

No. _____

IN THE
Supreme Court of the United States

FRANEK OLSTOWSKI,
Petitioner,

v.

PETROLEUM ANALYZER COMPANY, L.P.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

DYLAN B. RUSSELL
Counsel of Record
JOSEPH O. SLOVACEK
HOOVER SLOVACEK LLP
5051 Westheimer Rd.,
Suite 1200
Houston, Texas 77056
(713) 977-8686
russell@hoverslovacek.com

Counsel for Petitioner

QUESTION PRESENTED

A 2007 state-court judgment confirmed an arbitration award declaring Petitioner Olstowski the owner of trade-secret technology for an excimer lamp using krypton-chloride specifically to measure sulfur using ultraviolet fluorescence, and Respondent Petroleum Analyzer Company, L.P. (PAC) was permanently enjoined from using the trade secret. In 2010, the state appellate court affirmed the judgment after PAC appealed. Olstowski sought relief in the same state court after learning PAC had been selling a device containing the trade secret. In 2011, the state court entered an order clarifying that Olstowski's trade secret was any "technology using an excimer light source that uses Krypton-Chloride specifically to measure sulfur using ultraviolet fluorescence." Because of that order, PAC stopped selling the devices. Out of a company's bankruptcy case in 2012, Olstowski filed an adversary proceeding against PAC for disgorgement of its profits from the sold devices. After a bench trial in 2018, the federal district court found PAC not liable, and the Fifth Circuit affirmed. Because PAC admitted that its devices used the trade secret, as defined by the state-court orders, neither the district court nor the Fifth Circuit gave full and faith and credit to the state-court confirmation judgment and clarification order.

The question presented is:

1. Whether state-court judgments confirming arbitration awards, including state-court orders clarifying such judgments, are "judicial proceedings" entitled to "full faith and credit in every court within the United States," pursuant to 28 U.S.C. § 1738?

PARTIES TO THE PROCEEDING

Franek Olstowski, petitioner on review, was a plaintiff-appellant below.

Petroleum Analyzer Company, L.P., respondent on review, was the defendant-appellee below.

Atom Instrument Corporation, and later Atom Instrument, LLC, as successor to Atom Instrument Corporation, was co-plaintiff-appellant below, but Atom Instrument, LLC has since ceased to exist and is thus not a party to this petition.

CORPORATE DISCLOSURE STATEMENT

Petroleum Analyzer Company, L.P.'s parent company is Roper Technologies, Inc., which is a publicly-held corporation owning 10% or more of Petroleum Analyzer Company, L.P.'s shares.

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PETITION FOR A WRIT OF CERTIORARI

Franek Olstowski (“Olstowski”) respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit’s revised opinion, dated September 17, 2020, is reported at 969 F.3d 210. App-001-App-015. The Fifth Circuit’s initial opinion is not reported. App-018-App-032. The District Court’s order denying a motion to alter judgment, final judgment, and findings and conclusions are not reported. App-035-App-043.

JURISDICTION

The Fifth Circuit entered judgment on August 7, 2020. App-33-App-034. Olstowski timely petitioned for rehearing en banc, which was denied on September 16, 2020. App-016-App-017. This Court’s jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S. Code § 1738 provides in relevant part:

* * *

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

A. Factual Background

On June 15, 2001, Olstowski signed a consultant agreement with Antek Instruments, Inc., the predecessor of Respondent, PAC. (ROA3027-27).¹ The agreement provided that any technology developed by Olstowski while Antek's consultant would be Antek's property. (ROA.3028).

In 2002, Olstowski had “an idea to use an excimer light source to measure sulfur using ultraviolet (“UV”) fluorescence.” (ROA.3028). Olstowski informed Antek of the idea. (ROA.3028). Antek declined the opportunity to invest any time or resources in developing the idea but allowed Olstowski to do so on his own time, with his own resources, and on his own behalf. (ROA.3029).

By December 2002, Olstowski had successfully developed the excimer technology using his own resources. (ROA.3031). On December 27, 2002, Olstowski filed a patent application titled “Excimer UV Fluorescence Detection,” which was granted later based on amendments to the application. (ROA.3031,3453-63,3464-75). Olstowski informed Antek of his patent application but required a non-disclosure agreement from Antek before he would disclose more about the excimer technology, for Antek's potential use with a license. (ROA.3031). Antek

¹ “ROA” refers to the record on appeal filed by the district clerk with the Fifth Circuit.

entered into a non-disclosure agreement with Olstowski. (ROA.3031).

In 2003, Olstowski and Antek began long-term negotiations for a license agreement regarding the excimer technology. (ROA.3032-33). In 2004, Antek merged with PAC, leaving PAC as the surviving entity. (ROA.3033). In March of 2005, Olstowski and PAC entered into a non-disclosure and non-use agreement that kept Olstowski's excimer technology secret, prevented PAC from using the technology, but allowed continued discussions about the technology and a potential license agreement. (ROA.3033-34). The non-disclosure agreement made clear that PAC could "not use or divulge" Olstowski's "trade secrets," including "trade secrets associated with excimer lamps or the detection of substances using excimer fluorescence." (ROA.3033, 3115).

B. State Court Procedural History

Despite the agreement, PAC filed suit against Olstowski and his company, ATOM Instrument Corporation ("ATOM"), in a state district court in Harris County, Texas, seeking to claim ownership in the sulfur-detecting excimer technology. (ROA.3476,3482). In 2007, the state court entered ordered the parties to arbitration. *See In re Petroleum Analyzer Co., L.P.*, No. 01-07-00218-CV, 2007 Tex. App. LEXIS 2505, at *1 (Tex. App.—Houston [1st Dist.] Mar. 29, 2007, orig. proceeding). PAC sought mandamus relief, which the court of appeals denied. *See id.* The Supreme Court of Texas also denied mandamus relief. (ROA.272-307).

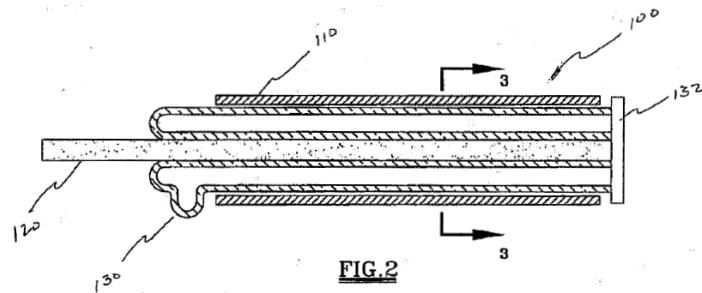
In October 2007, an arbitration award ("2007 Award") was issued favorable to Olstowski, granting

him exclusive ownership of the technology and enjoining PAC from using it. “The arbitration panel declared that Olstowski was the owner of:

- a. the technology and methods embodied in the patent application[] styled . . . “Excimer UV Fluorescence Detection”.”

ATOM Inst. Corp. v. Pet. Analyzer Co., L.P., 969 F.3d 210, 213 (5th Cir. 2020) (emphasis added). Such technology and methods were declared the “trade secrets of Olstowski.” *Id.* at 213-14.

Notably, the patent application titled “Excimer UV Fluorescence Detection” provided that the “invention” was, “more specifically,” a “system and method for detecting sulphur dioxide using a KrCl dielectric barrier-discharge (DBD) excimer lamp.” (ROA.3031, 3453-63, 3464-75).



The patent application further noted that “the above embodiment of the excimer lamp 100 can take many and numerous forms” and that “[t]he presently preferred embodiment of the excimer lamp 100 comprises an outer electrode 110, an inner electrode 120 and a quartz envelope 130.” (ROA.3416). But the patent application specifically provided that “departures may

be made from the details without departing from the spirit or scope of the disclosed general inventive concept.” (ROA 3459,3471).

On November 6, 2007, the 2007 Award was confirmed in an Order on Olstowski’s Motion to Confirm Arbitration Award (“2007 Texas Judgment”) by the state district court. (ROA.3055). The 2007 Texas Judgment incorporated the 2007 Award and made numerous consistent findings, as follows:

- (1) Olstowski is the exclusive and sole owner of all technology in dispute,
- (2) PAC is enjoined from claiming ownership in or using the technology developed by Olstowski,
- (3) Further, PAC is enjoined from interfering with Olstowski’s use and enjoyment of his excimer . . . technology,
- (4) the technology and intellectual property embodied within the technology in dispute are trade secrets of Olstowski, . . .

(ROA.3055) (emphasis added).

PAC appealed the 2007 Texas Judgment, but the court of appeals affirmed “the judgment of the trial court.” *See Petroleum Analyzer Co., L.P. v. Olstowski*, No. 01-19-00076-CV, 2010 Tex. App. LEXIS 5581, at *68 (Tex. App.—Houston [1st Dist.] July 15, 2010, no pet.) (affirming “the judgment of the trial court” and overruling PAC’s argument that “the award was ambiguous”).

The 2007 Texas Judgment, including the permanent injunction, did not stop PAC from selling about \$10

million of devices (MultiTek) containing Olstowski's trade secret. (ROA.3077-78). In 2011, when Olstowski learned of the sales, he moved that the state district court enforce the 2007 Texas Judgment. (ROA.3057). Discovery ensued, and in July of 2011, PAC admitted in interrogatory responses that it was "using (1) an excimer lamp to (2) measure the substance sul[f]ur with (3) fluorescence." (ROA.3176).

October 17, 2011, the state court issued an order ("2011 Order") clarifying the 2007 Texas Judgment, stating in part that "the phrase 'technology developed by Olstowski' means technology using an excimer light source that uses Krypton-Chloride specifically to measure sulfur using ultraviolet Fluorescence" and that the "phrase 'technology developed by Olstowski' includes the technology and methods embodied in the patent application styled, "Excimer UV Fluorescence Detection."'" (ROA.3057-58). As a result of the 2011 Order, PAC began "implementing a plan to stop using excimer lamps of any kind in any of its products." (ROA.3078).

C. Federal Court Procedural History

Thereafter, ATOM filed bankruptcy due to matters unrelated to the excimer technology. In 2012, Olstowski and ATOM filed an adversary proceeding complaint against PAC for misappropriation and theft of Olstowski's excimer trade secret, which was litigated for years before the federal district court. (ROA.2414). In 2014, the federal district court issued an Opinion on Partial Summary Judgment seemingly favorable to Olstowski, which opened, as follows:

A consulting scientist has sued a company for its use of his trade secrets. He moved for a partial judgment on liability for its theft of trade secrets and unfair competition. He will prevail because (a) a judgment holds that the technology is his trade secret and (b) the company admits that it used it.

App-044. Despite the statements above, the opinion ended with the following confusing statement:

Petroleum Analyzer Company, L.P., will be liable for using the trade secrets of Franek Olstowski and ATOM Instrument, LCC, if it used his technology in its MultiTek. The court will next (a) compare the technologies and (b) examine the profit derived from the use of Olstowski's secrets.

App-046-App-047.

In 2015, Olstowski and ATOM filed a motion for final summary judgment (ROA.10,994-96), but when the district court did not rule, a bench trial was requested, which occurred in late July 2018. (ROA.1083,2396,2774-955). Evidence admitted at trial,² including the evidence used in the motion for partial summary judgment on liability, established that PAC's MultiTek contained technology using an excimer light source that uses krypton-chloride specifically to measure sulfur using ultraviolet fluorescence. Significantly, an affidavit by PAC's then-president was admitted into evidence, which conceded that the

² (ROA.1822,2009,2372-73,2368,2917,3229,3248-52,3373-75,3867,3884).

2011 Order prohibited PAC’s “use of an excimer light source using krypton-chloride specifically to measure sulfur using UV fluorescence.” (ROA.3077).

After the bench trial, the district court concluded that, despite the admitted similarities between Olstowski’s trade secret technology and PAC’s MultiTek, three slight physical differences in the internal components of the MultiTek excimer lamp meant that PAC had not used Olstowski’s trade secret. *See ATOM Instrument Corp. v. Petroleum Analyzer Co., L.P.*, No. H-12-1811, 2018 U.S. Dist. LEXIS 139063, at *6-9 (S.D. Tex. Aug. 16, 2018) (stating that Olstowski has “not shown is that the MultiTek’s excimer lamp was sufficiently similar to Olstowski’s excimer lamp to be his technology” and noting the three lamp differences: solid versus spiral coil inner electrode, an emission aperture versus not, and an unknown ratio of krypton and chloride in either lamp).

But Olstowski steadfastly explained that those differences in the “specific details” of the excimer lamp, as noted in the patent application, were contemplated as part of the broader “general inventive concept” and thus did not change the fact that PAC’s MultiTek undisputedly used “an excimer light source that uses Krypton-Chloride specifically to measure sulfur using ultraviolet fluorescence,” as defined in the 2011 Order. (ROA.3057).

Olstowski and ATOM appealed to the Fifth Circuit. At oral argument, Olstowski’s counsel answered “Yes” to the very last question, as follows:

“Is your position essentially that that the part of Judge Hinde’s 2011 order describes all we

need to know—before he got into the three paragraphs pulled out of the arbitrators’ decision—he said the technology developed by your client means technology using an excimer light source that uses krypton-chloride specifically to measure sulfur using ultraviolet whatever the last word is [fluorescence]. Are you saying that’s the be-all end-all and that’s what they have done and so therefore it violates this interpretation, which is binding on us?”³

On August 7, 2020, the Fifth Circuit issued its initial opinion, affirming the district court’s take-nothing judgment. Contrary to the district court, the Fifth Circuit did not analyze whether MultiTek’s excimer lamp contained Olstowski’s trade secret as defined in 2007 Texas Judgment or 2011 Order.

Instead, the Fifth Circuit concluded that what the state-court orders declared was Olstowski’s trade secret—“an excimer light source that uses Krypton-Chloride specifically to measure sulfur using ultraviolet fluorescence”—was not a trade secret at all. *See ATOM*, 2020 U.S. App. LEXIS 24999, at *10-11. Telling of the court’s skepticism about what was deemed Olstowski’s trade secret in the 2007 Texas Judgment and 2011 Order, the Fifth Circuit’s initial opinion stated that “it was unclear to the district court, as it is unclear to us, how a gas and a chemical compound

³ *See* Oral Argument at 43:00, ATOM Instrument Corp., et al. v. Petroleum Analyzer Co., L.P., 2020 U.S. App. LEXIS 24999 (5th Cir. 2020) (No. 19-20151), http://www.ca5.uscourts.gov/OralArgRecordings/19/19-20151_2-4-2020.mp3 (alteration added).

commonly used in lamps and lasers can be a trade secret.” App-025.

Of course, neither the 2007 Texas Judgment nor the 2011 Order limited the trade secret to only the mere use of krypton-chloride. Instead, Olstowski’s original trade secret was an excimer light source containing krypton-chloride gas specifically to measure sulfur using ultraviolet fluorescence.

A petition for rehearing en banc was filed, which argued that both the district court and the Fifth Circuit violated 28 U.S.C. § 1738 by failing to give full faith and credit to the state-court orders’ definition of Olstowski’s trade secret and by failing conclude, as a matter of law, that PAC’s admitted use of the excimer technology in Multi-Tek made it liable. In response, and based on a purported “technical revision,” the Fifth Circuit issued a revised opinion, dated September 17, 2020, the day after denying the petition. Significantly, the revised opinion removed the key substantive statement questioning the validity of state-court orders, as follows: “Yet it was unclear to the district court, as it is unclear to us, how a gas and a chemical compound commonly used in lamps and lasers can be a trade secret.” *Compare* App-008 *with* App-025.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

I. This Court Has Never Decided Whether § 1738 Applies to State-Court Judgments Confirming Arbitration Awards.

“Article IV, § 1, of the United States Constitution demands that ‘Full Faith and Credit shall be given in

each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 336 (2005). “In 1790, Congress responded to the Constitution’s invitation by enacting the first version of the full faith and credit statute.” *Id.* “The modern version of the statute, 28 U.S.C. § 1738, provides that ‘judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State.’” *Id.* “The general rule implemented by the full faith and credit statute—that parties should not be permitted to relitigate issues that have been resolved by courts of competent jurisdiction—predates the Republic.” *Id.* The “statute embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims.” *Id.* at 343, n.24.

On the other hand, “[a]rbitration is not a ‘judicial proceeding’ and, therefore, § 1738 does not apply to arbitration awards.” *McDonald v. West Branch*, 466 U.S. 284, 288 (1984). That is because of “the plain language of § 1738.” *Id.* at 287-88 (citing *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 (1982)).

Over thirty years ago, however, the Ninth Circuit acknowledged that “[w]hile the Supreme Court has not directly addressed the issue of whether an arbitrator’s decision that has been reviewed by a state court

is entitled to preclusive effect, . . . it has consistently held that an unreviewed arbitration decision does not preclude a federal court action.” *Caldeira v. County of Kauai*, 866 F.2d 1175, 1178 (9th Cir. 1989), *cert. denied*, 493 U.S. 817, 107 L. Ed. 2d 36, 110 S. Ct. 69 (1989). “Here, in contrast, the plain language of section 1738 controls, requiring us to give the state court’s determination preclusive effect.” *Id.* “The state court’s confirmation of the arbitration award constitutes a judicial proceeding for purposes of section 1738, and thus must be given the full faith and credit it would receive under state law.” *Id.*

Since *Caldeira*, a split among the courts of appeals has continued to develop regarding whether a state-court order confirming an arbitration award should be give “full faith and credit in every court within the United States” as a state’s “judicial proceedings.” *See* 28 U.S.C. § 1738.

A. The Circuits Are Divided Over Whether A State-Court Confirmation Order Of An Arbitration Award Is A “Judicial Proceeding” Under 28 U.S.C. § 1738 And Thus Entitled To “Full Faith And Credit” In Every Court Within The United States.

As noted above, the Ninth Circuit in *Caldeira* held that a “state court’s confirmation of the arbitration award constitutes a judicial proceeding for purposes of section 1738, and thus must be given the full faith and credit it would receive under state law.” 866 F.2d at 1178. To determine the preclusive effect under state law, the Ninth Circuit noted that the claim first raised in arbitration confirmed a Hawaii state court

was a final judgment on the merits because “[c]onfirmation of the arbitration decision constitutes an entry of judgment” under Hawaii state law and may be enforced in court. *Id.* at 1179.

The Ninth Circuit also explained that “[b]efore a person can be denied access to federal courts through the preclusive effect of a state court proceeding, it must be established that he received a ‘full and fair opportunity’ to litigate his claim in the state proceedings.” *Id.* at 1180 (citing *Kremer*, 456 U.S. at 480-81). Quoting from *Kremer*, the court noted that “state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment’s Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law.” *Id.*

With that framework, the Ninth Circuit detailed the steps that Caldeira took to pursue his claims, including being represented by counsel during a two-day arbitration proceeding during which evidence was submitted, witnesses testified and were cross-examined, and Caldeira testified himself. *Id.* After being served with the state-court motion to confirm the arbitration order, Caldeira filed a response and presented argument during an oral hearing. *Id.* After that award was confirmed, Caldeira filed a motion for reconsideration, which was also argued during another oral hearing. *Id.* After that motion was denied, Caldeira filed yet another motion seeking to vacate the arbitration award in which he argued that the award was procured by corruption, fraud, or undue means. *Id.* at 1180-81. That motion was denied for lack of evidence. *Id.* at 1181. Caldeira then filed a petition for writ of

mandamus, which was dismissed, and an appeal of the “denial of his motion to vacate” and “the order confirming the arbitration award’ to the Hawaii Supreme Court, which was also “dismissed as untimely.” *Id.*

Finally, Caldeira also complained about the “summary manner in which the state court’s confirmation order was rendered” and that Hawaii law “requires only the arbitration agreement and the arbitrator’s award be filed as the record in conjunction with a motion for confirmation.” *Id.* at 1180 n.3. The court noted, however, that as the Eleventh Circuit has recognized, “the teaching of *Kremer* . . . is that federal courts must accord preclusive effect to issues litigated and decided on the merits, even though the review on the merits is sharply limited.” *Id.* (quoting *Sykes v. McDowell*, 786 F.2d 1098, 1103 (11th Cir. 1986)). Accordingly, the Ninth Circuit held that “[i]t is overly apparent that Caldeira received a full and fair opportunity to litigate his claim as measured by minimal due process,” and therefore, “[h]e is thus barred from pursuing his section 1983 claims in federal court by the prior Hawaii proceedings.”

The Tenth Circuit, in *Ryan v. City of Shawnee*, found *Caldeira* “distinguishable from the instant case because Oklahoma law precludes a state court from considering the merits of the award reviewed.” 13 F.3d 345, 349 (10th Cir. 1993) (citing *Caldeira*, 866 F.2d at 1179). Specifically, the court noted that *Caldeira* did not set out the scope of review provided by state law to the arbitration award at issue, [but] the court did say that in affirming the award the state court ‘necessarily determined’ the merits of the claim

raised in arbitration.” *Id.* Therefore, the Tenth Circuit held “*Caldeira* is thus distinguishable from the instant case because Oklahoma law precludes a state court from considering the merits of the award reviewed.” *Id.* More specifically, the court explained that in Oklahoma, “the reviewing court may not consider factual or legal findings or the merits of the arbitration award,” and therefore, “the merits of a discrimination claim cannot be litigated in that judicial proceeding.” *Id.* at 348. On that point, the Tenth Circuit noted that “cases considering state proceedings in which the merits of an arbitration award could not be reviewed have held that those decisions are not entitled to preclusive effect under state law.” *Id.* at 349 (citing *Kirk v. Board of Educ.*, 811 F.2d 347, 354 (7th Cir. 1987) and *Bottini v. Sadore Management Corp.*, 764 F.2d 116, 120-21 (2d Cir. 1985)).

In *Fayer v. Town of Middlebury*, the Second Circuit considered “whether the Connecticut court’s confirmation of the award in favor of the Town, an award resulting from an arbitration in which Fayer’s constitutional claims were not presented, precludes his litigation of those claims in the federal courts.” 258 F.3d 117, 123 (2d Cir. 2001). In making this determination, the court noted that “Connecticut statutes set out a special narrow procedure for confirming, vacating, or modifying arbitration awards” and that “[s]uch proceedings are initiated by an application and heard at a ‘short calendar session . . . in order to dispose of the case with the least possible delay.’” *Id.* at 124 (quoting Conn. Gen. Stat. § 52-420(a)). The Second Circuit also noted that “proceeding to confirm, vacate, or modify ‘is

not considered a civil action, but rather is a special proceeding.” *Id.* (quoting *Busconi v. Dighello*, 668 A.2d 716, 723 (Conn. App. 1995)). Finally, the Second Circuit explained that the scope of review in such proceedings was limited to a small list of issues similar to those found in the FAA. *See id.* Ultimately, the Second Circuit concluded that “[u]nder Section 1738, we likewise will not give it such preclusive effect.” *Id.* at 125 (citing *Bottini v. Sadore Management Corp.*, 764 F.2d 116, 121 (2d Cir. 1985), *Ryan v. City of Shawnee*, 13 F.3d 345 (10th Cir. 1993), *Jalil v. Avdel Corp.*, 873 F.2d 701 (3d Cir. 1989), and *Kirk v. Board of Ed.*, 811 F.2d 347 (7th Cir. 1987)).

More recently, in *Myer v. Americo Life, Inc.*, the Eighth Court of Appeals affirmed the district court’s dismissal of Myer’s petition in federal court to vacate an unfavorable arbitration award for “over \$ 1.4 million in damages and injunctive relief.” 469 F.3d 731, 732 (8th Cir. 2006). The day after Myer brought his action in federal court, “Americo filed a petition in Texas state court seeking to confirm the award.” *Id.* A few months later, “the Texas state court issued a final judgment confirming the arbitration award.” *Id.* Myer then filed a motion for new trial in the Texas court, but it was denied by operation of law. *Id.* at 732-33. Although expressly deciding that the dismissal of Myer’s federal action should be affirmed on *res judicata* grounds, the Eighth Circuit cited to the Restatement (Second) of Judgments comment, which cited to 28 U.S.C. § 1738. *See id.* at 734; *see also id.* at 734, n.9 (quoting 28 U.S.C. § 1738).

Most recently, in *W.J. O'Neil Co. v. Shepley, Bulfinch, Richardson & Abbott, Inc.*, the Sixth Circuit reversed the district court's dismissal of claims under res judicata explaining that “[a]n arbitration award cannot bar a claim that the arbitrator lacked authority to decide, and an arbitrator lacks authority to decide a claim that the parties did not agree to arbitrate.” 765 F.3d 625, 627 (6th Cir. 2014). The court, therefore, concluded that “O’Neil did not agree to arbitrate the instant claims.” *Id.* at 627-28.

As further support for its conclusion, however, the court also noted that “[n]o party sought judicial confirmation or review of the arbitration award.” *Id.* at 627. But the Sixth Circuit further provided that “[w]e would reach the same conclusion even if a Michigan court had reviewed the arbitration award.” *Id.* at 633. In such a case, the court noted that “the state court’s review would be a ‘judicial proceeding’ entitled here to the same preclusive effect it would receive in state court.” *Id.* at 633-34 (citing to 28 U.S.C. § 1738 and *Ryan v. City of Shawnee*, 13 F.3d 345, 347 (10th Cir. 1993)). As to Michigan law, the Sixth Circuit described the limited review of arbitration awards in Michigan state-court proceedings. *Id.* at 634 (citing *Gordon Sel-Way, Inc. v. Spence Bros., Inc.*, 475 N.W.2d 704, 709 (Mich. 1991) and stating that “[i]n a state action appealing a statutory arbitration, ‘the court rules provide the court with three options: it may confirm, modify or correct, or vacate the award’ and that such power “is very limited”).

In sum, the Sixth Circuit concluded that “Michigan courts would not bar the present claims because of a

judgment confirming or modifying the arbitration award.” *Id.* at 634. Judge McKeague dissented, concluding that “O’Neil’s claims are barred by res judicata under Michigan law,” outlining the following:

The parties in the present case have already spent substantial time and money litigating the exact issues raised in this case. The previous arbitration lasted almost a year and generated 10,000 pages of transcripts, over 1,400 exhibits, and testimony from 50 witnesses. Now, the parties must begin again.

Id. at 635 (McKeague, J. dissenting). In sum, he concluded that “[n]othing prevented O’Neil from bringing his tort claims in the initial arbitration, and it is apparent that O’Neil has simply repurposed his arbitration claims to take a second bite at the apple.” *Id.*

Based on the foregoing, for over thirty years, the courts of appeals have taken starkly different views on the meaning of “judicial proceedings” 28 U.S.C. § 1738, with some circuits concluding that a state-court judgment confirming an arbitration award is entitled to full faith and credit in federal courts while other circuits delve into the muddled nuances of the scope of review of arbitration awards under the applicable state law. These inconsistent approaches, not having any clear basis in the text of 28 U.S.C. § 1738, have caused nationwide confusion among the courts and litigants and have unnecessarily increased legal expenses due to the lack of finality for state-court confirmed arbitration awards. This Court should clear up the discord among the circuits.

B. Nothing in the Text of 28 U.S.C. § 1738 Suggests that a State-Court Judgment Confirming an Arbitration Award Is Not a “Judicial Proceeding” Entitled to “Full Faith and Credit.”

As noted above, the phrases “full faith and credit” and “judicial proceedings” found in 28 U.S.C. § 1738 are derived from “Article IV, § 1, of the United States Constitution.” *See San Remo Hotel, L.P.*, 545 U.S. at 336. With respect to such text, this Court is “guided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.’” *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008). In *Heller*, the Court relied on the “1773 edition of Samuel Johnson’s dictionary” and “Timothy Cunningham’s important 1771 legal dictionary” to construe the Second Amendment. *Id.* at 581.⁴

More recently, in *Bostock v. Clayton Cty.*, the Court construed Title VII of the Civil Rights Act of 1964 (42 U. S. C. §2000e-2(a)(1)) regarding whether discrimination “because of” sex included discrimination against gay or transgender people. 140 S. Ct. 1731, 1737-40 (2020). In answering the statutory construction question in the affirmative, stated as follows: “When the express terms of a statute give us one answer and extratextual considerations suggest

⁴ As to legislative history, the Court noted that “[i]t is dubious to rely on such history to interpret a text that was widely understood to codify a pre-existing right, rather than to fashion a new one.” *Id.* at 603.

another, it's no contest." *Id.* at 1737. To be sure, the Court wrote: "Only the written word is the law, and all persons are entitled to its benefit." *Id.*

Furthermore, the Court outlined the following rules of statutory construction:

This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extra-textual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.

Id. at 1738.

With respect to the text, "full faith and credit," in 28 U.S.C. § 1738, one scholar concluded that "*Full* faith and credit is the maximum possible credit; it is conceptually impossible to give faith and credit that is more than full." Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 296 (1992) (emphasis in original).

Samuel Johnson's definitions of the words "Full Faith" accord with Laycock's modern understanding. Johnson's most applicable definition of "faith"

provides that it meant “fidelity; unshaken adherence.” A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785). Similarly, Johnson’s definition of “full” meant “complete without abatement; at the utmost degree.” *Id.*

Timothy Cunningham’s 1765 legal dictionary defined “judicial” as “such decisions, as by way of deduction and illation upon those laws are formed or deduced.” 2 A NEW AND COMPLETE LAW DICTIONARY. Johnson’s definition of “proceedings,” with respect to legal procedure, meant “the proceedings at law.” A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785). Under the plain meaning of “judicial proceedings,” therefore, a state-court judgment confirming an arbitration award would surely qualify under 28 U.S.C. § 1738. In fact, one scholar has noted that “[t]he Supreme Court consistently defines the term *judicial proceedings* to mean judgments.” Elizabeth Redpath, *Between Judgment and Law: Full Faith and Credit, Public Policy, and State Records*, 62 EMORY L. REV. 639, 649 (2013).

In *Matsushita Elec. Indus. Co. v. Epstein*, the Court concluded that “the judgment at issue is the result of a class action, rather than a suit brought by an individual, does not undermine the initial applicability of § 1738.” 516 U.S. 367, 373-74 (1996). “The judgment of a state court in a class action is plainly the product of a ‘judicial proceeding’ within the meaning of § 1738.” *Id.* at 374. “Therefore, a judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to

full faith and credit under the express terms of the Act.” *Id.*

A state-court judgment confirming an arbitration award should be treated no differently, and the same goes for a state-court order merely clarifying that judgment.⁵⁵ This Court should construe the meaning of “judicial proceedings” in 28 U.S.C. § 1738 in this context.

II. The Fifth Circuit’s Decision Is Incorrect and Contradicts 28 U.S.C. § 1738’s Command to Give State-Court Judgments Full Faith and Credit.

This Court has held that “[r]egarding judgments, however, the full faith and credit obligation is exacting.” *Baker v. GMC*, 522 U.S. 222, 233 (1998). “For claim and issue preclusion (res judicata) purposes, in other words, the judgment of the rendering State gains nationwide force.” *Id.* As to 28 U.S.C. § 1738, “the command for full faith and credit to judgments

⁵⁵ See, e.g., *Thomas v. Oldham*, 895 S.W.2d 352, 356 (Tex. 1995) (stating “[a]ny document other than a motion to enforce or clarify, filed after the expiration of the trial court’s plenary jurisdiction, would be a nullity”); *Allen v. Allen*, 717 S.W.2d 311, 312 (Tex. 1986) (stating because party “instituted this action after the trial court lost its plenary power over the decree,” the trial court “retained only its inherent power to clarify or enforce the decree”); *In the Estate of Brazda*, 582 S.W.3d 717, 731 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (stating “[a]fter a trial court loses plenary power over a final judgment, it lacks jurisdiction to alter that judgment, save for clarifying the judgment”); *Jobe v. Lapidus*, 874 S.W.2d 764, 767 (Tex. App.—Dallas 1994, no pet.) (stating “[t]he only postjudgment proceedings over which the trial court retains jurisdiction after the expiration of its plenary power are proceedings to clarify or enforce a judgment”).

has remained constant.” *Id.* at 243, n.4.

Here, after the 2007 Texas Judgment was entered, PAC appealed “an arbitration award and final judgment in favor of appellee, Franek Olstowski, and a summary judgment in favor of appellee, Atom Instrument Corporation (Atom).” *See Olstowski*, 2010 Tex. App. LEXIS 5581, at *1. Specifically, after addressing each of the issues that PAC raised on appeal, the court of appeals concluded its opinion with this statement: “We affirm the judgment of the trial court.” *Id.* at *68.

In addressing the validity of the underlying arbitration proceedings, the court of appeals noted that the arbitration clauses in the two relevant non-disclosure agreements respectively provided that “[j]udgment upon an award rendered by the arbitrator may be entered in and by any court having jurisdiction” and that “the parties acquiesce to the jurisdiction of the U.S. District Courts and a judgment upon an award rendered by the arbitrators may be entered in and by the U.S. District court.” *Id.* at *7-9. Both the FAA and the Texas Arbitration Act (TAA) permit trial courts to entered judgments on arbitration awards. *See* 9 U.S. Code § 9; *see also* Tex. Civ. Prac. & Rem. Code § 171.081. The court of appeals concluded that the FAA applied “while recognizing that the TAA also applies[d] to the extent it is consistent with the FAA.” *Id.* at *16.

The 2007 Texas Judgment incorporating the 2007 Award, affirmed by the court of appeals, included the finding that “Olstowski was the exclusive and sole owner of all the technology in dispute, and enjoined PAC from claiming ownership in or using the

technology, and from interfering with Olstowski’s use and enjoyment of the technology,” including technology for an “excimer light source specifically intended to measure sulfur using ultraviolet (UV) fluorescence.” *Id.* at *4, 11.

Six months after *Baker*, the Fifth Circuit issued a scathing rebuke that a “Texas judgment intrinsically was wrong, dead wrong.” *Salazar v. United States Air Force*, 849 F.2d 1542, 1544 (5th Cir. 1988). Stated another way, the court “reemphasize[d] that the correctness of the Texas court’s decision not only escapes us,” but “[w]e find it totally wrong and unacceptable.” *Id.* at 1548. But the court noted that “[a]ll this takes place—indeed must take place as we view the law—because of the cherished Congressional policy under 28 U.S.C. § 1738 which mandates full faith and credit to judgments of state courts.” *Id.* at 1544. “Under § 1738, we can inquire no further.” *Id.* at 1548. Thus, in the past, it is clear that when the Fifth Circuit disapproved of the merits of a state-court judgment, it had no qualms about expressing such an opinion, but it recognized that 28 U.S.C. § 1738 forced its hand.

Here, the Fifth Circuit’s uneasiness with the state-court orders is more subtle but evident nonetheless. In its initial opinion, the court doubted the state court’s conclusion of law defining Olstowski’s trade secret method, effectively disregarding the text of those state-court orders, as follows:

The arbitration panel stated that the technology described in Olstowski’s patents is a trade secret. To be sure, the words “krypton” and “chloride” appear in the panel decision. **Yet it was**

unclear to the district court, as it is unclear to us, how a gas and a chemical compound commonly used in lamps and lasers can be a trade secret. . .

. . . We find, first, that neither the arbitration panel award nor the state clarification order explicitly stated that the use of krypton-chloride itself was a protected trade secret.

App-025-App026 (emphasis added).

In response, Olstowski filed a petition for rehearing en banc, which asserted that the opinion violated 28 U.S.C. § 1738 “by failing to adhere to the plain text of the state-court orders defining Olstowski’s excimer lamp trade secret method, which PAC’s MultiTek undisputedly used.” After denying the petition, the Fifth Circuit issued its revised opinion, removing the above-emphasized text. *ATOM Instrument Corp.*, 969 F.3d 210, 216 (5th Cir. 2020).

Twice the opinion erroneously states that Olstowski claimed a trade secret in the mere use of krypton-chloride. *Id.* at 215-16 (stating “Olstowski and ATOM base their entire case on [PAC’s] use of krypton-chloride in the MultiTek” and “that neither the arbitration panel award nor the state clarification order explicitly stated that the use of krypton-chloride itself was a protected trade secret”). But Olstowski never made such a claim. Instead, the use of krypton-chloride was just one step of what comprised Olstowski’s trade secret method. *E.g., Limelight Networks, Inc. v. Akamai Techs., Inc.*, 572 U.S. 915, 921 (2014) (stating that “[t]he Federal Circuit’s analysis fundamentally misunderstands what it means to infringe a method

patent” and that a “method patent claims a number of steps”).

Shockingly, the Fifth Circuit, earlier in its opinion, quoted the precise definition of Olstowski’s trade-secret, as defined by the state court, but in equally shocking contrast acknowledged that not even the district court gave that definition full faith and credit when Olstowski demanded that it be applied in federal court, as follows:

The state court concluded that the phrase “technology developed by Olstowski” as used in the confirmation order “means technology using an excimer light source that uses Krypton-Chloride specifically to measure sulfur using ultraviolet fluorescence.”

...

The district court rejected Olstowski and ATOM’s assertion “that Olstowski’s technology is any device using an excimer light source that uses krypton-chloride specifically to measure sulfur using ultraviolet fluorescence,”

Id. at 214-15.

Despite the foregoing, the Fifth Circuit still purported to give the state-court orders “credit,” but not in compliance with 28 U.S.C. § 1738. The court only stated *ipse dixit* that the district court “did not deviate from the arbitration panel award or any other order.” *Id.* at 216. But notably absent from the opinion’s analysis section titled “*Whether Petroleum Analyzer used Olstowski’s technology*” is any discussion of the text in the state-court orders and whether PAC’s MultiTek,

despite the similarities and differences, contained Olstowski's trade secret method. *See id.* at 215-16. That is not giving full faith and credit to the state-court orders but is, at best, only paying lip service to them. *E.g., Abbott v. Perez*, 138 S. Ct. 2305, 2329 (2018) (stating "the dissent pays only the briefest lip service").

The irony of the district court and Fifth Circuit's lip service to purportedly honoring the state-court orders is that when PAC read the 2011 Order, it knew it would violate that order if it continued to sell Multi-Teks containing the excimer lamp technology. As noted, PAC's president in 2012 admitted in an affidavit that "the October 2011 order modified the 2007 injunction such that the injunction could be interpreted to include not just the excimer technology developed by Mr. Olstowski, but any use of an excimer light source using krypton-chloride specifically to measure sulfur using UV fluorescence." (ROA.3077).

But now, with the district court's decision and the Fifth Circuit's blessing, PAC can go right back to selling the Multi-Teks despite the clear language in the 2007 Texas Judgment and the 2011 Order. How this can be giving full faith and credit to the state-court orders defies logic—and the plain meaning of 28 U.S.C. § 1738. The given reasons for declaring *ipse dixit* that the state-court orders were followed are pretextual, because the Fifth Circuit's analysis is non-textual. Neither of the courts below compared the technology that PAC admitted to using with the text of the 2011 Order or the 2007 Texas Judgment, or the patent application incorporated into it.

Although the Fifth Circuit did not expressly acknowledge refusing to give full faith and credit to the state-court orders, its opinion is still in direct violation of 28 U.S.C. § 1738.

For example, in *Dart Cherokee Basin Operating Co., LLC v. Owens*, the Court concluded that the Tenth Circuit erroneously denied a discretionary interlocutory appeal on the implied ruling that it must have denied the appeal on the erroneous legal conclusion that a notice of removal under 28 U. S. C. §1446(a) required evidence in addition to a “short and plain statement” regarding the amount in controversy. 574 U.S. 81, 83-84 (2014). Despite the lack of express reasoning for denying the appeal, this Court concluded that “[f]rom all signals one can discern then, the Tenth Circuit’s denial of Dart’s request for review of the remand order was infected by legal error.” *Id.* at 93.

The same infection of clear has developed here. The Fifth Circuit’s opinion cannot be squared with the plain text of the state-court orders and thus violates 28 U.S.C. § 1738.

III. The Question Presented Is Important and Should Be Decided in This Case.

Although this Court has held that “[a]rbitration is not a ‘judicial proceeding’ and, therefore, § 1738 does not apply to arbitration awards,” *McDonald*, 466 U.S. at 288, to permit the circuits courts below to continue to avoid giving full faith and credit to state-court judgments confirming arbitration awards would be “contrary to the longstanding policy of this Court favoring

the finality of arbitration awards.” *E.g., Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 574 (1976) (Rehnquist, J., dissenting).

When parties agree to resolve their disputes in arbitration, they presume the awards are final, subject to state laws that may permit those awards to be confirmed as state-court judgments and then appealed to the state appellate courts. The text of 28 U.S.C. § 1738 does not leave any room for what “judicial proceedings” means. But the circuit split discussed above creates significant uncertainty for litigants across the country as to whether their state-court confirmed arbitration awards, even after lengthy state-court appeals, will be disregarded in some subsequent federal-court action.

Put simply, “[a]bsent a partial repeal of the Full Faith and Credit Act, 28 U.S.C. § 1738, by another federal statute, a federal court must give the judgment the same effect that it would have in the courts of the State in which it was rendered.” *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 369 (1996). A state-court judgment confirming an arbitration award “is plainly the product of a ‘judicial proceeding’ within the meaning of § 1738.” *See id.* at 374. Therefore, such a judgment “like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit under the express terms of the Act.” *See id.* The Fifth Circuit here and the other circuits discussed above are split on this important question, underscoring the need for this Court’s review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DYLAN B. RUSSELL
Counsel of Record
JOSEPH O. SLOVACEK
HOOVER SLOVACEK LLP
5051 Westheimer Rd.,
Suite 1200
Houston, Texas 77056
(713) 977-8686
russell@hoverslovacek.com
Counsel for Petitioner

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