No. 20-1273

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

REPLY BRIEF

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

April 26, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

REPLY BRIEF

In 1989, the Ninth Circuit noted that "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." *Caldeira v. County of Kauai*, 866 F.2d 1175, 1178 (9th Cir. 1989), *cert. denied*, 493 U.S. 817 (1989). The question presented—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—requires a text-based construction of the words "judicial proceedings" as understood by voters in 1790. Olstowski submits that "judicial proceedings" under Section 1738 do not require a state court's merits review of an arbitration award. The circuit split on this question has continued unresolved for decades. The petition for a writ of certiorari should be granted.

ARGUMENT

I. The Split in the Circuits Over How to Apply Section 1738 to State-Court Confirmed Arbitration Awards Is Not Caused by Different State Laws But Whether a "Full and Fair Opportunity to Litigate" Means Full Merits Review or Only "Minimum Procedural Requirements of the Fourteenth Amendment's Due Process Clause."

PAC misunderstands the question presented and thus suggests a different question with a seemingly simple answer. PAC asserts that each one of the circuit court cases discussed in Olstowski's petition, which show the conflicting applications of 28 U.S.C. §

1738, "recognizes that a confirmed arbitration award is a 'judicial proceeding,' thereby invoking an analysis of state law concerning the preclusive effect of the confirmation order." PAC Resp., 26. PAC's simple answer is that differences in state law explain why some state-court judgments confirming arbitration awards are not given full faith and credit.

In essence, PAC argues that the second half of the following text from Section 1738 renders the first half irrelevant: "Such . . . judicial proceedings . . . 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, . . ." 28 U.S.C. § 1738. But "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *See Duncan v. Walker*, 533 U.S. 167, 174 (2001).

As to the second half of the sentence, this Court has noted that "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482 (1982). But the states do not check a box to dictate to federal courts which judgments are given full faith and credit. Instead, to give a state-court judgment full faith and credit, "[t]he State must, however, satisfy the applicable requirements of the Due Process Clause." *Id.*

To be sure, this Court has explained that its "decisions enforcing the Full Faith and Credit Clause of the Constitution, Art. IV, § 1, also suggest that what a full

and fair opportunity to litigate entails is the procedural requirements of due process." *Id.* at 483, n.24. For example, "there is nothing in the concept of due process which demands that a defendant be afforded a second opportunity to litigate the existence of jurisdictional facts." *Id.* at 483, n.24.

Simply put, the original meanings of the words "judicial" and "proceeding" in 28 U.S.C. § 1738 and this Court's interpretative limitation that such proceedings minimally include "procedural requirements of due process" informs the federal circuits' analysis of whether a state-court judgment confirming an arbitration award is entitled to full faith and credit. It is the differences in that analysis that reveal the circuit court conflicts that necessitate this Court's review.

For example, in *Caldeira*, the Ninth Circuit concluded that "[t]he 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 reach this conclusion, however, the Ninth Circuit's analysis was not limited to a single question of whether the confirmed arbitration award was a "judicial proceeding," which is PAC's simplistic answer.

Instead, the Ninth Circuit initially answered three issue-preclusion questions under Hawaii law: "Was the issue decided in the prior action identical with the issue presented in the present action? (2) Was there a final judgment on the merits in the prior action? (3) Was the party against whom the doctrine is asserted a party or in privity with a party to the previous

adjudication?" *Id.* at 1178-79. The first and third questions were undisputed. In answering the second question, the court confirmed that under Hawaii's arbitration statutes such confirmed arbitration awards are judgments, and the court distinguished a Second Circuit case where under a New York statute such confirmed awards were not effective or enforceable as judgments. *See id.* at 1179-80 (discussing *Bottini v. Sadore Management Corp.*, 764 F.2d 116 (2d Cir. 1985)).

Not surprisingly, answering the state law issue-preclusion questions was not the end of the analysis. That is because in most cases, answering the state-specific issue preclusion questions is relatively simple. The more difficult question in *Caldeira* arises solely from the meaning of the text in 28 U.S.C. § 1738, as explained by this Court in *Kremer.* Specifically, in *Caldeira*, the Ninth Circuit 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." 866 F.2d at 1178 (quoting *Kremer*, 456 U.S. at 480-81).

Whether there has been a "full and fair opportunity" to litigate the claim in state court is where the circuit-court conflicts have grown unresolved by this Court, particularly in the arbitration context where the scope of state-court review of an arbitration award is often narrow. But *Kremer* provided the following non-text-based guidance:

> Our previous decisions have not specified the source or defined the content of the requirement that the first adjudication offer a full and fair opportunity to litigate. But for present purposes, where we are bound by the statutory directive of § 1738, 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.

456 U.S. at 481.

With that framework, this Court concluded that state-court "judicial review in the Appellate Division" of an agency (New York State Division of Human Rights) finding of no national origin or religious discrimination should be given full faith and credit under Section 1738. *Id.* at 484-65. Specifically, the Court found that such state-court review was sufficient because it assured "that a claimant is not denied any of the procedural rights to which he was entitled and that the NYHRD's determination was not arbitrary and capricious." *Id.*

In *Ryan v. City of Shawnee*, the Tenth Circuit 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). More specifically, the Tenth Circuit equated the inability of a state "reviewing court" to "consider factual or legal findings or the merits of the arbitration award" as akin to not having a "'full and fair opportunity' to litigate the critical issue in the earlier case." *See id.* at 348 (quoting *Underside*

v. Lathrop, 645 P.2d 514, 516 n.6 (Okla. 1982), which quoted *Allen v. McCurry*, 449 U.S. 90 (1980)).

Thus, the split among the circuit courts depends on the non-textual but implied "statutory directive of § 1738" 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." *See Kremer*, 456 U.S. at 481.

Olstowksi submits that meaning of the words "judicial proceedings," as understood by American voters in the mid- to late-1700s, provides text-based proof that state-court judicial review of an arbitration award should be entitled to "full faith and credit" even if there is no reconsideration of the merits. As long as the state-court confirmation process is conducted as a "proceeding at law" that involves "decisions, as by way of deduction and illation upon those laws are formed or deduced," it would qualify as a "judicial proceeding" within the meaning of 28 U.S.C. § 1738. *See* 2 A NEW AND COMPLETE LAW DICTIONARY; *see also* A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785).

Under that text-based test, the NYHRD's decision in *Kremer* did not reconsider the merits, but the claimant was "not denied any of the procedural rights to which he was entitled and that the NYHRD's determination was not arbitrary and capricious." 456 U.S. at 484. This Court should grant review to construe the meaning of "judicial proceedings" in 28 U.S.C. § 1738 in this context and to resolve the conflicting approaches taken in the circuit courts.

II. The Fifth Circuit's Erroneous Conclusion Was Caused by that Court's Failure to Give Full Faith and Credit to the State-Courts' Legal Definition of Olstowski's Trade Secret.

Although PAC's lengthy statement of the case shows the procedural history of this case is long and the subject matter of the technology is complicated to laypeople, the fundamental legal question here is exquisitely simple: Does PAC's Multi-Tek contain "an excimer light source that uses Krypton-Chloride specifically to measure sulfur using ultraviolet fluorescence," as defined in the 2011 Order? (ROA.3057). The answer is conclusively yes.[1]

To be clear, the parties have no dispute about the details of the excimer lamp in PAC's Multi-Tek. Olstowski takes PAC at its word about the slightly different internal components of its lamp. The only case-specific question on which PAC's liability depends is whether the excimer lamp in PAC's Multi-Tek fits the legal definition framed by the state-court orders. That question does not depend on adequacy of proof or sufficiency of persuasion but on a court's proper construction of the state-court orders' text in light of the undisputed facts. *See Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1067 (2020) (stating "the application of a legal standard to undisputed or established facts" is a "question of law"); *accord New Nat'l Gypsum Co. v. Nat'l Gypsum Co. Settlement Trust*, 219 F.3d 478, 483

---

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

(5th Cir. 2000) (stating "[t]he interpretation of a court order is purely a question of law").

With the pertinent facts undisputed and the legal standard framed by the state-court orders, all that is left is for the federal courts to give the state-court orders full faith and credit. Neither the Fifth Circuit's opinion nor the district court's findings and conclusions can be squared with the plain text of the state-court orders. Thus, those courts did not comply with 28 U.S.C. § 1738 to "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).

That said, PAC's emphasis on claims 1 through 5 in Olstowski's original patent application, which were canceled in an amendment to the original patent application, does not change the simple legal question here. That is because the 2011 Order made clear that the phrase "his excimer technology" from the 2007 Texas Judgment was "not limited to the technology and methods embodied in the December 11, 2006 amendment to the patent application for Excimer UV Fluorescence Detection, but instead includes the technology and methods embodied in any patent applications submitted by Olstowski for Excimer UV Fluorescence Detection." (ROA.3058). And the original 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).

Giving full faith and credit to the state-court orders confirming the arbitration award, PAC's Multi-Tek

contained "an excimer light source that uses Krypton-Chloride specifically to measure sulfur using ultraviolet fluorescence." (ROA.3057). Accordingly, as the district court initially ruled on partial summary judgment, Olstowski should have prevailed "because (a) a judgment holds that the technology is his trade secret and (b) the company admits that it used it." App-044.

III. There Are No Barriers to Review.

PAC questions whether Olstowski previously raised the 28 U.S.C. § 1738 argument that the lower courts failed to follow the orders of the state courts. But Olstowski has always claimed that the district court and the Fifth Circuit failed to follow the clear text of the state-court orders. *See Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (stating "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below").

After the federal district court concluded that three slight differences in certain internal components of the Multi-Tek's excimer lamp meant it was not "sufficiently similar" to be Olstowski's trade secret, Olstowski's motion to alter judgment claimed, in part, that "any suggestion that a 'device using an excimer light source that uses krypton-chloride specifically to measure sulfur using ultraviolet fluorescence' . . . is not the protected . . . has been resolved by the state district court and appellate court (respectively confirming and affirming the arbitration award)."

Similarly, in his second briefed issued to the Fifth Circuit, Olstowski raised that same claim but argued

that "federal district courts lack jurisdiction to entertain collateral attacks on state court judgments," including collateral attacks that "include 'what in substance would be appellate review of the state judgment.'" *See Weaver v. Tex. Capital Bank N.A.*, 660 F.3d 900, 904 (5th Cir. 2001) (discussing *Rooker-Feldman* doctrine).

It was only when the initial opinion issued that it became clear that the Fifth Circuit questioned the merits of the state-court orders framing what was Olstowki's trade secret. In response, Olstowski's petition for rehearing en banc expressly argued that "[t]he panel opinion violates the Full Faith and Credit Clause and 28 U.S.C. § 1738 and parts with *Thompson v. Dallas City Attorney's Office*, 913 F.3d 464, 471 (5th Cir. 2019) and *Allen v. McCurry*, 449 U.S. 90, 96 (1980) 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." Olstowski also explained that "the *Rooker-Feldman* doctrine is 'very close if not identical to the more familiar principle that a federal court must give full faith and credit to a state court judgment.'" *Am. Airlines, Inc. v. DOT*, 202 F.3d 788, 801 n.9 (5th Cir. 2000).

In sum, at each stage of this litigation, Olstowski has always claimed that the federal courts below failed to honor the plain text of the state-court orders. As the federal courts' rationale for disregarding those state-court orders became more obviously a lack of faith in the correctness of the state-court orders, Olstowski was permitted to raise new legal arguments

to protect his 2007 state-court confirmed arbitration award, which permanently enjoined PAC from using an "an excimer light source that uses krypton-chloride specifically to measure sulfur using ultraviolet fluorescence." *See Yee*, 503 U.S. at 534.

To allow the continued erosion of the 231-year-old protections provided by 28 U.S.C. § 1738 defies common sense and the due process rights described in *Kremer*, but it will be a recurring problem in the circuits if the Fifth Circuit's decision below is left standing.

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

April 26, 2021