NO. 15-1121

In the
Supreme Court of the United States

NEUSOFT MEDICAL SYSTEM COMPANY, LTD.; NEUSOFT MEDICAL SYSTEMS, U.S.A., INC.; TOM BUSE; AND KEITH MILDENBERGER,

Petitioners,

v.

NEUISYS, LLC,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of North Carolina

REPLY BRIEF FOR PETITIONERS

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Respondent NeuIsys barely disputes Neusoft China's substantive entitlement to international arbitration. NeuIsys agrees that the International Distribution Agreement contains an arbitration clause, and it does not dispute that it intends to use the two non-stayed claims to litigate the *exact same issues* and obtain the *exact same relief* that it seeks through the stayed claims that must be arbitrated in China. NeuIsys also concedes the fatal flaw of the decision below—namely, that it completely ignores the Federal Arbitration Act ("FAA") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), both of which require state courts to apply the strong federal policies in favor of international arbitration.

Instead of engaging with the merits or defending the decision below, NeuIsys lodges several procedural objections in an attempt to insulate that decision from this Court's review. But those arguments rest on a gross distortion of both the proceedings below and Neusoft China's arguments. For example, NeuIsys contends that Neusoft China failed to preserve the question of whether the FAA displaces North Carolina's "substantial change in circumstances" test. But that is not the question presented in the Petition. The actual question in this case—which was raised at each and every stage of the proceedings below—is whether the North Carolina courts were required to apply the FAA and Convention when considering Neusoft China's renewed motion to compel arbitration. The answer to that question is unequivocally yes, and the state courts' utter

disregard for federal law warrants summary reversal regardless of the particular state-law doctrine those courts used to mask their anti-arbitration hostility.

NeuIsys also tries to avoid review by speculating that the state court might deny arbitration on remand on alternative grounds that were not addressed by the North Carolina Court of Appeals. But this Court routinely reviews certworthy issues despite the possibility that the respondent might prevail on some alternative ground on remand. What matters is what the court below *actually decided*, not what it *might* decide in future proceedings. What the North Carolina courts decided here was that they could ignore the FAA, ignore the Convention, and ignore the international arbitration clause in the parties' agreement. This Court should summarily reverse that decision and reaffirm the primacy of federal law in the context of arbitration generally and international arbitration in particular.

I. The Decision Below Improperly Disregards The FAA And The Convention.

The FAA, the Convention, and this Court's precedents leave no doubt that the strong federal pro-arbitration policies apply with full force in state court, and that state courts must order arbitration when a dispute falls within the scope of a valid arbitration clause. The two non-stayed claims at issue here fall squarely within the scope of a valid arbitration clause in the International Distribution Agreement, and the courts below clearly erred by refusing to apply federal law and declining to order arbitration.

A. As explained in the Petition, the International Distribution Agreement contains an arbitration clause

that applies to any dispute arising out of the "interpretation or implementation" of the Agreement. Pet.5. Unless expressly altered, the arbitration clause also applies to any amendment to the Agreement. *Id.* The parties thus expressly agreed to arbitrate in China any claim that: (1) challenges the validity of the 2010 Amendment, or (2) seeks damages based on the terms of the original Agreement. Pet.11.

Discovery revealed that NeuIsys's two non-stayed claims do both. The claims are premised exclusively on NeuIsys's contention that Neusoft China improperly used NeuIsys's confidential information as leverage during negotiations over the 2010 Amendment. Because NeuIsys claims those negotiations were tainted, it seeks to *invalidate the Amendment* and recover the profits it would have earned if the original Agreement had remained in force. Pet.31-32. Those issues fall squarely within the scope of the arbitration clause, which expressly states that only an arbitration panel in China can interpret the Agreement. Indeed, NeuIsys's two non-stayed claims now involve the exact same facts and legal theories as the four claims the trial court has already stayed pending arbitration. NeuIsys's own actions also confirm this point—although the trial court stayed four of NeuIsys's claims pending arbitration in October 2012, NeuIsys has yet to initiate arbitration proceedings on any of them, thereby confirming that NeuIsys's goal is to circumvent the international arbitration agreement and instead litigate the arbitrable issues in state court.

Because NeuIsys's two non-stayed claims fall within the scope of a valid arbitration clause, the FAA

and the Convention unequivocally required the North Carolina courts to stay proceedings pending arbitration. Even if this were a close call—which it is not—the FAA requires "any doubts concerning the scope of arbitrable issues [to] be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). And that is doubly true in the international context, where the presumption in favor of arbitration "applies with special force." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 631 (1985); *see id.* at 629 (courts must enforce international arbitration agreements "even assuming that a contrary result would be forthcoming in a domestic context."). But rather than apply federal law and stay the litigation pending international arbitration, the North Carolina courts ignored federal law altogether and denied Neusoft China's motion as if this were all just a routine question of state law. That erroneous ruling must be corrected to preserve the integrity of international treaties and the strong federal policy in favor of enforcing arbitration agreements as written.

B. The only portion of NeuIsys's brief nominally dedicated to the merits (at 22-24) does nothing but gloss over the core issue and then change the subject. Instead of attempting to explain how the two non-stayed claims could possibly be outside the scope of the arbitration clause, NeuIsys just asserts as *ipse dixit* (at 22) that the non-stayed claims "arise solely from" the Non-Disclosure Agreement (implying, presumably, that they do not arise from the International Distribution Agreement). But NeuIsys has no response to the fact that the two non-stayed claims can succeed only if the 2010 Amendment to the

International Distribution Agreement is invalidated. Those disputes are unquestionably subject to the Agreement's arbitration clause and must therefore be decided by an arbitration panel in China.

NeuIsys also attempts to change the subject by repeating *ad infinitum* (at 4, 22, 22 n.14, 23, 24) that the NDA does not contain its own arbitration clause. That is true but irrelevant. Nothing in the NDA purports to displace the International Distribution Agreement's arbitration clause for disputes that arise in connection with the Agreement or its amendments. Pet.8-11, 30-33. Whenever a dispute arises from the Agreement—as this one plainly does, because NeuIsys's claims would require invalidation of the 2010 Amendment—the IDA provides for international arbitration, regardless of whether the dispute might also implicate the NDA.

* * *

In sum, NeuIsys has almost nothing to say about the merits of the Petition, and what little it says is unsupported, irrelevant, or both. NeuIsys's entire theory of recovery—as to both the stayed and non-stayed claims—is premised on the 2010 Amendment being declared void; that dispute turns on the meaning of the Agreement, which the parties expressly agreed would be determined by an arbitration panel in China. The North Carolina courts simply disregarded the FAA and Convention and treated this issue as nothing more than a state-law procedural matter. This Court should summarily reverse the decision below and remand the case for consideration of Neusoft China's renewed motion to compel arbitration under the proper pro-arbitration federal standard. *See* Pet.26-

28. As *amici* explain, "the North Carolina state courts' consistent enforcement of arbitration agreements is necessary to secure the benefits of arbitration to North Carolina courts and litigants alike." Br. of North Carolina Ass'n of Defense Attys at 2.

II. Respondent's Procedural Objections Are Unavailing.

A. Neusoft China Fully Preserved the Question Presented.

Instead of attempting to defend the North Carolina courts' utter disregard of federal law, NeuIsys seeks to evade review on procedural grounds, arguing (at 17-22) that Neusoft China forfeited its federal-law arguments under the FAA and the Convention. But NeuIsys can advance that argument with a straight face only by rewriting the Question Presented. The *actual* question in the Petition was preserved at every stage of the proceedings below, as Neusoft China repeatedly argued that the North Carolina courts were required to apply the pro-arbitration federal policies reflected in the FAA and the Convention.

1. The Question Presented is: "[W]hether the North Carolina state courts improperly disregarded the FAA and Convention by refusing to stay state court proceedings pending international arbitration in China of claims arising from a contract containing a valid arbitration clause." Pet.i. As the Petition explains, summary reversal is warranted because the North Carolina courts "ignor[ed] the FAA and the Convention, and the substantive pro-arbitration policies reflected therein." Pet.19.

Neusoft China preserved that argument every step of the way in the proceedings below. In the trial court, Neusoft China argued that "[e]nforcement of this arbitration provision in the United States is governed by the [Convention], codified as part of the Federal Arbitration Act." R.444. Neusoft China cited multiple federal cases for the proposition that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." R.445 (quoting *Moses H. Cone*, 460 U.S. at 24-25). And Neusoft China emphasized that "the national policy favoring the enforcement of arbitration provisions applies 'with special force in the field of international commerce.'" *Id.* (quoting *Mitsubishi*, 473 U.S. at 631 and citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974)).

Neusoft China then raised those same arguments in the North Carolina Court of Appeals, explaining that "[t]his case is controlled by federal law and the Convention…, a treaty codified in the Federal Arbitration Act." Br. of Appellant Neusoft China at 2 (Sep. 26, 2014). Neusoft China emphasized that the FAA embodies a "liberal federal policy favoring arbitration agreements," and that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 11. Neusoft China also reiterated that the "presumption favoring arbitration" applies "with special force in the field of international commerce," *id.* at 12, and that "[t]he Convention requires the Court to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration," *id.* at 27.

In the North Carolina Supreme Court, Neusoft China again noted the applicability of the FAA and Convention; highlighted the presumption in favor of arbitrability; and criticized the lower courts' failure to engage with governing principles of federal law. *See* Neusoft China's Pet. For Discretionary Rev. at 21 (Aug. 11, 2015) ("The Court of Appeals erred by failing to apply the FAA and Convention."); *id.* at 24 ("The presumption favoring arbitration is especially strong in this case because the IDA is between parties in international commerce."); *id.* at 26 ("Here, the Court of Appeals gave no regard to the federal policy favoring arbitration, much less 'due regard' to the 'special force' with which that presumption applies in the international context.").

In short, Neusoft China repeatedly argued in the state court proceedings that the FAA and the Convention provided the applicable *substantive* law and required the North Carolina courts to grant Neusoft China's renewed motion for arbitration. That is more than sufficient to preserve the federal question for this Court's review. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 n.9 (1980) (preservation requires "only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision in due time").

2. NeuIsys is able to argue otherwise only by rewriting the Question Presented. According to NeuIsys (at 18), this case is just a narrow dispute over "whether the FAA or Convention displaces North Carolina's 'substantial change in circumstances' test."

NeuIsys then proceeds to argue that Neusoft China failed to preserve *that* issue.

NeuIsys's preservation argument completely misses the mark. The "substantial change in circumstances" test is only indirectly related to the question in the Petition, which is whether the North Carolina state courts erred by refusing to apply the FAA and Convention *at all*. Pet.i. If state courts are required to apply the FAA and Convention when considering a motion for arbitration—which they are—then the decision below should be reversed, full stop. That is true regardless of which parochial state-law rule the state courts went on to apply after ignoring federal law. What warrants summary reversal here is "the North Carolina courts' utter disregard for the FAA, the Convention, and this Court's arbitration decisions," Pet.19, not the particular state-law rule that replaced the federal standard.

In all events, Neusoft China also preserved a challenge to the state courts' "substantial change in circumstances" test. The issue before the trial court was whether the court should apply the FAA and Convention and stay NeuIsys's two remaining claims (as Neusoft China argued) or whether the court should instead deny Neusoft China's renewed motion by applying North Carolina's "substantial change in circumstances" test (as NeuIsys argued). Neusoft China insisted that the FAA and Convention controlled, *notwithstanding* any state law rule that would change the standard of review or deemphasize the pro-arbitration policy embodied in federal law. *See* R.444-46.

Likewise, in the court of appeals, Neusoft China argued that "[t]he Convention requires the Court to 'subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration,'" Br. of Appellant Neusoft China at 27, and insisted that the state court could not "hamstring its right to seek arbitration under the Convention and IDA … by construing this appeal as merely about reconsideration," Reply Br. of Neusoft China at 5; *see also* Br. of Appellant Neusoft China at 26 ("The FAA/Convention preempt state law."). Neusoft China also filed a notice of additional authority regarding *Dillon v. BMO Harris Bank, N.A.*, 787 F.3d 707 (4th Cir. 2015), in which the Fourth Circuit held that the FAA displaces procedural rules—akin to the "substantial change in circumstances" test—that would preclude the application of federal arbitration law to renewed motions for arbitration. *See* Pet.17, 29-30.

Finally, NeuIsys concedes (at 20) that Neusoft China challenged the "substantial change in circumstances" test in the North Carolina Supreme Court, but incorrectly suggests (at 20-21) that the court dismissed the appeal for failure to preserve that question. In reality, the North Carolina Supreme Court did not provide any explanation for its dismissal of the appeal and denial of the accompanying petition for discretionary review, issuing only a pro forma order akin to a denial of certiorari by this Court. Pet.App.20. Absolutely nothing in that order suggests that the dismissal was based on the waiver or forfeiture grounds that NeuIsys advances here.

B. The Existence of Alternative Arguments on Remand Does Not Preclude Review.

In a last-ditch effort to prevent this Court's review, NeuIsys argues that summary reversal would be improper because the decision below could be affirmed on alternative grounds. In particular, NeuIsys notes (at 25) that the trial court ruled in the alternative that Neusoft China waived its right to seek arbitration of the two non-stayed claims. But NeuIsys conveniently fails to mention that the court of appeals expressly *declined* to rule on the question of waiver. *See* Pet.App.16 n.4.

NeuIsys is thus effectively arguing that an alternative argument *unaddressed* by the courts below can serve as a bar to this Court's review. But that is demonstrably wrong: "an alternative ground for denying arbitration does not prevent us from reviewing the ground exclusively relied upon by the courts below." *Perry v. Thomas*, 482 U.S. 483, 492 (1987). In *Perry*, for example, this Court granted certiorari and reversed the ruling of a California state court denying arbitration. In doing so, the Court rejected as irrelevant the plaintiff's alternative unconscionability argument because that issue "was not decided below" and could "be considered on remand." *Id.* at 492 n.9; *see also Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 568 (1977) ("That the Ohio court might have, but did not, invoke state law does not foreclose jurisdiction here."). For the same reason, NeuIsys cannot insulate the decision below from this Court's review simply by speculating that the state court on remand might find other ways to deny arbitration.

III. This Court Should Reverse The Denial Of A Stay Pending Arbitration As To Neusoft USA, Buse, And Mildenberger.

If this Court summarily reverses the decision below or grants certiorari to address Neusoft China's renewed motion to compel arbitration, it should also vacate and remand the decisions below denying a stay pending arbitration to Neusoft USA, Buse, and Mildenberger. NeuIsys suggests (at 31) that this Court lacks jurisdiction to vacate the stay orders, but this Court regularly reverses or vacates state-law rulings that are closely tied to mistaken interpretations of federal law. *See, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012). This Court unquestionably "retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984).

NeuIsys further contends (at 32) that its counterclaims against Neusoft USA, Buse, and Mildenberger do not overlap with its claims against Neusoft China. But the counterclaims turn largely on the validity of the 2010 Amendment—an issue unquestionably subject to arbitration. *See* Pet.8-11. For example, NeuIsys contends that Neusoft USA intruded on NeuIsys's exclusive territory, but NeuIsys *had no exclusive territory* under the terms of the 2010 Amendment. NeuIsys's claims against Neusoft USA, Buse, and Mildenberger can succeed only if the 2010 Amendment is deemed invalid, but that is a question for the arbitral tribunal in China, not a jury in North

Carolina state court. This Court should summarily reverse the decision below and vacate the order denying a stay to Neusoft USA, Buse, and Mildenberger.

CONCLUSION

This Court should summarily reverse the decision below or, alternatively, grant the petition for certiorari.

Respectfully submitted,

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