuring that policyholders have the right to take their insurance coverage disputes to court, Washington has protected policyholders like Plaintiffs from the harms caused by mandatory arbitration of insurance disputes. The drawbacks of arbitration in this context include its tendency to rely on arbitrators that favor insurers; its confidential nature, which advantages insurers at the expense of policyholders; and its costs for policyholders, which often exceed the costs of litigation.

Washington law clearly prohibits *domestic* insurers from enforcing mandatory arbitration provisions in their insurance policies. That is because Congress has enacted a statute, the McCarran-Ferguson Act, which provides that state insurance laws preempt generally applicable federal statutes, and courts have held the Federal Arbitration Act ("FAA") is the sort of generally applicable law that is "reverse preempted" by a state anti-arbitration law.

The district court nevertheless held that the Washington anti-arbitration law cannot apply to *foreign* insurers, and thus those insurers may enforce mandatory arbitration provisions in their policies. The court concluded that foreign insurers must be treated differently because, in the court's view, an international treaty—the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention")—preempts Washington's anti-arbitration law. Although Congress enacted legislation to implement the treaty (the "Convention Act"), and that legislation said nothing about superseding the McCarran-Ferguson Act, the district court concluded that this legislation was unnecessary because the relevant Convention provision is self-executing and thus preempts state law on its own. Under this view, the McCarran-Ferguson Act is inapplicable because its reverse-preemption provision applies only to Acts of Congress, not to treaties.

The district court's view undermines Washington's considered scheme for ensuring judicial resolution of insurance disputes, depriving policyholders like Plaintiffs of the judicial protections Washington guarantees them. Worse, this view creates a special rule sidelining the McCarran-Ferguson Act—and thus, state regulation of insurance dispute procedures—in the specific context of insurance policies sold by foreign insurers, depriving policyholders of local judicial process precisely when it is most crucial, and instead subjecting them to potential *overseas* arbitration as the only forum in which to vindicate their rights.

This Court should reject the view that the Convention is self-executing. Indeed, the only court of appeals to decide that issue—the Second Circuit—has squarely held that the treaty is non-self-executing, and the Supreme Court has identified the Convention as an example of a non-self-executing treaty. Two courts of appeals have held that the Convention Act—the statute implementing the treaty—preempts state laws prohibiting mandatory arbitration of insurance disputes even though the Convention Act is silent on the McCarran-Ferguson Act, but those decisions conflict with the plain language of the McCarran-Ferguson Act. Rather than depart from the statutory text, this Court should join the Second Circuit and hold that state anti-arbitration laws are enforceable against foreign insurers, just as they are enforceable against domestic insurers.

ARGUMENT

I. Like Many States, Washington Has Made the Reasonable Policy Judgment That Insurers Should Not Impose Mandatory Arbitration Provisions on Their Policyholders.

The Washington legislature has exercised its authority to regulate its insurance market by prohibiting insurers from enforcing mandatory arbitration provisions in their insurance policies. *See* Wash. Rev. Code § 48.18.200 (2000). The Washington Supreme Court has applied this provision to deny a motion to compel arbitration in a dispute between Washington policyholders and U.S.-based insurers. *See State Dep't of Transp. v. James River Ins. Co.*, 292 P.3d 118, 123 (Wash. 2013).

Washington is not alone in prohibiting mandatory arbitration provisions in insurance policies. Indeed, at least thirteen states have such a policy,[2] and three more states prohibit such provisions in some insurance contracts.[3] These states have made the reasonable judgment that, despite its potential benefits in other contexts, mandatory arbitration clauses have no place in insurance policies. There are numerous reasons why states take this view.

1. As a general matter, arbitrators tend to favor insurers over policyholders. Though arbitrators are nominally impartial, arbitrators in insurance coverage disputes are likely in practice to favor insurers. This is true for many reasons. *First*, as in this case, "insurance companies draft arbitration provisions and may specify the method of choosing arbitrators or require particular qualifications in order to favor their own interests." Susan Randall, *Mandatory Arbitration in Insurance Disputes:*

[2] *See* Ark. Code Ann. § 16-108-201(b) (2011); Haw. Rev. Stat. § 431:10-221 (1987); Kan. Stat. Ann. § 5-401(c) (1987); Ky. Rev. Stat. Ann. § 417.050(2) (2019); La. Stat. Ann. § 22:868 (2020); Mo. Ann. Stat. § 435.350 (1996); Neb. Rev. Stat. Ann. § 25-2602.01(f)(4) (2010); 10 R.I. Gen. Laws Ann. § 10-3-2 (1998); S.C. Code Ann. § 15- 48-10(b)(4) (1978); S.D. Codified Laws § 21-25A-3 (1997); Va. Code Ann. § 38.2-312 (1986).

[3] *See* Cal. Health & Safety Code § 1363.1 (requiring specific disclosure requirements before an arbitration clause in certain health insurance contracts may be enforced); Md. Code Regs. 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); 044-0002-23 Wyo. Code R. § 7 (prohibiting mandatory arbitration of uninsured motorist claims).

Inverse Preemption of the Federal Arbitration Act, 11 Conn. Ins. L.J. 253, 258 (2005).[4] *Second*, "insurance arbitration is likely to be a once-in-a-lifetime event" for a policyholder, while "insurance companies engage in repeated arbitrations . . . [,] know arbitrators' records, and perhaps have experience before them, facilitating the choice of a sympathetic arbitrator." *Id.* at 258–59. *Third*, many insurance arbitrators' continuing employment depends on being selected by insurers to arbitrate coverage disputes, "potentially creating inherent bias in favor of the industry." *Id.* at 259. *Fourth*, insurance arbitrators "generally have direct connections with the insurance industry," and thus "may be predisposed to favor the industry or to see disputes from its perspective," to the disadvantage of policyholders. *Id.*

2. Policyholders are harmed by the confidentiality of arbitration. Confidential arbitration shields the insurance industry from public scrutiny, preventing the public

[4] In UP's experience, it is not uncommon for arbitration clauses in certain insurance policies to require that all arbitrators be current or former insurance company executives or be a panel member of ARIAS-US, an arbitration provider that requires its panelists to have at least ten years of specialization in the insurance industry. Further, insurance policy arbitration clauses requiring arbitration abroad often specify a non-administered London arbitration under the English Arbitration Act 1996. But the English courts have not required arbitrators to disclose prior appointments by the same insurance company, and the appellate court in a pending matter before the English Supreme Court involving a US business that was forced to arbitrate in London found nothing wrong with the appointment of an arbitration panel chair who had failed to disclose that he had previously been appointed by the insurer as a party arbitrator on many occasions and had been appointed twice again as a party arbitrator by that insurer while the arbitration was pending. *See Halliburton Co. v. Chubb Bermuda Ins. Ltd.* [2018] EWCA Civ. 817, [2018] 1 WLR 3361 (Eng.).

and policymakers from assessing industry practices, policing the industry for abuses, and punishing bad actors—and diminishing incentives for insurers to keep on good behavior. *Id.* at 258, 263. Similarly, confidential arbitration—as opposed to litigation—prevents the development of case law that affects the conduct of insurers generally, and that establishes a baseline to which the public and policymakers can refer when debating how best to regulate the industry. *See id.* That is, if confidential arbitration results consistently, and unfairly, favor insurers, the public and policyholders may not comprehend the need for a revised legal scheme more fair to policyholders. In addition, arbitrators who are "repeat players" for insurers know how other arbitration panels have ruled and can advocate rulings to the other arbitrators on that basis, whereas the policyholder's counsel does not have that same information. Finally, confidential arbitration allows for inconsistent, opaque application of the law—meaning that policyholders may not fully understand the meaning of their policies, while insurers who regularly arbitrate can better predict how their policies will be interpreted, and "may take varying positions on the same policy provision in successive arbitrations, or continue to advance an oft-rejected interpretation." *Id.* at 262–63.

3. Arbitration is often more costly than litigation, especially for policyholders. Arbitration is often touted as efficient and cost-effective. *See, e.g.*, *Schoenduve Corp. v. Lucent Techs., Inc.*, 442 F.3d 727, 731 (9th Cir. 2006) (finding that "[t]he

strict procedural requirements that govern litigation in federal courts do not apply to arbitration" and that "[a]rbitration offers flexibility, an expeditious result, and is relatively inexpensive when compared to litigation."). But, at least for policyholders, the opposite is often true.[5] Most saliently, mandatory arbitration provisions often require that arbitration proceed in a distant forum that is inconvenient and costly for policyholders—like New York City or, often, London or even Bermuda—rather than in the policyholder's local courts. *See* Mark J. Bunim, *When States Prohibit Dispute Resolution: The Use of Mandatory Arbitration Clauses in Insurance Policies*, 71 Disp. Resol. J., 47, 47–48 (2016); 1 Law and Prac. of Ins. Coverage Litig. § 11:4. Here, Plaintiffs are based in Graham, Washington, but Defendants are demanding arbitration in New York City—nearly 3,000 miles away—despite having purposefully availed themselves of the privilege of conducting business in Washington by selling an insurance policy to the Plaintiffs. Further, arbitration may impose significant fees on policyholders, and, compared to litigation, "plaintiffs' lawyers who typically work on a contingent fee basis may be less willing to handle arbitrations," making it difficult for policyholders to secure affordable counsel. Randall, *supra*, note 4 at 259. Insurers may also craft arbitration clauses to *exclude* policyholders'

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[5] Indeed, it is far from clear that, on average, the *overall* costs of arbitration are lower than litigation. Randall, *supra*, at 259, 260 n.29 (collecting studies on the cost of arbitration).

bad-faith claims, Stephen S. Ashley, *Bad Faith and Arbitration Clauses*, 14 No. 2 Bad Faith L. Rep. 21 (1998), meaning a policyholder that prevails in arbitration to secure coverage wrongfully withheld will then have to initiate *separate litigation* to recover for the insurer's bad faith—increasing the time and expense of resolving the dispute or may be deemed to have waived the bad faith claim because of the passage of time. Lastly, one of the principle claimed cost savings of arbitration—limited discovery—may ultimately impose enormous costs on policyholders by effectively preventing them from proving their claims and obtaining any recovery. Randall, *supra*, at 258. By imposing these added costs on policyholders, insurers can effectively insulate themselves from lawsuits seeking coverage for smaller-value claims, as the cost of seeking coverage will often exceed the potential recovery.

II. The McCarran-Ferguson Act Gives the States Plenary Authority to Regulate the Business of Insurance, Including Both Domestic and Foreign Insurers.

From the Founding until the Supreme Court's decision in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), states exercised plenary authority in regulating the business of insurance. *See id.* at 584 (Jackson, J., dissenting in part). Before *South-Eastern Underwriters*, the issuance of insurance policies was viewed as a purely local matter and thus beyond the scope of the Commerce Clause, which meant that "the states could regulate the insurance industry without federal interference." *Gerling Glob. Reinsurance Corp. of Am. v. Low*, 240

F.3d 739, 743–44 (9th Cir. 2001) (citing *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 414–16 (1946)). The Supreme Court's holding in *South-Eastern Underwriters*—that the business of insurance is subject to federal regulation under the Commerce Clause—was a legal earthquake, upending nearly two centuries of expectation, tradition, and understandings of federalism. One contemporaneous commentator noted that "the decision [would have] a devastating impact upon the entire system of state regulation." Elmer Sawyer, INSURANCE AS INTERSTATE COMMERCE 50 (1945).

Within days of the Supreme Court's decision, Congress took action to reverse the impact of *South-Eastern Underwriters* and ensure state control of insurance regulation. The Attorney General testified before a joint Congressional committee about whether the Justice Department intended to enforce generally applicable federal laws against the insurance industry. *See Insurance: Joint Hearing Before the Subcomms. of the Comms. on the Judiciary*, 78th Cong. 635–640 (Jun. 23 1944 Statement of Francis Biddle, Att'y Gen. of the United States). At least three congressional reports noted an "urgent need for an immediate expression of policy by the Congress . . . [that the] validity of State tax laws as well as State regulatory provisions" was unimpaired. H.R. Rep. No. 79-68 at 2 (1945); H.R. Rep. No. 79-143 at 3 (1945); S. Rep. No. 79-21 at 1–2 (1945). Senator Homer Ferguson—the McCarran-Ferguson Act's namesake—expressed concern that insurance companies would be faced with the problem that they might "violate a federal law" in order to "be in compliance with state law." *Insurance: Joint Hearing Before the Subcomms. of the Comms. on the Judiciary* at 639.

Less than a year after *South-Eastern Underwriters*, Congress passed, and President Truman signed, the McCarran-Ferguson Act. *See* An Act to Express the Intent of Congress with Reference to the Regulation of the Business of Insurance, Pub. L. No. 79-15, 59 Stat. 33 (Mar. 9, 1945); 15 U.S.C. §§ 1011–1015. This law restored the "virtually exclusive [regulatory] domain" that the states had previously exercised over the insurance industry. *See St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 538-39 (1978). In enacting the law, Congress observed that "the continued regulation and taxation by the several States of the business of insurance is in the public interest," 15 U.S.C. § 1011, because "the insurance business is essentially local and best supervised locally by the States rather than through another cumbersome Federal bureau." H. R. Rep. 78-873 at 10 (1943). Congress explained:

> Insurance is . . . fundamentally local in character, and therefore best regulated by the States. . . . The fundamental fact is that under the law as it exists today each State has ample power to regulate as it may see fit. How it regulates is a matter for it to determine. As a matter of fact the hearings show . . . that State regulation has promoted efficiency and satisfaction in the insurance business, and that such a result has been accomplished with a steady decrease in insurance rates throughout the country. . . . [T]here is no reason why the States should not continue to meet developments by the exercise of that power.

Id. at 9.

To give states plenary authority to regulate insurance, the McCarran-Ferguson Act "overturn[ed] the normal rules of pre-emption." *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 507 (1993). The Act provides 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, . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). To supersede a state law that regulates 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 ("[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."). As a result, the McCarran-Ferguson Act 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 Cnty., N.A. v. Nelson*, 517 U.S. 25, 39 (1996).

Nothing in the McCarran-Ferguson Act suggests that the states' authority to regulate insurance is limited to domestic insurers. To the contrary, the statute expressly provides that "[t]he business of insurance, and *every person engaged therein*, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a) (emphasis added). Consistent with this plain statutory language, courts—including the Supreme Court—have repeatedly recognized that foreign insurers are subject to state laws regulating insurance. *See, e.g.*, *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 69-74 (1954) (British insurer was subject to Louisiana insurance law, given the state's "vital interests" in regulating in-state risks—that the insurer was foreign did not diminish those interests or entitle it to additional protections); *id.* at 78 (Frankfurter, J., concurring) (states may impose regulations on alien insurance companies "as part of the fair bargain" by which they offer those companies the privilege of doing business in the state).[6]

In short, Congress enacted the McCarran-Ferguson Act to give states plenary authority to regulate the business of insurance. That authority draws no distinction between domestic and foreign insurers, but instead permits states to regulate all insurers doing business in the state, regardless of their domicile.

[6] *See also Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 320 (1943) ("The power New York may exercise to regulate domestic insurance associations may be applied to foreign associations which New York permits to conduct the same kind of business."); *Orient Ins. Co. v. Daggs*, 172 U.S. 557, 566 (1899) ("[t]he power of a state to impose conditions upon foreign corporations" that do business in that state is "as extensive as [its] power over domestic corporations"); *see also British Int'l Ins. Co. v. Seguros La Republica, S.A.,* 212 F.3d 138, 140 (2d Cir. 2000) (requiring alien reinsurer to post pre-answer security required by New York insurance law).

III. Washington May Apply Its Anti-Arbitration Law to Both Domestic and Foreign Insurers.

Although the McCarran-Ferguson Act draws no distinction between domestic and foreign insurers, the district court held that this distinction was dispositive of the question whether Washington could prohibit an insurer from enforcing a mandatory arbitration provision in an insurance policy. The district court acknowledged that domestic insurers were subject to Washington's law against mandatory arbitration of insurance coverage disputes, *see* ER4–5, which courts have held is "shielded from preemption" under the McCarran–Ferguson Act. *James River Ins. Co.*, 292 P.3d at 402. But the court concluded that foreign insurers were not subject to Washington's law, and thus held that the parties in this case must arbitrate per the terms of the form insurance contract.

The district court erred in reaching this result. Contrary to the court's view, the Convention is not a "self-executing" treaty that applies as a matter of domestic law. Rather, the terms of the treaty became enforceable as a matter of domestic law only when Congress enacted the Convention Act to implement the treaty. Because the Convention Act is an Act of Congress subject to the McCarran-Ferguson Act, the McCarran-Ferguson Act reverse preempts the Convention Act (which is codified as part of the FAA) for both domestic *and* foreign insurers.

A. The Convention Is Not Self-Executing and Applies Only Through the Convention Act.

The district court held that the Convention preempts Washington's anti-arbitration law because it is self-executing. ER7–10. That holding directly conflicts with the Second Circuit's decision in *Stephens v. American International Insurance Co.*, 66 F.3d 41 (2d Cir. 1995), the only court of appeals decision to decide the issue. It is also at odds with the Supreme Court's view of the Convention, which it identified as an example of a non-self-executing treaty in *Medellín v. Texas*, 552 U.S. 491, 504 (2008).

The Supreme Court has long distinguished between self-executing and non-self-executing treaties. This distinction was first drawn nearly two centuries ago by Chief Justice Marshall in *Foster v. Neilson*, 27 U.S. 253, 314 (1829), and was recently reaffirmed in *Medellín*, 552 U.S. at 504. Under these decisions, a self-executing treaty "operates of itself without the aid of any legislative provision," and is "to be regarded in courts of justice as equivalent to an act of the legislature." *Foster*, 27 U.S. at 314, *overruled on other grounds, United States v. Percheman*, 32 U.S. 51 (1833). In contrast, a non-self-executing treaty is strictly a contract between nations, and is aimed at the political branches, not the courts. *Medellín*, 552 U.S. at 516 ("The point of a non-self-executing treaty is that it 'addresses itself to the political, *not* the judicial department; and the legislature must execute the contract before it can become a rule for the Court.'" (quoting *Foster*, 27 U.S. at 314)).

In *Stephens*, the Second Circuit adhered to this framework and held that the Convention was not self-executing and thus did not preempt an anti-arbitration provision in the Kentucky Liquidation Act. 66 F.3d at 42. The foreign insurer in that case argued that the McCarran-Ferguson Act's reverse-preemption provision did not apply to treaties, and thus the arbitration agreement could be enforced pursuant to the Convention itself. *Id*. at 45. In rejecting this argument, the Second Circuit explained that "[t]his argument fails because the Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation. . . . The Convention itself is simply inapplicable in this instance." *Id.*

This Court should reach the same result. To determine whether a treaty is self-executing, courts must consider, among other things, "the negotiation and drafting history of the treaty as well as the postratification understanding of signatory nations." *Medellín*, 552 U.S. at 507 (internal quotation marks omitted). As with statutory interpretation, a closer-in-time construction of the Convention should be given the greatest weight. *See Zemel v. Rusk*, 381 U.S. 1, 11 (1965) ("The interpretation expressly placed on a statute by those charged with its administration must be given weight by courts faced with the task of construing the statute."); *F.P. Baugh, Inc. v. Little Lake Lumber Co.*, 297 F.2d 692, 695 (9th Cir. 1961).

Through actions and words, all three branches of the federal government have shown definitively that the Convention is not a self-executing treaty. *First*, when

President Johnson submitted the Convention to the Senate for ratification, he made clear that that the United States would not deliver an instrument of accession until implementing legislation was enacted. *See* 114 Cong. Rec. 10,488 (1968) (message of President Johnson) ("Changes in title 9 (arbitration) of the United States Code *will be 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."). *Second*, Congressional action shows the same intention. The Senate, in giving its advice and consent, reiterated that "[c]hanges in the Federal Arbitration Act (title 9 of the United States Code) will be required before the United States becomes party to the convention." S. Rep. No. 90-10, at 2 (1968).

Congressional hearings confirm that the United States did not intend the Convention to be self-executing. For three years before the United States deposited the instruments of accession to the Convention, Ambassador Richard Kearny—the State Department's representative to Congress on this matter—assured Congress that the Convention would not be used to take authority away from the states. Two weeks before the Senate ratified the Convention, Ambassador Kearney testified before the Committee on Foreign Relations. *Id.* When Senator John Sparkman asked the ambassador whether the Convention "seek[s] in any way to extend Federal jurisdiction into areas not now within Federal jurisdiction," Ambassador Kearney simply and succinctly responded "[n]o, Senator." *Id*. at 7.

The Supreme Court has already indicated its view that the Convention is not self-executing, specifically citing the Convention Act as an example of Congressional implementation of a non-self-executing treaty. *See Medellín*, 552 U.S. at 521–22. The Court observed that "[t]he judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress," and cited 9 U.S.C. §§ 201–208, the sections of the U.S. Code where the entirety of the Convention Act is codified. *Id.* at 521. The Supreme Court then explained that "[s]uch language" (*i.e.* the Convention Act) shows "that Congress knows how to accord domestic effect to international obligations when it desires such a result." *Id.* at 522. In other words, the Convention applies as domestic law only though the Convention Act, *i.e.*, the Convention is not self-executing: "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts *in accordance with this chapter.*" 9 U.S.C. § 201 (emphasis added); *see also Stephens*, 66 F.3d at 45–46 (finding the Convention non-self-executing).

The district court accepted that most of the Convention may be non-self-executing, but it nevertheless held that the provision of the Convention relevant to this case, Article II, was self-executing. ER7–10. There is no sound basis to distinguish the different parts of the Convention and treat some as self-executing and others as not. Nothing in *Medellin*'s discussion of the Convention suggests that the Supreme

Court thought implementing legislation was only partially necessary. Indeed, the Supreme Court did not limit its citation to Sections 203-205, the provisions necessary for implementing Article III of the Convention. To the contrary, the Court cited the entirety of Chapter 2 of the FAA, which implemented all Articles of the Convention. *See Medellín*, 552 U.S. at 521 (citing 9 U.S.C. §§ 201–08). Nor does the ratification history support the view that implementing legislation was only partially necessary. Neither the President nor the Senate suggested that the implementing legislation was necessary only for some provisions and not others. That Congress enacted legislation to implement the entire Convention confirms that it did not think that implementing legislation was only partially necessary.

The district court overlooked this history and instead focused narrowly on the Convention's use of the word "shall" to conclude that it was self-executing. ER8–9. The use of terms like "shall" may weigh in favor of interpreting a treaty to be self-executing, but it is not dispositive. As the Supreme Court explained in *Medellín*, in addition to the text of the treaty, a court should also consider other "aids to its interpretation" including "the negotiation and drafting history of the treaty." 552 U.S. at 506–07 (quotation marks and citations omitted).

The text of a treaty may help a court "decide whether a treaty's terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect." *Id.* at 521. But the ultimate inquiry is whether the treaty-makers chose to enter into "compact between independent nations" that "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Id.* at 505 (citation omitted). Or whether they intended to ratify a treaty that had the same domestic effect as an Act of Congress. *Id.* at 505–06. Nothing in *Medellín* suggests that a treaty's use of terms like "shall" can supersede the treaty-makers' own statements regarding the type of treaty they ratified and whether it required implementing legislation. Indeed, by choosing the Convention as an example of a non-self-executing treaty, the Supreme Court demonstrated that its use of "shall" does not make the treaty self-executing.

B. The McCarran-Ferguson Act Prevents the Convention Act from Preempting State Law.

No court of appeals has held that the Convention is self-executing. *ESAB Grp. Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 387–88 (2012); *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 721–32 (2009); *Stephens*, 66 F.3d at 45. Instead, each of these courts addressed whether the Convention Act—the statute implementing the treaty—preempted state law or whether it was reverse preempted under the McCarran-Ferguson Act. In *Stephens*, the Second Circuit correctly held that an anti-arbitration provision in the Kentucky Liquidation Act reverse preempted Chapter 2 of the FAA (the Convention Act). 66 F.3d at 42. Because the Kentucky anti-arbitration law was enacted for the purpose of regulating the business of insurance and the FAA is not specifically related to the business of insurance, the

Second Circuit held that, pursuant to the McCarran-Ferguson Act, the Kentucky statute "is not preempted by the Federal Arbitration Act." *Id.* at 45-46.

The Fourth and Fifth Circuits have reached the opposite result, compelling arbitration for policyholders and foreign insurers on the ground that the McCarran-Ferguson Act does not reverse preempt the Convention Act. These decisions misinterpret the McCarran-Ferguson Act and should not be followed here.

1. The Fifth Circuit's decision relies on an overly narrow interpretation of the term "construed."

The McCarran-Ferguson Act provides that no Congressional Act "shall be construed" to invalidate a state law enacted for the purpose of regulating insurance. 15 U.S.C. § 1012. Nevertheless, in *Safety National*, the Fifth Circuit compelled insurance arbitration pursuant to the Convention and Convention Act. In addressing the relationship among the Convention, the Convention Act, and the McCarran-Ferguson Act, the Fifth Circuit held that even assuming the Convention was non-self-executing, reverse preemption still did not apply. *Id.* at 722–23. The court reasoned that the Convention Act implemented the Convention by reference. *Id.* at 724. Accordingly, the Fifth Circuit concluded that because courts must consult the Convention to apply the Convention Act, then courts were construing the Convention, rather than the Convention Act. *Id.* at 724–25. And because the McCarran-Ferguson Act does not apply to treaties, the court held that the McCarran-Ferguson

Act does not apply to the Convention. *Id.* at 732.[7] According to the *Safety National* court, "[t]he Convention Act *directs* us to the treaty it implemented, and [only] when we '*construe*' the Convention, we are faced with the possibility of 'superseding' [state] law." *Id*. at 725 (emphasis added).

The Fifth Circuit's semantic distinction between "direction" and "construction" has no basis in law and is untenable. The act of *construing* a legal text means *applying* that text. *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 Const. Comment. 95, 103 (2010) ("[C]onstruction gives legal effect to the semantic content of a legal text."); Randy E. Barnett, *Interpretation and Construction*, 34 Harv. J. of L. & Pub. Pol'y 65, 66 (2011) ("Construction is the activity of applying that meaning to particular factual circumstances."). Because the Convention is a non-self-executing treaty, it cannot operate alone to require the compulsion of arbitration in a given case. Instead, the principles embodied in the Convention are applied in court only through the Convention Act. Thus, only when the court applies the Convention Act to a case—*i.e.*, *construes* the Convention Act to apply—may arbitration be compelled pursuant to the Convention. If and when such construction of the Convention Act would invalidate state insurance law, as it

[7] The Court did not hold the Convention to be self-executing, and reached its decision consistent with the understanding that the Convention is *not* self-executing. *Id.* at 721–32.

would in the present appeal, it is preempted by the McCarran-Ferguson Act, and there is no authority that allows the court to disregard state insurance law and compel arbitration under federal law.

The dissenting judges in *Safety National* recognized the clear flaw in the majority's holding. Judge Elrod (joined by Judges Smith and Garza) reasoned that "the plain meaning of 'construe . . . to supersede any law enacted by any State' is to give preemptive force, to apply the source of law in question rather than state law." 587 F.3d at 747 (Elrod, J., dissenting). "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 . . . McCarran-Ferguson does not apply. But there is still no preemption [of state law] unless *the Convention* is actually capable of superseding [state law] as a matter of Supremacy Clause law." *Id.* at 738–39 (Elrod, J., dissenting). Because the Convention is not self-executing, it cannot, and does not, preempt state law. Any such preemption *would be* the job of the Convention Act—except that in the area of insurance, the Convention Act is itself reverse preempted by state law under the McCarran-Ferguson Act. *Id.* at 751–52.[8]

[8] *See also Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006) (Kavanaugh, J., concurring) ("[I]t 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." (emphasis added) (citation omitted)).

2. The Fourth Circuit's decision rewrites the statutory text by holding that McCarran-Ferguson applies only to domestic legislation.

Like the Fifth Circuit, the Fourth Circuit has held that the Convention Act is not subject to reverse preemption under the McCarran-Ferguson Act, and thus preempts a state anti-arbitration law. *See ESAB Grp.*, 685 F.3d 387–90. But the Fourth Circuit did not adopt the Fifth Circuit's reasoning. Instead, the Fourth Circuit held that the McCarran-Ferguson Act "is limited to legislation within the domestic realm," and thus had no preemptive effect on the Convention Act, because it had "international implications." *Id.* at 388.

That interpretation cannot be reconciled with the statutory text. The McCarran-Ferguson Act expressly states that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede" any state insurance law." 15 U.S.C. § 1012(b). There is simply no plausible way to interpret "*no* Act of Congress" to differentiate between Acts of Congress "within the domestic realm" and those with "international implications." *ESAB Grp.*, 685 at 387–90. The Fourth Circuit did not focus on the statutory text, but instead concluded that the Supreme Court had already limited the McCarran-Ferguson Act to domestic legislation. *Id.* at 389 (discussing *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003)).

The court of appeals misread the Supreme Court's decision in *Garamendi*. That case concerned a California statute that would have forced foreign insurers, under the guise of state insurance regulation, to disclose information about insurance policies issued in Europe to foreign citizens during the Holocaust. *Id.* at 408–12. The Court concluded that the state statute was preempted because it conflicted with executive agreements addressing reparations for Holocaust victims. *Id.* at 407–08. In rejecting the State's argument that the executive agreements were reverse preempted, the Court held that the McCarran-Ferguson Act "cannot sensibly be construed to address preemption by executive conduct in foreign affairs." *Id.* at 428. But the Supreme Court did not suggest, and certainly did not hold, that the McCarran-Ferguson Act was directed *only* to domestic commerce legislation. Indeed, the Supreme Court had no need to parse the language of the statute to discern which types of Acts of Congress were included in the McCarran-Ferguson Act and which were not, because there was not even an Act of Congress at issue in that case. The state law was preempted by an executive agreement.[9]

The Fourth Circuit also relied on two misplaced public policy considerations to reach its holding in *ESAB Group*. Specifically, the court stated that "the federal government must be permitted to 'speak with one voice when regulating commercial

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[9] The Fourth Circuit's holding squarely conflicts with the Illinois Supreme Court's decision in *Sun Life Assurance Co. of Can. v. Manna*, 879 N.E.2d 320, 330 (Ill. 2007), which relied on the "plain language of the McCarran-Ferguson Act" to held that "alien insurers are within the ambit of the McCarran-Ferguson Act." *Id.*

relations with foreign governments,'" and that "[t]o allow parochial refusal[s] to enforce foreign arbitration agreements would frustrate the very purposes for which the Convention was drafted: achieving the predictable and orderly resolution of disputes 'essential to any international business transaction' and ensuring parties are not haled into hostile or inappropriate forums." 685 F.3d at 390 (citations omitted). The court's resolution of both those concerns—(1) predictability and (2) the risk of subjecting litigants to hostile and inappropriate fora—was backwards.

First, while Congress is free to bring uniformity and predictability to regulatory regimes, it has expressly provided through the McCarran-Ferguson Act that federal policy need *not* be uniform in the area of insurance. 15 U.S.C. § 1011 ("the continued regulation and taxation by the several State*s* of the business of insurance is in the public interest"). And foreign commercial entities choosing to operate in the United States are routinely subject to disparate state laws where Congress has not imposed a preemptive uniform regulatory regime. *See Watson*, 348 U.S. at 69–74; *Hoopeston Canning Co.*, 318 U.S. at 320; *Daggs*, 172 U.S. at 566. By insisting on a uniform rule regarding insurance arbitration, the Fourth Circuit improperly elevated its own policy preference over the express, contrary policy embodied in the McCarran-Ferguson Act.

Second, any interest in protecting a litigant from a hostile and inconvenient forum militates *against* enforcement of insurance policy arbitration clauses, which typically require insurance consumers to arbitrate in New York City or abroad. *See supra* Section I. In *ESAB Group*, the South Carolina-based plaintiff was forced to arbitrate in Sweden. 685 F.3d at 391. There can be no serious argument that requiring an American small business to arbitrate in Northern Europe in order to obtain relief is more fair than requiring an insurance company to litigate in the state that it purposefully entered to sell insurance. Washington and federal policy honor this concern—allowing states to protect policyholders from being dragged to foreign arbitration in order to obtain relief. If a foreign insurer is concerned about litigating coverage disputes in the courts of a particular state, it can choose not to issue policies within that state.

Finally, *ESAB Group* assumed that it was dealing with an international corporate transaction, in which US executives are flying off to Frankfurt and sitting in a conference room for a week to negotiate a contract to purchase an entity in Istanbul while bargaining over the terms of the deal on a line-by-line basis. 685 F.3d at 376. When it comes to insurance policies, in nearly every instance, the insurance policy is a standard form largely offered to the insured on a "take it or leave it" basis without negotiation over key terms and is issued either in the United States through a surplus lines broker or is transmitted to an offshore subsidiary of a US insurance broker, which then sends the contract back to the US. There are no expectations to protect.

In short, the *ESAB Group* court protected non-existent international interests while failing to weigh sufficiently the actual interests of those policyholders and of the states that have, for the entire existence of this country, been solely responsible for regulating insurance transactions.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's decision.

Respectfully submitted,

By: /s/ *Mark W. Mosier*

David S. Watnick
COVINGTON & BURLING LLP
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, CA 94105
Telephone: (415) 591-6000

Mark W. Mosier
Jordan V. Hill
COVINGTON & BURLING LLP
One CityCenter, 850 Tenth Street NW
Washington, DC 20001
Telephone: (202) 662-6000

Counsel for Amicus Curiae United Policyholders

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,698 words, which is less than one-half the maximum length authorized for a party's principal brief, excluding the items exempted by Fed. R. App. P. 32(f). I further certify that this brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6), respectively, because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14-point Times New Roman font.

Dated: September 18, 2020

/s/ Mark W. Mosier

CERTIFICATE OF SERVICE

I certify that on September 18, 2020, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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