No. 24-246

IN THE

Supreme Court of the United States

JAMES W. MILLER,

Petitioner,

v.

MBC DEVELOPMENT, LP, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

BRIEF IN OPPOSITION

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October 7, 2024

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CORPORATE DISCLOSURE STATEMENT

Respondents MBC Development, LP, MBC Management, LLC, MBC Properties, LP, and Miller Properties Management, LLC have no parent corporations and no publicly-held company owns 10% or more of any of their stock.

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REASONS FOR DENYING THE PETITION

This Court should deny the petition of James W. Miller (Son) because he presents no compelling reason to grant review. S. Ct. R. 10. This is for at least three reasons.

First, Son waived the question presented by failing to preserve it. As a result of Son's waiver, neither the trial court nor the intermediate appellate court ever addressed it. The Pennsylvania Supreme Court also did not grant review to decide Son's question. It heard this case only to decide a single state law question about the meaning of a Pennsylvania statute. Federal Arbitration Act preemption surfaced only because one justice started a debate over it without the benefit of adversarial briefing. The majority responded, but only in *dicta*.

Second, the state supreme court decision was on a narrow question lacking any serious federal law or nationwide implications. The court decided only that the parties' specification that Pennsylvania law applied to their limited partnership agreements meant they made a choice to follow the special litigation committee procedures in the Pennsylvania Limited Partnership Act. The Act's language was specially crafted by the state legislature and is unique to Pennsylvania. This is not a case with broader consequences warranting this Court's input.

Third, the state supreme court's decision does not conflict with this Court's FAA jurisprudence. This case is essentially the same as *Volt Information Sciences, Inc. v. Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). Like the state supreme court here, this Court in *Volt* upheld a stay of arbitration because the

parties made the choice to apply a state's laws to their contract and those laws allowed a court to stay arbitration. Thus, the Court addressed Son's question 35 years ago. That decision remains settled law, so there is no reason to hear and decide the issue again. And the other FAA cases Son cites do not apply, as they mostly involved state law prohibitions on private agreements to arbitrate. The Pennsylvania statute here does not prohibit arbitration. Parties to limited partnership agreements can easily draft their agreements to avoid the process in 15 Pa. Cons. Stat. Ann. § 8694. The parties chose not to here. They opted for the default rules of Pennsylvania law. Nothing in the FAA prevented this.

For these reasons, detailed below, the Court should deny Son's petition.

A. The question presented was neither preserved for appellate review nor adequately addressed below.

This Court should deny review for the threshold reasons that Son waived his FAA issue and it was insufficiently addressed below. *See Clingman v. Beaver*, 544 U.S. 581, 598 (2005) ("We ordinarily do not consider claims neither raised nor decided below."). The following short recitation shows why.

This case began when respondents petitioned the Pennsylvania trial court, the court of common pleas, for a stay of Son's arbitration under a Pennsylvania state law, the Pennsylvania Limited Partnership Act. Respondents did not mention the FAA in their petition. (Petition, filed June 2, 2021.) Nor did Son in his answer. (Answer, filed June 23, 2021.) And the trial court did not discuss the

FAA in its decision. The court instead based its decision exclusively on the state Act. The trial court stayed the arbitration solely under that state law. (Pet. App. 74a-92a.)

Son then filed an appeal. Pennsylvania law requires an appellant like Son to file a statement of appellate issues when ordered. Issues not included in that statement are not preserved for appellate review. *See* Pa. R. App. P. 1925(b)(4)(vii) ("Issues not included in the Statement . . . are waived."). Son listed six issues in his statement. All were confined to state law matters. None involved FAA preemption. (Statement of Issues, filed Nov. 10, 2021.) Son thus waived appellate review of any FAA preemption question. *See HTR Rests., Inc. v. Erie Ins. Exch.*, 307 A.3d 49, 71 (Pa. 2023) (holding appellant waived issue not included in statement of appellate issues).

Son further narrowed his appellate issues to two state law questions in the brief he filed in the intermediate appellate court, the Pennsylvania Superior Court. (Brief, filed Jan. 10, 2022.) Again, neither issue had anything to do with FAA preemption. And while the parties made passing mention of the FAA in their briefs, the Superior Court never discussed or even mentioned FAA preemption in its decision. The court instead decided the appeal solely on the two state law questions Son presented. It concluded that state law allowed Son's arbitration, and so it reversed the trial court. (Pet. App. 57a-73a.)

Respondents then petitioned the Pennsylvania Supreme Court for discretionary review. It granted the petition to decide one question of state law: the meaning of the Pennsylvania Limited Partnership Act. (Pet. App. 2a, 16a.) The court's grant order made no reference to FAA

preemption. 290 A.3d 643. And the court did not direct the parties to brief or argue FAA preemption.

In its decision, the state supreme court described the issue presented as "a legal question of statutory interpretation." (Pet. App. 16a.) It held that the "clear and unambiguous" statutory language in the Pennsylvania act required the court to reverse the Superior Court and reinstate the trial court's order. (Pet. App. 23a-26a.) The court's holding—on the only state law issue squarely presented for review—had nothing to do with the FAA. (*Id.*)

After ruling on the question presented, the supreme court's opinion addressed other matters, in *dicta*. First, it discussed why the court had elected not to consider official comments to the Pennsylvania act. (Pet. App. 26a.) Next, the court described why its holding had created no FAA issue and explained the flaws in the dissenting justice's contrary arguments. (Pet. App. 27a-31a.) Lastly, the court commented on how the Superior Court had improperly distinguished between matters of substance and procedure. (Pet. App. 32a.)

One justice, David Wecht, agreed with the court's assessment of state law, but dissented on FAA grounds. (Pet. App. 46a-56a.) The FAA was not before the court, however. Son hardly mentioned it in his brief. (Brief, filed Apr. 17, 2023.) As the court observed, Son's "cursory treatment of the FAA does not identify which section of the FAA is purportedly violated nor does it argue that the FAA preempts any provision of" the Pennsylvania act. (Pet. App. 27a n.10.) The concurring justice echoed this, noting that Son "offers no language in the [Partnership]

Agreements or other advocacy to support the interstate commerce requirement for FAA application." (Pet. App. 43a n.11.) Son never even cited *Volt* or *Southland*, which Justice Wecht and the majority wound up debating. (Brief, filed Apr. 17, 2023.)

Justice Wecht candidly admitted that Son "certainly could have written more on the matter." (Pet. App. 53a.) The justice admitted it was a "plausible position" to find that Son waived any FAA issue. (Pet. App. 52a n.18.) Justice Wecht opined that perhaps Son's advocacy omissions should have led the court to dismiss the appeal as improvidently granted. (Pet. App. 52a n.18 & 53a.)

Despite all these warning signs, Justice Wecht went ahead with his FAA preemption analysis. It was enough for him that Son got Justice Wecht to "notice" the matter and "warrant my inquiry." (Pet. App. 53a.) Justice Wecht then independently developed an FAA preemption analysis detached from the adversarial process, triggering the majority's *dicta* response. (Pet. App. 30a-31a.) Justice Wecht also criticized respondents for not offering more on FAA preemption—even though Son had waived the issue and it was not before the court for decision. (Pet. App. 46a, 50a n.15, 52a.)

In short, Son asks this Court for review based solely on the non-controlling, freelance views of one dissenting jurist on a question Son did not preserve for appellate review, the trial and intermediate appellate courts never addressed, the parties did not meaningfully brief, and the state supreme court mentioned only in *dicta*. That is not a good reason for this Court to take this case. *See Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552 n.3 (1990)

("Applying our analysis . . . to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion.").

B. The isolated issue here—pertaining only to Pennsylvania limited partnerships—is not worth this Court's review.

Even assuming Son did not waive and properly developed the issue presented, it still does not merit review. That is because the state supreme court decision was on a narrow question special to Pennsylvania and its unique laws.

The Pennsylvania Supreme Court's narrow holding was that the parties' specification that their limited partnership agreements "shall be construed and enforced in accordance with the laws of the State of Pennsylvania" meant they had chosen to follow the special litigation committee procedures in the Pennsylvania Limited Partnership Act. (Pet. App. 4a, 23a-26a.) That holding does not involve a federal question. And it lacks national significance.

The state Act's text also is unique to Pennsylvania. The state legislature used a blend of sources to create special statutory language for Pennsylvania. *See*, *e.g.*, 15 Pa. Cons. Stat. Ann. § 8691 to § 8694 cmts. (noting these sections were developed using a uniform law, legal institute principles, and other sources). No other state has a limited partnership act matching Pennsylvania's. A decision by this Court on the merits thus would seem to have little application nationwide.

In sum, the state supreme court issued a narrow holding under Pennsylvania law about state statutory language exclusive to Pennsylvania. Son has it exactly wrong in claiming this case presents a "common and recurring issue." Pet. 5. It does not.

C. The state supreme court's decision fits with this Court's FAA precedents.

Lastly, this case does not warrant review because the Pennsylvania Supreme Court's decision correctly describes and tracks this Court's FAA decisions.

The FAA provides that arbitration provisions in contracts are valid and enforceable. 9 U.S.C. § 2. Its primary purpose is to ensure that "private agreements to arbitrate are enforced according to their terms." *Volt Info. Sciences, Inc. v. Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

Here, the state supreme court enforced the parties' limited partnership agreements according to their terms. Those agreements specified that they "shall be construed and enforced in accordance with the laws of the State of Pennsylvania"—without exception. (Pet. App. 4a.) The laws of Pennsylvania include its Limited Partnership Act, which is acutely applicable here. It lays out the process if a limited partnership chooses to respond to a derivative litigation demand by appointing a special litigation committee. 15 Pa. Cons. Stat. Ann. § 8694.

The parties could have included any number of carve-outs in their choice-of-law clause. They could have opted out of the § 8694 process. (Pet. App. 39a) (Donohue, J.,

concurring) ("When the partnership Agreements in this case were being formulated and finalized, the partners had a choice regarding how to address demands for litigation made by limited partners."). They did not. Instead, after arm's length negotiations through legal counsel, the parties executed limited partnership agreements requiring wholesale application of Pennsylvania law. The Pennsylvania Supreme Court thus took the parties as choosing to accept the special litigation committee process in § 8694's plain language. If Son did not want to use that procedure, then he should have negotiated for something else. He did not, so he must live with the agreements he signed.

Nothing about this conflicts with the FAA or any decision of this Court construing it. In *Volt*, the Court considered a contract between Stanford University and a contractor for electrical upgrades to the university's campus. The agreement (1) called for arbitration of all disputes between the parties "arising out of or relating to this contract or the breach thereof" and (2) included a choice-of-law clause specifying that the contract "shall be governed by the law of the place where the Project is located." 489 U.S. at 470-71. After the contractor's work got underway, a payment dispute erupted. The contractor filed for arbitration under the arbitration clause—but the state courts stayed it, because of a state statute. *Id.* at 471-73.

This Court affirmed the stay of arbitration. It explained that arbitration "under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Id.* at 479. They "may limit by contract the issues which they

will arbitrate." *Id.* Thus, when parties agree to state law rules, "enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA." *Id.* This holds true "even if the result is that arbitration is stayed where the [FAA] would otherwise permit it to go forward." *Id.* Permitting courts to "rigorously enforce" these agreements gives "effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA." *Id.*

The state supreme court decision here tracks *Volt*. As in *Volt*, the parties' limited partnership agreements include both arbitration and choice-of-law clauses. Like the contractor in *Volt*, Son pursued arbitration under the agreements' arbitration clause. And as in *Volt*, the state courts stayed the arbitration based on a state statute that applied because of the agreements' choice-of-law clause.

This Court decided *Volt* 35 years ago. It remains settled law. There is no need to grant review just to re-decide *Volt*. *See* S. Ct. R. 10 (review may be granted if a state court "has decided an important question of federal law that has not been, but should be, settled by this Court"). And even if the state supreme court had misapplied *Volt*, that still would not be a good reason to grant review. *See id.* ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

In his independent FAA analysis, developed without the benefit of adversarial briefing, Justice Wecht opined that this case is more like *Southland Corp. v. Keating*, 465 U.S. 1 (1984). (Pet. App. 49a.) It is not. That case involved an agreement between 7-Eleven and its franchisees

including an arbitration clause. Unlike *Volt* and this case, the 7-Eleven agreement did not include a choice-of-law clause. *Id.* at 3-4. Franchisees sued 7-Eleven in court, and 7-Eleven moved to compel arbitration. The state courts halted the arbitration because a state statute prohibited it by mandating judicial consideration of the claims. *Id.* at 4-5. This Court held the statute preempted by the FAA. *Id.* at 10. It reasoned that, in § 2 of the FAA, Congress "withdrew the power of the states to require a judicial forum for the resolution of claims" that parties had agreed to arbitrate. *Id.*

Southland is inapplicable. Pennsylvania law does not "require a judicial forum" for any of the parties' disputes. The parties were free to include language in their agreements stating that the special litigation committee process in § 8694 of the Pennsylvania act would not apply to their limited partnerships. They did not. They instead included a choice-of-law clause specifying that Pennsylvania law would apply *in toto*. That law provides for common pleas court review of special litigation committee challenges. The parties chose a judicial forum.

The state supreme court's decision does not keep future limited partnerships from agreeing to arbitration in disputes like those here. They will have no trouble drafting their agreements to avoid the § 8694 default process by opting out of that statute, writing their own rules, choosing a different process, or doing something else. Pennsylvania law does not prevent, and would fully enforce, those choices. Nothing in the state supreme court decision suggests otherwise.

The other cases Son cites are as unhelpful as *Southland*. They involved state law prohibitions on arbitration or state laws allowing lawsuits even if the parties agreed to arbitrate. *See, e.g.*, *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022) (California law invalidated waivers of suit); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015) (California law precluded class arbitration of consumer contracts); *Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17 (2012) (Oklahoma law prohibited non-competition agreements); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012) (West Virginia law prohibited arbitration of certain claims); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (California law precluded class arbitration of consumer contracts); *Perry v. Thomas*, 482 U.S. 483 (1987) (California law permitted suit despite agreement to arbitrate); *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Devel. (US), LLC*, 282 P.3d 1217 (Cal. 2012) (California statute permitted suit despite agreement to arbitrate). This case does not involve either of these problematic aspects of state law that raise significant FAA preemption concerns.

The Pennsylvania Supreme Court's opinion tracks *Volt*. That decision remains settled law. And the other decisions cited by Justice Wecht and Son are inapt. Thus, there is no reason for this Court to hear this case.

CONCLUSION

For these reasons, respondents ask the Court to deny Son's petition.

Respectfully submitted,

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