No. 20-895

In the Supreme Court of the United States

SCOTT A. SELDIN, INDIVIDUALLY AND AS TRUSTEE OF THE SELDIN 2002 IRREVOCABLE TRUST, DATED DECEMBER 31, 2002, 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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

BARTHOLOMEW L. MCLEAY
KUTAK ROCK LLP
1650 Farnam Street
Omaha, NE 68102

ROMAN MARTINEZ
Counsel of Record
GREGORY G. GARRE
CAROLINE A. FLYNN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-3377
roman.martinez@lw.com
Counsel for Petitioners

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INTRODUCTION

This petition presents the opportunity to resolve two questions that have long vexed the lower courts: (1) whether the longstanding public-policy exception to the enforceability of arbitration awards was abrogated, *sub silentio,* by *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); and (2) the proper standard for finding an arbitrator's "evident partiality" under 9 U.S.C. § 10(a)(2), after *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). Both questions have generated acknowledged splits. And in both instances, the confusion results from a prior decision of this Court—making it essential that the Court clear up the uncertainty.

Respondents attempt to stave off review by denying both lower-court conflicts. They also offer a host of waiver and other vehicle arguments. But the splits are real, and respondents' manufactured vehicle problems are not. Certiorari should be granted.

ARGUMENT

I. The First Question Warrants Review

Respondents offer no convincing reason why this Court should decline to resolve the conflict over whether courts reviewing arbitration awards subject to the FAA are foreclosed from vacating awards on public-policy grounds.

A. The Split Is Real

The split on the first question presented is acknowledged and entrenched. *See, e.g.*, *Caputo v. Wells Fargo Advisors, LLC*, 2020 WL 2786934, at *3 (D.N.J. May 29, 2020) ("[T]he Circuit Courts of

Appeals have . . . disagreed on whether the public policy exception continues to serve as cognizable means for challenging an arbitration award."); Pet. 18-19.

Respondents' attempts to spin the cases do not show otherwise. They argue that the Seventh Circuit in *Titan Tire Corp. of Freeport, Inc. v. United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union*, 734 F.3d 708 (7th Cir. 2013), reviewed the award under the Labor Management Relations Act (LMRA). But the Seventh Circuit evidently considered the FAA relevant to the scope of its judicial review because it ruled that the "*Hall Street* Court did not overrule *Eastern Associated Coal* or *W.R. Grace*, both of which recognized a public policy exception to the general prohibition on overturning arbitrator awards." *Id.* at 716-17 & n.8. In support, the court cited the circuit's previous decision in *Affymax, Inc. v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 660 F.3d 281 (7th Cir. 2011)—an FAA case that similarly held that a public-policy exception "survives *Hall Street*." *Titan Tire*, 734 F.3d at 717 n.8.[1]

Respondents also emphasize that *Wachovia Securities, LLC v. Brand*, 671 F.3d 472 (4th Cir. 2012), as well as *Comedy Club, Inc. v. Improv West Associates*, 553 F.3d 1277 (9th Cir. 2009), addressed the judicially created "manifest disregard of law" ground for vacatur. *See* BIO 15, 17. That is correct,

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[1] Respondents' argument that the FAA does not apply at all to labor arbitrations, BIO 11, is flatly incorrect. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (holding that 9 U.S.C. § 1's carve-out for "contracts of employment" applies only to transportation workers).

but the point is that both decisions rejected the notion that *Hall Street* eliminated judicially created grounds for vacatur.[2] That's why both circuits' subsequent decisions have continued applying the public-policy exception without considering *Hall Street*. *See DeMartini v. Johns*, 693 F. App'x 534, 537 (9th Cir. 2017) ("[A] court may vacate an arbitration award that is contrary to public policy."); *Wells Fargo Advisors, LLC v. Watts*, 540 F. App'x 229, 231 (4th Cir. 2013).[3]

The same goes for *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444 (2d Cir. 2011). In addressing the "manifest disregard of law" exception, the Second Circuit rejected the *Hall Street* exclusivity argument—and then moved on to consider the public-policy exception without discussing *Hall Street* again. *See id.* at 451-52. Respondents also misleadingly quote *Schwartz*'s language (BIO 16); the Second Circuit was merely clarifying that the power to set aside awards on public-policy grounds is not "broad," but rather limited to public policy that is "well defined and dominant." 665 F.3d at 452.

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[2] To be sure, *Wachovia* did not decide whether the "manifest disregard" ground survives *Hall Street* as a separate ground for review *or* as a "judicial gloss" on the enumerated grounds. 671 F.3d at 483. But petitioners likewise argue that the public-policy exception can be understood as a "gloss" on Section 10(a)(4). Pet. 20-21.

[3] The Alaska Supreme Court agrees with petitioners' interpretation of the Ninth Circuit's approach. *Dunham v. Lithia Motors Support Servs., Inc.*, 2014 WL 1421780, at *6 (Alaska Apr. 9, 2014) (FAA case explaining that "[t]he Ninth Circuit will vacate an award on public policy grounds"); *see also Immersion Corp. v. Sony Comput. Ent. Am. LLC*, 188 F. Supp. 3d 960, 968-69 (N.D. Cal. 2016).

Respondents also protest that the courts in *Wells Fargo*, *DeMartini*, and *Schwartz*—as well as the Alaska Supreme Court in *Dunham*—did not actually end up vacating the awards at issue on public-policy grounds. BIO 15-18. But that is irrelevant. The courts still recognized the exception's continued viability, allowing litigants in those jurisdictions to continue to seek vacatur on that ground.

So respondents do not come close to refuting the entrenched circuit conflict. Only this Court's intervention can solve the post-*Hall Street* "disarray" and "quagmire." *Hoskins v. Hoskins*, 497 S.W.3d 490, 498-500 (Tex. 2016) (Willett, J., concurring).

B. The Issue Is Squarely Presented Here

Respondents' attempts to manufacture vehicle problems are no more compelling.

1. There was no waiver. *See* BIO 6-7, 22. Even respondents concede that petitioners raised the same public-policy challenge raised here on appeal to the Nebraska Supreme Court, and respondents do not deny that the court squarely addressed it. BIO 8. The question presented was "pressed" and "passed upon" below. *United States v. Williams*, 504 U.S. 36, 41 (1992).

Respondents next maintain that 9 U.S.C. § 12 required petitioners to raise their public-policy challenge in their motion to *vacate* the award, not in opposing respondents' motion to *confirm* the award. BIO 22. But the Nebraska Supreme Court rightly rejected this argument. Pet. 15a. Section 12 merely obligates a party to give the other side "notice of a motion to vacate, modify, or correct an award" within three months of the award; it says nothing about raising all substantive arguments in that particular

motion. And although respondents suggest Section 12's deadline may be "jurisdictional," that is (1) incorrect, because Congress did not "clearly state[]" as much, *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013), and (2) irrelevant, because the Nebraska Supreme Court held that petitioners complied with the provision.[4]

2. Respondents also argue that this case is a bad vehicle because the award did not violate Nebraska public policy. BIO 19-22. But the Nebraska Supreme Court deliberately chose not to resolve petitioners' challenge on the merits, *see* App. 25a, instead resting on the broader ground that there is no public-policy exception at all, *see id.* at 22a-25a. It is that categorical holding that warrants this Court's review. If the Court agrees with petitioners that this holding was wrong, then it can remand for the Nebraska Supreme Court to consider petitioners' state-law public-policy challenge.

In any event, respondents are wrong about the merits of that challenge. Aside from respondents' *ipse dixit* assertions that the arbitrator's damages awards "flow[ed] from two separate injuries" and "compensate[d] for two separate harms," BIO 2, 20, they do not meaningfully dispute that the award allowed respondents to recover *both* as owners of Sky Financial and as if they were never owners at all. *See* Pet. 7-9, 25. This is a constitutionally impermissible double recovery. *See Abel v. Conover*, 104 N.W.2d

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[4] Respondents cite cases for the proposition 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." BIO 22. But in all of those cases—unlike here—the party failed to file a timely motion to vacate *at all*.

684, 689-90 (Neb. 1960).[5] But again, this issue of state law should be resolved on remand. It is not an obstacle to certiorari.

C. Respondents' Arguments On The Merits Of The Question Presented Are Premature And Unpersuasive

Respondents also argue that the Nebraska Supreme Court got it right and that *Hall Street* did in fact deny the existence of the public-policy exception *sub silentio*. BIO 1, 10, 23-28. But respondents are wrong that *Hall Street*—which decided only whether parties could supplement the list of grounds in Section 10 *by agreement*—foreclosed other grounds for vacatur, including common-law grounds. *See* Pet. 22-23. Indeed, this Court subsequently recognized in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, that *Hall Street* left open whether such grounds are viable "as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur." 559 U.S. 662, 671 n.3 (2010). Respondents never address the point.

Respondents also wrongly insist that this Court's recognition of the public-policy exception in *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757 (1983), *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987), and *Eastern Associated Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57 (2000),

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[5] Because the arbitrator awarded the Sky Financial interests *back* to respondents—notwithstanding his award of rescissionary damages—respondents were actually granted a triple recovery. Pet. 11.

merely represented an "interpret[ation]" of the LMRA. BIO 10. But those decisions do not ground the exception in the LMRA. They explain that the exception derives from the *common law*—citing cases (like *Hurd v. Hodge*, 334 U.S. 24 (1948)) standing for the general proposition that courts cannot enforce illegal contracts. *See W.R. Grace*, 461 U.S. at 766; *Misco*, 484 U.S. at 42. This is why—at least before *Hall Street*—lower courts readily found that the public-policy exception applied in FAA cases outside the labor context. *See, e.g.*, *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001); *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 816 (D.C. Cir. 2007).

Finally, respondents have no answer to the serious federalism concerns flowing from their position. According to respondents (and the Nebraska Supreme Court), a federal statute denies state courts the ability to vindicate a dominant state public policy if the parties' agreement involves interstate commerce. *See* Pet. 21-22, 25-26. This, too, is compelling reason to grant review.

II. The Second Question Warrants Review

This Court should also decide whether the FAA's "evident partiality" ground for vacatur, 9 U.S.C. § 10(a)(2), is met when the facts give rise to a *reasonable impression* of the arbitrator's partiality—or whether the FAA requires a more heightened showing that a reasonable observer *would have to conclude* that the arbitrator was partial.

A. The Split Is Real

The second question asks this Court to resolve the "longstanding, wide-ranging, and intractable judicial

division over evident-partiality doctrine."[6] Courts have repeatedly acknowledged the split. *See, e.g.*, *Ploetz v. Morgan Stanley Smith Barney LLC*, 894 F.3d 894, 898 (8th Cir. 2018) (noting the "absence of a consensus on the meaning of 'evident partiality'"); *Burlington N. R.R. Co. v. TUCO Inc.*, 960 S.W.2d 629, 633-34 (Tex. 1997) (federal and state courts are "divided"); *UBS Fin. Servs. Inc. v. Asociación de Empleados del Estado Libre Asociado de Puerto Rico*, 419 F. Supp. 3d 266, 272 (D. Mass. 2019) ("[T]he Circuits are still split . . . ."). They have emphasized that the confusion stems from *Commonwealth Coatings*. *See, e.g.*, *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 251 (3d Cir. 2013); *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Fund*, 748 F.2d 79, 82-83 (2d Cir. 1984). And they have begged this Court for "guidance" about the proper standard. *See, e.g.*, *Ploetz*, 894 F.3d at 898; *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983); *Morelite*, 748 F.2d at 83 ("[W]e are left in the dark . . . .").

Notwithstanding this disarray, respondents make the sweeping assertion that the differing tests are "not outcome-determinative." BIO 28. But their attempt to dismiss the lower courts' contradictory standards as mere "loose language," *id.* at 33, is simply implausible. A standard requiring challengers to show that the facts give rise to a "reasonable impression" of the arbitrator's partiality is plainly different from one requiring a showing that "a

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[6] Edward C. Dawson, *Speak Now or Hold Your Peace: Prearbitration Express Waivers of Evident-Partiality Challenges*, 63 Am. U. L. Rev. 307, 324 (2013); *see also* Pet. 30 (citing other scholars addressing the confusion).

reasonable person *would have to conclude* that an arbitrator *was* partial to one party." *Morelite*, 748 F.2d at 84 (emphasis added); *see Burlington*, 960 S.W.2d at 633-34 ("[C]ircumstances can convey an impression of partiality without necessarily dictating a conclusion of partiality . . . ."); App. 20a-21a (Nebraska Supreme Court explaining that the "would have to conclude" standard places a "heavy burden" on challengers). Indeed, the distinction is why the courts on the Nebraska Supreme Court's side of the split must explain that they are rejecting the *Commonwealth Coatings* majority's standard as non-binding. *See, e.g.*, *Morelite*, 748 F.2d at 83 & n.3; *Freeman,* 709 F.3d at 251-52.

Respondents point out that some of these courts have nonetheless disclaimed an "actual bias" standard. BIO 30. Petitioners did not assert otherwise. *See* Pet. 28. Petitioners do argue, however, that the practical effect of those courts' heightened standard is to demand such a showing. *See, e.g.*, App. 21a (rejecting petitioners' challenge because "the record contains no evidence that the arbitrator *engaged in* . . . partiality" (emphasis added)). Labels aside, the standards are markedly distinct.[7]

Moreover, respondents do not even try to dispute that courts on their side of the split have rejected a rule holding arbitrators to the same ethical standards as judges—notwithstanding the *Commonwealth Coatings* majority's express instruction to the

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[7] Respondents acknowledge that three circuits on their side of the split have *not* disclaimed an "actual bias" standard. BIO 31. So at most, respondents' parsing of the inter-circuit landscape shows the split is three-sided, not two-sided.

contrary. *See* Pet. 28-29; *Commonwealth Coatings*, 393 U.S. at 148-49 (courts "should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges"). Had the Nebraska Supreme Court not "rejected a 'judicial ethics' standard" for "analyzing the FAA's requirement of 'evident partiality,'" App. 21a, petitioners' challenge—based on the arbitrator's violation of a judicial ethics rule—would have come out differently.[8]

Notably, respondents do not actually defend the lower courts' adoption of the heightened "would have to conclude" standard. *See* BIO 28-38. This is telling. This Court should grant review to establish that the *Commonwealth Coatings* majority's "reasonable impression of bias" standard is controlling, and that the Nebraska Supreme Court wrongly determined it could not hold arbitrators to the same ethical standards as judges. *See* Pet. 31-34.

B. The Question Is Squarely Presented

As with the first question presented, respondents offer a scattershot of arguments to convince the Court that the evident-partiality issue is not cleanly presented. None hits the mark.

1. Remarkably, respondents claim that "this Petition is the first time that Petitioners have sought to invalidate the underlying arbitration award on the basis of evident partiality," accusing petitioners of

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[8] Nebraska law applies judicial ethics rules to arbitrators. *See* Pet. 12-13; App. 20a-21a. But because the Nebraska Supreme Court believed the FAA sets a higher standard for finding evident partiality, it refused to entertain petitioners' challenge based on the arbitrator's violation of Neb. Rev. Stat. § 24-739. App. 20a-21a.

"changing horses" at the cert stage. BIO 2-3. That is not correct. As respondents acknowledge, petitioners invoked Section 10(a)(2) in their briefing both before the Nebraska district court and the Supreme Court. BIO 7; *see also* BIO 37. And the Nebraska Supreme Court clearly understood petitioners to be making an evident-partiality argument: It explained that although petitioners also "us[ed] the term 'misconduct'" in their briefing, "*their argument focuses only on the arbitrator's possible partiality* as the purported owner of Sky Financial." App. 20a (emphasis added). The Court accordingly proceeded to dispose of petitioners' argument under Section 10(a)(2)'s evident-partiality standard. *Id.* at 20a-21a; *see also* App. 63a-65a (district court addressing evident-partiality argument). So once again, the question presented was plainly preserved.

2. Respondents also argue that the facts of this case do not implicate the split because "there [wa]s no . . . undisclosed fact here"; they point out that the arbitrator accepted the Sky Financial ownership interests on the record during an arbitration hearing. BIO 35. But as respondents eventually acknowledge (*see* BIO 36), this argument attacks a straw-man characterization of petitioners' challenge.

Petitioners were of course aware that the arbitrator had accepted the Sky Financial interests in his role *as arbitrator*—akin to "an officer of the court"—such that the assignment was "an act of interpleading." Pet. 8-9. Petitioners did *not* know, however, that sometime afterward the arbitrator formed the belief that he had taken ownership of the Sky Financial interests *in his personal capacity*. Pet. 9-10; *cf. Monster Energy Co. v. City Beverages, LLC*, 940 F.3d 1130, 1136, 1138 (9th Cir. 2019) (finding

evident partiality when arbitrator failed to fully disclose personal interest). The arbitrator did not reveal that fact until his final award, when he "individually and d/b/a Gene Commander, Inc." conveyed the Sky Financial interests to respondents. Pet. 9-10, 34-35. Respondents do not dispute that if the arbitrator did believe he acquired a pecuniary interest, his failure to disclose it and obtain written consent violated Neb. Rev. Stat. § 24-739.[9]

Respondents ultimately disagree with petitioners' reading of the arbitrator's award. *See* BIO 36. But this, too, is a matter that the Nebraska Supreme Court can consider on remand—after this Court provides instruction on the proper legal standard for evident partiality under Section 10(a)(2).

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[9] Although respondents deny the arbitrator ever acquired a financial "interest" in the arbitration for purposes of Neb. Rev. Stat. § 24-739, BIO 36-37, the arbitrator's belief that he personally owned the very property at issue clearly qualifies.

CONCLUSION

The petition should be granted.

Respectfully submitted,

BARTHOLOMEW L. MCLEAY
KUTAK ROCK LLP
1650 Farnam Street
Omaha, NE 68102

ROMAN MARTINEZ
Counsel of Record
GREGORY G. GARRE
CAROLINE A. FLYNN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-3377
roman.martinez@lw.com

Counsel for Petitioners

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