

## RECENT DEVELOPMENTS

### *Citizens Bank v. Alafabco, Inc.*\*

#### I. INTRODUCTION

Alabama has never hidden its contempt for arbitration or its disapproval of the broad reach of the Federal Arbitration Act (FAA).<sup>1</sup> Even after numerous failed attempts to constrain the application of the FAA, the Alabama Supreme Court yet again jumped at an opportunity—provided by the United States Supreme Court’s language in *United States v. Lopez*<sup>2</sup>—to do just that. Reading and applying that language in a way that narrowed the reach of the FAA, the Alabama Supreme Court decided *Alafabco, Inc. v. Citizens Bank*,<sup>3</sup> holding that an economic transaction between two Alabama residents was beyond the reach of the Act.<sup>4</sup>

Granting certiorari and reversing the Alabama Supreme Court’s decision, the U.S. Supreme Court’s per curiam opinion took steps to clarify the reach of the FAA. Specifically, the U.S. Supreme Court addressed the impact of *Lopez* on the Act, sending a strong message to all who might contemplate an interpretation similar to that of the Alabama Supreme Court in an attempt to subvert the FAA’s full scope.<sup>5</sup>

To fully understand the impact of the *Alafabco* decision, one must consider it within the context of the history and development of the FAA, which includes periods during which many states (especially Alabama) and their courts refused to accept the U.S. Supreme Court’s expansive reading of the Act’s scope. Congress passed the FAA<sup>6</sup> in 1925 in an effort to “legitimize arbitration as a dispute resolution mechanism and to compel parties who [had] entered into an arbitration agreement, but who [attempted] to sue, to resolve their disputes through arbitration.”<sup>7</sup> Throughout the history of the

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\* *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003).

<sup>1</sup> 9 U.S.C. §§ 1–16 (2000).

<sup>2</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>3</sup> *Alafabco, Inc. v. Citizens Bank*, 872 So. 2d 798 (Ala. 2002).

<sup>4</sup> *Id.* at 805.

<sup>5</sup> See *Citizens Bank*, 539 U.S. at 58.

<sup>6</sup> 9 U.S.C. §§ 1–16.

<sup>7</sup> Charity Robl, Recent Development, *Circuit City Stores, Inc. v. Adams*, 17 OHIO ST. J. ON DISP. RESOL. 219, 219 (citing Holland & Hart, *High Court Holds Worker to Signed Agreement*, 6 WYO. EMP. LAW LETTER, June 2001, at 7).

FAA, some states have waged a war of sorts against its enforcement.<sup>8</sup> A number of state legislatures passed laws that invalidated arbitration clauses and agreements, and some state courts attempted to find ways to enforce those anti-arbitration statutes in conflict with U.S. Supreme Court decisions regarding such activities.<sup>9</sup> It is within this context that the U.S. Supreme Court decided a line of cases attempting to define the breadth, scope, and power of the FAA. Central to the issue is § 2 of the FAA<sup>10</sup> which has been examined in cases such as *Southland Corp. v. Keating*<sup>11</sup> and *Allied-Bruce Terminix Cos. v. Dobson*.<sup>12</sup> *Southland* established the preemptive nature of § 2,<sup>13</sup> and *Allied-Bruce* defined its scope broadly to reach as far as Congress' Commerce Clause power.<sup>14</sup> It was at this point in the development of FAA § 2 jurisprudence that the U.S. Supreme Court decided *Lopez* and brought confusion to the world of FAA preemption/expansion. It was forced to decide *Alafabco* in order to reestablish (reasonable) clarity with regards to the issues of FAA applicability, scope, and preemption by directly addressing these *Lopez* questions.

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<sup>8</sup> See Kirsten Brown, Comment, *State Court Attempts to Limit Applicability of the Federal Arbitration Act in a Post-Lopez World*, 56 U. MIAMI L. REV. 1051, 1051, 1064–65 (2002); Bryan L. Quick, Note, *Keystone, Inc. v. Triad Systems Corporation: Is the Montana Supreme Court Undermining the Federal Arbitration Act?*, 63 MONT. L. REV. 445, 445–47 (2002); Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit*, 35 TEX. TECH L. REV. 497, 500 (2004).

<sup>9</sup> See Edmond Seferi, Note and Comment, *FAA and Arbitration Clauses—How Far Can it Reach? The Effect of Allied-Bruce Terminix, Inc. v. Dobson*, 19 CAMPBELL L. REV. 607, 613 (1997).

<sup>10</sup> Section 2 of the FAA provides that:

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, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

<sup>9</sup> U.S.C. § 2 (emphasis added).

<sup>11</sup> *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

<sup>12</sup> *Allied-Bruce Cos. v. Dobson*, 513 U.S. 265 (1995).

<sup>13</sup> *Southland*, 465 U.S. at 16.

<sup>14</sup> *Allied-Bruce*, 513 U.S. at 270.

## II. THE FACTS AND PROCEDURAL HISTORY

A quasi-contractual<sup>15</sup> relationship existed between Citizens Bank (an Alabama lending institution) and Alafabco, Inc. (an Alabama fabrication and construction company) that eventually resulted in a dispute related to the Bank's refusal to provide Alafabco with capital for construction projects on which it allegedly encouraged the company to bid.<sup>16</sup> Alafabco used money previously allocated<sup>17</sup> for repayment of prior debts owed to the Bank to fund these construction contracts.<sup>18</sup> This eventually led to Alafabco's default on the debt and an agreement between the two parties for debt restructuring that took the form of "renewal notes," which included an arbitration agreement.<sup>19</sup> Eventually, Alafabco filed a petition for bankruptcy protection.<sup>20</sup> The parties negotiated a deal whereby Alafabco agreed to dismiss its bankruptcy petition, entering into a second set of "renewal notes" complete with an arbitration agreement that was "functionally identical" to the first.<sup>21</sup> Soon after executing this agreement, Alafabco filed suit in Alabama state court, prompting Citizens Bank to move to compel arbitration.<sup>22</sup> The court granted the Bank's motion and ordered the parties to participate in arbitration per their agreement.<sup>23</sup> On appeal, the Supreme Court of Alabama, over Justice See's dissent,<sup>24</sup> reversed the lower court.<sup>25</sup> The court based its decision upon

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<sup>15</sup> As alleged by Alafabco, it and Citizens Bank had an "understanding" whereby the Bank would agree to provide the company with all the required capital in order to complete the building projects. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 53 (2003) ("[T]he bank agreed to provide operating capital necessary for Alafabco to secure and complete construction contracts."). The original complaint contained allegations regarding this "implied agreement." *See Alafabco, Inc. v. Citizens Bank*, 872 So. 2d 798, 799 (Ala. 2002).

<sup>16</sup> *Citizens Bank*, 539 U.S. at 53.

<sup>17</sup> *See id.* ("Alafabco completed the Courtland project with funds that would otherwise have been dedicated to repaying existing obligations to the bank. Alafabco in turn became delinquent in repaying those existing obligations.").

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 53–54.

<sup>20</sup> *Id.* at 54.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 53.

<sup>23</sup> *Id.*

<sup>24</sup> Justice See dissented, explaining that, from his view, the court had erred in its formulation of the *Sisters* test that involved a reading of the United States Supreme Court's opinion in *Lopez*. *Id.* at 55. Justice See rejected the stringent test—which required "that 'a particular contract, in order to be enforceable under the Federal Arbitration Act,

the application of a test it previously announced in *Sisters of the Visitation v. Cochran Plaster Co.*<sup>26</sup> Simply stated, the test was “whether [the debt-restructuring] transactions by themselves, had a ‘substantial effect on interstate commerce.’”<sup>27</sup> The court held that an insufficient nexus with interstate commerce existed for the FAA to apply because there was no evidence that: (1) the restructured debt was attributable in any way to interstate commerce; (2) the debt originated out-of-state; or (3) the debt was inseparable from out-of-state projects.<sup>28</sup> Since the debt-restructuring agreements did not, in the eyes of the Alabama Supreme Court, have enough of an effect on interstate commerce to invoke FAA, the Alabama anti-arbitration statute was not preempted, and thus, the arbitration agreement between Citizens Bank and Alafabco was invalid.<sup>29</sup>

### III. THE COURT’S HOLDING AND REASONING

The U.S. Supreme Court ultimately rejected the majority decision of the Supreme Court of Alabama, reversed the decision, and remanded the case for further proceedings.<sup>30</sup> To reach this conclusion, the U.S. Supreme Court began by revisiting its holding in *Allied-Bruce*.<sup>31</sup> It reemphasized its earlier

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must, by itself, have a substantial effect on interstate commerce,”—in favor of “a more generous view” of the necessary effect on interstate commerce. *Id.* (quoting *Alafabco, Inc. v. Citizens Bank*, 872 So. 2d 798, 808 (Ala. 2002)). Thus, Justice See would have found that the debt restructuring met the FAA’s “involving commerce” requirement. *Id.*

<sup>25</sup> *Citizens Bank*, 539 U.S. at 55.

<sup>26</sup> *Sisters of the Visitation v. Cochran Plaster Co.*, 775 So. 2d 759 (Ala. 2000) (interpreting the United States Supreme Court decision in *Lopez*). For further discussion of *Lopez*, see *infra* Part IV.

<sup>27</sup> *Citizens Bank*, 539 U.S. at 55 (quoting *Alafabco*, 872 So. 2d at 803).

<sup>28</sup> See *id.* (citing *Alafabco*, 872 So. 2d at 805).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 58.

<sup>31</sup> *Allied-Bruce Cos. v. Dobson*, 513 U.S. 265, 265 (1995). In *Allied-Bruce*, the Court addressed (among other matters) the scope of the FAA. After first rejecting a request to overrule its *Southland* decision, the court examined the appropriate reach of the Act. As Justice Breyer’s opinion explains the issue:

[*Allied-Bruce* concerned] the reach of § 2 of the Federal Arbitration Act. That section makes enforceable a written arbitration provision in “a contract *evidencing* a transaction *involving* commerce.” Should we read this phrase broadly, extending the Act’s reach to the limits of Congress’ Commerce Clause power? Or, do the two italicized words—“involving” and “evidencing”—significantly restrict the Act’s application?

interpretation of the FAA § 2 term “involving commerce” as “the functional equivalent of the more familiar term ‘affecting commerce’—words of art that ordinarily signal the broadest permissible exercise of Congress’ Commerce Clause power.”<sup>32</sup> Thus, “it [was] perfectly clear [to the U.S. Supreme Court] that the FAA encompass[e] a wider range of transactions than those actually ‘in commerce’—that is, ‘within the flow of interstate commerce.’”<sup>33</sup> Applying this broad reading of the FAA’s scope from *Allied-Bruce*, the U.S. Supreme Court determined that the Supreme Court of Alabama was “misguided in its search for evidence that a ‘portion of the restructured debt was actually attributable to interstate transactions’ or that the loans ‘originated out-of-state’ or that ‘the restructured debt was inseparable from any out-of-state projects.’”<sup>34</sup>

It also denounced the Supreme Court of Alabama’s reasoning that FAA application was defeated “because the individual debt-restructuring, taken alone, did not have a ‘substantial effect on interstate commerce.’”<sup>35</sup> As it stated in *Mandeville*,<sup>36</sup> the “Commerce Clause power ‘may be exercised in individual cases without showing any specific effect upon interstate commerce’ if in the aggregate the economic activity in question would represent ‘a general practice . . . subject to federal control.’”<sup>37</sup> So long as the general practice “bear[s] on interstate commerce in a substantial way,” it is within the reach of Congress’ Commerce Clause power, and thus the FAA.<sup>38</sup>

The U.S. Supreme Court found the *Alafabco* case to be “well within [its] previous pronouncements on the extent of Congress’ Commerce Clause

*Id.* at 268 (internal citations omitted). The Court concluded “that the broader reading of the Act is the correct one.” *Id.* The Court reasoned that “the basic purpose of the Federal Arbitration Act is to overcome courts’ refusal to enforce agreements to arbitrate.” *Id.* at 270. Additionally, the FAA represents an exercise of Congress’ “control over interstate commerce . . .” *Id.* at 271 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395, 405 (1967)).

<sup>32</sup> *Citizens Bank*, 539 U.S. at 56 (quoting *Allied-Bruce*, 513 U.S. at 273–74).

<sup>33</sup> *Id.* (quoting *Allied-Bruce*, 513 U.S. at 273).

<sup>34</sup> *Id.* at 56 (quoting *Alafabco, Inc. v. Citizens Bank*, 872 So. 2d 798, 805 (Ala. 2002)). As the Court noted, “[s]uch evidence might be required if the FAA were restricted to transactions actually ‘in commerce . . .’” *Id.* (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195–96 (1974)). However, the Court has not so restricted the FAA’s reach. *See id.*

<sup>35</sup> *Id.* (citing *Alafabco*, 872 So. 2d at 808).

<sup>36</sup> *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

<sup>37</sup> *Citizens Bank*, 539 U.S. at 56–57 (quoting *Mandeville*, 334 U.S. at 236).

<sup>38</sup> *Id.* at 57 (citing *Maryland v. Wirtz*, 392 U.S. 183, 196–97 n.27 (1968)).

power” for three reasons (despite the fact that it involved agreements executed by Alabama residents in Alabama).<sup>39</sup> First, Alafabco conducted business in other states using loans from the Bank that were the subject of the debt-restructuring agreements.<sup>40</sup> The second reason centered around the use of all of Alafabco’s business assets—“including its inventory of goods assembled from out-of-state parts and raw materials”<sup>41</sup>—to secure the restructured debt.<sup>42</sup> Finally, to answer concerns regarding “any residual doubt about the magnitude of the impact on interstate commerce caused by the particular economic transactions in which the parties were engaged,” it considered the “general practice” of those transactions.<sup>43</sup> The U.S. Supreme Court stated that, “[n]o elaborate explanation [was] needed to make evident the broad impact of commercial lending on the national economy or Congress’ power to regulate that activity pursuant to the Commerce Clause.”<sup>44</sup>

According to the U.S. Supreme Court, the Supreme Court of Alabama’s decision in *Sisters*<sup>45</sup> “adhere[d] to an improperly cramped view of Congress’ Commerce Clause power” derived from a misreading of *Lopez*.<sup>46</sup> It explicitly stated that “*Lopez* did not restrict the reach of the FAA or implicitly overrule *Allied-Bruce*.”<sup>47</sup> “Nor did *Lopez* purport to announce a new rule governing Congress’ Commerce Clause power over concededly economic activity such as the debt-restructuring agreements . . . .”<sup>48</sup> Having so found, it granted Citizens Bank’s petition for writ of certiorari, reversed the Supreme Court of Alabama, and remanded the case.<sup>49</sup>

#### IV. THE BROADER EFFECT OF *ALAFABCO*

The *Alafabco* decision directly answers questions raised by, and fills gaps caused by, the U.S. Supreme Court’s seemingly bipolar decisions in

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (stating that the “loans to Alafabco had been used in part to finance large construction projects in North Carolina, Tennessee, and Alabama”).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 57–58 (quoting *Mandeville*, 334 U.S. at 236).

<sup>44</sup> *Id.* at 58 (citing *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38–39 (1980)).

<sup>45</sup> *Sisters of the Visitation v. Cochran Plaster Co.*, 775 So. 2d 759, 759 (Ala. 2000).

<sup>46</sup> *Citizens Bank*, 539 U.S. at 58.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

*Allied-Bruce and Lopez*. *Alafabco* also reestablishes the preemptive power of the FAA—often challenged by Alabama and its courts—such that those in favor of arbitration now have a case to take to the lower-level courts that, until recently, might have been confused as to the interplay between the FAA and state anti-arbitration laws.<sup>50</sup>

### A. *A History of Preemption*

It is often said that “a page of History is worth a volume of logic.”<sup>51</sup> Such is the case with § 2 of the FAA. The rise of FAA § 2 expansion began in 1983 with the U.S. Supreme Court’s decision in *Southland*, which involved a suit by a class of franchisees against a franchisor of 7-Eleven stores under claims of, among other things, violating disclosure requirements of California’s Franchise Investment Law (FIL).<sup>52</sup> On appeal of the California Supreme Court’s decision that the FAA did not preempt California law, the U.S. Supreme Court reversed, and held that the Act applied to state courts and did in fact preempt the California law as it applied to arbitration agreements.<sup>53</sup> Thus, “[s]ince the United States Supreme Court’s decision in [*Southland*], the Federal Arbitration Act has been read as embodying a ‘national policy favoring arbitration.’”<sup>54</sup>

Following the policy set forth in *Southland*, the U.S. Supreme Court decided *Allied-Bruce* to define the scope of the Act. *Allied-Bruce* involved a suit by an Alabama homeowner against an exterminating company pertaining to a lifetime “Termite Protection Plan.”<sup>55</sup> The contract happened to contain an arbitration agreement that Allied-Bruce, in conjunction with a request for a stay, attempted to enforce once the homeowners initiated a lawsuit.<sup>56</sup> The trial court denied Allied-Bruce’s request for stay and refused to submit the matter to arbitration.<sup>57</sup> The Supreme Court of Alabama affirmed the lower

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<sup>50</sup> Donald Lee Rome, *High Court Reverses Alabama Court’s “Cramped Reading” of Interstate Commerce*, 58 DISP. RESOL. J. 4, 5 (Aug.–Oct. 2003).

<sup>51</sup> *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

<sup>52</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 3–4 (1984).

<sup>53</sup> *Id.* at 16; see also Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 397 (2004).

<sup>54</sup> Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 185 (2004) (citing *Southland*, 465 U.S. at 10 (O’Connor & Rehnquist, JJ., dissenting)).

<sup>55</sup> *Allied-Bruce Cos. v. Dobson*, 513 U.S. 265, 268 (1995).

<sup>56</sup> *Id.* at 269.

<sup>57</sup> *Id.*

court's decision and held that, in this situation, the FAA did not preempt the Alabama law that invalidated arbitration agreements because the contract at issue had too slight of a connection with interstate commerce.<sup>58</sup> On appeal, and prior to reaching the main issue of the scope of the FAA, the U.S. Supreme Court laid out three guiding points. "First, the basic purpose of the Federal Arbitration Act is to overcome the courts' refusal to enforce agreements to arbitrate."<sup>59</sup> Second, in enacting the FAA, Congress relied in some part on its power to control interstate commerce.<sup>60</sup> "Third, the Court had held in *Southland* that the FAA applies in state courts, and, thus, 'state courts cannot apply state statutes that invalidate arbitration agreements.'<sup>61</sup> Having laid out these points, it declined to overrule *Southland*,<sup>62</sup> and instead moved on to examine the scope of the FAA.<sup>63</sup> In doing so, it construed the "involving commerce" language of FAA § 2 as the "functional equivalent" of the Commerce Clause's "affecting commerce" language.<sup>64</sup> The U.S. Supreme Court ultimately determined that the scope of the FAA extended to the full reach of Congress' Commerce Clause power.<sup>65</sup> Thus, if a transaction

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 270.

<sup>60</sup> *Id.* at 271.

<sup>61</sup> *Id.* at 272.

<sup>62</sup> The Court in *Allied-Bruce* reasoned that the *Southland* Court had already considered the basic arguments raised by the respondents and amici. *Id.* The Court stated that nothing had significantly changed over the ten years since *Southland* was decided and no later cases had eroded its authority. *Id.* Additionally, the Court had not seen evidence of unforeseen practical problems arising as a result of the *Southland* doctrine. *Id.* Rather, the Court noted that it was likely that a number of private parties had relied on *Southland* when writing contracts. *Id.* Finally, the Court justified its refusal to overrule *Southland* by acknowledging that both before and after the decision, Congress has only taken action to expand the scope of arbitration, never retract it. *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 273–74. To reach this conclusion, the Court reasoned that the words "involving commerce" were "broader than the often-found words of art "in commerce." *Id.* at 273. The Court examined the FAA's statutory language and determined that "the word 'involving' is broad and is indeed the functional equivalent of 'affecting.'" *Id.* at 273–74. The Court explained that such a reading was consistent with its earlier decisions in which it "described the Act's reach expansively as coinciding with that of the Commerce Clause." *Id.* at 274 (citing *Perry v. Thomas*, 482 U.S. 483, 490 (1989) and *Southland*, 465 U.S. at 14–15). To conclude this portion of its analysis, the Court stated that "a broad interpretation of ["involving commerce"] is consistent with the Act's basic purpose, to put arbitration provisions on 'the same footing' as a contract's other terms." *Id.* at 275 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

<sup>65</sup> *Id.* at 275.

fell within the scope of the Commerce Clause, it fell within the reach of the FAA, which then preempted state laws precluding arbitration.<sup>66</sup>

Not long after *Allied-Bruce* seemed to set the standard by which one could measure the reach of the FAA, the U.S. Supreme Court began a new saga in the preemption battle with its decision in *Lopez*. The *Lopez* case involved a challenge to Congress' Gun-Free School Zone Act.<sup>67</sup> A high school student, Alfonso Lopez, Jr., carried a concealed handgun into his school and was subsequently charged and convicted of violating the Act.<sup>68</sup> Prior to his conviction, Lopez sought to have the charges dropped because the Act, as he argued, was "beyond the power of Congress to legislate control over . . . public schools," and was thus unconstitutional.<sup>69</sup> The district court's denial of Lopez's motion led to his conviction.<sup>70</sup> The Fifth Circuit Court of Appeals overturned the conviction and stated that the Act was beyond Congress' Commerce Clause power.<sup>71</sup> Eventually, the U.S. Supreme Court granted the petition for writ of certiorari and held that Congress had, in fact, overstepped its Commerce Clause power with the Act.<sup>72</sup>

Following a detailed analysis of the history of the Commerce Clause power, it stated three jurisprudential points pertaining to the Clause.<sup>73</sup> The first was that Congress has the power to regulate the use of interstate commerce channels.<sup>74</sup> Second, Congress has the power to regulate activities in order to protect "instrumentalities of interstate commerce, or persons or things in interstate commerce."<sup>75</sup> Third, Congress has the power to regulate activities that have "a substantial relation to interstate commerce."<sup>76</sup> As to the third point, the test is whether the activity "substantially affects"

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<sup>66</sup> *Id.*; see also *Lea Richmond IV, Sisters of the Visitation v. Cochran Plastering Co.: Earnest Federalism or Reconstructive Defiance to the Federal Arbitration Act*, 25 AM. J. TRIAL ADVOC. 633, 637 (2002) ("Allied-Bruce signaled the United States Supreme Court's desire to increase the FAA's scope over individual contracts that affected interstate commerce.").

<sup>67</sup> *United States v. Lopez*, 514 U.S. 549, 551 (1995) (citing 18 U.S.C. § 922(q) (1990)).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 552.

<sup>71</sup> *Id.*

<sup>72</sup> See generally *id.*

<sup>73</sup> *Id.* at 558.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 558–59 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

interstate commerce.<sup>77</sup> The U.S. Supreme Court, in applying this test to Lopez's situation, ultimately held that regulation of guns in school zones is in no sense an economic activity that might substantially affect interstate commerce.<sup>78</sup> Its decision in *Lopez* raised a number of questions and left other courts free to interpret its meaning and effect as they pleased.

### B. *Questions Abound After Allied-Bruce and Lopez*

Having just extended the reach of the FAA to the corners of Congress' Commerce Clause power, the U.S. Supreme Court turned around and arguably retracted the scope of that power. This decision left many wondering about the impact of either case on the FAA, and it opened the door for some courts to again attempt to circumvent FAA preemption.

Following *Lopez*, courts were left with a choice as to how they could interpret the scope of the FAA. A number of post-*Lopez* decisions fall into one of three categories.<sup>79</sup> The first category consists of cases in which courts applied an "Affects Approach," simply ignoring the *Lopez* decision as irrelevant in the context of the FAA's scope.<sup>80</sup> The second category consists of cases in which courts took a "Substantially Affects Approach . . . incorporat[ing] *Lopez*'s requirement that any law passed by Congress under its commerce powers must regulate an activity that substantially affects interstate commerce."<sup>81</sup> Finally, some courts applied the "Three Categories of Commerce Approach" which "encompasses the 'Substantially Affects Approach' and recognizes it as one of three areas in which Congress may legislate under its commerce power."<sup>82</sup>

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<sup>77</sup> *Id.* at 559.

<sup>78</sup> *Id.* at 567.

<sup>79</sup> See Brown, *supra* note 8, at 1057-58.

<sup>80</sup> *Id.* at 1058-59 & nn.58-63 (citing and discussing Grohn v. Sisters of Charity Health Servs., 960 P.2d 722 (Colo. Ct. App. 1998); Alford v. Johnson Rice & Co., 773 So. 2d 255, 258 (La. App. 4 Cir. 11/15/00); Saga Communications of New England, Inc. v. Voornas, 756 A.2d 954 (Me. 2000); Duggan v. Zip Mail Servs., Inc., 920 S.W.2d 200 (Mo. Ct. App. 1996); Towe, Hester & Erwin v. Kansas City Fire & Marine Ins. Co., 947 P.2d 594, 596 (Okla. Ct. App. 1997); Zabinski v. Bright Acres Assoc., 553 S.E.2d 110 (S.C. 2001)).

<sup>81</sup> *Id.* at 1057, 1060-61 & nn.74 & 76-77 (citing and discussing Rogers Found. Repair, Inc. v. Powell, 748 So. 2d 869 (Ala. 1989); Ikon Office Solutions v. Eifert, 2 S.W.3d 688, 691 (Tex. App. 1999); Russ Berrie & Co. Inc. v. Michael Gantt, 998 S.W.2d 713 (Tex. App. 1999)).

<sup>82</sup> *Id.* at 1057, 1063-64 & nn.89 & 90 (citing and discussing Robert Frank McAlpine Architecture, Inc. v. Heilpern, 712 So. 2d 738 (Ala. 1998); City of Cut Bank v. Tom Patrick Constr., 963 P.2d 1283 (Mont. 1998)).

It is in this third category of opinions that the generally anti-FAA Alabama Supreme Court<sup>83</sup> decided *Sisters*.<sup>84</sup> While making its decision, the court examined five characteristics of the transaction to see whether it “substantially affect[ed]” interstate commerce.<sup>85</sup> The Alabama Supreme Court used a narrow interpretation of *Lopez* to counter the U.S. Supreme Court’s efforts to broaden the scope of the FAA through *Allied-Bruce*.<sup>86</sup> Armed with its reading of *Lopez* as a limitation on the FAA’s scope, the Supreme Court of Alabama decided *Alafabco*.

### C. Alafabco—Alabama Take Heed

Frustrated by the state courts’ abusive misreadings of *Lopez*, the U.S. Supreme Court clarified its decision and quashed a number of potential interpretations.<sup>87</sup> Three years after leaving the scope of the FAA in limbo, it took the opportunity presented by *Alafabco* to definitively and clearly lay out its stance on the FAA, to address its decisions in *Allied-Bruce* and *Lopez*, and

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<sup>83</sup> See generally Richmond, *supra* note 66.

<sup>84</sup> See Brown, *supra* note 8, at 1057–67.

<sup>85</sup> *Sisters of the Visitation v. Cochran Plaster Co.*, 775 So. 2d 759, 765 (Ala. 2000). The five components considered by the court were:

(1) a contract solely between two local parties, both of them engaging in activities that do not involve any person or entity in another State; (2) tools and equipment, which, although they moved in interstate commerce, were not purchased or leased solely for the farmer to perform the particular contract at issue; (3) substantially more than half of the amount paid to the farmer by the other landowner is allocable to the cost of the services rendered by the farmer, who renders those services without using persons or entities from another State, while substantially less than half of the amount paid is allocable to the cost of materials specially purchased for use or consumption in the farmer’s performance of the contract; (4) the object of the services is incapable of subsequent movement across State lines or otherwise having a subsequent substantial effect on interstate commerce; (5) such a degree of separability from any contracts that are subject to the FAA that allowing this contract to remain outside the scope of the Act would not substantially disrupt activities that Congress intended to be subject to the Act.

*Id.*

<sup>86</sup> “The United States Supreme Court’s rhetoric in *Allied-Bruce* symbolized the Court’s intention to strengthen the FAA and quash anti-arbitration state law.” Richmond, *supra* note 66, at 642 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)). Alabama’s reconciliation of *Allied-Bruce* and *Lopez* was to state that “for a particular contract to invoke the FAA, the contract must, in fact, substantially affect interstate commerce.” *Id.* at 644 (citing *Perry v. Thomas*, 482 U.S. 483, 491 (1989)).

<sup>87</sup> See *id.* at 633.

to scold those courts that attempted to take advantage of the temporary lapse in clarity regarding the FAA by construing its scope narrowly.

This has no greater implications in any state than it does in Alabama—a state in which arbitration is an important and charged issue.<sup>88</sup> Combine the importance of arbitration with the fact that Alabama is historically an anti-arbitration state,<sup>89</sup> and it is no wonder the state judiciary jumped at the opportunity to limit the scope of FAA application.<sup>90</sup> The question remains whether—without the ability to narrowly construe the Act's scope through *Lopez*—Alabama will fall in line with the national sentiment favoring arbitration. More broadly, will other states opposed to arbitration finally accept the U.S. Supreme Court's message or will they continue to devise creative schemes to avoid the FAA and give effect to state anti-arbitration laws? One thing is for certain: Any court that wants to try to use *Lopez* to justify a narrow reading of the FAA's scope in an economic transaction setting had better be ready for a chiding<sup>91</sup> by the U.S. Supreme Court. One need only look to its treatment of the Alabama Supreme Court's *Alafabco* decision.

## V. CONCLUSION

The U.S. Supreme Court's *Alafabco* ruling settled the dispute over the effect of *Lopez* on both the FAA and *Allied-Bruce*'s definition of its scope. Furthermore, *Alafabco* sent a message to Alabama that arbitration and the FAA are here to stay. While *Lopez* left room for courts to narrow the reach of the FAA through a restrictive reading of that decision, *Alafabco* set the record straight. It did not intend for *Lopez* to narrow the scope of the FAA, and it certainly did not intend to open the door for courts to ignore the FAA's preemptive power. *Alafabco* states this plainly and clearly, leaving little room (unlike *Lopez*) for misguided interpretations by the Alabama Supreme Court, or any other court for that matter.

*James A. Cannatti, III*

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<sup>88</sup> *Id.* ("Perhaps no other state makes arbitration a political issue more than Alabama.").

<sup>89</sup> See Brown, *supra* note 8, at 1061; see also Huber, *supra* note 8, at 501 (calling the Supreme Court of Alabama "the most antiarbitration court in the nation").

<sup>90</sup> See Brown, *supra* note 8, at 1061 (discussing how Alabama's state courts "often use the *Lopez* decision as a technique to circumvent the national policy of enforcing arbitration agreements").

<sup>91</sup> See Huber, *supra* note 8, at 500 ("In *Alafabco*, the Court chastised the Alabama Supreme Court for its continuing hostility to arbitration . . .").