No. 20-895

In The
Supreme Court of the United States

SCOTT A. SELDIN, Individually and as a Trustee of the Seldin 2002 Irrevocable Trust, dated October 9, 1993, *et al*.,

Petitioners,

v.

ESTATE OF STANLEY C. SILVERMAN, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nebraska

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners claim that the underlying arbitration suffers two fatal flaws that implicate entrenched circuit splits. The splits alleged do not actually exist, and this Court has denied review of other petitions raising these questions. For its part, this Petition is plagued with vehicle problems. The Court should deny the Petition.

First, Petitioners ask whether "public policy" may invalidate an arbitration award. But this Court already has decided that the grounds for vacatur in the Federal Arbitration Act ("FAA") are "exclusive"—and public policy is not among them. The lower courts that have applied that decision have not, in practice, diverged in their application of it. In any event, this is not the case to address that issue because, among other reasons, this award did *not* violate public policy.

Second, Petitioners allege a split on the question what constitutes "evident partiality" by an arbitrator when he has an undisclosed conflict of interest. But the split is again illusory (or academic, at best). Moreover, there was no *undisclosed* conflict here—the parties expressly agreed to the conduct which the Petition alleges *ex post* constitutes wrongdoing. Perhaps for that reason, Petitioners did not raise this ground as a basis for vacatur of the award until this Petition.

The questions presented are:

(1) Whether the Court should reconsider its prior decisions that the statutory bases in the FAA for

QUESTIONS PRESENTED—Continued

vacating an arbitration award are "exclusive" and instead find—in a holding broader than any lower court to-date—that courts may vacate arbitration awards that violate "public policy;" and

(2) Whether the Court should opine on the scope of the FAA's "evident partiality" exception to the confirmation of arbitration awards, even though that question was not raised below and is not implicated in this case because there was no undisclosed conflict of interest, and despite the fact that there is no real circuit split on the legal standard that governs this issue.

PARTIES AND RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, Respondents are Estate of Stanley C. Silverman; Theodore M. Seldin, individually and as trustee of the Theodore M. Seldin Revocable Trust, dated May 28, 2008; Howard Scott Silverman, as trustee of the Amended and Restated Stanley C. Silverman Revocable Trust, dated August 26, 2006; Silverman Holdings, LLC, a Nebraska limited liability company; SCS Family, LLC, a Nebraska limited liability company; TMS & SNS Family, LLC, a Nebraska limited liability company; Sarah N. Seldin and Irving B. Epstein, as trustees of the Theodore M. Seldin and Sarah N. Seldin Children's Trust, dated January 1, 1995; Uri Ratner, as trustee of the Stanley C. Silverman and Norma R. Silverman Irrevocable Trust Agreement (2008), dated April 10, 2008; John W. Hancock, Irving B. Epstein, and Randall R. Lenhoff, as trustees of the Theodore M. Seldin and Sarah N. Seldin Irrevocable Trust Agreement (2008), dated May 12, 2008; and Seldin Company.

Each Respondent states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

STATUTES

INTRODUCTION

Neither question presented merits the Court's review, which perhaps is why this Court recently has denied review of both questions when raised in other petitions. The Petition overstates the circuit splits it alleges and ignores myriad vehicle problems that preclude review of those questions in this case.

The Court already has answered the first question presented—whether the bases for review of an arbitration award spelled out in the FAA are exhaustive, or whether courts may expand them by judicial fiat to include a "public policy" exception that appears nowhere in the statute—with a resounding no. In *Hall Street Associates, L.L.C. v. Mattel, Inc*., 552 U.S. 576 (2008), the Court squarely held that courts may vacate an award *only* for one of the statutorily prescribed reasons in 9 U.S.C. § § 10-11. *See id.* at 584. That holding aligns with the FAA's plain text and purpose.

The Petition claims that other cases—which predate *Hall Street* and arise under a separate statute governing labor arbitrations—allow for a public-policy exception to the confirmation of FAA awards. But this confuses the Court's precedents and conflates separate statutes that serve different aims. The Petition then alleges a split among the lower courts post-*Hall Street* that does not actually exist.

Worse still, this case does not even raise the first question presented because the underlying arbitration award does not actually violate public policy. Petitioners claim that Nebraska state law prohibits an award

of "double damages," but no such award was made here. Rather, the arbitrator awarded two sets of damages flowing from two separate injuries—a merits determination that cannot be reviewed on appeal under any standard, and a request for error correction that does not merit this Court's intervention.

Finally, review of the first question is not warranted because the Nebraska Supreme Court correctly decided this question.

As to the second question presented—whether "evident partiality" by an arbitrator requires a party to show actual bias, as opposed to the appearance of bias, in order to vacate an award under 9 U.S.C. § 10(a)(2)—this too is not cert-worthy. The lower courts' decisions do not actually lead to conflicting results.

Moreover, under *any of the standards* adopted by the courts below, there was no "evident partiality" here, because the arbitrator *disclosed* the alleged conflict on the record. The parties expressly agreed to proceed in the manner the arbitrator described. Only after losing do Petitioners bemoan the conduct to which they consented.

Indeed, this Petition is the first time Petitioners have sought to invalidate the underlying arbitration award on the basis of evident partiality. Through hundreds of pages of post-arbitration briefing before the arbitrator, the district court, and the Nebraska Supreme Court, Petitioners never raised this argument. Instead, they sought vacatur on a basis they now abandon—alleged arbitrator *misbehavior* under 9 U.S.C.

§ 10(a)(3). But changing horses at the cert-stage to (attempt to) implicate a circuit split is no basis for a grant, and this Court should not consider in the first instance a question nowhere raised below.

STATEMENT OF THE CASE

A. Protracted Arbitration.

In this nearly seven-year saga, Petitioners litigated, arbitrated, and then litigated again before finally losing. But a long-running dispute does not a cert-worthy petition make.

1. In 2010, the parties' prior business relationship ended with an agreement to separate their interests through competitive bidding and to arbitrate any disputes. Pet.App.3a-4a. Pursuant to that agreement, the parties asserted claims against each other and commenced arbitration. Pet.App.4a.

Almost immediately, Petitioners attempted to avoid the arbitration to which they had agreed. Petitioners filed three lawsuits in Nebraska state court, seeking alternatively to litigate their arbitrable claims or to replace the arbitrator. Pet.App.4a. All three lawsuits were dismissed. *Id*. Petitioners sought to disqualify the arbitrator, which the AAA denied. *Id.* The beleaguered arbitrator subsequently resigned and the AAA appointed a replacement. *Id.*

In April 2017, the arbitrator issued a final award after vetting the claims for more than three and a half

years. Pet.App.46a-47a. This concluded an exhaustive process involving "protracted discovery and sixty-one separate . . . case management conferences . . . followed by arbitration hearings spanning fourteen months and fifty-three hearing days, during which fifty-eight fact and expert witnesses testified and 1,985 exhibits were admitted[.]" Pet.App.6a. The arbitrator issued preliminary findings after "each of eleven bifurcated hearings," and then allowed the parties to seek reconsideration. *Id.* After all of that, the arbitrator issued a "final Interim Award" and again invited the parties to challenge it. *Id.* While each side prevailed on some claims, Respondents were the net prevailing parties in the amount of $2,997,031. *Id.*

2. On one claim, the arbitrator awarded $3,135,681 in damages against Petitioners for fraud under the Arizona Securities Act ("Act") related to an investment in securities of a company called Sky Financial. Pet.App.6a.

At the damages stage, the parties disputed whether Respondents must tender the securities to recover rescissionary damages under the Act and, if so, to whom. Pet.App.5a. Petitioners argued that tender *after* the damages hearing would be untimely, so Respondents disclosed their intention "to tender to the Arbitrator" before the hearing. E2-I, 214. On the first day of the hearing, Respondents "requested that the arbitrator take possession of Sky Financial as a form of interpleader so as to permit the award of the asset to the appropriate party after a determination was made." Pet.App.5a-6a.

Respondents tendered an assignment "to Eugene R. Commander, as Arbitrator, for purposes of effectuating the relief to be awarded." E2-L, 486-88. "The relief contemplated was the award of the asset to the appropriate party after a determination had been made." Pet.App.18a.

Petitioners reviewed the tender and asked questions about it. *See* E10-4, 64-74. The parties agreed that the arbitrator would accept post-trial briefing to guide his final disposition of the assignments. *Id.* at 73-74. Petitioners, orally and on the record, consented to the arbitrator taking temporary possession of the assignments. Pet.App.19a. As agreed, the parties later submitted post-trial briefs, each arguing that the securities should be awarded to them. E1-OO, 445-47.

In the final award, the arbitrator acknowledged that he had accepted the assignments "as a form of temporary interpleader for the limited purposes stated in the record." E1-QQ, 462. He rejected Petitioners' tender defense. *Id.* at 463. Finding that the securities should be awarded to Respondents, the arbitrator entered an order ensuring that all "tendered" interests would revert to them. *Id.* Between the tender and the final award, Petitioners filed 131 pages of briefing with the arbitrator—and never accused him of partiality or misconduct in connection with the temporary interpleader process. E2, 292-320, 340-87, 446-75; E1, 407-49.

3. The arbitrator separately awarded $1,962,528 against Petitioners for breach of fiduciary duty. Pet.

App.6a. This award also related to Sky Financial but arose from a different harm. Under an operating agreement, an entity called SVP was entitled to receive acquisition, disposition, and management fees from Sky Financial. E1-W, 290, 300. Petitioner Millard Seldin became a "passive" member of SVP and thereby reaped millions of dollars in fee income. *Id.* The arbitrator held that Millard had a duty to disclose this opportunity to Respondents but failed to do so. E1-W, 304, 307. The damages awarded for this breach represent the portion of the opportunity that Millard should have shared with Respondents. E1-Z, 340-46.

After the damages hearing, Petitioners argued that Respondents should be required to elect either their rescission claim under the Act or their damages claim for breach of fiduciary duty. E2-I, 312-13. The arbitrator rejected this.

B. The Trial Court Denied Petitioners' Motion To Vacate And Awarded Attorneys' Fees To Respondents.

Respondents timely moved to confirm the arbitration award and Petitioners later moved to vacate it. Pet.App.6a.

As to the first question presented, the Petition argues that the arbitration award violates public policy by awarding double damages. Pet.7; 10-11. But Petitioners did not make that argument to the arbitrator or the trial court. Instead, Petitioners made a different public-policy argument, attacking the arbitrator's

factual finding by arguing that Respondents "suffered no damages" because they "made a significant profit" from Sky Financial, E50, 14; that Respondents failed to prove that Petitioners profited from the corporate opportunity, *id.* at 15; that the arbitrator failed to apply offsets, *id.* at 17; and that the award violated Nebraska law governing pre-judgment interest, *id.* at 19-22.

As to the second question presented, Petitioners did not levy an evident partiality challenge under 9 U.S.C. § 10(a)(2). Although they cursorily cited this Court's partiality jurisprudence, they argued that the award should be vacated for "alleged *misbehavior* on the part of the Arbitrator for accepting the Sky Financial Securities to hold until his determination of an award," under 9 U.S.C. § 10(a)(3). Pet.App.61a (emphasis added).

The trial court held that any argument "that the arbitrator was not legally or ethically permitted to accept tender of the Securities as a form of temporary interpleader" was "waived" because it was "never presented to the Arbitrator." *Id.* at 58a-59a. The court went on to hold on the merits that "the mere appearance of bias" would not suffice to vacate the award, but that "such an appearance" does not exist in this case. Pet.App.63a.

Sternly rebuking Petitioners' litigation tactics, the court held that Petitioners' arguments were "meritless and frivolous," Pet.App.88a, "not credible, legally mischaracterized, fundamentally misplaced, and

repeatedly misleading," Pet.App.92a, unsupported by "rational factual or legal basis," Pet.App.93a, and asserted as "pretext" to bait the court into reversing the arbitrator's "factual and legal determinations." Pet.App.97a.

"[Petitioners] simply refused to abide by the Arbitrator's award even though they had agreed to arbitration." Pet.App.88a. The trial court sanctioned Petitioners $131,184.45 for Respondents' attorneys' fees. Pet.App.99a.

C. The Nebraska Supreme Court Affirms And Awards Respondents Additional Fees.

The Nebraska Supreme Court affirmed, holding "what should have been a fairly simple [confirmation] procedure, [Petitioners] literally turned into a relitigation of the Arbitration itself," and increased the attorneys' fee sanction to $342,860.95. Pet.App.31a; 38a-40a.

As to the first question presented, on appeal, Petitioners switched horses and made a different public-policy challenge to the award. The Nebraska Supreme Court held that "public policy is not a ground for vacating an arbitration award under the FAA," citing *Hall Street*. Pet.App.25a.

As to the second question presented, Petitioners again challenged the interpleader procedure, alleging arbitrator "misbehavior" under 9 U.S.C. § 10(a)(3). Indeed, Petitioners tacitly admitted they could *not* prove

evident partiality: "A party does not need to show an arbitrator engaged in . . . 'evident partiality' to establish 'misbehavior' under the FAA." Brief and Cross-Appeal of Appellee Scott A. Seldin, Individually 25. *See also id.* at 27 ("Scott is not required to prove . . . evident partiality.").

Rejecting this, the Nebraska Supreme Court held that "[Petitioners] expressly agreed" to the assignments they challenged, "and there is no evidence that the arbitrator engaged in misconduct by accepting the transfer." Pet.App.18a. After disposing of Petitioners' argument, the Court proceeded to address "the arbitrator's possible partiality as the purported owner of Sky Financial." Pet.App.20a. It held that it would not apply Nebraska's judicial-disqualification statute to an arbitration, following its precedent rejecting a "judicial ethics" standard under the FAA. Pet.App.21a (citation omitted).

REASONS FOR DENYING THE PETITION

I. The First Question Presents An Illusory Split, This Case Is A Poor Vehicle For Review Of That Question, And The Decision Below Is Correct.

The Court recently denied a petition raising the question whether an arbitration award may be vacated on the basis that the award violates public policy. *See Parallel Networks v. Jenner & Block*, No. 16-1271. The Court should not now grant review for three reasons:

(1) There is no split for the Court to review; (2) Even if there were confusion in this area of the law, this case presents a poor vehicle for reviewing the question presented; and (3) The decision below was correct.

A. The Petition Mischaracterizes And Overstates The Split It Alleges.

The Court clearly and recently held that a reviewing court may vacate or modify an arbitration award *only* for one of the reasons spelled out in FAA Section 10 (governing vacatur) or Section 11 (governing modification). *Hall St.*, 552 U.S. at 584 ("We now hold that § § 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification."). Yet the Petition alleges "widespread confusion" and "stark [division]" among the lower courts regarding whether there exists a "common-law public policy exception" to the confirmation of awards "recognized in *W.R. Grace* and its progeny," cases which pre-date *Hall Street* and interpret an entirely different statute. Pet.16. That characterization misrepresents the case law, conflates two separate statutory regimes, and then compounds those errors by ginning up an illusory split among courts interpreting the FAA.

1. In *Hall Street*, the Court unambiguously held that the FAA's grounds for vacating an arbitral award are "exclusive" and may not be expanded by agreement of the parties. *See Hall St.*, 552 U.S. at 578.

The Petition attempts to two-step around these exclusive bases for vacatur and modification, arguing

that three pre-*Hall Street* cases "squarely recognized a public policy exception" to the confirmation of arbitral awards. *See* Pet.19. But all three of these decisions—*W.R. Grace*, *Misco*, and *Eastern Associated Coal*—involve arbitrations arising from collective bargaining disputes governed by the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), and therefore fall *outside* the ambit of the FAA. None of these cases considered, much less applied, the FAA's exclusive language regarding the bases for review of awards, so their usefulness in resolving the question presented is limited, and certainly not "squarely" relevant.

This Court recognizes that FAA § 1 excludes labor arbitrations from its reach. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537 (2019). The reason the FAA does not apply to labor arbitrations is because they are governed by a separate statute, the LMRA, which implicates distinct policy issues.

The LMRA evinces a policy preference for enforcing arbitration provisions in labor agreements to facilitate the peaceful resolution of disputes without economically disruptive labor strikes. *See Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 455 (1957) ("[T]he agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike" and "federal courts should enforce these agreements[.]"). Enforcing the arbitration of labor disputes is "part and parcel of the collective bargaining process itself." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960); *see also id.* ("A major factor in achieving industrial peace

is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement," since "arbitration is the substitute for industrial strife."); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 54 (1974) ("The primary incentive for an employer to enter into an arbitration agreement is the union's reciprocal promise not to strike.").

To this end, the public-policy exception for labor arbitrations is narrow and serves as a limited check on a particular "arbitrator's own notions of industrial justice" where that conflicts with well-defined and dominant public policy. *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

The FAA, on the other hand, ensures courts recognize arbitration awards in a broader civil context, allowing private parties to contract for arbitration as a cheaper and quicker alternative to the courts. The FAA evinces a clear preference for enforcing arbitration awards and *by statute* circumscribes the bases on which such awards may be altered. The FAA was enacted to address "widespread judicial hostility to arbitration," to enshrine in statute "a liberal federal policy favoring arbitration[.]" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citation omitted). "The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id.* at 344.

Burying the lede, the Petition acknowledges (as it must) that *W.R. Grace*, *Misco*, and *Eastern Associated*

Coal each arose "in the context of labor arbitration," but goes on to argue that "they apply in other contexts as well[.]" Pet.20. But the LMRA decisions are limited by their terms to arbitrations arising from collective bargaining agreements. *See W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers of Am.*, 461 U.S. 757, 766 (1983) ("[A] court may not enforce *a collective bargaining agreement* that is contrary to public policy.") (emphasis added); *Misco*, 484 U.S. at 44 (same); *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62 (2000) (same).

Moreover, although "the federal courts have often looked to [the FAA] for guidance in labor arbitration cases," the reverse is not necessarily true, *see Misco*, 484 U.S. at 40 n.9, since the public-policy concerns undergirding these separate statutory regimes are not coextensive. *See id.*; *Hall St.*, 552 U.S. at 582.

Nor is it clear why the broader reach of the FAA should be limited by the narrower focus of the LMRA. In interpreting arbitration provisions in collective bargaining agreements, "courts must fashion [rules of federal common law] from the policy of our national labor laws," *Textile Workers Union*, 353 U.S. at 456; *see Misco*, 484 U.S. at 40 n.9, both to reflect the policies underlying those particular laws and because the LMRA is textually silent on what standards reviewing courts should apply.

That stands in stark contrast to the broader policies animating the FAA and Section 10's "exclusive" list of "statutory grounds" for vacatur. *Hall St.*, 552

U.S. at 578. The Petition's conflation of the LMRA's and the FAA's standards—and the aims animating those statutes—creates confusion where none need arise.

2. After misrepresenting this Court's precedents, the Petition overstates any confusion among the lower courts. The cases that the Petition claims demonstrate a deep and dangerous split illustrate no such thing.

The Petition alleges "[f]ive courts—the Second, Fourth, Seventh, and Ninth Circuits," and "the Alaska Supreme Court" have upheld a "public-policy exception in post-*Hall Street* FAA decisions." Pet.16. But the decisions the Petition cites do not go nearly that far, and certainly do not suggest an entrenched and intractable split. None of these cases embraces the broad characterization of the case law the Petition articulates—that there is a public-policy exception that allows for review of FAA awards. If a split of authority exists at all, it is not as deep as the Petition alleges.

a. *Titan Tire Corp. of Freeport, Inc. v. United Steel Workers Int'l Union*, 734 F.3d 708 (7th Cir. 2013) did not arise under the FAA, but is yet another LMRA arbitration case about labor-specific public policy concerns. That case resolved whether a company's payment of union officials' salaries violated "the plain meaning of Section 302 [of the LMRA]" prohibiting such payments. *Id.* at 712. Because the LMRA-governed arbitration award would itself have violated the LMRA, the court vacated it. *See id.* at 729. Holding that an award is invalid if it would violate the statute

governing its issuance is a far cry from invalidating an FAA award on the basis that it violates public policy in some way unrelated to the FAA.

b. The Petition also misrepresents two Fourth Circuit cases. The Fourth Circuit expressly has left open the question whether manifest disregard for the law (not "public policy") exists "*either* as an independent ground for review *or* as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10." *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012) (emphases added).

But the answer to that question does not matter, because the arguments presented in *Wachovia Securities* failed regardless. *See id.* ("Whether manifest disregard is a 'judicial gloss' or an independent ground for vacatur, it is not an invitation to review the merits of the underlying arbitration."). In other words, in some future case that actually addresses the issue, the Fourth Circuit may decide that "manifest disregard" is just a judicial gloss on Section 10's exclusive grounds for vacatur under the FAA but, *even if manifest disregard means more than that*, it cannot mean wholesale reconsideration of damages determinations on the basis of public policy.

The Petition also cites an unpublished, nonbinding Fourth Circuit decision for the proposition that that court "continue[s] to apply" the public-policy exception post-*Hall Street*. *See* Pet.16 (citing *Wells Fargo Advisors, LLC v. Watts*, 540 F. App'x 229, 232 (4th Cir. 2013)). But there the court *affirmed* a *denial* of a

motion to vacate, expressly noting that the appellant presented no "basis for vacating this portion of the arbitration award on public policy grounds." *Id.* at 231. This is not obviously inconsistent with a "judicial gloss" on Section 10 that retains its exclusive basis for vacatur.

c. The Petition points to no Second Circuit case in which that court has invalidated an arbitral award on the basis of public policy post-*Hall Street*.

The single case the Petition does cite, *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444 (2d Cir. 2011), denied a petition to vacate an award on the basis of public policy, stating that "[n]one of the grounds articulated in FAA § 10(a) is applicable[.]" *Id.* at 453–54. The court reiterated that even vacatur for manifest disregard for the law—which the Petition attempts to warp into a broader "public policy" exception—means no such thing. That language "does not . . . sanction a broad judicial power to set aside arbitration awards as against public policy." *Id.* at 452 (quoting *W.R. Grace*, 461 U.S. at 766).[1]

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[1] Another Second Circuit case confirms that manifest disregard does not encompass the public-policy exception the Petition advocates. *See T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010) (Manifest disregard applies "in those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent," and "the award should be enforced, . . . if there is a *barely colorable justification* for the outcome reached.") (internal quotations and citations omitted).

d. The Petition argues that the Ninth Circuit has embraced a public-policy exception to the confirmation of FAA awards. But again, a close review of these cases suggests something different and less severe—a mix of messy and distinguishable decisions, none of which obviously creates a split.

Matthews v. National Football League Management Council, 688 F.3d 1107, 1111 (9th Cir. 2012) is expressly a LMRA case involving a labor dispute. It cites neither the FAA nor *Hall Street*.

Comedy Club, Inc. v. Improv W. Assocs., 553 F.3d 1277 (9th Cir. 2009) characterizes "manifest disregard" as the Ninth Circuit's description of Section 10(a)(4)'s prohibition on arbitrators who "exceed their powers." *Id.* at 1290. It is thus *not* an extra-statutory basis for vacatur when an award violates "public policy." *Id.* at 1281.

In *DeMartini v. Johns*, 693 F. App'x 534 (9th Cir. 2017), the Ninth Circuit confirmed in an unpublished opinion that "manifest disregard" is that court's articulation of Section 10(a)(4), *see id.* at 536, and made plain it is a high standard that legal error alone does not meet. There was no public-policy violation that prevented confirmation of the award in that case. *Id.* at 538. The court even cited *Hall Street* and noted that "Sections 10 and 11 of the FAA provide the 'exclusive

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Moreover, the Second Circuit in *T.Co Metals* (as in *Schwartz*), concluded that the "manifest disregard claim ultimately fails on the merits[.]" *Id.* at 342.

grounds' for vacating or modifying an arbitration award." *Id.* at 539.

e. The Petition also relies on a single unpublished, non-precedential decision of the Alaska Supreme Court. *See Dunham v. Lithia Motors Support Servs., Inc.*, No. S-15068, 2014 WL 1421780 (Alaska Apr. 9, 2014). There, the court merely adopted what it believed was the Ninth Circuit's law on manifest error, with no discussion whether that ground for vacatur survives *Hall Street*. *See id.* at *4. The court ultimately declined to invalidate the award on the basis of public policy. *Id.* at *9.

In short, the Petition gins up a split and then exaggerates it in two respects. First, the split is not as deep as the Petition claims—it is entirely possible that the Fourth, Second, and Seventh Circuits, and the Alaska Supreme Court, might align their decisions with the other side of the alleged split if they squarely considered the question presented. And while the Ninth Circuit's case law may be somewhat messier, it is not obvious whether even that court has squarely held that public policy alone can invalidate an arbitral award post-*Hall Street*.

Second, the Petition's characterization of these cases as expressing a "public policy exception" is overbroad: Even those lower courts that consider "manifest disregard for the law" a potentially viable basis for vacatur (though they have not invoked it to actually invalidate an award) do not frame the question in terms of "public policy," but rather ask the more targeted

question whether an arbitrator has directly considered and specifically rejected otherwise binding law, while acknowledging there is *no* place for wide-ranging judicial re-examination on the merits.

Here, the arbitrator considered the law on a question squarely within the scope of the arbitration provision, reached a conclusion, and then awarded damages flowing from the breaches found. Petitioners simply disagree with the conclusion the arbitrator reached (and his calculation of damages) and seek to re-litigate those questions.

B. This Case Is A Poor Vehicle For Review Because The Award Does Not Violate Public Policy And Petitioners Did Not Timely Raise That As A Basis For Vacatur.

This case is a poor vehicle for review of question one because the arbitration award here did not violate public policy as a matter of Nebraska law and the question whether that issue was even raised below implicates a lurking jurisdictional concern.

1. Petitioners argue that the damages awarded violate Nebraska's prohibition against "punitive, vindictive, or exemplary damages," because the arbitrator improperly allowed Respondents a "double recovery" for prevailing on "two inconsistent theories" of harm. Pet.7; 10-11; *Abel v. Conover*, 104 N.W.2d 684, 688–90 (Neb. 1960) (citing Neb. Const., art. I § 3; art. VII § 5).

But, under Nebraska law, this award is *not* punitive and amounts to no double recovery. The arbitrator awarded two sets of damages to compensate for two separate harms. Petitioners concede Respondents alleged two injuries—Millard's "wrongful investment" of jointly owned assets in Sky Financial, and that Millard "absconded with a corporate opportunity by not asking them to participate in Sky Financial's management and earn certain fees and compensation." Pet.7-8.

Thus, the arbitrator "awarded [Respondents] $1,962,528 in damages for their lost corporate opportunities claims, as well as an additional $3,135,681 in recessionary [sic] damages for the securities violation claims." Pet.App.6a. As Nebraska law permits, these were two measures of compensatory damages for what the arbitrator perceived as "two separate wrongs" that "arose out of different obligations and different operative facts." *deNourie & Yost Homes, LLC v. Frost*, 893 N.W.2d 669, 682 (Neb. 2017) (claims for fraudulently inducing and also breaching the same contract were not inconsistent so as to require an election of remedies). No doubt, Petitioners' view of the harms was different. But twice the arbitrator considered and rejected that view. E2-I, 312-13; E1, 342, 364, 429-30, 467, 470-71.

Whether claims require an election of remedies is a quintessential merits question entrusted to a factfinder's "wide discretion." *Bryant Heating & Air Conditioning Co. v. U.S. Nat'l Bank of Omaha*, 342 N.W.2d 191, 195 (Neb. 1983). Reviewing courts should not disturb such merits determinations. *See United*

Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 568 (1960) (Courts "have no business weighing the merits of the grievance[.]"). That is "especially true" where the challenged decision relates to "formulating remedies," because arbitrators must be afforded "flexibility in meeting a wide variety of situations." *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).[2]

Each of the three LMRA decisions cited by the Petition affirms that courts may not review an arbitration award's merits. *See W.R. Grace*, 461 U.S. at 764; *Misco*, 484 U.S. at 36; *E. Associated Coal*, 531 U.S. at 68. "[W]here it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect[,]" and even "serious error does not suffice to overturn his decision." *Misco*, 484 U.S. at 38.

The arbitrator disagreed with Petitioners' view of the claims and awarded damages accordingly. That judicial review of this determination would "exceed[ ] the authority of a court" has been settled law at least since *Misco*, *see* 484 U.S. at 45, and remains the view of every

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[2] Moreover, under Nebraska law, even if the damages award were *wrong*, that would not make it *punitive*. *Distinctive Printing & Packaging Co. v. Cox*, 443 N.W.2d 566, 574 (Neb. 1989) (punitive damages are those awarded to punish and deter); *Singer Mfg. Co. v. Fleming*, 58 N.W. 226, 227 (Neb. 1894) ("penalty" is an award that has "no element of compensation"). A tribunal awards a "penalty" only when it determines "the actual damages" and then "arbitrarily require[s] the defendant to pay" more than that. *Abel*, 104 N.W.2d at 690.

lower court to have considered the question, including every jurisdiction allegedly on the wrong side of the post-*Hall Street* split.[3]

2. Even if this question otherwise were cert-worthy, this case is plagued with a lurking jurisdictional issue that makes it a bad vehicle. Petitioners' public-policy challenge was not timely raised.

The FAA includes a strict three-month limitation by which a dissatisfied party may notice a motion to vacate or modify an arbitration award. *See* 9 U.S.C. § 12. Petitioners raised a public-policy argument—a different public-policy argument than the one they raise now—for the first time in opposition to Respondents' motion to confirm, filed twenty-two days after the three-month statutory deadline. E50, 13-22, 25.

Lower courts have held that "a party may not assert a defense to a motion to confirm that the party could have raised in a timely motion to vacate, modify, or correct[.]" *Sanders-Midwest, Inc. v. Midwest Pipe Fabricators, Inc.*, 857 F.2d 1235, 1237–38 (8th Cir. 1988) (collecting cases); *Choice Hotels Int'l, Inc. v. Shiv Hosp., L.L.C.*, 491 F.3d 171, 177–78 (4th Cir. 2007); *Cigna Ins. Co. v. Huddleston*, 1993 WL 58742, at *11 (5th Cir. 1993).

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[3] *See Int'l Bhd. of Elec. Workers, Local 97 v. Niagara Mohawk Power Corp.*, 143 F.3d 704, 716 (2d Cir. 1998); *E.I. DuPont de Nemours & Co. v. Grasselli Emps. Indep. Ass'n of E. Chicago, Inc.*, 790 F.2d 611, 617 (7th Cir. 1986); *DeMartini*, 693 F. App'x at 537; *Dunham*, 2014 WL 1421780, at *6.

Because this deadline is statutory, it should not be extended by the lower courts (nor ignored by the Court here). *See Argentine Republic v. Nat'l Grid Plc*, 637 F.3d 365, 368 (D.C. Cir. 2011) ("Every court to have considered this question has held that Rule 6(b) may be used only to extend time limits imposed by the court itself or by other Federal Rules, but not by statute."). The Nebraska Supreme Court agreed that the three-month statutory period was "jurisdictional," Pet.App.15a, although it went on to hold that this requirement was procedural—a decision arguably at odds with the FAA and other courts.

If this Court wants to consider whether public policy can form a basis for challenging an arbitration award, it should do so in a case in which the party challenging the award timely raised that issue.

C. The Decision Below Is Correct.

The Court also should decline review because the decision below is correct. *Hall Street* and the text of the FAA make this clear.

1. *Hall Street* is readily applicable to the question presented. The question the Court resolved in *Hall* Street (whether the parties to an arbitration could agree to expand judicial review of an award beyond § § 10–11) and its answer (no) resolve the question raised here. There, parties sought for themselves the power to expand judicial review of an award. Here, Petitioners seek that same authority for the courts. But *Hall Street* turned not on *who* sought expansion of

the grounds for vacatur but on *whether* such expansion was permissible at all. 552 U.S. at 586 ("[T]he FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration" because "the text compels a reading of the § § 10 and 11 categories as exclusive.").

Adding new categories for vacatur "would rub too much against the grain of the § 9 language," which "carries no hint of flexibility." *Id.* at 587. Federal courts "must grant" an order confirming an award "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11[.]" 9 U.S.C. § 9; *Hall St.*, 552 U.S. at 587. These statutory grounds "are exclusive[.]" *Id.* at 578. The Court's use of the term "exclusive" boasts no ambiguity.

In short, the arguments that failed in *Hall Street* fail still today. *See Hall St.*, 552 U.S. at 585 (Hall Street argued for "manifest disregard of the law as a further ground for vacatur on top of those listed in § 10[.]"). In holding the line on limited judicial review, the Court explained that the statutory grounds "address egregious departures from the parties' agreed-upon arbitration." *Id.* at 586. Each emphasizes a problem that arises from "extreme arbitral conduct," (also described as "specific instances of outrageous conduct") akin to fraud, *not* "mistake" or "any legal error." *Id.*

Hall Street controls and the Nebraska Supreme Court correctly applied that decision. Indeed, much of *Hall Street*'s language could have been written for this case:

> Instead of fighting the text, it makes more sense to see the three provisions, § § 9–11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process, and bring arbitration theory to grief in post arbitration process.

Id. at 588 (citations and alterations omitted).

2. In other contexts, the Court has made clear that the FAA applies even when it contravenes *federal* public policy. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (Courts must "rigorously enforce" agreements to arbitrate even "for claims that allege a violation of a federal statute, unless the FAA's mandate has been overridden by a contrary congressional command.") (quotation and citations omitted). In *Italian Colors*, the Court enforced an arbitration provision prohibiting class-wide arbitration even though doing so meant that any enforcement of the underlying claim was extremely unlikely (because the expected recovery in an individual arbitration would be dwarfed by the cost of arbitrating). *See id.* at 232.

3. The Petition attempts to ground its public-policy exception in Section 10(a)(4). *See* Pet.20-21. That provision of the FAA allows for vacatur "where the

arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). A plain reading does not support vacatur on the basis that an award violates public policy. Rather, an award may be vacated only for arbitrator misconduct in deciding a question beyond the scope of the arbitration, or otherwise acting in a way unconnected from the arbitration provision for which the parties bargained.

This Court's prior decisions addressing Section 10(a)(4) make clear that it does not tolerate the broad reading the Petition invokes. Section 10(a)(4) imposes "a heavy burden." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013). It is "not enough . . . to show that the [arbitrator] committed an error—or even a serious error." *Id.* (quoting *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010)). Where an arbitrator reaches a decision "even arguably construing or applying the contract," the arbitral award stands, "regardless of a court's view of its (de)merits." *Id.* (citation omitted).

Section 10 focuses on arbitrator "*misconduct* rather than *mistake*[.]" *AT&T Mobility*, 563 U.S. at 350–51 (emphasis added). Only if "the arbitrator acts outside the scope of his contractually delegated authority—issuing an award that simply reflects his own notions of economic justice rather than drawing its essence from the contract—may a court overturn his determination." *Oxford Health Plans*, 569 U.S. at 569 (cleaned up). The reason such a lawless award may be

vacated under Section 10(a)(4) is because "[i]n that situation . . . the arbitrator 'exceeded [his] powers,' for the task of an arbitrator is to interpret and enforce a contract, not to make public policy." *Stolt-Nielsen*, 559 U.S. at 672. Vacatur is permitted "*only* when the arbitrator stray[s] from his delegated task of interpreting a contract, not when he perform[s] that task poorly." *Oxford Health Plans*, 569 U.S. at 572 (emphasis added).[4]

The Petition stretches Section 10(a)(4)'s text beyond its limits. It asserts first that there exists a free-floating basis for vacatur grounded in the background principle that an award may not exhibit "manifest disregard" for the law (a term that appears nowhere in Section 10), and then inflates the argument further to claim that any award contrary to public policy evinces "manifest disregard" for the law and therefore can be a basis for invalidation.

Vacating awards on this basis would allow precisely the sweeping judicial review that the FAA prohibits, thereby undercutting the very reason

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[4] Petitioners' argument that awards which violate public policy exceed an arbitrator's powers because parties cannot agree to violate the law is a red herring. An arbitrator's award of damages is just that—the resolution of legal claims representing the settlement of a controversy. What Petitioners really seek is judicial review of the arbitrator's *reasoning* for the sum awarded, a merits question well beyond the FAA's scope. *See infra* at I.B.1. The review Petitioners seek is broader even than what "manifest disregard" cases contemplate because it would permit vacatur when the arbitrator has not considered and rejected clearly binding, settled law.

arbitration is such a valuable contract right: it allows for swift and low-cost dispute resolution.

II. The Second Question Presented Impacts A Split That Is Academic And, In Any Event, Not Raised Here.

Petitioners also seek review of the standard by which a court may vacate an award on the basis of an arbitrator's "evident partiality" pursuant to 9 U.S.C. § 10(a)(2) for the arbitrator's failure to disclose a conflict of interest. But the "deep" and "longstanding" split alleged, Pet.26, is, at best, academic. Any confusion in the lower courts about the standard that applies to evident partiality is not outcome-determinative. That may be why the Court recently and repeatedly has denied review of this question. *See Monster Energy v. City Beverages*, No. 19-1333; *Stone v. Bear Stearns*, No. 13-959.

Moreover, even if the Court wanted to weigh in, this case would be a curious vehicle to do so, since (1) The arbitrator here had no undisclosed conflict of interest—quite the contrary, the parties expressly agreed to the conduct the Petition now frames as wrongdoing—and (2) Petitioners did not argue "evident partiality" below. Because this case does not present this issue either as a matter of fact (there was no undisclosed conflict) or law (Petitioners did not seek vacatur on that basis), the Court should not review it.

A. The Split Alleged Is Academic And Not Outcome-Determinative.

1. This Court considered the meaning of an arbitrator's "evident partiality" under Section 10(a)(2) in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). There, an arbitrator failed to disclose that a party was a "regular customer" of the arbitrator, whose "patronage was repeated and significant . . . [and] even went so far as to include the rendering of services on the very projects involved in this lawsuit." *Id.* at 146.

On those facts, the Court held that the FAA requires arbitrators to "disclose to the parties any dealings that might create an impression of possible bias." *Id.* at 149. Justice White, joined by Justice Marshall, concurred separately to urge caution in re-litigating alleged conflicts after the fact, because "[t]he judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality," and instead allow the parties to decide for themselves the scope of the "prevailing ethical standards and reputations" that should govern disclosures in advance of arbitration proceedings. *Id.* at 151.

2. Petitioners allege a split on the meaning of "evident partiality" post-*Commonwealth Coatings*, claiming that "[f]our courts—the Ninth and Eleventh Circuits, as well as the highest courts of Alabama and Texas . . . have held that evident partiality must be found when an arbitrator fails to disclose a fact or

circumstance that gives rise to a reasonable impression of partiality." Pet.26-27 (quotation omitted).

This "impression of partiality" test conflicts, allegedly, with eight other lower courts—the First, Second, Third, Fourth, Fifth, Sixth, and Seventh Circuits, in addition to the Nebraska Supreme Court—which require that an award may be vacated only when a reasonable person "would have to conclude that an arbitrator was partial to one party to the arbitration." Pet.27 (quotation omitted). The Petition describes this as an "actual bias" standard. *See* Pet.27-28.

3. The Petition's description of the split it alleges is inaccurate. The cases on the long side of the split *do not* adopt an actual bias standard. In fact, five of the eight courts—the Second, Fourth, Sixth, and Seventh Circuits, and the Nebraska Supreme Court—expressly *reject* an actual bias standard. *See Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) ("[W]e cannot countenance the promulgation of a standard for partiality as insurmountable as 'proof of actual bias[.]'"); *ANR Coal Co. v. Cogentrix of N. Carolina, Inc.*, 173 F.3d 493, 500–01 (4th Cir. 1999) ("[T]he standard for evident partiality" is not "equivalent to proving actual bias."); *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 325 (6th Cir. 1998) (Evident partiality "requires a lesser showing than 'actual bias.'"); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 682 (7th Cir. 1983) ("[I]t is unnecessary to demonstrate . . . that the arbitrator had an actual bias."); *Dowd v. First Omaha Sec.*

Corp., 495 N.W.2d 36, 43 (Neb. 1993) (rejecting "unrealistic" actual bias standard).

The remaining circuits—the First, Third, and Fifth—have not expressly rejected an actual bias standard, but also do not endorse that standard in the cases cited (or otherwise). None of these decisions turn on the difference between actual bias and the appearance of bias.

JCI Communications, Inc. v. IBEW, Local 103, 324 F.3d 42, 51–52 (1st Cir. 2003), turned on the fact that the alleged bias was disclosed to the Party seeking to vacate the award and thus did not constitute evident partiality. The parties were "on notice that the [arbitration] panel would be drawn from members of [the parties'] own and related industries," and, thus, "[m]ere participation by arbitrators from the same industry as a party does not present a facial claim of 'evident partiality.'" *Id.* at 45; *accord Commonwealth Coatings*, 393 U.S. at 148 (Arbitrators "cannot sever all their ties with the business world."). In any event, failure to raise the issue to the arbitrator meant it was waived. *JCI Commc'ns*, 324 F.3d at 52.

Freeman v. Pittsburgh Glass Works LLC, 709 F.3d 240, 254–55 (3d Cir. 2013) held that the alleged conflict—that one party had donated to the arbitrator's political campaign—failed under *both* an appearance of bias and an actual bias standard. *See id.* at 254 ("[U]ndisclosed election support does not establish

'evident partiality,' . . . nor does it create an appearance of bias[.]") (citations omitted).[5]

Finally, in *Cooper v. WestEnd Capital Mgmt., L.L.C.*, 832 F.3d 534, 545 (5th Cir. 2016) the losing party alleged "evident partiality" because JAMS employed a third party with whom the opposing party had a relationship. Failure to disclose information about "a JAMS arbitrator who was not involved in the [underlying] arbitration proceedings" did not constitute evident partiality because "there is no evidence that [the third party] had any relationship with the Arbitrator other than the fact that both serve as JAMS arbitrators." *Id.* at 540, 545. This holding is consistent with either an actual or an implicit bias test for evident partiality.

4. As to the Eighth, Tenth, and D.C. Circuits—which the Petition characterizes as "adopt[ing] mixed or muddled standards," Pet.29, these decisions do not suggest confusion—and certainly do not establish the type of conflict that would merit this Court's intervention.

The Eighth Circuit in *Ploetz for Laudine L. Ploetz, 1985 Trust v. Morgan Stanley Smith Barney LLC* held that whether actual or apparent bias was the appropriate standard did not matter because "[appellant] has not shown [that the arbitrator] had evident

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[5] The court also noted that the alleged conflict was not, in fact, *undisclosed*—"campaign funds are a matter of public record," and one could "view all contributions to [the arbitrator's] campaign after a five-minute internet search[.]" *See id.* at 255.

partiality under any of them[.]" 894 F.3d 894, 898 (8th Cir. 2018).

Likewise, *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 682 (D.C. Cir. 1996) did not turn on the difference between actual and apparent bias, but rather addressed whether an arbitrator must make affirmative inquiries to uncover a possible conflict of which the arbitrator was not otherwise aware. That question is far afield of the one presented here.

Ormsbee Development Co. v. Grace, 668 F.2d 1140 (10th Cir. 1982) likewise does not create a split. There, the court held that "[a]rbitrators are, of course, obligated to disclose possible bias[.]" *Id.* at 1147. The Court never addressed the difference between actual and apparent bias and in fact expressly relied on *Commonwealth Coatings* as the correct articulation of the standard, holding that "[t]he nondisclosure complained of . . . does not fall within the impartiality commands of *Commonwealth*, supra." *Id.* at 1150.[6]

In short, even if some loose language in lower-court decisions might suggest a slight divergence of authority on the proper standard, in practice these differences do not matter. Any confusion is not an intractable and irreconcilable split that merits this Court's intervention. Unless and until the lower courts decide that the standard of review for adjudicating

[6] The Tenth Circuit also has underscored that *disclosed* conflicts of interest cannot constitute evident partiality. *See Pub. Serv. Co. of Okla. v. Burlington N. R.R.*, 69 F.3d 548, 1995 WL 640375, at *5 (10th Cir. 1995).

"evident partiality" actually affects their narrowly circumscribed post-arbitration review, this Court should not intervene.

B. The Question Presented Was Not Raised Below And Is Not Implicated By This Case.

This case does not raise the question what constitutes "evident partiality" by an arbitrator because, *in all versions of the test*, evident partiality flows from an arbitrator's *undisclosed* conflict of interest. The split alleged assumes an undisclosed conflict of interest and then asks by what standard that undisclosed conflict should be disqualifying.

Here, the alleged conflict of interest—the arbitrator's decision to allow Respondents to interplead to him the assignment of shares, ownership of which the arbitrator decided in the arbitration—was contemporaneously disclosed, openly discussed, and agreed to by both parties on the record.

That undoubtedly explains why Petitioners nowhere alleged below that the arbitrator suffered from the "evident partiality" that 9 U.S.C. § 10(a)(2) prohibits. Rather, Petitioners sought to invalidate the arbitral award on a totally unrelated basis (which they abandon now)—arguing arbitrator "misconduct" under 9 U.S.C. § 10(a)(3). But, as the trial court held, any argument "that the arbitrator was not legally or ethically permitted to accept tender of the Securities as a form of temporary interpleader" was "waived" because it

was "never presented to the Arbitrator." Pet.App.58a-59a.

1. The Petition glosses over the fact that the difference between actual and apparent bias is not implicated here. As the Petition itself describes the short-side of the split—the side it claims Nebraska should be on but is not—these courts "have held that evident partiality must be found when an arbitrator *fails to disclose a fact*" that could give the impression of bias. Pet.26 (emphasis added).

There is no such undisclosed fact here. The arbitrator accepted tender of the securities "as a form of interpleader" after full disclosure, discussion on the record, and consent by Petitioners. Pet.App.5a-6a; 18a-19a; 59a-60a. The tender was memorialized by a document received in evidence that explained precisely the interest the arbitrator received, the capacity in which he received it ("as arbitrator"), and the purposes for which he received it ("effectuating the relief to be awarded"). E2-L, 486-88. The securities were tendered back to Respondents only after the arbitrator determined liability on the merits. E1-QQ, 463.

After consenting to the tender, Petitioners participated in a three-day damages hearing and subsequently filed 131 pages of briefing with the arbitrator, never once suggesting that the tender to which they had agreed could constitute a possible conflict of interest. Because this case does not involve non-disclosure, it does not present any question under *Commonwealth Coatings*.

Faced with full knowledge of the tender and acquiescence to it—but having lost on the merits of their claims—Petitioners now allege that the arbitrator did not disclose his "belief" that he had acquired the securities "in his personal capacity" until he issued the final award. Pet.9-10.

That is not a fair characterization of the record. In the final award, the arbitrator acknowledged that he had accepted the assignments "by agreement of the Parties as a form of temporary interpleader for the limited purposes stated in the record." E1-QQ, 462. Then, after rejecting Petitioners' "tender" defense, the arbitrator, "individually and d/b/a Gene Commander Inc., a Colorado corporation, disclaim[ed] and release[d] any and all right, title and interest in any and all membership interests that were or *could have been* the subject of the Original Assignments. And *to the extent deemed necessary*, the Arbitrator hereby reassigns any and all such interests back to the assignors." *Id.* at 463 (emphasis added). Nothing in this language conflicts with the arbitrator's earlier statement that his possession of the assignments was temporary and for the limited purpose of deciding the merits of the damages in dispute.

Petitioners cite "Nebraska judicial ethics law," to allege that this "personal interest" should have disqualified the arbitrator. Pet.34. That statute provides for judicial disqualification "[i]n any case in which" the judge "is a party or interested." Neb. Rev. Stat. § 24-739. "The word 'interested' in that statute has long been interpreted as one of a pecuniary nature." *State*

v. Gillette, 357 N.W.2d 472, 476 (Neb. 1984). But Petitioners do not allege that the arbitrator acquired a pecuniary interest in the case—*i.e.*, a pecuniary interest in deciding the case one way or the other. *See* Pet.App.64a. Nor could they. *No party* believed that at the close of the arbitration the arbitrator could have awarded the securities *to himself*. Rather, it always was understood that the securities would be assigned to whichever party won their claim. The arbitrator never had any pecuniary interest in the case and *even if* the Nebraska Supreme Court had applied that standard here, Petitioners would still lose.

2. It is likely for that reason that the Petitioners nowhere below argued evident partiality as a basis for vacatur.

The district court stated that "[n]o conflict or failure to disclose is alleged in this case." Pet.App.64a. Rather, Petitioners argued that the award should be vacated for "alleged *misbehavior* on the part of the Arbitrator" pursuant to 9 U.S.C. § 10(a)(3). Pet.App.61a (emphasis added). The district court addressed evident partiality only because Petitioners cited bias cases to support their misbehavior argument. *See* Pet.App.63a.

Petitioners again argued arbitrator misbehavior, not evident partiality, on appeal. Pet.App.16a. The Nebraska Supreme Court likewise addressed evident partiality, in dicta and as an aside, only because of the cited bias cases. *See* Pet.App.20a-21a. Because Petitioners raise this issue for the first time now (in an

attempt to implicate an alleged split of authority), the Court should not consider it. This Court is one "of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and it does not review issues that were not "pressed or passed upon below," *Duignan v. United States*, 274 U.S. 195, 200 (1927); *see also United States v. Williams*, 504 U.S. 36, 41 (1992).

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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