NO. 23-1066

In the Supreme Court of the United States

CONTINUING CARE RISK RETENTION GROUP, INC.,

Petitioner,

v.

JACOB BENSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF THE BENSON RESPONDENTS

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals correctly held that Arizona's garnishment statutes, and the Arizona Supreme Court opinion applying those statutes in connection with a prior appeal in this case, are excepted from the general preemption provisions of the Liability Risk Retention Act, 15 U.S.C. § 3902, because under § 3902(a)(4) such State laws are generally applicable to all persons or corporations?

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STATEMENT OF THE CASE

This Brief in Opposition is filed on behalf of JACOB BENSON and family members JOSEPH BENSON, DEBORAH BENSON, and K.B., a minor. (hereinafter collectively "Respondents") Jacob Benson is a disabled vulnerable adult who was under the care of CASA DE CAPRI ENTERPRISES, LLC ("Judgment Debtor") in an Arizona facility. Respondents Jacob Benson and his family members sued the Judgment Debtor in Arizona state court for abuse and neglect of a vulnerable adult and for negligence.

At the time of the events, Judgment Debtor had a policy of insurance issued by CONTINUING CARE RISK RETENTION GROUP, INC. (hereinafter "Petitioner"), a South Carolina entity[1] authorized under the Liability Risk Retention Act ("LRRA"), 15 U.S.C. § 3901 et seq. Petitioner acknowledged coverage under its insurance policy for the Respondents' claims and initially provided a defense for Judgment Debtor. The insurance policy contained a provision requiring arbitration of any dispute by "the parties", whether the insured remained a member of Petitioner or not. The Subscription Agreement, which was incorporated by reference into the insurance policy, precluded Judgment Debtor from assigning, except in situations not relevant, any rights or interest under that Subscription Agreement and the required insurance policy.

After Judgment Debtor filed a Chapter 11 reorganization bankruptcy case, Petitioner and Judgment

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[1] Petitioner later became domiciled in Vermont.

Debtor colluded to retroactively cancel the insurance policy and Petitioner withdrew its defense in the Respondents' state court lawsuit.

On December 1, 2017, judgment in the amount of $1,501,069.80 was entered in state court for Respondents and against Judgement Debtor. To collect its judgment, on December 18, 2017, Respondents had a writ of garnishment issued by the state court seeking to garnish an alleged debt owed by Petitioner to Judgment Creditor. Under Arizona law, in a garnishment proceeding, the court sitting without a jury is required to decide all issues of fact and law. A.R.S. § 12-1584(E). On January 2, 2018, Petitioner timely removed the garnishment proceeding to the District Court.

A week later, Petitioner filed a motion to dismiss the garnishment action or to compel arbitration based upon the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., or, alternatively, the substantially similar Arizona arbitration statutes if the FAA did not apply. The motion argued that by garnishing the alleged debt the Respondents stepped into the shoes of the Judgment Debtor as assignees of its rights under the insurance policy and were thus bound by the terms of the policy including its arbitration provision.

After full briefing of Petitioner's motion, on August 17, 2018, the initial District Court Judge denied the Petitioner's motion, ruling that under the FAA the Respondents as non-signatories were not bound to the arbitration provision based upon ordinary contract principles. The District Court noted that a 1989 Arizona Court of Appeals opinion had held that a non-signatory garnishing judgment creditor was not bound under Arizona law by the arbitration provision in the contract for which a debt was garnished.

Petitioner chose not to seek interlocutory relief from the denial of its motion to compel arbitration as authorized by the FAA. 9 U.S.C. § 16(a).

Thereafter, the case proceeded in typical fashion with a scheduling conference and order, discovery, and motions. Petitioner filed its Answer to the Writ of Garnishment and subsequently filed a motion for judgment on the pleadings asking for dismissal on the merits. The District Court ultimately denied the motion for judgment on the pleadings.

As part of a pilot program, this District Court required the parties in this action to provide mandatory initial discovery responses including setting forth all relevant facts, legal theories, witnesses, persons with knowledge, exhibits, and relevant documents. The parties complied and Respondents also took depositions of persons connected with Petitioner's third party administrator and a former employee of the Judgment Debtor.

Eventually, on March 2, 2019 the Respondents filed a motion for summary judgment on the merits of the garnishment action arguing the evidence on the merits showed that a debt was owed under applicable law by Petitioner to Judgment Creditor under the insurance policy.

On the day before Petitioner was to and did file their response to the motion for summary judgment, Petitioner filed a renewed motion to compel arbitration under the FAA.

After the renewed motion to compel arbitration was fully briefed, the second judge assigned to the case asked for supplemental briefing regarding Arizona's common law direct-benefits estoppel doctrine and

whether it would apply under the FAA to this situation. The parties then filed their supplemental briefs addressing the issue of Arizona law regarding direct-benefits estoppel.

On July 30, 2019, the District Court granted Petitioner's motion to compel arbitration and dismissed the action pursuant to the FAA. (Pet. App. 70-71, 88-89) The District Court's decision predicted that Arizona courts would apply the common law doctrine of direct-benefits estoppel in the statutory garnishment setting and, therefore, Respondents were subject to the arbitration provision of the insurance policy. (Pet. App. 70-79) This decision made no mention of the LRRA. (Pet. App. 64-89)

Respondents timely appealed to the Ninth Circuit Court of Appeals. After full briefing and oral argument, the Ninth Circuit explained that under the FAA, a federal court must use traditional principles of state law to determine if a non-party to an arbitration agreement is bound by the arbitration agreement. (Pet. App. 56-57) The Ninth Circuit was unsure whether to read the 1989 Arizona Court of Appeals decision as announcing a general rule or categorically holding that a garnishing creditor is not subject to an arbitration provision in the contract giving rise to the debt being garnished. (Pet. App. 60-61) Therefore, the Ninth Circuit certified two questions to the Arizona Supreme Court:

1) In a garnishment action by a judgment creditor against the judgment debtor's insurer claiming that coverage is owed under an insurance policy, where the judgment creditor is not proceeding on an assignment of rights, can the insurer invoke the doctrine of direct

benefits estoppel to bind the judgment creditor to the terms of the insurance contract?

2) If yes, does direct benefits estoppel also bind the judgment creditor to the arbitration clause contained in the insurance policy?

(Pet. App. 61-62)

After further briefing and oral argument, the Arizona Supreme Court answered the first certified question with a "no" and, therefore, did not reach the second question. (Pet. App. 44, ¶ 2) The Arizona Supreme Court held that "[t]he common law doctrine of direct benefits estoppel cannot be invoked in a garnishment action to bind the judgment creditor to the terms of the contract because applying the doctrine in this context would contravene Arizona's statutory garnishment scheme" which required that a court, sitting without a jury, must decide all issues of fact and law. A.R.S. § 12-1584(E). (Pet App. 44, 49, ¶ 2, 14) The Court further framed the issue before it and its holding as follows:

> The Ninth Circuit asks whether the doctrine of direct benefits estoppel can be applied in an Arizona garnishment proceeding as an exception to the general rule that nonparties are not bound by the terms of a contract. We hold it cannot.

(Pet. App. 50, ¶ 16) The Court's pronouncement was not *dicta* but a reflection that the Court announced a categorical rule for all garnishments whether related to an insurance contract dispute or not because the "common law equitable doctrine cannot supersede the legislature's clear mandate regarding garnishment proceedings." (Pet. App. 51, ¶ 17) Garnishing creditors

under Arizona law are not bound by or effectively parties to the underlying contract, nor do they step into the shoes of the judgment debtor but merely have the right to hold the garnishee liable for the debt. (Pet. App. 51-52, ¶ 19) The Court noted that when a debt is contested, as is the case here, the issue of whether the debt exists is decided at the garnishment hearing before the court. (Pet. App. 51-52, ¶ 19)

Based upon the Arizona Supreme Court's answer to the first certified question, the Ninth Circuit then held the District Court erred in granting Petitioner's renewed motion to compel arbitration and dismissing the action. (Pet. App. 40-42) The decision was made under the FAA which left to state law the determination of whether direct-benefits estoppel would apply to bind Respondents as judgment creditors in this garnishment proceeding. (Pet. App. 39, 41, 56-57) In a footnote, the panel noted that Petitioner raised in its brief the issue of LRRA preemption and Respondents questioned whether that issue was adequately raised in the District Court, so the issue of LRRA preemption was remanded for the District Court to decide in the first instance. (Pet. App. 42, n. 1) In March of 2022, Petitioner's petition for panel rehearing was denied after an amendment was made to the decision. (Pet. App. 36-37) This unpublished Amended Memorandum decision is hereinafter referred to as the *Benson I* decision. Petitioner did not seek review by this Court of the FAA issues decided in the *Benson I* decision.

After remand, the parties submitted new briefing regarding the issue of LRRA preemption. In Respondent's brief they argued that Petitioner waived the right to assert preemption under the LRRA by actively litigating the merits, that LRRA preemption

did not apply under the express language of 15 U.S.C. § 3902(a)(4), that LRRA preemption did not apply because the FAA required consideration of the same Arizona state law sought to be preempted and the issue under the FAA was decided in the first appeal, and that the terms of the insurance policy did not allow or provide that judgment creditors who garnish Petitioner could or were required to arbitrate any coverage dispute. Respondents did not admit that the garnishment statutes, facially or as applied in this case, regulate Petitioner's conduct as asserted in the Petition.

The District Court then denied Petitioner's renewed motion to compel arbitration holding that Arizona's garnishment statutes and denial of the direct-benefits estoppel doctrine in this garnishment proceeding were not preempted by the LRRA. (Pet. App. 34) The Court's decision was a simple matter of applying the clear pertinent text found in Section 3902(a)(4): "except that nothing in this section shall be construed to affect the applicability of State laws generally applicable to persons or corporations." [hereinafter the "Exception Clause"] (Pet. App. 28, 34) The District Court noted that Arizona's garnishment statutes and even the direct-benefits estoppel theories are generally applicable to persons and corporations, and so fall within the terms of the Exception Clause. (Pet. App. 34) The lower court also found that it lacked jurisdiction on the limited remand from the *Benson I* decision to consider Petitioner's alternative argument that Arizona's garnishment statutes and the decision by the Arizona Supreme Court were preempted by the FAA. (Pet. App. 21-22, n. 3) The Court did not reach any of

Respondents' arguments other than application of the Exception Clause. (Pet. App. 19-21)

In November of 2022, Petitioner then timely appealed the interlocutory decision denying the motion to compel arbitration pursuant to 9 U.S.C. § 16(a). In its briefing to the Ninth Circuit, Petitioner argued that any law impacting the arbitration clause in its insurance policy was preempted as an insurance law under § 3902(b)(3)(C) relating to loss control and claims administration. However, Petitioner in its reply brief clarified that it was not disputing that the language in the Exception Clause (that "nothing in this section shall be construed to affect the applicability of State laws generally applicable to person or corporations") referred to the entire preemption statute by referring to "this section". Petitioner did not argue in its briefs that FAA preemption was an issue to be decided as part of the second appeal. (Pet. App. 4, n. 2)

The Ninth Circuit affirmed the denial of Petitioner's motion to compel, holding that Arizona's garnishment statutes and the decision of the Arizona Supreme Court were generally applicable state law which were not preempted under the LRRA by the clear language of the Exception Clause. (Pet. App. 2-4) This Memorandum decision is referred to as the *Benson II* decision. The panel did not consider Petitioner's argument regarding alleged FAA preemption because it was made for the first time at oral argument. (Pet. App. 4, n. 2) Petitioner's request for en banc rehearing was denied after no judge even requested a vote. (Pet. App. 5)

REASONS FOR DENYING THE PETITION

The Petition should be denied as Petitioner has failed to demonstrate compelling reasons to justify this Court exercising its discretionary review.

Petitioner improperly seeks review of the issue of preemption under the FAA of the Arizona garnishment statutes and the Arizona Supreme Court decision. The FAA issue was decided in the *Benson I* decision for which Petitioner did not seek review from this Court nor was it raised in the Ninth Circuit in the briefing of this second appeal. Respondents believe, therefore, this Court lacks jurisdiction over this issue or, alternatively, it strongly weighs against granting review for an issue not decided by the *Benson II* decision.

Regarding the LRRA, the Petition fails to demonstrate any conflict between the *Benson II* decision and any court decision relating to application of the Exception Clause. The Petition does not allege or demonstrate the Ninth Circuit failed to apply proper standards of statutory construction but seeks to rewrite Congress' clear language by arguing to apply a canon of construction which does not apply to interpreting a single statute and then misapply it. The Petition additionally mischaracterizes the impact of the *Benson II* decision on the enforceability of the arbitration clauses. It also misstates Arizona law as to whether there must be a determination of coverage before a garnishment can occur.

It is not clear that even a reversal would aid Petitioner ultimately. Even if the garnishment statute

was held preempted under the LRRA, the same reasoning would result in the common law doctrine of direct-benefits estoppel being preempted leaving Respondents not subject to the arbitration clause as held in the *Benson I* decision. Further, issues not reached in the lower court such as waiver of the right to compel arbitration and whether the arbitration clause includes non-parties would still need to be decided.

A. PETITIONER IMPROPERLY SEEKS REVIEW RELATED TO PREEMPTION UNDER THE FEDERAL ARBITRATION ACT WHICH ISSUE WAS NOT PROPERLY RAISED OR DECIDED IN THE *BENSON II* DECISION SOUGHT TO BE REVIEWED

Petitioner asks this Court to review the *Benson II* decision regarding alleged preemption pursuant to the FAA of Arizona's garnishment statutes and the decision by the Arizona Supreme Court. (Pet. at i, 14). But any issue regarding the application of FAA preemption is not before this Court as Petitioner failed to seek review from the *Benson I* decision under the FAA and waived that issue in the *Benson II* appeal by not raising it in its briefs. (Pet. App. 4, n. 1) The District Court on remand also refused to consider the FAA preemption argument as it exceeded the scope of the remand from the *Benson I* decision. (Pet. App. 21-22, n. 3; 42, n. 1)

Therefore, Respondents believe that this Court lacks jurisdiction to entertain Petitioner's request for review of whether the FAA preempts Arizona's garnishment statutes and the Arizona Supreme Court's decision in the earlier appeal. Even if this Court does have jurisdiction, it should not grant certiorari of the *Benson II* decision regarding any claim of FAA preemption as

that issue was not considered and decided in that appeal.

B. THE *BENSON II* DECISION'S APPLICATION OF THE LRRA'S EXCEPTION CLAUSE UNDER 15 U.S.C. § 3902(a)(4) DOES NOT CONFLICT WITH THE DECISION BY ANY COURT

Petitioner erroneously claims review by this Court is needed because the decision in *Benson II* conflicts with authority from that same Circuit and seems to imply a conflict with decisions from other Circuits as well. The Ninth Circuit's decision in *Benson II* held the Arizona garnishment statutes and the Arizona Supreme Court's decision were generally applicable to all persons or corporations, and that they thus were excepted from LRRA preemption under § 3902(a)(4)'s Exception Clause. (Pet. App. 3-4) The *Benson II* decision does not conflict with any other court's decision.

The Petition acknowledges that this Court has not addressed the preemptive scope of the LRRA. (Pet. p. 13)

No other appellate court has addressed whether a non-insurance law, which is generally applicable to all persons or corporations, falls within the Exception Clause and, if so, does that clause override any assertion of preemption under Section 3902. The two Ninth Circuit cases cited in the Petition immediately after the claim of a split of authority (Pet. p. 13-14) dealt with statutes specifically applicable to just the business of insurance as described even by Petitioner. Neither case dealt with any generally applicable state law nor mentioned the Exception Clause, so there could be no conflict with the *Benson II* decision. The Petition fails to demonstrate any conflict with any appellate court's decision but

instead recites general platitudes from various cases interpreting the LRRA outside the context of the Exception Clause.

The other appellate decisions cited in the Petition do not conflict as they dealt with insurance specific laws. Several cases which deal with insurance specific laws cited in the Petition have acknowledged that LRRA preemption does not apply to generally applicable laws because of the Exception Clause. The Ninth Circuit in *National Warranty Ins. Co. RRG v. Greenfield*, 214 F.3d 1073, 1081 (9th Cir. 2000), cited by Petitioner[2], characterized the "concluding clause" of § 3902(a)(4) as "specifically allow[ing] regulation by state laws not specifically regulating insurance—that is, by state laws 'generally applicable to persons and corporations.'" The Second Circuit's decision in *Wadsworth v. Allied Pros. Ins. Co.*, 748 F.3d 100, 103 (2d Cir. 2014), cited by Petitioner, also similarly reasoned the LRRA "prohibits states from enacting regulations of any kind that discriminate against risk retention groups or their members, but does not exempt risk retention groups from laws that are generally applicable to persons or corporations." The decision by the Nebraska Supreme Court in *Speece v. Allied Prof'ls. Ins. Co.*, 289 Neb. 75, 853 N.W.2d 169, 180 (2014), cited by Petitioner, similarly noted "that the language of § 3902(a)(4) of the LRRA means that 'State laws generally applicable to persons or corporations' apply to risk retention groups, but it does not mean that risk retention groups must comport

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2 Although this decision is not referenced in the Petition's Table of Authorities, it is cited and referenced as "*Greenfield*". (Pet. p. 20-21)

with laws generally applicable to insurance companies." These appellate cases support the *Benson II* decision.

The only case other than the *Benson II* decision cited in the Petition which dealt with and addressed the Exception Clause was *Soyoola v. Oceanus Ins. Co.*, 986 F. Supp. 2d 695 (S.D.W. Va. 2013). The District Court in *Soyoola* held that LRRA preemption did not apply under the Exception Clause to generally applicable laws, including common law claims for breach of contract and fraud, even though they might impact a risk retention group's loss control or claims administration. *Id.* at 705, 707. The decision similarly applied the express language of the Exception Clause to find no LRRA preemption for generally applicable common law to be decided by a court.

The Petition failed to support its claim of a conflict between the *Benson II* decision regarding the Exception Clause and any other court's decision regarding generally applicable state law to justify granting the Petition in this case.

C. OTHER CONSIDERATIONS MILITATE AGAINST GRANTING CERTIORARI IN THIS CASE

The issue of the application of the LRRA's Exception Clause for generally applicable state law is not "certworthy" due to many other reasons.

1. The Exception Clause Issue Is Rarely Litigated.

The District Court here correctly noted that "few cases" address application of the Exception Clause. (Pet. App. 29) Counsel's research on Westlaw reflects that application of the Exception Clause by a court for generally applicable state law has only been at issue

before an appellate court solely in the *Benson II* decision, and in only three District Court cases other than this one. Most cases (whether before a state or federal court) which mention or quote § 3902(a)(4) do so in passing and do not have any need to apply it. A few cases mention and substantively address § 3902(a)(4) but almost always regarding the application of the preceding non-discrimination clause (a risk retention group is exempt from State law to the extent such insurance law would "otherwise, discriminate against a risk retention group or any of its members"). (Pet. App. 92)

This case does not involve an important or common question which weighs against granting review.

2. Petitioner's Argument Lacks Merit.

The application of the Exception Clause does not arise very often, most likely because the answer is clear that when it applies, because a state law is generally applicable, that trumps any claim of LRRA preemption. This Court has declared that statutory text is the best evidence of Congressional intent. *E.g.*, *CSX Transp. v. Easterwood*, 507 U.S. 658, 663-664 (1993). The language of the Exception Clause is clear that it excepts from preemption all generally applicable state law as the lower courts held – "**nothing** in this section shall be *construed to affect the applicability* of State laws generally applicable to persons or corporations." (Pet. App. 2-4, 22, 34) (bold, underscoring and italics added)

Petitioner's argument that the Exception Clause does not apply to generally applicable Arizona garnishment law, and such law is preempted under § 3902 (b)(3)(C), lacks any merit. The Petitioner at length

argues that LRRA preemption applies under the language of Section 3902(b)(3)(C) because a court proceeding versus arbitration allegedly impacts "loss control and claims administration". While Respondents dispute this assumption[3], that issue is ultimately not controlling as the District Court correctly noted. (Pet. App. 28, 34-35) On appeal Petitioner did not challenge Respondent's assertion that when the Exception Clause states, "except that nothing in this section shall be construed to affect the applicability of State laws generally applicable to persons or corporations", that "this section" refers to the entire preemption statute including 3902(b)(3)(C).[4] Instead, before the Ninth Circuit and in its Petition, Petitioner has invoked a canon of construction regarding interpretation of two separate statutes on the same subject. (Pet. p. 36)

The canon involved does not apply to construction of this single statute. Even if it did, the Petition acknowledges that where, as here, congressional intent is clear for one provision to control it does control. (Pet. p. 36) That is the situation at hand here as the

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[3] Respondents do not believe the McCarran-Ferguson Act, cited in the Petition, applies to the LRRA and even the Petition recognizes that is true. (Pet. p. 26) Respondents do not agree or believe that when a third party (whether an arbitrator or a court) decides contested coverage questions that is a matter of loss control or claims administration as those focus on internal matters. Rather than address all issues, this Brief focuses on the decisive issue which is application of the Exception Clause which is not part of and in no way impacts the McCarran-Ferguson Act.

[4] Such concession was understandable as "this section" is referenced in two other places in Section 3902 besides the Exception Clause and that statute also uses the terms "subsection" and "paragraph". (Pet. App. 90-96) So, Congress meant the entirety of Section 3902 when referring to "this section".

Exception Clause expressly controls over all other provisions in Section 3902—"except nothing in this section shall be construed to apply to affect State laws generally applicable". Additionally, Petitioner's argument misapplies the canon it purports to apply. The general provisions of the preemption statute found in subsections (a) and (b) give way to the specific and unambiguous language in the Exception Clause that "nothing in this section" shall be construed to apply to generally applicable State law. To suggest that the Exception Clause only applies to state law which is not otherwise preempted under § 3902(a) and (b) would render the Exception Clause meaningless and superfluous. The Exception Clause only has meaning if, as the District Court and the Ninth Circuit interpreted, it saves from preemption a generally applicable law which otherwise might be construed to be preempted under the other provisions of § 3902.

The lower courts in this case had little difficulty in discerning that the garnishment statutes and the Arizona Supreme Court's decision are generally applicable without regard to whether the garnishment is of a debt owed under an insurance policy as opposed to any other type of contract. (Pet. App. 3-4, 29-30) The Arizona Supreme Court reached a categorical decision: "A common law equitable doctrine cannot supersede the legislature's clear mandate regarding garnishment proceedings." (Pet. App. 50-51) This categorical decision, reflected in at least three places in the answer to the certified questions, was not dicta as Petitioner argues but the reason why the certified question was answered in this case which by happenstance involved an insurance contract. (Pet. App. 44, 50-51, ¶ 2, 16-17)

The lack of merit weighs against granting discretionary review in this case

3. The LRRA Preemption Issue Would Open a Gordian Knot.

While the LRRA preempts insurance laws by non-domiciliary states, the state law at issue here is required to be considered under the FAA. The LRRA does not preempt federal law and under the FAA the *Benson I* decision allowed and relied on Arizona's traditional principles of law as described by the Arizona Supreme Court. This begs the question which federal law controls: the LRRA or the FAA? Counsel is unaware of any court addressing this thorny issue and this Court should not wade into such a thicket either in this case by granting review.

4. LRRA Preemption Analysis Would Not Change the Result.

If one were to assume the garnishment statute's requirement for a court to decide all issues is preempted under the general LRRA preemption analysis offered by Petitioner because it limits the reach of the arbitration clause, this does not ultimately help Petitioner. That is because the same LRRA preemption analysis would then arguably preempt Arizona's common law direct-benefits estoppel doctrine because it expands who can participate in arbitration under the insurance policy. The federal policy favoring arbitration embodied in the FAA is only applicable where the parties have agreed to submit a dispute to arbitration. *Granite Rock Co. v. Intl. Bhd. of Teamsters*, 561 U.S. 287, 303 (2010). This further weighs against granting review.

5. The Arbitration Clause Remains Enforceable as to the Parties to the Policy.

Petitioner falsely asserts that the *Benson II* decision in this case rendered the arbitration provision in the insurance policy and the subscription agreement void and unenforceable. (Pet. p. 14, 28) No decision in this case held the arbitration provisions are not enforceable between Petitioner and the Judgment Debtor. Rather the decision in *Benson I* held that under the FAA the arbitration clause did not apply in a statutory garnishment to Respondents who were not a party to any arbitration agreements. (Pet. App. 38-42) But Petitioner did not seek review of that decision. The decision in *Benson II* held only that the LRRA did not preempt Arizona's requirement that garnishments be decided by a court. (Pet. App. 2-4) The arbitration agreements remain fully enforceable between the parties who agreed to arbitration to resolve disputes between them. This circumstance does not support granting review.

6. LRRA Preemption Might Not Change the Result as Petitioner Waived the Right to Compel Arbitration by Actively Litigating the Merits.

In the unlikely event of a reversal on the LRRA preemption issue, the issue of whether Petitioner waived any right to compel arbitration would need to be decided as the District Court did not decide that issue (Pet App. 21), nor did the *Benson II* decision address that alternative ground to affirm on appeal. This circumstance weighs against granting discretionary review.

7. The Garnishment Proceeding Is the Proper Time to Determine Contractual Liability.

Finally, the Petition falsely suggests that a garnishment can only proceed after a determination is made that an insurance policy covers a claim. (Pet. 5) Such argument misstates Arizona law contrary to the guidance in this case from the Arizona Supreme Court that the garnishment is an appropriate place and time for a judgment creditor to have coverage determined under an insurance policy. (Pet. App. 49-50) In *Kepner v. W. Fire Inc. Co.*, 109 Ariz. 329 (1973), quoted by the Arizona Supreme Court (Pet. App. 52), the Arizona Supreme Court held that "[s]uch a testing of the insurer's liability may take the form of a declaratory judgment brought in advance of a third party's action or proceedings on garnishment following the trial of the third party's action as in the instant case." *Id*. at 332 (underscoring added) This principle applies in non-insurance garnishment contexts as well under Arizona law. *E.g., Able Distrib. Co. v. James Lampe, Gen. Contractor*, 160 Ariz. 399 (App. 1989) (holding judgment creditor not bound by arbitration clause in contract between general contractor and subcontractor and determining that a debt was owed under that subcontract which could be garnished). The garnishment proceeding is when under Arizona law any underlying contract (in this case an insurance policy) is construed to determine if a debt is owed which can be garnished.

The circumstances here do not support discretionary review of the *Benson II* decision by this Court.

CONCLUSION

For the foregoing reasons, Respondents request that the Petition for Certiorari be denied.

Respectfully submitted,

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