No. 12-1429

In the Supreme Court of the United States

IMAD BAKOSS, M.D.,

Petitioner,

v.

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON ISSUING CERTIFICATE NO. 0510135,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR SCHOLARS AND PRACTITIONERS OF ARBITRATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors and practitioners who teach, write, and practice in the area of alternative dispute resolution, such as arbitration, mediation, and negotiation.

Amici have an interest in the development of jurisprudence that promotes and protects parties' ability to resolve disputes outside of litigation in a manner consistent with their wishes. Our primary objective in filing this brief is to provide context regarding how the definition of "arbitration" under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, implicates a wide variety of alternative dispute resolution processes, and to assist the Court in reaching the best possible decision in advancing FAA jurisprudence.

The views expressed in this brief are our own and do not reflect the beliefs of the institutions with which we are affiliated.

SUMMARY OF ARGUMENT

This brief argues that the definition of "arbitration" under the FAA adopted by the Second,

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[1] Pursuant to Rule 37.2, letters consenting to this a*mici curiae* filing accompany this brief. Pursuant to Rule 37.3(a), *amici curiae* affirm that all parties have consented in writing to the filing of this *amici curiae* brief. Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or counsel for *amici curiae* made a monetary contribution intended to fund the preparation of submission of this brief.

Third, Fourth and Tenth Circuit – which examines whether a process might "realistically settle a dispute" when "viewed in light of reasonable commercial expectations" – has proven to be overbroad and unpredictable in its application and has produced problematic results.

This settlement-based definition has been applied to voluntary processes, such as mediation, that bear little resemblance to "classic arbitration" and are ill-suited to the FAA's enforcement framework. At the same time, the settlement-based definition periodically excludes processes that provide the procedural protections common to "classic arbitration" – in particular, some form of briefing or hearing, the presentation of arguments and evidence by the parties, and an award by the arbitrator. These processes are consequently excluded from the FAA's enforcement framework largely based on a court's oracular prediction of whether the process is "likely" to settle the dispute.

Our view is that the "classic arbitration" definition adopted by the First, Sixth and Eleventh Circuits is more consistent with congressional intent, common definitions of arbitration in use when the FAA was drafted, state practice, and due process. Excluding processes that do not fit the definition of "classic arbitration" from the FAA also affords courts some discretion to examine whether compelling such process would be efficient and whether it is consistent with the parties' intent in agreeing to their dispute resolution clause.

ARGUMENT

I. THE "SETTLEMENT"-BASED DEFINITION OF ARBITRATION IS OVERBROAD AND UNPREDICTABLE

The circuit split over the federal common law definition of "arbitration" originated from two divergent interpretations of the 1985 district court decision in *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456 (E.D.N.Y. 1985). One standard, subsequently adopted by the Second, Third, Fourth and Tenth Circuit, quotes language from *AMF* inquiring whether the process at issue will "realistically" or "definitively" "settle" a dispute. *Id.* at 461; *Harrison v. Nissan Motor Corp. in U.S.A.*, 111 F.3d 343, 349 (3d Cir. 1997); *Salt Lake Tribune Publishing Co., LLC v. Management Planning*, 390 F.3d 684, 690 (10th Cir. 2004).

The alternative standard, adopted by the First, Sixth and Eleventh Circuits, draws from language in the *AMF* decision that looks to the "essence" of arbitration, rather than nomenclature. *AMF*, 621 F. Supp. at 460. This approach examines on a case-by-case basis whether the process resembles "classic arbitration," characterized by "an independent adjudicator, substantive standards . . . and an opportunity for each side to present its case." *See, e.g., Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1 (1st Cir. 2004).

The Second Circuit's definition in *Bakoss* most closely resembles the former settlement-based approach. Although the terse Second Circuit opinion

includes little discussion of the definition, the lower court ruling affirmed by the Second Circuit expressly adopted *AMF*'s settlement-based language. *Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135,* 2011 WL 4529668, at *6 (E.D.N.Y. September 27, 2011).

Although the Second Circuit's ruling also makes reference to a "decision" by the arbitrator, it distances itself from the "classic arbitration" definition by quoting *AMF* for the proposition that "an adversary proceeding, submission of evidence, witnesses, and cross-examination are not essential elements of arbitration." *Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*, 707 F.3d 140, 143 (2d Cir. 2013).

A definition of "arbitration" based on the term "settlement" is problematic because it does not present useful criteria for distinguishing arbitrations from other processes. *See Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003).

First, the standard does not offer clear guidance as to whether appraisal processes qualify as "arbitration." *Compare Salt Lake Tribune Publishing Co.,* 390 F.3d at 690 (appraisal did not qualify as "arbitration" because it did not "definitively settle" the dispute) *with Bakoss,* 2011 WL 4529668, *6 (reasoning that appraisal qualifies as "arbitration" so long as it settles "a controversy").

Second, the standard offers no predictable guidance on whether non-binding arbitrations qualify as "arbitration." Instead, the definition has

turned on a court's speculative forecast as to the likelihood a given process will in fact resolve the dispute. *AMF*, 621 F. Supp. at 461 (non-binding process qualified as "arbitration"); *Harrison v. Nissan Motor Corp.*, 111 F.3d at 349 (non-binding process not deemed "arbitration"); *Dluhos v. Strasberg*, 321 F.3d at 370 (same); *Exxon Mobil Corp. v. Saudi Basic Industries Co.*, 2005 WL 6939358, at *3 (D.N.J. September 30, 2005) (same).

Third, the threshold for demonstrating a "reasonable likelihood" of resolution to render a non-binding process "arbitration" varies considerably. The *AMF* decision was based on near certainty that the case would be resolved. *See* 621 F. Supp. at 458. By contrast, the Fourth Circuit applied a futility standard. *Bankers Ins.*, 245 F.3d at 322. Indeed, the inquiry as to the likelihood of settlement through a non-binding process is an inherently speculative one. As characterized by commentator Thomas Stipanowich, "a process culminating in a nonbinding decision is in most cases aimed at encouraging settlement, with the decision serving as an objective spur to consensus. …There is, moreover, no legal guarantee of a resolution – only varying levels of expectation and hopefulness." Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 Nev. L.J. 427, 451-452 (2007).

Fourth, the standard has proved vastly overbroad in the context of voluntary settlement-based processes, such as mediation, that bear little actual resemblance to arbitration. *AMF*, 621 F.

Supp. at 459; *Cummings v. Consumer Budget Counseling, Inc.*, 2012 WL 4328637, at *3 (E.D.N.Y. September 19, 2012) (agreement to submit dispute to "mediation" and to "abide by the decision of the mediator" covered by the FAA); *Thyssenkrupp Safway, Inc. v. Tessa Structures, LLC*, 2011 WL 475000, at *3 (E.D. Va. February 4, 2011) ("a provision providing for 'mediation' carries the same effect as one providing for 'arbitration'"); *Sekisui Ta Industries, LLC v. Quality Tape Supply, Inc.*, 2009 WL 2170500, at * 4 (D. Md. July 17, 2009) (assuming that mediation "is within the ambit of 'arbitration'"; *Dobson Bros. Constr. Co. v. Ratliff, Inc.*, 2008 WL 4981358, at *10 (D. Neb. November 6, 2008) (dispute resolution clause providing for "mediation or arbitration" covered by the FAA); *American Tech. Serv., Inc. v. Universal Travel Plan, Inc.*, 2005 WL 2218437, at *2 (E.D. Va. Aug. 8, 2005) (citing *AMF* and the statutory reference to the word "settle" for the proposition that mediation qualifies as "arbitration" under the FAA); *Fisher v. GE Medical Systems*, 276 F. Supp. 2d 891, 893 (M.D. Tenn. 2003) (citing the statutory "settle" language for the proposition that mediation qualifies as arbitration, and concluding that "'arbitration' in the FAA is a broad term that encompasses many forms of dispute resolution"); *CB Richard Ellis, Inc. v. Am. Envtl. Waste Mgmt.*, 1998 WL 903495, at *3-4 (E.D.N.Y. December 4, 1998) (citing *AMF* and the word "settle" in the FAA, concluding that mediation constitutes "arbitration"); S.I. Strong, *Does Class Arbitration 'Change the Nature' of Arbitration? Stolt-Nielsen, AT&T, and a Return to First Principles*, 17 Harvard

Neg. L. Rev. 201, 242 (2012) ("[S]ome courts have an unfortunate propensity to interpret the term 'arbitration' as including alternative dispute resolution devices (such as mediation) that are patently not arbitration"); Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 Tex. Int. L. J. 449, 469 (2005)(noting a "growing tendency" to treat mediation as covered under the FAA on the questionable reasoning that the FAA defines arbitration as a process that will 'settle' the controversy).

As commentator Amy J. Schmitz has observed, processes like mediation are distinct from arbitration because they rely on the parties' consent and agreement to resolve the dispute, rather than a ruling imposed by a third party. *Refreshing Contractual Analysis of ADR Agreements By Curing Bipolar Avoidance of Modern Common Law*, 9 Harv. Negot. L . Rev. 1, 14-15 (2004).

In sum, the settlement-based approach does not produce consistent results, or even results that are consistent with the parties' expectations in agreeing to dispute resolution clauses.

II. THE "CLASSIC ARBITRATION" DEFINITION BETTER REFLECTS CONGRESSIONAL INTENT IN ENACTING THE FAA

The First, Sixth and Eleventh Circuits have at least attempted to give some practical constraints to the term "arbitration" by considering whether the process at issue "resembles classic arbitration". *Fit*

Tech, Inc. v. Bally Total Fitness Holding Corp. 374 F.3d 1 (1st Cir. 2004). The defining features considered by these circuits include the presence of "an independent adjudicator, substantive standards… and an opportunity for each side to present its case." *Id.* at 7; *Evanston Ins. Co. v. Cogswell Properties, LLC*, 683 F.3d 684, 693 (6th Cir. 2012); *Advanced Bodycare Solutions, LLC v. Thione Intern. Inc.*, 524 F.3d 1235, 1239 (11th Cir. 2008).

The "classic arbitration" definition finds some support in the language of the FAA.[2] First, Section 10 of the FAA uses the term "award" – signaling that Congress envisioned an adjudicatory, rather than a facilitative role for the third party. 9 U.S.C. § 10 (bases for "vacating the award"); *see also* 9 U.S.C. § 9 ("judgment of the court shall be entered upon the award made pursuant to the arbitration"), § 11 ("modifying or correcting the award"); *Advanced Bodycare*, 524 F.3d at 1235 (reasoning that the term "award" in the statute refers to a "declara[tion] of the rights and duties of the parties").

Second, the bases upon which Congress permits parties to vacate an arbitration award suggest that Congress believed certain procedural protections were fundamental to the process –

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[2] It is possible that Congress's failure to define the term "arbitration" in the FAA or to include any guidance in the legislative history reflects the intent to leave states to define arbitration. Ian R. Macneil, Richard E. Spiedel & Thomas J. Stipanowich, *Federal Arbitration Law: Agreements, Awards, and Remedies Under the Federal Arbitration Act* (1994), Section 2.3.1.1.

neutrality on the part of the arbitrator, some form of hearing, and the opportunity to present material evidence. 9 U.S.C. § 10 (arbitration award may be vacated "where there was evident partiality . . . in the arbitrators," where the arbitrator "refus[ed] to postpone the hearing" or "refus[ed] to hear evidence pertinent and material to the controversy"); Report to the Committee on the Judiciary, House of Representatives, 68th Congress 1st Session, Report No. 96 at 2 (January 24, 1924)(referring to "safeguarding the rights of the parties" in summarizing the standard for vacatur, and later stating that "[i]f one party [to an arbitration agreement] is recalcitrant, he can no longer escape his agreement, but his rights are amply protected").

It is unlikely that Congress considered processes that did not include some form of hearing and the presentation of evidence to fall within the definition of "arbitration." Otherwise, a party compelled by the FAA to complete such a process would immediately have the right to appeal the process on the basis of its fundamental procedural defects.

Indeed, in reviewing arbitration awards, several circuits have articulated a basic requirement that arbitrators conduct a "fundamentally fair hearing." *See, e.g., Bowles Financial Group, Inc. v. Stifel, Nicolaus & Co., Inc.*, 22 F.3d 1010, 1012-1013 (10th Cir. 1994); *Nat'l Post Office Mailhandlers v. U.S. Postal Service*, 751 F.2d 834, 841 (6th Cir 1985); *Bell Aerospace Co. Div. of Textron, Inc. v. Local 516, Int'l Union, United Auto., Aerospace and Agr.*

Implement Workers of America, 500 F.2d 921, 923 (2d Cir. 1974); *Employers Ins. Of Wausau v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481, 1491 (9th Cir. 1991).

Lastly, the term "settle" in Section 2 of the FAA appears as part of the phrase "settle by arbitration." 9 U.S.C. § 2. Presumably "arbitration" was intended to limit the term "settle", and not for settlement alone to be the defining feature of arbitration. *See RedLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) ("It is a commonplace of statutory construction that the specific governs the general") (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S. Ct. 2031 (1992)); *U.S. v. Nordic Village Inc.*, 503 U.S. 30, 36, 112 S. Ct. 1011 (1992) (citing the "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect"). This limited use of the word "settle" is consistent with the 1924 transcripts of subcommittee hearings on the FAA. In his testimony, Charles Bernheimer, the "father of commercial arbitration" and "driving force" behind the FAA, described "four known methods" to resolve trade disputes: (1) "for the parties to *settle* between themselves," (2) "for the parties to *settle* by negotiation with the assistance of a third party," (3) "for the parties to enter into formal arbitration . . . arbitration which has legal sanction, so that the parties cannot . . . back out at the last moment when they see the case is going against them" and (4) litigation." Joint Hearings before the Subcommittees of the Committees on the

Judiciary, Congress of the United States, Sixty Eight Congress, First Session on S. 1005 and H.R. 646 at 7 (January 9, 1924) (emphasis added); Imre Szalai, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* (2013) (describing Bernheimer's instrumental role in the FAA's passage). This description treats arbitration as a binding "formal[ized]" process distinct from other methods of settlement.

III. THE "CLASSIC ARBITRATION" APPROACH IS MORE CONSISTENT WITH DEFINITIONS OF ARBITRATION AROUND THE TIME OF THE FAA'S ENACTMENT IN 1925

Working definitions from around the time that Congress enacted the FAA are closer to a "classic arbitration" standard than to a settlement-based approach. Conciliation-based processes were not considered arbitration, and Congress may have intended to exclude all non-binding processes from the definition of arbitration. State law treatment of appraisals and valuations around the time of the FAA's enactment suggests that they were either not considered arbitration or deemed arbitration only if they included some of the procedural protections of "classic arbitration."

First, it is unlikely that Congress intended to include the wide variety of voluntary processes available today such as mediation-arbitration ("med-arb"), early neutral evaluation, and multistep dispute resolution processes – for the simple reason

that such processes are a relatively recent development. *See* Harold Baer, Jr., *History, Process, and a Role for Judges in Mediating their own Cases*, 58 N.Y.U. Ann. Surv. Am. L. 131 (2001); Jerome T. Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement* (2004); Frank E. A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 University of Florida L. Rev. 97, 106.

Even so, a 1910 treatise on arbitration written by one of the drafters of the FAA made a sharp distinction between arbitration and conciliation processes then in use, explaining "[t]he parties do not intend to compromise their claims by submitting to arbitration. They could compromise without the aid of the third party, if they so desired." See Julius Henry Cohen, *Hand Book for Arbitrators* at 47. Cohen also described the arbitration process as one in which all relevant facts and evidence are presented to the arbitrator. *Id*. at 48, 51.

While non-binding processes were used in the 1920s, it is unclear whether Congress intended for the FAA to cover such processes. *See* Joint Hearings before the Subcomms. of the Comms. on the Judiciary, Cong. of the U.S., 68th Cong., First Session on S. 1005 and H.R. 646 at 8. Indeed, it was the judicial tendency to treat binding arbitration as a non-binding process that originally motivated Congress to pass the FAA. Kenneth F. Dunham, *Sailing Around Erie: The Emergence of a Federal General Common Law of Arbitration*, 6 Pepp. Disp. Resol. L.J. 197, 203-204 (2006); Szalai at 9-10.

Commentator Ian MacNeil has argued that this motive suggests that Congress did not consider non-binding arbitration covered by the Act: "[i]ts entire history is free of any suggestion [that non binding arbitration is covered by the Act], and it was precisely the fear of nonbinding awards that led to the need expressed in the House Report . . . to make the contracting party live up to its agreement." Macneil, Spiedel & Stipanowich, 9.8.1. at 9:55-9:57.

Appraisal and valuation provisions were also used in the 1920s, but states tended to define them as arbitration only where the process included elements of "classic arbitration." Welsey A. Sturges, *A Treatise on Commercial Arbitrations and Awards* 18 (1930); Schmitz at 32, n.149; *Van Bueren v. Wotherspoon*, 164 N.Y. 368, 377-379 (N.Y. 1900); *Coles v. Peck*, 96 Ind. 333 (1884).

At that time, some states presumed that appraisals did not qualify as arbitrations because appraisers, unlike arbitrators, need not listen to or decide based upon the evidence offered by the parties. Sturges at 20-21 (appraisals not deemed arbitration in California, Florida, Illinois, Missouri and New York). States that treated appraisals within the definition of arbitration imposed notice and hearing requirements on the process, which suggests that they considered such procedural requirements germane to arbitration. *Id.* at 24. States that took a less categorical approach to appraisals nevertheless evaluated each process at issue regarding its formality, the extent to which the parties were or were not in "dispute", and the

amount of judgment required of the third party to reach a decision. *Id.* at 32. Formal processes serving to resolve a dispute, and requiring a high level of judgment by the third party, were treated as "arbitrations" and deemed conclusive by state courts. *Ibid.*

IV. THE "CLASSIC ARBITRATION" APPROACH IS MORE CONSISTENT WITH HOW MOST STATES DEFINE ARBITRATION

State statutory definitions of arbitration, though not binding to the extent that federal common law definitions control under the FAA, are nevertheless useful in that they illustrate commonsense definitions and functional categories for dispute resolution processes, rather than the likelihood of settlement.

Like the FAA, the Revised Uniform Arbitration Act ("UAA"), adopted in 17 states, does not define arbitration.[3] The UAA duplicates the FAA's standard for vacatur of an award, which the UAA does not permit the parties to waive. UAA §§ 4 & 23. The UAA also prohibits parties from modifying or waiving the arbitrator's authority to issue subpoenas or permit a deposition. UAA §§ 17 & 23. This suggests that the UAA's drafters deemed the opportunity for the parties to present relevant evidence to the arbitrator in some form of adversarial process as fundamental to arbitration.

[3] Its predecessor statute, the Uniform Arbitration Act, adopted in 49 states, did not define arbitration either.

See also UAA § 15 (making reference to a hearing or, upon mutual consent or notice, summary adjudication). Like the FAA, the UAA also makes reference to an arbitration award. UAA § 1 ("arbitrator" means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate").

State statutes and court rules that define arbitration tend to incorporate the "classic" features of arbitration. Several make reference to a decision by a neutral third party based on evidence and testimony provided by the disputants. *See, e.g.,* Colo. Rev. Stat. Ann. § 13-22-302; Fla. Stat. Ann. § 44.1011: Ind. ADR Rule 1.3; Mass. S.J.C. Rule 1:18; Nev. St. ADR Gen Rule 1; Utah Code Ann. § 78B-10-102; *see also* N.D. Ct. Rule 8.8; Tenn. R. S. Ct. Rule 31 § 2; Kan. Stat. Ann. § 5-502; Mo. Sup. Ct. R. 17.01; Wis. Stat. § 802.12. [4]

We were not able to identify any state laws or rules defining arbitration as a process to "settle" a controversy or any based on whether it has a "reasonable likelihood" of settling a controversy. The state law definition most closely resembling the "settlement"-based approach was South Carolina's, and even that made reference to an "award." S.C. R. ADR Rule 2 ("an informal process in which a third-party arbitrator issues an award deciding the

[4] We have not included state definitions that define arbitration in a circular manner. *See, e.g.*, Or Rev. Stat. Ann. § 36.110 ("arbitration means any arbitration whether or not administered by a permanent arbitral institution").

issues in controversy"). Likewise, three state definitions made no reference to the presentation of evidence, facts or arguments, but limited the definition to binding arbitration. Ariz. R. Civ. P. 72; Del. Ch. Ct. R. 96; Md. Land Use § 16-301.

This does not mean that the word "settlement" is absent from state law definitions of alternative dispute resolution processes. Rather, it typically appears in state law definitions of "mediation" – which states define separately from arbitration.[5] *See, e.g.*, Code of Ala. § 6-6-20; Ind. ADR Rule 1.3; Ga. Alt. Disp. Resol. I; N.C. Gen. Stat. Ann. § 7A-38.1; S.C. R ADR Rule 2; Utah Code Ann. § 78B-6-202; Wis. Stat. § 802.12; Wyo. Stat. § 1-43-101; *see also* Cal. Rules of Court, Rule 3.800; D.C. Code § 16-4201; Iowa Code Ann. § 679C.102; Ind. ADR Rule 1.3; N.J. Stat. Ann. § 2A:23C-2; N.D. Ct. Rule 8.8; ORC Ann. 2710.01; 12 Okla. St. § 1802; Or. Rev. Stat. Ann. § 36.110; S.D. Codified Laws § 19-13A-2; Tenn. R. S. Ct. Rule 31 § 2; Va. Code Ann. § 8.01-581-21; Wash. Rev. Code Ann. § 7.07.010; W. Va. Trial Ct. R. 25.02; *cf.* Ga. Alternate Disp. Resol. I ("arbitration differs from mediation in that an arbitrator or panel of arbitrators renders a decision after hearing an abbreviated version of the evidence").

That most state definitions of "arbitration" resemble the "classic definition" suggests that it

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[5] In 1999, the National Council of Commissioners on State Laws considered a proposal to include mediation within its definition of arbitration, which it ultimately rejected. *See* Unif. Mediation Act § 5(i) (Annual Meeting Draft, Jul. 23-30, 1999).

represents a more functional approach than a definition based on the word "settlement," which tends to be associated with negotiated and facilitated processes.

V. THE FAA IS ILL-SUITED TO PROCESSES THAT DO NOT RESEMBLE "CLASSIC ARBITRATION"

Applying a settlement-based definition of arbitration under the FAA is problematic in three respects: (1) it forces the courts to compel completion of non-binding processes, regardless of efficiency or the parties' wishes, (2) it produces results that are likely inconsistent with the parties' expectations when they first drafted the dispute resolution agreement, and (3) its failure to inquire as to the nature of the process at issue is inconsistent with notions of due process that circuit courts have applied in their review of arbitration awards.

A. AN OVERLY BROAD DEFINITION OF "ARBITRATION" FORCES COURTS TO COMPEL PARTIES TO COMPLETE PROCESSES THAT MAY BE INEFFICIENT

The primary effect of defining a broad class of alternative dispute resolution processes as "arbitration" is to compel courts to specifically enforce the performance of that process, regardless of the parties' wishes, relevant facts, or applicable state law. 9 USC § 4; *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 218, 105 S. Ct. 1238 (1985) ("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").

Where courts apply a "settlement"-based standard for defining arbitration, courts must compel mediation and other voluntary or non-binding processes that fall within that definition. *See, e.g., American Technology Servs., Inc.*, 2005 WL 2218437 (W.D. Va. Aug. 8, 2005) (compelling mediation); *Fisher v. GE Medical Systems*, 276 F. Supp. 2d 891 (M.D. Tenn. 2003) (same); s*ee also Sekisui Ta Industries,* 2009 WL 2170500, at * 3 (same); *Mostoller v. General Elec. Co.*, 2009 WL 3854227, at *2 (S.D. Ohio 2009) (assuming, without analysis, that employer's non-binding arbitration policy covered by the FAA and compelling arbitration); *CB Richard Ellis, Inc.*, 1998 WL 903495, at *4 (same).

Absent a definition of arbitration based on the features of the process itself, courts have also reflexively assumed that every aspect of a multi-stage dispute resolution process – which starts with an informal, voluntary process, and culminates in arbitration – constitutes "arbitration." *See, e.g., Young v. Quixtar, Inc.*, 2008 WL 269516, at *3 (N.D. Ga. 2008) (characterizing three-step alternative dispute resolution process, ending in binding arbitration, as an "arbitration agreement"). They are then compelled to specifically enforce the entire process, even if neither party has requested the early stage, informal processes. *See id.*

Compelling specific performance of informal processes that bear little resemblance to classic arbitration can be inefficient. The efficiency-based justification for the FAA is that it moves consenting parties out of the court system and into an alternate process that is more abbreviated and offers greater finality than the judicial system. *Southland Corp v. Keating*, 465 U.S. 1, 7 (1984); Stipanowich at 444.

This efficiency-based justification does not apply to processes that rely on the assent of one or both parties to settle the dispute. As the Eleventh Circuit explained in *Advanced Bodycare Solutions*, 524 F.3d at 1239-40:

> The laudatory goals of the FAA will be achieved only to the extent that courts ensure arbitration is an alternative to litigation, not an additional layer in a protracted contest.... Unlike submitting a dispute to a private adjudicator, which the FAA contemplates, compelling a party to submit to settlement talks it does not wish to enter and which cannot resolve the dispute of their own force may well increase the time and treasure spent in litigation.

Indeed, as commentator Thomas Stipanowich has observed, forcing courts to compel the completion of other dispute resolution processes as a condition precedent to arbitration is actually

contrary to the FAA policy favoring enforceability of arbitration provisions. Stipanowich at 459.

By contrast, federal courts adopting a "classic arbitration" standard tend to draw a distinction between arbitration and settlement-based processes – whether stand-alone or as part of a multi-step dispute process. They then have considerably more flexibility to consider other arguments in favor or against specific enforcement of the non-arbitral process as a matter of state law. *See, e.g., Omni Tech Corp. v. MPC Solutions Sales, LLC* 432 F.3d 797, 799 (7th Cir. 2005) (dispute resolution clause is not rendered unenforceable when outside the FAA, but may be enforced as a matter of state contract law); *Okla. City Water Utilities Trust v. Systems & Software, Inc.*, 2007 WL 2729369, at *1-2 (W.D. Okla. September 19, 2007) (declining to compel negotiation and mediation processes after concluding that they did not sufficiently resemble "classic arbitration").

B. AN OVERLY BROAD DEFINITION OF "ARBITRATION" CAN PRODUCE RESULTS CONTRARY TO THE PARTIES' INTENT

Several judicial opinions applying the FAA to processes that do not resemble "classic arbitration" have produced results that seem far removed from the parties' original intent in drafting a dispute resolution clause.

First, some courts have used an expansive definition of "arbitration" to compel processes that

were apparently drafted to be optional. *See, e.g., Thyssenkrupp Safway*, 2011 WL 475000, at *5 (staying litigation pending the outcome of "mediation or arbitration"); *In re Managed Care Litig.*, 132 F. Supp. 2d 989, 1002 (S.D. Fla. 2000) (compelling performance of dispute resolution clause that provided for "negotiation, mediation and/or arbitration," and that only made arbitration available by mutual agreement), *reversed on other grounds*, *PacificCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003);

This result should be particularly concerning as a matter of FAA interpretation, as one of the primary purposes of the statute is to effectuate the parties' intent. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59-60, 115 S. Ct. 1212 (1995); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474, 109 S. Ct. 1248 (1989); *AT&T Tech, Inc. v. Communications Workers of Am.*, 475 U.S. 1, 24, 106 S. Ct. 903 (1983); *Dluhos v. Strasberg*, 321 F.3d at 369.

A broad definition of "arbitration" has led to other unusual results. Classifying a non-binding process as "arbitration" raises the question of the standard of review available for such a non-binding decision. In *Dow Corning v. Safety National Case Corporation*, the Eighth Circuit applied the FAA's vacatur standard to a non-binding arbitration award. 335 F.3d 742, 748 (8th Cir. 2003). Because the contract apparently made non-binding arbitration a condition precedent to litigation, the

court reasoned that, should the award be vacated, the parties would have to re-arbitrate their claims before resorting to litigation. *Ibid.*

In other cases, courts have premised their merits-based review of parties' claims following a non-binding arbitration on a prior conclusion that such process did not qualify as "arbitration" under the FAA. *Dluhos v. Strasberg*, 321 F.3d at 373; *Retail Servs., Inc. v. Freebies Publ'g*, 364 F.3d 535, 541 (4th Cir. 2004). This suggests that a merits-based review would be limited or unavailable were the process deemed an "arbitration," surely contrary to the parties' original intent to preserve their right to a judicial remedy when they chose a non-binding process. Schmitz at 3, 7 (parties to non-binding processes assume they "preserve their rights to have claims resolved in court"); *Lynn v. Gen. Elec. Co.*, 2005 WL 701270, at *6 ("when parties agree to binding arbitration, they waive their rights to litigate; whereas parties to non-binding ADR processes preserve their rights to have claims resolved in court").

An overbroad definition of arbitration also complicates the already difficult question of the proper division of labor between courts and arbitrators. The Supreme Court recently granted certiorari in the case of *BG Group PLC v. Argentina*, on the question of whether the court or an arbitrator should determine whether a condition precedent to arbitration has been satisfied. 665 F.3d 1363 (D.C. Cir. 2012) (court has the authority to determine whether a condition precedent to arbitration has

been satisfied); Supreme Court Docket No. 12-138 (certiorari granted).

That case involves litigation as a condition precedent to international arbitration. However, petitioners in that case noted the frequency with which various forms of multi-stage dispute resolution processes are now used in the international context. Petition for a Writ of Certiorari at 18-19. The Petition assumed, without discussion, that the initial stages of these multi-step processes do not qualify as "arbitration" and urged the Court to rule that the arbitrator should be given discretion to decide whether such processes must be completed. *Id*. at 20. If, however, a broad definition of "arbitration" were applied to other types of alternative dispute resolution processes, the ruling as to conditions precedent could be delegated to a third-party other than the final arbitrator.

Such an absurd outcome is not as far-fetched as it might appear. In an analogous context, a federal court treated a mediation agreement as "arbitration." *Sekisui Ta Industries,* 2009 WL 2170500, at *4. Following the general principle that defenses to a contract are to be decided by an arbitrator, the court refused to consider the defendant's argument that the contract was signed under duress and stayed proceedings pending mediation. *Id.* The parties in that case, however, presumably did not intend to delegate a ruling on such legal issues to the mediator when they entered into the contract. Michael Moffitt, *Schmediation and the Dimensions of Definition*, 10 Harv. Neg. L.

Rev. 69, 89 (2005) (characterizing definition of mediators as "third parties, not otherwise involved in a controversy, who assist disputing parties in their negotiation" as descriptively accurate)(quoting Sarah R. Cole et al., *Mediation: Law, Policy, Practice* §5:3 n.18 (2d ed. 2003)). Indeed, many mediators would consider a ruling on the legal issues to be far outside their role of facilitating productive dialogue and refuse to do so, even if they happen to have the expertise to make such a determination. *See* Stipanowich at 445; Gabriel M. Wilner, *Domke on Commercial Arbitration* (3d ed. 1989); Kimberlee Kovach & Lela Love, *Evaluative Mediation is an Oxymoron*, 14 Alternatives to High Cost Litig. 31 (1996).

The ultimate result of an overbroad definition of "arbitration" may be to deprive a party of any forum in which to assert a defense to the contract, or postpone such hearing until the alternative dispute resolution process has been exhausted. *Compare Lynn v. General Electric Co.*, 2005 WL 701270, at *6-8 (following determination that mediation agreement not covered by FAA, court empowered to make factual and legal findings as to validity of underlying agreement). As commentator Thomas Stipanowich observed, "[w]hile it makes sense to afford arbitration law sufficient 'breathing space' to accommodate a wide range of party choice, the application of these same legal principles to mediation and nonbinding arbitration is either illogical or of limited utility." Stipanowich at 462-463.

C. DEFINING ARBITRATION IN TERMS OF "CLASSIC ARBITRATION" IS MORE CONSISTENT WITH A FUNDAMENTALLY FAIR HEARING

A standard that examines the nature of the process, rather than its likelihood of success, is more consistent with the fundamental fairness standard courts have applied in reviewing arbitral awards. *See* citations *supra* in Section II, pp. 7-11 (circuit court cases examining whether the process is "fundamentally fair"). Why, for example, should a non-binding arbitration process that is very likely to result in a settlement be subject to the spartan judicial review specified under Section 10 of the FAA, when a process with lower odds of success can be reviewed on the merits? *See, e.g.*, *Dluhos v. Strasberg*, 321 F.3d at 373 (examining the merits of constitutional issue only after concluding that a non-binding process not likely to "realistically settle the dispute" and therefore not covered by the FAA); *Retail Servs., Inc. v. Freebies Publ'g*, 364 F.3d at 541 (same).

Alternative dispute resolution processes vary considerably in terms of their resemblance to classic arbitration. Many non-binding processes are perfunctory, without affording opportunities to present relevant evidence. Stipanowich at 453. Some are conducted prior to discovery, where the third party makes a proposal based on his own expert knowledge rather than any submissions by the parties. *See, e.g.,* Thomas Hitter, *What is So Special About the Federal Circuit? A*

Recommendation for ADR Use in the Federal Circuit, 13 Fed. Cir. B. J. 441, 450-451 (2003-2004). Hybrid processes, such as med-arb may consist of a perfunctory "ruling" by the mediator following a failed mediation, in which the entire process was devoted to potential avenues for settlement rather than the merits of the case. Alternatively, med-arb may consist of separate processes, where the "arbitration" component affords a hearing, argument and evidence. Where courts blindly treat all such processes as "arbitration," they strip a party's right to a "fundamentally fair hearing" and decline judicial review of an "award" that may be entirely unrelated to the evidence. *See, e.g., Al-Harbi v. Citibank, N.A.*, 85 F.3d 680 (D.C. Cir. 1996).

By contrast, applying a standard based on "classic arbitration" would permit courts to consider whether the process includes the basic procedural protections of arbitration – "an independent adjudicator, substantive standards . . . and an opportunity for each side to present its case" – before the case is removed from judicial scrutiny. *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d at 7.

CONCLUSION

The Court should grant certiorari in this case and resolve the circuit split in favor of circuits applying a "classic arbitration" standard.

Respectfully submitted,

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APPENDIX: List Of *Amici Curiae*

Elizabeth Tippett is an Assistant Professor at the University of Oregon School of Law and was formerly an attorney with the technology firm Wilson Sonsini Goodrich & Rosati. She teaches in the areas of negotiation, mediation, and alternative dispute resolution.

Kristen M. Blankley is an Assistant Professor at the University of Nebraska, where she teaches in the area of Mediation and Arbitration. Professor Blankley has written numerous articles and given many talks on dispute resolution, including arbitration issues and ethics issues.

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Robert L. Arrington is a member of the American Arbitration Association's Rosters of Neutrals for arbitration and mediation of commercial, employment, and class action disputes and for non-binding arbitration.

Richard Bales is the Dean of Ohio Northern College of Law.

Robert A. Creo has been a member of the Supreme Court bar since 1981 and a member of the

National Academy of Arbitrators, 1986 National Academy of Distinguished Neutrals, and CPR Panel of Distinguished Neutrals

Ellen Deason is a Professor of Law at The Ohio State University Moritz College of Law.

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Carrie Menkel-Meadow is a Chancellor's Professor of Law and Political Science at the University of California Irvine and A.B. Chettle Jr. Professor of Law, Dispute Resolution and Civil Procedure, Georgetown University Law Center, and is a leading founder, scholar and teacher in the dispute resolution field.

Michael Moffitt is Dean and Professor of Law at the University of Oregon School of Law. He has authored more than two dozen books and articles on dispute resolution, including *The Handbook of Dispute Resolution* (Jossey-Bass 2005) and *Dispute Resolution: Examples and Explanations* (Aspen 2008, 2d ed. 2011). His dispute resolution practice has included work across the United States and in sixteen countries.

Elizabeth C. Simon is an attorney arbitrator and mediator who has specialized in commercial, labor, and employment matters for over 20 years.

She is a member of the Illinois Bar and is admitted to practice before the Federal District Court, Northern District of Illinois, and the Seventh Circuit Court of Appeals.

Gilbert K. Squires, P.E., Esq. has extensive global experience in international arbitration and litigation and is an international energy and complex commercial arbitrator through the International Centre for Dispute Resolution (ICDR) and domestic Arbitrator through the American Arbitration Association (AAA).

Imre Szalai is a law professor at Loyola University New Orleans College of Law, and his scholarship focuses on the history and development of arbitration law.

Maureen Arellano Weston is a Professor of Law at Pepperdine University School of Law. Professor Weston teaches courses on arbitration, mediation, negotiation, international dispute resolution, legal ethics, and U.S. and international sports law.

Michael J. Yelnosky is Professor of Law at Roger Williams University School of Law, where he teaches Civil Procedure. He has written extensively about alternative dispute resolution and the Federal Arbitration Act during his over 20 years of law teaching.