No. 24-738

IN THE

Supreme Court of the United States

JUAN CARTAYA,

Petitioner,

v.

TRAVELERS INDEMNITY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Cited Authorities

Cited Authorities

Statutes, Rules and Regulations

Other Authorities

REPLY BRIEF FOR PETITIONER

The Federal Arbitration Act makes contracts to arbitrate "valid, irrevocable, and enforceable," 9 U.S.C. § 2, but how should a court decide whether a contractual dispute-resolution process qualifies as arbitration? This case cleanly presents this important question, which has badly divided lower courts.

ARGUMENT

I. The Question Presented Is Important, and the Erroneous Decision Below Adds to the Division Among the Lower Courts.

Travelers heaps irrelevant factual assertions on the question presented and then asserts this is "a factually-driven fraud dispute" that fails to present "any significant issue of federal law." BIO at *i.*, 3.

Travelers essentially contends that, on the facts, Petitioner is not entitled to arbitral immunity. *E.g.*, *id.* at 8. But in making this argument, Travelers has gone farther down the immunity road than the lower courts ever ventured. Petitioner has had no opportunity to litigate arbitral immunity because the lower courts decided that the insurance-industry appraisal he participated in was not an FAA arbitration.

The squarely presented question here is narrow and consequential, "Under the FAA, what is an arbitration?" Arbitral-immunity issues will be for the lower courts to decide only if this Court first decides that the appraisal Petitioner participated in was an FAA arbitration.

Although Travelers argues there is no compelling reason to grant review, *id.* at 4, parties who are otherwise identically situated will be treated differently based on geography and state vs. federal judicial systems until this Court supplies a uniform definition of FAA arbitration. Travelers cannot deny that "the United States Courts of Appeals are split on whether to use state law or federal common law to define this term," *Martinique Properties, LLC v. Certain Underwriters at Lloyd's London*, 567 F. Supp. 3d 1099, 1104 (D. Neb. 2021), *aff'd sub nom. Martinique Properties, LLC v. Certain Underwriters at Lloyd's of London*, 60 F.4th 1206 (8th Cir. 2023); *see* Pet. at 5-6 (discussing split). Indeed, as shown by this case and an Alabama case Travelers raises, *Great American Insurance Company v. Crystal Shores Owners Association, Inc.*, No. 23-1051, where this Court declined review of similar issues last term, the entrenched split persists and extends to state courts.[1]

Travelers says that in the state appeal it did not oppose Petitioner's argument that federal law governs what is an arbitration, and the court of appeals applied federal law. BIO at 4. That tells only half the story. While Travelers took no position in the court of appeals, in the trial court it cited federal cases holding that state law applies and suggested the court should adopt that view to hold that an appraisal is not an arbitration. That court did, "endors[ing]" the state-law-based holding in *Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1061-62 (5th Cir. 1990), that an appraisal is not an FAA arbitration. Without this Court's voice on that question, litigants are free to take whatever position suits their purposes, as

1. As shown below, this case presents none of *Crystal Shores*'s vehicle problems.

Travelers did, for there is something for everyone to cite in support of their position.

Travelers is wrong to argue that *Oliver v. State Farm Fire & Casualty Insurance Co.*, 939 N.W.2d 749 (Minn. 2020), undercuts *Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co.*, 284 U.S. 151 (1931). *See* BIO at 11 n.1. In *Oliver*, the Minnesota Supreme Court granted review on an analogous question: whether an appraisal is an arbitration under the Minnesota Uniform Arbitration Act (MUAA). And it noted the analogous problem: "[MUAA] does not define what constitutes an agreement to arbitrate nor what constitutes arbitration."[2] 939 N.W.2d at 751. In "interpret[ing]" MUAA to answer the question, the court did not mention *Hardware Dealers* or the FAA; it noted it previously "ha[d] used the terms 'arbitration' and 'appraisal' interchangeably," and the Minnesota Court of Appeals in 2010 had held appraisals *are* arbitrations under the MUAA. *Id.* at 751-52 & n.3.

Oliver doesn't detract from *Hardware Dealers*, in which this Court, deciding a federal constitutional question, used the terms appraisal and arbitration "interchangeably." Nor does it detract from the *certiorari* question presented here. State courts are free to decide whether appraisals are arbitrations under their state arbitration acts, but those decisions do not bear on whether the appraisals, even the same appraisals, or other dispute-resolution methods are arbitrations under the FAA.

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2. *See* Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 Nev. L.J. 427, 434 (2007) (noting that neither the FAA nor its "close 'cousin,'" the Uniform Arbitration Act, on which most state arbitration acts are based, defines "arbitration").

If Travelers now takes the state-law view, as it did in the trial court, the subsidiary question of "which body of law defines arbitration?" is squarely presented. If Travelers argues for federal law, this Court could appoint an *amicus* to argue the state-law view or assume without deciding that federal law controls. *See United States v. Providence Journal Co.*, 485 U.S. 693, 704 (1988) ("[I]t is well within this Court's authority to appoint an *amicus curiae* to file briefs and present oral argument in support of [a position]."). Travelers' shifting stance about the basic framework for the FAA's administration underscores the need for this Court's review.

Even with a stipulation that federal law defines FAA arbitration, this case is worthy of this Court's review because there is not a settled federal approach. *Compare Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 7 (1st Cir. 2004) (taking federal approach and finding "the more interesting question[s]" to be "how closely the specified procedure [must] resemble[] classic arbitration and whether treating the procedure as arbitration serves the intuited purposes of Congress"), *with Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*, 707 F.3d 140, 143-44 (2d Cir. 2013) (approving district court's reliance on *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 460 (E.D.N.Y. 1985), where Judge Weinstein "noted that under the FAA '[a]n adversary proceeding, submission of evidence, witnesses and cross-examination are not essential elements of arbitration' and held that '[i]f the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration.'").

The Colorado Court of Appeals' purported application of *Salt Lake Tribune Publishing Co., LLC v. Management*

Planning, Inc., 390 F.3d 684 (10th Cir. 2004), effectively sprung forth yet another approach, one focused on finality amidst hypothetical impasses.

In *Salt Lake Tribune*, the parties "fashioned an agreement where, in the event that they could not agree on a price and their chosen appraisers were too far apart, a third appraiser would contribute a value that may, or may not, be used to calculate the exercise price." *Id.* at 690; *see* Pet. at 9-12 (discussing *Salt Lake Tribune*). The Tenth Circuit reasoned that the third appraiser's report "would not necessarily settle" the dispute. 390 F.3d at 691; *see id.* ("[A] scenario existed where the parties would not use [the third appraiser's] report at all.").

Even though Petitioner's participation as the insured's appraiser was necessary under Travelers' appraisal process, the Colorado appellate court below imagined "an unresolved impasse" in which the two appraisers and one umpire could not decide what is the loss amount. Pet. at 16a. "[W]hat then?" the court asked. *Id.* Relying on what it called a federal district court's "prescient" observation,[3] it concluded that the appraisal provision's failure to address such an impasse disqualifies the appraisal process as an arbitration.

The division called this "the final-and-binding settlement test," *id.*, but all arbitration clauses will fail an FAA test that requires them to resolve the arbitrators' hypothetical—and rare—inability to decide the dispute. The test is at odds with the minimum threshold for parties to submit a dispute to arbitration under the FAA:

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3. *Id.* (citing *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 129 F. Supp. 3d 1150, 1153 (D. Colo. 2015)).

> What if an arbitration clause were shorn of details? What if it did not specify how many arbitrators, what forum, or any other administrative matters? Suppose [the clause] read, in full: "Any disputes arising out of this contract will be arbitrated." Could a court then use [FAA] § 5 to supply particulars? . . . .
>
> The answer is yes. Section 5 applies "if no method be provided" in the contract—that is, if the parties use the sort of detail-free clause we have just imagined.

Green v. U.S. Cash Advance Ill., LLC, 724 F.3d 787, 792 (7th Cir. 2013). The Seventh Circuit rejected the district court's conclusion that the arbitration clause was ineffective because the chosen arbitrator was unavailable. Relying on this Court's holding that courts may not add to or depart from the FAA's standards, Judge Easterbrook wrote for the Seventh Circuit: "[The arbitration clause] makes one thing clear: These parties selected private dispute resolution. Courts should not use uncertainty in just how that would be accomplished to defeat the evident choice. Section 5 allows judges to supply details in order to make arbitration work." *Id.* at 793.

The Colorado Court of Appeals' particular definition of what qualifies as an arbitration illustrates the free-for-all dispute over the FAA's scope.

Travelers tries to defend the division's absurd finality reasoning and argues that, under Travelers' appraisal provision, "no further mechanism exists to resolve an impasse." BIO at 13.

But Travelers comes to the division's finality point only after defending the decision below on two other grounds that confirm the need for this Court's review. First, Travelers argues that appraisals are too informal to be arbitrations. *Id.* at 10-11. But formality is not the test. "Parties need not establish quasi-judicial proceedings resolving their disputes to gain the protections of the FAA, but may choose from a broad range of procedures and tailor arbitration to suit their peculiar circumstances." *Salt Lake Tribune*, 390 F.3d at 690; *see Bakoss*, 707 F.3d at 143 ("[U]nder the FAA an adversary proceeding, submission of evidence, witnesses and cross-examination are not essential elements of arbitration[.]" (alterations and quotations omitted)).

Second, Travelers argues that although appraisals can settle loss-amount disputes, they do not typically "resolve coverage, liability, and damages." BIO at 10-11; *id.* at 12 (arguing that appraisal does not resolve the "ultimate amount of damages to be paid"). To qualify as arbitration, it argues, a process must settle the parties' entire dispute. *Id.* at 13. This Court's cases, however, already have rejected that argument: parties to an arbitration may use it to resolve some or all of a dispute. *See, e.g.*, *KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011) (*per curiam*) (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985)); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

The country needs an answer to the question, "What is the rule for deciding whether a process is an FAA arbitration?" The answer from the division below is incorrect, as Travelers' resort to other arguments confirms. This Court should grant review.

II. This Is the Right Case to Decide the Question.

Petitioner seeks this Court's review after suffering a substantial judgment against him, where the state courts' federal-law errors prevented factual consideration of his immunity defense. This is an excellent vehicle to decide the question. Travelers' contentions to the contrary miss the mark.

Travelers argues that *Crystal Shores*, the case this Court declined to review in May 2024, "presented a better vehicle." BIO at 5. But this case does not come with the interlocutory and state-law problems of *Crystal Shores*. There, the insurer was sued in Alabama state court and sought to compel arbitration on an appraisal provision like this one.[4] *Great Am. Ins. Co. v. Crystal Shores Owners Ass'n, Inc.*, 393 So. 3d 492, 495-97 (Ala. 2023), *cert. denied*, 144 S. Ct. 2561 (2024). When the circuit court denied the insurer's motion to dismiss or stay the action, the insurer appealed to the Supreme Court of Alabama. *Id.* at 498. That court ruled it lacked jurisdiction under state rules and dismissed the appeal. *Id.* at 509. This Court then declined review where the stakes were whether the loss-valuation dispute would be arbitrated or litigated in court.

Petitioner Cartaya, by contrast, appeals from a final judgment holding him personally liable where the state courts refused to consider his FAA-based arbitral-immunity claim because, as a matter of law, this typical insurance appraisal is not FAA-governed arbitration.

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4. That is, opposite Travelers' view here, the insurer argued its appraisal process *was* arbitration.

Travelers argues *GSL Group, Inc. v. Travelers Indemnity Co.*, No. 18–CV–00746–MSK–SKC, 2021 WL 4245372 (D. Colo. Sept. 16, 2021), creates a vehicle problem. It says the federal court there "voided and nullified the entire appraisal process and, along with it, Petitioner's status as an 'appraiser.'" BIO at 2; *see id.* at 7-8. To the extent *GSL Group* is relevant, it actually presents a different part of the same problem caused by the absence of an FAA arbitration definition.

GSL Group, which selected Petitioner as one of the appraisers in the loss-amount dispute, sued Travelers for bad-faith breach of the insurance policy. Petitioner was not a party. The judge granted summary judgment for Travelers on its counterclaim for recoupment of its insurance payout and vacated the appraisal award, finding Petitioner was not an impartial appraiser, as the policy required.[5] Travelers' assertion of a recoupment counterclaim is another consequence of the absence of an FAA definition of arbitration. If appraisal is an arbitration, vacatur of the award, for "evident partiality" or otherwise, would not be governed by the policy but by FAA § 10. That statute requires courts to "give considerable leeway to the arbitrator" and to "set[] aside his or her decision only in certain narrow circumstances." *First Options*, 514 U.S. at 943.

But *GSL Group* does not impinge on the *certiorari* question here. Travelers does not claim that there never was an appraisal or that Petitioner did not participate as an appraiser. Indeed Travelers obtained in state

5. The case ultimately was settled and dismissed with prejudice by stipulation.

court a fraud judgment against Petitioner for his actions serving as an appraiser. The federal court's vacatur of the appraisal award because it found GSL Group breached the policy's impartial-appraiser requirement is an issue distinct from whether Petitioner is immune from personal liability for his appraiser role—although both issues take decidedly different paths to resolution depending on whether an appraisal is an FAA arbitration. Despite Travelers' muddying the waters, this case cleanly presents the issue.

Travelers raises another irrelevant issue not passed on below, the applicability of the McCarran-Ferguson Act. BIO at 3, 9-10. "The FAA applies to all contracts involving interstate commerce." *Kong v. Allied Pro. Ins. Co.*, 750 F.3d 1295, 1303 (11th Cir. 2014). But Travelers asserts there is no proof of interstate commerce here, even though Travelers, a Connecticut company, issued the insurance policy at issue to a Colorado corporation. Of course, "the FAA does not relate to insurance," but as in *Kong*, Travelers "has not identified a single [Colorado] *insurance* statute that would be invalidated, impaired, or superceded by the application of the FAA." *Id.* Even if Travelers' reverse-preemption arguments had merit, they should be addressed on remand. They have no bearing on how to define FAA arbitration.

Finally, Travelers notes the court of appeals declined to publish its opinion below (although it is publicly available and searchable in an electronic database, *see* Pet. at 1 n.1).[6] This misses the *certiorari* point.

6. The court denied Petitioner's motion to publish the opinion.

Whether a decision on an important federal question is published does not bear on its appropriateness as a vehicle for *certiorari* review, particularly when, as here, it simply exemplifies or extends a preexisting problem many courts have struggled with in published decisions. "[T]he fact that the Court of Appeals' order under challenge here is unpublished carries no weight in [this Court's] decision to review the case." *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987) (*per curiam*). This Court routinely has granted *certiorari* to review unpublished decisions,[7] and some of its most influential decisions followed review of unpublished cases.[8]

Petitioner is presenting for *certiorari* review a question of critical importance throughout the country to arbitration parties and state and federal courts. The lower court's holding—that a dispute-resolution clause does not set up an arbitration because it doesn't settle what happens if the appraisers can't decide—is part and parcel of the larger, pressing consequence of the absence of a national definition of what is an FAA arbitration.

This is the right vehicle.

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7. *See, e.g.*, *Campos-Chaves v. Garland*, 602 U.S. 447, 455-56 (2024); *E. Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 61 (2000); *Lynce v. Mathis*, 519 U.S. 433, 436 (1997).

8. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hiahleah*, 508 U.S. 520, 530 (1993); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991).

CONCLUSION

The Court should grant the petition.

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