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

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

MARK A. KRIEGEL
LAW OFFICE OF MARK A. KRIEGEL, LLC
1479 Pennington Road
Ewing, NJ 08618
609-883-5133
mkriegel@kriegellaw.com

TIMOTHY W. BERGIN
Counsel of Record
POTOMAC LAW GROUP, PLLC
1300 Pennsylvania Ave., N.W.
Suite 700
Washington, D.C. 20004
703-447-4032
tbergin@potomaclaw.com

Counsel for Petitioner

November 22, 2022

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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PETITION FOR REHEARING

Petitioner Christopher Caputo, through his undersigned counsel pursuant to Supreme Court Rule 44.2, respectfully submits this Petition for Rehearing of the Court's denial on October 31, 2022, of his Petition for Writ of Certiorari ("Petition") in this case.

SUMMARY

For the reasons set forth under the Argument heading below, and in accord with this Court's precedent addressed thereunder, which constitute substantial grounds not previously presented by the Petition, the Court should issue a so-called GVR order in this case — granting certiorari, vacating the decision below by the Third Circuit as contrary to this Court's decisions, and remanding this case for consideration of an alternative ground for the decision below, under *Hall Street Associates v. Mattel, L.L.C.*, 552 U.S. 576 (2008), that was raised but not decided by the court below.

BACKGROUND

This case presents issues of unquestionable importance for federal arbitration law. While arbitral awards are necessarily accorded great deference as a general matter, this Court has repeatedly recognized a narrow but vital public policy exception designed to ensure that arbitral awards that violate positive law are not enforced by courts. *See* Petition, pp. 19-22, addressing *Eastern Associated Coal Corp. v. United Mine Workers,* 531 U.S. 57 (2000); *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29 (1987); *W.R. Grace &*

Co. v. Local Union, 461 U.S. 757 (1983); and *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982).

The arbitral award in this case clearly violated state labor statutes, by effectuating a contractual forfeiture of fully-earned remuneration,[1] and the court below did not suggest otherwise. Rather, contrary to the bright-line test laid down by this Court in *Eastern*, the conclusory unpublished decision below (despite oral argument) held *sua sponte* that it did not matter that the arbitral award violated the labor statutes — both because the public policy embodied by the statutes supposedly was not sufficiently well defined and dominant, and because any legal error of the arbitrators in failing to apply the statutes was in any event supposedly entitled to deference by courts. *See* Petition, p. 18. *But see* Petition, pp. 23-28 (the rulings by the Third Circuit below conflict with decisions by other Circuits); *cf.* Supplemental Brief in support of the Petition (addressing recent decision by the Second Circuit consistent with the rulings below in this case).

Given its rulings below, the Third Circuit had no occasion to decide whether (as it assumed *arguendo*, Petition App. p. 7 n. 11) this Court's public policy exception survives its decision in *Hall Street* that §§10 and 11 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§10-11, provide the exclusive grounds for vacating or

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[1] *See* Petition, notes 2-3, 5-7, 9, & 17 and accompanying text. Arbitration of such matters is mandatory under rules governing the securities industry applicable in this case. *See Roberts v. Wells Fargo Clearing Services, LLC*, 2022 WL 16826715, at *3 (11th Cir. Nov. 9, 2022).

modifying arbitral awards under the FAA. The lower courts are divided on this issue of vital importance for federal arbitration law (on which the court below ordered supplemental briefing). *See* Petition, pp. 29-34; Supplemental Brief in support of Petition, pp. 4-5.

ARGUMENT

The Court issued a GVR order in *Youngblood v. West Virginia*, 547 U.S. 867 (2006), based not on any then-recent court decision (or confession of error on behalf of a governmental party), but instead based on a showing that the summary affirmance below was directly at odds with longstanding precedent of this Court.[2] Specifically, as pointed out in the GVR order, the two rationales of the lower courts in *Youngblood*, in denying a new trial under *Brady v. Maryland*, 373 U.S. 83 (1963), for the government's failure to disclose exculpatory evidence to the accused, had been squarely rejected in *Kyles v. Whitley*, 514 U.S. 419 (1995) (*Brady* applicable even where such evidence is known only to police and not to prosecutors), and *United States v. Bagley*, 473 U.S. 667 (1985) (*Brady* applicable to impeachment evidence as well as exculpatory

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[2] *Cf. Stutson v. United States*, 516 U.S. 193 (1996) (issuing GVR order where (*inter alia*) summary affirmance below potentially conflicted with then-18-month-old Supreme Court precedent as construed by several Circuits); *Lawrence v. Chater*, 516 U.S. 163, 170 (1996) (comparing *Stutson* to *Netherland v. Tuggle*, 515 U.S. 951 (1995), vacating summary order below "for probable failure to apply a 12-year-old Supreme Court precedent that the parties briefed to the Court of Appeals"); *Price v. United States*, 537 U.S. 1152 (2003) (issuing GVR order where (*inter alia*) affirmance below potentially conflicted with then-4.5-year-old Supreme Court precedent).

evidence). *See* 547 U.S. at 869-870. This Court accordingly remanded for determination by the court below whether the *Brady* violation was sufficiently material to the outcome below to warrant a new trial (*id*. at 870), and the court below so held on remand.[3]

A GVR order is likewise warranted in this case where the Third Circuit, in denying application of this Court's public policy exception to deference normally accorded to arbitral awards, held *sua sponte* and summarily (*see* Petition p. 18) that an arbitral award in clear violation of applicable state labor statutes could not qualify for such exception — on asserted grounds at odds with this Court's longstanding precedent. *See Eastern*, 531 U.S. at 62-63 (arbitral award should be vacated under public policy exception if the award would enforce contractual provision that "violates positive law"); *Misco*, 484 U.S. at 43-45 & n.11 (such public policy issue "'is ultimately ... for resolution by courts'" even though "for the arbitrator in the first instance to decide"); *Kaiser*, 455 U.S. at 83-84 ("[w]here the enforcement of private agreements would be violative of ["public policy ... manifested in ... statutes"] ... it is the obligation of courts to refrain from" enforcing such agreements). The Third Circuit proceeded to deny without explanation a petition for rehearing showing that the public policy exception is plainly applicable under this Court's precedent, in accord with several decisions by other Circuits in analogous cases which likewise conflict with the decision below. *See* Petition pp. 19-28.

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[3] *State v. Youngblood*, 221 W.Va. 20 (2007). This case did not return to the Supreme Court.

Thus, as in *Youngblood*, the decision below does not simply 'misapply' settled law to 'unique' facts. Rather, it fails to apply at all the settled law outlined above, including this Court's mandate for *de novo* judicial review of arbitral awards that would enforce contractual provisions apparently violating statutory law. Moreover, other lower courts have increasingly done likewise. *See* Petition p. 26 & n.32; Supplemental Brief in support of the Petition (addressing decision last month by the Second Circuit, consistent with the decision below, which expands the conflict among Circuits). The decision below may well have considerable impact, particularly in the securities industry. *See* Petition p. 6 & n.8 and accompanying text.

A GVR order in this case, no less than in *Youngblood*, is fully consistent with the Court's practice, under the leading case of *Lawrence v. Chater*, 516 U.S. 163 (1996), and otherwise. As recognized in *Lawrence*, flexible exercise of the Court's broad power to issue GVR orders "is important [so] that the meaningful exercise of this Court's appellate powers not be precluded" even where "ambiguous summary dispositions below" may otherwise "lack the precedential significance that we generally look for in deciding whether to ... grant plenary review." *Id*. at 170. By the same token, "the standard ... appl[ied] in deciding whether to GVR is somewhat more liberal than ... a showing that a grant of certiorari and eventual reversal are probable[.]" *Id*. at 168.

A GVR order is all the more important where, as here, the summary decision below purports to reflect

'settled law' that does not warrant publication of the decision (which is thus expressly non-precedential) even though the law that is purportedly 'settled' is anything but 'settled' — such that the merits of the unpublished decision are highly dubious under this Court's precedent and its progeny. Thus, in *Plumley v. Austin*, 135 S. Ct. 828 (2015), Justice Thomas, joined by Justice Scalia in dissenting from denial of certiorari, characterized non-publication in such circumstances as "disturbing" and "yet another reason to grant review." *Id*. at 831.[4] *See also* Nielson & Stancil, *Gaming Certiorari*, 170 U. Pa. L. Rev. 1129, 1192-1193 (May 2022) ("unpublished opinion may have [broad] real-world effects because parties will anticipate a court following the decision even if it is not formally required to do so" as non-publication is a "signal" that the decision "merely applies settled law").

These concerns apply *a fortiori* in this case, where the unpublished decision below (after oral argument and court-ordered supplemental briefing re *Hall Street*) was both conclusory and unanimous, thus providing no indication that it does *not* simply apply settled law.[5]

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[4] Justice Thomas observed that "[i]t is hard to imagine a reason that the Court of Appeals would not have published this opinion except to avoid creating binding law for the Circuit." *Id*. Judge Thomas noted in this regard that the Court of Appeals "had full briefing and argument" and issued an extensive opinion over a dissent. *Id*.

[5] *See also Gaming Certiorari*, *supra*, at 1180 & n.171 (reportedly some "would-be dissenters go along with a result they do not like so long as it is not [published and thus] elevated to a precedent") (*en banc* rehearing in Courts of Appeals "is subject to precisely the

Instead, it sends a stronger but unwarranted signal of reliability (enhanced by denial of rehearing below and certiorari here). Thus, despite its non-precedential status (hindering rehearing *en banc* below), the decision below will doubtless be invoked and relied on by parties, arbitrators, and other courts (fostering conflict) to further undermine this Court's public policy exception to deference normally accorded to arbitral awards. Issuance of a GVR order is therefore fully warranted in this case, as in *Youngblood*, for purposes of instead fostering both adherence to this Court's precedents and consideration of a potential alternative ground for the decision below, under *Hall Street* (*see* Petition, pp. 29-34; Supplemental Brief in support of Petition, pp. 4-5), that was raised but not decided by the court below.

No less than in *Youngblood*, a GVR order is further warranted in this case under the general standard set forth in *Lawrence* that the Court can discern a "reasonable probability" that such order may result in different outcome below, "by flagging a particular issue that ... does not appear to have been fully considered" below. 516 U.S. at 167-168. While members of the Court have expressed differences as to whether a GVR order should issue in other contexts,[6] there appears to

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same ... problem that the Supreme Court faces at the certiorari stage"); Nielson & Walker, *Strategic Immunity*, 66 Emory L. J. 55, 92-94, 110-111, 120 (2016) (similar) ("that a decision is unpublished should carry little weight in certiorari review").

[6] Such differences may amount to less than appears. *See* Bruhl, *The Remand Power and the Supreme Court's Role*, 96 Notre Dame L. Rev. 171, 176-178 (November 2020) ("although the remand

be common ground that such order is warranted where, as here, the decision below is apparently incorrect under this Court's precedent (and thus at odds with most other Circuits) but could potentially be sustained on an alternative ground (such as, here, *Hall Street*) raised but not decided in the court below.[7]

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skeptics rely in large part on claims about historical practice, neither the skeptics nor the Justices who hold a more expansive conception of the power to remand have dug into the background of the relevant statutes or ventured very far back into history to see what the early practices actually reveal") ("the key conclusion of this Article is that the skeptics are wrong about the extent of the remand power") ("the remands that the skeptics have protested most consistently, namely the justice-ensuring remands, should be the *easiest* to justify, especially if one is a fan of judicial restraint") (emphasis in original).

[7] *See Gzregorczyk v. United States*, 142 S.Ct. 2580 (2022) (statement of Justice Kavanaugh, with whom Chief Justice Roberts, Justice Thomas, Justice Alito, and Justice Barrett joined, denying a GVR order because the decision below was "correctly" decided); *id*. at 2584-2585 & nn.3, 6 (Justice Sotomayor, with whom Justice Breyer, Justice Kagan, and Justice Gorsuch joined, dissenting from denial of GVR order, observing that even Justices advocating a narrower scope for GVR orders support them where "the Court itself determines that the outcome [below] was erroneous" [citing dissents from GVR orders] but discerns "possible alternative grounds for those judgments" not reached below); *Hicks v. United States*, 137 S.Ct. 2000 (2017) (Justice Gorsuch, concurring in GVR order given "reasonable probability" it would result in a "different outcome" below); *id*. at 2002 (Chief Justice Roberts, with whom Justice Thomas joined, dissenting from GVR order absent "determination from this Court that the judgment below was wrong"); *cf. Major League Baseball Players Assn. v.*

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for Rehearing and issue a GVR order granting a writ of certiorari in this case, vacating the opinion and judgment of the Court of Appeals below as contrary to this Court's decisions in *Eastern*, *Misco*, and *Kaiser*, and remanding this case for consideration of an alternative ground for the decision below, under *Hall Street*, that was raised but not decided by the court below. Alternatively, the Court should grant certiorari for plenary review of the decision below.

Respectfully submitted,

MARK A. KRIEGEL
LAW OFFICE OF MARK A. KRIEGEL, LLC
1479 Pennington Road
Ewing, NJ 08618
609-883-5133
mkriegel@kriegellaw.com

TIMOTHY W. BERGIN
Counsel of Record
POTOMAC LAW GROUP, PLLC
1300 Pennsylvania Ave., N.W.
Suite 700
Washington, D.C. 20004
703-447-4032
tbergin@potomaclaw.com

Counsel for Petitioner

Garvey, 532 U.S. 504, 505, 511-512 (2001) (based on certiorari petition, summarily reversing and remanding decision below at odds with this Court's longstanding precedent governing judicial review of arbitral awards).

RULE 44(2) CERTIFICATE

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

Respectfully submitted,

MARK A. KRIEGEL
LAW OFFICE OF MARK A. KRIEGEL, LLC
1479 Pennington Road
Ewing, NJ 08618
609-883-5133
mkriegel@kriegellaw.com

/S/ TIMOTHY W. BERGIN
TIMOTHY W. BERGIN
Counsel of Record
POTOMAC LAW GROUP, PLLC
1300 Pennsylvania Ave., N.W.
Suite 700
Washington, D.C. 20004
703-447-4032
tbergin@potomaclaw.com

Counsel for Petitioner