Docket No. 09-145

IN THE

Supreme Court of the United States

October Term, 2009

Reliable International Insurance Company,

Petitioner,

v.

Toyco, Inc.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Reliable International Insurance Company, appellee in Docket No. 09-0417 before the United States Court of Appeals for the Thirteenth Circuit, respectfully submits this brief on the merits, and asks this Court to reverse the Thirteenth Circuit Court of Appeals.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Thirteenth Circuit was entered on September 8, 2009. (R. at 13.) Petitioner then filed for writ of certiorari, which this Court granted on October 30, 2009. (R. at 14.) This court has jurisdiction under 28 U.S.C. § 1332(a)(2) (2006).

OPINIONS BELOW

The decision and order of the United States District Court for the District of Calisota is unreported and set out in the record. (R. at 1-7.) The opinion of the United States Court of Appeals for the Thirteenth Circuit is also unreported and set out in the record. (R. at 8-12.)

RELEVANT PROVISIONS

The following provisions of the United States Constitution are relevant to this case: U.S. Const. art. I, § 8, cl. 3; U.S. Const. art. VI, § 2. These provisions are reprinted in Appendix A.

Article II of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II, June 10, 1958, 21 U.S.T 2517, 330 U.N.T.S. 3, is relevant to this case and is reprinted in Appendix B.

The following statutory provisions of the Federal Arbitration Act incorporating the New York Convention are also relevant to this case: 9 U.S.C. §§ 201, 203, 205, 208 (2006). These provisions are reprinted in Appendix C.

The following provisions of the McCarran-Ferguson Act are relevant to this case: 15 U.S.C §§ 1012(a), (b) (2006). This provisions are reprinted in Appendix D.

QUESTIONS PRESENTED

I. Is the New York Convention the supreme law of the United States and immune from the reverse-preemption provisions of the McCarran-Ferguson Act?

II. Is the McCarran-Ferguson Act restricted by its history, purpose, and this Court's case law to regulating only domestic, not international, insurance agreements?

STATEMENT OF THE CASE

On January 5, 2008, Toyco, Inc. ("Toyco") commenced this insurance coverage action against Reliable International Insurance Company ("Reliable") in the United States District Court for the District of Calisota. (R. at 2.) Pursuant to the parties' valid arbitration agreement, Reliable filed a motion to compel arbitration in London, England. (R. at 2.) In opposition to this motion, Toyco argued that Calisota Code § 102, which prohibits the enforcement of arbitration agreements in insurance contracts, prevented the court from ordering arbitration. (R. at 3.) On February 9, 2009, the district court granted Reliable's motion to compel arbitration and ruled that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") governed the arbitration agreements between the domestic and foreign companies.

The district court then certified Toyco's interlocutory appeal, and the United States Court of Appeals for the Thirteenth Circuit subsequently reversed the decision of the district court. (R. at 7, 12.) Reliable filed a petition for writ of certiorari in this Court, which was granted on October 30, 2009. (R. at 14.)

STATEMENT OF THE FACTS

This case involves an arbitration agreement between two companies: one domestic and the other foreign. (R. at 1.) Toyco, a Delaware corporation, is one of the largest manufacturers of children's toys, with its principal place of business in San Paul, Calisota. (R. at 1.) Reliable is incorporated in England, and its principal place of business is London, England. (R. at 1.)

Between 1995 and 2005, Reliable issued a series of liability insurance policies that provided insurance coverage to Toyco for potential claims brought by third parties for bodily

injury arising from exposure to Toyco products. (R. at 1.) Each of these policies contains an arbitration clause that expressly provides: "All disputes under or arising out of this insurance shall be settled by way of arbitration in England." (R. at 2.)

Currently, Toyco is a defendant in approximately 4,000 individual actions filed in state and federal courts in the United States. (R. at 2.) These claims consist of numerous product liability actions for personal injuries allegedly arising from the claimants' exposure to toys manufactured by Toyco. (R. at 2.) Toyco has requested that Reliable defend it against these claims and indemnify Toyco for any resulting judgments or settlements. (R. at 2.) Reliable refused Toyco's request and denies that it is obligated to provide coverage based on the terms of the insurance policies. (R. at 2.) Toyco then commenced this insurance coverage action, and Reliable seeks to resolve this dispute by arbitration in London, England pursuant to the terms of the arbitration agreements. (R. at 2.)

SUMMARY OF THE ARGUMENT

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") governs international arbitration agreements and mandates the enforcement of Reliable and Toyco's agreements to arbitrate. The McCarran-Ferguson Act cannot permit Calisota Code § 102 to reverse-preempt the Convention for two reasons, each of which is independently sufficient to hold that Calisota law does not apply.

1. The Convention is not an Act of Congress.

The McCarran-Ferguson Act applies only to "Acts of Congress" that conflict with a state law designed to regulate the business of insurance. As a self-executing provision of a United States treaty, Article II of the Convention supersedes the McCarran-Ferguson Act. Article II unequivocally states: "The court of a Contracting State . . . shall . . . refer the parties to arbitration. . . ." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3. This language is an express directive to the courts of contracting states to recognize and enforce international arbitration agreements. The language of Article II comports with this Court's most recent description of a self-executing treaty provision in *Medellin v. Texas*, 552 U.S. 491, 128 S. Ct. 1346, 1358 (2008). Although other provisions of the Convention may have arguably required implementing legislation, the Federal Arbitration Act ("FAA") adopts Article II of the Convention wholesale, demonstrating that no additional legislation was required to define Article II's directive to domestic courts.

Even if the Convention is not self-executing, McCarran-Ferguson does not reverse-preempt a congressionally implemented treaty. The Convention is a treaty and not an act of Congress, and its implementing legislation does not supplant the underlying international

obligation. The treaty maintains its unique character as a binding international agreement. This is especially true because the FAA does not repeat or replace Article II of the Convention. Instead, the directive to courts to refer matters to arbitration is in the Convention itself. Thus, the substantive provisions conflicting with Calisota state law derive from the Convention's own terms and not an act of Congress. Therefore, it is the Convention, not its implementing legislation, that this Court should construe to supersede Calisota Code § 102.

2. McCarran-Ferguson does not apply to international commerce.

As this Court has held, Congress did not intend the McCarran-Ferguson Act to apply to matters of foreign affairs and international commerce. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 428 (2003). Congress enacted McCarran-Ferguson after this Court held that insurance was commerce within the meaning of the Commerce Clause—a decision allowing the federal government to regulate the historically state-law-dominated insurance industry. In response, Congress passed McCarran-Ferguson to reinstate the power the states had traditionally enjoyed. This power, however, neither before nor after McCarran-Ferguson, included the ability of a state to regulate foreign commerce or to trump international treaties.

Several courts that have examined the language and purpose of the McCarran-Ferguson Act have concluded that the Act does not allow state law to preempt the Convention because the Act is limited to matters of domestic commerce. As these courts have confirmed, the legislative history of the McCarran-Ferguson Act unambiguously demonstrates that Congress never envisioned that the Act would apply to matters of foreign commerce.

These lower court decisions are consistent with the well-defined reluctance of this Court to interpret U.S. law in a manner that would invalidate international arbitration provisions otherwise domestically unenforceable. This Court's reluctance stems from its

recognition that the United States must speak with one unified voice in foreign affairs. Here, that one voice—the federal government—has already spoken and declared that courts must enforce international arbitration agreements under the Convention.

In short, an individual state cannot preempt a multi-national treaty simply because it affects the insurance industry. McCarran-Ferguson only prevents an "Act of Congress,"—not a treaty, whether self-executing or not—from preempting state law. Accordingly, this Court should reverse the holding of the Thirteenth Circuit Court of Appeals and reinstate the district court's motion compelling arbitration in London, England.

STANDARD OF REVIEW

Whether the McCarran-Ferguson Act permits Calisota state law to reverse-preempt the Convention is a question of law reviewed de novo. *See Weiss v. First Unum Life Ins. Co.*, 482 F.3d 254, 263 (3d Cir. 2007) (reviewing de novo the district court's determination that state law reverse-preempted federal racketeering statute); *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1370 (10th Cir. 1996) (noting that the preemption effect of McCarran-Ferguson involves a question of law reviewed de novo).

Similarly, whether McCarran-Ferguson permits state regulation of foreign commerce is a question of law. *See Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 49 (1st Cir. 1999) (applying de novo review when determining the grant of power under the Commerce Clause). Thus, both issues before this Court are questions of law subject to de novo review.

ARGUMENT

I. The Thirteenth Circuit erred in holding that Calisota state law reverse-preempts the Convention.

The FAA, enacted in 1925, "seeks to ensure the validity and enforcement of arbitration agreements in any . . . contract evidencing a transaction involving commerce." 9 U.S.C. § 2 (2006). Through the FAA, Congress established a "national policy favoring arbitration" and made arbitration agreements subject to the same level of enforceability and revocation as contracts under the common law. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1983); 9 U.S.C. §§ 1-14. In 1970, the United States properly acceded to the Convention, which established that signatory nations would enforce foreign arbitration agreements. *See* Convention, art. II. That same year, Congress passed legislation that incorporated by reference the Convention into Chapter 2 of the FAA. *See* 9 U.S.C. § 201.

Generally, the FAA will preempt state laws that seek to prohibit or limit valid arbitration agreements. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996). As an exception to this general rule, a state law specifically regulating the business of domestic insurance can preempt the FAA. *See* 15 U.S.C. § 1012(b) (2006). This principle of state-law preemption, referred to as "reverse-preemption," derives from the McCarran-Ferguson Act, which was designed to "restore the supremacy of the states in the realm of insurance regulation." *U.S. Dept. of Treasury v. Fabe*, 508 U.S. 491, 500 (1993). McCarran-Ferguson provides in pertinent part that "[n]o Act of Congress shall be construed to invalidate, impair or supersede

any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance. . . ."[1] 15 U.S.C. § 1012(b).

Calisota Code § 102 expressly invalidates any contract provisions requiring arbitration of claims brought by an insured party or beneficiary under an insurance policy. The Court of Appeals held that the Convention was not self-executing and its implementing legislation was an act of Congress subject to reverse-preemption by Calisota state law. (R. at 12.) This Court should reverse the lower court because this case involves an arbitration agreement with a foreign insurance company that is enforceable under the provisions of the Convention. *See* 9 U.S.C. § 201 *et seq.*

A. Article II of the Convention is self-executing and thus McCarran-Ferguson does not apply.

Toyco did not argue, and the Court of Appeals did not address, whether a self-executing treaty regarding insurance supersedes contrary state law despite the reverse-preemption provisions of McCarran-Ferguson. (R. at 8.) Presumably, by not raising this issue on appeal, Toyco concedes that if the Convention is self-executing it would not be an act of Congress within the meaning of McCarran-Ferguson. *See Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 739 (5th Cir. 2009) (en banc) (Eldrod, J., dissenting) (conceding that if the Convention is self-executing "then [the majority] is correct that McCarran-Ferguson does not apply").

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellín v. Texas*, 552 U.S. 491, 128 S.Ct. 1346, 1357 (2008). In *Medellín*, this Court

[1] It is undisputed that Calisota's anti-arbitration statute was enacted for the purpose of regulating the insurance business. (R. at 3.) Also, it is conceded that the Convention and Chapter 2 of the FAA do not specifically relate to the business of insurance. (R. at 3.)

examined the textual provisions of the Vienna Convention and its implementing legislation to determine whether that treaty "convey[ed] an intention" of self-execution. *Id.* at 1356. In so doing, this Court also provided a framework for the self-execution analysis that focused on whether the plain language of the treaty was a "directive to domestic courts." *Id.* This Court explained that the phrase "undertakes to comply" does not constitute such a directive, but instead only signifies a commitment to take future legislative action. *Id.* This Court then contrasted the language in the Vienna Convention with language directing "that the United States 'shall' or 'must' comply" with the directive at issue. *Id.* Ultimately, this Court concluded that the absence of a directive to domestic courts rendered the treaty non-self-executing. *Id.* at 1358.

1. The express language of Article II evidences that it is self-executing.

Under the *Medellín* framework, Article II of the Convention evidences a clear intent to create a binding, self-executing obligation upon the courts of signatory nations. Specifically at issue here is Section 3 of Article II, which provides that "[t]he court of a Contracting State . . . shall, at the request of one of the parties, refer the parties to arbitration. . . ." Convention, art. II (3). Section 3 is addressed to the courts of contracting states and not to the states themselves or their respective legislatures. *Id.*

Further, referral to arbitration is mandatory as Section 3 provides that a "court . . . *shall* . . . refer the parties to arbitration." *Id.* (emphasis added). This language leaves no discretion to the political branches of signatory nations whether to enforce the treaty through implementing legislation; instead, the section is enforceable by its own terms. *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (declaring a treaty to be self-executing "whenever it operates of itself without the aid of any legislative provision"), *overruled in part by United*

States v. Percheman, 32 U.S. 51 (1833) (reinterpreting the treaty in light of new evidence regarding the Spanish translation of a term). As *Medellín* noted, treaty provisions couched in such mandatory terms strongly favor a finding of self-execution. *See Medellín*, 128 S.Ct. at 1358, 1359 n.5. Thus, the "shall" language of Article II constitutes a directive to domestic courts and evidences Article II's self-executing nature. *See id.* at 1358.

It is true that *Medellín* in dictum cited the Convention's implementing legislation as an example of Congress's ability to accord domestic effect to the judgments of arbitration tribunals. *See Medellín*, 128 S.Ct. at 1366. The United States' obligation, however, to "recognize arbitral awards as binding" is set forth in Article III of the Convention. *See* Convention, art. III. Therefore, it was Article III that the *Medellín* Court was addressing. *See Medellín*, 128 S.Ct. at 1366. Unlike Article II, Article III contains no language addressed to the courts of contracting states and instead addresses itself only to the contracting states. *Compare* Convention, art. II (3), *with* Convention, art. III. Although this Court has never expressly held that individual treaty provisions may be self-executing, while a treaty in its entirety may not be, *Medellín* strongly suggests this conclusion. *See Medellín*, 128 S.Ct. at 1362 (noting the Court's "obligation to interpret treaty *provisions* to determine whether they are self-executing" (emphasis added)); *see also United States v. Postal*, 589 F.2d 862, 878 (5th Cir. 1979) (recognizing that other, unrelated provisions of the Convention could be interpreted to require future implementation but that such provisions do not render the entire treaty non-self-executing); Restatement (Third) of the Foreign Relations Law of the United States § 11 cmt. h (1987) ("Some provisions of an international agreement may be self-executing and others non-self-executing . . . .").

Thus, the notion that Congress needed to enact implementing legislation to render Article III enforceable in domestic courts says nothing about Article II's self-execution status. Accordingly, the proper inquiry is whether the express language of Article II provides that it specifically, not the entire Convention, is self-executing. And that express language clearly states that "[t]he *court* of a Contracting State . . . *shall* . . . refer the parties to arbitration. . . ." Convention, art. II (3) (emphasis added).

2. Because the language of Article II is clear, it is unnecessary to consult the drafting history of the Convention.

The Court of Appeals, purportedly adhering to the *Medellín* framework, disregarded the plain language of the Convention and instead focused on the drafting history of the treaty. (R. at 10.) The *Medellín* Court did point out that, in addition to a treaty's text, this Court had in prior cases "also considered as 'aids to [a treaty's] interpretation' the negotiation and drafting history of the treaty as well as 'the post-ratification understanding' of signatory nations." *Medellín*, 128 S.Ct. at 1357. *Medellín*, however, also directed that the "explicit textual expression" of a treaty is the primary focus of the self-execution analysis because "[t]hat is after all what the Senate looks to in deciding whether to approve the treaty." *Id.* at 1362. Thus, like the interpretation of a statute, when a treaty's text is clear it is unnecessary to consult any extra-textual aids to interpret its meaning. *See, e.g., Nielsen v. Johnson*, 279 U.S. 47, 52 (1929); *Air France v. Saks*, 470 U.S. 392, 400 (1985); *see generally* Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land"*, 99 Colum. L. Rev. 2095, 2095-96 (1999) (contending that the Supremacy Clause was intended to make ratified treaties self-executing).

3. Even the Convention's drafting history suggests Article II is self-executing.

The history surrounding accession to the Convention suggests that Article II was self-executing. Congress passed legislation implementing the Convention on July 31, 1970, two months prior to the United States acceding to the Convention on September 30, 1970, and six months prior to the Convention taking force on December 29, 1970. *See* Gerald Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 Sw. U. L. Rev. 1, 15 (1971). Prior to accession, there was concern that many provisions of the Convention would be difficult to apply in domestic courts. *See id.* As just one example, the scope of the Convention's use of the phrase "transaction involving commerce" presented legal problems because domestic courts had not yet established its legal meaning.[2] *See id.* (identifying numerous concerns expressed prior to accession to the Convention).

To address these problems, it was necessary to amend the FAA prior to accession to the Convention—an unusual approach for implementing a truly non-self-executing treaty. *See id.* This prompted President Johnson to address the Senate: "Changes in the [FAA] 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." *See* 114 Cong. Rec. S10487, S10488 (April 24, 1968) (statement of President Johnson). The Court of Appeals read this language to mean that the Convention required implementing legislation to achieve its legally binding effect. (R. at 10.) But the fact that Congress amended the FAA *prior to accession* to the Convention suggests that the implementing legislation was intended to address these prior concerns before the Convention

[2] The 1970 amendments to the FAA also addressed concerns relating to venue and federal court jurisdiction over matters falling under the Convention. *See* 9 U.S.C. §§ 203-205.

would otherwise automatically take effect. *Safety Nat'l*, 587 F.3d at 736 n.6 (Clement, J., concurring) (citing *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Edye v. Robertson*, 112 U.S. 580, 599 (1884)).

Moreover, in the Resolution officially declaring the "advice and consent" of the Senate to accede to the Convention, President Nixon declared that the "Convention *shall* be observed and fulfilled . . . ." Recognition and Enforcement of Foreign Arbitral Awards, December 29, 1970, 21 U.S.T. 2517. Therefore, the legislative history suggests that Congress likely intended Article II to take automatic legal effect. In any event, legislative history cannot serve as authority for ignoring the express textual language of Article II of the Convention. *See Medellín*, 128 S.Ct. at 1362.

4. The amendments to the FAA do not support the conclusion that congressional implementation was required to give the Convention legal effect.

As this Court and others have suggested, several provisions of the Convention—e.g., Article III—lack the mandatory "shall" language addressed to domestic courts and therefore are arguably not self-executing. *See, e.g., Medellín*, 128 S.Ct. at 1362; *Postal*, 589 F.2d at 878. Congress implemented the entire Convention, not just Article II, into Chapter 2 of the FAA. *See* 9 U.S.C. § 201. The fact that implementing legislation exists, however, does not dictate that all legislatively implemented provisions are non-self-executing. *See* Ved P. Nanda & David K. Pansius, 2 *Litigation of International Disputes in U.S. Courts* § 10:7 (2009) ("[E]ven self-executing treaties may require legislation as regards [to] some of their provisions.").

Thus, it makes sense that Congress would implement the entire Convention without regard to which provisions were self-executing in order to ensure that the non-self-executing provisions were also legally binding. *See* H.R. Rep. No. 91-1181, at 3 (1970) ("[R]ather than

amending a series of sections of the [FAA] it would be preferable to enact a new chapter dealing exclusively with recognition and enforcement of awards falling under the Convention. This approach would leave unchanged the largely settled interpretation of the [FAA].").

Until the appellate court's holding in this case, it made no difference whether Congress implemented an already self-executing treaty provision like Article II. *See* Nanda & Pansius, *supra*. All that congressional implementation evidences is that Congress desired to enforce the entire Convention subject to very few specific restrictions. Implementing the entire treaty does not suggest that Article II was not independently enforceable. Thus, just because Congress chose to adopt legislation implementing the Convention does not mean that Article II required such implementing legislation to have legal effect.

In short, Article II of the Convention is self-executing and fully enforceable in domestic courts by its own operation. As a treaty, it is not an act of Congress subject to reverse-preemption under the McCarran-Ferguson Act. Accordingly, it is entitled to recognition as "the supreme Law of the Land" under the Supremacy Clause. U.S. Const. art. VI, § 2.

B. Whether self-executing or not, the Convention is not an "Act of Congress" subject to reverse-preemption within the meaning of McCarran-Ferguson.

Even if the Convention was not self-executing and required legislation to implement some or all of its provisions in United States courts, it does not logically follow that Congress intended an "Act of Congress," as that phrase is used in McCarran-Ferguson, to encompass a non-self-executing treaty implemented by congressional legislation. *See Safety Nat'l*, 587 F.3d at 721.

1. Congressional implementation of the Convention does not abolish the legal effect of the underlying international treaty.

Implementing legislation that does not conflict with or override a treaty does not replace or displace that treaty. *See United States v. Percheman*, 32 U.S. 51, 89 (1833). Whether a treaty is self-executing or not, it still remains a legally binding obligation of the United States and is the supreme law of the land. *See* Louis Henkin, *Foreign Affairs and the United States Constitution*, 198-204 (2d ed. 1996). If it is not self-executing, however, it is not "a rule for the court." *Id.* But it remains an obligation of the President and Congress to make it a rule for the courts if such action is required by the treaty or is necessary to fulfill the United States' obligation. *Id.* Further, "upon the United States signing a treaty and Congress adopting enabling legislation, *the treaty* becomes the supreme law of the land." *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 903 (5th Cir. 2005) (emphasis added). The fact that Congress implements the treaty does not mean that the treaty dissipates and only the implementing legislation remains for courts to construe. *See id.* at 902-03; *Medellin*, 128 S.Ct. at 1365 (noting that just because provisions of a treaty "might not automatically become domestic law hardly means the underlying treaty is 'useless'").

It does not appear from the language of other statutes that Congress has ever distinguished between a self-executing and implemented treaty; instead, Congress often refers to just the term "treaty." For example, in immigration law, the term "immigrant" "means every alien except . . . an alien entitled to enter into the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national . . . ." 8 U.S.C. § 1101(a)(15)(E) (2006). This provision would not seem to exclude a treaty that is non-self-executing but implemented by an act of Congress. *See also* Revenue Act of 1941, Pub. L. No. 77-250, § 109, 55 Stat. 687, 695 (1941)

(amending provisions of the Internal Revenue Code to exclude their application to residents of certain countries "so long as there is in effect with such country a treaty which provides otherwise"); Farm Labor Supply Appropriation Act, Pub.L. No. 78-229, § 3, 58 Stat. 11, 13 (1944) (authorizing "the modification or termination of any agreement . . . whenever [the War Food Administrator] finds such action to be necessary in order to carry out the terms of any treaty or international agreement to which the United States of America is signatory").

To accept Toyco's argument, and the holding of the Court of Appeals, this Court must conclude that when Congress used "Act of Congress" in McCarran-Ferguson, it intended the phrase to exclude self-executing treaty provisions but to include treaty provisions implemented by federal legislation. The plain text of McCarran-Ferguson and the commonly accepted understanding of the force of an implemented treaty do not support this conclusion. *See Safety Nat'l*, 587 F.3d at 723; *Lim*, 404 F.3d at 903.

2. It is the Convention itself, not its implementing legislation, that preempts Calisota state law.

The conclusion that Congress did not intend the term "Act of Congress" to include a treaty such as the Convention is reinforced by the express provisions of the Convention's implementing legislation. Chapter 2 of the FAA by its own terms does not operate without reference to the provisions of the Convention. *See* 9 U.S.C. § 201 ("The Convention . . . of June 10, 1958, shall be enforced in United States courts in accordance with this chapter."). Further, when implementing the Convention, Congress provided that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the *laws and treaties* of the United States." 9 U.S.C. § 203. This is a direct indication that Congress thought that jurisdiction of an action under the Convention partially derived from the treaties of the United States.

Moreover, the FAA states that it only applies "to the extent that [it] is not in conflict with . . . the Convention." *Id.* § 208. Thus, even the very act of Congress that Toyco argues was necessary to implement the Convention in domestic courts, relegates itself to the authority of the Convention. *See id.* Accordingly, it is the Convention, and not its implementing legislation, that this Court should construe as superseding Calisota law. *See, e.g., McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 120 F.3d 583, 586 (5th Cir. 1997) (refusing to decide "whether *the Convention* preempts La. R.S. 22:629" (emphasis added)); *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1145 (5th Cir. 1985) (holding that if an arbitration agreement qualifies, "*the Convention* requires district courts to order arbitration" (emphasis added)). This is so because the FAA does not repeat or replace the directive in Article II that a court "shall, at the request of the parties, refer the parties to arbitration." *See* 9 U.S.C. § 201 *et seq.*; Convention, art II. Thus, the directive to courts to refer matters to arbitration is in the Convention itself. *See* J. Logan Murphy, *Law Triangle: Arbitrating International Reinsurance Disputes Under the New York Convention, the McCarran-Ferguson Act, and Antagonistic State Law*, 41 Vand. J. Transnat'l L. 1535, 1574 (2008) (concluding "the Convention and its implementing legislation should be enforceable over a state anti-arbitration statute . . ."). Because it is the provisions of the Convention, not the FAA, conflicting with Calisota Code § 102, there is no "act of Congress" preempting state law, and McCarran-Ferguson is inapplicable. *See Safety Nat'l*, 587 F.3d at 723.

3. The Second Circuit improperly held that McCarran-Ferguson permits state law to reverse-preempt the Convention.

In *Stephens v. American International Insurance Co.*, the Second Circuit held that "the Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation."[3] 66 F.3d 41, 45 (2d Cir. 1995). The Second Circuit then addressed whether the Convention's implementing legislation should preempt a Kentucky statute that subordinated all arbitration provisions in contracts where an insolvent insurer in liquidation was a party. *Id.* at 43. Ultimately, the court concluded that the implementing legislation was an act of Congress, and "[a]ccordingly, the implementing legislation [did] not preempt the Kentucky Liquidation Act." *Id.* at 45.

Stephens was certainly correct to the extent that, when provisions of a treaty are not self-executing, Congress must provide implementing legislation to give the provisions force in domestic courts. But this conclusion does not address the issue of whether Congress intended state law to reverse-preempt an implemented treaty when it used the phrase "[n]o Act of Congress" in the McCarran-Ferguson Act. In other words, it is clear implementing legislation is required to give a non-self-executing treaty legal effect in domestic courts, but this does not negate the fact that, once implemented, the treaty maintains its status as an independent international obligation. *See Safety Nat'l*, 587 F.3d at 723.

Further, *Stephens* is distinguishable from the present case because it did not involve state regulation of a foreign insurance company, but rather concerned the application of state law to a domestic insurance company in liquidation. *See Stephens*, 66 F.3d at 43; *McDermott*

[3] In regards to *Stephens*' self-execution holding, the Second Circuit undertook no textual analysis and set forth no reasons to support its conclusion. *See Safety Nat'l*, 587 F.3d at 737 (Clement, J., concurring) (discussing the *Stephens* holding). Further, the court decided the case before *Medellin*, which provides critical guidance to lower courts for determining when treaty provisions are self-executing. *Id.*

In'l, Inc. v. Underwriters at Lloyd's, 1996 WL 291803, at *3-4 (E.D. La. May 30, 1996) (distinguishing the *Stephens* holding). Also, the Second Circuit has since recognized the tension between its reasoning in *Stephens* and the legislative history of McCarran-Ferguson. *See Stephens v. Nat'l Distillers and Chem. Corp.*, 69 F.3d 1226, 1231-33 (2d Cir. 1995) ("*Nat'l Distillers*"). In *Nat'l Distillers*, the Second Circuit held that McCarran-Ferguson did not cause a state law requiring out-of-state insurers to post security before participating in court proceedings to reverse-preempt the Foreign Sovereign Immunities Act. *See id.* at 1231. Contrary to *Stephens*, the Second Circuit reasoned that it must "apply federal law to the insurance industry, in spite of the McCarran-Ferguson Act, whenever federal law clearly intends to displace all state laws to the contrary." *Id.* at 1233.

The Court of Appeals below erroneously relied on *Stephens* in reaching its conclusion and disregarded the Fifth Circuit's contradictory holding in *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 543 F.3d 744 (5th Cir. 2008), *vacated by en banc review*, 558 F.3d 599 (2009). (R. at 11.) The appellate court dismissed this decision as a "now-vacated Fifth Circuit panel opinion." (R. at 11.) It is true that the Fifth Circuit had vacated its decision at time the appellate court issued its ruling; however, on Nov. 9, 2009, after a rehearing of the case en banc, an overwhelming majority issued an even more decisive opinion. The court held that "the text of the McCarran-Ferguson Act does not support the inclusion by implication of 'a treaty implemented by an Act of Congress.'" *Safety Nat'l*, 587 F.3d at 731 (en banc) (Fourteen judges joining the majority opinion, one judge concurring in the judgment, and three judges dissenting.). The court unequivocally stated: "[S]elf-executing or not, [implemented treaty provisions] are not reverse-preempted by state law pursuant to the McCarran-Ferguson Act." *Id.*

This court should find persuasive the reasoning and holding of the Fifth Circuit in *Safety Nat'l*, and disregard the contradictory case law of the Second Circuit.

4. When Congress passed the McCarran-Ferguson Act, it was aware that courts differentiated between implemented treaties and acts of Congress.

At the time of McCarran-Ferguson's enactment, courts analyzed treaties, even when implemented by an act of Congress, as treaties. This Court's decision in *Missouri v. Holland*, 252 U.S. 416 (1920), reflects that a treaty followed by implementing legislation remains a treaty that, where relevant, is viewed as distinct from an act of Congress.

Prior to *Holland*, two district courts found that an act of Congress attempting to regulate the killing of migratory birds within the states was unconstitutional. *United States v. Shauver*, 214 F. 154, 160 (E.D. Ark. 1914); *United States v. McCullagh*, 221 F. 288, 296 (D. Kan. 1915). Subsequently, the United States consummated a non-self-executing treaty with Great Britain to protect the killing of migratory birds. *Holland*, 252 U.S. at 431. An act was then passed implementing this treaty that directed the Secretary of Agriculture to promulgate regulations prohibiting the killing of migratory birds except as permitted by the treaty. *Id.* at 431-32. Seeking to prohibit the enforcement of this Act and the Secretary's regulations, the State of Missouri cited *Shauver* and *McCullagh* for the proposition that the Act interfered with rights reserved to the states by the Tenth Amendment. *Id.* at 430-31.

This Court acknowledged that the earlier Act "that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States" was unconstitutional. *Id.* at 432. This Court, however, also recognized the difference between acts of Congress and "a treaty followed by such an act." *Id.* at 433. The validity of the implementing legislation turned on the constitutionality of the treaty even though it was implemented by an act of Congress. *Id.* This Court assumed that "but for the treaty the State

would be free to regulate [migratory birds within its boundaries] . . . , [but that] a treaty may override [the state's] power." *Id.* at 434. Because the treaty was constitutional, this Court upheld the treaty and its implementing legislation. *Id.* at 435; *see also* John Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-self-Execution*, 99 Colum. L. Rev. 2218, 2251 (1999) ("If a treaty regulates a matter within the jurisdiction of the states, then the word "treaty" in the Supremacy Clause provides Congress with the authority to pass a statute preempting state law to give effect to the treaty.").

This Court decided *Holland* two decades prior to Congress passing the McCarran-Ferguson Act. Thus, Congress was well aware that an implemented treaty was distinct from an act of Congress and could serve as the source of authority to "override [a state's] power." *Id.* at 434. Viewed in historical context, if Congress had intended for a state law regulating the business of insurance to reverse-preempt any future treaty implemented by an act of Congress then it seems probable Congress would have included in the McCarran-Ferguson Act a phrase such as "or any treaty requiring congressional implementation." *Safety Nat'l*, 587 F.3d at 729. But McCarran-Ferguson's text is silent as to any congressional intent to restrict the United States' ability to negotiate and fully implement a treaty affecting some aspect of international insurance agreements. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419-20 (2003).

In sum, the McCarran-Ferguson Act does not permit Calisota Code § 201 to reverse-preempt the Convention regardless of whether the treaty required implementing legislation to give it legal effect. Instead, Congress's subsequent adoption of the Convention supersedes state-based anti-arbitration statutes otherwise valid in the domestic context. *Goshawk Dedicated v. Portsmouth Settlement Co.*, 466 F. Supp. 2d 1293, 1310 (N.D. Ga. 2006).

II. The Thirteenth Circuit erred in holding that the McCarran-Ferguson Act permits state law to regulate foreign commerce.

The Commerce Clause of the U.S. Constitution provides that "Congress shall have power . . . [t]o regulate commerce with Foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause prohibits states from enacting laws that burden interstate or international commerce without express congressional permission. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981); *Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 7-8 (1986). Although there is only one Commerce Clause, the section dealing with foreign commerce is often referred to as "the Foreign Commerce Clause," and "state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny" than regulations on purely interstate commerce. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984).

McCarran-Ferguson provides in relevant part that "the 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). In reaching its holding that McCarran-Ferguson applies to foreign commerce, the Court of Appeals disregarded substantial authority strongly suggesting otherwise. (R. at 5-6.) Once acknowledging that authority, this Court should conclude that McCarran-Ferguson is domestic commerce legislation that applies only to interstate, not international, commerce in insurance.

A. The history and purpose of McCarran-Ferguson's enactment shows that Congress did not intend the Act to permit state regulation of foreign commerce.

Congress passed the McCarran-Ferguson Act in direct response to this Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). *South-Eastern Underwriters* held that insurance is "commerce" within the meaning of the

Commerce Clause, thus giving the federal government the power to regulate the insurance industry. *Id.* at 579. Congress, believing "that the business of insurance is 'a local matter, to be subject to and regulated by the laws of the several States,"' enacted McCarran-Ferguson, which was designed to restore state taxing and regulatory powers over the insurance business to their pre-*South-Eastern Underwriters* scope. *See Western & Southern Life v. State Board of Equalization of Cal.*, 451 U.S. 648, 654 (1981) (quoting H.R.Rep. No. 143, 79 th Cong., 1st Sess., 2).

Prior to *South Eastern Underwriters*, however, the States only enjoyed the power to regulate domestic insurance and not international insurance agreements. *See Spirt v. Teachers Ins. and Annuity Ass'n*, 691 F.2d 1054, 1064-65 (2d Cir. 1982), *modified and aff'd*, 735 F.2d 23 (2d Cir. 1984). Thus, McCarran-Ferguson relinquished to the states what *South-Eastern Underwriters* had eliminated—the power to regulate and tax domestic insurance. *Moore v. Nat'l Distillers and Chem. Corp.*, 143 F.R.D. 526, 534 (S.D.N.Y. 1992) (holding that the preemptive effect of McCarran-Ferguson does not extend to congressional power to regulate foreign commerce). Congress did not intend to delegate its foreign commerce power, which was a power the states never possessed prior to *South-Eastern Underwriters*.

The legislative history of McCarran-Ferguson makes this clear. *See* H.R. Rep. No. 143, at 671 (1945) ("It is not the intention of Congress in the enactment of [McCarran-Ferguson] to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in *South Eastern Underwriters*."). One of the authors of the legislation, Senator Homer Ferguson, clarified during the Senate debate, "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) (statement of Senator Ferguson) (emphasis added); *see also* Raymond A. Guenter, *Rediscovering The McCarran-Ferguson Act's Commerce Clause Limitation*, 6 Conn. Ins. L.J. 253, 256 (2000).

Additionally, when Congress originally passed the McCarran-Ferguson Act, it required a future Congress to reevaluate the Act after a reasonable time. *See* Report of the Committee on the Judiciary, United States Senate, *The Insurance Industry: Aviation, Ocean Marine, and State Regulation*, p. 12, 86th Cong., 2d Sess. (August 10, 1960) (the "Report"). In 1960, the Senate Judiciary Committee reevaluated McCarran-Ferguson and issued the Report chaired by Senator Joseph O'Mahoney, who drafted substantial portions of the language in McCarran-Ferguson fifteen years prior. *Id.* at 20. The Report confirmed that Congress did not intend for McCarran-Ferguson to preempt its authority to regulate matters of international insurance under the foreign commerce clause. *Id.* at 14.

Specifically, the Report stated, "foreign commerce of the United States is subject to regulation by the Federal Government under the foreign provision of the commerce clause, which acts as an even more severe restriction upon State power than the interstate provision of the commerce clause." *Id.* at 22. The Report further provided that the "legislative history of [McCarran-Ferguson] reveals that Congress did not intend to relinquish its authority over the foreign commerce of the United States." *Id.* The committee reasoned:

> State regulation is not suited to the myriad problems in the foreign commerce field . . . [and] [i]t was for this reason that the Constitution wisely lodged responsibility for such problems in the Congress which possessed the power to protect the interest of all the people on a national and international basis. Nothing in the McCarran Act would indicate that Congress intended to lessen its primary responsibility in this sensitive area.

Id. at 23. Thus, the original legislative history and the Report of the Senate Judiciary Committee strongly indicate that Congress did not intend McCarran-Ferguson to apply to international insurance agreements.

B. Acknowledging McCarran-Ferguson's history, courts have routinely held that it does not apply to international insurance agreements.

The history and purpose behind McCarran-Ferguson has proven highly persuasive to this Court and other lower courts, which have overwhelming recognized that McCarran-Ferguson does not apply to foreign commerce. Merely because the particular field of foreign commerce involves international arbitration should not change this result. *See Nat'l Distillers*, 69 F.3d at 1233 (holding that the McCarran-Ferguson Act does not displace federal law "simply because the insurance industry is involved"). Accordingly, this Court should find persuasive the considerable case law holding that McCarran-Ferguson does not apply to foreign commerce or international insurance agreements.

1. Since McCarran-Ferguson's inception, this Court has recognized it does not apply to foreign commerce.

In *FTC v. Travelers Health Ass'n*, this Court held that the FTC could issue a cease and desist order against certain insurance practices by a Nebraska insurance company. 362 U.S. 293, 302 (1960). In that case, an insurance company was selling insurance through an interstate mail order business. *See id.* at 298. This Court held the company's activities were extra-territorial and were not governed by state law under the McCarran-Ferguson Act. *See id.* Therefore, the insurance practices were not immune from federal control. *Id.* This Court stated that it is clear from the debate surrounding the implementation of the McCarran-Ferguson Act "that Congress viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated. There was no

indication of any thought that a State could regulate activities carried on beyond its own borders." *Id.* at 300.

This Court has since confirmed that McCarran-Ferguson was intended to apply to domestic, not international, commerce. *See Garamendi*, 539 U.S. at 428. In *Garamendi*, the President had entered into an executive agreement with Germany's chancellor promising that if a German company was sued in a United States court regarding a Holocaust-era claim, the federal government would submit a statement that adjudicating such a claim was against the United States' foreign policy interests. *Id.* at 406. Subsequently, several insurers challenged a California statute requiring all insurers licensed in California to disclose the details of any policies issued in Europe during the Holocaust era. *Id.* The State of California attempted to defend its statute on the ground that McCarran-Ferguson authorized states to enact legislation regulating the insurance industry. *Id.* This Court granted certiorari to resolve the question "whether the McCarran-Ferguson Act insulates [the California statute] from review under the Foreign Commerce Clause." *Petition for Writ of Certiorari, Am. Ins. Ass'n v. Low*, 539 U.S. 396 (2003) (No. 02-722), 2002 WL 32101138, at *i.

This Court did not rule, as California urged, that McCarran-Ferguson authorized the challenged statute. *See Garamendi*, 539 U.S. at 428. Rather, this Court held that the statute was preempted by the foreign affairs privilege afforded to the federal government's chief executive. *Id.* Admittedly, because *Garamendi* involved an executive agreement, not a treaty, it is not instructive in determining the meaning of "act of Congress" in the McCarran-Ferguson Act. The decision, however, provides an important insight into the limitations of McCarran-Ferguson's scope: "[A] federal statute directed to implied preemption by domestic

commerce legislation cannot sensibly be construed to address preemption by *executive conduct in foreign affairs*." *Id.* (emphasis added).

Moreover, in *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, this Court enforced an international arbitration clause in the context of a challenge to its enforceability under the Carriage of Goods by Sea Act ("CGSA"). 515 U.S. 528, 530 (1995). In *Vimar*, this Court interpreted a provision of the CGSA, which rendered void any provision in maritime contracts that lessened the liability of a carrier of goods, as not conflicting with the FAA or the Convention. *Id.* (citing 46 U.S.C.A. § 1300 *et seq.*). This Court noted that the policy in favor of enforcing international agreements counseled against construing the CGSA in a manner that rendered an international arbitration clause unenforceable. *Id.* at 539. This Court cautioned: "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." *Id.*

Thus, *Travelers*, *Garamendi*, and *Vimar* strongly support the conclusion that this Court should construe the McCarran-Ferguson Act as not applying to arbitration agreements in international insurance contracts.

2. In line with this Court's precedent, lower federal and state courts have consistently held that McCarran-Ferguson does not apply to international arbitration agreements.

While this Court has not directly addressed whether the McCarran-Ferguson Act allows state law to reverse-preempt the Convention, lower courts have determined that it was not intended to do so. Even the Second Circuit—the only circuit to hold that an implemented treaty is an act of Congress subject to reverse-preemption—has noted that "there is some

indication in the legislative history of the McCarran-Ferguson Act that it was intended to apply only to domestic Commerce Clause legislation." *See Nat'l Distillers*, 69 F.3d at 1231 n.5.

Several federal district courts have also ruled that McCarran-Ferguson "was intended to apply only to interstate commerce and not to foreign commerce." *In re Arbitration Between The West of England Ship Owners Mut. Ins. Ass'n*, No. CIV. A. 91-3645, CIV. A. 91-3798, 1992 WL 37700, at *4 (E.D. La. Feb. 18, 1992) (holding that Louisiana's anti-arbitration statute did not preempt the Convention because McCarran-Ferguson does not reverse-preempt provisions where federal law deals with international, as opposed to interstate, commerce); *McDermott Int'l v. Underwriters at Lloyd's London*, No. CIV. A. 91-841, 1992 WL 37695, at *3-4 (E.D. La. Feb. 14, 1992) (same); *Cont'l Ins. Co. v. Jantran, Inc.*, 906 F. Supp. 362, 366 (E.D. La. 1995) (same); *Antillean Marine Shipping Corp. v. Through Trans. Mut. Ins., Ltd.*, No. 02-22196-CIV., 2002 WL 32075793, at *2-3 (S.D. Fla. 2002) (holding that McCarran-Ferguson is inapplicable to foreign commerce).

Likewise, in *Apollo Ship*, a case with remarkably similar facts as here, a Bermuda insurance company demanded arbitration to resolve a dispute with a Florida policyholder. *Assuranceforeningen Skuld (Gjensidig) v. Apollo Ship Chandlers, Inc.*, 847 So. 2d 991, 992 (Fla. Dist. Ct. App. 2003) ("*Apollo Ship*"). The policyholder argued that McCarran-Ferguson prohibited arbitration because of a Florida anti-arbitration statute that conflicted with the FAA. *Id.* at 993. The court rejected this argument because McCarran-Ferguson "was intended to apply only to interstate commerce and not foreign commerce." *Id.*; *see also Moore*, 143 F.R.D. at 534 (holding that the preemptive effect of McCarran-Ferguson does not

extend to congressional power to regulate foreign commerce); *Moore v. Aegon Reinsurance Co. of Am.*, 196 A.2d 250, 260 (N.Y. App. Div. 1994) (same); Guenter, *supra*, at 257.

Additionally, a similar question is raised when interpreting the final phrase of the Commerce Clause, which gives Congress the power to "regulate commerce . . . with the Indian tribes." U.S. Const., art. I, § 8, cl. 3. In *Warm Springs*, an Indian tribe sued its workers' compensation insurer for a rebate under the tribe's insurance contract. *Warm Springs Forest Prod. Indus. v. Employee Benefits Ins. Co.*, 703 P.2d 1008, 1009 (Or. Ct. App. 1985). The defendant insurer argued that its alleged contractual obligation for the rebate was unenforceable under anti-rebating provisions of Oregon's insurance laws. *Id.* at 1010. The court refused to apply the Oregon statute and held that McCarran-Ferguson did not give the states "jurisdiction over insurance matters involving reservation Indians." *Id.* at 1014 n.8. *Warm Springs* further confirms that Congress intended McCarran-Ferguson to relinquish its power to regulate commerce "among the several states," and that Congress did not intend to delegate any of its remaining commerce power—including the power to regulate foreign commerce.

C. Disregarding this ample contrary authority, the Court of Appeals relied solely on a case that misconstrued an inapplicable decision of this Court.

The Court of Appeals stands alone as the only federal court ever to rule that McCarran-Ferguson applies to international commerce. In support of its ruling, the appellate court cited a decision of the Illinois Supreme Court, *Sun Life Assurance Co. v. Manna*, 879 N.E.2d 320, 330 (Ill. 2007). (R. at 11.) *Sun Life*, in turn, relied exclusively on this Court's decision in *Western & Southern*, which, according to *Sun Life*, held that McCarran-Ferguson "removed all Commerce Clause limitations on the authority of the States to regulate and tax

the business of insurance when it passed the McCarran-Ferguson Act." *Sun Life*, 879 N.E.2d at 330 (quoting *Western & Southern*, 451 U.S. at 653).

The Illinois Supreme Court's reliance on *Western & Southern* was misplaced. *Western & Southern* is limited by its facts and holding to questions of interstate commerce. The case raised a constitutional challenge to a California retaliatory tax on an Ohio insurer. *Western & Southern*, 451 U.S. at 651. This Court stated: "Congress may 'confe[r] upon the States an ability to restrict the flow of *interstate commerce* that they would not otherwise enjoy.'" *Id.* at 652 (emphasis added). The above statement immediately preceded the portion of the opinion upon which *Sun Life* relied in support of its conclusion that McCarran-Ferguson "removed all Commerce Clause limitations" upon state laws affecting the business of insurance. *See id.* When viewed in context, this Court's statement in *Western & Southern* relates to interstate, not international, commerce. *See id*; Guenter, *supra*, at 256 ("[McCarran-Ferguson] frees state insurance laws only from the restraints imposed by the interstate commerce clause.").

Moreover, in a subsequent decision, this Court expressly confirmed that *Western & Southern* is limited to questions of interstate commerce. *See Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 876-77 (1985) ("In *Western & Southern*, . . . we held that California's purpose in enacting the retaliatory tax - to promote the *interstate business of domestic insurers* by deterring other States from enacting discriminatory or excessive taxes - was a legitimate one." (emphasis added)). In addition, lower courts agree that *Western & Southern* was referring only to interstate commerce. *See, e.g., Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 740 F.2d 203, 208 (2d Cir. 1984) (citing *Western & Southern* in support of its statement that "[t]he Commerce Clause has been interpreted to limit the power of the states to

interfere with or impose burdens on interstate commerce"); *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 424 (7th Cir. 1991) (same).

Therefore, *Sun Life*, the Court of Appeals' sole authority, provides an unstable foundation for the conclusion that McCarran-Ferguson authorizes state intrusion into foreign commerce. In contrast, a bevy of decisions from this Court, as well as other lower courts, support the conclusion that McCarran-Ferguson only operates to reverse-preempt domestic commerce in insurance.

D. Public policy and international comity demand that the United States speak with "one voice" in international affairs.

The Court of Appeals' conclusion that Calisota law applies to foreign commerce and prevails over the Convention is inconsistent with recognized international policy that strongly favors the enforcement of arbitration clauses. Specifically, it is important to enforce international arbitration agreements to promote international comity and ensure predictability in international business transactions. *See Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1294 (11th Cir. 1998).

Commentators and courts have defined comity as the "reciprocity or consideration of high international politics concerned with maintaining amicable and workable relationships between nations." *See, e.g., Turner Entm't Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1519 n. 10 (11th Cir. 1994); Ernest A. Young, *Treaties as "Part of Our Law"*, 88 Tex. L. Rev. 91, 100 (2009). To promote comity, it is essential that the United States "act through a single government with unified and adequate national power." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979). And because "[f]oreign commerce is pre-eminently a

matter of national concern," the United States "must speak with one voice when regulating commercial relations with foreign governments." *Id.*

In two different cases, this Court has relied on the strong policy of international comity and enforced international arbitration agreements that were not enforceable in the domestic context. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

In *Scherk*, for example, this Court held that, despite anti-arbitration provisions in Section 29 of the 1934 Securities Act,[4] an arbitration clause in an international agreement was nonetheless enforceable because "[s]uch a contract involves considerations and policies significantly different" from those in the domestic context. 417 U.S. at 515. *Scherk* reasoned that an international agreement to arbitrate is "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Id.* at 516. And while finding it unnecessary to reach the issue of whether the Convention "would require of its own force" that the arbitration agreement be enforced, this Court concluded that the distinct international concerns alone mandated enforcement of the arbitration clause at issue. *Id.* at 520 n.15.

Later in *Mitsubishi*, this Court again enforced an international arbitration agreement even while assuming it was not enforceable in the domestic context. 473 U.S. at 629. That case addressed whether a claim under the Sherman Act alleging antitrust violations could be litigated in an international arbitration forum. *Id.* at 616. The lower court held that such a

[4] Several years before *Scherk*, this Court held that arbitration agreements in securities contracts were void under the no-waiver provisions of the Securities Act. *Wilko v. Swan*, 346 U.S. 427, 437 (1953). This Court has since overruled its decision in *Wilko*, holding that the 1934 Securities Act does not prohibit the enforcement of arbitration agreements contained in securities transactions. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989).

claim could not be brought in an international forum because "the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make . . . antitrust claims . . . inappropriate for arbitration." *Id.* at 629. This Court reversed the lower court and held that the international nature of the transaction alone justified its enforcement despite the domestic unenforceability of the agreement:

> [The] concerns of international comity, respect for the capacities of foreign and transactional 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, even assuming that a contrary result would be forthcoming in a domestic context.

Id. Additionally, relying on its previous decision in *Scherk*, this Court stated that "it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration." *Id.* at 639.

Here, the arbitration restrictions that contradict the Convention do not arise from the national government, but from an individual state. Calisota Code § 102 is in conflict with the federal government's accession, ratification, and implementation of the Convention and prevents the United States from speaking with one voice in international affairs. *See Scherk*, 417 U.S. at 520 n.15. The holding of the Court of Appeals improperly invites a second voice—the voice of a state—to drown out the express promise of the federal government: "The Convention . . . shall be enforced in United States courts . . . ." 9 U.S.C. § 201.

CONCLUSION

Reverse-preemption under the McCarran-Ferguson Act is expressly limited to an "Act of Congress." Because a treaty is not an act of Congress, the McCarran-Ferguson Act does not allow Calisota Code § 102 to reverse-preempt the Convention. This is so even if the Convention required Congress to pass implementing legislation because the supremacy of the underlying treaty does not dissipate upon implementation. Further, the history and purpose of the McCarran-Ferguson Act demonstrates that Congress did not intend for the Act to apply outside of the realm of interstate commerce. This history reinforces the long held understanding of this Court and others that McCarran-Ferguson does not permit state law to reverse-preempt foreign commercial agreements.

Thus, this Court should hold that the Convention, whether self-executing or not, is not an act of Congress, within the meaning of the McCarran-Ferguson Act, and that McCarran-Ferguson does not apply to international commerce in insurance. It is for these reasons this Court should reverse the holding of the Thirteenth Circuit Court of Appeals.

Respectfully submitted,

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

We certify that a copy of Petitioner's brief was served upon Respondent, Toyco, Inc., through the counsel of record by certified U.S. mail return receipt requested, on this, the 11th day of January, 2010.

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Attorneys for Petitioner

APPENDIX A

Constitutional Provisions

U.S. Const. art. I, § 8, cl. 3

The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. art. VI. § 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX B

Relevant Provisions of the Convention

Article II:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

. . . .

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement [to arbitrate] within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

APPENDIX C

Relevant Provisions of the Federal Arbitration Act

9 U.S.C. § 201

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. § 203

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

9 U.S.C. § 205

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States.

9 U.S.C. § 208

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

APPENDIX D

Relevant Provisions of the McCarran-Ferguson Act

15 U.S.C. § 1012

(a) State regulation

The 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.

(b) Federal regulation

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: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C.A. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State law.