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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Left to stand, the District Court and Ninth Circuit's holdings will effectively permit state legislatures to ignore acts of Congress and the binding precedents of this Court. Contrary to Respondents' contentions otherwise, the Ninth Circuit's decision to affirm (Appx. 1) the District Court's Order denying arbitration (Appx. 7.) would allow Arizona to unilaterally single out garnishment as a class of claims subject to disparate treatment under the Federal Arbitration Act – something this Court has repeatedly stated the FAA does not allow. *See*, *e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) ("West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA."); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.").

Moreover, the Ninth Circuit's holding would also allow non-chartering states, under the guise of legislating "laws of general applicability," to legislate the terms and conditions of foreign risk retention groups' policies as well as their loss control and claims administration practices in direct contravention of the Liability Risk Retention Act. 15 U.S.C. § 3902(b)(3). "A major benefit extended to risk retention groups by the

LRRA is the ability to operate on a nationwide basis according to the requirements of the law of a single state, without being compelled to tailor their policies to the specific requirements of every state in which they do business." *Wadsworth v. Allied Prof'ls Ins. Co.*, 748 F.3d 100, 108 (2d Cir. 2014); *Soyoola v. Oceanus Ins. Co.*, 986 F.Supp.2d 695, 703 (S.D. W.Va. 2013) ("The very purpose of the LRRA was to allow risk retention groups to operate nationwide under the regulation of one jurisdiction, rather than fifty-one jurisdictions.")

If states are free to regulate foreign risk retention groups by simply imposing their will "equally" on all citizens and not on carriers exclusively through the placement of specified laws outside the state's insurance code, then states are free to render any act of Congress a legal nugatory – something federal preemption does not permit. States like Arizona are not allowed to circumvent the broad preemptive scope of the LRRA through the imposition of statutes that in name are of "general applicability" but ***in effect*** impinge uniquely and specifically upon a core function of the business of insurance – its claim administration process. Only by granting certiorari can this Court speak, for the first time, as to the broad preemptive effect of the LRRA and provide legal certainty to the risk retention industry and the courts of this nation. *See generally*, *e.g.*, *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 21 (2007) (federal preemption under National Bank Act avoids "rival oversight regimes" by multiple states).

While Respondents are free to cite to facts and argue the law in opposition to the Petition, what they are

no permitted to do is create facts or espouse opinions as the law.[1] Respondents' transgressions could have been unintentional; they are certainly not outcome determinative to the instant Petition. Nonetheless, these transgressions must be acknowledged as ardent adherence to both the record and the law are paramount to the process at hand and the fostering of both trust and confidence in its outcome.

[1] For example, in their Opposition, Respondents state that CCRRG "colluded" with Capri to retroactively cancel its policy. (Opp. 1–2.) Not only was there no "collusion" between CCRRG and its insured Capri, but Judge Lanze also rejected this argument in the District Court proceeding. (Dkt. 149 at 6–14.)

Similarly, in their Opposition, Respondents falsely state that CCRRG, after answering the Writ of Garnishment, subsequently filed a motion for judgement on the pleadings asking for a dismissal "on the merits." (Opp. 3.) Perhaps attempting to set up a waiver defense should the Petition be granted and the case remanded to the District Court (*see*, Opp. § C.6 at 18.), the motion, which was not based upon the merits of the claim, was prompted by the atypical procedural hoops Respondents initiated and the obvious fact that the Writ of Garnishment filed by Respondents did not meet the pleading requirements of the Federal Rules of Civil Procedure. CCRRG never litigated "the merits of the case" prior to filings it renewed motion to compel arbitration. (Dkt. 63.)

ARGUMENT

A. Coverage Under The Policy For The Underlying Judgment Is A Condition Precedent To Garnishment Of The Policy's Indemnity Benefits; For If There Is No Coverage For The Debt, There Is Nothing To Garnish.

Simply stated, garnishment is the impounding of an asset or property *of a judgment debtor* which is found to be in the hands of unrelated third-party. *Kuffel v. United States*, 103 Ariz. 321, 325 (1968). The impounded or garnished property is then used to satisfy the underlying debt. Respondents (and the courts below) appear to confuse the underlying debt in this case, i.e., the money judgment owed by Capri to the Bensons, with CCRRG's dispute with Capri (and derivatively the Bensons) over whether the subject Policy provides coverage for that debt. (Opp. 6 "[w]hen a debt is contested, *as in the case here*, the issue of whether the debt exists is decided at the garnishment hearing before the court.")

Here, CCRRG does not dispute the underlying debt (money judgment) is owed by Capri to the Bensons. If there was coverage under the Policy for the judgment, the Policy's indemnity benefits could be garnished to satisfy that judgment. However, Capri's Policy with CCRRG does not provide coverage for the judgment, so there is no property to garnish.

As discussed below, Courts are not permitted to skip this coverage step and either lien or physically impound Policy benefits ahead of the determination of

whether they are owed to the judgment debtor. More importantly, neither the Arizona Supreme Court nor the Arizona Legislature is free to rewrite the terms and conditions of the parties' contract to set forth an alternative mechanism for that coverage determination. Here, Capri and CCRRG negotiated the terms of the Policy years ago. The Policy, like all other contracts, sets forth the terms, conditions, obligations and responsibilities of the parties, including in this case, what kind of risk CCRRG was willing to accept, for how long and at what price. Similarly, the Policy sets forth, among other things, the type of claims Capri wanted covered, at what premium and under what conditions. Included in its terms and conditions, the Policy sets forth the parties' agreement as to how disputes concerning the Policy are to be resolved. (Pet. 6.)

1. As Judgment Creditors Of Capri, Respondents Have No Greater Rights Under The Policy Than Capri, And Neither The Arizona Supreme Court Nor Legislature Can Divest CCRRG Of Its Contractually Bargained For Right Of Arbitration.

Arizona has long held that "[t]he rights of the garnishor-creditor to the assets in the hands of the garnishee are no greater than the rights of the defendant-debtor to those assets." *Mid-State Elec. Supply Co. v. Arizona Title Ins. & Trust Co.*, 105 Ariz. 321, 323–324 (1970), *citing*, *Peevey v. Dickson*, 26 Ariz. 212 (1924);

Gillespie Land & Irrigation Co. v. Jones, 63 Ariz. 535 (1945).

> [I]t is well settled in Arizona that the rights of a garnishor-creditor to assets in the hands of a garnishee are no greater than rights of the defendant-debtor to those assets. (Citations omitted.) **These derivative rights, in essence, place the garnishor-creditor in the shoes of the debtor and if the debtor has no right to the funds sought to be garnished, then neither does the garnishor-creditor**. (Emphasis added.)

Webster v. USLife Title Co., 123 Ariz. 130, 132 (Ariz. Ct. App. 1979). *Accord*, *In re Daly*, 30 B.R. 625, 626 (Bankr. D. Ariz. 1983).

In *Labertew v. Langemeier*, 846 F.3d 1028 (9th Cir. 2017), a judgment creditor obtained a judgment against a tortfeasor and then initiated a garnishment action in Arizona state court against the tortfeasor's insurance company. *Id*. at 1029–30. In response, the insurance company removed the case to federal court. *Id*. at 1030. The Ninth Circuit recognized that "[t]his case now is in substance a claim by the insureds' assignee against the liability insurers for breaching their obligations under the insurance policies." *Id*. at 1034. The court further observed that, although the "insurers' duties . . . were not relevant to and did not arise in the Arizona tort case," those contractual duties "will control the garnishment." Id. at 1031–32.

Here, Capri, a party to the Policy and the judgment-debtor in question, agreed to arbitrate all

coverage disputes under the Policy. The Bensons are not a party to the Policy, and all of their rights, if any, to the Policy's indemnity benefits, are derived from their status as judgment creditors of Capri. Under both *Mid-State Elec. Supply Co.* and *Labertew*, the Bensons have no greater rights than Capri to the Policy's indemnity benefits, the determination of which is subject to arbitration pursuant to the bargained for terms of the Policy. It would not only be contrary to the cited authorities to allow the Bensons, as the judgment creditors of Capri, to claim the indemnity "benefits" of the CCRRG Policy while simultaneously avoiding the "burdens" of its arbitration provision, but also be inequitable and fundamentally unfair to CCRRG to be compelled to give up its bargained for right to arbitrate coverage disputes.

> It seems unfair that a garnishee should be stripped of her contractual right to demand arbitration on the mere happenstance that the person asserting contractual rights against her is a nonparty whose interest arises only by virtue of the misfeasance of the garnishee's creditor. On the other hand, there is no unfairness of which the garnishing creditor can complain if the contract between garnishee and judgment creditor is construed to require him to arbitrate. . . .

Phillips, J., dissenting, *U.S. v. Harkins Builders, Inc.*, 45 F.3d 830, 837 (4th Cir. 1995).

B. Arizona's Anti-Arbitration Garnishment Statute A.R.S. § 12-1584 Is Preempted By The Federal Arbitration Act And Properly Before This Court.

This Court has repeatedly stated that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *AT&T Mobility LLC*, *supra*, 563 U.S. at 341. See, *Marmet Health Care Ctr., Inc.*, 565 U.S. at 533 ("West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA"); *Preston v. Ferrer*, 552 U.S. 346, 359 (2008) ("when parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative"); *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 650 (2022); *Kindred Nursing Ctrs. L. P. v. Clark*, 581 U.S. 246, 251 (2017).

Here, there can be no argument that A.R.S. § 12-1584 violates the FAA. Section 12-1584(E) provides that in a garnishment action, the court "sitting without a jury" shall decide all issues of fact and law. A clearer categorical rule prohibiting arbitration of a particular type of claim, in this case a garnishment claim, could not be stated. Rather than contest this fact, or even admit it, Respondents seek to ignore the issue and

instead half-heartedly argue CCRRG waived it by not appealing *Benson I* to this Court. This is patently false.

As the Court will recall, in *Benson I*, the District Court granted CCRRG's Renewed Motion to Compel Arbitration. (Appx. 64.) In that decision, the District Court stated,

> [S]tate law cannot prohibit the arbitration of a particular type of claim. *See*, *e.g.*, *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 533 (2012) ("West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA."); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."); *Preston v. Ferrer*, 552 U.S. 346, 359 (2008) ("When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative."). Plaintiffs are effectively arguing that Arizona law prohibits the arbitration of garnishment claims, which the FAA does not allow.

(Appx. 80.) When *Respondents* appealed the District Court's denial of arbitration, they did not challenge the Court's ruling on the issue. Instead, Respondents

focused their argument, as did both the Ninth Circuit and Arizona Supreme Court, on the very narrow issue of direct-benefits estoppel. (Appx. 36–42, 43–52 and 53–63.) The District's Court's original determination of FAA preemption was left undisturbed because it was neither challenged by Respondents nor necessary to the *Benson I* Court's reversal and remand decision. (Appx. 36–42.)

On remand, the District Court requested briefing strictly on LRRA issues. Nonetheless, CCRRG did remind the Court in its supplemental briefing of the FAA preemption issue. (Appx. 21, n.3.) While the District Court declined to substantively address the issue on remand, it was not for a lack trying on the part of CCRRG. The issue was again raised in the Ninth Circuit, who like the District Court did not address the issue. (Appx. 4, n.2.)

CCRRG has raised FAA preemption from the start of these proceedings and has never waivered from the same. Left to stand, the Ninth Circuit's decision permitting A.R.S. § 12-1584 to single out garnishment claims for disparate treatment under the Federal Arbitration Act would present an anomalous, unexplained conflict with the Constitution's Supremacy Clause (U.S. Const. art. VI, cl. 2) and signal to the states that they are free to ignore the binding precedents of this Court. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (vertical *stare decisis*, as it must be in a hierarchical system with one Supreme Court, is absolute and state courts and lower federal courts have a constitutional

obligation to follow Supreme Court precedent unless and until it is overruled.)

C. Left To Stand, The Ninth Circuit's Decision Would For The First Time Authorize Non-Chartering States, Like Arizona Herein, To Dictate The Terms And Conditions Of A Foreign Risk Retention Group's Policy.

It is undisputed that the LRRA leaves regulation of risk retention groups, including their loss control and claims administration procedures, to the state where the RRG is chartered, and broadly preempts any non-chartering state law, rule, regulation, or order to the extent that such law, rule, regulation, or order would make unlawful, or regulate, **directly or indirectly**, the operation of a risk retention group. 15 U.S.C. §§ 3902(a)(1), 3902(b)(3). Until now, the Ninth Circuit has repeatedly supported the LRRA's broad preemption of conflicting state laws. See, *Allied Prof'ls Ins. Co. v. Anglesey*, 952 F.3d 1131 (9th Cir. 2020); *Attorneys Liab. Prot. Soc'y, Inc. v. Ingaldson Fitzgerald, P.C.*, 838 F.3d 976 (9th Cir. 2016); *Nat'l Warranty Ins. Co. RRG v. Greenfield*, 214 F.3d 1073 (9th Cir. 2000).

In the proceedings below, both the District Court and Ninth Circuit wrongly took a "form over substance" approach to the application of 15 U.S.C. § 3902(a)(4). Section 3902(a)(4) provides,

> Except as provided in this section, a risk retention group is exempt from any State law,

> rule, regulation, or order to the extent that such law, rule, regulation, or order would . . .
>
> > (4) otherwise, discriminate against a risk retention group or any of its members, **except that nothing in this section shall be construed to affect the applicability of State laws generally applicable to persons or corporations.** (Emphasis added.)

In affirming the District Court's decision to allow Arizona's anti-arbitration garnishment statute to reverse preempt the LRRA, the Ninth Circuit opined that A.R.S. § 12-1584(E) was "non-specific to the insurance business" and "generally applicable to all corporations and persons" thus falling within the exception to the exception of preemption under 15 U.S.C. § 3902(a)(4). (Appx. 3–4.)

However, the Ninth Circuit's approach to Section 3902(a)(4) impermissibly allows the exception to swallow both the rule and purpose behind Congress' passage of the LRRA – "to allow risk retention groups to operate nationwide under the regulation of one jurisdiction, rather than fifty-one jurisdictions." *Soyoola*, *supra*, 986 F.Supp.2d at 703. Rather than take a "form over substance" approach to interpreting Section 3902(a)(4), the Ninth Circuit should have taken "substance over form" approach focusing instead on achieving Congress' stated and intended goals in passing the LRRA. It is well-settled law that "[w]hen interpreting a statute, a court must interpret the relevant words not in a vacuum, but with reference to the statutory

context, structure, history, and purpose." *Abramski v. U.S.*, 573 U.S. 169 (2014).

In the case at bar, such an approach would have acknowledged the LRRA and the fact the Court had in front of it a policy provision concerning a foreign RRG's loss control and claims administration practices – core operations of any insurance carrier. The Court would have acknowledged that under the LRRA and Section 3902(a)(4), non-domiciliary states like Arizona may still regulate a foreign RRG's **non-insurance roles and practices**, such as a company's employment practices, its observance of local zoning ordinances, and its compliance with state health and safety standards, but what it may not do is impose its laws on the core operations of a foreign risk retention group as an insurance carrier.

Here, there is no argument that arbitration falls within CCRRG's loss control and claims administration practices. The Ninth's Circuit's interpretation of Section 3902(a)(4) and its application to the facts presented was simply wrong.

CONCLUSION

For the reasons stated in its Petition and above, Petitioner respectfully requests that this Court issue the requested writ of certiorari.

Respectfully submitted,

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