No. 24-_____

In the Supreme Court of the United States

ASCENSION DATA & ANALYTICS, LLC, ET AL.,

Petitioners,

v.

PAIRPREP, INC., D/B/A OPTICSML,

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

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QUESTIONS PRESENTED

This case raises important federal concerns regarding policies favoring arbitration and the well-established doctrine of *res judicata*, where circuits are divided on whether a court, as opposed to the arbitrator, decides the preclusive effect of a prior judgment.

The questions presented are:

1. Should a court decide the preclusive effect of a judgment on an arbitration proceeding?

2. Did the district court have federal question jurisdiction to determine the preclusive effect of a federal judgment adjudicating a federal question?

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiff-Appellants below

- Ascension Data & Analytics, LLC
- Rocktop Partners, LLC
- Rocktop Holdings II, LLC

Respondent and Defendant-Appellee below

- Pairprep, Inc. d/b/a OpticsML

Related Parties

The following are parties in a related proceeding that are not directly involved in the subject matter of this Petition. In the related proceeding, Rocktop Technologies, LLC is represented by counsel of record herein. It was also initially named as a party in the district court proceeding below but was omitted from subsequent amended pleadings and is not a party to this appeal.

- Rocktop Technologies, LLC
- Indian Harbor Insurance Company

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, no publicly held corporation owns 10% or more of the stock of any Petitioner or its respective parent company, as applicable. Petitioners' parent companies are as follows:

(i) Rocktop Asset Management LLC and Jazz Realty Rocktop, LLC are the parent companies of Petitioner Rocktop Holdings II, LLC; and

(ii) Rocktop Technologies, LLC is the parent company of Petitioners Rocktop Partners, LLC and Ascension Data & Analytics, LLC.

LIST OF PROCEEDINGS

United States Court of Appeals (5th Cir.):
Ascension Data & Analytics, LLC, Rocktop Partners, LLC, and Rocktop Holdings II, LLC v. Pairprep, Inc. d/b/a OpticsML (No. 23-11026) (June 25, 2024, Judgment and August 5, 2024, Order denying petition for rehearing)

United States District Court (N.D. Tex.):
Ascension Data & Analytics, LLC, Rocktop Partners, LLC, and Rocktop Holdings II, LLC (No. 3:23-cv-00552-N) (September 11, 2023) (Judgment)

Civil District Court of Dallas County (191st Dis.):
Pairprep, Inc. d/b/a OpticsML v. Ascension Data and Analytics, LLC, Rocktop Partners, LLC, Rocktop Technologies II, LLC, Rocktop Technologies, Indian Harbor Insurance Company (No. DC-23-04299) (pending)

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

STATUTORY PROVISION

OTHER DOCUMENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

STATUTES

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 105 F.4th 749. (App.1a-10a.) The memorandum opinion and order of the district court is available at 2023 WL 5945859. (App.11a-17a.)

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2024. (App.1a.) Its order denying rehearing was entered on August 5, 2024, effectively extending the deadline to file this petition to November 4, 2024. (App.18a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10 is reproduced in the appendix to this petition. (App.19a-20a.)

INTRODUCTION

This case presents important issues not previously addressed by this Court, on which substantial conflict exists between the circuits and state courts. It provides an opportunity for this Court to decide the proper balance between the FAA objective favoring arbitration proceedings and the strong public policy supporting the well-established doctrine of *res judicata, i.e.*, a definitive end to an adjudicated claim via courts enforcing the preclusive effects of judgments. The primary issue is whether a court should decide the preclusive effect of a prior judgment when the same claims are presented in an arbitration proceeding. On this issue, the circuits and state courts have conflicting decisions. Some have held that this issue is to be decided by a court,[1] others that it should be decided by an arbitrator,[2] and another that it may be decided by either.[3] This Court should grant review to provide guidance on the proper considerations and balancing of interests.

The questions presented in this case raise practical and legal issues of substantial importance involving

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[1] *See, e.g.*, *Duhaime v. John Hancock Mut. Life Ins. Co.*, 200 Fed. Appx. 6, 8 (1st Cir. 2006); *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 499 (5th Cir. 1986); *Ewart v. Y & A Group, Inc.* (*In re Y & A Group Secs. Litig.*), 38 F.3d 380, 382-83 (8th Cir. 1994); *Leon C. Baker, P.C. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 821 So. 2d 158, 164 (Ala. 2001); *Waterfront Marine Constr. v. N. End 49ers Sandbridge Bulkhead Grps. A, B and C*, 468 S.E.2d 894, 903 (Va. 1996).

[2] *See, e.g., Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126, 131 (2d Cir. 2015); *Constellium Rolled Prods. Ravenswood, LLC*

the preclusive effect of a prior judgment on a subsequent arbitration proceeding or award therein. It impacts a significant number of cases in federal and state court, as the latter applies federal case law to proceedings under the FAA. This Court has not yet addressed the issues presented in this case. In *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217, 222 (1985), a private arbitration agreement was enforced, notwithstanding that it resulted in separate proceedings in different forums. This Court found that a stay of the arbitration proceedings was not necessary to protect federal interests, as collateral estoppel rules afforded adequate protection. One concern in that case was the potentially preclusive effect of a prior arbitration award on pending federal claims. This case, on the other hand, involves the preclusive effect of a federal judgment on an arbitration proceeding. Even so, *Dean* did not decide whether the court or arbitrator determines the preclusive effect of an earlier arbitration award.

Additionally, this Court, in *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 85-86 (2002), held that a NASD arbitrator should decide gateway procedural issues, like timeliness, and reserved for the court questions of arbitrability. While *Howsam* did not decide that *res judicata* is such a "procedural issue," courts commonly

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v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, ALF-CIO/CLC, 18 F.4th 736, 741 (4th Cir. 2021); *United Comput. Sys. v. At&T Info. Sys.*, 298 F.3d 756, 764 (9th Cir. 2002); *Shell Oil Co. v. Co2 Comm., Inc.*, 589 F.3d 1105, 1109 (10th Cir. 2009); *Grigsby & Assocs. v. M Sec. Inv.*, 664 F.3d 1350; 1352 (11th Cir. 2011).

3 *See, e.g., John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 138-40 (3d Cir. 1998).

cite that case as support for arbitrators deciding the preclusive effect of a prior judgment.

This case provides an excellent vehicle for clarifying *Howsam* and the rationale for courts to determine the preclusive effect of a prior judgment or to otherwise consider when deciding whether that issue should be decided in an arbitration proceeding. This case provides an exceptional opportunity for this Court to address the role of courts enforcing judgments on the merits of a case, as opposed to their narrow review of an arbitration award where preclusion was raised in that proceeding. Depending on the arbitration award, it may not be apparent that the arbitrator considered that issue or committed manifest error in its application. It also raises the issue of whether a different rationale should be applied in instances where *res judicata* is raised in opposition to a motion to compel arbitration, *i.e.*, before the arbitration proceedings, as opposed to this case, where the judgment was entered shortly before the arbitration award, *res judicata* was raised in the arbitration proceeding and denied via a boilerplate statement that all defenses not granted are denied, and asserted by Petitioners when seeking to vacate the arbitration award.

These cases involve the confluence of separate proceedings, where the court's analysis regarding *res judicata* is based to a significant extent on a judgment arising from a judicial proceeding outside of a related arbitration proceeding. Under such circumstances, the courts should not relinquish their role in managing cases and furthering the public policies supporting *res judicata* merely because the parties agreed to a contract with an arbitration clause, regardless of its scope. The well-established doctrine of *res judicata* provides an

efficient and effective means for resolving disputes, a common goal attributed to arbitration proceedings.

This case also presents the important question, yet to be decided by this Court, whether a district court has federal question jurisdiction to determine the preclusive effect of a judgment adjudicating a federal question. The Fifth Circuit found that it did not, reasoning that *res judicata* was considered and rejected during the arbitration proceeding. This Court in *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009), applied the well-pleaded complaint rule to determine whether federal question jurisdiction was invoked, reasoning that "arises under" federal law may only be met when the plaintiff's statement of his own cause of action shows that it is based upon federal law. In this instance, Petitioners seek to vacate an arbitration award, in part, because *res judicata* arising from an intervening judgment precluded relitigating the same claims in the arbitration proceeding. The Fifth Circuit failed to follow the well-pleaded complaint rule, erroneously reasoning that its decision regarding *res judicata* would require reviewing the arbitration proceeding. This Court, in *Badgerow v. Walters*, 596 U.S. 1, 11 (2022), only requires a petitioner to plead an independent basis for jurisdiction — it does not preclude a district court from considering arbitration proceedings when deciding issues presented in a case, like *res judicata*, once a threshold jurisdictional basis is pled. Granting certiorari review would provide this Court an opportunity to address the proper analysis for determining whether the allegations in a petition are sufficient to establish an independent basis for jurisdiction as required in *Badgerow*.

STATEMENT OF THE CASE

A. Legal Background

This Court has recognized that "the general and well-established doctrine of *res judicata*, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation — a maxim which comports with common sense as well as public policy." *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 402 (1981). It further explained that public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. *Id.* at 401.

This case arises from the confluence of co-pending proceedings. In one proceeding, a district court entered judgment in favor of Petitioners' vendor on claims for alleged violations of the Defend Trade Secrets Act ("DTSA"), 18 U.S.C. § 1836 *et seq*. In a related arbitration proceeding, an award adverse to Petitioners was issued on the same federal claims adjudicated in the prior judgment. Petitioners seek declaratory relief, in part, that the intervening judgment supports vacating the arbitration award on claims barred by *res judicata*, as they are *res judicata* privies of their vendor. Under such circumstances, the district court should determine *res judicata* because it arises out of a prior judgment on claims in a separate proceeding, and, as such, it should not be constrained by the limited bases and standard of review applicable to vacating an arbitration award under FAA Section 10.

See e.g., *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010) (To vacate an arbitration award, the challenger must clear a high hurdle—it is not enough show that the panel committed an error—or even a serious error.).

B. Statement of Facts and Procedural History

Petitioners' contract with Respondent to extract data from loan documents was terminated after a data breach. Petitioners sought reimbursement of their data breach remediation costs, and Respondent refused. Petitioners then initiated arbitration in Dallas, Texas, pursuant to the parties' contract. (App.25a-26a.) Respondent later sued Petitioners in the United States District Court for the Eastern District of Texas, asserting DTSA violations and related claims. That court compelled Respondent to assert its claims in the pending arbitration. (App.38a, 41a.) Respondent then counterclaimed in the arbitration, asserting the same DTSA claims against Petitioners and Altada Technologies Solutions Ltd. ("Altada"), a vendor providing data extraction services to Petitioners after the termination of the contract with Respondent. (App.43a-45a.)

After Altada objected to arbitration, Respondent sued it in the Eastern District of Texas, asserting the same DTSA violations. Shortly before the final arbitration hearing, Respondent dismissed with prejudice its DTSA and related claims against Altada. *Id.*

Shortly thereafter in the arbitration, Respondent was awarded damages against Petitioners based on the same DTSA claims dismissed with prejudice against Altada. (App.45a.) Petitioners asserted *res judicata* as a defense therein. The arbitration award did not address that defense; rather, it generally

states in the final paragraph that all defenses not granted are denied. (App.30a-35a.)

Petitioners sued Respondent in the U.S. District Court for the Northern District of Texas to vacate the arbitration award, in part, based on *res judicata*.[4] Petitioners pled that federal question jurisdiction is invoked, in part, based on the federal issues arising from determining the preclusive effect of the federal judgment involving DTSA claims against Altada. (App.37a-40a, 57a-58a.) The district court granted Respondent's motion to dismiss for lack of subject matter jurisdiction, and Petitioners appealed. (App.11a-17a.)

The Fifth Circuit affirmed the district court finding that it lacked subject matter jurisdiction. *Ascension Data & Analytics, L.L.C. v. Pairprep, Inc.*, 105 F.4th 749 (5th Cir. 2024). It reasoned that Petitioners failed to demonstrate that federal law entitles it to relief. *Id.* at 753-754. (App.6a-9a.) Regarding *res judicata*, that court reasoned that it was considered and rejected in the arbitration proceeding and that the court would have to consider the arbitration proceedings when deciding whether the claims therein are barred by *res judicata*. *Id.* at fn. 7. (App.7a.) It also reasoned that Petitioners' *res judicata* defense was not before the district court, presumably because it was argued in arbitration, notwithstanding that it was pled in Respondents' complaint. *Id.* at 754. (App.8a.) The Fifth Circuit denied rehearing without any stated reasons. (App.18a.)

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[4] Respondent filed a mirror-image suit in state court in Dallas, Texas, where proceedings are ongoing. *Pairprep, Inc. d/b/a OPTICSML v. Ascension Data and Analytics, LLC*, (Civil Dist. Ct. Dallas County, 191st Dist., No. DC-23-04299).

REASONS FOR GRANTING THE PETITION

A. The Circuit Courts Having Conflicting Decisions Regarding the Preclusive Effect of a Prior Judgment on an Arbitration Proceeding.

Several circuits have held that issues regarding the preclusive effect of a prior judgment should be submitted to arbitration. *See e.g.*, *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126, 131 (2d Cir. 2015) (affirming district court finding that the preclusive effect of a prior judgment confirming an arbitration award should be decided in the arbitration proceeding); *Constellium Rolled Prods. Ravenswood, LLC v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, ALF-CIO /CLC*, 18 F.4th 736, 741 (4th Cir. 2021) (after *Howsam*, it is clear that unless an arbitration agreement stipulates otherwise, *res judicata* is for the arbitrator to decide in the first instance); *United Comput. Sys. v. AT&T Info. Sys.*, 298 F.3d 756, 764 (9th Cir. 2002) (finding that *res judicata* based on a judgment confirming an arbitration award must be considered by the arbitrator not the court); *Shell Oil Co. v. Co2 Comm., Inc.*, 589 F.3d 1105, 1109 (10th Cir. 2009) (finding that the broad arbitration clause included submitting defenses like *res judicata* to arbitration); *Grigsby & Assocs. v. M Sec. Inv.*, 664 F.3d 1350; 1352 (11th Cir. 2011) (*res judicata* is a question for the arbitrator, in the absence of an agreement to the contrary).

Other circuits and state courts have held that the court should decide preclusion issues. *See, e.g., Duhaime*

v. John Hancock Mut. Life Ins. Co., 200 Fed. Appx. 6, 8 (1st Cir. 2006) (the preclusive effect of a prior court judgment is among the disputes decided by the court); *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 139 (3d Cir. 1998) (district court should determine *res judicata* effect of judgment at time of contested arbitral demand); *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 499 (5th Cir. 1986) (parties should be barred from seeking relief from an arbitration panel if *res judicata* principles would bar relief in federal court); *Ewart v. Y & A Group, Inc.* (*In re Y & A Group Secs. Litig.*), 38 F.3d 380, 382-83 (8th Cir. 1994) (affirmed the district court enjoining arbitration of previously determined issues based on collateral estoppel); *see also Leon C. Baker, P.C. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 821 So. 2d 158, 164 (Ala. 2001) (holding that the trial court, not the arbitrator, was the proper forum for resolving collateral estoppel); *Waterfront Marine Constr. v. N. End 49ers Sandbridge Bulkhead Grps. A, B and C*, 468 S.E.2d 894, 903 (Va. 1996) (the court, not the arbitration panel, determines whether a previous arbitration award operates as *res judicata*).

The Fifth Circuit in this proceeding found that Petitioners failed to plead a sufficient basis for federal question jurisdiction, in part, because *res judicata* was raised and rejected in the arbitration. *Id.* at fn. 7. (App.7a.) It also reasoned that Petitioners' *res judicata* defense was not before the district court, presumably because it was argued in arbitration. *Id.* at 754. (App.8a.) If this Court grants certiorari review and finds that the district court should determine the preclusive effect of a judgment, it would belie the Fifth Circuit's

rationale for finding that *res judicata* does not provide a sufficient basis for federal question jurisdiction.

B. This Case Presents Issues with Important National Implications in Federal and State Courts.

The circuit and state court split implicates the relationship between courts and arbitration panels in the context of preclusion doctrines. This Court has recognized that a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive. *Arizona v. California*, 460 U.S. 605, 619 (1983). The conflict exists in part because *Dean* did not answer whether the courts or arbitrators decide preclusion issues. It also arises from *Howsam,* where this Court describes questions of arbitrability reserved for the court and more generally describes procedural issues relegated to the arbitrator. Several courts have since considered preclusion issues as procedural matters to be decided in the arbitration proceeding. However, the public policy supporting *res judicata* and other preclusion issues distinguish them from timeliness, waiver, and other defenses to be decided in arbitration according to *Howsam*. When a court decides an issue in a manner that raises preclusion issues, that conclusive judicial determination removes certain claims or issues from the range of matters that are still litigable or arbitrable. Like the absence of consent of the parties to arbitration, a final judicial decision should be considered a matter of arbitrability that may preclude arbitration in whole or part, which should be decided by a court to effectively resolve such claims or issues without the burden of arbitration proceedings thereon.

In that regard, the preclusive effect of a prior judicial decision should be decided by the courts as a gateway matter. *See Howsam v. DeanWitter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002). It is not a mere procedural question that grows out of the contract dispute, in part, because it involves a separate proceeding resulting in a judgment outside of the arbitration. The preclusive effects of a judgment should not be relegated to an arbitrator merely because the parties contracted for arbitration. The public policy favoring arbitration is also not undermined by courts determining the preclusive effect of a judgment, as the parties dispute would be more effectively and efficiently resolved than arbitrating claims precluded in whole or part by *res judicata*.

If preclusion issues are relegated to arbitration, it would belie the public policy supporting *res judicata.* First, it is unlikely that an arbitrator would consider and decide preclusion issues as a preliminary matter to dispose of an arbitration proceeding in its entirety. Second, it may be unclear whether preclusion issues were considered at all depending on the arbitration award, as in this instance, where all defenses were denied in a boilerplate paragraph at the end of the arbitration award with no substantive analysis of whether *res judicata* precluded the claims in arbitration, in whole or part. Third, even if considered, the court's review of any arbitration award is so narrow that it could not vacate an award based on a finding that the arbitrator erred when deciding a preclusion issue.

Like arbitrability, the issue of preclusion may reach the courts either before an arbitration proceeding or after the award. The court's analysis of preclusion issues should be the same regardless. In this instance,

an intervening judgment was entered a few weeks before the final hearing in the arbitration. Petitioners timely asserted *res judicata* during the arbitration, as their failure to do so may be considered a waiver. Petitioners likewise asserted *res judicata* in their complaint to vacate the arbitration award, *i.e.*, the first instance where that issue could be presented to a court to decide. The Fifth Circuit erroneously concluded that Petitioners ostensibly waived *res judicata* by asserting it in arbitration, reasoning that it was not "before the district court," as discussed above. Whether courts or arbitrators should decide issues of preclusion should not depend on whether they were raised before or during an arbitration proceeding, especially when the judgment was entered while the arbitration proceeding was pending. Petitioners raising *res judicata* in the arbitration is consistent with the FAA policy of favoring arbitration. The policies supporting *res judicata* are likewise reinforced if the district court considers preclusion issues *de novo, i.e.,* in the same manner as if the judgment was entered before the arbitration proceeding and *res judicata* was raised in response to a motion to compel arbitration.

Whether arbitrators or courts should determine the preclusive effect of a judgment requires further guidance. *Howsam* dictates that decisions regarding arbitrability are to be decided solely by the courts. It also provides that arbitrators should decide procedural issues arising out of the contract dispute. However, such procedural issues should not include issues of preclusion, where arbitrators would decide with effective finality whether the parties are bound by a prior judgment. Such issues should be decided by courts.

C. The Fifth Circuit Failed to Follow *Dean* or Correctly Apply *Badgerow*.

The Fifth Circuit failed to follow the well-pleaded complaint rule recited in *Dean* when determining whether Petitioners pleading established a basis for federal jurisdiction. The Fifth Circuit reasoned that Petitioners' *res judicata* defense was not before the district court, notwithstanding that it was pled in detail in their complaint. (App.8a.) It also reasoned that Petitioners failed to demonstrate a basis for federal question jurisdiction because *res judicata* was raised and rejected in arbitration. (App.7a.) *Dean* required the Fifth Circuit to consider the allegations within the four corners of Petitioners' complaint. The Fifth Circuit ostensibly gave little to no consideration of Petitioners' allegations regarding federal question jurisdiction, as it found that *res judicata* was not before the district court notwithstanding Petitioners' *res judicata* allegations. It also violated that rule by looking outside of the complaint to the arbitration proceedings when determining whether Petitioners' pleadings were sufficient to invoke federal question jurisdiction finding that *res judicata* was raised and rejected in the arbitration proceeding.

The Fifth Circuit also misapplied *Badgerow*. It reasoned that Petitioners are asking the court to engage in the exact analysis precluded by *Badgerow* by alleging that the district court had federal question jurisdiction based on DTSA claims asserted in the arbitration and *res judicata*. *Id.* at 753-754. (App.7a.) Yet, Petitioners pled that federal question jurisdiction is invoked by federal issues arising out of a federal judgment in a proceeding outside of the arbitration. The fact that the district court may be required to consider

the arbitration proceedings when deciding *res judicata* is not precluded by *Badgerow,* which merely requires that Petitioners plead an independent basis for federal jurisdiction. Pleading *res judicata* necessarily requires identifying a prior ruling with preclusive effect, *i.e.*, the judgment in favor of Altada, and subsequent claims that are precluded, *i.e.*, the same claims in the arbitration award. The mere mention of the latter does not implicate *Badgerow*. The district court was required to determine whether Petitioners' pleadings were sufficient to support federal question jurisdiction when asserting *res judicata* based on a federal judgment on federal claims outside of the arbitration. The fact that *res judicata*, if established, would vacate an arbitration award does not support the conclusion that the jurisdictional analysis violates the "look through" analysis precluded by *Badgerow*. This Court should grant certiorari review to provide further guidance on a court's analysis of whether an independent basis exists to support jurisdiction in light of *Badgerow*. If this Court reviews the first question presented and determines that a district court should decide the preclusive effect of a judgment on arbitration proceedings, it would, likewise, reinforce that the Fifth Circuit should have considered the federal issues raised by federal judgment on federal claims outside of the arbitration proceeding, as opposed to whether the *res judicata* analysis may require analyzing the subsequent arbitration proceedings.

IV. This Case Is an Excellent Vehicle for this Court to Address Whether a District Court Should Decide the Preclusive Effect of a Judgment on an Arbitration

This case presents the preclusion issue in the context of an intervening federal judgment, where *res judicata* was argued and denied in arbitration and asserted in a petition to vacate the arbitration award. This Court can thus address whether a district court should decide the preclusive effect of an intervening judgment, as opposed to deciding that issue in the context of a motion to compel arbitration before the issue is decided in arbitration, and what standard of review should be applied. This case presents an opportunity for this Court to decide that the preclusive effect of a judgment is a matter of arbitrability to be decided by a district court, regardless of whether it is raised prior to or after an arbitration proceeding, and regardless of whether it was considered and rejected in arbitration.

In two prior instances, this Court denied certiorari review on whether a district court or arbitrator should decide the preclusive effect of a prior judgment. *See Collins v. D. R. Horton, Inc.,* 552 U.S. 1295 (2008); *Grynberg Prod. Corp. v. Susman Godfrey, L.L.P.*, 568 U.S. 883 (2012). In *Collins,* a judgment was entered after a jury trial, and the district court denied Petitioners' motion to reconsider compelling arbitration on related claims based on collateral estoppel. The district court confirmed a subsequent arbitration award, notwithstanding finding that the arbitrator erred in deciding that issue. Petitioners sought certiorari review of whether collateral estoppel should have been submitted to arbitration. *Ryan v. D.R. Horton, Inc.*, 2007

U.S. S. Ct. Briefs LEXIS 2681, *6-7 (No. 07-849 submitted Dec. 26, 2007). This case presents a better vehicle for deciding the deference, if any, that a district court should give to an arbitration ruling on the preclusive effect of a judgment, where the Fifth Circuit reasoned, as discussed above, that the issue was not properly before the district court given that it was asserted and denied in the arbitration proceeding.

In *Grynberg*, the question presented was whether the district court properly applied the preclusive doctrine "law of the case" to a question of arbitrability as opposed to remanding that question to arbitration. *Grynberg Prod. Corp. v. Godfrey*, 2012 U.S. S. Ct. Briefs LEXIS 2820, *1-2 (No. 12-14 submitted May 8, 2012). In that case, the preclusion issue arose out of a judgment confirming a prior arbitration award and subsequent proceedings where the district court granted a motion to enforce that judgment. This case presents a better vehicle for addressing the question presented, as it does not involve subsequent proceedings to enforce a judgment confirming an arbitration award.

CONCLUSION

For the reasons detailed herein, the petition should be granted.

Respectfully submitted,

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