No. 07-

IN THE

Supreme Court of the United States

JULIE E. COLLINS AND ROBERT B. RYAN,

Petitioners,

v.

D.R. HORTON, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the court or the arbitrator determine the preclusive effect of a prior court judgment on the arbitration?

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Julie E. Collins and Robert B. Ryan respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 505 F.3d 874 (App. A, at 1a-21a). The opinion of the district court is reported at 361 F. Supp. 2d 1085 (App. B, at 22a-57a).

JURISDICTION

The judgment of the court of appeals was entered on September 24, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This petition raises a long-standing inter-circuit conflict on an important question under the Federal Arbitration Act: Whether the court or the arbitrator determines the preclusive effect on the arbitration of a prior court judgment. Preclusion doctrines reflect fundamental principles of common-law adjudication that command respect for the decisions of courts in conclusively resolving issues and claims. The effect of court decisions should be determined by courts, not arbitrators whose philosophical or economic interests may favor retrying settled matters. This split among the circuits under a statute of nationwide importance should be resolved by this Court.

This is the right case for the Court to decide this issue. Before the arbitration, petitioners Julie E. Collins and Robert B. Ryan sought to have the district court apply offensive non-mutual collateral estoppel to their contract and fraud claims against their former employer; preclusion was based on a jury verdict in the same court in favor of Collins and Ryan's former colleague, who brought identical claims based on the employer's conduct directed toward all three plaintiffs as a group. The district court deferred the issue to the arbitrators, who violated a century of federal precedent by holding that the pending appeal from the jury verdict barred application of collateral estoppel. The arbitrators required relitigation of the contract and fraud issues, and reached a result contrary to what the jury had decided. The district court recognized that the arbitrators had erred by failing to apply collateral estoppel, but it refused to vacate their decision because it felt constrained by the narrow standard of review for arbitrable issues.

On appeal, the Ninth Circuit affirmed, holding that arbitrators should decide the preclusive effect of prior court judgments, subject only to the usual review for "manifest disregard of the law." This conflicted with sister circuits, which have recognized that the application of preclusion based on a prior court judgment is a matter within the primary and plenary authority of the courts, whether they decide the issue before or after the arbitration. This Court should resolve the circuit split and hold that the courts have plenary authority to ensure that the preclusive effects of court judgments are properly enforced, without the constraints imposed by deference to the decisions, however erroneous, of the arbitrators.

I. FACTUAL BACKGROUND

This petition arises from two parallel lawsuits for breach of contract and fraud brought in the United States District Court for the District of Arizona by Julie Collins, Robert Ryan, and Tom Hickcox, who were former employees of defendant D.R. Horton, Inc. ("DRH"), a homebuilder. The three plaintiffs had all been top executives of another homebuilder, Continental Homes Holding Corporation, which DRH acquired through a merger: Hickcox was Continental's President and Chief Executive Officer; Collins was Continental's Chief Financial Officer, Treasurer, and Secretary; and Ryan was Continental's Vice President of Management Information Systems and a member of its board of directors.

During pre-merger negotiations, DRH promised the former company's management group a block of 30,000 shares of DRH stock to be divided among them. This would compensate the management group for the loss of their potential right to accelerate the vesting of a substantial number of unvested Continental stock options if the merger were conducted as a pooling-of-interests transaction, which was DRH's preferred method of merger. DRH President Donald Horton and Executive Vice President Richard Beckwitt made the promise in a face-to-face meeting with several Continental managers, including Collins, Ryan, and Hickcox. After the merger was completed, DRH reneged on the promise, and Collins, Ryan, and Hickcox never received any of the 30,000 shares that DRH had promised to the group.

Collins, Ryan, and Hickcox each sued DRH for breach of contract and fraud. The identity of the issues on both claims flowed inexorably from the fundamentally collective nature of the events and allegations:

- a *single* actor (DRH, through Horton and Beckwitt),
- in a *single* meeting with Continental managers, including Collins, Ryan, and Hickcox,
- entered into a contract, and/or knowingly made a false representation of an intent to pay
- a *single* block of 30,000 shares of DRH stock to be divided among the Continental management *group*,
- where the offer was made to alleviate the *group members' common concern* about their loss of acceleration rights in a pooling-of-interests merger, and
- the offer was intended to induce the *group* to *collectively* support the merger, and
- the group *collectively* relied on the representation by supporting the merger and

- suffered a *collective* harm from DRH's failure to pay the shares of stock *to the group*.

Collins, Ryan, and Hickcox, as members of the group, were thus similarly situated in all respects for purposes of the contract and tort claims based on the promise of 30,000 shares: they heard the promise together; they relied together as members of Continental's top management; and they were harmed together.

II. THE PROCEEDINGS BELOW

A. The Parallel Lawsuits in District Court

On February 22, 1999, Collins and Ryan filed this action against DRH in the District of Arizona. That same day, in the same court, Tom Hickcox filed a similar suit against DRH. The two actions were assigned to different judges. Both actions were litigated for over two years in the district court, through cross-motions for summary judgment, trial memoranda, and motions in limine. Then, after this Court recognized that the Federal Arbitration Act applied to employment contracts, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), DRH moved for the first time to compel arbitration of Collins's and Ryan's claims, but not Hickcox's. Six weeks before the trial date, the district court granted the motion to compel.

A few days after the district court ordered Collins and Ryan to arbitration, the jury in the *Hickcox* case returned its verdict, finding that, among other things, DRH had committed fraud and breach of contract as to

the promise of 30,000 shares of DRH stock. In upholding the verdict, the district court recognized the collective nature of the claims. DRH "was clearly motivated to obtain the enthusiastic support of Continental management for the merger which it had not previously been able to achieve in its first attempt to purchase Continental." ER.229, Ex. D, at 4.[1] DRH "acquired that support, in part, by its promise of 30,000 shares to the Continental managers who would be losing their potential right to accelerate the vesting of their options by accepting the Defendant's offer rather than pursuing negotiations with other suitors." *Id.* As the court concluded, "The representation was material to the Continental managers to whom it was made." *Id.*

The court relied on collective considerations in concluding that the entire Continental management team had actually and reasonably relied on DRH's representations as to the 30,000 shares. As the court found, "the evidence showed that this promise was a turning point in the negotiations between Continental and D.R. Horton. It signaled the beginning of exclusive negotiations, the rejection of negotiations with other suitors, and the unquestioned support by Continental management of the merger." *Id.* at 4-5. "[B]ecause of the promise," the court explained, Continental's management did "not explore[]" any alternative ways to avoid "the loss of the right to accelerate option vesting by the structure of the transaction as a pooling of interest." *Id.*

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[1] In citations to the record before the Ninth Circuit, "ER" refers to Collins and Ryan's Excerpts of Record, and "CR" refers to the Clerk's Record.

Moreover, the court explained, "the jury apparently concluded that the reliance [on the promise] was justifiable because of the significant experience of Horton's executives, Donald Horton and Richard Beckwitt, in mergers and acquisitions and their superior knowledge about the structure of the transaction," which was true vis-à-vis all of the Continental management team, whether collectively or individually. *Id.* at 5.[2]

The district court entered judgment in the *Hickcox* case on April 5, 2002, and it entered an amended judgment on August 20, 2002, after it ruled on the parties' post-trial motions. The parties filed notices of appeal and cross-appeal to the Ninth Circuit.

On May 21, 2002, Collins and Ryan moved for reconsideration by the district court of its order compelling arbitration, arguing that collateral estoppel should be applied based on the *Hickcox* judgment to keep DRH from relitigating issues as to its 30,000-share promise. CR.220. Collins and Ryan later supplemented their motion with the amended judgment entered by the district court in *Hickcox*.

On March 5, 2003, the district court denied Collins and Ryan's motion for reconsideration, holding that the

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[2] In fact, the court cited the pendency of the Collins and Ryan arbitration – "the companion lawsuit involving two other members of the management team that were beneficiaries of the 30,000-share claim" – when it reduced the amount of punitive damages awarded by the jury to Hickcox on the fraud claim, in order to avoid excessive punishment of DRH when Collins and Ryan were later awarded their own fair share of such damages. *Id.* at 7.

issue of collateral estoppel should be decided, at least initially, by the arbitrators. ER.228. The court expressly reminded the parties of judicial precedent establishing the court's retained authority to vacate an arbitration award if arbitrators choose to ignore applicable legal principles. *Id.* at 10-11.

B. The Arbitrators' Refusal to Apply Collateral Estoppel

Collins and Ryan filed a motion with the arbitrators to preclude relitigation of the 30,000-share issues. ER.229, Ex. F. Without even calling for DRH's response, the arbitrators refused to apply collateral estoppel based on the *Hickcox* judgment solely because DRH had filed an appeal from that judgment. They conceded that "the argument for collateral estoppel to at least some issues might be compelling if this were an appealable proceeding in a court of law." ER.229, Ex. G. However, they rejected collateral estoppel because "an appeal is pending in the Hickcox matter, an appeal that we gather will not be resolved until well beyond the projected end of the current proceeding." *Id.* Acknowledging well-established principles, the arbitrators "recognize[d] that the pendency of – and possibility of reversal in – an appeal would not necessarily deprive a judgment of preclusive effect in a collateral proceeding in a court of law." *Id.* Nevertheless, they decided to abandon those principles based on their view that "[p]racticality and fairness suggest a different conclusion in this binding arbitration . . . in which the estoppel, if now ordered, cannot later be undone if the Hickcox judgment is later reversed." *Id.* The arbitrators cited no authority for their

newly created exception to the doctrine of collateral estoppel.[3]

As a result, the same 30,000-share issues were retried before the arbitrators. On October 5, 2003, the arbitrators issued their final award, in which they decided – contrary to the *Hickcox* jury and court – that Collins and Ryan had not established that DRH had committed fraud or breach of contract in connection with the promise of 30,000 shares. The arbitrators did not cite any evidence distinguishing Collins' and Ryan's situation from that of Hickcox.

Three days after the arbitrators issued their final award, and one day before the scheduled oral argument in the Ninth Circuit in the *Hickcox* appeal – the same appeal that the arbitrators had used to avoid collateral estoppel – DRH settled Hickcox's claims against it. The appeal and cross-appeal were dismissed, but the district court's judgment was left standing.

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[3] The arbitrators also did not rely on any of the grounds of discretion in applying offensive non-mutual collateral estoppel that this Court recognized in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979): (i) where the defendant had little incentive to defend the first action vigorously; (ii) where there were multiple inconsistent prior judgments; (iii) where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result; or (iv) where the plaintiff could easily have joined in the earlier action but adopted a wait-and-see approach.

C. The Courts' Affirmance of the Arbitrators' Decision

Collins and Ryan then moved the district court to vacate the portion of the arbitrators' award relating to the 30,000-share promise because the arbitrators had improperly refused to apply collateral estoppel, and to enter judgment for Collins and Ryan based on collateral estoppel. On March 21, 2005, the district court denied the motion even though it specifically concluded that the arbitrators had committed legal error. App. at 41a-46a, 54a.

The district court conceded that "the rule that a pending appeal does not deprive a judgment of preclusive effect *has no exceptions*," and that "the rule *applies equally to arbitrations* and to proceedings in a court of law." App. at 55a (emphasis added). Indeed, it has been well settled for over a century that "in federal courts . . . the preclusive effects of a lower court judgment cannot be suspended simply by taking an appeal that remains undecided," and this rule applies in situations where "the second judgment has become conclusive even though it rested solely on a judgment that was later reversed." 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4433, at 71, 78-79, 88-89 (2d ed. 2002). As leading commentators note, "Despite the manifest risks of resting preclusion on a judgment that is being appealed, the alternative of retrying the common claims, defenses, or issues is even worse," i.e., "the burdens of retrial, the potential for inconsistent results, and the occasionally bizarre problems of achieving repose and finality that may arise." *Id.* at 94.

Further, the district court found "that general principles of fairness and practicality are not sufficient grounds to dispense with collateral estoppel under federal law." App. at 55a. It held that "[t]he arbitrators were therefore not free to refuse to give the *Hickcox* judgment preclusive effect on the basis of their overriding sense of fairness and practicality," App. at 51a.

Nevertheless, the district court declined to vacate the award because it reviewed the application of collateral estoppel under the standard of "manifest disregard of the law," rather than do novo. Applying a "mens rea" requirement, the court held, "Although the arbitrators committed an error of law, the Court cannot conclude that the arbitrators understood they were acting in error. It therefore cannot find that the arbitrators acted in 'manifest disregard of the law.'" App. at 56a.

On appeal, Collins and Ryan argued that the courts, not the arbitrators, should ultimately determine the application of preclusion doctrines and that the manifest-disregard standard should not apply.[4] Alternatively, Collins and Ryan argued that the arbitrators had engaged in manifest disregard. The Ninth Circuit rejected both arguments. First, the court held that while "'[a]rbitrators are not free to ignore the preclusive effect of prior judgments under the doctrines of res judicata

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[4] *See* Opening Br. at 12-13, 29-30; Reply Brief at 23; Oral Argument audio file, *available at* http://www.ca9.uscourts.gov/ca9/media.nsf/Media%20Search?OpenForm&Seq=2 (last visited Dec. 24, 2007).

and collateral estoppel,'" nevertheless "arbitrators are entitled to determine in the first instance whether the prerequisites for collateral estoppel are satisfied." App. at 17a (quotation omitted). In addition, the court held that "arbitrators possess the same broad discretion possessed by district courts to determine when to apply offensive non-mutual collateral estoppel" under *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, (1979). App. at 11a-12a; *see id.* at 17a. Unlike the district court, the Ninth Circuit expressly declined to resolve whether the arbitrators had abused their discretion, conducting instead limited review under the manifest-disregard standard. App. at 21a. The court concluded that the arbitrators did not manifestly disregard the law because "no *binding* precedent existed" on the application of offensive non-mutual collateral estoppel in a subsequent arbitration while the prior judgment was on appeal. *Id.* (emphasis added).

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT HAS EXPANDED A CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE COURT OR THE ARBITRATOR DETERMINES THE PRECLUSIVE EFFECT OF A PRIOR COURT JUDGMENT.

In its opinion below, the Ninth Circuit widened an existing split among the circuits as to whether the court or the arbitrator determines the preclusive effect of a prior court judgment on an arbitration proceeding. The Ninth Circuit held that preclusion is to be treated like any other arbitrable issue: "arbitrators are entitled to

determine in the first instance whether the prerequisites for collateral estoppel are satisfied," App. at 17a, and the subsequent judicial review is under the narrow manifest-disregard standard, *id.* at 21a.

The Ninth Circuit thus squarely answered the question that a prior panel of that court had explored at greater length in *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126 (9th Cir. 2000). (Indeed, the panels overlapped in membership.) In *Chiron*, the Ninth Circuit acknowledged authority from other circuits recognizing that the preclusive effect of a federal judgment was ultimately for the court to decide, not the arbitrator. *Id.* at 1134. But in *Chiron*, the precise issue was the preclusive effect of a *prior arbitration*, and the Ninth Circuit distinguished that context from one in which the prior judgment arose from *judicial* proceedings rather than an arbitration. In doing so, it acknowledged "the presumption that the court issuing the original decision is best equipped to determine ... what is or is not precluded by that decision." *Id.* The Ninth Circuit has now granted arbitrators the identical power to determine preclusion even though the prior judgment was that of the same federal court and based on a jury verdict. App. at 17a (citing *Aircraft Braking Systems Corp. v. Local 856, Int'l Union*, 97 F.3d 155, 159 (6th Cir. 1996) (recognizing that arbitrators "generally are entitled to determine in the first instance whether to give the prior judicial determination preclusive effect")). In doing so, the court joined the Second and Eleventh Circuits in holding that the preclusive effect of a prior court judgment is itself arbitrable. *United States Fire Ins. Co. v. Nat'l Gypsum Co.*, 101 F.3d 813, 816-17 (2d Cir. 1996); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1109 (11th Cir. 2004).

The Third, Fifth, and Eighth Circuits, however, along with district courts in other circuits and some state courts, have held that courts' consideration of preclusion issues is plenary, not limited by the usual manifest-disregard standard. Some circuits have held that the courts should decide the issue in the first instance, while others have permitted arbitrators to consider the issue first, subject to full court review. *See, e.g.*, *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 139 (3d Cir. 1998) (district court should determine res judicata effect of judgment at time of contested arbitral demand); *Tel. Workers Union, Local 827 v. N.J. Bell Tel. Co.*, 584 F.2d 31, 33 (3d Cir. 1978) (affirming district court's rejection of arbitrators' decision based on collateral estoppel effect of prior judicial decision); *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 499 (5th Cir. 1986) (parties should be barred from seeking relief from an arbitration panel if res judicata principles would bar relief in federal court); *John Morrell & Co. v. Local Union 304A, UFCW*, 913 F.2d 544, 562-63 (8th Cir. 1990) (affirming district court's vacating of arbitration award based on collateral estoppel effect of prior jury determination of same issue); *Ewart v. Y & A Group, Inc. (In re Y & A Group Secs. Litig.)*, 38 F.3d 380, 382-83 (8th Cir. 1994) (district court could enjoin arbitration of previously determined issues based on collateral estoppel because "[t]he district court, and not the arbitration panel, is the best interpreter of its own judgment"); *Leon C. Baker, P.C. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 821 So. 2d 158, 164 (Ala. 2001) (holding that the trial court, not the arbitrator, was the proper forum for resolving collateral estoppel). As one court summarized, "However limited our jurisdiction [to review arbitration awards] is, we have the power to

determine if the arbitral panel was precluded from its action by our [prior] decision. . . ." *Am. Train Dispatchers Ass'n v. Burlington N.R.R. Co.*, 784 F. Supp. 899, 903 (D.D.C. 1992). "[C]ourts have the right of plenary review when asked to determine the preclusive effects of a federal judgment on relitigation of the same issues in an arbitral forum." *Id.*

In 2001, the Alabama Supreme Court comprehensively surveyed the precedent nationally on "[t]he question of *who decides* whether the arbitration of a previously *litigated* issue is collaterally estopped," and it found that the "courts have reached divergent conclusions." *Leon C. Baker, P.C.*, 821 So. 2d at 163. Since this Court's last decision regarding the respective roles of courts and arbitrators, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), that divergence has not been resolved. Some courts have recognized that the preclusive effect of a prior court judgment is to be determined by the court, not the arbitrator. *See, e.g.*, *Duhaime v. John Hancock Mut. Life Ins. Co.*, 200 Fed. Appx. 6, 8 (1st Cir. 2006) (recognizing that the "preclusive effect of [a] prior court judgment" is among the "disputes that have generally been held to be matters for the court"); *Drag v. SouthTrust Bank*, No. 3:04CV319-H, 2005 WL 1883241, at *6 (W.D.N.C. Aug. 4, 2005) (enjoining arbitration based on res judicata effects of prior judgment); *W. Dow Ham III Corp. v. Millenium Income* Fund, __ S.W.3d __, 2007 WL 2005071, at 8 (Tex. Ct. App. July 12, 2007) (noting at headnote 13 that court may determine res judicata effect of prior judgment); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Benjamin*, 766 N.Y.S.2d 1, 6 (App. Div. 2003) ("determining the preclusive effect of court judgments

on subsequent arbitrations is another subject 'so interlaced with strong public policy considerations that [it must be] placed beyond the reach of the arbitrators' discretion'" (quotation omitted)).

On the other hand, other courts have held that the preclusive effect of a prior court judgment is to be decided by the arbitrator. *See Klay*, 376 F.3d at 1109; *Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 415 F. Supp. 2d 887, 890 (N.D. Ill. 2006). It therefore remains true that state and "federal courts have reached seemingly disparate and conflicting conclusions" on the issue. Jarrod Wong, *Court or Arbitrator – Who Decides Whether Res Judicata Bars Subsequent Arbitration Under the Federal Arbitration Act?*, 46 Santa Clara L. Rev. 49, 58-59 (2005).

In affirming the primary role of the courts in determining the preclusive effect of a prior court judgment on an arbitration, the Third Circuit properly reconciled critical principles of preclusion with the federal policy favoring arbitration. "When a federal court is presented with the contention that a prior federal judgment determined issues now sought to be relitigated in an arbitral forum [the court] must *first* determine the effect of the judgment." *Tel. Workers Union*, 584 F.2d at 33 (emphasis added). Before then, the court noted, the "federal policy favoring [arbitration] clauses . . . does not come into play." *Id.* Contrary to these principles, the Ninth Circuit placed the issue of preclusion in the hands of the arbitrators, subject to the same limited, deferential judicial review given to ordinary arbitrable issues. The Ninth Circuit's ruling cannot be reconciled with the rulings of these other circuits.

II. THIS CASE PROPERLY RAISES THE CRITICAL ISSUE OF WHO SHOULD DECIDE A JUDGMENT'S PRECLUSIVE EFFECT.

This case raises this circuit split in the best possible manner. First, Collins and Ryan raised the issue of who should determine the collateral estoppel issue early and repeatedly. Immediately after the *Hickcox* verdict was returned, they sought reconsideration of the district court's order referring the case to arbitration on the ground that the court should decide the issue-preclusive effect of that verdict on Collins' and Ryan's own claims. After the court declined to decide the issue but left open the possibility of review after the arbitration, Collins and Ryan presented their preclusion arguments to the arbitration panel. After the arbitrators refused to apply collateral estoppel and reached a conclusion diametrically opposed to that of the *Hickcox* jury, Collins and Ryan again sought to have the district court reexamine the issue. On appeal, Collins and Ryan again pressed for the Ninth Circuit's plenary review of the preclusion issue.

Second, whether the court or arbitrators decide the preclusion issue determines the outcome of this case. The arbitrators conceded that "the argument for collateral estoppel to at least some issues might be *compelling* if this were an appealable proceeding in a court of law." ER.229, Ex. G (emphasis added).) They rejected issue preclusion solely because "an appeal is pending in the Hickcox matter, an appeal that we gather will not be resolved until well beyond the projected end of the current proceeding." *Id.* On the other hand, "the district court . . . [held] that the arbitrators erred

by not giving preclusive effect to Hickcox's judgment." App. at 8a; *see id.* at 56a The district court recognized that "the rule that a pending appeal does not deprive a judgment of preclusive effect *has no exceptions*," and that "the rule *applies equally to arbitrations* and to proceedings in a court of law." App. at 55a (emphasis added). Despite finding error, the court upheld the arbitrators' decision solely because it was applying the manifest-disregard standard, rather than deciding the issue itself by conducting a plenary review. App. at 54a. On appeal, the Ninth Circuit affirmed on the basis of the limited scope of manifest-disregard review, without even deciding whether the arbitrators' decision had been incorrect. App. at 21a. The circuit held that the discretion under *Parklane Hosiery* belonged to the *arbitrators* both in the first instance and ultimately, not the district court. App. at 17a. Thus, the outcome was determined by the choice of decision maker.

III. THIS CASE PRESENTS AN ISSUE WITH IMPORTANT NATIONAL IMPLICATIONS.

This circuit split implicates the relationship between courts and arbitration panels in the context of preclusion doctrines that are "[a] fundamental precept of common-law adjudication." *Montana v. United States*, 440 U.S. 147, 153 (1979). As this Court has emphasized, "a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive." *Arizona v. California*, 460 U.S. 605, 619 (1983). "Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial

economy by preventing needless litigation." *Parklane Hosiery*, 439 U.S. at 326. "Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." *Montana*, 440 U.S. at 153.

The conflict raised here presents what is essentially a corollary of the principle recognized by this Court that, with a few exceptions, the courts have "the primary power to decide arbitrability" of a dispute, not the arbitrator. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute."). When a court decides an issue in a manner that raises collateral estoppel, the conclusive judicial determination removes the issue from range of issues that are still litigable or arbitrable. Like the absence of consent of the parties to arbitration, a final judicial decision is a limitation on the scope of arbitrability that is extrinsic to the arbitration procedures themselves.

Moreover, the preclusive effect of a prior *judicial* decision is "the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter." *Howsam v. DeanWitter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002). It is not a mere procedural question that grows out of

the dispute. *See id.* at 84.[5] The preclusive effects of *judges'* determinations are quintessentially questions that "concern ... judicial procedures" and that parties would expect *judges* to decide. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. at 452-53 (plurality). Just as this Court held that NASD arbitrators were "comparatively more expert about the meaning of their own [time-limit] rule" and "comparatively better able to interpret and to apply it," *Howsam*, 537 U.S. at 85, courts are more expert about the meaning of judgments and better able to apply them to other disputes – particularly where, as here, the courts are applying their *own* prior judgments.

Like decisions as to substantive arbitrability, decisions on relitigation in the arbitration of judicially determined issues or claims should be made by the courts. *See First Options*, 514 U.S. at 944 (recognizing that "the law reverses the presumption" of arbitrability when the issue is who decides arbitrability, rather than the merits of the dispute). Like arbitrability, the issue of preclusion may reach the courts either before the arbitration or after the award. The court's exercise of the plenary power to decide the issue should be the

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[5] *Cf. Federated Dept. Stores, Inc. v Moitie*, 452 U.S. 394, 401(1981) (reiterating that "'res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours,'" but is instead "'a rule of fundamental and substantial justice'" (quotation omitted)); *Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1475 (8th Cir. 1994) ("Res judicata and collateral estoppel are issues of substantive law. . . ."); *Lynch v. Merrell-National Labs.*, 830 F.2d 1190, 1192 (1st Cir. 1987) ("The law on collateral estoppel is as substantive in its effect as the law of contracts or torts.").

same pre-arbitration or post-award. *See generally* 2 Ian R. Macneil et al., *Federal Arbitration Law* § 15.1.4, at 15:5 (Supp. 1999) ("*First Options* was a post-award case, but its principles apply to pre-award situations, such as proceedings to compel arbitration.").

This dispute over who decides preclusion highlights a broader struggle between judicial and arbitral systems. Arbitrators have institutional or philosophical reasons to reject the preclusive effect of prior judgments and decide the issues and claims anew. They may believe that they are simply smarter, better educated, or endowed with greater industry expertise than jurors, or less constrained by resource or time limitations and procedural niceties than judges, and thus better suited and equipped to decide issues accurately, fairly, and dispassionately. "Some arbitrators and mediators . . . believe that virtually every dispute can be resolved by ADR and that a mediated or arbitrated resolution is almost always vastly superior to a litigated one. It is also good for their business." Scott Atlas & Nancy Atlas, *Potential ADR Backlash*, 10 No. 4 Disp. Resol. Mag. 14, 15-16 (2004); *see also* Chris Guthrie, *Misjudging*, 7 Nev. L.J. 420, 454-55 (Spring 2007) (arguing that "arbitrators often offer the potential advantage of subject-matter expertise" that "is seldom the case in jury trials," and that "arbitrators, by virtue of their specialized subject-matter knowledge, might be better able than general jurisdiction judges to make accurate decisions").

Citing their concern that, for these reasons, arbitrators may improperly decline to apply preclusion doctrines, courts have recognized the ultimate authority of courts to determine whether such doctrines apply.

See, e.g., *John Morrell*, 913 F.2d at 562 (court may vacate an arbitration award if the arbitrator's decision on issue preclusion disregards judicial precedent in favor of his "own brand of industrial justice"); *Hudson-Berlind Corp. v. Local 807, IBT*, 597 F. Supp. 1282, 1285 (E.D.N.Y. 1984) (warning of the danger of taking from courts the power to determine the preclusive effect of a judgment and giving that power to an arbitrator "who might not be as respectful of such judgments as courts would be").

The threat that professional hubris poses to the fair application of preclusion doctrines is compounded by the fact that arbitrators are not salaried judicial officers but instead are compensated based on the scope and duration of their arbitral efforts. The disinclination of arbitrators to

> terminate a dispute as a result of a pre-trial motion, such as a motion to dismiss or motion for summary judgment ... may arise from a desire to hear the parties out, but it also might be influenced by the arbitrators' self-interest in extending their ability to bill the parties for their services.

Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 Harv. J.L. & Pub. Pol'y 579, 588 (2007); *see* Mark Berger, *Arbitration and Arbitrability: Toward an Expectation Model*, 56 Baylor L. Rev. 753, 787-88 (Fall 2004) (noting "no documented support" for the proposition that "arbitrators will put their own interests ahead of their responsibilities").

The reluctance of arbitrators to apply preclusion doctrines ultimately undermines the utility of arbitration as a solution in our legal system. Arbitration is advanced as a means of resolving disputes more quickly and less expensively, and it has been criticized for failing to meet that goal. *See* Noyes, *supra*, at 584-89. The failure to apply preclusion doctrines will make arbitration an even more time-consuming and costly form of dispute resolution and make parties less willing to agree to it in the first place. "The doctrine of res judicata and its cousin collateral estoppel have probably done more to prevent useless and wasteful litigation that arbitration ever could." *Miller Brewing*, 781 F.2d at 497 n.3 (internal citation omitted).

The Court should ensure that arbitration remains a streamlined process. Allowing extrajudicial actors to determine the force and effect of judicial determinations should be unacceptable, particularly where, as here, the court involved in the second suit is the same one that issued the prior judgment. Decisions as to arbitrability are generally left safely in the hands of the courts. While procedural requirements are generally left to the arbitrators, those issues do not raise the direct conflict with judicial authority that is created when arbitrators decide with effective finality whether they are bound by prior judicial determinations of issues and claims. Such issues as the force and effect of court judgments should be decided by courts, not arbitrators. Without plenary review by the courts of those decisions, preclusion doctrines cannot fulfill their fundamental role in our legal system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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