No. 22-265

In the
Supreme Court of the United States

CHRISTOPHER N. CAPUTO,
Petitioner,

v.

WELLS FARGO ADVISORS, LLC,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

Banco de Seguros del Estado v. Mutual Marine Office, Inc., 344 F.3d 255 (2d Cir. 2003) 7

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001). 4

Commodities & Minerals Enterprise Ltd. v. CVG Ferrominera Orinoco, C.A., 49 F.4th 802 (2d Cir. 2022). . . . . *passim*

Commodities & Minerals Enterprise Ltd. v. CVG Ferrominera Orinoco, C.A., 2020 WL 7261111 (S.D.N.Y. Dec. 10, 2020), *aff'd*, 49 F.4th 802 (2d Cir. 2022) 4

Eastern Associated Coal Corp. v. United Mine Workers, 531 U.S. 57 (2000) 4, 5, 6-7

IBEW, Local 97 v. Niagara Mohawk Power Corp., 143 F.3d 704 (2d Cir. 1998) 5-6

Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974) 7

Tatneft v. Ukraine, 21 F.4th 829 (D.C. Cir. 2021) 7

Tecnicas Reunidas de Talara S.A.C. v. SSK Ingenieria y Construccion S.A.C, 40 F.4th 1339 (11th Cir. 2022) 5, 7

Telenor Mobile Commc'ns AS v. Storm LLC, 584 F.3d 396 (2d Cir. 2009) 5

United Paperworkers Int'l Union v. Misco, Inc.,
484 U.S. 29 (1987) 4, 5, 6

W.R Grace & Co. v. Local Union,
461 U.S. 757 (1983) 4, 5, 6, 7

Yusuf Ahmed Alghanim & Sons v. Toys "R" Us,
126 F.3d 15 (2d Cir. 1997) 4

STATUTES

9 U.S.C. §2 2

9 U.S.C. §9 5

9 U.S.C. §10(a) 4

9 U.S.C. §10(a)(4) 5

9 U.S.C. §201-208 1

9 U.S.C. §202 2

9 U.S.C. §207 2

9 U.S.C. §208 4

9 U.S.C. §307 4

RULES

Sup. Ct. R. 15.8. 1

OTHER AUTHORITIES

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997 (entered into force as to U.S. on Dec. 29, 1970) 1-2

Article V(2)(b) 2, 4

Inter-American Convention on International Commercial Arbitration, T.I.A.S. No. 90-1027, O.A.S.T.S. No. 42, 1438 U.N.T.S 245 (Jan. 30, 1975) 4

Article V(2)(b) 4

Restatement, 3d, U.S. Law of International Commercial Arbitration §4.20(b)(5) 5

Petitioner Christopher Caputo, through his undersigned counsel, respectfully submits this Supplemental Brief, pursuant to Supreme Court Rule 15.8, in support of his pending Petition for Writ of Certiorari in this case ("Petition").

ARGUMENT

The importance of each of the three issues of federal arbitration law presented by the Petition, and the need for resolution of these contentious issues by this Court, is pointed up by the recent decision in *Commodities & Minerals Enterprise Ltd. v. CVG Ferrominera Orinoco, C.A.,* 49 F.4th 802 (2d Cir. Oct. 3, 2022) ("*CME*"). That case involved an arbitration between two companies which, although formed and operating abroad, had agreed in their commercial contract to arbitration in New York City governed by U.S. law, including specifically the Federal Arbitration Act, U.S.C. Title 9 ("FAA"). *Id*. at 807. The arbitral panel awarded over $12 million to claimant, rejecting respondent's defense (*inter alia*) that the contract was void because it was obtained through corruption. Claimant sought confirmation of the award under the FAA, in the U.S. District Court for the Southern District of New York. Respondent opposed confirmation on grounds (*inter alia*) that "enforcing the award would violate United States public policy" because the contract was obtained through corruption. *Id*. at 808. The award was nonetheless confirmed by the District Court.

On appeal, the Second Circuit recognized that under chapter 2 of the FAA, 9 U.S.C. §§201-208, the award was subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T.

2517, T.I.A.S. No. 6997 (entered into force as to U.S. on Dec. 29, 1970) ("New York Convention"). *See* 49 F.4th at 807, 809-810; 9 U.S.C. §202 (New York Convention applies to commercial contracts, including contracts described in 9 U.S.C. §2, except contracts or awards "entirely between citizens of the United States" and lacking any "reasonable relation" to any other country); 9 U.S.C. §207 (on application for judicial confirmation of arbitral award subject to New York Convention, the court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention"). Among the grounds for refusal to confirm an arbitral award under Article V of the New York Convention is a judicial finding in the country where enforcement is sought that "enforcement of the award would be *contrary to the public policy of that country*." 49 F.4th at 809 n.4 (quoting Article V(2)(b) of the New York Convention) (emphasis supplied).

The Second Circuit held (like the District Court) in *CME* that the public policy argument presented there was unavailing because it

> falls outside the narrow public policy exception codified by Article V(2)(b) .... [which] "must be 'construed very narrowly' to encompass only those circumstances 'where enforcement would violate our most basic notions of morality and justice.'" [*Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396 (2d Cir. 2009)] at 411 (quoting *Europcar Italia S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998)). In reviewing an arbitral award for violations of

public policy, a court may not "revisit or question the fact-finding or the reasoning which produced the award." *IBEW, Local 97 v. Niagara Mohawk Power Corp*., 143 F.3d 704, 716 (2d Cir. 1998). Instead, "a court's task in reviewing ... possible violations of public policy is limited to determining whether the award itself, as contrasted with the reasoning that underlies the award, 'create[s] [an] explicit conflict with other laws and legal precedents' and thus clearly violates an identifiable public policy." *Id*. (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 ... (1987)). When a party claims that an underlying contract is invalid for violating public policy, that claim is "to be determined exclusively by the arbitrators." *Europcar Italia*, 156 F.3d at 315.

Ferrominera's public policy argument attacks the General Piar Charter [underlying contract] itself, not the Award or its enforcement. The Panel carefully considered Ferrominera's corruption allegations and gave Ferrominera ample opportunity to substantiate its claim. ... It offers no argument that enforcement itself, "within the parameters of the arbitrator's interpretation of the facts," *IBEW, Local 97*, 143 F.3d at 726, violates public policy.

.... Ferrominera's argument here ... is nothing more than a collateral attack on the General Piar Charter and a thinly veiled effort to relitigate factual determinations by the Panel. Ferrominera makes no argument that enforcing

> the Award, standing alone, violates public policy.

49 F.4th at 818-819 & n.13 (underscoring by counsel).

1.

As an initial matter, application of the "public policy exception codified [under FAA chapter 2] by Article V(2)(b)" of the New York Convention (*CME* at 818), and also codified under FAA chapter 3 by Article V(2)(b) of the parallel Panama Convention,[1] is closely akin to application of the public policy exception laid down in *W.R Grace & Co. v. Local Union*, 461 U.S. 757 (1983), *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987), and *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000) — labor cases now held by several Circuits to be governed by FAA chapter 1 in light of *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). *See* Petition p. 20 n.25 (cases applying *Circuit City*), p. 33 (Convention cases invoking *W.R. Grace* and *Misco*).

FAA chapters 2 and 3 expressly incorporate FAA chapter 1, §10(a) (judicial vacatur of arbitral awards) for awards made in the United States.[2] By the same

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[1] Inter-American Convention on International Commercial Arbitration, T.I.A.S. No. 90-1027, O.A.S.T.S. No. 42, 1438 U.N.T.S 245 (Jan. 30, 1975) ("Panama Convention"), reprinted following Pub. L. 101-369, 104 Stat. 448 (1990).

[2] *See* 9 U.S.C. §§208, 307; *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us*, 126 F.3d 15, 20-21(2d Cir. 1997). In *CME*, no timely petition for vacatur of the arbitral award was filed (*see* 2020 WL 7261111 at *4 n.3 (S.D.N.Y. Dec. 10, 2020)) but in rejecting

token, the public policy exception codified by FAA chapters 2 and 3 provides a basis for vacatur, under FAA §10(a)(4), of arbitral awards made in the U.S., at least if they involve a foreign party.[3] One of the three issues presented here by Petitioner Caputo is whether FAA §10(a)(4) likewise applies to the public policy exception laid down by this Court in *W.R. Grace*, *Misco*, and *Eastern*. *See* Petition pp. 29-34 (addressing the third issue presented). *CME* further points up the disarray among lower courts in applying the public policy exception, as shown below in addressing other issues presented in this case.

2.

The Second Circuit recognized in *CME* that the public policy exception codified by FAA chapter 2 is governed by this Court's decisions in *W.R. Grace*, *Misco*, and *Eastern*. *See* 49 F.4th at 818-819, relying on a labor case, *IBEW, Local 97 v. Niagara Mohawk*

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appellant's challenge to confirmation of the award, the Second Circuit relied on cases denying vacatur of arbitral awards. Denial of judicial confirmation (enforcement) of such award in the U.S. is tantamount to vacatur of such award, in the U.S. at least. *See* 9 U.S.C. §9 ("the court must grant such an order [confirming the award] unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title").

[3] *See Tecnicas Reunidas de Talara S.A.C. v. SSK Ingenieria y Construccion S.A.C*, 40 F.4th 1339, 1344-1345 (11th Cir. 2022); *Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396, 410-411 (2d Cir. 2009); Restatement, 3d, U.S. Law of International Commercial Arbitration §4.20(b)(5) & cmts. a and f (proposed final draft April 24, 1919) ("award whose confirmation ... would violate public policy is by definition an award in excess of an arbitral tribunal's powers" under FAA §10(a)(4)).

Power Corp., 143 F.3d 704 (2d Cir. 1998), applying *W.R. Grace* and *Misco*. Like the opinion by the Third Circuit below, however, *CME* clashes with this Court's decisions, and decisions of other Circuits, in several important respects.

First, the distinction sharply drawn by *CME* (quoted above) between the arbitral "award itself," "standing alone," and the "underlying contract" that would be enforced by the award but supposedly could not itself be subject to "collateral attack" on judicial review under the public policy exception, has been squarely rejected by this Court. *See* Petition pp. 19-21. Thus, the Court held in *Eastern* that "the award is *not* distinguishable from the contractual agreement" on which the award is based. 531 U.S. at 62 (emphasis supplied).[4] Accordingly, contrary to *CME*, several Circuits have mandated or affirmed vacatur of arbitral awards on the public-policy grounds that contractual provisions enforced by such awards violated positive law such as labor statutes. *See* Petition pp. 24-25.

Second, *CME's* espoused (above-quoted) standard for the public policy exception — as applicable only when enforcement of an arbitral award "'would violate our most basic notions of morality and justice'" — is likewise at odds with *Eastern*, where this Court instead

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[4] Any such distinction should make no difference in this case, where the arbitral award itself rejected Caputo's claim for earned remuneration, and ordered him to repay advances of his earned remuneration (otherwise payable over ten years), based on contractual provisions that were expressly unlawful, void, and unenforceable under state labor law (providing for exemplary damages as well as criminal sanctions). *See* Petition pp. 2-9, 12.

held that the public policy exception is applicable when an arbitral award would enforce a contractual provision that "violates positive law" (*e.g.*, a statute). 531 U.S. at 62-63. The amorphous standard espoused in *CME* predates the *W.R. Grace* decision of this Court.[5] To the extent that standard currently persists, in coexistence with the standard clarified in *Eastern*,[6] it undermines *Eastern* and fosters arbitrary decisions, like the decision by the Third Circuit below, that violations of positive law supposedly do not implicate sufficiently important public policy — contrary to decisions by other Circuits. *See* Petition pp. 23-25 (addressing the first issue presented).

Third, the assertion in *CME* (quoted above) that "[w]hen a party claims that an underlying contract is invalid for violating public policy, that claim is 'to be determined exclusively by the arbitrators'" — while consistent with Third Circuit decision below and other decisions (*see* Petition p. 26) — is at odds with *Misco* and several U.S. Court of Appeals decisions. *See* Petition pp. 26-28 (addressing the second issue presented); *see also id.* pp. 24-25. While *CME* alternatively relied on arbitral factfinding as foreclosing application of the public policy exception in that case, no such factfinding is implicated in this case.

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[5] *See Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier (RAKTA),* 508 F.2d 969, 974 (2d Cir. 1974).

[6] *See Tecnicas Reunidas de Talara*, 40 F.4th at 1345; *Tatneft v. Ukraine*, 21 F.4th 829, 837-838 (D.C. Cir. 2021); *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 264 (2d Cir. 2003).

Rather, the arbitral panel below simply applied the contractual provisions at issue, notwithstanding that they were unlawful, void, and unenforceable under applicable labor law — presenting a classic case for a narrow application of this Court's public policy exception to deference otherwise accorded arbitrators.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition for Writ of Certiorari in this case, the Petition should be granted as to each of the issues presented.

Respectfully submitted,

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