

No. 16-1271

IN THE
Supreme Court of the United States

PARALLEL NETWORKS, LLC,
Petitioner,
v.
JENNER & BLOCK LLP,
Respondent.

**On Petition for a Writ of Certiorari to the
Court of Appeals for the Fifth District
of Texas at Dallas**

**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND BRIEF AMICUS CURIAE
OF EAGLE FORUM EDUCATION
& LEGAL DEFENSE FUND
IN SUPPORT OF PETITIONER**

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May 8, 2017

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b) of the Supreme Court, Eagle Forum Education & Legal Defense Fund (“Eagle Forum ELDF”) respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the Petition for a Writ of *Certiorari* submitted by Petitioner Parallel Networks, LLC.

Petitioner has filed blanket consent to the submission of *amicus* briefs in this action. Eagle Forum ELDF provided both parties with timely notice along with its request for consent to file an *amicus curiae* brief, but Respondent Jenner & Block LLP failed to respond timely to the request.

Phyllis Schlafly founded Eagle Forum ELDF in 1981. It has long advocated and filed *amicus* briefs against federal overreach, in defense of state sovereignty and moral virtue. For example, Eagle Forum ELDF filed an *amicus* brief before this Court in support of California legislation to promote virtue for children in the landmark case of *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786 (2011), though ultimately losing that decision on First Amendment grounds.

In addition, Eagle Forum ELDF has consistently advocated the rights of small inventors and patent holders, like Petitioner here, who are so essential to achieving American prosperity. For example, Eagle Forum ELDF filed an *amicus curiae* brief on the side of inventors in *Bilski v. Kappos*, 561 U.S. 593 (2010).

Eagle Forum ELDF has a direct and vital interest in this case in defending against federal encroachment on state sovereignty to the detriment

of small inventors and patent holders, on a matter of public policy properly defined by States.

Petitioner seeks a writ of *certiorari* here in order to resolve the pervasive Circuit conflict on “[w]hether Congress intended Section 10(a) of the FAA to categorically foreclose public-policy challenges to arbitration awards.” (Pet. at I) Petitioner describes the deep split among the Circuits on this issue.

In its accompanying *amicus* brief, Eagle Forum ELDF elaborates on the conflict among the Circuits as set forth in the Petition. In addition, Eagle Forum ELDF explains the national importance of this matter and why this Petition is a good vehicle for resolving it. Finally, Eagle Forum ELDF argues that the goal of the FAA is better served by allowing state courts to review awards that violate public policy, rather than prohibiting such judicial review.

For the foregoing reasons, Eagle Forum ELDF respectfully requests that its motion for leave to file the accompanying brief *amicus curiae* be granted.

Respectfully submitted,

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QUESTION PRESENTED

Whether Section 10(a) of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, withdraws the jurisdiction of state courts from considering public-policy challenges to arbitration awards.

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INTERESTS OF *AMICUS CURIAE*¹

Founded in 1981 by Phyllis Schlafly, *Amicus Curiae* Eagle Forum Education & Legal Defense Fund (“Eagle Forum ELDF”) has long advocated and filed *amicus curiae* briefs against federal overreach and in defense of state sovereignty and moral virtue. For example, Eagle Forum ELDF filed an *amicus curiae* brief before this Court in support of California

¹ No counsel for a party authored this brief in whole or in part. No person or entity other than *Amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. *Amicus* files this brief with the requisite ten-day prior written notice to all parties. Petitioner has filed its blanket consent for *amicus* briefs, but Respondent failed to respond timely to a request by *Amicus* for consent, thereby necessitating the accompanying motion for leave to file.

legislation to promote virtue in the seminal case of *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011).

In addition, Eagle Forum ELDF has persistently advocated for the rights of small inventors and patent holders, like Petitioner here, which are so essential to achieving American prosperity. Eagle Forum ELDF filed an *amicus curiae* brief on the side of inventors in *Bilski v. Kappos*, 561 U.S. 593 (2010).

Eagle Forum ELDF has a direct and vital interest in this case to defend against federal encroachment on state sovereignty on a matter of public policy properly established by States.

SUMMARY OF ARGUMENT

Shakespeare's Portia thwarted enforcement of a contractual provision that would have been unconscionable and contrary to public policy, even by the standards of the late 16th century, with her famous ruling:

Tarry a little, there is something else.
This bond doth give thee here no jot of blood;
The words expressly are "a pound of flesh."

Shakespeare, *The Merchant of Venice*, Act 4, scene 1. Today, however, if an arbitrator had imposed a modern-day equivalent of such a repugnant award, would a court of law have the power to overturn it? Application of the Federal Arbitration Act (FAA) has become so expansive in some courts that their answer may well be that they are without authority to overturn such a ruling.

Confusion reigns among lower courts as to whether they do indeed lack authority, based on the

FAA, to decline to enforce arbitration awards that violate public policy. The ruling below puts state court judges in a predicament between protecting public policy, as they would do in every other scenario, or turning a blind eye to ethics and other policy considerations in order to rubber-stamp arbitration awards offensive to basic values.

The Petition for a Writ of *Certiorari* should be granted to resolve whether the FAA withdraws authority from state courts over public policy, as erroneously held by the Texas court below, the Alabama and Florida supreme courts, and multiple Circuit Courts. (Pet. 15-16, 19) This is an issue of great importance because it implicates a central aspect of state sovereignty and the delicate balance between federal and state laws. Nothing in the text of the FAA can be read to deny state courts their ability to defend the public policy in their states.

Arbitration awards that embrace discrimination, unethical behavior, or even illegal conduct should not be considered immune from review based on the FAA. Yet the court below held exactly that. The Texas state court ruled that “*Hall Street* forecloses our review of non-statutory grounds,” such as the ground of public policy. (Pet. App. 13a, citing *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008)). The ruling below widened the split on this issue.

Specifically, the Texas state court incorrectly held that it was bound by *Hall Street* to uphold an arbitration award even if it were contrary to public policy in the State of Texas:

If we were to overturn the arbitration award as unconscionable and violative of public policy, we would be substituting our judgment merely

because we would have reached a different decision.

(Pet. App. 13a)

To the contrary, State courts should be encouraged to “reach[] a different decision” from an arbitrator when public policy is at stake. The lower court misread the FAA and *Hall Street* to intrude upon the central authority of state courts: to prevent conduct that violates legitimate policies of the State. The FAA should not be construed to empower arbitrators to grant awards that are completely exempt from judicial review based on public policy. Where, as here, the arbitration award affects the ethics of the legal profession, then the power of state courts should be at its zenith.

The goal of the FAA is to encourage arbitration, and denying judicial review for unethical and illegal awards that violate public policy is detrimental to the purpose of the FAA. Arbitrariness without judicial review is not conducive to promoting arbitration.

The decision below exacerbates a sharp conflict among multiple circuits and state courts, as demonstrated by the Petition, which should thereby be granted. (Pet. 10-20) The Petition for a Writ of *Certiorari* is also meritorious to correct the unjustified intrusion into the responsibility of lower courts to safeguard public policy against abhorrent arbitration awards. The wide divide among the lower courts as to the proper interpretation of the FAA should be resolved on this Petition, to restore the essential authority of state courts to protect the valid public policy of the State.

ARGUMENT**I. STATE COURT AUTHORITY TO SAFEGUARD PUBLIC POLICY AGAINST VIOLATION BY ARBITRATION AWARDS SHOULD BE RESTORED TO RESOLVE THE CIRCUIT SPLIT.**

Nothing in the text or intent of the FAA undermines the authority of state courts to review arbitration awards that are contrary to public policy. The FAA is not a proper way to circumvent local standards of ethics and values.

The logic of the *per curiam* ruling by this Court in *Marmet Health Care* is clear: while state courts are precluded by the FAA from applying public policy against the process of arbitration itself, state courts should fully implement “state common-law principles that are not specific to arbitration.” *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 534 (2012). Given that state courts should apply their “common-law principles” to arbitration, they should include in this an application of their public policy to arbitration awards.

Despite this Court’s clarity in *Marmet Health Care* and elsewhere, confusion and conflict has spread in lower courts anyway. Last year, the Sixth Circuit properly applied *Marmet Health Care* to limit FAA preemption of state laws and rules to only two scenarios. *See Richmond Health Facilities v. Nichols*, 811 F.3d 192, 197 (6th Cir. 2016) (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011)). The first category where preemption occurs is “when a state law prohibits outright the arbitration of a particular type of claim.” *Richmond Health*

Facilities, 811 F.3d at 197 (quoting *Concepcion*, 563 U.S. at 341). The second preemption category is “when a doctrine normally thought to be generally applicable, such as duress or ... unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.” *Richmond Health Facilities*, 811 F.3d at 197 (quoting *Concepcion*, 563 U.S. at 341-42). The Sixth Circuit concluded that under this category the proper test is “whether the state law rule would have a ‘disproportionate impact’ on arbitration agreements.” *Richmond Health Facilities*, 811 F.3d at 197 (citing *Concepcion*, 563 U.S. at 341-42).

The Sixth Circuit concluded that the proper test is whether a “disproportionate impact stand[s] as an obstacle to the accomplishment of the FAA’s objectives.” *Richmond Health Facilities*, 811 F.3d at 197-98 (quoting *Concepcion*, 563 U.S. at 343, internal quotation marks omitted).

Yet the Fifth Circuit and state courts in Texas have applied *Hall Street* in an overly wooden manner, to abdicate their own authority and responsibility to respect Rule of Law and public policy. The Fifth Circuit, for example, has mistakenly held that:

In the light of the Supreme Court’s clear language that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected. Indeed, the term itself, as a term of legal art, is no longer useful in actions to vacate arbitration awards. *Hall Street* made it plain that the statutory language means what

it says: “courts *must* [confirm the award] unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title,” 9 U.S.C. § 9 (emphasis added), and there’s nothing malleable about “must,” *Hall Street*, 128 S. Ct. at 1405. Thus from this point forward, arbitration awards under the FAA may be vacated ***only for reasons provided in § 10.***

Citigroup Glob. Mkts. Inc. v. Bacon, 562 F.3d 349, 358 (5th Cir. 2009) (emphasis added). Disagreeing with multiple sister Circuits (Pet. 13-15), the Fifth Circuit held, “To the extent that our previous precedent holds that nonstatutory grounds may support the vacatur of an arbitration award, it is hereby overruled.” 562 F.3d at 358.

If this overly literal view taken by the Fifth Circuit, the Texas state court below, and the Alabama and Florida supreme courts (Pet. 16) were correct, then this Court would not have unanimously remanded in *Marmet Health Care* for the West Virginia state court to determine if the arbitration clauses “are unenforceable under state common-law principles that are not specific to arbitration and preempted by the FAA.” *Marmet*, 565 U.S. at 534.

Given this Court’s lucent teaching that the FAA does not preempt general principles of state common law, the FAA also must not preempt review of arbitration awards with respect to general common-law principles. A pedantic view of preemption for the FAA to forbid every possible public policy consideration except those expressly enumerated in 9 U.S.C. § 10 would result in enforcement of arbitration awards that are illegal, discriminatory, treasonous, or

in violation of constitutional rights. The FAA does not require judicial approval of such repugnant awards, and the Petition for a Writ of *Certiorari* should be granted to clarify the lack of such preemption.

II. DEPRIVING STATE COURTS OF THEIR AUTHORITY TO DEFEND PUBLIC POLICY HAS NATIONAL IMPORTANCE BEST ADDRESSED IN THIS CONTEXT OF LEGAL ETHICS.

As this Court has emphasized, the judiciary does not – and should not – enforce contracts that are violative of public policy. *W.R. Grace & Co. v. Local Union 759, Int’l Union of United Rubber*, 461 U.S. 757, 766 (1983). Under the FAA, agreements to arbitrate are “enforceable to the same extent as other contracts.” *Alexander v. Anthony Int’l L.P.*, 341 F.3d 256, 263 (3d Cir. 2004) (quoting *Seus v. John Nuveen & Co.*, 146 F.3d 175, 178 (3d Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999)).

State autonomy over local interests and public policy is a matter of national importance. “States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.” *United States v. Lopez*, 514 U.S. 549, 581 (1995) (citing *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). When state courts are deprived of their authority to review an arbitration award for violating public policy, then this issue of national importance merits review by this Court. The untoward effect of allowing

arbitration awards to override public policy is to erode state sovereignty and improperly weaken the authority of state courts.

The context presented by the Petition is particularly good for addressing the scope of FAA preemption. An essential function of state courts is to exercise oversight of the legal profession, and to prevent attempts to undermine legal ethics among attorneys. When an arbitration award impacts ethical conduct by lawyers, then it is paramount that state courts be empowered to curb the arbitrator's overreach. The need for judicial review to protect the integrity of the legal profession against arbitration awards that reward potentially unethical and unlawful conduct by attorneys is compelling.

Ethics of the legal profession lies exclusively within the domain of state policy. Texas has an appropriate ethical rule that sharply limits the ability of attorneys to withdraw their representation from a client. Tex. Disc. R. Prof. Conduct § 1.15. Whether an attorney can violate this rule by abandoning his client, and yet still demand and collect a massive post-abandonment contingency fee, is a matter of public policy affecting both the practice of law and the efficiency of the state court system. Arbitration awards should not be allowed to the extent they undermine the strong public policy needed on this issue. At a minimum, judicial review of such awards must be permitted to safeguard against undermining valid state interests.

The Fifth and Eleventh Circuits, Texas state court, and Alabama and Florida state courts have ruled contrary to the majority view and the teachings of this Court on the preemptive effect of the FAA.

(Pet 15-16) The underlying substantive issue of legal ethics presented here is the best context for resolving the conflict. Thornier fact patterns with complicating considerations would not be better candidates for resolving the wide conflict below about FAA preemption. The Petition for a Writ of *Certiorari* should be granted.

III. THE PURPOSE OF THE FAA IS HINDERED BY PRECLUDING JUDICIAL REVIEW OF ARBITRATION AWARDS THAT VIOLATE PUBLIC POLICY.

The FAA exists to encourage and promote arbitration, not discourage it. As this Court explained in *Concepcion*:

our cases place it beyond dispute that the FAA was designed to promote arbitration. They have repeatedly described the Act as “embod[ying] [a] national policy favoring arbitration,” *Buckeye Check Cashing*, 546 U.S., at 443, 126 S. Ct. 1204, 163 L. Ed. 2d 1038, and “a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary,” *Moses H. Cone*, 460 U.S., at 24, 103 S. Ct. 927, 74 L. Ed. 2d 765; see also *Hall Street Assocs.*, 552 U.S., at 581, 128 S. Ct. 1396, 170 L. Ed. 2d 254.

Concepcion, 563 U.S. at 345-46.

It is a misreading of *Concepcion* to expand it so far as to preclude judicial review of arbitration awards that violate public policy. Rather, *Concepcion* merely stands against state rules that impede the process of arbitration, rather than granting *carte blanche* to an

arbitrator to ignore fundamental values and principles. As this Court explained in *Concepcion*:

Thus, in *Preston v. Ferrer*, holding pre-empted a state-law rule requiring exhaustion of administrative remedies before arbitration, we said: “A prime objective of an agreement to arbitrate is to achieve ‘streamlined proceedings and expeditious results,’ which objective would be ‘frustrated’ by requiring a dispute to be heard by an agency first. 552 U.S., at 357-358, 128 S. Ct. 1396, 170 L. Ed. 2d 254. That rule, we said, would, ‘at the least, hinder speedy resolution of the controversy.’ *Id.*, at 358, 128 S. Ct. 1396, 170 L. Ed. 2d 254.

Concepcion, 563 U.S. at 346.

Denying judicial review of unethical and illegal arbitration awards frustrates the overarching goal of the FAA to encourage arbitration. Arbitrariness in arbitration is not attractive. Arbitration becomes more of a gamble if awards may transgress public policy without accountability or reviewability. A few may like taking big gambles, but state courts should not be forced to affirm them when they end up being illegal or otherwise improper. Nothing in the FAA inherently ties the hands of state courts to safeguard against bizarre arbitration awards that run afoul of state policy.

Precluding judicial review of arbitration awards that are repugnant to public policy does not advance the goals of arbitration or fulfill the purpose of the FAA. It also disrupts our finely tuned system of federalism that depends on state courts to protect important state interests against unethical and

illegal awards. The minority view adopted below that the FAA preempts state court review of arbitration awards that violate public policy is contrary to the goal of the FAA to promote arbitration.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

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