No. 24-738

IN THE

Supreme Court of the United States

JUAN CARTAYA,

Petitioner,

v.

TRAVELERS INDEMNITY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16, immunizes an insurance appraiser from all liability for common law fraud where:

1. A federal district court vacated the subject appraisal award in its entirety because the subject appraiser failed to meet the minimum requirements to be an appraiser in the first instance, effectively voiding his status as an appraiser in the eyes of the law;

2. The *vacatur* of the appraisal award rested in part on the appraiser's conduct in fraudulently fabricating a fictional construction bid and using the false evidence he created to "grossly-overinflate" the award;

3. The inflated award benefitted the party who appointed the appraiser and that party's law firm;

4. The appraiser enjoyed an undisclosed multi-million-dollar relationship with the appointing party's law firm; and

5. Petitioner never proved at trial that the appraisal award and the insurance policy under which it was conducted come within interstate commerce and, to the contrary, Petitioner cannot prove this as a matter of law due to the federal McCarran-Ferguson Act's reverse-preemption provision.

CORPORATE DISCLOSURE STATEMENT

The Travelers Indemnity Company is 100% owned by Travelers Insurance Group Holdings, Inc., which is 100% owned by Travelers Property Casualty Corp., which is 100% owned by The Travelers Companies, Inc. The Travelers Companies, Inc. is the only publicly held company in the corporate family. No individual or corporation owns 10% or more of the stock of The Travelers Companies, Inc.

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STATEMENT OF THE CASE

Factual background. This matter reaches this Court after a binding jury finding of fraud against Petitioner Juan Cartaya, arising from an insurance appraisal award he primarily created in 2017 to resolve a property claim between Respondent The Travelers Indemnity Company ("Travelers") and its insured, GSL Group, Inc. ("GSL"). Pet. App. 2a, 5a.

GSL submitted an insurance claim to Travelers in 2015 for alleged storm damage to its commercial building. *Id*. at 2a. After GSL and Travelers could not agree on the amount of loss, GSL invoked the appraisal clause of its insurance policy. *See id*. GSL appointed Petitioner to serve as an appraiser, while Travelers appointed Trent Gillette. *Id*. at 3a. During the appraisal, Petitioner inflated the appraisal award by fabricating a non-existent "verbal" construction bid for $603,864 to replace the building's structural purlins. He was motivated to commit fraud by his long-standing, multi-million-dollar relationship with GSL's legal counsel. Unaware of the fraud at the time, the other appraiser signed the award. Travelers paid GSL $1.6 million, also not realizing that the award had been inflated by a fictional construction bid.

Proceedings in the Federal and State Trial Courts. GSL then pursued insurance bad faith claims against Travelers in an action, entitled, *GSL Group, Inc. v. The Travelers Indemnity Co*., No. 18–cv–00746 (D. Colo.). *See* Pet. App. 4a. Discovery in that action revealed Petitioner's fraud and his bias in favor of GSL in violation of the insurance policy's appraisal provision.

In August 2020, Travelers initiated a state-court action against GSL and Petitioner in the Denver County

District Court, entitled, *The Travelers Indemnity Company v. GSL Group, Inc. and Juan Cartaya*, No. 2020CV32891 (Denver Cty. Dist. Ct., Colo.). In the state-court action, Travelers asserted against Petitioner claims for fraud and negligent misrepresentation, as well as other claims. Pet. App. 4a.

In September 2021, the federal district court presiding over GSL's insurance bad faith action vacated as void the appraisal award, finding the award "grossly-overinflated" and also finding Cartaya was not "impartial" as required by the subject insurance policy. *GSL Group, Inc. v. Travelers Indem. Co.*, No. 18–CV–00746–MSK–SKC, 2021 WL 4245372, at *6–8 (D. Colo. Sept. 16, 2021). The federal court specifically held "the appraisal award is void *ab initio* due to Mr. Cartaya's partiality[.]" *Id.* at *7 n.8. In effect, the federal court voided and nullified the entire appraisal process and, along with it, Petitioner's status as an "appraiser."

Travelers' fraud and negligent misrepresentation claims against Petitioner proceeded to trial in the Denver County District Court in March 2022. *See* Pet. App. 5a. Following a five-day jury trial, the jury found for Travelers and against Petitioner on the fraud claim, awarding $603,864 in damages. *Id.*

Proceedings in the Colorado Court of Appeals. Petitioner appealed. He did not deny in the Colorado Court of Appeals he had fabricated a false construction bid and included it in the appraisal award, or that Travelers paid for it. *See* Pet. App. 5a (summarizing Petitioner's arguments on appeal). Rather, he claimed the FAA entitled him to "arbitral immunity" to commit fraud. *Id.* The

court of appeals unanimously rejected Petitioner's FAA argument and affirmed the judgment in an unreported, non-precedential opinion, entitled, *Travelers Indemnity Co. v. Juan Cartaya*, No. 22CA0739 (Colo. App. Oct. 5, 2023). The court held the insurance policy's appraisal provision did not "constitute an arbitration agreement within the coverage of the FAA." Pet. App. 4a, 5a–6a, 8a, 16a (paragraphs 9, 13–14, 19, 35, 37). Because the court disposed of Petitioner's argument on that basis, it did not address other arguments requiring the same outcome, such as Travelers' contention that the FAA cannot apply here because of the federal McCarran-Ferguson Act, 15 U.S.C. §§ 1011–1015. *See id.* at 8a.

Proceedings in the Colorado Supreme Court. Petitioner sought certiorari review in the Colorado Supreme Court. In an unreported, non-precedential order dated June 17, 2024, the Colorado Supreme Court unanimously denied review. Pet. App. 30a ("IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED").

REASONS FOR DENYING THE PETITION

Far from presenting any significant issue of federal law, this proceeding concerns a factually-driven fraud dispute that pivots on whether Petitioner fabricated false evidence and used it to inflate the amount of an appraisal award he was entrusted to create—a point resolved by a jury in fair trial and not challenged on appeal. The courts below all unanimously resolved this individualized dispute on its facts in unreported, non-precedential opinions that break no new legal ground, do not meet any of the certiorari criteria in Rule 10 of this Court's rules, were

correctly decided, and, in any event, will have little or no influence on other cases because they cannot be cited as authority. Certiorari should be denied.

I. No compelling reasons for certiorari review exist

Rule 10 of the Supreme Court provides that a "petition for a writ of certiorari will be granted only for compelling reasons." Rule 10 further provides that a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." This matter does not meet any of the criteria for certiorari review under Rule 10.

This case does not involve any pertinent conflict (1) among United States courts of appeals; (2) between a United States court of appeals and a state court of last resort; or (3) among state courts of last resort on an important federal question. The petition argues that some United States courts of appeals have historically applied state law to the question of whether an insurance appraisal qualifies as an FAA arbitration where there is no legal conflict with federal law in doing so, while other such courts have looked solely to federal law to answer that question. Pet. 6–7. That nuanced distinction not only has made little or no difference to the outcome of any case, it is neither here nor there for purposes of this case. The Colorado Court of Appeals and the parties all solely applied federal law. Nor would applying Colorado law lead to a different result here than the Colorado Court of Appeals already reached. The petition's claim of a circuit split based on a few older decisions that would make no difference here, therefore, cannot supply a "compelling" reason to grant review.

This Court's recent activity confirms that the petition's question presented is unworthy of review. The Court so ruled recently. In May of last year, this Court denied a petition for a writ of certiorari filed by Great American Insurance Company ("Great American") in a matter, entitled, *Great American Insurance Co. v. Crystal Shores Owners Association, Inc.*, No. 23-1051. Great American raised the same primary question for review as the present petition. The Court denied certiorari. Indeed, *Crystal Shores* presented a better vehicle for reviewing the question than this case does. At least in *Crystal Shores*, the petitioner had been denied an appraisal and asked the courts to compel one. But here, Petitioner does not seek to reinstate the vacated appraisal award or to embark on a new appraisal process. Instead, he seeks to reclassify retrospectively the appraisal as an arbitration for the sole purpose of immunizing himself from liability for past fraud. Such a secondary use of the question presented renders this case a poor vehicle for examining the question presented. Just as this Court denied certiorari in *Crystal Shores* in May 2024, it should do so again here.

II. The petition overtly requests certiorari review because of a purported "misapplication of a properly stated rule of law"

The Court should apply Rule 10 and deny review because the petition merely asks the Court to reapply a properly stated rule of law. Under Rule 10, this Court ordinarily does not grant certiorari review due to an alleged "misapplication of a properly stated rule of law."

Here, Section I from the petition's section entitled, "Reasons for Granting the Petition," asks the Court to

grant review to clarify that federal law determines which processes qualify as FAA arbitrations. Pet. 5–9. But that is what the Colorado Court of Appeals did. *Id.* at 10. It applied federal law to determine whether the appraisal qualified as an FAA arbitration. Pet. App. 10a. The opinion below did so because the parties so stipulated: "Accepting the parties' stipulation that federal common law governs, we lay out the legal framework before applying it to the present case." *Id.* Both sides agreed that a specific Tenth Circuit decision "controls." *Id.* at 12a ("Nonetheless, the Tenth Circuit's reasoning in that case is instructive. Moreover, the parties agree that it controls.").

The petition nowhere backs away from that stipulation. Pet. 10 ("The parties here agreed *Salt Lake Tribune*," a decision by the Tenth Circuit, "provided the governing law"). Nor does it argue the opinion below applied the wrong legal framework or test. Quite the opposite, the petition admits the Colorado Court of Appeals applied the "correct legal framework." *Id.* (referring to "the Colorado court's application of the correct legal framework . . . "). The petition admits the Colorado Court of Appeals "adopted the Tenth Circuit's approach to defining 'arbitration' for FAA purposes[.]" *Id.* at 9.

While acknowledging the Colorado Court of Appeals correctly stated the applicable legal framework—which is the same one he stipulated to—Petitioner now seeks review solely because he believes the opinion below misapplied it. *Id.* at 12. Ultimately, the petition argues the Tenth Circuit's decision in *Salt Lake Tribune* "supplied the right law, but the case is ***distinguishable***" on its facts. *Id.* (emphasis added). The petition seeks for this Court to apply the ***same*** legal framework but merely to come to a

different conclusion than the opinion below. This is the precise circumstance contemplated by this Court's Rule 10, which warns that this Court does not generally grant certiorari review due to a "misapplication of a properly stated rule of law." On this basis, the Court should deny the petition.

III. The petition's question presented makes no difference to this case, rendering certiorari review pointless

The Court should deny certiorari review because this case's outcome will not change based on Petitioner's question presented, no matter how it is answered. This is so for many reasons.

a. The appraisal award was vacated and voided in its entirety, which in turn voided Petitioner's status as an appraiser in the eyes of the law

First, a federal court order voided Petitioner's status as an "appraiser," and that order is final. *GSL*, 2021 WL 4245372 at *6–8; *see also* Pet. App. 4a. This is so because the *GSL* federal court found that Petitioner failed to meet the minimum requirements to serve as an appraiser under the insurance policy: he was not impartial, and he participated in creating a "grossly-overinflated" appraisal award. *Id*. As a result, the *GSL* federal court vacated the entire award, effectively voiding and nullifying the entire appraisal process, including Petitioner's status as an "appraiser." *See id.* Moreover, the *GSL* federal court held "the appraisal award is void *ab initio* due to Mr. Cartaya's partiality[.]" *Id.* at *7 n.8. In the eyes of the law, it is the same as if the appraisal never occurred. Petitioner's status

as an appraiser has been voided along with the appraisal award, since he never met the requirements to serve as an appraiser in the first instance. *See id.* at *7–8 & n.8.

Because the law does not recognize Petitioner as an "appraiser," he cannot possibly enjoy arbitral or any other kind of immunity in connection with the voided appraisal award. This is the case, and will always be the case, no matter how the petition's question presented is answered.

b. Petitioner's fraud did not arise out of a decisional act, precluding FAA arbitral immunity

Second, even if insurance appraisers were FAA arbitrators (which they are not), Petitioner would still not receive arbitral immunity here. Arbitral immunity "does not protect arbitrators" from "all claims asserted against them." *Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155, 1159 (10th Cir. 2007). The "key question" is whether the claim "arises out of a decisional act." *Id.* If not, no immunity applies. *See id.*

Here, Petitioner engaged in fraudulent conduct falling outside any rational boundaries of an appraiser's "decisional act." He fabricated false evidence and attributed it to a fictional person, to deceive another appraiser and reward his associates at the law firm of the party that appointed him. That is simply not an arbitral "decisional act." It is not decisional in the same way that taking a bribe or forging documents is not "decisional." *See Lanza v. Fin. Indus. Regul. Auth.*, 953 F.3d 159, 164 (1st Cir. 2020) (stating that "we doubt that such [arbitral] immunity would afford shelter to an arbitrator who, say,

decided a matter after accepting a bribe."). Because creating false evidence to deceive others participating in the appraisal process cannot be characterized as "decisional" in nature, arbitral immunity does not protect Petitioner, not even if the appraisal were an arbitration.

c. Petitioner never proved at trial the interstate-commerce element of the FAA, nor can he do so, which defeats his immunity defense

Third, Petitioner never proved at trial the interstate-commerce element of the FAA, and it is legally impossible for him to do so because of the federal McCarran-Ferguson Act ("Act"). 15 U.S.C. §§ 1011 *et seq.* In the Act, Congress relinquished its commerce powers over insurance to the states, 15 U.S.C. § 1012(a), and reverse-preempted all other federal statutes that would interfere with that relinquishment unless they specifically relate to the business of insurance, *id.* § 1012(b). It is well-settled that the FAA does not relate specifically to the business of insurance. *Am. Bankers Ins. Co. of Fla. v. Inman*, 436 F.3d 490, 493 (5th Cir. 2006) (finding reverse preemption and holding, there "is no question that the FAA does not relate specifically to the business of insurance"). This is particularly so with respect to Colorado, where the General Assembly enacted a statutory scheme for the "comprehensive regulation of insurance trade practices" with the intent to "***oust federal regulation*** from the business of insurance" pursuant to the Act. *Showpiece Homes Corp. v. Assurance Co. of Am.*, 38 P.3d 47, 52 & n.3 (Colo. 2001) (emphasis added).

For these reasons, the Act defeats any argument that the insurance policy in this matter comes within the

FAA. Even the case cited by Petitioner, *Kong v. Allied Professional Insurance Co.*, 750 F.3d 1295 (11th Cir. 2014), agrees "the FAA does not relate to insurance." *Id.* at 1303. *Kong* applied the FAA to an arbitration provision—not an insurance appraisal clause, *id.* at 1299 n.1—because doing so would not have impaired Florida law governing insurance, *id.* at 1304. But here, even the *Kong* court would apply the Act and decline to apply the FAA. That is so given that Colorado's insurance code explicitly seeks to "oust federal regulation from the business of insurance" pursuant to the Act. *Showpiece Homes*, 38 P.3d at 52 & n.3. Because Petitioner never proved at trial the FAA's interstate-commerce element, and it is legally impossible for him to do so, he cannot obtain any relief in this matter based on the petition's question presented.

IV. The opinion below is correct, rendering certiorari review pointless

This Court should deny certiorari review for the further reason that the Colorado Court of Appeals reached the correct result. It is well-established that appraisals are not arbitrations, under both federal and state law across the United States. Appraisal is "traditionally thought of as a means of quantifying a loss, and not a way to resolve disputes over . . . coverage, or liability[.]" 12 Jeffrey E. Thomas et al., *New Appleman on Insurance Law Library Edition* § 149.07[1][b], at 149-101 (2018). "Appraisals are usually very informal. Appraisals usually do not involve an exchange of information or meeting between appraisers." *Id.* § 149.07[1][f] at 149-104. "Unlike a judicial, or even an ***arbitration*** proceeding, the appraisal process generally does not allow each side to 'make its case,' or present evidence to the other appraiser or the umpire." *Id.* at

149-104 to -105 (emphasis added). In sharp contrast with appraisal, arbitration "is a quasi-judicial proceeding." *Id.* § 149.07[2][a] at 149-108. "Arbitration is a more formalized procedure than either mediation or appraisal." *Id.* Unlike appraisals, arbitrations typically do resolve coverage, liability, and damages. *See id.*

In ascribing error to the Colorado Court of Appeals, Petitioner cites as his lead authority a published Tenth Circuit case that cuts against him. Pet. 6, 9, 10, 12–15, 17 (citing *Salt Lake Tribune Publishing Co., LLC v. Mgmt. Planning, Inc.*, 390 F.3d 684 (10th Cir. 2004)).[1] Petitioner's reliance on *Salt Lake Tribune*, however, continues to be puzzling, given that the appraisal process there did ***not*** qualify as an arbitration under the FAA. 390 F.3d at 686. *Salt Lake Tribune* reasoned that, when a contract

1. The petition also relies on the over-90-year-old inapposite case of *Hardware Dealers' Mutual Fire Insurance Co. of Wisconsin v. Glidden Co.*, 284 U.S. 151 (1931), for the proposition that this Court has strongly suggested that "appraisals like this one are arbitrations." Pet. 11. That is not correct, for multiple reasons. First, *Hardware* nowhere addresses the FAA, much less whether an appraisal qualifies as an "arbitration" under the FAA. Federal courts have distinguished *Hardware* on this basis. *See, e.g.*, *Rastelli Bros., Inc. v. Netherlands Ins. Co.*, 68 F. Supp. 2d 440, 445 (D.N.J. 1999). Instead, *Hardware* discusses the constitutionality of the appraisal process from the statutory Minnesota Standard Fire Insurance Policy. 284 U.S. at 155. Second, the Minnesota Supreme Court subsequently clarified that the appraisal process from the Minnesota statutory fire policy is not an arbitration under its state-law equivalent to the FAA. *Oliver v. State Farm Fire & Cas. Ins. Co.*, 939 N.W.2d 749, 753 & n.3 (Minn. 2020). The very process from *Hardware* on which the petition relies is not an arbitration.

does not expressly require arbitration, the court "must determine if the process at issue sufficiently resembles classic arbitration to fall within the purview of the FAA." *Id.* "Central to any conception of classic arbitration is that the disputants empowered a third party to render a decision settling their dispute." *Id.* The appraisal in *Salt Lake Tribune* was not an arbitration because it "would by no means definitively settle the dispute between" the parties. *Id.* Instead, the appraisal "[a]t most . . . supplied a data point that the parties could use in establishing the exercise price." *Id.*

Other federal courts have reached the same outcome as *Salt Lake Tribune* by finding that insurance appraisals are not arbitrations. The Sixth Circuit observed that "an appraisal provision in a property insurance policy is not controlled by the FAA because appraisal differs significantly from arbitration." *Evanston Ins. Co. v. Cogswell Properties, LLC*, 683 F.3d 684, 695 (6th Cir. 2012); *see also Dwyer v. Fidelity Nat'l Prop. & Cas. Ins. Co.*, 565 F.3d 284, 286–87 (5th Cir. 2009); *Prien Props., LLC v. Allstate Ins. Co.*, No. 07–CV–845, 2008 WL 1733591, at *2 (W.D. La. Apr. 14, 2008); *Rastelli Bros., Inc. v. Netherlands Ins. Co.*, 68 F. Supp. 2d 451, 453–54 (D.N.J. 1999); *Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1061–62 (5th Cir. 1990).

Here, applying *Salt Lake Tribune* confirms the correctness of the Colorado Court of Appeals' conclusion that the subject insurance appraisal is not an FAA arbitration. The Travelers appraisal provision does not allow the appraisal panel to finally settle or resolve disputes or determine an ultimate amount of damages to be paid, unlike an arbitration. Pet. App. 2a–3a. Similar

to the provision in *Salt Lake Tribune*, and as the opinion below concluded, the appraisal outcome under Travelers' policy "would by no means definitively settle the dispute between" Travelers and its insured, 390 F.3d at 690, given that the insurance appraisal outcome pertains to only one element of the claim—the amount of loss—and a loss amount does not determine what, if anything, must be paid. Moreover, as the opinion below correctly noted, the appraisal process here does not definitively yield a final and binding settlement of the parties' dispute because it does not "lay out a definitive mechanism of reaching a final and binding figure as to the loss amount," to say nothing of Travelers' and GSL's overall dispute. Pet. App. 16a. Relying on prior law observing that an appraisal process "will not settle the parties' disagreement over the amount of the loss if no two [appraisers or an appraiser and an umpire] can agree," the opinion below noted that there is no other, more definitive mechanism for resolving the dispute in the appraisal clause. *Id.* And because no further mechanism exists to resolve an impasse, an insurance appraisal lacks an arbitration's finality and binding nature regarding the scope of the dispute. *Id.* The opinion below noted that Travelers' appraisal provision was "even less definitive than those that didn't pass muster in *Salt Lake Tribune*." *Id.*

The petition identifies no reversible error in this reasoning. The petition, for instance, nowhere shows any pathway to finality when the appraisers and umpire ultimately disagree. *Id.* at 10–16. Instead, in a circular fashion, Petitioner suggests that, in such a situation, "the ***FAA*** fills the gap." *Id.* at 13 (emphasis added). This circular reasoning obliquely concedes the Colorado Court of Appeals' point. Without ***assuming*** the FAA already

applies to appraisals (and thus "fills the gap"), the petition cannot ***prove*** it.

The potential for a third appraisal participant—an umpire—to enter the fray and outvote one of the appraisers does not affect the reasoning of the opinion below. That scenario, too, blazes no definitive path to finality. The Colorado Court of Appeals cited case law addressing this scenario. It noted the possibility that an appraisal process, such as Travelers' process here, "under which a decision must be 'agreed to by any two [of the appraisers ***and the umpire***]' will not settle the parties' disagreement over the amount of the loss if ***no two*** can agree." Pet. App. 14a (emphasis added; brackets in the opinion below). The opinion below thus already accounts for the petition's (incorrect) argument that the potential for an umpire ensures finality. It does not. Adding a third appraisal participant (i.e., an umpire) does not ensure the three of them will resolve the dispute any more than the two appraisers provide that assurance.

Unable to locate any definitive path to finality in the appraisal clause, the petition next argues that classic arbitrations offer no such path, either. Pet. 15–16. This argument backfires. As the petition itself acknowledges, arbitration rules provide for the replacement of arbitrators who are unable or unwilling to perform the duties of the office, *id.* at 16 n.10, and, of course, deciding the issues submitted for determination and issuing an award is one of those duties.[2] By contrast, insurance appraisers owe no

2. *See, e.g.*, The Code of Ethics for Arbitrators in Commercial Disputes, Canon V(A) (Mar. 1, 2004) ("The arbitrator should, after careful deliberation, decide all issues submitted for determination."),

such duty, and certainly not under Travelers' appraisal clause. This point, which the petition cited as one of its central arguments for review, actually points in the opposite direction and weighs against granting review.

The opinion below correctly concluded Travelers' appraisal clause does not require the appraisal process to reach final resolution. It therefore does not have the characteristics of an arbitration. Because the opinion below is correct, there is no point in this Court granting certiorari review.

V. The opinion below is unsuitable for certiorari review because it has no wider importance

Finally, the petition claims it presents a question that is "critically important to the" entire "world of dispute resolution." Pet. 8. Not so. The opinion below is unpublished. Such opinions are not available electronically in Westlaw to practicing lawyers or judges and do not create precedent. And because the opinion below is unreported, the inability to cite it as authority prevents it from having any wide impact.

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at https://adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf; *id.*, Canon V(C) ("An arbitrator should not delegate the duty to decide to any other person").

CONCLUSION

The petition should be denied.

Respectfully submitted,

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