No. 14-774

In the Supreme Court of the United States

ROBERT L. MYER AND
STRIDER MARKETING GROUP, INC., PETITIONERS

v.

AMERICO LIFE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

REPLY BRIEF FOR THE PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement for the petitioners made in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR THE PETITIONERS

This case presents a question of "who decides?" that has divided lower courts. As petitioners previously explained, when parties have contracted for institutional arbitration under the auspices of an arbitral body, the parties naturally (and often, as here, expressly) intend the arbitral body to resolve whatever disputes arise about the process of selecting an arbitration panel and the qualifications of panelists to serve. See Pet. 15-19. On judicial review under the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, a court must defer to the arbitral body's execution of its duties, so long as the arbitral body was arguably applying the parties' agreement. See Pet. 19-20.

Respondents disagree, insisting that the designated arbitral body here, the American Arbitration Association (AAA), "did not have the authority to arbitrate disputes over what [qualifications] appl[ied]" to panelists. Br. in Opp. 11. Though respondents occasionally

label this as a case-specific question "unique to the parties" (*id.* at 17), nowhere do they explain why the AAA—despite being "authorize[d] * * * to administer the arbitration," Pet. App. 129a; see *id.* at 53a-54a—lacked authority to arbitrate disputes over qualifications in this particular case. In the end, respondents can only justify the decision below with a general rule (of uncertain origin) that "courts reviewing arbitrator-selection disputes must determine the 'contractual method' of selecting arbitrators," and ordinarily "never defer." Br. in Opp. 17.

That no-deference rule has been rejected by most appellate courts to consider the question, but it was accepted by the court below. Respondents' arguments against deference conflict with this Court's FAA decisions. The deference issue is recurring, foundational to modern institutional arbitration practice, and squarely presented by this case. The petition for a writ of certiorari should be granted.

A. Respondents' Efforts To Justify The Decision Below Only Underscore Its Conflict With This Court's Decisions

Respondents try to avoid the conflict between the decision below and this Court's FAA precedents with both case-specific and more far-reaching arguments. None is persuasive.

1. As an initial matter, there is no merit to respondents' repeated (but uncited) claim that the AAA lacked a basis in this particular case to decide questions relevant to arbitrator selection and qualification.[1]

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[1] See, *e.g.*, Br. in Opp. 2 ("[T]he AAA did not interpret the arbitrator-selection provision * * * ."") (no citation); *id.* at 10 ("The AAA had no express contractual authority * * * .) (no

To the extent respondents contend that the AAA so clearly erred that it was not even "arguably construing or applying the [parties'] contract," *Oxford Health Plans LLC* v. *Sutter*, 133 S. Ct. 2064, 2068 (2013) (internal quotation marks and citations omitted), their argument is thoroughly contradicted by the record. The AAA's decision is readily grounded in the parties' agreement (as the dissenting Justices below explained, see Pet. App. 12a-20a), it is certainly worthy of deference on deferential review (as the Texas Court of Appeals explained, see *id.* at 33a-34a), and the majority below never suggested otherwise.

Respondents' argument is equally implausible if understood as a claim that the AAA had no authority over arbitrator selection and qualification. As the petition explains, securing those services is a *central purpose* of engaging an arbitral body. See Pet. 16-17. That intent is made express in the parties' agreement that "arbitration proceedings shall be conducted in accordance with the commercial arbitration rules of the American Arbitration Association." Pet. App. 53a-54a. "When parties agree to arbitrate under th[o]se rules, * * * they thereby authorize the AAA to administer the arbitration." *Id.* at 129a (AAA Rules Section R-2). In turn, "[t]he authority and duties of the AAA are prescribed in the agreement of the parties and in the[ ] rules," *ibid.*, and they include deciding any objection to panelist qualifications, "which decision shall be conclusive," *id.* at 132a (AAA Rules Section R-17(b)).

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citation); *id.* at 11 ("[T]he AAA did not have the authority to arbitrate disputes * * * .) (no citation); *id.* at 14 ("[T]he AAA was not an arbitrator, [and] had no power to construe [the parties' agreement].") (no citation).

Nowhere do respondents grapple with the fact that, as in any institutional arbitration, the AAA's authority exists because the parties agreed to proceed before the AAA under the AAA's rules. As this Court has explained in interpreting a contract incorporating the AAA's rules, those rules "are not secondary interpretive aides that supplement our reading of the contract; they are prescriptions incorporated by the express terms of the agreement itself." *C & L Enters., Inc.* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 419 & n.1 (2001); see Pet. App. 3a (noting the parties' incorporation of the AAA's rules).

Under this Court's precedents, then, the onus is on respondents to explain why the AAA's rules, incorporated here as they are in myriad other proceedings, do not give the AAA authority over panelist selection and qualification. Certainly, nothing in the parties' agreement withdraws the AAA's authority.[2] And most importantly for this Court's purposes, the parties' agreement is typical of institutional arbitration agreements; nothing meaningfully distinguishes the contractual appointment of the AAA here from the contractual appointments of the arbitral bodies in the appellate cases discussed in the petition. See pp. 10-11, *infra* (discussing cases in which the parties appointed an arbitral body while also agreeing on further terms of panel selection and qualification).

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[2] The Texas Court of Appeals held that "[respondents'] argument that the AAA only applied to proceedings after the arbitrators were empaneled is an unreasonable interpretation [of the parties' agreement]." Pet. App. 31a. The state supreme court likewise saw "no dispute [that] the AAA rules would govern matters on which the [parties'] agreement is silent," *id.* at 9a, such as the process of resolving panelist qualifications.

2. Without a defensible case-specific reason for refusing the AAA deference, respondents try out a motley assortment of arguments for why courts should never (or rarely) defer to arbitral bodies' decisions about arbitrator selection and qualification. None is persuasive. Indeed, respondents' game attempts to justify the result below only underscore the need for this Court's review because respondents' logic would potentially control in *every* case involving institutional arbitration, yet it directly conflicts with this Court's settled FAA precedent.

a. Initially, respondents offer the *non sequitur* that because FAA § 5, 9 U.S.C. 5, provides that the parties' "method [of panelist selection] shall be followed," courts must always engage in *de novo* review of panelist selection disputes. Br. in Opp. 9-10. As previously explained, however, Section 5 says nothing about judicial review. Pet. 21. Indeed, inasmuch as the parties had expressly agreed that the AAA—not the Texas courts—would administer the selection process, the decision below stands out as violating Section 5's command to honor the process provided by the parties.

b. Later, respondents abandon Section 5 in favor of decisions announcing that "arbitrators have no power to determine their own jurisdiction." Br. in Opp. 12 (emphasis omitted). But the problem of self-declared jurisdiction is not presented here. Parties designate an arbitral body to oversee the selection and qualification of panelists precisely to avoid the bootstrapping problems associated with panelists deciding their own authority. The relevant question here is not whether a court should defer to the conclusion of the *panelists* hearing the parties' substantive dispute that they themselves were properly seated (though the panel

here did so conclude, Pet. App. 67a). Rather, the question is whether to defer to *the AAA's* decision. See *id.* at 85a (AAA letter announcing that "the Association has determined that Ernest Figari will be removed as arbitrator in this matter").

As previously explained, the agreement that the AAA would decide questions about the selection and composition of the panel is an enforceable agreement under FAA § 2, 9 U.S.C. 2, in exactly the way this Court has found other agreements to arbitrate discrete issues enforceable. See Pet. 17. The unwillingness of respondents and the court below to give effect to the parties' agreement contradicts the Court's decisions.

c. Switching gears again, respondents fall back to proposing that some aspects of panelist selection and qualification could be reviewed deferentially, but others *de novo*. Respondents' novel regime would distinguish between the "*interpretation* of what [selection and qualification] rules apply under the arbitration agreement" (a matter, respondents say, for the court) and the "[arbitral] body's *application* of th[ose] rules" (to which a court should defer). Br. in Opp. 20; see *id.* at 10 (asserting that the AAA lacked authority "to determine arbitrator-qualification requirements").

But, as respondents admit, this boils down to a claim that "question[s] of law for a court" (*e.g.*, contract interpretation) are presumptively not committed to arbitrators and do not merit deference. Br. in Opp. 19. That contradicts the "ordinary presumption that the *interpretation* and application of procedural provisions * * * are primarily for the arbitrators" (here, the AAA as the arbitral body). *BG Group, PLC* v. *Republic of Argentina*, 134 S. Ct. 1198, 1210 (2014) (emphasis added). In opting for institutional arbitration, the

parties "bargained for the [AAA's] construction of their agreement" on panelist qualifications—not a court's construction imposed on judicial review. *E. Associated Coal Corp.* v. *United Mine Workers*, 531 U.S. 57, 62 (2000). Indeed, the FAA does not even permit *de novo* judicial review of an arbitral body's supposed error of law in the discharge of its duties. *Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576 (2008). This Court has, accordingly, deferred to arbitrators' legal conclusions despite some skepticism of their merits. See, *e.g.*, *BG Group*, 134 S. Ct. at 1212-1213; *Oxford Health*, 133 S. Ct. at 2070.

Uniform deference is practical and what arbitrating parties would expect. Respondents point to no comparable practice of bifurcating matters of contract interpretation and application between court and arbitrator. Such a distinction readily collapses. Cf. Br. in Opp. 20 (suggesting, circularly, that a court should " 'defer[ ]' to arbitrator-selection decisions by an arbitral body [only] after it has first determined that the arbitral body followed the arbitrator selection rules"). It risks squandering parties' resources to put them through an arbitration before a panel that a court later may freely decide was improperly constituted. And respondents' approach creates an irresistible invitation for the disappointed party to "bring arbitration theory to grief in postarbitration process." *Hall Street*, 552 U.S. at 588. Such judicial review can only frustrate the "national policy favoring arbitration." *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984).[3]

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[3] Respondents decry "[g]iving arbitral bodies unreviewable power to make arbitrator selection decisions," Br. in Opp. 22, but that is precisely the status the FAA grants to arbitrators making awards on the merits. Parties desiring judicial super-

3. Respondents do not quarrel with the bedrock principle that deference is due to an arbitral body's decisions on issues committed to its responsibility. "Because the parties bargained for the [AAA's] construction of their agreement" about the selection and qualification of the panel, a decision by the AAA "even arguably construing or applying the contract must stand." *Oxford Health*, 133 S. Ct. at 2068 (internal quotation marks and citations omitted). As explained, the AAA's decision here easily satisfies that test, and the failure of the court below to apply that deferential test stands in conflict with this Court's decisions.

B. Respondents Fail To Reconcile The Widespread Division Among Lower Courts

The question presented has divided lower courts. A substantial majority has recognized that the chosen arbitral body is responsible for interpreting and applying the parties' agreement regarding the selection and qualifications of a panel, subject only to extremely deferential review by a court. But a minority of appellate courts, including the court below, has reviewed such questions *de novo*. See Pet. 21-26. Respondents do not deny that these divergent decisions about whether to defer produce divergent outcomes.

Instead, respondents abandon their arguments on the merits (see pp. 5-7, *supra*) and offer the novel claim that the numerous decisions of lower courts in this

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intendence of arbitrator selection can simply provide for court appointment under FAA § 5, 9 U.S.C. 5. In practice, though, parties prefer institutional arbitration. See, *e.g.*, 1 Larry E. Edmonson, *Domke on Commercial Arbitration* § 6:1, at 6-5 to -6 (3d ed. 2014) (citing a 29-fold increase in AAA-administered proceedings between 1981 and 2011, with nearly 200,000 such proceedings annually).

area can all be explained by "courts 'defer[ring]' only to decisions by arbitral bodies that are unambiguously authorized to apply their own rules." Br. in Opp. 21. This new rationalization is necessary because none of respondents' arguments on the merits can reconcile the disparate outcomes in the circuits. If lower courts were consistently adhering to respondents' positions on the merits, then courts would generally be engaging in *de novo* review, or perhaps discriminating carefully between questions of "interpretation" and questions of "application"—yet that is decidedly *not* what most lower courts are doing.

Respondents' post hoc rationale for the lower courts' decisions—deference to arbitral bodies "authorized to apply their own rules"—also suffers from the considerable disadvantage that it was not, in fact, the rationale offered by the courts themselves. Rather, as the petition explains, lower courts following the majority rule of deference to arbitral bodies consistently explain their decisions as a straightforward application of *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), and the presumed arbitrability of procedural issues. See Pet. 21-23. That analysis is correct, it marks the point of departure between the majority and minority views in lower courts, and it exposes the error in the decision below.[4]

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[4] Respondents cannot fairly claim support (*e.g.*, Br. in Opp. 6, 19-21) from the fact that courts—including this Court—sometimes find it helpful to examine the parties' contractual language for themselves to understand why deference is warranted. See, *e.g.*, *BG Group*, 134 S. Ct. at 1212 (analyzing a legal issue to explain why the arbitrators' determination of that issue was "well within the arbitrators' interpretive authority").

In all events, respondents fail to reconcile the division among lower courts. If the dispositive question is whether the arbitral body is "authorized to apply [its] own rules," then the decision below is clearly incorrect, because the parties expressly agreed to proceed under the AAA's rules. See pp. 2-4, *supra*. In fact, looking past respondents' misstatement of the facts of several key decisions, the facts here are materially indistinguishable from those of cases respondents would distinguish away as ones in which "it was settled what rules applied." Br. in Opp. 17. At least four circuits that follow the majority rule of deference have done so in cases in which the parties' agreement mirrored the agreement here by incorporating an arbitral body's rules and separately setting out other panel qualifications—creating the same supposed "threshold issue about the meaning and scope of an arbitrator-selection clause" that respondents say warranted *de novo* review here, Br. in Opp. 18. In particular:

- *Adam Techs. Int'l S.A. de C.V.* v. *Sutherland Global Servs., Inc.*, 729 F.3d 443, 444-445, 451-452 (5th Cir. 2013) (ICDR rules coupled with a separate agreement on when parties were required to appoint arbitrators; rejecting "argument that [deference] disappears because of [this separate agreement]")
- *Crawford Grp., Inc.* v. *Holekamp*, 543 F.3d 971, 974-977 (8th Cir. 2008) (deferring to "the AAA's decision that [a particular arbitrator] was qualified to serve" because that decision "[wa]s an arguable interpretation of [a separate provision of the parties' arbitration agreement]")

- *Prostyakov* v. *Masco Corp.*, 513 F.3d 716, 719, 723-725 (7th Cir. 2008) (deferring to the AAA's administration of an arbitration notwithstanding the disappointed party's claim that the parties' agreement providing for "private" arbitration withdrew the AAA's authority)
- *Dockser* v. *Schwartzberg*, 433 F.3d 421, 423-426 (4th Cir. 2006) (Wilkinson, J.) (dispute about whether parties had separately agreed to appoint only one arbitrator; deferring to the AAA's decision under that separate provision)

Most prominently, those circuits include the Fifth Circuit, creating an indisputable and intolerable conflict between state and federal courts in Texas that requires this Court's resolution.

C. The Question Presented Merits Review And This Case Is An Excellent Vehicle

The question presented is recurring and fundamental to modern arbitration practice. See Pet. 26-27. Respondents do not disagree; indeed, their brief cites even more decisions on the subject than did the certiorari petition. Nor do respondents deny how attractive a vehicle this case is: the arbitration proceeded under the auspices of the leading arbitral body; the parties agree that the FAA controls here; and the record clearly reflects the AAA's resolution of the qualification issue. See Pet. 28-29.

Respondents contend the case is unsuitable for only two reasons worth comment. First, they assert that petitioners either failed to argue for deference below or "conceded" the point. Br. in Opp. 2, 4. Not so. The Texas Court of Appeals actually *agreed* with petitioners that deference was warranted, relying on cases in

the majority line of authority. Pet. App. 33a; see Pet. 25. And the certiorari petition catalogs petitioners' persistent claim for deferential review. Pet. 10, 11, 12, 13, 14; Pet. App. 90a-126a. Respondent's related observation (Br. in Opp. 7-8) that petitioners *also* argued that they should prevail even on *de novo* review is beside the point. Given the competing minority line of authority favoring *de novo* review, making that alternative argument was entirely prudent.

Second, respondents emphasize that the "state law contract interpretation ruling [below] is not reviewable [in this Court]." Br. in Opp. 2. True enough, but as previously explained (Pet. 28-29) that makes this case *more* attractive than one without a definitive *de novo* judicial interpretation in the record. This case's posture ensures that the Court's decision will answer the question presented and resolve the division in the lower courts: Respondents can prevail only if they establish that the AAA's decision was subject to *de novo* review under the FAA, while petitioners will prevail if this Court follows the usual rule that decisions in arbitration must be reviewed deferentially.

* * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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APRIL 2015