No. 12-1429

In the Supreme Court of the United States

IMAD BAKOSS, M.D.,
Petitioner,

v.

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

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

BRIEF OF PREEMPTION AND FEDERALISM LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Constitution

Statutes

INTEREST OF THE *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, *amici curiae*—preemption and federalism law professors—hereby submit this brief in support of Petitioner Imad Bakoss, M.D.[1]

Amici curiae are American law professors with scholarly expertise in preemption and federalism issues.[2] In submitting this brief, they seek to aid this Court by clarifying the extent to which the Second Circuit's decision below is irreconcilable with prevailing preemption jurisprudence. Proper application of preemption doctrines ensures that federal statutes displace state law only to the extent necessary to effectuate Congress's intent. Failure to apply the doctrines, conversely, misconstrues Congress's designs, disrespects the sovereignty of the several states, and upsets the expectations of private parties.

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[1] Petitioner and Respondent both consented to the filing of this brief. As required by Supreme Court Rule 37.2, counsel of record for all parties received notice of *amici*'s intent to file this brief at least 10 days prior to the due date for *amici curiae* briefs in support of the Petitioner. No counsel for any party authored this brief in whole or in part, nor did any party (or their counsel) make a monetary contribution intended to fund the preparation or submission of the brief.

[2] The names of *amici curiae* are set forth in the Appendix bound with this brief. *Amici curiae* appear here in their individual capacities, rather than as representatives of the entities or institutions with which they may be employed or affiliated.

SUMMARY OF THE ARGUMENT

1. Deepening an extant circuit split, the Second Circuit below categorically held that federal common law defines the meaning of "arbitration" under the Federal Arbitration Act, without making any effort to first determine the relevant state law definition of the term or to evaluate it alongside the terms or objectives of the statute. Such a course is incompatible with basic preemption jurisprudence. As this Court has previously held, the Federal Arbitration Act includes no express preemption clause, nor does it evidence any congressional intention to wholly occupy the field of arbitration. As a result, the doctrine of conflict preemption requires that state arbitration laws are preempted only (1) to the extent that it is either impossible to comply with federal and state law simultaneously, or (2) where the state law interposes an obstacle to the achievement of Congress's discernible objectives. By disregarding this analysis in favor of the adoption of a federal common law definition, the panel below instead effected something closer to field preemption, giving the Federal Arbitration Act a far broader reach than either Congress intended or this Court has ascribed to it. Such a fundamental error must be reversed.

2. The Second Circuit's decision to adopt a federal common law definition of "arbitration" cannot be squared with the established use of conflict preemption to address a number of other interpretive issues arising under the Federal Arbitration Act, such as the validity or scope of a purported agreement to arbitrate. Conversely, the historic use of traditional conflict-preemption rules to resolve such other ques-

tions under the Act illustrates that the Second Circuit's concerns about doing so with respect to the definition of "arbitration" are misplaced.

3. The Second Circuit's refusal to allow state law to play any part in shaping the definition of "arbitration" under the Federal Arbitration Act appears to stem from the tautological belief that the act simply must include some federal definition of the term. Rather, practice in a number of other federal-law contexts establishes that state law can play a valuable role in shaping the operation of federal statutory and/or regulatory regimes, without resort to categorical imposition of federal common law. Practice under the Federal Arbitration Act can and should follow suit, with federal law displacing state definitions only when the two are in a state of actual conflict.

ARGUMENT

In 1925, Congress enacted the Federal Arbitration Act (FAA, or "the Act") in order to put an end to widespread judicial hostility to arbitration agreements. *See Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008). Section 2 of the Act promotes and protects arbitration agreements by ensuring that they are placed on equal footing with other contractual agreements under relevant state law. *See, e.g.*, *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009). Further sections create procedural mechanisms through which parties can vindicate their contractual arbitration rights. *See, e.g.*, 9 U.S.C. §§ 3, 4, 16.

Both prior to and after the FAA's passage, arbitration and other forms or alternative dispute resolution were and are understood to be a matter of contract law, *see Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. ___, 130 S. Ct. 2772, 2776 (2010)—a quintessential state-law issue, *see Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Univ.*, 489 U.S. 468, 474 (1989) ("[T]he interpretation of private contracts is ordinarily a question of state law[.]"). Indeed, Section 2 of the FAA explicitly recognizes the ongoing role that state contract law plays when interpreting arbitration agreements. *See* 9 U.S.C. § 2. Therefore, in the years since the Act was adopted, this Court has repeatedly recognized that the FAA only displaces state contract law to the extent that the two actually conflict. *See Volt*, 489 U.S. at 477–478.

Through its decision below, the Second Circuit cast aside this system in favor of a categorical federal-common-law rule, defining "arbitration" to em-

brace nearly any form of alternative dispute resolution without regard to state law definitions. In so doing, the panel below—like panels in seven of its sister circuits—failed to respect the limited extent to which the FAA preempts state law. Such decisions cannot be reconciled with this Court's preemption jurisprudence, either in the specific context of the FAA or as to conflict preemption in general. This Court should therefore grant the petition for writ of *certiorari* and restore the proper application of federal preemption law.

I. The Second Circuit's Decision Fails To Apply Basic Principles Of Conflict Preemption.

In *Volt*, this Court made clear that the Federal Arbitration Act only displaces state laws to the extent that the two actually conflict. But instead of following this simple directive, the Second Circuit below determined that the FAA categorically preempts state laws that define arbitration and other forms of alternative dispute resolution, without any regard for the substance of such laws. Such an overreaching holding is incompatible with the doctrine of conflict preemption.

A. The Federal Arbitration Act Only Preempts State Laws With Which It Actually Conflicts.

Preemption doctrine controls the extent to which federal legislation displaces state law. Under the Supremacy Clause, federal laws and treaties are "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. State laws

that conflict with federal laws are therefore without effect: "[A]ny state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992)

Congress can demonstrate its intent to preempt state law in two ways: through a statute's express language or through its structure and purpose. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Express preemption is the more straightforward of these methods. In cases where Congress explicitly states that a federal statute displaces state law, the fact of preemption is clear, leaving only the question of the "substance and scope" of that preemption. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008).

Implied preemption, on the other hand, is more nuanced. In rare cases, the courts will view a federal statutory or regulatory scheme as so pervasive as to establish that "Congress intended the Federal Government to occupy [the field] exclusively[,]" notwithstanding the lack of any express provision establishing such a broad displacement of state law. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). Such "field" preemption applies even in the absence of a conflict between state and federal law, under the theory that Congress did not intend the states to have any role in the area at issue. *Gade*, 505 U.S. at 98. But in all other cases, the preemptive scope of a federal statute is limited to actual conflicts—situations where it is either impossible to comply with federal and state law simultaneously, or where the state law interposes an obstacle to the achievement of Congress's discernible objectives. *English*, 496 U.S. at 79.

In either event, a cornerstone of preemption doctrine is that "[i]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); internal quotation marks omitted). For this reason, when a statute's preemptive reach is susceptible to more than one plausible interpretation, courts ordinarily accept "the reading that disfavors pre-emption." *Altria Group*, 555 U.S. at 77 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

It is against this background that this Court has articulated the scope of preemption under the Federal Arbitration Act:

> The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. But even when Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law—that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Volt, 489 U.S. at 477 (citations and internal quotation marks omitted). Thus, the FAA implicitly

preempts state law when the two are in a state of actual conflict, but it does not completely displace all state law governing arbitration agreements, alternative dispute resolution, or contracts relating thereto. *See, e.g.*, *id.* (holding that California law regarding stays-of-arbitration are not preempted by the FAA). Conflict preemption—not field preemption—is the controlling rule.

B. The Second Circuit Erred By Disregarding This Court's Particularized Analysis In Favor Of A Categorical Application Of Federal Common Law.

Viewed through the lens of this Court's preemption jurisprudence, the Second Circuit's decision is irreparably flawed.

This Court has established a simple and logical two-step procedure for evaluating conflict preemption questions. First, one must identify the relevant state-law rule; then, one can determine the extent to which it does or does not conflict with federal law.

Recent Terms have provided several examples of this analytical rubric in action. For example, in *Mutual Pharmaceutical Co. v. Bartlett*, No. 12-142, 570 U.S. ___ (June 24, 2013), this Court determined the extent to which the Federal Food, Drug, and Cosmetic Act (and regulations promulgated thereunder by the United States Food and Drug Administration) preempted New Hampshire state-law product liability claims against generic drug manufacturers. *Id.*, slip op. at 4–6. Unsurprisingly, the first step of the Court's analysis was to "begin by identifying petitioner's duties under state law." *Id.*, slip op. at 7.

Only after determining both the nature and scope of these state law duties did the Court turn its attention to the federal regulations at issue. *Id.*, slip op. at 13. Then, having identified the two potentially-conflicting duties, the Court analyzed them alongside each other in order to determine whether or not they presented any actual conflict. *Id.*, slip op. at 13–16.

By contrast, in this case, the Second Circuit made no effort to determine New York's state law regarding the extent to which third-physician review is considered a form of "arbitration," nor did it evaluate the extent to which New York's law was in conflict with the FAA's terms. P.A. 7a–10a.[3] Instead, the Court insisted that a federal common law definition of arbitration was necessary to effect Congress's assumed "intent to create a uniform national arbitration policy." P.A. 8a–9a. The court therefore held that state law had no relevance to "defining the scope of 'arbitration' under the FAA." P.A. 9a.

This logic evokes the doctrine of field preemption, not conflict preemption. *See, e.g.*, *Arizona v. United States*, 567 U.S. ___, 132 S. Ct. 2492, 2501–2503 (2012) (finding field preemption under federal immigration law, in furtherance of the "harmonious whole" of federal registration standards); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366–367 (1943) (finding field preemption with respect to the federal government's issuance of commercial paper because "[t]he desirability of a uniform rule is plain," making resort to state law "singularly inappropriate

[3] Citations to "P.A." refer to the Petition Appendix accompanying the petition for a writ of certiorari.

here"); *Kurns v. A.W. Chesterton Inc.*, 620 F.3d 392, 395–399 (3d Cir. 2010) (finding field preemption under Locomotive Inspection Act in light of "Congress's goal of uniform railroad equipment regulation"), *aff'd sub nom Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. ___, 132 S. Ct. 1261 (2012). In such analyses, the exact contours of state laws in the area are considered irrelevant. *Gade*, 505 U.S. at 98. Rather, paeans to uniformity—like those made by the Second Circuit below—are used to support the conclusion that Congress intended to wholly occupy a field of law.[4]

This similarity dooms the Second Circuit's analysis. Whereas the panel below invoked uniformity as a reason to wholly displace state-law definitions of arbitration, this Court has repeatedly held that the FAA does not "reflect a congressional intent to occupy the entire field of arbitration." *Volt*, 489 U.S. at 477. Thus, the Second Circuit's decision retreads ground this Court covered in *Volt*, while somehow also reaching a contrary answer.[5] Such an egregious mistake highlights the need for this Court's intervention.

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[4] A Congressional desire for uniformity does not compel a finding of field preemption, however. As Petitioner notes, state law has continued to play a role in various areas in which uniformity was among Congress's goals. *See generally* Pet. 20–23.

[5] Tellingly, the Second Circuit's and district court's decisions below did not even cite *Volt*, and the key authorities relied upon in both opinions predate this Court's 1989 decision in *Volt*. *See McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F.2d 825 (2d Cir. 1988); *AMF, Inc. v. Brunswick Corp.*, 621 F. Supp. 456 (E.D.N.Y. 1985).

II. The Second Circuit's Approach Contradicts Established Practice With Respect To Other Interpretive Issues Arising Under The Federal Arbitration Act.

In addition to being incompatible with the general doctrine of conflict preemption, the Second Circuit's decision below departs from the judicial system's approach to several parallel issues arising under the FAA. There is no good reason for such similar inquiries to be governed by different analytical approaches.

A. State Law, As Evaluated Through The Doctrine Of Conflict Preemption, Is Relevant To A Number Of Arbitration-Related Questions.

Section 2 of the FAA, the Act's primary operative provision, ensures the enforceability of arbitration agreements:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The central question in any case implicating the FAA, then, is whether or not an agreement to arbitrate exists. If so, the FAA applies; if not, federal law has no role to play.

It is undisputed that that conflict preemption "provides the touchstone" for determining whether or not a contract includes a valid agreement to arbitrate, with state law controlling in the absence of an actual conflict with the FAA. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). Section 2 of the FAA, by its plain terms, provides that state laws governing the validity, revocability, and enforceability of contracts in general apply with full force in the specific context of arbitration agreements. 9 U.S.C. § 2; *see also Cook Chocolate Co. v. Salomon, Inc.*, 684 F. Supp. 1177, 1182 (S.D.N.Y. 1988) (Section 2 "preserves general principles of state contract law as rules of decision on whether the parties have entered into an agreement to arbitrate"). Such a regime allows for the preemption of state laws that fail to respect this nondiscrimination principle, of course. For example, in *Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, the Second Circuit first recognized that state law governed whether or not two parties had agreed to arbitrate, but then held that the FAA preempted New York case law holding arbitration agreements to a higher burden of proof than the standard applied to other contracts.[6] *See* 991 F.2d 42, 45–46 (2d Cir. 1993). But absent such a conflict, state law controls the subject, without resort to any federal common law definition of "agreement."

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[6] The *Progressive Casualty* decision is notable as an example of the Second Circuit properly applying conflict preemption analysis in an FAA case: the court first identified the relevant state law relating to agreements to arbitrate, then determined whether or not that law was in conflict with the terms of 9 U.S.C. § 2. This is the precise approach not followed by the Second Circuit panel below.

See, e.g., *Hill v. PeopleSoft USA, Inc.*, 412 F.3d 540, 543–545 (4th Cir. 2005) (applying Maryland contract law to determine whether arbitration agreement was void for lack of consideration).

Likewise, this Court has established that "background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)" are not categorically negated by the FAA. *See Arthur Andersen*, 556 U.S. at 630–631. *Arthur Andersen* rejected a federal rule—adopted by several circuit courts—that nonparties to a contract could not avail themselves of the FAA's procedural protections. *Id.* Rather, this Court recognized that myriad "traditional principles of state law allow a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel," and gave full effect to such principles so long as they developed in the context of general contract law. *Id.* (internal quotation marks omitted).

Even arbitration-specific state laws have been allowed to coexist alongside the FAA's terms, so long as the two do not directly conflict. For example, in *Volt*, this Court considered the validity of a California state law allowing a court to stay an arbitration pending related litigation—the obverse of the stays-of-litigation governed by Section 3 of the FAA. 489 U.S. at 470, 476. Because "the FAA contains no provision authorizing a stay of arbitration in this situation," the *Volt* petitioner argued for the adoption and application of a categorical federal rule against such stays. *See id.* at 476–477. But this Court, mindful of

the fact that the FAA does not reflect "a congressional intent to occupy the entire field of arbitration[,]" concluded that the state law presented no conflict with either the Act's text or Congress's purposes and objectives in adopting it. *Id.* at 467–468.

Throughout this body of law, courts have consistently and correctly followed traditional conflict preemption analysis when determining the existence an agreement, the scope thereof, or the mechanisms available to enforce it. In some cases, state law can exist in harmony alongside the FAA, and it is therefore followed. In others, where the relevant state law cannot be reconciled with the Act's requirements, the state law is preempted. But, in all situations, the two-step analysis discussed in Part I.B, *infra*, provides the controlling framework for the inquiry.

B. Adoption Of A Federal Common Law Definition Of "Arbitration" Creates Needless Inconsistencies.

This Court has already recognized that state law is relevant to the questions of the existence, scope, and meaning of an agreement to arbitrate under Section 2 of the FAA. There is no reason to treat the instant question differently. Whether a given dispute resolution provision is an agreement to "arbitrate," like the question of whether such a clause is an "agreement" to arbitrate, calls for consistent application of traditional conflict preemption rules.

The Second Circuit offered only one justification for its contrary decision to resort to federal common law: a fear that that looking to state law would "create a patchwork in which the FAA will mean one

thing in one state and something else in another," rather than supporting a "uniform national arbitration policy." *See* P.A. 8a–9a (internal quotation marks omitted). But this concern is equally present across the panoply of issues arising under the Act that the courts already resolve through preemption analyses. As different states have varying rules regarding the formation and validity of contracts, agreements that would be enforceable under the FAA in some states may fail in others. Third-party contract rights differ across the country; parties may therefore find themselves able to invoke rights under the FAA in some states but not others. Varying state laws can even control the procedural mechanisms available to parties to an arbitration agreement. If the desire for uniformity, standing alone, was enough to justify the abandonment of conflict preemption, then the FAA would require uniform federal-common-law rules for all these issues. This Court has made plain that it does not. *Cf. O'Melveny & Meyers v. FDIC*, 512 U.S. 79, 88 (1994) (characterizing the interest in uniformity as "that most generic (and lightly invoked) of alleged federal interests").

Moreover, effective use of choice-of-law provisions that respect the flexible ways that various states have chosen to address diverse forms of alternative dispute resolution can negate the alleged need for a one-size-fits-all federal common law approach. Choice-of-law provisions are all-but-compulsory in the sort of business contracts that most commonly include alternative dispute resolution clauses. *See, e.g.*, *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 516 (1974) ("A contractual provision specifying in advance the forum in which disputes shall be litigated

and the law to be applied is . . . an almost indispensible precondition to achievement of the orderliness and predictability essential to any international business transaction.") Such provisions provide parties with *ex ante* certainty that their contractual decisions—including their decisions regarding methods and procedures of dispute resolution—will be evaluated and respected according to the terms upon which they have agreed. *Cf. Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985) (noting that "passage of the [FAA] was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered").

Properly understood, then, the decision to respect divergent state laws, so long as they do not present an actual conflict with the FAA's terms, does not somehow make the Act mean different things in different states. Rather, the FAA's procedural and substantive protections remain constant, guaranteed as a matter of federal law. Parties, in the course of determining which state's law of contracts governs their affairs, can avail themselves of the knowledge of whether a given method of dispute resolution is or is not considered "arbitration" under the laws of their chosen state, just as their choice of state law shapes whether or not they have reached a valid "agreement" under the law. And the doctrine of conflict preemption remains an ever-present backstop, negating specific state laws whenever they present an actual, specific conflict with the language and purposes of the FAA—but not as a categorical matter in all cases. The Second Circuit's approach, by contrast, disrespects the historic role states have always played in indentifying, defining, and facilitating var-

ious forms of dispute resolution, while also upsetting the expectations of parties who order their contractual agreements in reliance upon this framework.

III. Initial Reference To State Definitions Of "Arbitration" Accords With Broader Jurisprudence Regarding The Relevance Of State Law Under Federal Statues.

The Second Circuit's rejection of state law's relevance seems to be the result of the panel's sense that it is "counter-intuitive" for a federal law directed at the enforcement of arbitration agreements to leave any room for state law to determine what constitutes "arbitration." *See, e.g.*, P.A. 8a (quoting *Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684, 693 (6th Cir. 2012)). Such a position has a facile appeal—a statute titled "The Federal Arbitration Act" could presumably include a "federal" definition of "arbitration." But tautologies are not truths. Rather, this Court has regularly permitted state law to retain relevance with respect to questions critical to the meaning and operation of a number of federal statutory and/or regulatory regimes.

Petitioner has already identified a number of circumstances in which "federal provisions look to state law to define key undefined terms." *See* Pet. 20–22. For example, state law determines whether a "contract" exists for the purposes of the Contracts Clause, U.S. Const., art. I, § 10, cl. 1, and the definition of "property" under a number of constitutional provisions relating thereto, *see* U.S. Const., amends. V, XIV. Such concerns are no less central than the definition of "arbitration" is to the operation of the FAA, yet state law—not federal common law—controls.

Likewise, a number of federal safety laws and regulations do not categorically preempt the application of state tort law, allowing states to play an ongoing role in defining the contours of "safety." For example, in *Williamson v. Mazda Motor of America, Inc.*, this Court considered whether a Federal Motor Vehicle Safety Standard requiring rear seatbelts in passenger vehicles, promulgated pursuant to the National Traffic and Motor Vehicle Safety Act, either expressly or implicitly preempted state-law tort actions predicated on claims that a manufacturer's choice of seatbelt was insufficiently safe. *See* 562 U.S. ___, 131 S. Ct. 1131, 1137–1140 (2011). Vehicular safety was the heartland of the regulation at issue, *id.* at 1137–1139, and the regulation did not require manufacturers to choose "lap-and-shoulder belts" over "simple lap belts," *id.* at 1134. Yet, under ordinary principles of conflict preemption, the *Williamson* Court held that the regulation did not prevent states from imposing stricter safety standards through the operation of state tort law. *Id.* at 1139–1140. Thus, states retained the ability to define and enforce standards of vehicular safety in some cases, even under the shadow of the National Traffic and Motor Vehicle Safety Act. *See also Sprietsma v. Mercury Marine*, 537 U.S. 51, 70 (2002) (holding that administrative decisionmakings under the Federal Boat Safety Act did not preempt state law claims challenging the safety of boat engine designs, notwithstanding the law's goal of "fostering uniformity in manufacturing regulations").

As a final illustration, one of the central mechanisms used by the IRS to collect unpaid income taxes—the imposition of federal tax liens pursuant to

I.R.C. § 6321—also uses state law is its initial touchstone. On its face, Section 6321 gives the United States a lien upon "all property and rights to property, whether real or personal, belonging to" a delinquent taxpayer. I.R.C. § 6321. Rather than mandating a uniform federal definition of property rights, however, the law generally "attaches consequences, federally defined, to rights created under state law[.]" *United States v. Bess*, 357 U.S. 51, 55 (1958); *see also Aquilino v. United States*, 363 U.S. 509, 512–513 (1960) (stating that courts must look to state law in resolving the "threshold question . . . in all cases where the Federal Government asserts its tax lien[;] whether and to what extent the taxpayer had 'property' or 'rights to property' to which the tax lien could attach"). But this incorporation of a state law definition of property can still be tempered by federal-law concerns when tension develops between the two. *See, e.g.*, *United States v. Craft*, 535 U.S. 274 (2002) (holding that federal tax lien could attach to property in which delinquent taxpayer held certain rights, notwithstanding state law providing that the taxpayer held no individual ownership interest in the property). Although not discussed in such terms, the process is roughly analogous to the conflict preemption doctrine explored throughout this brief.

Therefore, the Second Circuit's claim that it would be "counter-intuitive" for state law to play any role in defining the scope of "arbitrations" protected by the FAA disregards the myriad contexts in which the scope and nature of federal laws are shaped, in whole or in part, by relevant state laws. The Supremacy Clause suffices to ensure that, in specific cases where the two systems are in actual conflict,

offending state laws can be set aside. The Second Circuit therefore erred in abandoning this framework in favor of the categorical adoption of a federal common law definition of "arbitration."

CONCLUSION

Preemption doctrine serves a valuable role in our federalist constitutional structure. Failure to follow it disrespects both the delicate balance between federal and state sovereignty and the limitations Congress places upon the legislation it enacts. *See, e.g.*, *United States v. Yazell*, 382 U.S. 341, 352 (1966) (noting that "solicitude for state interests" requires a restrained approach to preemption).

Here, the Second Circuit conducted its statutory analysis without ever asking the correct questions. Rather than applying the doctrine of conflict preemption, the Second Circuit instead elected to create federal common law. This demonstrates that the circuits are not merely divided over how to answer the question of what constitutes "arbitration" under the FAA—they do not even agree where to begin.

This Court should grant the petition for *certiorari*, reverse the Second Circuit, and reinforce the limited extent to which the Federal Arbitration Act displaces state contract law.

Respectfully submitted,

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