No. _____

In the
Supreme Court of the United States

CHRISTOPHER N. CAPUTO,
Petitioner,

v.

WELLS FARGO ADVISORS, LLC,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In seeking vacatur of an arbitral award under the Federal Arbitration Act, U.S.C. Title 9 ("FAA"), §10(a)(4), Petitioner invoked *W.R. Grace & Co. v. Local Union*, 461 U.S. 757 (1983); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987); and *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000), where the Court laid down a public policy exception to the deference normally accorded to arbitral awards. These cases preclude judicial enforcement of arbitral awards that would enforce contractual provisions violating positive law, as determined by courts *de novo*.

The arbitral award at issue in this case would enforce a contractual forfeiture of earned remuneration that is expressly unlawful, void, and unenforceable under applicable state labor statutes. The Third Circuit nonetheless held this Court's public policy exception inapplicable both because such statutes supposedly did not embody sufficiently well-defined and dominant public policy and because *de novo* judicial review was supposedly inapplicable where the public policy issue was presented to the arbitrators. Each of these alternative holdings conflicts sharply with decisions by other Circuits applying this Court's public policy exception. The questions presented are:

1. Whether this Court's public policy exception is inapplicable to an arbitral award enforcing contractual provisions that are expressly illegal, void, and unenforceable under applicable statutes, on the supposition that such statutes do not embody sufficiently well-defined and dominant public policy.

2. Whether this Court's public policy exception to judicial deference toward arbitral awards is displaced by a deferential manifest-disregard-of-law standard of judicial review where, as here, the public policy issue was presented to the arbitrators.

3. Whether this Court's public policy exception is applicable under the FAA in light of *Hall Street Associates v. Mattel*, 552 U.S. 576 (2008) (holding that grounds set out in the FAA for vacating arbitral awards are exclusive), as to which lower courts are split.

DIRECTLY RELATED PROCEEDINGS

Caputo v. Wells Fargo Advisors, LLC, No. 3:19-cv-17204-FLW-LHG, U.S. District Court for the District of New Jersey. Judgment entered May 29, 2002; reconsideration denied Sept. 11, 2020.

Caputo v. Wells Fargo Advisors, LLC, No. 20-3059, U.S. Court of Appeals for the Third Circuit. Judgment entered May 9, 2022; rehearing denied June 17, 2022.

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Petitioner Christopher Caputo respectfully petitions for a writ of certiorari to review the judgment below of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Third Circuit below (App. 1-14) is not published in the national reporter but is available at 2022 WL 1449176. The opinions of the District Court below (App. 15-36 and 39-53) are likewise unpublished but are available at 2020 WL 2786934 and 2020 WL 5494685.

JURISDICTION

The judgment sought to be reviewed (App. 1-14) was entered May 9, 2022, and a timely petition for rehearing was denied June 17, 2022 (App. 66-67). This Court has jurisdiction to review the judgment, on writ of certiorari, under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 10(a) of the Federal Arbitration Act ("FAA"), 9 U.S.C. §10(a), is set out on the appendix hereto, as are the following provisions of the labor statutes of Missouri and New Jersey, respectively: Mo. Stat. §§290.080, 290.110, 407.911, 407.912.3, 407.913, and 407.915.2; N.J. Stat §§34:11-4.1, -4.2, -4.3, -4.4, -4.7, -4-10, -56a1(d), -57, -58.2.a, and -58.6.

STATEMENT OF THE CASE

1. *Contractual Framework.* Petitioner ("Caputo"), a securities broker, entered an employment contract with Respondent ("Wells Fargo"), a securities broker-dealer, in February 2011.

CA3.App.377-382. Under the contract, Caputo was promised more than the standard percentage-payout from gross commissions he generated, which was roughly 40% (the remainder retained by Wells Fargo), to the extent he earned up to four production-bonuses provided for in the contract, which were payable in monthly installments (with interest) over some ten years. The dollar amount of each such production-bonus was designed (based on gross-commission revenue generated by Caputo for the 12 months preceding the contract) to increase Caputo's percentage-payout from his gross commissions by 2.5% per year for ten years.[1] Caputo satisfied all contractual conditions for earning each such production bonus, as by generating gross-commission revenue over a 12-month period that exceeded the corresponding contractual benchmark. Wells Fargo's own testimony at the arbitral hearings below confirms that Caputo fully earned each of the four promised production bonuses,[2] which were awarded

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[1] Each production-bonus was calculated as 25% ($240,459) of Caputo's "Trailing 12 Production" ($961,835), payable over ten years (2.5% per year). *See* CA3.App.383-384 (Wells Fargo's formula for bonuses offered to Caputo); CA3.App.378-379, 388-391 (production-bonuses promised and awarded to Caputo by Wells Fargo); App. 69, 71 (arbitral testimony by Wells Fargo witness Citro).

[2] Wells Fargo witness Citro, who administered its production-bonuses, testified at the arbitral hearings below that:

> production-based bonuses ... are essentially another *set of bonus installments* that can be *earned* if at a *particular point in time* certain thresholds and requirements are met. ... [T]he production-based bonuses will say, if you meet x of your pre-hire trailing 12 *on this date*, you can

to him in writing shortly after he earned them (CA3.App.388-391), and paid in part, until Caputo was discharged at will by Wells Fargo in December 2014.

However, the Wells Fargo employment contract with Caputo contained the following standard forfeiture clause at issue in this case:

> Your receipt of continued payments on your Bonuses is conditioned upon your continued active employment with Wells Fargo.... In the event your employment terminates for any reason other than death or Disability ... then you will no longer be eligible to receive any further payments on any Bonuses and you will *forfeit* any unpaid installments or other amounts due under the Bonuses.

CA3.App.380, ¶5.b.[3] The contract also provided that Caputo was dischargeable at will, "at the discretion

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then *earn* another subsequent *installment period* of bonuses.

App. 71. *See also* App. 69 (Citro was responsible for developing *promissory notes* "for production-based bonuses that <u>were earned</u>" and then advanced in full before scheduled installment payments, as in this case); App. 74-75 (Citro testimony that promised production-bonuses presented "opportunity to *earn* ... [such] *loans*", which are addressed *infra*). All emphasis in quotations herein is by counsel unless otherwise indicated.

[3] Wells Fargo witness Citro acknowledged in his arbitral testimony below that the purpose of paying fully-earned production-bonuses in installments over time, subject to forfeiture, was to deter brokers from leaving Wells Fargo — by holding their earnings hostage. App. 72-73. Caputo first received the Wells Fargo employment contract for his review

of Wells Fargo ... at any time for any reason." CA3.App.381, ¶10. Although the production-bonuses were payable in installments, Wells Fargo advanced to Caputo the full amount of each production-bonus shortly after it was earned and awarded, subject to a promissory note reflecting a 'loan' that need not be repaid out-of-pocket (repayment installments were offset fully by corresponding production-bonus installments) unless the above-quoted forfeiture clause was triggered. *See* CA3.App.203-206, 388; note 2, *supra*. In the event of any such 'default' under the promissory notes, Wells Fargo reserved power to immediately declare the notes due in full, and to collect them accordingly.

2. *Related Labor Law.* The employment contract and promissory notes addressed above are expressly governed by the law of Missouri (CA3.App.205, 382), where Wells Fargo is based, although the law of New Jersey, where Caputo was employed by Wells Fargo, may also apply to the extent (if any) it provides greater protection to employees than Missouri law.[4] Labor statutes of both Missouri and New Jersey provide that employers shall pay in full, within one month after it

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only after he had already resigned from his prior position with UBS Wealth Management ("UBS"). The standard terms of Wells Fargo's employment contract for securities brokers were not negotiable.

[4] *See Instruction Sys., Inc. v. Computer Curric. Corp.*, 614 A.2d 124, 133, 135 (N.J. 1992) (rejecting contractual choice-of-law to "'preserve the fundamental public policy of the ... state *where its statutes afford greater protection*'"). This choice-of-law approach has never been challenged in this case.

is earned, all commission-based remuneration earned by employees, and shall not withhold any such remuneration from employees who leave employment for any reason.[5] Importantly, the statutes expressly provide that any contractual provision to the contrary "*shall be void*."[6] Further, violation of the statutes gives rise to potentially substantial

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[5] *See* Mo. Stat. §§290.080, 290.110, 407.912.3, 407.913; *State v. Missouri Pac. Railway*, 147 S.W. 118, 127, 129 (Mo. 1912) ("no valid contract can be made ... which conflicts with [Mo. Stat. §290.080]") (concurring opinion: conflicting contract "would be void" as "against public policy ... expressed by the statute"); *Lapponese v. Carts of Colorado, Inc.*, 422 S.W.3d 396, 398-401 (Mo. App. 2013) (affirming recovery for "commission bonus[es]" under Mo. Stat. §§407.912-913); *Service Purchasing Co. v. Brennan*, 42 S.W.2d 39, 41-42 (Mo. App. 1931) (remuneration "earned [vested]" under Mo. Stat. §290.110 "whether ... then due and payable or not"); N.J. Stat. §§34:11-4.2, -4.3, -4.4; *Bogage v. Display Group 21, LLC*, 2018 WL 1073354, at *5, 8-9 (N.J. App. 2-28-2018) (statute requires payment-in-full of employee's 'wages' within one month after "'rightfully earned'" irrespective of any agreement to defer such payment); *Martelet v. AVAX Tech., Inc.*, 2012 WL 1570964, at *9 (E.D. Pa. 5-3-2012) (New Jersey labor statute barred contractual forfeiture of earned retention-bonus); *Bintliff-Ritchie v. American Reins. Co.*, 2007 WL 556895, at *4-5 (D.N.J. 2-15-2007) (commissions become "'*earned*'" and "*vested*" upon "completion of sale[s]" *even* if employee earning such commissions is discharged before they are contractually payable) (thus, statute precludes "*delayed payment scheme* to deprive [employee] of the commission which he had earned"), *aff'd*, 285 Fed. Appx. 940 (3d Cir. 2008); *Feldman v. U.S. Sprint Com. Co.*, 714 F. Supp. 727, 728, 731-32 (D.N.J. 1999) (statute barred forfeiture of commission-payout bonus). *See also* notes 6-7, 9 & 17 and accompanying text, *infra*.

[6] Mo. Stat §407.915.2; N.J. Stat. §34:11-4.7. *See also* N.J. Stat. §§34:11-57 & -58.2.a (waiver of liability under labor statute "is contrary to public policy and is void and unenforceable").

statutory damages (mandatory in Missouri) and potential criminal liability.[7]

Caputo urged in the arbitral and subsequent proceedings below that the contractual provisions on which Wells Fargo relied (addressed above) were unlawful, void, and unenforceable under both the Missouri and New Jersey labor statutes referenced above. *See* App. 86 & n.8; CA3.App.148, 163-165, 176-181, 183-184. Notably, Wells Fargo did not substantially dispute this in any of those proceedings. Instead, Wells Fargo focused on the contractual provisions as standard in the securities industry, routinely enforced by arbitrators,[8] and asserted to the arbitrators (and courts) below that no court could substitute its judgment for that of the arbitrators "'no matter how wrong [it] may believe the [arbitral] panel's decision to be.'" App. 135 n.10. The Third Circuit essentially adopted this position below, while assuming that the contractual provisions at issue were void under the applicable state labor statutes, as shown *infra*.

Each such statute reflects "'fundamental policy'" in that "any effort to [contractually] waive or

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[7] Mo. Stat. §407.913, §290.080; N.J. Stat. §34:11-4.10, §34:11-58.6.

[8] *See* App. 119-120; CA3.App.171-174, quoting *Wells Fargo Advisors, LLC v. Watts*, 540 Fed. Appx. 229, 231 (4th Cir. 2013) (Wells Fargo's "bonus agreement and promissory note that the arbitrators enforced ... *are standard agreements in the industry that courts routinely uphold*") (emphasis by Wells Fargo); note 11, *infra* (forfeiture of earned production-bonus installments upon Caputo's resignation from his prior employer, UBS); App. 71, 73 (arbitral testimony by Wells Fargo witness Citro that contractual terms at issue "are very common in the industry").

modify its provisions is unenforceable". *Hugh Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 498-499 (Mo. 1992); *Leisman v. Archway Medical, Inc.,* 53 F.Supp.3d 1144, 1147-1148 (E.D. Mo. 2014) (Mo. Stat. §407.913 reflects "fundamental policy" of Missouri, in conflict with Illinois analogue permitting, but not mandating, exemplary damages); *Carrow v. FedEx Ground Pkg. Sys.*, 2019 WL 7184548, at *6 (D.N.J. 12-26-2019) (New Jersey labor statute enacted "to *void* those arrangements that defy the *public policy* that it embodies"); *Mulford v. Computer Leasing, Inc.*, 759 A.2d 887, 891 (N.J. Super., Law Div., 1999) (the statute embodies "*strong public and statutory policy* ... of protecting payment of employees' duly earned [commission] compensation").

Wells Fargo plainly violated these statutes, and the public policy they embody, when it not only failed to timely pay commission-based remuneration (in the form of annual production-bonuses) already fully earned by Caputo — instead paying such remuneration over some ten years *subject to forfeiture* of unpaid installments — but also when Wells Fargo required Caputo to repay such fully-earned remuneration that was advanced to him in the form of 'loans' that were not payable out-of-pocket (were fully offset by production-bonus installments) unless Wells Fargo invoked its contractual forfeiture-clause, as it did upon discharging Caputo at will in December 2014.[9]

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[9] *See Male v. Acme Markets, Inc.*, 264 A.2d 245, 246-247 (N.J. App. 1970) (any agreement requiring employee to repay earned remuneration would "violate public policy and be invalid" under

3. *Arbitral Proceedings.* In August 2015, Wells Fargo filed arbitral claims against Caputo with the Financial Industry Regulatory Authority ("FINRA"),[10] seeking enforcement of promissory notes assertedly requiring Caputo to repay all post-discharge installments of his fully-earned production-bonuses (as well as his transitional bonus)[11] that had been 'advanced' to him subject to forfeiture, in lieu of outright payment by Wells Fargo. The aggregate

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labor statute); *Snyder v. Dietz & Watson*, 837 F.Supp.2d 428, 445-448 (D.N.J. 2011) (similar); *cf. Beckwith v. UPS,* 889 F.2d 344, 349 (1st Cir. 1989) (similar); *DHR Int'l Inc. v. Charlson*, 2014 WL 4808752, at *6-7 (N.D. Cal. 9-26-2014) (state labor statute "prevents an employer from taking back" earned commission-bonuses "under the guise of recouping an advance").

[10] FINRA is a self-regulatory membership organization comprised of securities broker-dealers such as Wells Fargo. FINRA is the successor to the National Association of Securities Dealers ("NASD"). *See* finra.org.

[11] The transitional bonus provided for in Wells Fargo's employment contract with Caputo was designed to induce him to leave his prior employer, UBS, and undertake over several months to transfer his large clientele to Wells Fargo, by compensating Caputo for the business he brought over to Wells Fargo, and for business he lost or was unable to pursue during the transition, and for substantial deferred compensation he forfeited by leaving UBS, and for substantial financial obligations he thereby incurred under his employment contract with UBS which, like his subsequent employment contract with Wells Fargo, provided for production-bonuses, in the form of forgivable loans, subject to forfeiture if Caputo left UBS, as he did, before the loan was fully forgiven over time. Wells Fargo witness Citro testified at the arbitral hearings below that Wells Fargo's bonus/'loans' to Caputo were "equivalent" to those he received from UBS, except only that the latter were specified as "forgivable loans." App. 74-78.

outstanding principal claimed by Wells Fargo under the promissory notes amounted to $1,663,529,71. App. 119, 133.

Caputo in turn asserted arbitral counterclaims against Wells Fargo, which were subsequently restated and specified in accord with a prehearing order of the arbitral panel. CA3.App.367-374. Caputo asserted contract claims both for Wells Fargo's post-discharge failure to pay him promised installments of his fully-earned production-bonuses, amounting to $821,481 in the aggregate,[12] and for Wells Fargo's confiscation of his personal brokerage account and vested deferred compensation owed him by Wells Fargo, amounting together to at least $27,690, as a set-off against the promissory notes that Wells Fargo sought to enforce. Caputo also asserted a claim under Mo. Stat §407.913, which provides that an employer who "fails to timely pay the … commissions earned by [its] … sales representative *shall* be liable … for [them] … and *an additional amount as if the sales representative were still earning commissions* calculated on an annualized *pro rata* basis from the date of *termination* to the date of payment."[13]

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[12] This claim was predicated on Caputo's assertion that the contractual forfeiture-clause on which Wells Fargo relied was unlawful, void, and unenforceable under applicable state labor statutes.

[13] At the outset, Caputo also asserted a claim under the New Jersey labor statute, which was amended effective August 6, 2019 to provide for statutory damages up to 200% of earned remuneration withheld in violation of the statute. N.J. Stat. §34:11-10.c. As amended, the statute also provides for criminal

Caputo's arbitral counterclaims also included a claim for defamation damages, and expungement of defamatory statements from his public record, under (*inter alia*) Mo. Stat. §409.5-507, which focuses on broker-dealer communications to FINRA that disparage brokers negligently or recklessly.[14] In this regard, Caputo relied below on admissions by Wells Fargo's arbitral witnesses, undisputed by Wells Fargo, that the type of transaction leading to its discharge of Caputo (surrendering a variable annuity to invest the proceeds in mutual funds) did not violate any Wells Fargo policy or regulatory rules; that all such transactions for Caputo's clients that were reviewed contemporaneously by Wells Fargo supervisors were approved by them; that all of Caputo's clients later questioned by Wells Fargo about such transactions confirmed that they were fully-informed and approved in advance; that none of

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liability for knowing violations, stating that "[e]ach week ... any violation ... continues shall constitute a separate and distinct offense." N.J. Stat. §34:11-10.a. Thus, application of N.J. Stat. §34:11-10.c. to Wells Fargo's statutory violations that continued well past August 2019 would not be a retroactive application of the statutory amendment. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 44-46 (2006), followed in *Frontier-Kemper Constr., Inc. v. Director*, 876 F.3d 683, 689 (2017) ("a statute has no retroactive effect where the conduct being regulated begins before a statutory change ... and continues after that change").

[14] Wells Fargo's communications to FINRA disparaging Caputo included a written statement (on form U-5) readily accessible to the public (via brokercheck.finra.org). Among other things, this hampered Caputo's re-employment in the securities industry, and precluded any transitional bonus for payment of Wells Fargo's promissory note claims against Caputo. *Cf.* note 11, *supra*.

Caputo's clients ever complained to Wells Fargo about any such transactions; and that the analysis of such transactions on which Wells Fargo purported to rely in discharging Caputo (which it provided to FINRA, in expanded form, in 2016) was manifestly and fundamentally flawed, ignoring both the high annual costs (fees) of variable annuities and annual capital gains distributions by mutual funds.[15] Notably, while this analysis eventually led to FINRA sanctions against Wells Fargo in 2020 (CA3.App.860-869), FINRA did not bring any enforcement proceeding against Caputo, after deposing him for two days in 2016 based on its interviews of his clients and documents provided by Wells Fargo.[16]

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[15] *See* App. 90-104; CA3.App.1040-1063. Whether or not Caputo was discharged for just cause (which Wells Fargo ultimately did not claim below, *see* App. 120, 129-132) is immaterial to his claims under the applicable state labor statutes. *See* Mo. Stat. §290.110; *Lapponese*, 422 S.W.3d at 404 (Mo. Stat. §497.913 applicable "regardless of the reason" for termination of employment contract); N.J. Stat. §34:11-4.3; *Martelet*, at *4, 9. Otherwise, the Court should consider CA3.App.1040-1063. *Cf. United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 34 & n.6, 44 (1987).

[16] This regulatory history bears out Caputo's position that he was discharged as a sacrificial lamb given Wells Fargo's admitted concern at the time to mitigate its exposure to FINRA sanctions for its lack of an adequate system for monitoring and supervising the type of transaction at issue. *See* App. 90-91 & n.14, 96-97, 112-113. When such sanctions materialized in 2020, Wells Fargo was 'hoist on its own petard' in that it was required to make restitution to clients (most of whom were never Caputo's clients) based on its fundamentally flawed analysis of transactions for Caputo's clients that it submitted to FINRA in 2016.

On July 26, 2019, after eleven days of hearings, a FINRA arbitral panel awarded Wells Fargo $1,663,529.71 (App. 59), precisely the aggregate outstanding principal claimed by Wells Fargo under the promissory notes. Caputo's arbitral counterclaims were denied, as were Wells Fargo's claims for pre-award interest, and attorney fees, in accord with the promissory notes. The arbitral award did not include any rationale, much less explain how it could be reconciled with the state labor statutes invoked by Caputo.

4. *District Court Proceedings.* On August 26, 2019, Caputo filed in the District Court below, pursuant to the FAA, a petition to vacate the arbitral award below, invoking diversity jurisdiction under 28 U.S.C. §1332, as Caputo is a citizen of New Jersey while Wells Fargo is a citizen of Missouri and Delaware. Caputo sought vacatur of the award primarily on grounds that the "forfeiture" clause of Wells Fargo's employment contract with Caputo, and the promissory notes designed to enforce such forfeiture and recoup Caputo's earned remuneration, were expressly void under applicable state labor statutes. Caputo urged that because the award was based on illegal and unenforceable contract provisions, it was subject to *de novo* judicial review under *W.R. Grace & Co. v. Local Union*, 461 U.S. 757 (1983), *Misco*, *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000), and their progeny.

The District Court initially denied vacatur, in its May 29, 2020 opinion (by Wolfson, C.J.), on grounds never raised by Wells Fargo (even in the

arbitration) and thus not initially addressed by Caputo. He undertook to rebut such grounds on his timely motion for reconsideration under Fed. R. Civ. P. 59(e), which was denied on much narrower grounds (upon *de novo* review of the award) in the District Court's September 11, 2020 opinion.

Ironically, the District Court ultimately relied on Wells Fargo's contractual forfeiture-clause, holding that because Wells Fargo discharged Caputo, he supposedly was prevented from fully earning his production-bonuses by (as assertedly required by the forfeiture-clause) remaining employed by Wells Fargo for some ten years after the production-bonuses were awarded. App. 47-49. Only on this basis did the District Court ultimately conclude that enforcement of the arbitral award "does not violate public policies under state labor laws" (App. 49).

Importantly, the District Court overlooked both the admissions by Wells Fargo witness Citro (*see* notes 2-3, *supra*) and case law uniformly holding that such forfeiture-clauses — conditioning payment of earned remuneration on continued employment — are unenforceable under state labor statutes.[17] In

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[17] *See*, *e.g., Kolchins v. Evolution Markets,* 96 N.E.3d 784, 790 (N.Y. 2018) ("any [contractual] provision ... that would operate to deny [former-employee]-plaintiff those [*commission production-bonus*] wages after they were 'earned' [by employee's productivity] based on the *timing of payment* would be *void as against public policy*" under the New York labor statute); *Israel v. Voya Inst. Plan Serv.*, 2017 WL 1026416, at *2-3, 7 (D. Mass. 3-16-2017) (same under Massachusetts labor statute) ("to decide otherwise would ... permit, even encourage, employers to evade the law by imposing lengthy delays on the payment of commissions [production-bonuses fully earned] and conditioning

this light, the District Court's holding is untenable because it would permit a contractual forfeiture-clause to override statutory provisions that prohibit and nullify such contractual clauses as contrary to public policy — thus rendering nugatory the statutory provisions and the public policy they

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the payments on continued employment"); *DHR*, *supra* (same under California labor statute) (contractual condition of continued employment "was not a condition for *earning* the bonuses, as the bonuses had already been earned" when awarded for payment, and the condition "was not something that was entirely within [employee's] control" as he could be discharged at will); *Medex v. McCabe*, 811 A.2d 297, 304-305 (Md. 2002) (contractual condition of continued employment overridden by "*public policy* [underlying Maryland labor statute] that employees have a right to be compensated for their efforts" as "courts across the country" have held under similar statutes) (otherwise employers could avoid paying earned remuneration simply by discharging at-will employees). Missouri and New Jersey law is in accord with these cases. *See* notes 5-6 and accompanying text, *supra.* The District Court cited cases involving only unearned bonuses, such as retention-bonuses or discretionary profit-sharing bonuses (App. 49-52), as opposed to production-bonuses, promised in advance for meeting personal productivity benchmarks. Compare *Israel*, *supra* (production-bonus treated as commission-based 'wages' under state labor statute); *Medex*, at 302-303 (same); *Reilly v. NatWest Mkts. Group*, 181 F.3d 253, 265 (2d Cir. 1999) (same); *cf. Parker v. NutriSystem, Inc.* 620 F.3d 274, 283-284 (3d Cir. 2010) (commissions include flat-amount payments proportional to sales revenue generated by employee), citing approvingly *Yi v. Sterling Collision Ctrs.*, 480 F.3d 505, 508-510 (7th Cir. 2007) (Posner, J.) (gross commission "has to be divided ... somehow" between parties who helped earn it "and the method chosen ... doesn't alter the character of the compensation as a commission").

embody. Caputo timely filed a notice of appeal on October 8, 2020.

5. *Judicial Stay Proceedings.* On October 8, 2020, the District Court denied Caputo's motion to stay enforcement, pending appeal, of its judgment confirming the arbitral award. Caputo filed a motion in the Court of Appeals for such stay on October 26, 2020, after FINRA notified Caputo that unless and until he satisfied the judgment or obtained such stay, or filed for bankruptcy relief, he would be suspended effective October 30, 2020 from association with any FINRA member, and thus from pursuing his livelihood as a securities broker. Wells Fargo opposed any such stay "because it means that [it] must *continue to litigate* this matter while [Caputo] continues ... *delaying* his impending *bankruptcy* petition...."[18] The Third Circuit denied any such stay (even a temporary stay pending resolution of Caputo's motion) without stating its reasons on October 29, 2020. Caputo was thus constrained to file for bankruptcy relief that same day.[19] This case was assigned by the Third Circuit to mediation on October 30, 2020.

6. *Bankruptcy Proceedings.* The Chief Circuit Mediator stayed mediation pending developments in Caputo's bankruptcy case, which were reported by Caputo to the Chief Circuit Mediator and Wells Fargo (which chose not to participate in the bankruptcy proceedings or the mediation) in status reports to which are attached

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[18] Dist.Ct.Dkt.33, p. 11.

[19] *See In re Caputo*, no. 22148-KCF (Bankr. D.N.J.).

pertinent excerpts from Caputo's bankruptcy filings, as well as the bankruptcy trustee's report and orders of the bankruptcy court.

As reflected in the initial such status report, Caputo's chapter 7 bankruptcy filings disclosed that "if [his] appeal is successful" his counterclaims against Wells Fargo "may exceed judgment entered against Debtor" in the District Court below, then amounting to roughly $1.8 million. CA3.App.319, 322, 325. Caputo's counterclaims against Wells Fargo were thus duly scheduled for purposes of their abandonment by the bankruptcy trustee, back to Caputo, under 11 U.S.C. §554(c).[20] As reflected in the second such status report, on February 5, 2021 the bankruptcy court ordered a discharge of Caputo's debt to Wells Fargo under the judgment below, and closed Caputo's bankruptcy case. CA3.App.337-343. As a result, Caputo's counterclaims against Wells Fargo were "abandoned to the debtor" under Bankruptcy Code §554(c) and may be pursued as though Caputo had not filed for bankruptcy.[21]

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[20] *See In re Furlong*, 660 F.3d 81, 87 (1st Cir. 2011) (disclosure of claims by debtor was sufficient to enable trustee to determine whether to investigate further) ("Bankruptcy Code does not require every component of a cause of action to be spelled out on a debtor's schedule"); *In re Kane*, 628 F.3d 631 (3d Cir. 2010) (similar).

[21] *See* Norton Bankruptcy Law and Practice 3d §74:1 ("[a]bandonment under Code §554 removes property from the bankruptcy estate and returns the property to the debtor as though no bankruptcy occurred") ("abandonment occurs nunc pro tunc to the petition date"), §74:3 (under Code §554(c), "abandonment of property that was scheduled but not administered occurs automatically on the closing of the case").

7. *Third Circuit Proceedings Post-Bankruptcy.* The Court of Appeals below had jurisdiction, under 9 U.S.C. §16(a) and 28 U.S.C §1291, of Caputo's timely appeal from the District Court's judgment below. As the Third Circuit recognized below, in its May 9, 2022 opinion by Senior Judge Fuentes (joined by Chagares, C.J., and Bibas, J.), Caputo's arbitral counterclaims may be pursued by him post-bankruptcy, by operation of basic bankruptcy law (*see* note 21 and accompanying text, *supra*), both by pursuing vacatur of the arbitral award and, if the award is vacated, then pursuing the counterclaims as appropriate. As an example, the Third Circuit observed that "vacatur of the arbitration award could result in Caputo receiving the money from his Wells Fargo brokerage accounts, which were placed on administrative hold after Caputo failed to pay ... the Promissory Notes", in holding that "Caputo's [post-bankruptcy] appeal is not moot." App. 6 n.4.[22] As another example, if the award is vacated on the grounds urged here — that it is based on contractual provisions that are unlawful, void, and unenforceable under applicable state labor statutes — then Caputo should be entitled to pursue his claims for statutory damages (and attorney fees) under Mo. Stat. §407.913 or N.J. Stat. §34:11-10.c (*see* note 13 and accompanying text, *supra*).

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[22] Wells Fargo has asserted that the validity of such setoff is unaffected by the discharge in bankruptcy of Caputo's purported debt to Wells Fargo. CA3.App.345-357. All such debt would be void *ab initio*, however, if the arbitral award below is vacated on grounds that the contractual forfeiture-clause (and ancillary promissory notes) on which all such debt is based were void for all purposes under state labor statutes.

Notably, the Third Circuit tacitly rejected the ultimate rationale of the District Court below, which expressly relied on Wells Fargo's contractual forfeiture-clause in confirming the arbitral award.[23] Instead, the Third Circuit held that even if Wells Fargo's forfeiture-clause was void under applicable state labor statutes, such statutes supposedly did not embody public policy sufficiently "'well defined [or] dominant'" for application of this Court's decisions in *W.R. Grace* and *Misco*. App. 9-10. The Third Circuit further asserted in this regard that Caputo "improperly conflate[s] the manifest disregard [of law] and public policy doctrines" (App. 9-10 & n.22), and that "[e]ven if the FINRA arbitration panel got it wrong, it is hard to see how this would be more than legal error" which "we 'may not overrule [as "manifest disregard of ... state labor statutes"] ... simply because [we] disagree....'" App. 10-12.[24] A

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[23] *See* note 17 and accompanying text, *supra*. Thus, the Third Circuit requested supplemental briefing on whether this Court's decision in *Hall Street Associates v. Mattel*, 552 U.S. 576 (2008), affected the Third Circuit's prior case law recognizing *W.R. Grace* and *Misco* as grounds for vacatur of arbitral awards under the FAA, and held oral argument on November 17, 2021.

[24] The Third Circuit itself improperly conflated these doctrines. *See* note 29, *infra*. Caputo does not rely here on manifest-disregard-of-law as grounds for vacating the arbitral award below. Caputo reserves his additional argument below that Wells Fargo's contractual scheme at issue violates public policy underlying federal income tax law. *See* CA3.App.161-162 & n.38 (citing case law); App. 70, 79-80 (related arbitral testimony by Wells Fargo witness Citro); *Nyhus v. Travel Management Corp.,* 466 F.2d 440, 447, 450 (D.C. Cir. 1972) (contracts designed to circumvent tax laws are unenforceable on public policy grounds).

timely petition for panel rehearing or rehearing *en banc* in this case was denied by the Third Circuit on June 17, 2022.

REASONS FOR GRANTING THE PETITION

This Petition should be granted because the decision below strikes at core holdings of this Court in *W.R. Grace*, *Misco*, and *Eastern*, and sharply conflicts with the Court's related decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), as well as with holdings by several other U.S. Courts of Appeals applying those decisions of this Court. Further, the decision below raises additional important questions of federal arbitration law, under this Court's *Hall Street* decision and otherwise, upon which courts are divided.

1. The Decision Below Conflicts Fundamentally with Decisions of This Court Precluding Enforcement of Arbitral Awards Based on Contractual Provisions Prohibited by Statute.

The rubric for vacating an arbitral award on public policy grounds was first articulated by this Court in *W.R. Grace*:

> As with <u>*any*</u> contract, ... a court may not enforce a collective bargaining agreement that is contrary to public policy .... and, in any event, the question of public policy is ultimately one for <u>*resolution by the courts*</u>. If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are <u>*obliged*</u> to refrain from enforcing it.

> Such a public policy, however, must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'

461 U.S. at 766.[25] *Misco* clarified that "[a] court's refusal to enforce an arbitrator's award ... because it is contrary to public policy is a specific application of the more general doctrine ... that a court may refuse to enforce contracts that violate law or public policy" (484 U.S. at 42), as when "specific terms contained in [an] agreement violate public policy." *Id*. at 43. *Misco* left open, however, whether "a court may refuse to enforce an award on public policy grounds *only* when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law." *Id*. at 45 n.12.

Eastern further clarified the rubric for vacating arbitral awards on public policy grounds. First, "the award is not distinguishable from the contractual agreement" on which the award is based. 531 U.S. at 62. Second, of particular importance here, the award should be vacated if it would enforce a contractual provision that "violates positive law", *e.g*., a statute. *Id*. at 63. Thus, any such award

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[25] Arbitration under collective bargaining agreements has been held subject to the FAA, including its vacatur provisions. *See PG Publishing, Inc. v. Newspaper Guild of Pittsburgh*, 19 F.4th 308, 311-312 & n.3, 319-320 (3d Cir. 2021), citing Seventh and Tenth Circuit decisions applying *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). *But see Misco*, 484 U.S. at 40 n.9,

presumably violates "explicit, well-defined and dominant public policy" under *Misco* and *W.R. Grace*. *Id.* Third, this standard is presumably not met absent any such prohibition of a contractual provision to be enforced by the award. *Id.* Thus, the Court held in *Eastern* that where "expressions of positive law embody *several* relevant policies" in tension (such as to discourage drug use but also encourage rehabilitation), and permit discretionary balancing, no single such policy is dominant under *W.R. Grace* and *Misco*. *Id.* at 65.[26]

Under *Eastern*, it was not the province of the court below to weigh whether the statutory prohibition at issue strikes it as insufficiently important to warrant vacatur of the arbitral award. To the contrary, in *Kaiser*, this Court held that where a defense is properly raised under a labor statute provision arguably voiding contractual provisions for which enforcement is sought, "a court must entertain the defense" (455 U.S. at 85-86) irrespective of the general rule that courts "'must defer to the exclusive competence'" of a regulatory agency in such matters. *Id.* at 83-84 ("[w]here the enforcement of private agreements would be violative of ["public policy ... manifested in ... statutes"] ... it is the obligation of courts to refrain from" enforcing such agreements)

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[26] *See also Southwest Regional Council of Carpenters v. Drywall Dynamics, Inc.*, 823 F.3d 524, 534-535 (9th Cir. 2016) ("[w]here ... there are two competing policies applicable with regard to a single matter, neither can be a 'dominant' policy... [that] can drive a public policy refusal to enforce an arbitration award") (drawing on *Eastern*, *supra*). *Compare* note 31, *infra*.

(quoting *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948), cited in *W.R. Grace* and *Misco*).

The decision below conflicts fundamentally, in two distinct ways, with this Court's decisions addressed above. First, it permits enforcement of an arbitral award effectuating contractual provisions that are expressly illegal, void, and unenforceable under applicable statutory law,[27] holding that such law is not sufficiently well-defined or dominant to warrant vacatur of the award.[28] Second, the decision below effectively holds that the public-policy exception, under *W.R. Grace* and *Misco*, to judicial deference toward arbitral awards is displaced in this case by a manifest-disregard-of-law standard of judicial review which is highly deferential to arbitral awards.[29] Further, the decision below conflicts with

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[27] *See* notes 5-7, 9 & 17 and accompanying text, *supra*.

[28] In *United Transp. Union v. Suburban Transit Corp.*, 51 F.3d 376, 381 (3d Cir. 1995), cited below, the arbitral award did *not* assertedly violate any statute or regulation, and the court recognized that *W.R. Grace* and *Misco* would otherwise apply. *Id*. at 381-382 & n.3.

[29] In asserting that "[Caputo's] arguments improperly conflate the manifest disregard and public policy doctrines", the court below quoted *dicta* from *Seneca Nation of Indians v. New York*, 988 F.3d 618, 628 (2d Cir. 2021), that "a court could certainly vacate an arbitration award that interpreted an agreement to require something expressly prohibited by law or statute, insofar as that would show that the arbitrators 'willfully flouted the governing law by refusing to apply it.'" App. 9-10 & n.22. The Third Circuit pointed out in this regard that the quote-within-the-quote referenced a manifest-disregard-of-law standard (invoked in *Seneca*) rather than the public-policy exception (*not* invoked in *Seneca*). By no means does this signify, however, that an arbitral award "requir[ing] something

most (but not all) decisions by other U.S. Courts of Appeals in analogous cases, as shown below.

2. The Decision Below Conflicts with Decisions by Other U.S. Courts of Appeals Mandating Vacatur of Arbitral Awards Enforcing Contractual Provisions Prohibited by Statute.

The decision below that "'[a]n express statutory override'" of the contractual forfeiture-clause enforced by the arbitral award below does not reflect sufficiently "'well defined [or] dominant'" public policy under *W.R. Grace*, *Misco*, and *Eastern* (App. 9-10) conflicts with decisions by other U.S. Courts of Appeals.[30] Thus, in contrast with the Third

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expressly prohibited by ... statute" could be vacated *only* under a manifest-disregard-of-law standard, and *not* under the separate public-policy exception laid down in *W.R. Grace*, *Misco*, and *Eastern*. Thus, the decision below (not Caputo) improperly "conflate[s]" the two by substituting a manifest-disregard-of-law standard for this Court's public-policy exception, at least where, as here, the public-policy issue was presented to the arbitrators.

[30] Like the Third Circuit below, however, the Second Circuit has viewed *Misco* as "pos[ing] a difficult question ... about where to draw the line in determining whether the [asserted] public policy ... is *important enough* to require us to vacate an [arbitral] award." *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 825 (1997) (insufficient that award failed to include remedy mandated by applicable statute). *See also PDV Sweeny, Inc. v. ConocoPhillips Co.*, 670 Fed. Appx. 23, 24 (2d Cir. 2016) (public policy exception applies only to arbitral awards violating "our most basic notions of morality and justice"); *Local 97 v. Niagara Mohawk Pwr. Corp.*, 196 F.3d 117, 127, 131 (2d Cir. 1999) (regulatory mandate deemed too general); *Bevies Co. v. Teamsters*, 791 F.2d 1391 (9th Cir. 1986) (neither federal

Circuit, the Seventh Circuit in *Titan Tire Corp. v. United Steel et al. Workers*, 734 F.3d 708 (2013), mandated vacatur of an arbitral award enforcing a remuneration agreement in violation of a labor statute, declaring that a "*violation of a statute or some other positive law is the clearest example of a violation of public policy*" under *Eastern* and *W.R. Grace*, and that "'no arbitrator is entitled to direct a violation of positive law.'" *Id.* at 716 (quoting *EEOC v. Indiana Bell Tel. Co.*, 256 F.3d 516, 526 (7th Cir. 2001) (*en banc*)).

Similarly, in *Teamsters v. KCI Constr. Co.,* 384 F.3d 532 (2004), the Eighth Circuit vacated confirmation of an arbitral award that indirectly enforced a contractual provision that arguably violated a labor statute, declaring that "[n]otwithstanding our obligation to show great deference to most arbitration awards, we must not enforce illegal contracts" and "[w]e have an absolute 'duty to determine whether a contract violates [the labor statute] before enforcing it.'" *Id.* at 537, quoting *Kaiser*, 455 U.S. at 83. *See also Ace Elec. Contractors v. International Broth. of Elec. Wkrs.*, 414 F.3d 896, 899-900 (8th Cir. 2005) (affirming vacatur of arbitral award enforcing contractual provision that violated state statute, following *W.R. Grace* and *KCI*, *supra*).

Further, the Fourth Circuit mandated vacatur of an arbitral award in *Marrowbone Dev. Co. v. District 17, United Mine Workers*, 147 F.3d 296

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statutory policy nor state statutory prohibition deemed sufficient) (drawing dissent).

(1998), because upon *de novo* review, the Court determined that a contractual provision enforced by the award violated a labor statute that *expressly rendered such contractual provisions void and unenforceable*, thus precluding both "the authority of the arbitrator to legally make the award and ... the ability of the courts to enforce the award" under *Kaiser*. *Id*. at 300.[31] *See also National Railroad Passenger Corp. v. Fraternal Order of Police*, 855 F.3d 335, 338-340 (D.C. Cir. 2017) (affirming vacatur of arbitral award under *Misco* where "the particular contractual provision at issue" violated a statute); *Continental Airlines v. Air Line Pilots Assn*., 555 F.3d 399, 421 (5th Cir. 2009) (mandating vacatur of arbitral award under *W.R. Grace*, *Misco*, and *Eastern* inasmuch as it "comes perilously close to direct conflict with federal regulations" even though it served air-traffic safety); *Jackson Purchase Rural Elec. Coop. v. Local Union*, 646 F.2d 264, 267-268 (6th Cir. 1981) (affirming vacatur of arbitral award that enforced an implied contractual provision for wage deductions in violation of labor statute).

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[31] Public policy is *ipso facto* "well-defined and dominant" under *W.R. Grace*, *Misco*, and *Eastern* where, as here, it is so expressed by such statute. In *State v. Public Safety Employees Ass'n*, 257 P.3d 151, 158-160 (Alaska 2011), the court emphasized that this Court's public policy exception is underpinned by §178(1) of the Restatement, 2d, Contracts, which makes clear that no weighing of public policy is necessary or appropriate, to determine whether a contractual term is unenforceable on public policy grounds, "if legislation provides that it is unenforceable" — in which case "the court is bound to carry out the legislative mandate with respect to the enforceability of the term" (*id*. cmt. a), as this Court held in *Kaiser* and echoed in *Eastern*.

3. The Decision Below Conflicts with Decisions by Other U.S. Courts of Appeals Applying *De Novo* Judicial Review under This Court's Public Policy Exception Where, as Here, the Public Policy Issue Was Submitted to the Arbitrators.

The decision below effectively grafting a deferential manifest-disregard-of-law standard onto this Court's public-policy exception to judicial deference generally accorded to arbitral awards (*see* note 29, *supra*), while supported by a controversial Seventh Circuit decision,[32] conflicts with decisions by other Circuits recognizing that the public-policy exception under *W.R. Grace*, *Misco*, and *Eastern*

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[32] Like the Third Circuit below, the Seventh Circuit has held that notwithstanding this Court's public policy exception, courts have no authority to consider whether an arbitral award (or any contractual provision it would enforce) violates positive law where that question was "put to, and resolved by, the arbitrators." *Baxter Int'l, Inc. v. Abbott Laboratories*, 315 F.3d 829, 832 (7th Cir. 2003) (Easterbrook, J.) (refusing to consider whether contract as construed and effectuated by arbitrators constituted *per se* violation of §1 of Sherman Act). S*ee also id.* at 836 (Cudahy, J., dissenting) ("under the majority's analysis, the rule that unlawful conduct cannot be commanded by arbitrators is consumed by the [supposed] exception that, if the arbitrators themselves say that what they have commanded is not unlawful, then 'their answer is conclusive'"); 325 F.3d 954-955 (dissent by three other judges from denial of rehearing *en banc* in *Baxter* on grounds that it resolves an "important issue" in "conflict[] with any number of Supreme Court and circuit cases" establishing that "questions of public policy are ultimately reserved for the courts" as where arbitral awards, "at least arguably, order the parties to violate the law"); note 36 and accompanying text, *infra* (decisions consistent with *Baxter* by state courts under the FAA).

requires *de novo* application of law by courts, to facts found by arbitrators or otherwise not subject to genuine dispute, to determine whether an arbitral award violates well-defined and dominant public policy. *See PaineWebber, Inc. v. Agron*, 49 F.3d 347, 350 (8th Cir. 1995) ("review[ing] ... [NASD arbitrators'] conclusions *de novo* to determine if they violate public policy"); *Gulf Coast Indus. Wkrs. v. Exxon Co.*, 991 F.2d 244, 249 (5th Cir. 1993) ("public policy exception to our usual deference" to arbitral awards); *E.I. Dupont de Nemours & Co. v. Grasselli Empl. Indep. Ass'n*, 790 F.2d 611, 617 (7th Cir. 1986) ("public policy doctrine allows this Court to decide *de novo* whether the judgment made by the arbitrator ... violates public policy"); *Iowa Elec. Light & Pwr. Co. v. Local Union*, 834 F.2d 1424, 1427 (8th Cir. 1987) ("taking the facts as found by the arbitrator, but reviewing his conclusions de novo").

In direct conflict with the Third Circuit below, the Eighth Circuit has adhered to this line of authority and expressly rejected substituting a deferential manifest-disregard-of-law standard of judicial review where the public-policy issue was presented to and rejected by the arbitrators. *Air Line Pilots Assn. Int'l v. Trans States Airlines, LLC*, 638 F.3d 572, 576, 578 (8th Cir. 2011). Instead, the Eighth Circuit held that under this Court's decision in *Kaiser*, courts "have an absolute duty to determine whether an award violates public policy before enforcing it." *Id.* at 578. This decision by the Eighth Circuit is also faithful to *Misco*, 484 U.S. at 45 & n.11 ("asserted public policy" issue "was a matter for the

arbitrator *in the first instance* to decide" — but subject to *de novo* judicial review, *id.* at 43).

Likewise, in *Titan Tire*, the Seventh Circuit undertook *de novo* judicial review notwithstanding that the public-policy issue presented there had been submitted to arbitration. *See* 734 F.3d at 711, 716-717 (quoting *W.R. Grace* and *Iowa Elec. Light*, *supra*, after citing case law "distinguishing between" a manifest-disregard-of-law standard and the public-policy exception laid down in *W.R. Grace* and *Eastern*). *See also Labor Rel. Div. of Constr. Indus. of Mass., Inc. v. Teamsters*, 156 F.3d 13, 18-19 (1st Cir. 1998) (applying *Misco's* "'public policy' exception" to judicial deference normally accorded to *arbitrator's application of law*); *National R.R. Passenger Corp. v. Consolidated Rail Corp.*, 892 F.2d 1066, 1067, 1070 (D.C. Cir. 1990) (compelling arbitration of public-policy issue, after which parties "may properly put the public policy issue before a court" under *W.R. Grace*).[33]

[33] This Court need not itself necessarily apply any state labor statute or otherwise resolve any counterclaims in this case. Unless the Court is inclined to go further, Caputo asks essentially at least for vacatur of the court decisions below, as in conflict with this Court's decisions in *W.R. Grace*, *Misco*, *Eastern*, and *Kaiser* (as well as their progeny), and a remand for application of those cases, and resolution as appropriate of Caputo's arbitral counterclaims, with such instructions or guidance as the Court may deem fit to provide.

4. The Decision Below Raises Additional Important Questions of Federal Arbitration Law Upon Which Courts Are Divided.

An additional question raised by the decision below is whether the public policy exception under *W.R. Grace*, *Misco*, and *Eastern* is applicable under the FAA in light of the holding in *Hall Street* that §§10 and 11 of the FAA provide the exclusive grounds for vacating or modifying arbitral awards under the FAA. 552 U.S. at 583-585. The court below necessarily so assumed (App. 7 n. 11) because like the Seventh Circuit, the Third Circuit has held, in light of this Court's decision in *Circuit City*, that the FAA is applicable to arbitration under collective bargaining agreements. *See* note 25, *supra*. Thus, the court below was required to adhere to this Court's public policy exception, as applicable under the FAA, because only this Court could determine otherwise, as the Seventh Circuit held in *Titan Tire*, 734 F.3d at 717 n.8.

Moreover, courts that have addressed this issue are in conflict. The Seventh Circuit has recognized that the public policy exception is consistent with *Hall Street* in that arbitrators lack power, under FAA §10(a)(4),[34] to issue awards prohibited by positive law. *Titan Tire*, 734 F.3d at 716-717 & n.8, citing *George Watts & Son, Inc. v.*

[34] Vacatur of arbitral awards is authorized thereunder "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).

Tiffany & Co., 248 F.3d 577 (7th Cir. 2001); *id*. at 580-581 (arbitrators lack power to issue award violating positive law). In the latter regard, *Titan Tire* is consistent with the Fourth Circuit decision in *Marrowbone*, 147 F.3d at 300, and the Sixth Circuit decision in *Jackson*, that an arbitrator "exceeded his authority" by issuing an award enforcing contractual provisions in violation of labor statutes. 646 F.2d at 268. *See also Comedy Club, Inc. v. Improv West Associates*, 553 F.3d 1277, 1287-1288 (9th Cir. 2009) (arbitrator exceeded authority by issuing award contrary to statute rendering awarded relief void).[35]

Other courts have held to the contrary. In *Visiting Nurse Ass'n of Florida v. Jupiter Medical Center*, 154 So.3d 1115 (2014) ("*VNA*"), the Supreme Court of Florida held that under *Hall Street*, an arbitral award subject to the FAA could not be vacated under the public policy exception of *W.R. Grace*, *Misco*, and *Eastern* even if the award enforced illegal contractual kickbacks. *Id.* at 1132. The court also concluded that because, under *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440 (2006), an issue as to the legality of the contract (apart from its arbitration provisions) is arbitrable under the FAA, such issue should not be subject to *de novo* review by courts (154 So.3d. at 1126-1128), despite the declaration in *Buckeye* that such issue "is considered by the arbitrator *in the first instance*." 546 U.S. at

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[35] *Cf. Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.,* 548 F.3d 85, 95 (2d Cir. 2009) (arbitration agreement normally confers no authority to disregard applicable law), *rev'd on other grounds*, 559 U.S. 662 (2010); *Comedy Club,* 553 F.3d at 1281, 1290 (similar).

446. *See also Misco*, 484 U.S. at 43, 45 & n.11 ("asserted public policy" issue "was a matter for the arbitrator *in the first instance* to decide" — but subject to *de novo* judicial review).

Similarly, in *Vargas v. Rigid Global Buildings, LLC*, __ S.W.3d __, 2022 WL 2311620 (Tex. App. 6-28-2022), the court held that under *Hall Street*, an arbitral award subject to the FAA could not be vacated under this Court's public policy exception even if the award was based on a contractual limitations provision rendered illegal and void by statute. *Id*. at *2, 6. In holding that the arbitrator did not exceed his power in disposing of such issue, even if his disposition violated fundamental public policy, the court in *Vargas* asserted (*id*. at *7) that *W.R. Grace* and *Misco* were inapposite because they supposedly involved arbitration not subject to the FAA. *But see* note 25, *supra*.[36] For broad decisions to like effect, *see Seldon v. Estate of Silverman*, 939 N.W.2d 768, 786-787 (Neb. 2020) ("hold[ing] that under the FAA," as construed in *Hall Street*, "a court is not authorized to vacate an arbitration award based on public policy grounds"); *Frazier v. CitiFinancial Corp*., 604 F.3d 1313, 1322 & n.7, 1324 (11th Cir. 2010) (similar broad holding, based on

[36] The Florida Supreme Court made the same seemingly erroneous assumption in the *VNA* case, 154 So.3d at 1128. *VNA* and *Vargas* conflict with *Titan Tire* not only on that issue and the *Hall Street* issue, but also on the distinct *de novo* review issue addressed in the preceding section (point 3).

"categorical language" of *Hall Street*, cited with approval in *VNA*, 154 So.3d at 1131).[37]

This conflict presents important questions of federal law. As an initial matter, because "[s]tate courts ... are most frequently called upon to apply the ... FAA .... [i]t is a matter of great importance ... that state supreme courts adhere to [the FAA]" no less than federal courts. *Nitro-Lift Technologies v. Howard*, 568 U.S. 17, 17-18 (2012); *Vardan v. Discover Bank*, 556 U.S. 49, 59 (2009) (recognizing the "prominent role" of state courts as enforcers of the FAA).

Further, *Nitro-Lift* held that Supreme Court of Oklahoma failed to adhere to the FAA by denying arbitration on grounds that employment-contract

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[37] In *Seldon*, the Supreme Court of Nebraska expressly left intact its post-*Hall Street* precedent applying this Court's public policy exception under Nebraska's version of the Uniform Arbitration Act, which is quite similar in relevant respects to the FAA. In *VNA*, by contrast, the Supreme Court of Florida refused to apply the public policy exception to the similar Florida Arbitration Code (at least unless arbitrators enforced a contract "patently illegal and criminal in nature") because "such an exception would evince resistance to arbitration" (154 So.3d at 1136 & n.14) — indicating that any such public policy exception is preempted by the FAA. *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (FAA "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration"); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341-344 (2011) (FAA precludes judicial decisions holding arbitration agreements "unenforceable as against public policy" based on common law inconsistent with FAA purpose "to ensure the enforcement of arbitration agreements ... so as to facilitate streamlined proceedings").

provisions were "'void and unenforceable as against Oklahoma public policy'" expressed in its statutes, "rather than leaving that determination to the arbitrator *in the first instance*". 568 U.S. at 18-19; *cf.* note 37, *supra*. *Nitro-Lift* went on to twice repeat that italicized language (*id.* at 20, 22), which was drawn from *Buckeye*, thus calling into question the strained repudiation of such language, by the Florida Supreme Court in *VNA*, as otherwise supporting *de novo* judicial review of arbitral awards, in FAA cases, under this Court's public policy exception.

Moreover, the FAA by its terms incorporates the public policy exception, which is expressly applicable under treaties governing international arbitration which are enforced by the FAA. *See Tecnicas Reunidas de Talara S,A,C. v. SSK Ingenieria y Construccion S.A.C.*, 40 F.4th 1339, 1343-1345 (11th Cir. 2022) (public policy exception is grounds for vacatur, under FAA, of international arbitral award, citing *W.R. Grace*); *Tatneft v. Ukraine*, 21 F.4th 829, 837-838 (D.C. Cir. 2021) (confirmation of such award under FAA is subject to public policy exception under *Misco*); *Banco de Seguros del Estado v. Mutual Marine Office, Inc.,* 344 F.3d 255, 264 (2d Cir. 2003) (*Misco* may apply on motion to vacate such award under FAA).

Vacatur standards under FAA §10(a) are thus applicable to international and domestic arbitral awards alike. *See Yusuf Ahmed Alghanim & Sons v. Toys "R" Us*, 126 F.3d 15, 20-21 (2d Cir. 1997); *BG Group v. Republic of Argentina*, 572 U.S. 25, 31-32, 44 (2014) (applying FAA §10(a)(4) to international arbitral award); *cf. Corporacion AIC, SA v.*

Hidroelectrica Santa Rita S.A., 34 F.4th 1290 (11th Cir. 2022). For these reasons among others, this case presents important questions of pure law, including whether the FAA can be harmonized with the vital core of this Court's public policy exception under *W.R. Grace*, *Misco*, and *Eastern*, by construing FAA §10(a)(4) as authorizing vacatur of domestic (as well as international) arbitral awards that violate dominant public policy, at least where, as here, the award violates unequivocal positive law expressly rendering void and unenforceable the contractual provisions enforced by the award, which Wells Fargo never disputed below.

CONCLUSION

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted as to each of the issues presented.

Respectfully submitted,

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