No. 23-

IN THE

Supreme Court of the United States

GREAT AMERICAN INSURANCE COMPANY,

Petitioner,

v.

CRYSTAL SHORES OWNERS ASSOCIATION, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does federal law or state law govern what qualifies as an "arbitration" provision under the Federal Arbitration Act?

II. Does a contract's dispute resolution provision requiring parties to submit property loss valuation disputes to an independent appraisal panel for binding resolution qualify as "arbitration" under the FAA?

PARTIES TO THE PROCEEDING

Petitioner is Great American Insurance Company. Petitioner was the appellant below.

Respondent is Crystal Shores Owners Association, Inc. Respondent was the appellee below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to United States Supreme Court Rule 29.6, Petitioner states as follows:

Great American Insurance Company is a wholly owned subsidiary of American Financial Group, Inc. American Financial Group, Inc. is a publicly traded company that owns 10% or more of Petitioner's stock.

STATEMENT OF RELATED PROCEEDINGS

This case is directly related to the following proceedings:

Bowen-Wilson Inc. d/b/a ServPro of Montgomery v. Crystal Shores LLC, and Crystal Shores Owners Ass'n, Inc., No. CV-2021-900497, Circuit Court of Baldwin County, Alabama. Judgment entered Jan. 6, 2023.

Great American Ins. Co. v. Crystal Shores Owners Ass'n, Inc., No. SC-2023-0092, Supreme Court of Alabama. Judgment entered Dec. 22, 2023.

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This case concerns an important question of law under the Federal Arbitration Act ("FAA"). The FAA was created to bring national uniformity across courts in validating and enforcing dispute resolution procedures—an oft-threatened uniformity further endangered by this latest in a long line of Alabama Supreme Court decisions hostile to arbitration.

Since this Court's decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court has strongly defended the FAA against various state court efforts to avoid enforcing arbitration agreements, often through attempted impositions of state law barriers to enforcement erected by states like Alabama. *See, e.g.*, *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003). Despite Great American's stance that federal law governs what qualifies as an "arbitration" provision under the FAA, the Alabama Supreme Court purported to analyze the provision under state law and federal law.

The decision below reached a remarkable conclusion inconsistent with the FAA and this Court's precedent. A split of authority currently exists over whether (as the First, Second, Sixth, and Tenth Circuits have held) federal law governs what qualifies as an "arbitration" provision under the FAA, or whether (as the Fifth and Ninth Circuits have held) state law governs. Although the Alabama Supreme Court acknowledged the long-recognized split, the court applied both federal and state law. Such an approach runs afoul of established FAA precedent that federal law preempts conflicting state

law. It would be untenable—and inconsistent with this Court's precedent—for both federal and state law to apply. Analyzing an arbitration provision under both federal and state law would allow state courts to apply state law so as to undermine arbitration rights protected by federal law.

Not only is the Alabama Supreme Court's decision wrong, but it is also in direct conflict with numerous other courts. This Court should grant certiorari to resolve the recognized circuit split regarding whether federal law or state law governs what qualifies as an "arbitration" provision under the FAA. And, if it holds federal law governs, this Court should clarify that the alternative dispute process here qualifies as "arbitration." This case presents the perfect vehicle for resolving the well-acknowledged conflict surrounding dispute resolution procedures that are, in all but name, arbitration provisions.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is reported as *Great American Insurance Co. v. Crystal Shores Owners Association, Inc.*, 2023 WL 8858165, __ So. 3d __ [Ms. SC-2023-0092] (Ala., Dec. 22, 2023) and is reproduced at Petition Appendix 1a–40a.

JURISDICTION

The Supreme Court of Alabama issued its opinion on December 22, 2023, and entered its certificate of judgment on January 10, 2024. App. 1a–40a. Great American invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). The Alabama Supreme Court's decision is final for purposes of this Court's review. *See Southland Corp. v. Keating*,

465 U.S. 1, 6–7 (1984) (holding state judgment denying arbitration is reviewable final judgment). There is no adequate or independent state law ground because application of Alabama's procedural rule for review turns on the substantive federal question presented. *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 388 (1986) ("If the Alabama procedural ruling under state law implicates an underlying question of federal law, . . . the state law is not an independent and adequate state ground supporting the judgment . . . .").

STATUTORY PROVISION INVOLVED

This case involves the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* Section 2 of the Act provides: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4."

STATEMENT OF THE CASE

This case asks whether federal or state law governs what qualifies as an "arbitration" provision under the Federal Arbitration Act. Once that issue is resolved, the case also asks whether a dispute resolution provision in a contract evidencing a transaction "involving" interstate commerce and requiring parties to submit any property

loss valuation disputes to an external, independent appraisal panel for binding resolution qualifies as "arbitration" under the FAA.

A. The Policy

The case turns on a commercial property insurance policy Great American issued to Crystal Shores Owners Association, Inc. ("Crystal Shores"). App. 2a. Under the Policy, disputes as to the value of the property, the amount of Net Income and operating expense, or the amount of loss are to be arbitrated by appraisers (plus an umpire) for binding resolution:

> If [Great American] and [Crystal Shores] disagree on the value of the property, the amount of Net Income and operating expense, or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property, the amount of Net Income and operating expense, or the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:
>
> 1. pay its chosen appraiser; and
>
> 2. bear the other expenses of the appraisal and umpire equally.

> If there is an appraisal, we will still retain our right to deny the claim.
>
> Neither the appraisers nor the umpire shall attempt to resolve any issue of insurance coverage, policy exclusions, compliance with the Policy terms and conditions, or any issues concerning the Limits of Insurance available under the Policy.

App. 7a–8a.

The Policy further provides that no lawsuit may be filed against Great American without complying with all policy provisions, which includes the appraisal provision:

> No one may bring a legal action against [Great American] under this Coverage Part unless:
>
> 1. there has been full compliance with all of the terms of this Coverage Part . . .

App. 8a–9a.

B. The Instant Action

Crystal Shores submitted insurance claims seeking payment for damage to property at the Crystal Shores Condominium complex caused by two separate events in 2020: a bathtub overflow and Hurricane Sally. As for the bathtub overflow claim, it is undisputed Great American determined there was coverage for the property damage, and before it was sued, Great American had already paid over a million dollars on the claim. App. 11a. A dispute

arose concerning the amount of the bathtub overflow loss, however, when Crystal Shores claimed to be entitled to additional payments due to its assertion of a higher damage valuation.

Crystal Shores filed suit against Great American for alleged insufficient payment on the bathtub overflow claim, without having complied with the Policy requirement to first submit the dispute to appraisal. App. 5a–6a. Great American invoked the appraisal provision and filed a motion to dismiss or in the alternative to stay and compel compliance with the appraisal provision. App. 1a, 7a. Preserving the federal claim presented, Great American argued that "[u]nder the FAA, written arbitration agreements affecting interstate commerce must be enforced as a matter of federal law." Pet'r's Mot. to Dismiss, or in the alternative, Stay and Compel Compliance, at ¶ 10; *see also* Pet'r's Ala. Sup. Ct. Op. Br., at 16.

The trial court denied that motion without explanation. App. 12a.

Great American appealed the trial court's denial to the Alabama Supreme Court pursuant to Alabama Rule of Appellate Procedure 4(d), which provides an appeal as of right from any order denying a motion to compel "arbitration." App. 12a. Great American emphasized the established meaning of an agreement to "arbitrate" as a written agreement to submit specific kinds of disputes to third parties, rather than a court, for binding resolution—which the parties' appraisal provision plainly directs with regard to any dispute concerning the value of a property loss. *See* Cyclopedic Law Dictionary (2d

ed. 1922) (defining arbitration as "[t]he investigation and determination of a matter or matters of differences between contending parties, by one or more unofficial persons, chosen by the parties and called 'arbitrators,' or 'referees.'"); *see also* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining arbitration as "[a] dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute"). Relying on the definitions set forth in federal law, Great American asserted that the "FAA preempts state law and renders enforceable any pre-dispute arbitration agreement in a contract that involves interstate commerce." Pet'r's Ala. Sup. Ct. Op. Br., at 16. And when the necessary criteria are met, a dispute resolution procedure is enforceable as a matter of federal law.

The Alabama Supreme Court opined "that a threshold issue faced by federal courts in determining whether a certain procedure qualifies as 'arbitration' under the FAA is whether federal or state law defines that term in the statute." App. 16a. The court also acknowledged that courts applying federal law "provide various formulations" in defining "arbitration." It held that the dispute resolution process did not meet requirements of "classic arbitration" as a matter of federal law. App. 18a. Great American did not contend the definition of "arbitration" should be determined under state law. *See* App. 28a (explaining defining "arbitration" under federal law was "the only standard argued by Great American"). Because it concluded that the appraisal procedure was not an agreement to "arbitrate" enforceable under the FAA, the Alabama Supreme Court determined that Great American had no right to appeal the trial court's denial of

the motion to compel as a denial of arbitration under Ala. R. App. P. 4(d). App. 38a.

Great American sought to stay the issuance of the court's certificate of judgment and maintain the court's previously-issued stay of the trial court proceedings pending the filing of a petition for a writ of certiorari with this Court. The Alabama Supreme Court denied that request on January 10, 2024, and on the same day issued its certificate of judgment, returning jurisdiction of the case to the trial court. Great American also moved in this Court to stay the trial proceedings, which Justice Thomas denied on January 31, 2024. With this case now proceeding towards trial in Baldwin County Circuit Court, Great American turns to this Court to enforce its right to arbitrate rather than litigate the valuation dispute, a right protected by federal law.

REASONS FOR GRANTING THE PETITION

This case concerns an important question of law under the Federal Arbitration Act—an act created to bring national uniformity across courts in validating and enforcing dispute resolution procedures. The Alabama Supreme Court reached a remarkable conclusion inconsistent with the FAA and this Court's precedent.

The court engaged in a misguided analysis under federal law, but it also discussed its own decisions holding that an appraisal provision is not an agreement to "arbitrate" and therefore not enforceable under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* If the Alabama Supreme Court's decision stands, it will reinvigorate historic hostility to arbitration agreements that the FAA was intended to extinguish by allowing state courts to

define arbitration as narrowly as they wish under state law. Accordingly, this case is a prime candidate for this Court's review. Sup. Ct. R. 10.

I. This issue involves a well-acknowledged split of authority on whether federal law or state law governs "arbitration" under the FAA.

This case presents an opportunity for the Court to clarify a longstanding, broad split of authority. Sup. Ct. R. 10; *see also Harrison v. Nissan Motor Corp. in U.S.A.*, 111 F.3d 343, 350 (3rd Cir. 1997) ("We note first that the FAA does not define the term 'arbitration,' and *both courts and commentators have struggled to do so.*" (emphasis added)). There is a well-recognized and entrenched conflict of authority on whether federal law or state law governs what qualifies as "arbitration" under the FAA. This split has naturally led to a second split of authority on determining what qualifies as "arbitration" under the FAA. These outcome-determinative disagreements are creating precedent that runs contrary to the FAA and this Court's precedent. To permit continued conflict will only bolster already-existing hostility to arbitration agreements. The Alabama Supreme Court's erroneous decision is the latest conflicting holding among federal circuits and state courts of last resort. These deeply rooted conflicts—and the confusion stemming from them, as seen in this case—have called for correction and clarification by this Court for many years. This Court should accept this case to answer this important question.

When presented with an arbitration agreement, "the first task of a court . . . is to determine whether the parties agreed to arbitrate that dispute. The court is to make

this determination by applying 'federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the act.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (emphasis added)). Where parties have a contract to arbitrate, parties may not "ignore the contract and resort to the courts." *Southland Corp.*, 465 U.S. at 7.

This Court has made clear that the "primary substantive provision of the [Federal Arbitration] Act," 9 U.S.C. § 2, "is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone*, 460 U.S. at 24. The very enactment of the FAA exhibited Congress's "inten[t] to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Southland Corp.*, 465 U.S. at 16.

It is well-established that courts are openly and intractably divided regarding what law, state or federal, provides the definition of "arbitration" under the FAA. In fact, the Alabama Supreme Court's decision acknowledged this divide and noted that "[c]ircuit unity is highly improbable until the [Supreme Court of the United States] grants certiorari and issues an opinion." App. 17a (quoting Emily H. Slay, Evanston Insurance Co. v. Cogswell Properties: *Which Definition of "Arbitration" Should Control?*, 38 Am. J. Trial Advoc. 377, 383 (2014) (footnotes omitted)); *see also* James Dawson, Comment, *Contract after* Concepcion*: Some Lessons from the State Courts*, 124 Yale L.J. 233, 239 (2014) ("The courts of appeals currently are divided over the question of whether to define 'arbitration' under the FAA by reference to state law or by reference to federal law.").

Four circuit courts, the First, Second, Sixth, and Tenth Circuits, have held federal law governs what qualifies as "arbitration." *See Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 6 (1st Cir. 2004); *Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*, 707 F.3d 140, 143–44 (2d Cir. 2013); *Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684, 693 (6th Cir. 2012); *Salt Lake Trib. Publ'g Co., LLC v. Mgmt. Plan., Inc.*, 390 F.3d 684, 688–89 (10th Cir. 2004).

On the other hand, the Fifth and Ninth Circuits hold state law governs "arbitration" under the FAA. *See Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1062–63 (5th Cir. 1990); *Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987).

Three other circuit courts have recognized this split of authority. *See generally Harrison v. Nissan Motor Corp. in U.S.A.*, 111 F.3d 343, 350 (3d Cir. 1997) (explaining "FAA does not define the term 'arbitration,' and both courts and commentators have struggled to do so"); *United States v. Bankers Ins. Co.*, 245 F.3d 315, 322 (4th Cir. 2001) ("Whether an agreement to enter into a non-binding arbitration process is enforceable under the FAA is a matter not well-settled in the federal courts, and we have not yet directly addressed the question."); *Positano Place at Naples I Condo. Ass'n, Inc. v. Empire Indem. Ins. Co.*, 84 F.4th 1241, 1255 (11th Cir. 2023) ("We have not decided the question of whether an appellate court looks to state or federal law in determining whether an appraisal process falls within the definition of 'arbitration' for purposes of the FAA, nor has the Supreme Court directly addressed the question.").

At the center of this split are significant questions originating from this Court's precedent regarding the interplay between federal and state law in interpreting and enforcing arbitration agreements. *See Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("[S]tate law . . . is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2."); *see also Southland Corp.*, 465 U.S. at 20 (Stevens, J., concurring in part and dissenting in part) ("[T]he lower courts generally look to State law regarding questions of formation of the arbitration agreement under § 2, which is entirely appropriate so long as the state rule does not conflict with the policy of § 2."). What this dynamic means in application, however, is unclear and takes on different forms in different courts. Circuits applying federal law to define "arbitration" align with this Court's precedent, the FAA's intent, and the instant facts.

A. Applying federal law to determine whether a dispute resolution provision qualifies as "arbitration" is consistent with the FAA and congressional intent.

The FAA requires that courts use federal law to define "arbitration" under the FAA. The circuits applying federal law have properly reconciled this Court's precedent regarding the relationship between state and federal law by focusing on the purpose of the FAA. The First Circuit explained "the substance of [an] . . . agreement—who promised to do what—is governed by state law . . ., but whether what has been agreed to amounts to 'arbitration'

under the Federal Arbitration Act depends on what Congress meant by the term in the federal statute. Assuredly Congress intended a 'national' definition for a national policy." *Fit Tech, Inc.*, 374 F.3d at 6.

Similarly, the Second Circuit has long held that whether parties are bound by an arbitration provision under the FAA "is determined under federal law, which comprises generally accepted principles of contract law." *Genesco, Inc. v. T. Kakuchi & Co., Ltd.*, 815 F.2d 840, 845 (2d Cir. 1987). That court reaffirmed the application of federal common law in defining "arbitration," explaining that "'Congress sometimes intends that a statutory term be given content by the application of state law,' but absent 'a plain indication to the contrary' we presume that 'the application of the federal act is not dependent on state laws.'" *Bakoss*, 707 F.3d at 143 (cleaned up) (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989)). In fact, it noted the potential problems with applying anything but federal law in these scenarios, in that "[a]pplying state law would create a patchwork in which the FAA will mean one thing in one state and something else in another." *Id.* at 144 (internal quotations omitted).

Recognizing a similar concern, the Tenth Circuit held that "[n]either the language nor the legislative history of the FAA demonstrate that Congress plainly intended state law to define the FAA's central term. Not only does the FAA lack a plain indication that state law should govern, it is silent as to what law defines 'arbitration.' [The court could not], on the basis of congressional muteness, conclude that state law should define the FAA's pivotal word." *Salt Lake Trib. Publ'g*, 390 F.3d at 688–89.

Reaching this conclusion, the court opined that to define "arbitration" using state law "would empower states to define arbitration as they choose, thus limiting the FAA's utility." *Id.* Such an outcome is contrary to the intent of the FAA and this Court's precedent.

Ultimately, and as the Sixth Circuit noted, "it seems counter-intuitive to look to state law to define a term in a federal statute on a subject as to which Congress has declared the need for national uniformity." *Evanston Ins. Co.*, 683 F.3d at 693 (quoting *Portland Gen. Elec. Co. v. U.S. Bank Trust Nat. Ass'n as Trustee for Trust No. 1*, 218 F.3d 1085, 1091 (9th Cir. 2000) (Tashima & Lay, JJ., concurring)); *see also Salt Lake Trib. Publ'g*, 390 F.3d at 689 ("In passing the FAA to curb state attempts to eliminate arbitration provisions, Congress likely did not delegate to the states the power to define arbitration in a way that would circumscribe its availability.").

The Alabama Supreme Court's decision expressly acknowledged this threshold split regarding whether federal law or state law governs what qualifies as "arbitration." App. 16a.

The court also recognized that the question-of-law issue naturally led to a second split of authority on how to determine what qualifies as "arbitration" under the FAA. App. 18a ("Cases seeking to describe a federal-law definition of 'arbitration' provide various formulations."). If this Court holds federal law governs what qualifies as "arbitration," it then has the opportunity to clarify the correct formulation for determining what constitutes "arbitration" for purposes of the FAA.

B. The two courts applying state law to determine whether a dispute resolution provision qualifies as "arbitration" fail to meaningfully analyze the FAA.

Contrary to the majority of circuits, the Fifth and Ninth Circuits apply state law to define "arbitration" under the FAA. *See Teachworth*, 898 F.2d at 1062–63; *Wasyl, Inc.*, 813 F.2d at 1582.

In *Wasyl*, the Ninth Circuit decided without substantive analysis that state law controlled the definition of "arbitration" because California law "d[id] not conflict in any way with the federal policy favoring arbitration agreements, and in fact seem[ed] to promote such policy." *Wasyl, Inc.*, 813 F.2d at 1582. Notably, *Wasyl* has since been questioned by Ninth Circuit judges. *See Portland Gen. Elec. Co.*, 218 F.3d at 1091 (Tashima & Lay, JJ., concurring) (writing "separately to express . . . doubts as to whether *Wasyl* . . ., by which [the court was] bound and which govern[ed] the disposition of th[e] case, was correctly decided").

Simply following the Ninth Circuit, the Fifth Circuit in *Teachworth* has applied Texas law to define "arbitration." *Teachworth*, 898 F.2d at 1062–63.

Neither circuit has expanded on applying state law as opposed to federal law. *See Bakoss*, 707 F.3d at 144 (explaining "circuits that apply state law have 'articulated few reasons for doing so'" and noting the "Ninth Circuit decision in *Wasyl* 'assumed without real analysis that state law governed'" (first quoting *Liberty Mut. Grp., Inc. v. Wright*, No. 12–CV–0282, 2012 WL 718857, at *4 (D.Md. Mar. 5, 2012); then quoting *Fit Tech*, 374 F.3d at 6)).

II. The Alabama Supreme Court's decision illustrates the need for a uniform federal rule.

Acknowledging that there was a clear and longstanding split of authority among the federal circuit courts as to "whether state or federal law should define arbitration" and that "[c]ases seeking to describe a federal-law definition of 'arbitration' provide various formulations," App. 17a–18a, the Alabama Supreme Court purported to analyze the issue under both federal and Alabama law. Ultimately, however, the court's approach in applying federal and state law is inconsistent with this Court's precedent requiring federal preemption to the extent state law conflicts. The court disregarded Great American's position that only federal law controlled, and its purported analysis failed to apply federal law accurately. *See* App. 28a. The court was not only incorrect, but its ruling conflicts with the decisions of numerous other courts.

The court's federal-law analysis acknowledged that courts have identified various formulas to determine whether a dispute resolution procedure qualifies as "arbitration" under the FAA. App. 18a. Recognizing that no uniform formula exists, the court held the dispute resolution provision did not "fulfill multiple elements of so-called 'classic arbitration.'" App. 18a. Further, the court proceeded to focus on the treatment of appraisal provisions under Alabama law as a test for whether the FAA applied.

The Alabama Supreme Court's analysis, applying federal and state law, opens the door for any state to avoid the FAA with unreasonable state law restrictions—*e.g.*, restricting the right of the parties agreeing to arbitration

to "select their own procedure," or to agree to arbitrate some things and not others. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Mitsubishi Motors Corp.*, 473 U.S. at 628.

The court's opinion here reflects Alabama's longstanding hostility towards arbitration. *See* ALA. CODE § 8-1-41 ("The following obligations cannot be specifically enforced: . . . (3) An agreement to submit a controversy to arbitration . . . ."). The Court has previously recognized the Alabama Supreme Court's misapplications of the FAA and controlling authority when reviewing agreements to arbitrate. *See York Int'l v. Alabama Oxygen Co.*, 465 U.S. 1016 (1984) (summarily reversing, in light of *Southland*, Alabama Supreme Court's opinion that the FAA did not apply in state courts); *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995) (reversing Alabama Supreme Court's opinion that the FAA's requirement that the contract containing the arbitration agreement "involves commerce" did not reach the limit of Congress's Commerce Clause authority); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (summarily reversing Alabama Supreme Court's opinion that each contract containing an arbitration agreement had to itself have a "substantial effect on interstate commerce" to be enforceable under the FAA).

Here, once again, the Alabama Supreme Court inserted new barriers to arbitration in the form of definitional standards—standards not recognized by this Court or federal circuit courts—regarding what qualifies a dispute resolution process as arbitration under federal law.

For example, the Alabama Supreme Court held the parties' agreed-to dispute resolution procedure was not "arbitration" under the FAA because the entire controversy—meaning all asserted claims—between Great American and Crystal Shores (relating to coverage for *Hurricane Sally* damage) could not be resolved through that procedure. App. 24a. By imposing this new "all claims" requirement, discussed *infra*, the Alabama Supreme Court improperly added an undue restriction to the established understanding of "arbitration." This restriction directly conflicts with this Court's precedent and FAA principles. The court's erroneous construction of "arbitration" is primarily driven by its misunderstanding that, to be classified as "arbitration," either under state or federal law, the dispute resolution procedure must "resolve[] the entire dispute between the parties." App. 24a–28a; *see also id.* at 32a–33a. In other words, the court explained that a dispute resolution procedure is only considered "arbitration" when it resolves all claims between the parties.

This approach directly conflicts with this Court's settled precedent that the terms of a parties' agreement to submit a particular kind of dispute to binding arbitration must be enforced under the FAA, even if that results in "piecemeal" treatment of claims (*i.e.*, arbitration of some claims between parties but litigation of others). *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) ("The preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation . . . .").

Building on *Dean Witter*, this Court further explained that, under the FAA, "if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation." *KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011) (citing *Dean Witter*, 470 U.S. at 217). Resolving different claims in different forums "is not the result of any choice between the federal and state courts [but] occurs because the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone*, 460 U.S. at 20; *see also Dean Witter*, 470 U.S. at 217–18 (holding "the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed," and that the FAA requires a court to "compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums").

Instead of looking to the language of the dispute resolution procedure, the court clung to the parties' use of the word "appraisal" to describe the binding out-of-court procedure they were agreeing to. App. 29a–37a (emphasizing that Alabama Supreme Court's prior rulings concluded "insurance-appraisal clauses" are not "arbitration clauses" and explaining "Alabama law would not automatically construe an appraisal clause to be an arbitration clause"). The court engaged in minimal analysis of whether the characteristics of the dispute resolution procedure qualified as arbitration. In doing so, it ignored controlling authority and diminished the structure of the process provided. The fallacy of

its reasoning is perhaps best illustrated by imagining that the parties used the word "arbitration" in place of appraisal. That would change nothing about the procedure they agreed to nor its binding effect. Nonetheless, the Alabama Supreme Court effectively relied on the label "appraisal" as a complete definition of the procedure without analyzing the substantive aspects of the dispute resolution procedure. Despite its purported analysis of the dispute resolution provision under both federal and state law, the court misapplied federal law and reinvigorated Alabama law's historic hostility towards arbitration.

III. The questions presented are exceptionally important, recurring, and warrant this Court's review.

Arbitration is a Congressionally endorsed procedure permitting parties to secure a fair and reasonable private method of resolving disputes. Parties routinely execute, and courts routinely give effect to, agreements containing dispute resolution provisions. *See Southland Corp.*, 465 U.S. at 7 (criticizing state court judgment that "nullif[ed] a valid contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration"). Thus, the instant facts are emblematic of how cases underlying these splits of authority generally arise. When drafting these agreements, parties need clarity as to what requirements it must comply with to ensure the alternate dispute processes are valid and enforceable.

A. The split of authority results in inconsistent application of a policy intended to create national uniformity.

In the key respects at issue here, the Federal Arbitration Act—a federal statute that Congress intended to create uniform national policy—is currently being applied haphazardly across the federal circuits and state courts of last resort. The well-defined split of authority has been noted by most circuit courts of appeals and many commentators. *See Harrison*, 111 F.3d at 350 ("We note first that the FAA does not define the term 'arbitration,' and *both courts and commentators have struggled to do so*." (emphasis added)). To permit this divide to continue growing denigrates the sole purpose of the FAA and reinvigorates historic hostility towards arbitration agreements.

Absent this Court making clear that a uniform federal definition of "arbitration" controls under the FAA, courts are currently left to guess whether "arbitration" in 9 U.S.C. § 2 is defined via state law or federal law. And parties are left to blindly draft agreements without a clear grasp on the controlling law or whether their agreement to submit a particular dispute over a particular issue to binding resolution by a third party rather than a court—as in the agreement at issue here—will be considered "arbitration." Such variation creates outcomes that run directly contrary to the central purpose of the FAA: to overcome hostility to, and to create uniformity in enforcement of, arbitration agreements.

These diverging approaches are a direct result of the split of authority and this Court not defining "arbitration"

under the FAA. Circuits using federal law to define "arbitration" are left with the "interesting question" of determining "how closely the specified procedure resembles classic arbitration and whether treating the procedure as arbitration serve[s] the intuited purposes of Congress." *Fit Tech, Inc.*, 374 F.3d at 7. As courts and commentators have grappled with this definition, what the courts consider "classic arbitration" takes on different iterations with varying levels of specificities.

The First Circuit in *Fit Tech* recognized that "common incidents of arbitration" include "an independent adjudicator, substantive standards (the contractual terms of the pay-out), and an opportunity for each side to present its case." *Id.* Acknowledging this approach, the Eleventh Circuit has outlined elements of "classic arbitration":

> (i) an independent adjudicator, (ii) who applies substantive legal standards (*i.e.* the parties' agreement and background contract law), (iii) considers evidence and argument (however formally or informally) from each party, and (iv) renders a decision that purports to resolve the rights and duties of the parties, typically by awarding damages or equitable relief.

Advanced Bodycare Sols., LLC v. Thione Int'l, Inc., 524 F.3d 1235, 1239 (11th Cir. 2008). In contrast, the Second Circuit held that "under the FAA 'an adversary proceeding, submission of evidence, witnesses and cross-examination are not essential elements of arbitration.'" *Bakoss*, 707 F.3d at 143 (emphasis added) (quoting *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 460 (E.D.N.Y. 1985)).

Placing weight on whether the provision provides for definitive settlement between the parties, the *Bakoss* court affirmed that a contractual provision was an "arbitration clause because the parties agreed to submit a medically-related policy dispute to a third Physician who would make a final and binding decision." *Bakoss*, 707 F.3d at 143 (cleaned up) (first citing *McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F.2d 825, 830 (2d Cir. 1988); then citing *AMF Inc.*, 621 F. Supp. at 460); *see also Milligan v. CCC Info. Servs. Inc.*, 920 F.3d 146, 151–52 (2d Cir. 2019) ("A contractual provision that clearly manifests an intention by the parties to submit certain disputes to a specified third party for binding resolution is arbitration within the meaning of the FAA." (internal quotations omitted)).

Consistent with this approach, the Tenth Circuit explained that "[c]entral to any conception of classic arbitration is that the disputants empowered a third party to render a decision settling their dispute." *Salt Lake Tribune*, 390 F.3d at 689–90 (quoting *McDonnell Douglas*, 858 F.2d at 830 ("[W]hat is important is whether the parties clearly intended to submit some disputes to their chosen instrument for the definitive settlement of grievances under the Agreement." (cleaned up)).

In addition to the courts' attempts to outline qualifying criteria, *see Advanced Bodycare*, 524 F.3d at 1239, commentators have also attempted to provide uniform guidance to determine whether a dispute resolution procedure qualifies as "arbitration." These criteria include:

- neutral arbiter or tripartite panel with the umpire selected by the parties or their party-arbitrators
- some modicum of discovery
- an evidentiary hearing including examination of witnesses
- both parties having an opportunity to make arguments
- the resulting appraisal is final and binding as to value
- the parties have agreed to an "entry of judgment" provision required by FAA § 9

1 Thomas H. Oehmke & Joan M. Brovins, *Commercial Arbitration* § 1.11 (3d ed. 2023). Yet, because each circuit places emphasis on different factors, the courts analyze dispute resolution processes differently. This results in an inconsistent application of federal law across federal courts.

B. The split further results in direct contradiction among courts.

Whereas dispute resolution procedures resulting in definitive settlement are more likely to clearly fall within the FAA's control, the analysis is not truncated when a process suggests nonbinding resolution. Rather, when the binding nature of the dispute process is questioned, the analysis reveals a deeper split. *See Harrison*, 111

F.3d at 350 (explaining that debate regarding definition of "arbitration," "has occurred largely in the context of whether the FAA applies to nonbinding arbitration").

In *Milligan*, the Second Circuit enforced a dispute resolution procedure that contained a reservation-of-rights clause that stated, "[w]e will not waive our rights by any of our acts relating to appraisal." *Milligan*, 920 F.3d at 149. The court reasoned that an agreement need not state the words "arbitrate," "final," or "binding" to qualify as a procedure under the FAA. *Id.* at 151–52. If the provision "clearly manifests an intention by the parties to submit certain disputes to a specified third party for binding resolution," the procedure falls within the meaning of the FAA. *Id.* at 152 (quoting *McDonnell Douglas*, 858 F.2d at 831).

On the other hand, the Sixth Circuit in *Evanston*, held that a reservation-of-rights provision disqualifies a dispute resolution process from the benefits of the FAA. *Evanston Ins. Co.*, 683 F.3d at 693–94. It explained that when an insurer retained rights to deny the claim after the parties submitted the "determination of the amount of loss and the value of the [b]uilding" to an alternate dispute process, such a provision did not provide for "final and binding remedy by a neutral third party." *Id.* at 693–94. Notably, the court's analysis of this reservation-of-rights clause was dicta because it was unnecessary for the court resolving the case. These differing applications of federal law inevitably result in inconsistent outcomes.

Various district courts have grappled with provisions that permit a party to retain its right to deny a claim. *See Martinique Properties, LLC v. Certain Underwriters at*

Lloyd's London, 567 F. Supp. 3d 1099, 1107–08 (D. Neb. 2021) (collecting cases). Such divergence under federal law reflects the complex nature of this deeply engrained split of authority.

As the Alabama Supreme Court conceded, and as is repeatedly demonstrated by the federal courts, "[c]ircuit unity is highly improbable until the court grants certiorari and issues an opinion." App. 17a (quoting Emily H. Slay, Evanston Insurance Co. v. Cogswell Properties: *Which Definition of "Arbitration" Should Control?*, 38 Am. J. Trial Advoc. 377, 383 (2014) (footnotes omitted)). This issue calls for uniformity in federal and state courts. Federal law should govern, and the Court needs to clarify what qualifies as arbitration.

IV. This case is an ideal vehicle.

This case concerns a dispute resolution procedure that is, in all but its name, an arbitration provision. The provision itself evidences characteristics that courts have determined qualify as arbitration. Despite its clear characteristics, the Alabama Supreme Court was deterred by the absence of the word "arbitration" in the provision. App. 37a ("The language of the clause reflects that the parties intended the clause to be what it states it is: an appraisal clause."). Although some courts have acknowledged that magic words need not be present to bring a provision within the protection of the FAA, this is not consistent across the courts. *See Milligan*, 920 F.3d at 149.

The provisions affected by the Alabama Supreme Court's ruling on this issue are not in the mine run of

arbitration cases. These cases involve a small, specific set of dispute resolution provisions that do not expressly use the word "arbitration." But federal law requires focus on the substance of the provision, not the labels used.

The Alabama Supreme Court's decision seized on linguistic form over substance to resurrect its anti-arbitration stance. App. 34a. Unwilling to look past the label to the elements of the procedure the parties agreed to in the dispute resolution provision, the court denied the parties the agreed-to forum for resolution. Oehmke & Brovins, *Commercial Arbitration* § 1.11 ("Under the FAA, an appraisal should be treated as an arbitral award . . . when the valuation is achieved by the traditional trappings of arbitration . . . ."). But, as discussed *supra*, this is not the same approach employed by many other courts. Because courts are handling these differently, there is a critical need to make clear that a uniform federal law defines what constitutes arbitration under the FAA, so that the same definition applies consistently in federal courts and state courts. The drafters of the FAA sought to provide protection for private dispute resolution, not protection to use of specific labels.

This case presents the perfect vehicle for answering the long-percolating questions here presented.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and resolve the circuit split on whether federal law or state law governs what qualifies as an "arbitration" provision under the FAA. Additionally, the court should grant certiorari to provide clarity on whether a contract's dispute resolution provision requiring parties to submit property loss valuation disputes to an independent appraisal panel for binding resolution qualifies as "arbitration" under the FAA.

Respectfully submitted,

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March 21, 2024

APPENDIX

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APPENDIX A — OPINION OF THE SUPREME COURT OF ALABAMA, DATED DECEMBER 22, 2023

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2023-2024

December 22, 2023, Released

SC-2023-0092

GREAT AMERICAN INSURANCE COMPANY

v.

CRYSTAL SHORES OWNERS ASSOCIATION, INC.

Appeal from Baldwin Circuit Court.
(CV-21-900497).

PER CURIAM.

Great American Insurance Company ("Great American") appeals from the Baldwin Circuit Court's order denying its motion to invoke the appraisal procedure contained in a commercial-property insurance policy Great American issued to Crystal Shores Owners Association, Inc. ("Crystal Shores"), concerning the Crystal Shores Condominium complex ("the property") located on West Beach Boulevard in Gulf Shores. We dismiss the appeal.

Appendix A

I. Facts

According to Crystal Shores' complaint, on September 30, 2019, RSUI Indemnity Company ("RSUI") and Landmark American Insurance Company ("Landmark") issued a commercial-property insurance policy to Crystal Shores for a period of one year from the date of issuance.[1] On the same date, the complaint alleged, Great American issued a commercial-property insurance policy to Crystal Shores for a period of one year from the date of issuance.[2]

On September 16, 2020, Hurricane Sally made landfall on the Alabama Gulf Coast. Crystal Shores' complaint alleged that Hurricane Sally caused "substantial damages to the Crystal Shores Condominium." According to its complaint, Crystal Shores "timely and properly reported its Hurricane Sally claim to the Third-Party Defendants [Great American, RSUI, and Landmark] for damage to [the property] sustained as a result of the storm event."

Crystal Shores alleged that the main water line to the property had been turned off in preparation for the imminent landfall of Hurricane Sally. However, the owner

1. In its answer to Crystal Shores' complaint, RSUI agreed that Landmark had issued a commercial-property insurance policy to Crystal Shores, but it denied that RSUI was a party to the Landmark insurance policy. That dispute is not before us in this appeal.

2. The Great American insurance policy listed "Crystal Shores Condominium" as the "Named Insured," but there appears to be no dispute that "Crystal Shores Owners Association, Inc.," is the holder of the policy.

of Unit 606 had left on the faucet to the bathtub in that unit before vacating the premises because of the hurricane emergency. After Hurricane Sally had passed, the water flow was restored to the property, and the faucet in Unit 606 ran for over 24 hours before it was discovered by persons returning to the property. Crystal Shores alleged that the constant running of water in the bathtub of Unit 606 resulted in an overflow of water that flooded an entire stack of condominium units. Crystal Shores alleged that it "timely submitted the Unit 606 tub overflow claim to third-party defendants RSUI, Landmark, Great American [and fictitiously named defendants] seeking coverage to mitigate and remediate the damage resulting from this covered loss."

According to Crystal Shores' complaint, it

> "retained Bowen Wilson, Inc., d/b/a Servpro of Montgomery to mitigate and remediate damage caused by Hurricane Sally as well as the Unit 606 tub overflow claim. Crystal Shores timely submitted to Third-Party Defendants all invoicing and supporting documentation provided by Servpro pertaining to mitigation and remediation scopes of work performed by Servpro to mitigate and repair damage caused by Hurricane Sally and the Unit 606 tub overflow claim.
>
> "27. However, third-party defendants RSUI, Landmark, Great American, and [fictitiously named defendants] have failed to fully

> compensate [Crystal Shores] for the Unit 606 tub overflow claim and have further refused to compensate [Crystal Shores] for services allegedly rendered by Servpro to mitigate and remediate damage caused by both Hurricane Sally and the Unit 606 tub overflow."

On May 6, 2021, Bowen-Wilson, Inc., d/b/a Servpro of Montgomery ("Servpro"), commenced an action in the Baldwin Circuit Court by filing a complaint against Crystal Shores. In that complaint, Servpro alleged that Crystal Shores had not fully compensated Servpro for the mitigation and construction work Servpro had performed on the property pursuant to a contract between Servpro and Crystal Shores. On June 11, 2021, Crystal Shores filed an answer and counterclaim in response to Servpro's complaint.

On June 24, 2022, Crystal Shores filed in the Baldwin Circuit Court a "Motion for Relief to File Third-Party Complaint" in which Crystal Shores alleged that one reason it had not fully paid Servpro's invoices was that

> "Third-Party Defendants RSUI, Landmark and Great American refused to compensate [Crystal Shores] for all invoices [Crystal Shores] received from Servpro pertaining to the scopes of work allegedly performed by Servpro pertaining to both losses [the Hurricane Sally loss and the Unit 606 tub-overflow claim]. Accordingly, [Crystal Shores] was unable to fully compensate Servpro for services allegedly

> rendered mitigating and remediating the losses."

Crystal Shores thus sought leave to file a third-party complaint against RSUI, Landmark, and Great American "[s]o that this case can be fully and fairly litigated." On July 8, 2022, the circuit court granted Crystal Shores' motion.

On July 28, 2022, Crystal Shores filed a third-party complaint against RSUI, Landmark, Great American, and fictitiously named defendants. As we already have noted, Crystal Shores' complaint alleged that it filed insurance claims for damage to the property stemming from both Hurricane Sally and the Unit 606 bathtub overflow. In addition to the allegations we already have detailed, Crystal Shores' complaint asserted:

> "30. Third-Party Plaintiff Crystal Shores has incurred significant costs mitigating interior damage, replacing the roof and repairing exterior damage, as well as other damage the building sustained as a result of Hurricane Sally and the unit 606 tub overflow, all of which has been timely and properly reported to the third-party Defendants.
>
> "31. However, third-party Defendants RSUI, Landmark, Great American and [fictitiously named defendants] have failed to promptly and/or properly investigate [Crystal Shores'] losses.

> "32. Defendants RSUI, Landmark, Great American and [fictitiously named defendants] have further failed to timely and/or properly compensate Crystal Shores for losses sustained as a result of Hurricane Sally and the unit 606 tub overflow.
>
> "33. Defendants RSUI, Landmark, Great American and [fictitiously named defendants] have further failed to submit [Crystal Shores'] claims to a cognitive evaluation or review and have breached the insuring agreements and committed bad faith by refusing to compensate [Crystal Shores] for damage the building and units sustained as a result of Hurricane Sally and the unit 606 tub overflow."

Count I of Crystal Shores' complaint asserted against Great American and the other third-party defendants bad-faith claims: failure to pay insurance proceeds and failure to investigate. That count included the allegation that Great American and the other third-party defendants had "intentionally and/or recklessly failed to timely and/or properly investigate and/or pay [Crystal Shores'] claim for damages sustained as a result of the storm event and the Unit 606 tub overflow." Count II of Crystal Shores' complaint asserted claims against Great American and the other third-party defendants alleging breach of "the terms and conditions of the insurance policies ... by failing to timely and properly investigate and pay [Crystal Shores] for losses sustained as a result of the storm event and the Unit 606 tub overflow, said losses occurring during

the policy periods." Crystal Shores attached copies of the insurance policies -- including a copy of the commercial-property insurance policy issued by Great American -- to its complaint.

On September 30, 2022, Great American filed in the circuit court a "Motion to Dismiss, or in the Alternative to Stay and Compel Compliance with the Appraisal Procedure Specified in the Policy." In that motion, Great American argued that the parties' dispute about the amount of the loss suffered by Crystal Shores was subject to an appraisal procedure described in the insurance policy. Specifically, the appraisal clause in the Great American insurance policy provided:

> "**B. Appraisal**
>
> "If [Great American] and [Crystal Shores] disagree on the value of the property, the amount of Net Income and operating expenses, or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property, the amount of Net Income and operating expenses, or the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

"1. pay its chosen appraiser; and

"2. bear the other expenses of the appraisal and umpire equally.

"If there is an appraisal, [Great American] will still retain [its] right to deny the claim.

"Neither the appraisers nor the umpire shall attempt to resolve any issue of insurance coverage, policy exclusions, compliance with the Policy terms and conditions, or any issues concerning the Limits of Insurance available under the Policy."

(Bold typeface in original.) In its motion, Great American also noted that a previous section of the insurance policy provided:

"**SELECT BUSINESS POLICY CONDITIONS**

"This Coverage Part is subject to the following conditions.

"**General Conditions**

"....

"**D. Legal Action Against Us**

"No one may bring a legal action against [Great American] under this Coverage Part unless:

> "1. there has been full compliance with all of the terms of this Coverage Part; and
>
> "2. the action is brought within 2 years after the date on which the direct physical loss or damage occurred."

(Bold typeface in original.)

In its September 30, 2022, motion, Great American asserted:

> "8. The individual appraisal process mandated by the Great American Policy fully encompasses the claims set forth against Great American in the Third-Party Complaint, and Crystal Shores' compliance with it will establish the amount of loss associated with the claims made under the Great American Policy for damages sustained by the Property. Crystal Shores does not contend that it has complied with the appraisal provision."

Because, according to Great American, "the appraisal provision in the Great American Policy is mandatory once invoked," and because "[t]he appraisal, once conducted, will resolve this controversy in its entirety, since all claims in this action hinge upon the determination of the amount of the 'loss' sustained by the Property," Great American contended that the appraisal clause was a written arbitration agreement pursuant to the Federal Arbitration Act ("the FAA"), 9 USC § 1 et seq. Great

American therefore requested that the circuit court dismiss Crystal Shores' claims against it or stay the action and order Crystal Shores "to submit to the individual appraisal process required under the express terms of the policy."

On December 1, 2022, Crystal Shores filed a response in opposition to Great American's motion to compel an appraisal of the dispute over the amount of the loss incurred by Crystal Shores. In that response, Crystal Shores asserted that Great American had denied payment on its submitted hurricane-damage insurance claim based on "certain exclusions and 'coverage issues,'" not based on a disagreement over the amount of the loss. In support of that argument, Crystal Shores cited -- and attached to its response -- an October 27, 2020, letter Great American had sent to Crystal Shores. Relying on that letter and on *Rogers v. State Farm Fire & Casualty Co.*, 984 So. 2d 382, 392 (Ala. 2007), which Crystal Shores argued stood for the proposition that "'[q]uestions of coverage and liability should be decided only by the courts, not [by] appraisers,'" Crystal Shores contended that its action should not be stayed for purposes of an appraisal because there were questions about coverage, not just the amount of the loss, at issue in the case.

On December 19, 2022, Great American filed a "Supplemental Submission in Support of its Motion to Dismiss, or in the Alternative to Stay and Compel Compliance with the Appraisal Procedure Specified in the Policy." In that supplemental submission, Great American argued that the coverage-issues dispute between Crystal

Shores and Great American had concerned Crystal Shores' claim for damage stemming from Hurricane Sally and that "[t]he Hurricane Sally Claim has been resolved between Great American and Crystal Shores. The Hurricane Sally Claim is also not part of Crystal Shores' Third-Party allegations against Great American." The supplemental submission further asserted that "[t]here are no coverage issues related to the Unit 606 Claim [the bathtub-overflow claim] under Great American's policy, and the Hurricane Sally Claim was resolved in Great American's December 16, 2020, correspondence disclaiming coverage." In support of those contentions, Great American attached to its supplemental submission a December 16, 2020, letter from Great American adjuster Mark Erlandson, which stated that Great American had "completed its investigation into this claim involving wind and water damage to the Crystal Shores Condominium building that occurred during Hurricane Sally" and that "the facts of the loss and the Policy terms ... require us to decline coverage for a portion of the claim as submitted." Additionally, Great American attached to its supplemental submission an affidavit from Erlandson stating that "Great American has not received any correspondence from Crystal Shores or its attorneys disputing Great American's handling of the [Hurricane Sally] claim itself." Because, according to Great American, none of Crystal Shores' claims against it involved insurance-coverage issues, Great American argued that its motion to compel an appraisal of the dispute over the amount of the loss incurred by Crystal Shores should be granted.

Appendix A

On January 6, 2023, the circuit court entered an order denying Great American's motion to dismiss or to stay the action and compel compliance with the insurance policy's appraisal procedure. The order did not specify the circuit court's reasons for its decision. On February 2, 2023, Great American appealed. On April 14, 2023, Great American filed in the circuit court a motion to stay the proceedings in the circuit court pending resolution of its appeal; the circuit court did not rule on that motion.

On May 11, 2023, Crystal Shores filed in this Court a motion to dismiss Great American's appeal for lack of jurisdiction because, Crystal Shores argued, the appeal stemmed from a nonfinal interlocutory order. Specifically, Crystal Shores contended that Great American's appeal was not cognizable under Rule 4(d), Ala. R. App. P., because the appeal did not stem from "[a]n order granting or denying a motion to compel arbitration." In support of its argument, Crystal Shores attached to its motion a copy of this Court's order dismissing an appeal by Baldwin Mutual Insurance Company ("Baldwin Mutual") in *Baldwin Mutual Insurance Co. v. Dixon* (No. 1100162, Jan. 12, 2011), in which the Court stated that "the appeal is dismissed as from a non-appealable order." In order to provide context for that order, Crystal Shores also attached to its motion to dismiss a copy of Baldwin Mutual's appellate brief in Dixon, seeking to demonstrate that Baldwin Mutual had, like Great American in this case, appealed from a circuit court's order denying a motion to dismiss and demand for an appraisal.

On May 15, 2023, the Supreme Court Clerk's Office issued a show-cause order requiring Great American to respond to Crystal Shores' motion to dismiss the appeal. On the same date, Great American filed with this Court an emergency motion to stay the proceedings in the circuit court pending resolution of the appeal. On May 19, 2023, Great American filed with this Court its response to the show-cause order. Great American contended that "courts across the country have recognized [that], '[u]nder the Federal Arbitration Act, [9 U.S.C. § 1 et seq.], appraisal provisions are regularly treated as arbitration provisions by the courts and enforced in the same manner.' *Walker v. Allstate Prop. & Cas. Ins. Co.,* No. 2:19-CV-701-RDP, ... n.3, 2020 U.S. Dist. LEXIS 41160 (N.D. Ala. Mar. 10, 2020)." Great American further asserted that the order issued in *Dixon* "contains no stated rationale and has no precedential value." In support of that assertion, Great American attached to its response a copy of Baldwin Mutual's response to a show-cause order from this Court requiring it to explain why its appeal should not be dismissed in which Baldwin Mutual had argued that "in Alabama appraisal under an insurance policy is considered analogous to demands for arbitration and this Court has applied the same standards to both." In contrast, Great American contended, it had cited multiple cases from other jurisdictions showing that appraisal clauses are treated as arbitration clauses.

On May 23, 2023, Crystal Shores filed a reply to Great American's response to the show-cause order. In its reply, Crystal Shores argued that the case relied upon by Great American, *Walker v. Allstate Prop. & Cas.*

Ins. Co., No. 2:19-CV-701-RDP, 2020 U.S. Dist. LEXIS 41160, Mar. 10, 2020 (N.D. Ala. 2020) (not reported in Federal Supplement), "has no applicability to the present issue before this Court because the *Walker* Court "did not analyze whether an appellate court has jurisdiction pursuant to Rule 4(d)[, Ala. R. App. P.,] for purposes of reviewing the denial of an interlocutory non-final order such as the one presently before this Court." Crystal Shores further argued that if Great American wanted to "avail itself of the procedural mechanism within Rule 4(d) of the Alabama Rules of Appellate Procedure to appeal the denial of a motion to compel arbitration, Great American simply could have added an arbitration clause to its contract of insurance."

On May 26, 2023, this Court entered an order granting Great American's emergency motion to stay the proceedings in the circuit court pending resolution of the appeal and placing Crystal Shores' motion to dismiss the appeal under submission.

II. Analysis

As the rendition of facts details, the threshold issue in this case is whether this Court has jurisdiction to consider Great American's appeal of the circuit court's order denying its motion to dismiss or to stay the action and compel compliance with the insurance policy's appraisal procedure. It is undisputed that Great American's only asserted basis for jurisdiction is Rule 4(d), Ala. R. App. P., which provides:

> "An order granting or denying *a motion to compel arbitration* is appealable as a matter of right, and any appeal from such an order must be taken within 42 days (6 weeks) of the date of the entry of the order, or within the time allowed by an extension pursuant to Rule 77(d), Alabama Rules of Civil Procedure."

(Emphasis added.) Jurisdiction under Rule 4(d) necessarily requires Great American to contend that the appraisal clause is, in fact, an arbitration clause. Great American does so by quoting snippets from a few federal cases that have examined whether appraisal clauses in insurance contracts should be treated as arbitration clauses. For example, in *Milligan v. CCC Information Services Inc.*, 920 F.3d 146, 152 (2d Cir. 2019), the United States Court of Appeals for the Second Circuit concluded:

> "The appraisal process here constitutes arbitration for purposes of the FAA. The appraisal provision identifies a category of disputes (disagreements between the parties over 'the amount of loss'), provides for submission of those disputes to specified third parties (namely, two appraisers and the jointly-selected umpire), and makes the resolution by those third parties of the dispute binding (by stating that '[a]n award in writing of any two *will determine* the amount of the loss')."[3]

3. Great American also emphasizes the statement from a footnote in *Walker v. Allstate Prop. & Cas. Ins. Co.,* No. 2:19-CV-701-RDP, 2020 U.S. Dist. LEXIS 41160, Mar. 10, 2020, n.3 (N.D.

However, in citing *Milligan* and other federal cases, Great American has neglected to mention that a threshold issue faced by federal courts in determining whether a certain procedure qualifies as "arbitration" under the FAA is whether federal or state law defines that term in the statute. That issue arises because, as the *Milligan* court itself observed, "[t]he FAA does not define the term 'arbitration.'" *Milligan,* 920 F.3d at 151. See also *Evanston Ins. Co. v. Cogswell Props., LLC,* 683 F.3d 684, 693 (6th Cir. 2012) (same); *Fit Tech, Inc. v. Bally Total Fitness Holding*

Ala. 2020) (not reported in Federal Supplement), that, "[u]nder the Federal Arbitration Act ('FAA'), appraisal provisions are regularly treated as arbitration provisions by the courts and enforced in the same manner." The *Walker* Court's sole citation in support of that assertion was *200 Leslie Condo. Ass'n v. QBE Ins. Corp.,* No. 10-61984-CIV, 2011 U.S. Dist. LEXIS 65720, June 21, 2011 (S.D. Fla. 2011) (not reported in Federal Supplement), in which the *Leslie Condominium Association* court stated that "'[a]ppraisal provisions in insurance policies ... have generally been treated as arbitration provisions.'" But in making that statement, the Federal District Court for the Southern District of Florida was discussing Florida law and quoting from *United States Fidelity & Guaranty Co. v. Romay,* 744 So. 2d 467, 469 (Fla. Dist. Ct. App. 1999). In doing so, the federal district court apparently overlooked the Florida Supreme Court's decision in *Allstate Insurance Co. v. Suarez,* 833 So. 2d 762, 765 (Fla. 2002), in which it concluded that "an unambiguous provision for appraisal" could not be "construed as an agreement to arbitrate the underlying dispute." See also *Nationwide Mut. Fire Insurance Co. v. Schweitzer,* 872 So. 2d 278, 279 (Fla. Dist. Ct. App. 2004) ("*Suarez* plainly held that an appraisal provision is not an agreement to arbitrate. It follows from *Suarez* that an order granting or denying an appraisal is not appealable as an order involving entitlement to arbitration."). Thus, *Walker*'s statement was not supported by ample authorities.

Corp., 374 F.3d 1, 6 (1st Cir. 2004) ("The [FAA] itself does not define 'arbitration.'"); *Harrison v. Nissan Motor Corp. in U.S.A.*, 111 F.3d 343, 350 (3d Cir. 1997) ("We note first that the FAA does not define the term 'arbitration,' and both courts and commentators have struggled to do so."); *Martinique Props., LLC v. Certain Underwriters at Lloyd's London*, 567 F. Supp. 3d 1099, 1104 (D. Neb. 2021) (observing that "the law does not define what constitutes an arbitration," and that "the United States Courts of Appeals are split on whether to use state law or federal common law to define this term" and citing several cases to illustrate that point). A commentator summarized current federal-court treatment on the issue:

> "The United States Supreme Court has yet to issue an opinion on whether state or federal law should define arbitration. Circuit unity is highly improbable until the court grants certiorari and issues an opinion. Currently, the Fifth and the Ninth Circuits apply state law; the First, Second, Sixth, and Tenth Circuits apply federal common law."

Emily H. Slay, Evanston Insurance Co. v. Cogswell Properties: *Which Definition of "Arbitration" Should Control?*, 38 Am. J. Trial Advoc. 377, 383 (2014) (footnotes omitted). See also *Positano Place at Naples I Condo. Ass'n v. Empire Indem. Ins. Co.*, 84 F.4th 1241, 1255 (11th Cir. 2023) ("We have not decided the question of whether an appellate court looks to state or federal law in determining whether an appraisal process falls within the definition of 'arbitration' for purposes of the FAA, nor has the Supreme Court directly addressed the question.").

Appendix A

A. Defining FAA "Arbitration" Using Federal Law

The federal circuits that have concluded that federal law should determine the definition of the term "arbitration" in the FAA have done so under the rationale that, as the Sixth Circuit Court of Appeals stated in *Evanston Insurance Company,* it would be "'counter-intuitive to look to state law to define a term in a federal statute on a subject as to which Congress has declared the need for national uniformity.'" 683 F.3d at 693 (quoting *Portland GE v. United States Bank Trust N.A.,* 218 F.3d 1085, 1091 (9th Cir. 2000) (Tashima & Lay, JJ., concurring)).

Cases seeking to describe a federal-law definition of "arbitration" provide various formulations. According to the Eleventh Circuit Court of Appeals,

> "[o]ne widely-followed opinion asks whether the parties have agreed to submit a dispute to a third party for a decision. *AMF Inc. v. Brunswick Corp.,* 621 F. Supp. 456, 460 (E.D.N.Y. 1985) (Weinstein, J.). Other authority considers how closely the procedure chosen resembles 'classic arbitration' and whether enforcing it serves the intuited purposes of Congress. *Fit Tech v. Bally Total Fitness,* 374 F.3d 1, 6-7 (1st Cir. 2004); *Salt Lake Tribune Publ'g Co. v. Mgmt. Planning Inc.,* 390 F.3d 684, 689-90 (10th Cir. 2004). These differing verbal formulations do not constitute a real disagreement, because submitting a dispute to a third party for a binding decision is quintessential 'classic

> arbitration.' *See Salt Lake Tribune,* 390 F.3d at 689 ('classic arbitration' is characterized by 'empower[ing] a third party to render a decision settling [the] dispute'). Thus, when there is a dispute about whether any particular dispute resolution method chosen in a contract is FAA arbitration, we will look for the 'common incidents' of 'classic arbitration,' including (i) an independent adjudicator, (ii) who applies substantive legal standards (*i.e.* the parties' agreement and background contract law), (iii) considers evidence and argument (however formally or informally) from each party, and (iv) renders a decision that purports to resolve the rights and duties of the parties, typically by awarding damages or equitable relief. *See Fit Tech,* 374 F.3d at 7. The presence or absence of any one of these circumstances will not always be determinative, and parties have great flexibility under the FAA to select pre-packaged dispute resolution procedures, or to craft their own."

Advanced Bodycare Sols., LLC v. Thione Int'l, Inc., 524 F.3d 1235, 1239 (11th Cir. 2008).

Although Great American fails to expressly state that it believes federal law should govern the definition of the term "arbitration" in the FAA, Great American's argument that the appraisal clause is an arbitration clause generally appears to agree with the foregoing understanding of a federal definition of "arbitration."

Great American asserts that the question to be answered is: "[D]oes the [appraisal clause] say that the parties will submit disputes of the type at issue to binding resolution by third parties?" Great American's brief at 18. Great American contends that the appraisal clause fulfills those elements of arbitration because the appraisal clause provided that Crystal Shores and Great American "would submit valuations disputes under the Policy to binding resolution by third parties" and the appraisal clause "contains the elements of an arbitration agreement: the use of third-parties (appraisers and an umpire) to review the evidence and resolve the dispute by issuing a binding, final resolution of the dispute." *Id.* at 19, 20.

One flaw in Great American's argument is that the procedure outlined in the appraisal clause does not, in fact, fulfill multiple elements of so-called "classic arbitration" highlighted in *Advanced Bodycare Solutions.* First, although the appraisal clause provides for third parties to determine the amount of the loss, there is nothing in the appraisal clause that dictates that the appraisers or the umpire must use some specific standard in determining the value of the loss or that they must consider evidence and arguments from the parties in doing so. That is unsurprising given that insurance appraisals are often contrasted with the formalities usually inherent in arbitration proceedings.

> "The similarities and differences between the processes of appraisal and arbitration are not well defined, although it is generally conceded that appraisal is designed to be less formal

than arbitration. [See, e.g., *Allstate Ins. Co. v. Martinez,* 790 So. 2d 1151, 1152 (Fla. Dist. Ct. App. 2001) (holding that the appraisal process did not have to conform to rules of arbitration requiring attorney participation, court reporter transcriptions, and quasi-judicial hearing); *Hirt v. Hervey,* 118 Ariz. 543, 545, 578 P.2d 624, 626 (Ct. App. 1978) ('While appraisals are generally less formal than arbitrations, both provide a contractual method for settling questions in a less complicated and expensive manner than through court adjudication.'); *In re Delmar Box Co.,* 309 N.Y. 60, 62-66, 127 N.E.2d 808, 810-13 (1955) (noting that appraisal should not be given the same recognition as arbitration because it is limited to specific issues, conducted in a less formal manner, is not bound by strict judicial investigation, and requires no hearing).] ...

"....

"... In arbitration, parties want to present witnesses and evidence, and to cross-examine opponents' witnesses. [Andrew L. Pickens, *Appraisement: An Old But Effective Form of ADR for Contract Liabilities,* 60 Tex. Bar J. 18, 20 (1997) (quoting *City of Omaha v. Omaha Water Co.,* 218 U.S. 180, 194, 30 S. Ct. 615, 54 L. Ed. 991 (1910)) (discussing differences between appraisal and arbitration).] Appraisal, on the other hand, has few clear rules. *If the appraisers do not find it necessary, there*

> *may not be a formal hearing, presentation of witnesses, or taking of evidence.* [See Richard C. Bennett, Appraisal, in 2 *Insuring Real Property* § 30.03[6] (Matthew Bender 2005).] *Appraisers 'act independently and apply their own skill and knowledge in reaching their conclusions.'* [*Budget Rent-A-Car of Washington-Oregon, Inc. v. Todd Inv. Co.*, 43 Or. App. 519, 523, 603 P.2d 1199, 1201 (1979).] *Appraisers can generally make their own decisions concerning what they wish to see and how they see it.*"

Timothy P. Law & Jillian L. Starinovich, *What Is It Worth? A Critical Analysis of Insurance Appraisal,* 13 Conn. Ins. L.J. 291, 297-99 (2007) (emphasis added). Those same differences in procedural formality were highlighted by the Mississippi Supreme Court in *Hartford Fire Insurance Co. v. Jones,* 235 Miss. 37, 41-42, 108 So. 2d 571, 572 (1959):

> "'Appraisement, in particular, is perhaps most often confused with arbitration. While some of the rules of law that apply to arbitration apply in the same manner to appraisement, and the terms have at times been used interchangeably, there is a plain distinction between them. In the proper sense of the term, arbitration presupposes the existence of a dispute or controversy to be tried and determined in a quasi judicial manner, whereas appraisement is an agreed method of ascertaining value

> or amount of damage, stipulated in advance, generally as a mere auxiliary or incident feature of a contract, with the object of preventing future disputes, rather than of settling present ones. Liability is not fixed by means of an appraisal; there is only a finding of value, price, or amount of loss or damage. The investigation of arbitrators is in the nature of a judicial inquiry and involves, ordinarily, a hearing and all that is thereby implied. Appraisers, on the other hand, where it is not otherwise provided by the agreement, are generally expected to act upon their own knowledge and investigation, without notice of hearings, are not required to hear evidence or to receive the statements of the parties, and are allowed a wide discretion as to the mode of procedure and sources of information.'"

(Quoting 3 Am. Jur. *Arbitration and Award* § 3 at 830-31.) See, e.g., *City of Omaha v. Omaha Water Co.,* 218 U.S. 180, 198, 30 S. Ct. 615, 54 L. Ed. 991 (1910) (observing that "in an appraisement ... the strict rules relating to arbitration and awards do not apply, and the appraisers were not rigidly required to confine themselves either to matters within their own knowledge, or those submitted to them formally in the presence of the parties; but might reject, if they saw fit, evidence so submitted, and inform themselves from any other source, as experts who were at last to act upon their own judgment"); *Fit Tech,* 374 F.3d at 7 (holding that "common incidents" of classic arbitration include "an independent adjudicator, substantive standards...,

and an opportunity for each side to present its case"); *Allstate Ins. Co. v. Suarez,* 833 So. 2d 762, 765 (Fla. 2002) (overruling a Florida District Court of Appeals' decision because it "went beyond the plain meaning of the appraisal clause when it considered that the appraisers would have to 'exercise ... quasi-judicial authority to resolve the dispute'" (quoting *Florida Farm Bureau Cas. Ins. Co. v. Sheaffer,* 687 So. 2d 1331, 1334 (Fla. Dist. Ct. App. 1997))); *Black's Law Dictionary* 126 (11th ed. 2019) (defining "appraisement" as "[a]n alternative-dispute-resolution method used for resolving the amount or extent of liability on a contract when the issue of liability itself is not in dispute. ... Unlike arbitration, appraisement is not a quasi-judicial proceeding but instead an informal determination of the amount owed on a contract.").

Second, authorities that rely upon the idea of "classic arbitration" indicate that arbitration resolves the entire dispute between the parties, whereas appraisal does not. See, e.g., *Rastelli Bros. v. Netherlands Ins. Co.,* 68 F. Supp. 2d 440, 446 (D.N.J. 1999) ("'An agreement for arbitration, as that term is now generally used, encompasses the disposition of the entire controversy between the parties upon which award a judgment may be entered, whereas an agreement for an appraisal extends merely to the resolution of the specific issues of cash value and the amount of loss, all other issues being reserved for settlement by negotiation, or litigated in an ordinary action upon the policy.'" (quoting George J. Couch, Ronald A. Anderson, and Mark S. Rhodes, *Couch on Insurance* § 50:5 (2d ed. 1982))); 46A C.J.S. *Insurance* § 1900 (2018) ("Appraisal establishes only the amount of a loss and

not liability for the loss under the insurance contract, whereas arbitration is a quasi-judicial proceeding that ordinarily will decide the entire controversy."). Indeed, Great American steadfastly insists that "[t]he only dispute remaining [between the parties] is whether Crystal Shores is entitled to *additional* payments due to its assertion of a higher damage valuation" and that this is one reason the appraisal clause is, in fact, an arbitration clause. Great American's brief at 1.

However, Crystal Shores strenuously contends that "coverage and causation issues clearly exist" apart from the valuation dispute that would be settled by the appraisal clause. Crystal Shores' brief at 14. Specifically, Crystal Shores argues that, from the time it originally filed its insurance claims, Great American has disputed whether the insurance policy covers damage stemming from Hurricane Sally and "whether the water damage to the condominium and units was caused by the tub overflow, Hurricane Sally[,] or a combination of both." *Id.* at 14-15.

Great American counters by arguing that

> "because the Complaint limits the claims against Great American to the bathtub overflow claim, and because it is undisputed that Great American has accepted *coverage* on the bathtub overflow claim (and has actually already paid over $1 million), the only remaining dispute at issue in this lawsuit is one that the parties agreed should be resolved only through the appraisal procedure: the proper amount of payment due under the bathtub overflow claim."

Great American's reply brief at 2.

Great American's argument does not comport, however, with the allegations stated in Crystal Shores' third-party complaint. As we related in the rendition of the facts, in its complaint Crystal Shores expressly stated that it had "timely and properly reported its Hurricane Sally claim" to all of the third-party defendants, including Great American. Crystal Shores then alleged in part that Great American had "refused to compensate [Crystal Shores] for services allegedly rendered by Servpro to mitigate and remediate damage caused by ... Hurricane Sally ...." Crystal Shores further alleged in part that, even though it had timely and properly reported the damage "sustained as a result of Hurricane Sally," "third-party Defendants RSUI, Landmark, *Great American* and [fictitiously named defendants] have failed to promptly and/or properly investigate [Crystal Shores'] losses" and "Defendants RSUI, Landmark, *Great American* and [fictitiously named defendants] have further *failed to timely and/or properly compensate Crystal Shores for losses sustained as a result of Hurricane Sally* ...." (Emphasis added.) The specific counts of the third-party complaint also included allegations against Great American with respect to damage Crystal Shores allegedly had sustained because of Hurricane Sally. Crystal Shores' bad-faith claims in part included the allegation that Great American had "intentionally and/or recklessly failed to timely and/or properly investigate and/or pay [Crystal Shores'] claim for damages sustained as a result of the storm event ...." Crystal Shores' breach-of-contract claims in part included the allegation that Great American had breached "the

terms and conditions of the insurance policies ... by failing to timely and properly investigate and pay [Crystal Shores] for losses sustained as a result of the storm event ...."

In short, viewing the allegations in the complaint in the light most favorable to Crystal Shores -- as we are supposed to do in reviewing a motion to dismiss[4] -- Crystal Shores plainly leveled allegations against Great American pertaining to damage caused by Hurricane Sally even though Great American insists that "Crystal Shores' third-party complaint did not name Great American in the allegations regarding the Hurricane Sally loss and did not accuse Great American of any wrong with regard to that claim." Great American's brief at 11. In other words, Crystal Shores has alleged that it was entitled to coverage that Great American did not provide under the insurance policy with respect to damage allegedly caused by Hurricane Sally. Crystal Shores also asserts that Great American's denial of further payments on Crystal Shores' bathtub-overflow claim is tied to Great American's insistence that at least some of the remediation performed by Servpro was for damage caused by Hurricane Sally, compensation for which, Great American contends, it is not responsible under the insurance policy. Thus, outstanding coverage issues exist that would not be resolved by the appraisal procedure, and so the appraisal would not resolve the entire dispute between the parties. A procedure that does not fully and finally settle the dispute

4. See, e.g., *Morton v. Prescott,* 564 So. 2d 913, 916 (Ala. 1990) ("In considering a motion to dismiss, a court construes the allegations of the complaint in a light most favorable to the plaintiff, with all doubts and allegations resolved in his favor.").

between the parties does not comport with the definition of "arbitration" under federal law.

In short, the appraisal clause does not require the appraisers or the umpire to consider evidence and arguments from the parties, the appraisal clause does not require the appraisers or the umpire to base their valuation on a substantive legal standard, and submission of the valuation issue to the appraisal process would not settle the entire dispute between Crystal Shores and Great American. Thus, the appraisal clause fails to meet most of the elements of "classic arbitration" described in cases that have chosen to define the term "arbitration" in the FAA using federal law. We must conclude, therefore, that the appraisal clause is not an arbitration clause under the FAA according to that standard -- the only standard argued by Great American.

B. Defining FAA "Arbitration" Using State Law

The federal circuits that have concluded that state law should determine the definition of the term "arbitration" in the FAA have done so under the rationale that as long as a state's laws do not interfere with the goals of the FAA, state law should apply because the FAA only preempts state laws to the extent that they stand as an obstacle to the accomplishment of the purposes and objectives of the FAA. See, e.g., *Portland Gen. Elec,* 218 F.3d at 1089 (applying Oregon law); *Hartford Lloyd's Ins. Co. v. Teachworth,* 898 F.2d 1058, 1062-63 (5th Cir. 1990) (applying Texas law); *Wasyl, Inc. v. First Boston Corp.,* 813 F.2d 1579, 1582 (9th Cir.1987) (applying California

law). Cf. *Volt Info. Scis. Inc. v. Bd. of Trs. of Stanford Univ.,* 489 U.S. 468, 478, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989) (holding that the FAA preempts state laws to the extent that they "would undermine the goals and policies of the FAA").

Even if Great American had argued that the definition of the term "arbitration" in the FAA should be determined by Alabama law, the argument would have fared no better. With respect to Alabama law, the parties bicker about what can be read into our order dismissing Baldwin Mutual's appeal in *Dixon,* which stated that "the appeal is dismissed as from a non-appealable order." Crystal Shores is correct that Baldwin Mutual contended that its appeal from a circuit court's order denying its motion to dismiss and demand for appraisal was proper under Rule 4(d), Ala. R. App. P. Conversely, Great American is correct that Baldwin Mutual only argued that insurance appraisals are "considered analogous to demands for arbitration," not specifically that an appraisal clause *is* an arbitration clause, and Baldwin Mutual did not cite the federal authorities Great American has cited to us. Ultimately, *Dixon* is not decisive for either party in this case because our order in *Dixon* did not expressly address the issue presented here.

But our order in *Dixon* is revealing for the authorities Baldwin Mutual did cite and those it could not. Baldwin Mutual had noted in its response to the show-cause order that, in determining whether a party has waived its right to invoke an appraisal clause, this Court has applied the test it commonly uses to determine whether a party

has waived its right to invoke an arbitration clause. See *Rogers,* 984 So. 2d at 386 ("Although this Court has never ruled on what standard should be applied to determine whether there has been a waiver of the right to invoke an appraisal clause in an insurance policy, the former Court of Appeals previously indicated that the same standard applies to both appraisal and arbitration clauses."). However, despite the fact that this Court had employed the same test for waiver with respect to both types of clauses, Baldwin Mutual merely contended that an appraisal clause was "analogous to" an arbitration clause, not that it *was* an arbitration clause. Why?

One problem was that the *Rogers* Court itself went on to distinguish appraisal clauses from arbitration clauses by hearkening back to this Court's decision in *Casualty Indemnity Exchange v. Yother,* 439 So. 2d 77 (Ala. 1983). In *Yother,* the Court declared: "We agree that an appraisal is distinguishable from arbitration and is not subject to the various procedural requirements imposed upon the arbitration process." *Id.* at 79. The *Yother* Court went on to explain:

> "Arbitration and appraisal are generally distinguished in the following manner:
>
> > "'A distinction is often drawn between an arbitration and a mere appraisal or valuation, or proceeding in the nature of an appraisal, *the fundamental difference between the two proceedings being held to lie in the procedure to be*

> *followed and the effect of the findings.* In other words, the point is made that appraisers, unlike arbitrators, act without hearing or judicial inquiry upon their own knowledge or information acquired independent of the evidence of witnesses; and that the appraisal ordinarily settles only a subsidiary or incidental matter rather than the main controversy as does an arbitration award.'
>
> "6 C.J.S. *Arbitration,* § 3 (1975)."

Id. at 79-80 (emphasis added). The *Rogers* Court picked up on and repeated the analysis in *Yother:*

> "In *Yother,* this Court distinguished arbitration clauses from appraisal clauses in a situation in which the insured contended that it was entitled to the procedural protections applicable to arbitration as set forth in [Ala. Code 1975,] § 6-6-1.[5] The insurer contended that it was subject to the law applicable to appraisals and not § 6-6-1. At issue in *Yother* was the value of a stolen tractor. The Court, quoting *Corpus*

5. Section 6-6-1, Ala. Code 1975, is the first section of the Alabama Arbitration Act, providing: "It is the duty of all courts to encourage the settlement of controversies pending before them by a reference thereof to arbitrators chosen by the parties or their attorneys and, on motion of the parties, must make such order and continue the case for award."

Juris Secundum and *American Jurisprudence,* noted typical differences between arbitration and appraisal -- arbitration settles an entire controversy, whereas an appraisal resolves a subsidiary issue, such as the valuation of loss. This Court observed:

> """An agreement for arbitration ordinarily encompasses the disposition of the entire controversy between the parties upon which award a judgment may be entered, whereas an agreement for appraisal extends merely to the resolution of the specific issues of actual cash value and the amount of loss, all other issues being reserved for determination in a plenary action before the court. Furthermore, appraisers are generally expected to act on their own skill and knowledge; they may reach individual conclusions and are required to meet only for the purpose of ironing out differences in the conclusions reached; and they are not obliged to give the rival claimants any formal notice or to hear evidence, but may proceed by ex parte investigation so long as the parties are given opportunity to make statements and explanations with regard to matters in issue."'

> "439 So. 2d at 80 (quoting 5 Am. Jur.2d *Arbitration and Award* § 3 (1962)). However, the Court in *Yother* found it unnecessary to determine whether the valuation at issue there was the result of an arbitration or an appraisal, because it disposed of the case on the basis of applicable due-process considerations independent of § 6-6-1, Ala. Code 1975. This Court's distinguishing of arbitration and appraisal in *Yother* is consistent with other jurisdictions. See *Merrimack Mut. Fire Ins. Co. v. Batts,* 59 S.W.3d 142, 150 (Tenn. Ct. App. 2001) ('Insurance appraisals are generally distinguished from arbitrations.... [A]n arbitration agreement may encompass the entire controversy between parties or it may be tailored to particular legal or factual disputes. In contrast, an appraisal determines only the amount of loss, without resolving issues such as whether the insurer is liable under the policy.'), and *Smithson v. United States Fid. & Guar. Co.,* 186 W. Va. 195, 202, 411 S.E.2d 850, 857 (1991) ('The narrow purpose of an appraisal and the lack of an evidentiary hearing make it a much different procedure from arbitration.')."

984 So. 2d at 388-89. Thus, similar to the United States Supreme Court in *City of Omaha,* the Florida Supreme Court in *Suarez,* and the Mississippi Supreme Court in *Jones,* this Court in both *Yother* and *Rogers* emphasized the differences in scope and formality between arbitration and appraisal.

Tellingly, Great American does not discuss the *Yother* and *Rogers* Courts' distinctions between appraisal and arbitration. Indeed, Great American fails to cite a single case from our courts indicating that an insurance-appraisal clause is, in fact, an arbitration clause. The dearth of Alabama authority is also telling because insurance-appraisal clauses such as the one at issue in this case have been adjudicated by our courts for a long time. For example, in *Headley v. Aetna Insurance Co.*, 202 Ala. 384, 80 So. 466 (1918), this Court interpreted an insurance-appraisal clause very similar to the one in this case, and it distinguished between a predispute arbitration clause and the appraisal clause at issue:

> "A covenant in a contract, whether of insurance or of other matters, to submit every matter of dispute between the parties, growing out of such contract, to arbitration or to a board of appraisers, to the end of defeating the jurisdiction of courts as to the subject-matter, are universally held to be void, as against public policy. There need be no such express intent to so defeat the jurisdiction; if the necessary effect of the covenant will inevitably so operate, it is held to be void because against public policy. Agreements, however, which merely provide a mode or manner for ascertaining the value of property, or the amount of damages, losses, or profits, are valid, and may be made conditions precedent to the right of action to recover damages based on such values, damages, losses, or profits. *Western Assur. Co. v. Hall,* 112 Ala.

> 318, 20 South. 447 [(1896)]; *Niagara [Fire] Ins. Co. v. Bishop,* 154 Ill. 9, 39 N.E. 1102, 45 Am. St. Rep. 105 [(1894)]. The clause of the insurance policy in question falls within the latter class, and is valid and enforceable."

202 Ala. at 385, 80 So. at 467.

That Alabama law would not automatically construe an appraisal clause to be an arbitration clause is unsurprising given that

> "[a] trial court may not order arbitration of the issue of arbitrability except upon ""clea[r] and unmistakabl[e]' evidence"' that the parties agreed to arbitrate that issue. *Commercial Credit Corp. v. Leggett,* 744 So. 2d 890, 892 (Ala. 1999) (quoting *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995))."

Custom Performance, Inc. v. Dawson, 57 So. 3d 90, 96 (Ala. 2010). The most direct evidence of the parties' intent is the language of the agreement itself. See, e.g., *id.; Strickland v. Rahaim,* 549 So. 2d 58, 60 (Ala. 1989) ("In order to ascertain the intention of the parties, the clear and plain meaning of the terms of the contract are to be given effect, and the parties are presumed to have intended what the terms clearly state.").

> "When determining how to construe the provisions of an insurance policy, this Court is guided by the following principles:

> """When analyzing an insurance policy, a court gives words used in the policy their common, everyday meaning and interprets them as a reasonable person in the insured's position would have understood them. *Western World Ins. Co. v. City of Tuscumbia,* 612 So. 2d 1159 (Ala. 1992); *St. Paul Fire & Marine Ins. Co. v. Edge Mem'l Hosp.,* 584 So. 2d 1316 (Ala. 1991). If, under this standard, they are reasonably certain in their meaning, they are not ambiguous as a matter of law and the rule of construction in favor of the insured does not apply. *Bituminous Cas. Corp. v. Harris,* 372 So. 2d 342 (Ala. Civ. App. 1979). ..."
>
> "'*B.D.B. v. State Farm Mut. Auto. Ins. Co.,* 814 So. 2d 877, 879-80 (Ala. Civ. App. 2001). ...'
>
> "*State Farm Mut. Auto. Ins. Co. v. Brown,* 26 So. 3d 1167, 1169-70 (Ala. 2009)."

Mid-Century Ins. Co. v. Watts, 323 So. 3d 39, 50 (Ala. 2020).

In this case, the clause at issue seeks to settle disputes between Great American and Crystal Shores involving the amount of a loss by using appointed appraisers and an

umpire. In other words, the clause seeks to appraise the amount of the loss sustained to the property covered by the insurance policy. The language of the clause reflects that the parties intended the clause to be what it states it is: an appraisal clause. There is no ambiguity in the clause's language that would lead to a conclusion that the parties intended the clause to be anything other than what it states. As Crystal Shores observes, "[h]ad Great American desired to insert an arbitration clause in the insurance contract [it] could have done so ...." Crystal Shores' brief at 33. Instead, the insurance policy contains an appraisal clause.

It seems that Great American's only response to such reasoning is the *Milligan* court's statement that "the term 'arbitrate' need not appear in the contract in order to invoke the benefits of the FAA." *Milligan,* 920 F.3d at 151. But the *Milligan* court's statement was made in the context of concluding that federal common law defines the term "arbitration" in the FAA, a subject we dealt with in Part II.A. of this analysis. Here we address the definition of the term "arbitration" under Alabama law. As we have noted, Alabama cases have consistently drawn distinctions between appraisal and arbitration, Alabama law focuses on whether the parties to the contract intended to arbitrate the dispute at issue based on the language of the contract, and, despite the prolific presence of appraisal clauses such as the one at issue in insurance contracts, our courts have never held that "appraisal" is the same procedure as "arbitration." Therefore, we conclude that under Alabama law an appraisal clause in an insurance contract does not qualify as a clause calling for "arbitration" under the FAA.

III. Conclusion

Based on the foregoing, we conclude that, regardless of whether federal law or Alabama law controls the definition of the term "arbitration" in the FAA, the appraisal clause at issue in this case does not qualify as a clause calling for "arbitration" under the FAA. Therefore, Great American's motion to compel an appraisal of the loss did not constitute a motion to compel arbitration. It follows that the circuit court's denial of Great American's motion was not "[a]n order ... denying a motion to compel arbitration" under Rule 4(d), Ala. R. App. P. Rule 4(d) is Great American's only claimed basis for jurisdiction to immediately appeal the circuit court's January 6, 2023, order. Accordingly, we dismiss the appeal as one stemming from a nonfinal judgment.

APPEAL DISMISSED.

Wise, Bryan, Sellers, Mendheim, Stewart, and Cook, JJ., concur.

Shaw, J., concurs in the result.

Mitchell, J., concurs in the result, with opinion, which Parker, C.J., joins.

MITCHELL, Justice (concurring in the result).

In my view, the operative question in this appeal is whether an appraisal is an "arbitration" under Rule 4(d), Ala. R. App. P., not whether it is an "arbitration" under the Federal Arbitration Act ("the FAA"), 9 U.S.C. § 1 et seq. That is a question of Alabama law, and I believe our law fully supplies the answer. Accordingly, I would dismiss this appeal on State-law grounds only.

The main opinion focuses on the meaning of "arbitration" under the FAA and discusses the two leading standards applied by federal courts for defining FAA arbitration. But the main opinion does not cite -- and I am not aware of -- any precedent from our Court tying the meaning of "arbitration" under Rule 4(d) to the meaning of "arbitration" under the FAA. Thus, what federal courts have done to interpret the meaning of "arbitration" in the FAA is, at most, persuasive in determining what "arbitration" means in Rule 4(d). *West v. American Tel. & Tel. Co.,* 311 U.S. 223, 236, 61 S. Ct. 179, 85 L. Ed. 139 (1940) ("[T]he highest court of the state is the final arbiter of what is state law."); *Ex parte James,* 836 So. 2d 813, 834 (Ala. 2002) (Houston, J., concurring specially) ("[T]he Supreme Court of Alabama is the final arbiter of Alabama law."). I see no need to consider federal authority here because our own precedents have determined that an appraisal does not constitute arbitration. *See Rogers v. State Farm Fire & Cas. Co.,* 984 So. 2d 382, 388-89 (Ala. 2007); *Casualty Indem. Exch. v. Yother,* 439 So. 2d 77, 79-80 (Ala. 1983); *Headley v. Aetna Ins. Co.,* 202 Ala. 384, 385, 80 So. 466,

467 (1918). For that reason, I would dismiss the appeal based on Alabama law alone.

Parker, C.J., concurs.