No. 12-1429

IN THE
Supreme Court of the United States

IMAD BAKOSS, M.D.,
Petitioner,

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NO. 0510135
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Our Petition demonstrated that this case presents *three* critical circuit conflicts concerning the scope of the Federal Arbitration Act. Lloyd's acknowledges all three, and responds only with weak arguments that this case may not be the best context in which to resolve them. In fact, this case is an excellent vehicle for deciding all of these important issues. This Court's review is plainly warranted.

I. THE SECOND CIRCUIT'S DECISION PRESENTS SEVERAL CIRCUIT SPLITS FULLY WARRANTING THIS COURT'S REVIEW.

A. The Ruling That Relevant State Law Never Defines "Arbitration" Cements A Widely Acknowledged Circuit Conflict.

Lloyd's essentially concedes that, as many courts (including the court below) have noted, "[t]he circuits are split on whether the relevant state-law definition of 'arbitration' presumptively applies for purposes of the FAA." Pet. 10. And Lloyd's tacitly admits the split's depth and breadth, as well: a 2-to-8 division that has sufficiently percolated over the past 25 years. The Fifth and Ninth Circuits "engage[] in pre-emption analysis," Lloyd's notes. Opp. 22. They presumptively "look[] to [relevant state] law [to] determine[] [whether] an [ADR procedure] is … arbitration within the meaning of the FAA," Opp. 24, and apply it "if [it] d[oes] not conflict with the FAA," Opp. 22. But, Lloyd's observes, "seven other circuits" always divine the meaning of "arbitration" from federal-judge-made law. Opp. 25. And Lloyd's recog-

nizes that the Second Circuit expressly joined them, "finding that … federal common law provides the meaning of 'arbitration' within the … FAA." Opp. 7. Thus, there is no question that there is a deep and longstanding circuit conflict on this key threshold issue.

Moreover, Lloyd's does not contest the Solicitor General's observation that "when," as here, "'the courts of appeals are … divided on the interpretation of a federal statute,' creating a 'conflict[] about whether to apply state or federal law as the rule of decision' concerning a matter on which Congress has not legislated a national rule, '[t]his Court's review is appropriate.'" Pet. 12-13 (quoting Reply Br. for Petitioner at 7, *Astrue v. Capato*, 132 S. Ct. 2021 (Oct. 26, 2011) (No. 11-159)). Indeed, just last term, this Court granted cert to resolve precisely such a conflict. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (deference to state law in construing "parent" in Indian Child Welfare Act). Ditto for OT 2011. *Astrue*, 132 S. Ct. 2021 (2012) (deference to state law in construing "child" in Social Security Act). And Lloyd's does not even try to refute our thorough demonstration (Pet. 26-35) that the particular deference-to-state-law issue presented here is surpassingly important.

Yet, Lloyd's declares that "there is no need … for this Court's guidance." Opp. 21. Lloyd's points first to the Ninth Circuit's decision in *Portland General Electric Co. v. U.S. Bank Trust National Ass'n*, 218 F.3d 1085 (9th Cir. 2000). Like that court's earlier decision in *Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579 (9th Cir. 1987), the Ninth Circuit in *Port-*

land General Electric looked to relevant state law to inform the definition of "arbitration." But, according to Lloyd's, it "did not assess whether [such] law promoted federal policy, substituting instead a rigid deference to state law," and thereby "misunderstood" *Wasyl*'s preemption framework. Opp. 23. This "misunderst[anding]" (*id.*), Lloyd's says, diminishes the circuit conflict.

Lloyd's is incorrect. As an initial matter, Lloyd's misreads *Portland General Electric*. As Lloyd's notes, the Ninth Circuit in *Wasyl* made its "preemption analysis" explicit. Opp. 22. In *Portland General Electric*, the court (a) recognized at the outset that it "[wa]s governed by *Wasyl*," (b) recapitulated key aspects of *Wasyl*, and (c) avowedly reached its decision "under *Wasyl*." 218 F.3d at 1086, 1089. Thus, the obvious conclusion is that the *Portland General Electric* court did engage in preemption analysis, but simply declined to recite every jot and tittle of it, as Lloyd's observes that courts are entitled to do (Opp. 32).

Moreover, if Lloyd's is right, that only *strengthens* the circuit conflict. Suppose the Ninth Circuit in *Portland General Electric* really did usher in "a rigid deference to state law." Opp. 23. That would present even *more* evidence of that court's commitment *not* to categorically apply a federal-judge-made definition of "arbitration" across the board.

Next, Lloyd's tries to cast the Ninth Circuit's position in favor of relevant state law as somehow tentative. It contends that the Ninth Circuit "is inclined to" "correct itself" and abdicate any measure

of deference to state law (Opp. 24), citing the fact that "all three members of the *Portland Gen*[*eral*] *Electric* panel felt compelled to concur to state their disagreement with *Wasyl*" (Opp. 23). To hear Lloyd's tell it, the Ninth Circuit is champing at the bit to turn *Wasyl* into ancient history at the first opportunity.

The facts, however, prove otherwise. The Ninth Circuit *had* that opportunity in *Portland General Electric*, when the losing party asked for en banc rehearing. The court denied rehearing, however, and not a single judge issued an opinion dissenting from that denial. 99-35189 Docket (9th Cir. Oct. 13, 2000). The law of the Ninth Circuit is clear and unequivocal, and the circuit conflict awaits and requires resolution by this Court.

B. The Circuits Are Split On Whether "Arbitration" Must Resolve The Entire Cause Of Action And Whether It Must Employ An Adversarial Process.

As to the federal-common-law definition of "arbitration," Lloyd's does not attempt to deny the clear circuit conflicts. Nor can it dispute the importance of this critical FAA issue.

1. Lloyd's does not dispute that the circuits that categorically resort to federal-judge-made law are "split [3-to-4] on the important issue of whether an ADR procedure that [may] not necessarily resolve the plaintiff's entire claim [can ever] constitute[] 'arbitration.'" Pet. 14. Lloyd's simply argues the merits, asserting that the circuits disagreeing with the

court below "sidestep[]" the FAA and "ignore[] other controlling law." Opp. 25. This, however, is irrelevant to the existence of the conflict.

2. Lloyd's also basically concedes that "the Second Circuit became the first court of appeals to hold that 'arbitration' can encompass a decision based on personal observation … and does not require any sort of adversarial process." Pet. 16. All Lloyd's can muster in response is its own view that use of an adversarial process is not "central" to the "arbitration"-or-not determination. Opp. 27. This characterization, however, is belied by the undisputed fact that every other circuit that has addressed the issue has *always* found an adversarial process to be an essential component of "arbitration." Thus, there is a clear conflict on this point as well, and there can be no real dispute that the conflict goes to a fundamental legal issue.

* * *

This case squarely presents three related circuit conflicts. Any one on its own fully warrants this Court's review. Together, they present a compelling circumstance mandating this Court's immediate intervention.

II. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S RULINGS.

Lloyd's does not contest that this Court's FAA cases have repeatedly held that "[r]elevant state law concerning a particular issue applies so long as it will not 'undermine the goals and policies of the

FAA' … and can operate 'without doing violence to the policies behind … the FAA.'" Pet. 19 (quoting *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). Nor does Lloyd's deny that "[t]his Court has frequently held that, when a federal statute touches upon matters of traditional state concern," such as contract law, "'[t]he presumption that state law should be incorporated … is particularly strong.'" Pet. 20 (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991)).

Yet, Lloyd's asserts that "[t]he 2d Circuit's reliance on federal common law … does not conflict with any decision of this Court." Opp. 10. Lloyd's is wrong.

Lloyd's begins with a weaker proposition: that *some* of this Court's decisions *support* the ruling below. It points to a line of cases holding that "absen[t] a plain indication to the contrary, Congress … [does] not mak[e] … [a] federal act dependent on state law" (Opp. 9), and claims that there is no such indication here.

Even this weaker claim fails. Despite lauding this Court's decision in *Kamen* (Opp. 20), Lloyd's apparently fails to realize that it renders the federal-common-law presumption inapplicable here. The FAA represents a congressional overlay upon ordinary contract law, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) ("The FAA reflects the overarching principle that arbitration is a matter of contract."), an "area[] in which private parties have entered legal relation-

ships with the expectation that their rights and obligations would be governed by state-law standards," *Kamen*, 500 U.S. at 98. Accordingly, in the FAA context, there is a "particularly strong" "presumption that state law should be incorporated" as the rule of decision. *Id.*

Indeed, this Court applies this strong presumption when construing terms related to traditional state-law domains even when they are used in federal statutes that (a) deal with federal subjects and (b) were passed pursuant to constitutional authority purportedly requiring "uniformity." *See* Pet. 20-22. Here, however, the state-contract-law term ("arbitration") appears in a federal statute (the FAA) that (a) deals entirely with traditional state-law matters (contracts) and (b) was passed pursuant to a constitutional provision *without* any uniformity requirement (the Commerce Clause). *See id.* The presumption in favor of state law applies with full force.[1]

Lloyd's says that this presumption has been overcome. In its view, "Congress certainly intended national uniformity in passing the FAA, as its purpose was to overcome traditional state hostility to arbitration," so the federal-judge-made definition must apply across-the-board. Opp. 19.

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[1] Additionally, the case on which Lloyd's principally relies for the contrary presumption, *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), *see* Opp. 19-20, is itself on shaky ground, as this Court recently granted review to revisit its deference-to-federal-common-law holding (though it ultimately ruled on other grounds). *See Adoptive Couple*, 133 S. Ct. at 2560.

Not so. This Court has consistently recognized that this purpose does *not* compel across-the-board uniformity. Again and again, it has held preempted only those state laws that frustrate the FAA's purpose.[2] Pet. 19-20.

Indeed, the undisputed evidence proves just the opposite of what Lloyd's posits. The states were defining "arbitration" during the time leading up to the FAA's passage. Pet. 18. The statute's principal drafter explained to Congress that, should it not legislate a federal definition, "th[e] existence" of "arbitration agreements" would remain "a matter of substantive"—*i.e.*, state—"law." *Arbitration of Interstate Commercial Disputes: Joint Hearings Before the Subcomms. of the Comm. on the Judiciary*, 68th Cong. 30 (1924). Congress declined to do so. Thus, the FAA's legislative background, too, thwarts the position Lloyd's embraces.

Finally, Lloyd's argues that the conflict does not matter because third-physician review is not "arbitration" under New York law. That, however, simply misstates New York law. As we explained in the Petition (at 6), according to New York law, "arbitration" generally (1) "resolves the whole controversy between the parties," and (2) contemplates adversarial proceedings. *Penn Cent. Corp. v. Consol. Rail Corp.*, 436 N.E.2d 512, 516 (N.Y. 1982); *see* N.Y.

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[2] Accordingly, there is no merit to the speculative fear that, under Dr. Bakoss's approach, states could "define themselves out of the Act" (Opp. 32). Because such state laws would (by hypothesis) frustrate the FAA's purpose, the federal-common-law definition would preempt them.

C.P.L.R. § 7506. Thus, plainly, third-physician review is not "arbitration" under New York law.[3]

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE CONFLICTS PRESENTED.

Having essentially waved the white flag in the face of three substantial circuit conflicts, Lloyd's has no choice but to resort to the respondent's last refuge: claiming that this case has vehicle problems. Unfortunately for Lloyd's, however, it does not.

A. The Fact That This Case Arises Under FAA Chapter 2 Is Not Problematic.

Lloyd's says that the decision below is a poor vehicle because it arose under Chapter 2 of the FAA, whereas the circuit splits are "conflicts between FAA Chapter 1 cases." Opp. 9. Lloyd's gives three reasons why it thinks that this makes a difference. None has merit.

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[3] None of the supposedly contrary cases Lloyd's cites even questions whether a particular ADR procedure is "arbitration." *See* Opp. 34 (citing *Am. Ins. Co. v. Messinger*, 371 N.E.2d 798, 800 (N.Y. 1977) (whether "determination made in … arbitration … is binding in … subsequent [court] action"); *Instructional Television Corp. v. NBC*, 357 N.Y.S.2d 915, 916 (N.Y. App. Div. 1974) (whether "arbitration clause was unworkable and should not be enforced"); *Brooks v. BDO Seidman, LLP*, 917 N.Y.S.2d 842, 846 (N.Y. Sup. Ct. 2011) (whether "use of summary judgment in arbitration proceedings could be considered misconduct" where no "refusal to hear pertinent evidence")).

First, Lloyd's says, this means that the court below did not isolate the term "arbitration." Chapter 2 "covers more [arbitration] agreements than" Chapter 1, and Chapter 2 requires only that the case "relate[] to" such an agreement. Opp. 11. The district court's decision that federal-judge-made law always applies to *that overall inquiry*, and that, applying federal-judge-made law, *that overall inquiry* encompasses third-physician review, "is *the* ruling the 2d Circuit affirmed." Opp. 13 (emphasis added).

Not so. The threshold issue in the inquiry Lloyd's describes is whether the ADR clause is an "arbitration" agreement in the first place. Accordingly, the district court necessarily decided that federal-judge-made law always applies to "whether Defendants have established that the insurance policy at issue contains an arbitration clause," and that under such law, it does. P.A. 24a. The Second Circuit expressly affirmed this ruling, "hold[ing] now that federal common law provides the definition of 'arbitration'" and that the district court applied such law correctly. P.A. 7a.

Second, Lloyd's argues that Chapter 2 required the court below to apply an exceedingly lenient standard of review. In Chapter 2, the "arbitration"-or-not inquiry is jurisdictional. Opp. 12-13. As a result, Lloyd's says, purporting to invoke this Court's decision in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 629 n.3 (2009), the court below had to affirm so long as "Respondents' assertion that the third physician review process constitutes arbitration was not insubstantial, implausible, barred by

prior decisions of this Court, or otherwise devoid of merit." Opp. 13.

Lloyd's is wrong. The *Arthur Andersen* passage that Lloyd's misleadingly excerpts states in full: "Federal courts lack subject-matter jurisdiction when an asserted federal claim is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." 556 U.S. at 629 n.3. This just means that a non-frivolous federal *claim for relief* is *necessary* to maintain otherwise-proper federal jurisdiction.

Moreover, this point is irrelevant to the central conflict presented here, which concerns the antecedent question of the extent to which relevant state law defines "arbitration." Lloyd's does not dispute that the Second Circuit reviewed the district court's ruling on this issue *de novo*.

Third, Lloyd's gingerly asserts that "arbitration" in Chapter 2 "may" mean something different from "arbitration" in Chapter 1. Opp. 8. This argument contradicts the established rule that "a legislative body generally uses a particular word with a consistent meaning in a given context," *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972), such that "identical words used in different parts of the same act are intended to have the same meaning," even when those "different parts" were enacted at different times, *Sorenson v. Sec'y of the Treas. of the United States*, 475 U.S. 851, 860 (1986). These canons foreclose the chapter-by-chapter distinction Lloyd's tepidly offers.

This supposed distinction also ignores the fact that the FAA expressly requires Chapter 1 and Chapter 2 to be harmonized as much as possible. *See* 9 U.S.C. § 208. Additionally, the original legislative plan was for the substance of Chapter 2 to be inserted into Chapter 1, and "the reason for the change in plans … was basically to avoid the [logistical] confusion which might result from a series of minor changes in the different sections of [Chapter 1]," and not for any substantive reason. S. Rep. No. 91-702, at 5 (1970).

B. The Other Arguments Lloyd's Presents Are Equally Meritless.

Lloyd's attempts to paint this case as a poor vehicle for reviewing the threshold deference-to-state-law conflict because even if New York law applies and "the third physician process under New York law … were characterized as something other than arbitration," it "could still be enforced." Opp. 33-34.

That misses the point. The question is whether the decision below would come out differently. It plainly would. The court below held that the FAA applied, and therefore (because this case arose in the statute's jurisdictional context), the district court had jurisdiction. If New York law applies and third-physician review is not "arbitration," then the district court lacks jurisdiction.

Lloyd's also contends that because "the third physician process … never took place," this Court is "without an adequate record by which to assess" whether it actually would have resolved Dr. Bakoss's

entire benefits claim via an adversarial process. Opp. 9; *see* Opp. 28-31.

That is beside the point. Our Petition does not ask that *ex post* question. The question on which the circuits are split and on which the court below weighed in is the *ex ante* one: Can an ADR clause that does not *on its face* guarantee that the plaintiff's entire cause of action will be resolved through an adversarial process ever qualify as an agreement for "arbitration" of that claim? The only data required to answer this question are the ADR clause and the description of the cause of action. We have both. There *is* "an adequate record" (Opp. 9) on which to assess the circuit conflicts concerning the federal-judge-made definition of "arbitration."

* * *

This case presents three important circuit conflicts requiring this Court's resolution. Lloyd's cannot dispel their existence or their importance. And contrary to the strained contentions Lloyd's makes in opposition, this case presents an excellent vehicle to resolve these important legal issues.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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