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.,

Respondents.

On Petition for a Writ of Certiorari to The Supreme Court of Texas

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The parties' arbitration agreement defines specific qualification requirements for arbitrators. Nevertheless, the AAA disqualified Americo's chosen arbitrator because he did not meet a qualification requirement that was added to the AAA rules five years after the parties set their own requirements. Applying state-law principles of contract construction, the Supreme Court of Texas held that the specific provision on arbitrator qualification requirements displaced any AAA rules on the same subject and, therefore, "the arbitration panel was formed contrary to the express terms of the arbitration agreement."

Because the AAA applied the qualification requirements in its own rules rather than those set forth in the parties' contract, the case does not present a question of "deference" to the AAA's interpretation of the arbitration agreement. Instead, the question is whether courts may determine – and enforce – the contractual method of selecting arbitrators.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Robert L. Myer and Strider Marketing Group, Inc.

Respondents are Americo Life, Inc., Americo Financial Life and Annuity Insurance Co., Great Southern Life Insurance Co., The Ohio State Life Insurance Co., and National Farmers Union Life Insurance Co. The ultimate parent company of all Respondents is Financial Holding Corporation, which is privately owned. There is no parent or publicly held company owning 10% or more of Financial Holding Corporation's stock.

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Respondents Americo Life, Inc., Americo Financial Life and Annuity Insurance Co., Great Southern Life Insurance Co., The Ohio State Life Insurance Co., and National Farmers Union Life Insurance Co. (collectively, "Americo") respectfully ask the Court to deny the Petition for Writ of Certiorari in this case.

STATUTORY PROVISIONS INVOLVED

Two provisions in the Federal Arbitration Act ("FAA") are relevant to the Petition. Section 5 of the FAA provides:

> If in the agreement provision be made for a method of naming or appointing an arbitrator

> or arbitrators or an umpire, such method shall be followed ….

9 U.S.C. § 5.

Section 10 provides that an arbitration award may be vacated:

> where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(4).

INTRODUCTION

Petitioners struggle to frame an issue on which they can manufacture a conflict that appears worthy of review. Their efforts fail for two reasons.

First, the case does not present the question raised in the Petition. The Texas Supreme Court decided this case as a straightforward issue of contract interpretation. Neither side asked that Court to defer to the AAA's interpretation of the parties' arbitrator-selection provision because the AAA did not interpret the contractual language. Instead, the AAA disqualified Figari using its own rules. The issue presented to the Texas courts was whether the contract required a different standard. The Texas Supreme Court said yes. That state law contract interpretation ruling is not reviewable here. Moreover, because the AAA did not interpret the arbitrator-selection provision, this case does not present an appropriate vehicle to address issues of deference to AAA decisions. Courts cannot defer to a decision that was not made.

Second, there is no conflict in the authorities on the hypothetical question Petitioners present. None of the

decisions cited (Pet. at 21-26) recognize any disagreement among the circuits. To the contrary, those cases unite around the same core principle: The arbitration method selected by the parties "shall be followed" in accordance with the FAA's mandate. *See* 9 U.S.C. § 5. Petitioners' cases are thus consistent on the controlling principle of law.

In short, Petitioners' arguments cannot be reconciled with the material facts, Petitioners' arguments in the state courts, the FAA, and federal arbitration law, as demonstrated below:

STATEMENT OF THE CASE

1. This dispute arose from an arbitration agreement in a 1998 contract whereby Petitioners sold some life insurance marketing companies to Americo. (P-App. 2a.) The arbitration agreement sets a specific method for appointing arbitrators whereby each party would "appoint one arbitrator" who is a "knowledgeable, independent businessperson or professional." (P-App. 53a.) Once selected, "such two arbitrators to select the third." (*Id.*) Two paragraphs after defining the method for selecting arbitrators, the arbitration agreement states that "[t]he arbitration proceedings shall be conducted in accordance with the commercial arbitration rules of the American Arbitration Association." (P-App. 53a-54a.)

2. "When the parties executed their agreement, AAA rules did not require arbitrator-impartiality…." (P-App. 3a.) Instead, "[t]he industry norm…was that party-appointed arbitrators were advocates, and the AAA rules in place at that time presumed such arbitrators would not be impartial unless the parties specifically agreed otherwise." (P-App. 9a.)

3. The single ground for the disqualification at issue came into existence five years after the parties executed their agreement, when the AAA changed its arbitrator-selection rules to add an impartiality requirement. (*See* P-App. 3a (citing AAA Commercial Arbitration Rules R-17(a)(I) (2003)).) When Americo filed a demand for arbitration in 2005 to resolve a dispute over payments under the contract, it appointed Ernest Figari, Jr., as its designated arbitrator. (P-App 55a.) Figari had served on two previous panels under the parties' arbitration agreement. (*Id*.)

As the trial court found, Figari satisfied the stated contractual requirements to serve as an arbitrator. (*See id*.) Petitioners thus objected to Figari serving as an arbitrator only on the ground that he did not satisfy the new impartiality requirement in AAA Rule R-17. (P-App. 23a, 57a-58a.) Petitioners described their objection to the trial court thus: "The Myer parties objected immediately on the grounds that [Figari] was not neutral …. *** We've got a clear determination by the AAA *under its own standards* that Mr. Figari … did not meet that standard." (R-App. 2a, 4a (emphasis added).)

4. The AAA sustained Petitioners' objection and disqualified Figari from serving on the panel. Its disqualification letter confirms that the AAA's determination was made "in accordance with the [AAA's impartiality] Rules." (*See* P-App. 85a.) The letter makes no reference to the parties' contractual requirements for qualification. (*Id*.)

Petitioners conceded that the dispute over Figari's disqualification could have been submitted to a court.[1]

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[1] "[I]f Americo believed the AAA did not have the authority to disqualify Figari, Americo should have timely presented the

But, rather than disrupting the arbitration proceedings by seeking immediate judicial intervention, Americo "stated that it would proceed to arbitrate without waiving its objection and without waiver of the right to appeal any decision based on the removal of Figari." (P-App. 38a; *see also* P-App. 58a-59a.) Petitioners agreed, stating that "Americo is free to have its 'standing objection' in this proceeding." (P-App. 60a.) Over Americo's objection, a panel ultimately appointed by the AAA issued an award in Petitioners' favor. (P-App. 65a.)

5. Americo's motion to vacate the award complained that it "was not made by arbitrators who were appointed under the method provided in the Agreement" and, therefore, the arbitrators had no authority to decide the case. (P-App. 89a.) The trial court agreed, finding that Figari "was a 'knowledgeable and independent businessperson or professional' as required by Section 3.3 of the New Trailer Agreement" and, therefore, he was "qualified to serve as an arbitrator under the terms of the New Trailer Agreement." (P-App. 55a ¶ 5; 60a ¶ 17.) The court thus concluded that, because the award "was not issued by a properly appointed and authorized arbitration panel, [it] is void and has no binding effect." (P-App. 61a, ¶ 6.)

6. Petitioners appealed. The Texas Supreme Court reviewed the case twice. First it reversed (by per curiam opinion) the court of appeals' ruling that Americo waived its challenge. It held that Americo preserved the right to argue its interpretation of the arbitration agreement when it told the AAA:

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dispute about disqualification of Figari to any court that Americo did believe had authority to resolve that dispute." (R-App. 14a.)

> [T]he AAA Commercial Arbitration Rules do not govern the selection of and qualifications for arbitrators to hear disputes between Americo and Myer.... The Agreement states that "[e]ach arbitrator shall be a knowledgeable, independent businessperson or professional."

(P-App. 41a.)

7. On remand, the court of appeals reversed on the merits, but it did so based on *its* interpretation of the contract, not some interpretation by the AAA:

> We agree with appellants that the two provisions involving selection of the arbitrators can be read together and harmonized to avoid any irreconcilable conflict.

(P-App. 29a.) It thus reversed "[w]ith this contract interpretation in mind." (P-App. 32a-35a.)

8. The Texas Supreme Court granted review again and reversed in a 5-4 decision. Notably, neither the majority nor the dissenting justices adopted the approach Petitioners advocate here—of deferring to the AAA's decision to apply its own arbitrator-selection rules. Like the court of appeals, the majority and dissenting justices applied Texas contract law "to determine what the parties specified concerning the arbitrator-selection process." (P-App. 4a-5a.) Both recognized that the core issue was whether the agreement authorized the AAA to impose its own "impartiality" requirement, adopted five years after the parties set their own qualification requirements.

The decision was made under state-law principles of contract construction (P-App. 5a), honoring this Court's holding that "the interpretation of an

arbitration agreement is generally a matter of state law…." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010). The Court addressed head-on whether, under Texas contract law, the parties' agreement to conduct arbitration proceedings under the AAA rules modified the specific arbitrator-qualification requirements agreed upon by the parties. The Court recognized that the issue was not whether the contractual standards could be "harmonized" with the AAA rules, but whether the parties' method contemplated the later-enacted AAA neutrality rule and thus required arbitrators to be "impartial." (P-App. 10a.) It held, as a matter of the state contract law Petitioners urged it to apply, that "[t]he AAA impartiality rule conflicts with the parties' agreement," and thus "the agreement's voice is the only to be heard." (P-App. 11a.)

Having resolved the dispositive question of contract construction, the Court held that "the arbitration panel was formed contrary to the express terms of the arbitration agreement," and, therefore, the improperly appointed panel "exceeded its authority when it resolved the parties' dispute." (*Id.*) Pursuant to FAA § 10(a)(4), the Court "reverse[d] the court of appeals' judgment and reinstate[d] the trial court's order vacating the arbitration award." (*Id.*)

9. Resolution of that core or threshold issue by *courts* is precisely how Petitioners urged the case must be decided. They told the trial court: "If there were, in fact, a real conflict … then you [the trial judge] would go to principles of contract construction." (R-App. 5a.) They told the Texas court of appeals: "[T]he Texas rules of contract interpretation – which require the court to give effect to all contract provisions that the parties negotiated and agreed to – do not allow the

trial court to conclude that Americo's interpretation was the parties' intent." (R-App. 13a.) "[T]here is no basis for [Americo's] conclusion when Texas rules of contract interpretation are applied." (R-App. 12a.) They told the Texas Supreme Court: "Americo's interpretation only works if this Court ignores all relevant provisions of the Arbitration Agreement and fails to harmonize the entire agreement as the court of appeals properly did so. No rule of contract interpretation supports Americo's argument." (R-App. 18a.)

10. Even the four dissenting justices in the Texas Supreme Court agreed that the threshold issue turned on "fairly standard, unremarkable principles of contract interpretation." (P-App. 14a.) In concluding that the agreement "require[d] the arbitrators to be impartial" (P-App. 20a), the dissenters never suggested that the Court should have deferred to the AAA to determine what the agreement required.

REASONS FOR DENYING THE PETITION

Petitioners contend that this case presents a disputed issue about how a court should review an arbitral body's "interpretation and application" of an arbitration agreement. (*See* Pet. at I.) However, their plea for "deference" to the AAA's decision depends on an argument – made for the first time – that the AAA, sitting as an arbitrator, interpreted the contract and that interpretation is binding. Or, as Petitioners frame it: "'[T]he sole question' for a court asked to vacate an award under Section 10(a)(4) 'is whether the [AAA] (even arguably) *interpreted the parties' [agreement about panelist qualifications]*, not whether [it] got its meaning right or wrong.'" (Pet. at 20 (quoting *Oxford Health Plans LLC v. Sutter*, 133 S. Ct.

2064, 2068 (2013)) (bracketed language added by Petitioners; emphasis added by Respondents).)

The argument's foundation is flawed:

A. The Core Issue Is a Question of Law Properly Decided by Texas Courts.

All nine justices on the Texas Supreme Court (and all three on the court of appeals) agreed with Petitioners that this case turns on a threshold question of contract construction: What arbitrator-qualification requirements apply under the arbitration clause? No principle of federal arbitration law prevented the Texas Supreme Court from considering that question or required the Texas Supreme Court to defer to the AAA's decision to ignore specific terms in the arbitration agreement. Just the opposite. Section 5 of the FAA and the AAA's own Rule R-12(a) (P-App. 130a) require that the parties' method "shall be followed." To effectuate this law, courts must be able to make a threshold determination about what the parties' arbitrator-selection agreement requires.

Because the case-determinative issue turns on a state-law matter of contract construction – which Petitioners have conceded throughout – and that issue has been decided by the highest court in Texas, the Petition presents no federal question for this Court's review. *See Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989).

B. The Case Does Not Present the Legal Issue Petitioners Want Decided.

Petitioners have the cart before the horse in framing the issue as one of deference – *i.e.*, whether a court should review an "arbitral body's interpretation and application of the parties' agreement regarding the

selection and qualification of an arbitration panel" deferentially or *de novo*. (Pet. at I.) The issue ignores the threshold question: Did the AAA have (and exercise) some power that required deference?

No! The AAA had no express contractual authority to interpret the arbitration agreement to determine arbitrator-qualification requirements. So this case is nothing like *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010), in which the arbitration agreement expressly conferred on arbitrators a power "to arbitrate threshold issues concerning the arbitration agreement." Here, the AAA was not expressly "appointed" to arbitrate whether the parties intended that the unknowable, later-enacted AAA standards would supplement the standards they carefully negotiated and agreed to. The AAA's authority was invoked purely to apply "its own"[2] impartiality rule as if that rule's applicability was a *fait accompli*.

Implying that the AAA had such interpretative authority – as Petitioners now do – flouts the notion that arbitrability and all its ramifications are rooted in the parties' agreement. Under a silent arbitration agreement, arbitrators have no authority to determine their own jurisdiction. *See AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 651 (1986).

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[2] Petitioners' consistent theme in every Texas court was that the "AAA was the proper forum to determine whether an arbitrator *met AAA's own standards*." (P-App. 97a (emphasis added); *see also* P-App. 108a (arguing that the FAA does not allow vacatur "for an arbitral body's disqualification of an arbitrator *under its own rules and standards*") (emphasis added).) Petitioners never argued that the AAA, rather than a court, was the proper forum to determine whether the AAA's arbitrator-qualification requirements were even applicable.

Because the AAA did not have the authority to arbitrate disputes over what arbitrator standards the parties intended to apply, or to interpret and apply its own construction of the applicable standards, this case is not the vehicle to decide the "Question Presented" in the Petition – whether to review the AAA's "interpretation and application of the parties' agreement" under a *de novo* or deferential standard. That question is purely hypothetical.

C. The Texas Supreme Court's Decision Does Not Conflict with this Court's Precedent.

Petitioners are off the mark in arguing that the Texas Supreme Court's opinion "conflicts with this Court's [FAA] precedents." (Pet. at 15-21.) None of the recited principles bear on – much less conflict with – the Texas Supreme Court's analysis. That is not surprising given that most of the opinion applies "fairly standard, unremarkable principles of contract interpretation." (P-App. 14a.) A state court's application of state-law principles to determine the contractual method of selecting arbitrators is hardly on a collision course with this Court's fundamental rules on arbitration policy.

1. For example, Petitioners merely presuppose the threshold issue when they assert that the Texas Supreme Court's decision "fails to respect this Court's repeated holdings that an agreement to arbitrate presumptively contemplates arbitration of threshold *procedural* matters." (Pet. at 14-15 (emphasis added).)

This case is not about whether *arbitrators* as opposed to a *court* should have decided a procedural matter relating to the dispute submitted to arbitration. *See BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1207 (2014). It is about whether

arbitrators lacked contractual authority to issue an award because the AAA violated federal law and its own rules in failing to follow the parties' contractual method for selecting arbitrators.

"[T]he decision of *how the arbitrator should be selected* is not a circumstance 'where parties would likely expect that an arbitrator would decide the gateway matter.'" *Redman Home Builders Co. v. Lewis*, 513 F. Supp. 2d 1299, 1311 (S.D. Ala. 2007) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (emphasis added)). Moreover, arbitrators have *no power* to determine their own jurisdiction, as this Court recognized in *AT & T Technologies*, 475 U.S. at 651; *see also Int'l Ass'n of Machinists & Aerospace Workers, Progressive Lodge No. 1000 v. Gen. Elec. Co.*, 865 F.2d 902, 904 (7th Cir. 1989) ("The arbitrator is not the judge of his own authority…."). Thus, whether arbitrators were improperly selected and lacked authority to issue an award is not the sort of "procedural" matter that is presumptively for arbitrators to resolve. *See BG Grp.*, 134 S. Ct. at 1207.

As the Fourth Circuit has explained, issues that directly involve an arbitration panel's authority are jurisdictional, not procedural:

> [E]ven if the arbitrators here could somehow have interpreted the contract to determine how they should be selected (which appears impossible because the determination of how they should be selected obviously had to precede their selection), their interpretation would not be entitled to deference because it would have involved a determination of their own jurisdiction.

Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos, 25 F.3d 223, 226 (4th Cir. 1994). There is neither "any authority nor any reason to defer to the contractual interpretation of … an arbitral forum" on questions of whether the arbitrators were properly appointed and, therefore, had authority to resolve the parties' dispute. *See id.* at 225-26. "To hold otherwise would place arbitrators in the precarious position of deciding whether they have authority to decide." *Redman*, 513 F. Supp. 2d at 1311.

Labeling the AAA's disqualification decision as "procedural" thus is semantic gamesmanship to evade the threshold question over the contractual requirements for selecting arbitrators and the "well-established" rule "that it is the *court's* responsibility to interpret an arbitration agreement's language regarding arbitrator selection." *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 619 (D.S.C. 1998) (citing *Cargill Rice*, 25 F.3d at 225) (emphasis added).

That rule undergirds the balance and integrity of the arbitral process. Requiring deference to a ruling arbitral bodies have no power to make mocks the federal mandate that parties' agreements on the method of arbitrator selection "shall be followed." *See* 9 U.S.C. § 5.

2. When the contract-interpretation issue that controls the outcome is properly defined, the abstract principles that usher the Petition on its journey toward "deference" are reduced to meaningless abstractions.

For example, the rule that "most questions arising in arbitration are presumptively matters for the arbitrator to resolve" (Pet. at 15) is irrelevant because the question is whether the arbitrators were appointed

in accordance with the contractual method. *See Cargill Rice*, 25 F.3d at 226; *Redman*, 513 F. Supp. 2d at 1311. If the arbitrators are not properly so appointed, there are *no* questions for them to resolve.

The principle that "a decision *by the AAA* 'even arguably construing or applying the contract must stand'" (Pet. at 15 (emphasis added)) is inapplicable. The case Petitioners cite, *Oxford Health*, 133 S.Ct. at 2068, involves judicial review of the *merits* of a decision by an arbitrator who was properly appointed and, therefore, contractually authorized to resolve the parties' dispute. Here, the AAA was not an arbitrator, had no power to construe the breadth of the arbitrator-selection clause, and did not do so.

Lastly, Americo's, not Petitioners', position is supported by the principle that, "if there is doubt * * * about the 'scope of arbitrable issues' [a court] should resolve that doubt 'in favor of arbitration.'" (Pet. at 15-16 (quoting *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (additional citations omitted)).) That principle confirms that interpretation of an arbitration agreement to determine the qualification requirements for arbitrators is for a court to decide. Here, the Texas courts properly exercised that power because it presents "a claim of fundamental error" that goes to "the arbitrator's power to render an award." *See Avis Rent A Car Sys., Inc. v. Garage Emps. Union, Local 272*, 791 F.2d 22, 24 (2d Cir. 1986).

To sum up: The threshold issue of what arbitrator-qualification requirements must be met under the parties' contract is a question for a court to decide. That question was decided by the Texas Supreme Court under state-law contract principles. Requiring courts to defer to an arbitral body's decision to *ignore* the contractual requirements not only violates FAA

§ 5, it is "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *See Stolt-Nielsen*, 559 U.S. at 684.

D. There Is No Conflict Among the Lower Courts Warranting Review—The Lower Courts Uniformly Enforce the FAA's Mandate to Honor the Parties' Method of Selecting Arbitrators.

1. Petitioners' attempt to mold the issues at stake into a national debate over the role of "deference" given to arbitral decisions founders on four key principles:

- Arbitrators "derive their authority to resolve disputes" from the parties' arbitration agreement. *AT & T Techs.*, 475 U.S. at 648-49.
- "[T]he central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen*, 559 U.S. at 682 (quoting *Volt Info. Scis.*, 489 U.S. at 479).
- "[T]he FAA lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen [and] what their qualifications should be …."[3] *Hall St.*

[3] There are many examples in the case law of parties exercising their right to define their own arbitrator-selection requirements. *See, e.g.*, *Crawford Grp., Inc. v. Holekamp*, 543 F.3d 971, 974 (8th Cir. 2008) (requiring "[e]ach arbitrator shall have experience in arbitrating matters substantially similar to the matter being arbitrated"); *Zeiler v. Deitsch*, 500 F.3d 157, 166 (2d Cir. 2007) (requiring arbitration before "three named arbitrators"); *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 831 (11th Cir. 1991) (requiring arbitration "before at least three arbitrators"); *Oakland-Macomb Interceptor Drain Drainage Dist. v. Ric-Man*

Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 586 (2008).

- When arbitrators are not selected using the contract-specified method, they lack authority to issue an award (and necessarily exceed their authority in purporting to do so). *See, e.g.*, *Crawford Grp.*, 543 F.3d at 976 ("Arbitrators exceed their powers if, *inter alia*, the method of their appointment provided in the agreement has not been followed."); *Bulko v. Morgan Stanley DW Inc.*, 450 F.3d 622, 625 (5th Cir. 2006) ("Courts do not hesitate to vacate an award when an arbitrator is not selected according to the contract-specified method."); *R.J. O'Brien & Assocs., Inc. v. Pipkin*, 64 F.3d 257, 263 (7th Cir. 1995) ("[I]n order to enforce an arbitration award, the arbitrator must be chosen in conformance with the procedure specified in the parties' agreement to arbitrate."); *Cargill Rice*, 25 F.3d at 226 ("Arbitration awards made by arbitrators not appointed under the method provided in the parties' contract must be vacated."); *Szuts*, 931 F.2d at 832 (vacating award because arbitrators were not appointed in accordance with contractual terms and, therefore, "exceeded their authority under the arbitration agreement"); *Avis Rent A Car Sys.*, 791 F.2d at 25 ("[A]n award will not be enforced if the

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Constr., Inc., 850 N.W.2d 498, 506 (Mich. Ct. App. 2014) (requiring "lawyer member of the panel [to] have specific and substantial experience in construction litigation"). When the parties set their own requirements, the "contractual method" is defined by the contractual language.

arbitrator is not chosen in accordance with the method agreed to by the parties.").

2. Under those principles, courts decide what method of arbitrator selection is required by the arbitration agreement. Absent an unequivocal grant of power in the arbitration agreement to an arbitrator, courts never defer to arbitrators (or an arbitral body) to decide their own jurisdiction. *See, e.g.*, *Zeiler*, 500 F.3d at 166 (reviewing district court's interpretation of the contractual language "*de novo*"); *Oakland-Macomb*, 850 N.W.2d at 504 ("The interpretation of a contract presents a question of law that is reviewed *de novo*."). Instead, courts reviewing arbitrator-selection disputes must determine the "contractual method" of selecting arbitrators before they can decide whether that method was followed.

3. Given that (i) the case-determinative issue is to construe contractual language that is unique to the parties in order to determine the arbitrator-qualification requirements, and (ii) that issue was (at Petitioners' urging) decided by Texas courts under state principles of contract construction, it is hard to imagine how a plethora of federal cases could be in irreconcilable dispute over *that* issue. An arbitral association's *application* of arbitrator-selection rules known to apply is a far different issue than an interpretation of the arbitration clause to decide a gateway issue about what rules apply in making that determination. An *ultra vires* determination of that issue by an arbitral body is entitled to no deference.

None of the "conflict" cases cited by Petitioners made such a far-reaching holding. In all Petitioners' cases, it was settled what rules applied. For example, many of the cases cited as evidence of a conflict have arbitration agreements that require the parties to

arbitrate disputes in accordance with a designated body of arbitral rules. *See, e.g.*, *Adam Techs. Int'l S.A. de C.V. v. Sutherland Global Servs., Inc.*, 729 F.3d 443, 444 (5th Cir. 2013) (agreement to arbitrate under AAA rules); *Bulko*, 450 F.3d at 623 (NASD rules); *Dockser v. Schwartzberg*, 433 F.3d 421, 423 (4th Cir. 2006) (AAA rules); *York Research Corp. v. Landgarten*, 927 F.2d 119, 120 (2d Cir. 1991) (AAA rules). In those cases, the contractual method for selecting arbitrators was the method required by the incorporated rules. *See, e.g.*, *Bulko*, 450 F.3d at 625-26 (concluding that, "[b]ecause the parties' agreement (contract) did not have a specific method-of-selection clause," the contract "called for" the arbitrators to be selected under NASD rules). Thus, the rules to be applied by the association were known and the association had the authority to apply them with deference. *See Adam Techs.*, 729 F.3d at 452; *Bulko*, 450 F.3d at 626; *Dockser*, 433 F.3d at 425; *York Research*, 927 F.2d at 123.

Calling those cases the "majority" line of authority is meaningless, because they involve a different core principle. None of those cases involve a conflict with courts that properly interpreted *de novo* a threshold issue about the meaning and scope of an arbitrator-selection clause.

Americo agrees that *Dockser* is a "representative" example. (*See* Pet. at 22-23.) But, the case proves Americo's point. There, the arbitration agreement required that the arbitrator be "chosen pursuant to the rules and procedures of the American Arbitration Association," if the parties could not agree on an arbitrator. *Dockser*, 433 F.3d at 423. The Fourth Circuit, first, interpreted the contract *de novo* as "expressly invok[ing] a body of written rules to govern

arbitrator selection", namely the AAA rules. *Id*. at 425. Only then was it able to discern that the proper "application" of those known rules was for the AAA or, as it said, "the question of the number of arbitrators is one of arbitration procedure" and, therefore, "for arbitral, rather than judicial, resolution." *Id*. *Dockser* did not "defer" the key contract interpretation to the AAA to decide in the first instance. Its decision on the parameters of the arbitration clause as a question of law for a court parallels exactly what happened here. Only the outcome was different, and properly so, given the interpretation of the parties' selection method.

In toto, nothing in Petitioners' "majority" line of cases holds that a court gives "deference" to an arbitral body's decision to apply its own rules when the parties' arbitration agreement prevents it from doing so.[4]

4. For similar reasons, Petitioners miss the mark in arguing that the purported "conflict" over the applicable standard of review "is particularly intolerable because state and federal courts in Texas are now

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[4] A series of decisions from the Eighth Circuit further illustrates the analysis that the circuit courts use. When the contractual method for selecting arbitrators is followed, the court defers to the arbitrators' decision. *See Crawford Grp.*, 543 F.3d at 977 ("the parties' [contractual] method of appointment was arguably followed"); *accord Winfrey v. Simmons Foods, Inc.*, 495 F.3d 549, 550-51 (8th Cir. 2007) (confirming arbitration award because "the arbitration clause did not require the party-selected arbitrators to be neutral" and, therefore, "the arbitrators were 'properly appointed pursuant to the arbitration clause in question'"). In contrast, the court gives no deference to arbitrator-selection decisions that are inconsistent with specific requirements in the parties' arbitration agreement. *See Hugs & Kisses, Inc. v. Aguirre*, 220 F.3d 890, 893-94 (8th Cir. 2000) (vacating award because arbitrators were "not chosen as provided in the parties' arbitration agreement").

bound to apply diametrically opposed rules." (Pet. at 25.) In the cases cited, the Fifth Circuit only "defers" to arbitrator-selection decisions by an arbitral body after it has first determined that the arbitral body followed the arbitrator-selection rules mandated by the parties' agreement. Once such a determination is made, the Fifth Circuit properly defers to that body's *application* of the rules so mandated, but it has never deferred to an arbitral body an *interpretation* of what rules apply under the arbitration agreement.

For example, in *Adam Technologies*, the contractual method required arbitration under the ICDR rules. 729 F.3d at 447. Thus, the applicable rules were known. In rejecting an argument that an arbitral body "did not follow the agreement's method of appointing arbitrators," *id*. at 452, the Court held that the ICDR was contractually authorized to sustain an objection to an arbitrator "in accordance with its rules." *See id*. at 451. But, the issue as to what rules the body was authorized to apply came from the court's own construction of the agreement, not its deference to some interpretation of the arbitration agreement by the ICDR.

Bulko is the same. The applicable rules were known there, too. The agreement required arbitration in accordance with NASD rules. 450 F.3d at 623. "Because the parties' agreement (contract) did not have a specific method-of-selection clause," or a dispute over such a clause, the Fifth Circuit concluded that "determining [the arbitrator's] qualifications and eligibility is a matter left to the NASD." *Id*. at 626. No interpretation of what rules applied was ceded to the arbitral body. It was made *de novo* by the Fifth Circuit.

Thus, nothing in *Adam Technologies*, *Bulko*, or any other Fifth Circuit opinion suggests that, in this case, the Fifth Circuit would have "deferred" to the AAA's decision to apply its own arbitrator standards in defiance of the parties' chosen standards. The Fifth Circuit has made clear it applies the same rule as the Texas Supreme Court:

> An arbitration agreement is a contract; accordingly, arbitrators must be selected pursuant to the method provided in it. *Brook*, 294 F.3d at 672. Courts do not hesitate to vacate an award when an arbitrator is not selected according to the contract-specified method. *Id*. at 673.

Bulko, 450 F.3d at 625 (citing *Brook v. Peak Int'l Ltd.*, 294 F.3d 668, 672, 673 (5th Cir. 2002)).

To sum up: In reviewing arbitrator-selection decisions, courts "defer" only to decisions by arbitral bodies that are unambiguously authorized to apply their own rules and do so. Here, the threshold issue is different. It asks in the first instance: "What arbitrator-qualification requirements apply?" That issue required contract interpretation. Such interpretation was for a trial court to decide in the first instance, and it was properly reviewed "*de novo*" in the state-court appeals because it was a threshold question of contract interpretation.

How this case was decided thus fits comfortably within the rule that "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt Info. Scis.*, 489 U.S. at 474. There is no dispute among the federal circuits regarding *that* issue. Neither the FAA nor any other principle of arbitration law requires a court to

"defer" to what happened here – an arbitrator-selection decision by an arbitral body that ignored the parties' chosen method.

E. The Court Should Decline Petitioners' Request to Undermine the Right to Contract that is the Linchpin of the FAA.

Requiring arbitral bodies to honor the parties' negotiated qualification requirements for arbitrators hardly "undermines the benefits [that] arbitral bodies offer to parties in a dispute" or "deprives those bodies of the ability to seat an arbitrator or panel with unassailable authority to resolve the parties' dispute." (Pet. at 26-27.) If arbitral bodies want to seat a panel with "unassailable authority," all they need do is follow the contractual method of appointing the arbitrators. When they fail to do so, "courts have a statutory obligation to protect arbitral parties from abuse by the third-party agency conducting the arbitration." *Oakland-Macomb*, 850 N.W.2d at 505. Giving arbitral bodies unreviewable power to make arbitrator-selection decisions without regard to the parties' specific contractual requirements, as Petitioners tacitly urge, would violate the most fundamental of all arbitration principles – that "arbitration is a matter of contract" and, therefore, the contractual method of appointing arbitrators "shall be followed." *See AT & T Techs.*, 475 U.S. at 648; 9 U.S.C. § 5. Nor would "efficient dispute resolution" be sullied in this case. (*See* Pet. at 27.) Efficiency cannot trump the intention of the parties as expressed in their contract—not even under the FAA. What is inefficient is allowing arbitral bodies to ignore the parties' agreement to a method of arbitrator selection and to impanel arbitrators unauthorized to rule.

All in all, both the policies underlying arbitration and the body of law supporting them coexist comfortably with the decision of the Texas Supreme Court.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APRIL 2015

APPENDIX

APPENDIX A

REPORTER'S RECORD
VOLUME 1 OF 1 VOLUMES
TRIAL COURT CAUSE NO. DC-07-06538-E

ROBERT L. MYER and STRIDER MARKETING GROUP, INC.,	§	IN THE 193RD
Plaintiffs,	§	
V.	§	
AMERICO LIFE, INC., AMERICO FINANCIAL LIFE AND INSURANCE ANNUITY COMPANY, GREAT SOUTHERN LIFE INSURANCE COMPANY, THE OHIO STATE LIFE INSURANCE COMPANY, AND NATIONAL FARMERS UNION LIFE INSURANCE COMPANY,	§	JUDICIAL DISTRICT COURT
Defendants.	§	DALLAS COUNTY, TEXAS

Plaintiff's Motion To Confirm Arbitration Award
Defendants' Motion to Vacate Arbitration Award

* * *

On the 8th day of July, 2008, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable CARL H.

GINSBERG, Judge Presiding, held in Dallas, Dallas County, Texas.

Proceedings reported by computerized stenotype machine.

* * *

MR. BROTHERS:

Let me turn to the next item, which is a little bit more novel of a challenge, and that is the challenge to the composition of the panel that we hear from Americo. The Agreement, Section 3.3 of the Agreement that's the subject of the dispute, says Americo shall appoint one arbitrator, Myer shall appoint one, and the two arbitrators shall select the third. That's the mechanism that's set forth.

The Agreement also says, The arbitration proceeding shall be conducted in accordance with the commercial arbitration rules of the AAA. Americo filed its initial request to have Mr. Figari appointed as its appointed arbitrator. The Myer parties objected immediately on the grounds that he was not neutral, insofar as he had served on the panel in Arbitration l and 2, and had, in fact, dissented from the award in Number 1 because he would have ruled that Mr. Myer had breached certain warranty obligations in Number 1, in contravention of what a majority of the panel found.

And very importantly, Americo responded to this objection by stating that Mr. Figari was, in fact, neutral. And further stating in a letter to the AAA, that's in an exhibit, that Americo and Myer have never agreed that the appointed arbitrators will not be neutral. So, in other words, the agreement of the parties is that they're supposed to be independent, and

Americo acknowledges that that means that they should also meet the AAA standards for neutrality.

So if we turn to the AAA standards for neutrality under Rule, I believe it's 17(B), the question was determined or was referred to the AAA, which has the sole authority to make a decision as to a proposed arbitrator's neutrality.

Americo never took the position that the AAA did not have the authority to make this determination, nor did it take the position that it was entitled to appoint a non-neutral arbitrator until the AAA ruled against it. And after the AAA ruled that, in fact, Mr. Figari, given his prior service and his dissent in early [sic] arbitration, was not a neutral, did Americo take the position that the AAA was in error, and that the AAA did not have the authority to make that determination.

The next step of Americo was, I think, quite telling. Instead of attempting to name a neutral arbitrator, they tried to appoint Mr. Stephen Johnson, who was the former managing partner of the law firm representing Americo. Needless to stay, at that point Mr. Myer – we, on behalf of Mr. Myer filed another objection, and the AAA said, No, you can't do that. The rules require that even party-appointed arbitrators be neutral and impartial, unless expressly agreed to the contrary, which was not the case here, and they disallowed that. And then Americo got to [ ] appoint its own party-appointed arbitrator, Mr. Dick Sayles. We did not object to Mr. Sayles. Mr. Sayles sat as a neutral, a party-appointed neutral, and, in fact, was part of the unanimous opinion by the panel.

The FAA says, under Section 5, that if the agreement provision be made for the method of naming or

appointing an arbitrator or arbitrators, that shall be followed. That's what the FAA tells us, and that was done here. There was a method under the Agreement, and that method was followed.

And what the Agreement said is that each party chooses an arbitrator, and each party did choose an arbitrator. The Agreement did not provide a method for disqualifying a party-appointed arbitrator, nor did it say the parties agree that they need not be neutral. Instead, it said they have to follow the AAA Commercial Arbitration Rules.

Rule 12(B) of the Commercial Arbitration Rules, in turn, says that when the arbitrators are by agreement to be named by the parties, they must meet the neutrality standards of Rule 17 with respect to impartially [sic] and independence unless the parties specifically agree they can be non-neutral. And here, we have quite the contrary: Americo's own admission that even the party-appointed panelists need to be neutral.

And so what we have, in conclusion, then, is that the AAA is by the parties' own agreement the proper forum to determine whether the arbitrators met the standards of neutrality. We've got a clear determination by the AAA under its own standards that Mr. Figari and Mr. Johnson did not meet that standard.

* * *

THE COURT: Your opposing counsel – I mean, I know you say there's no conflict between the two sections we've talked about.

Your opposing counsel says there's a conflict, and one trumps over the other. And I guess my question is, you know, is there a conflict? Or if not, is there a conflict?

Or if there is, what section trumps? Is that a question of law or is that a question of fact to determine what the contract – I mean, just standard contract law.

There's a contract. Maybe it's a little unsure as to exactly what you did agree to. Did you agree for the AAA to predominate over the first section or not? And is that a question of fact for the tryer of fact to determine exactly what your agreement is? You know, standard first-year contract things we talk about. You know, what is – what is it that you actually agreed to?

MR. BROTHERS: Let me – and I'm – if I may circle around to the answer by starting with the AAA rule, because the AAA rule contemplates language in the contract such as exists here.

Rule 17(a) says, When each party has agreed to appoint one arbitrator, here's what we'll do. So it's not outside the purview of the AAA rules to have a situation where each party has agreed to appoint one arbitrator.

And so let me be very clear that I am unable to articulate the conflict they say exists. Because if the contract said something about neutrality, perhaps there would be a conflict. But, in fact, it's the opposite, the AAA rules contemplate the sort of contract language they have, which is that each party gets to select an arbitrator.

If there were, in fact, a real conflict, which there is not, then you would go to principles of contract construction, except there is a – in the very case they cite, in the *Brook* case, there is a standard in reviewing on this arbitrator selection issue, that a reviewing court must resolve all doubts in favor of arbitration. So there's a rule of construction favoring arbitration that would overlay that determination, and we're on page 672.

APPENDIX B

NO. 05-08-01053-CV

In the Fifth District Court of Appeals

Dallas, Texas

ROBERT L. MYER and STRIDER MARKETING GROUP, INC.,

***Appellants*,**

v.

AMERICO LIFE, INC., AMERICO FINANCIAL LIFE AND ANNUITY INSURANCE COMPANY, GREAT SOUTHERN LIFE INSURANCE COMPANY, THE OHIO STATE LIFE INSURANCE COMPANY, and NATIONAL FARMER'S UNION LIFE INSURANCE COMPANY,

***Appellees*.**

ON APPEAL FROM THE 193RD DISTRICT COURT
DALLAS COUNTY, TEXAS
TRIAL COURT CASE NO. DC-07-06538

BRIEF OF APPELLANTS

* * *

ISSUE ONE

In determining the parties' Arbitration Agreement was ambiguous about whether an arbitrator can be disqualified by the American Arbitration Association, and then vacating the arbitration award, the trial court ignored Texas contract construction rules. Consequently, it erred. This Court should, therefore, reverse the trial court's judgment and render judgment confirming the arbitration award.

* * *

B. The trial court erred in concluding that the Arbitration Agreement is ambiguous with respect to appointment of arbitrators.

Myer and Americo agreed to both of the following provisions in the Arbitration Agreement:

- "Americo shall appoint one arbitrator and Myer shall appoint one arbitrator and such two arbitrators to select the third. . . . Each arbitrator shall be a knowledgeable, independent businessperson or professional"; and
- "The arbitration proceedings shall be conducted in accordance with the commercial arbitration rules of the American Arbitration Association."[88]

The trial court erred in concluding that this language in the Arbitration Agreement is ambiguous because, on its face, it is not. And neither Myer nor Americo has claimed it is. Because the parties agreed to arbitrate

[88] Appendix 4, Section 3.3, ¶¶ 1, 3.

under both these contractual provisions, Texas law mandates that they must be bound by both.[89]

1. The Arbitration Agreement is not ambiguous because the written provisions of the Agreement can be harmonized and given a certain or definite meaning.

In determining whether a contract is ambiguous, a court must apply rules of contract construction and interpretation.[90] If, following those rules, the language of the contract can be given a certain or definite meaning, the contract is ***not*** ambiguous.[91] More to the point, a contract is ambiguous only if the intent of the parties, as expressed in the contract, is susceptible to more than one ***reasonable*** interpretation.[92] The mere disagreement between the parties about how a contract should be interpreted does not create an ambiguity.[93] And the Court should not "strain to find ambiguities, if in doing so, [it would] defeat the probable intentions of the parties."[94]

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[89] *See In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 574 (Tex. 1999, orig. proceeding); *In re Scott*, 100 S.W.3d 575, 579 (Tex. App.—Fort Worth 2003, orig. proceeding).

[90] *DeWitt County Elec. Coop. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999).

[91] *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003).

[92] *Id.*

[93] *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 134 (Tex. 1994).

[94] *Matador Petroleum v. St. Paul Surplus Lines Ins. Co.*, 174 F.3d 653, 657 (5th Cir. 1999).

The Texas Supreme Court has emphasized that:

> In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. To achieve this objective, ***courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument.***[95]

Courts must assume that "[g]enerally, the parties to a contract intend every clause to have some effect" and should "not strike down any portion of the contract unless there is an ***irreconcilable conflict***."[96] Courts must be particularly wary of isolating from its surroundings or considering apart from other provisions a single phrase, sentence, or section of a contract."[97]

In concluding that the Arbitration Agreement is ambiguous in this case, the trial court failed to apply even the most elementary rules of contract interpretation. The contract provision requiring the parties to each appoint an arbitrator who is "a knowledgeable, independent businessperson or professional" and the contract provision incorporating the

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[95] *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) (emphasis added); *see also Forbau,* 876 S.W.2d at 133.

[96] *Ogden v. Dickinson State Bank*, 662 S.W.2d 330, 332 (Tex. 1983) (emphasis added).

[97] *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995).

AAA Rules are easily read together and harmonized. They are certain and definite and they effectuate the intent of the parties. Moreover, the Arbitration Agreement is easily and reasonably interpreted to require arbitrators to both be "knowledgeable, independent" professionals and meet the requirements of AAA Rules R-12 and R-17 governing appointment of arbitrators. That interpretation:

- considers the entire Arbitration Agreement and gives effect to all provisions that the parties negotiated and agreed to;
- harmonizes the provisions of the Arbitration Agreement, demonstrating no "irreconcilable conflict"; and
- effectuates the intent of the parties as expressed by the plain language of the Arbitration Agreement read as whole.

The Arbitration Agreement expressly requires that a party-appointed arbitrator must be (1) "knowledgeable"; (2) "independent"; and (3) a "businessperson or professional." AAA Rules R-12 and R-17 require party-appointed arbitrators to be "independent" and additionally require that the arbitrators (4) be "impartial" and (5) perform their duties with "diligence and in good faith."[98] There is absolutely nothing inconsistent or in conflict between these requirements. An arbitrator can certainly meet all the requirements imposed by both provisions of the Arbitration Agreement – by being a knowledgeable, independent, and impartial

[98] *See* Appendix 5, Rule R-12 and Rule R-17(a) ("Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for (i) impartiality or lack of independence ...").

businessperson or professional who performs his or [sic] duties with diligence and in good faith.

Even if the contract provision incorporating the AAA Rules adds additional requirements for arbitrators, none of those provisions ***conflict*** with the "knowledgeable," "independent" and "businessperson or professional" requirements. For example, if a contract contained a provision requiring an arbitrator to be a "male attorney" and another provision requiring the arbitrator to be "a male who attended Harvard," there would not be a conflict. A male Harvard Law graduate could certainly meet all the requirements negotiated by the contracting parties. To the contrary, if one provision of a contract required that the arbitrator be a "***fe***male attorney" and another required the arbitrator to be "a male who attended Harvard," that would be an irreconcilable conflict. But there is no conflict like that in this Arbitration Agreement.

Likewise, nothing in AAA Rule R-17 granting the AAA authority to disqualify arbitrators who do not meet independence and impartiality requirements conflicts with any other provision in the Arbitration Agreement.[99] The Arbitration Agreement is otherwise silent as to how appointed arbitrators who do not meet knowledge and independence requirements can be challenged or disqualified. So, again, the AAA Rules, which provide a process for disqualification, present no irreconcilable conflict with any other contractual provision.

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[99] *See* Appendix 5, Rule R-17(b) ("Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.").

Absent an "irreconcilable conflict" between the requirements that a party-appointed arbitrator must be "a knowledgeable, independent businessperson or professional" and the requirements for party-appointed arbitrators in AAA Rules R-12 and R-17, both provisions of the Arbitration Agreement must be given effect and neither can be ignored. Tellingly, Americo has been unable to offer any consistent argument about why its right to pick an arbitrator who is an "independent businessperson" trumps or is any way inconsistent with the disqualification process imposed by the AAA Rules. And there is no basis for that conclusion when Texas rules of contract interpretation are applied. Because the trial court ignored the rules of contract interpretation in order to conclude the Arbitration Agreement was ambiguous, it erred.

2. Neither party contended the Arbitration Agreement was ambiguous and no evidence was presented on which the trial court could determine the intent of the parties.

Even if the trial court had been correct in concluding that the Arbitration Agreement is ambiguous (which Myer disputes), the court erred in concluding what the parties intended as their "meeting of the minds" with respect to appointment of arbitrators.[100] Neither party argued that the Agreement was ambiguous, and no evidence was presented to the trial court about the parties' intent. Arbitration agreements are governed by the same rules of contract interpretation as other

[100] *See* Appendix 2, at Findings of Fact, No. 9.

contracts.[101] Once a court determines that an agreement is ambiguous, parole [sic] evidence should be considered regarding the parties' intent in drafting and agreeing to the contract language.[102]

Here, the trial court had no evidence – other than the contract language itself – on which to determine whether the parties intended that the AAA Rules would govern all aspects of the arbitration, including the selection of arbitrators (as Myer contends), or only the arbitration proceedings conducted after the arbitrators were already selected (as Americo contends). And as previously discussed, the Texas rules of contract interpretation – which require the court to give effect to all contract provisions that the parties negotiated and agreed to – do not allow the trial court to conclude that Americo's interpretation was the parties' intent. The trial court's conclusion was therefore error.

* * *

D. Americo waived the argument it now makes in attempting to vacate the arbitration award.

In any event, America waived the only argument it now makes – that it was entitled under the Arbitration Agreement to appoint Ernest Figari, Jr. as a biased advocate-arbitrator. Americo failed to raise that argument with any proper tribunal at the appropriate time before participating in the arbitration. After Myer objected to the AAA that Figari did

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[101] *J.M Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003).

[102] *See, e.g.*, *Amistad, Inc. v. Frates Communities, Inc.*, 611 S.W.2d 121, 127 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.).

not meet the "independent" and "impartial" requirements in AAA Rule R-17, Americo asserted that Figari was neutral and impartial and urged the AAA, "***[u]nder AAA Rule R-17(b)***," to "promptly overrule Myer's objection to Mr. Figari's service on the panel."[121] In the alternative, Americo argued that the "AAA is not the tribunal to decide this issue" of disqualification of an arbitrator.[122] But Americo acknowledged (and did not dispute) the requirement that party-appointed arbitrators must be neutral because it failed to respond to the AAA's letter to the parties, which stated: "In accordance with the Rules, party-appointed arbitrators are neutral unless the parties agree otherwise. Therefore, absent receipt of your agreement on or before March 3, 2005 the party-appointed arbitrators will be neutral."[123]

Not until after the unanimous arbitration award was rendered against Americo did it argue, for the first time, that Figari's disqualification was improper because Americo was, in fact, entitled to the appointment of an advocate-arbitrator ***who was not neutral or impartial***. Americo's failure to raise ***that argument*** to the AAA constitutes waiver. Americo should not now be allowed to raise this new argument, for the first time, after the conclusion of an arbitration that did not result in its favor.

Moreover, if Americo believed the AAA did not have the authority to disqualify Figari, Americo should have timely presented the dispute about disqualification of Figari to any court that Americo did believe had authority to resolve that dispute. Instead, after the

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[121] D-Ex. 6 (emphasis added).

[122] D-Ex. 8.

[123] II CR 362-64, at 363.

AAA disqualified Figari, Americo again exercised its right to appoint an arbitrator (Richard Sayles) to the panel and proceeded to participate in the arbitration.[124] By doing so, without having raised in any court – or any forum – that Americo believed it was entitled to appointment of a biased advocate-arbitrator, Americo waived its objection to the AAA's disqualification decision.

* * *

[124] D-Ex. 17.

APPENDIX C

No. 12-0739

In the Supreme Court of Texas

AMERICO LIFE, INC., AMERICO FINANCIAL LIFE AND ANNUITY INSURANCE COMPANY, GREAT SOUTHERN LIFE INSURANCE COMPANY, THE OHIO STATE LIFE INSURANCE COMPANY, and NATIONAL FARMER'S UNION LIFE INSURANCE COMPANY,

Petitioners

v.

ROBERT L. MYER and STRIDER MARKETING GROUP, INC.,

Respondents

On Appeal from the Fifth Court of Appeals – Dallas, Texas
Cause No. 05-08-010530-CV

RESPONDENTS' BRIEF ON THE MERITS OF ROBERT L. MYER AND STRIDER MARKETING GROUP, INC.

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* * *

ARGUMENT

RESPONSIVE ISSUE ONE: For arbitration, the parties agreed each would select an arbitrator and agreed on the qualifications for the arbitrators. The question before this Court is whether that Agreement prohibited the American Arbitration Association from deciding a challenge to the qualifications of one of the selected arbitrators. Because the parties' Agreement expressly incorporated the AAA Rules, including the Rule that grants the AAA the "conclusive" authority to determine arbitrator disqualification, the AAA had authority to disqualify Ernest Figari, Jr.—and its decision should be conclusive.

A. The court of appeals did not rewrite the Arbitration Agreement, but rather properly read the Agreement as whole and gave effect to all provisions when it held that the AAA's disqualification of Ernst E. Figari, Jr. did not violate the Agreement.

After stripping away Americo's indignation and fist-shaking, this case comes down to a simple contract interpretation dispute. Americo cites a series of statements from this Court regarding contract interpretation, but in the end it becomes a mere list of platitudes—theories of interpretation cherry-picked to support Americo's strained interpretation of the Arbitration Agreement. Americo's interpretation does not ascertain the true intentions of the parties as expressed in the Agreement because it violates one of the most core contract interpretation rules. It does not examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the

contract so that none will be rendered meaningless. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003) (citing *Universal C.I.T. Credit Corp. v. Daniel*, 150 Tex. 513, 243 S.W.2d 154, 158 (1951)).

This Court has repeatedly held that "[n]o single provision taken alone will be given controlling effect; rather, ***all the provisions*** must be considered with reference to the whole instrument." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) (emphasis added); *see also Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994). But focus on a single provision is exactly what Americo urges the Court to do here. And Americo takes that single provision out of context to intonate a stronger meaning than can reasonably be read.

Americo argues that one provision—that "Americo shall appoint one arbitrator and Myer shall appoint one arbitrator and such two arbitrators to select the third" and that "each Arbitrator shall be a knowledgeable, independent businessperson or professional"—contains the only possible guidance about the appointment of arbitrators. And with no support in the language of the Agreement, Americo asks the Court to hold that this single provision nullifies the other contract provision that expressly incorporates the AAA Rules, and which expressly does ***not*** exclude the AAA Rules governing the disqualification of arbitrators. Americo's interpretation only works if this Court ignores all relevant provisions of the Arbitration Agreement and fails to harmonize the entire agreement as the court of appeals properly did so. No rule of contract interpretation supports Americo's argument.

* * *