No. 23-308

IN THE

Supreme Court of the United States

PAUL STEELMAN, INDIVIDUALLY AND AS TRUSTEE OF THE STEELMAN ASSET PROTECTION TRUST, ET AL.,

Petitioners,

v.

ERNEST BOCK LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent's opposition does not come to grips with the pure issue of law that the Ninth Circuit decided: how to apply the threshold issue under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), of whether simultaneously pending federal and state actions are "parallel." Only once that gating question is answered "yes" do courts go on to apply the multifactor test for whether a stay of the federal action is warranted. And as to the scope of the parallelism requirement, the Ninth Circuit gave an answer that squarely conflicts with the Seventh Circuit's approach, as the Ninth Circuit expressly acknowledged. Respondent's effort to blur the two distinct *Colorado River* steps cannot obscure the clear, established, and outcome-determinative conflict presented in the petition.

Respondent's remaining arguments likewise fail to make a case against this Court's review. The open division among the circuits belies respondent's insistence that the Court has already clarified the scope of the parallelism requirement. Respondent's suggestion that the Ninth Circuit would have resolved this case the same way even if it had found the parallelism requirement satisfied is demonstrably incorrect. And respondent's factbound attempted defense of the judgment cannot disguise the outcome-determinative nature of the question presented. Respondent does not even try to deny that without success in the New Jersey state action, his federal claim will necessarily fail. That inherent linkage amply justified a federal stay pending a state court ruling. The Ninth Circuit reversed only because of its legal determination that

this inherent linkage did not suffice to satisfy the parallelism requirement. This Court should grant review to resolve the square circuit split on that issue.

A. The Courts Of Appeals Are Intractably Divided Over The Question Presented

Respondent's main argument in opposition to certiorari is that there is no circuit conflict over the question presented—i.e., whether the *Colorado River* threshold parallelism requirement is satisfied if the pending state action could, but will not necessarily, resolve the federal litigation. But as the Ninth Circuit admitted below, there is "conflicting authority" on that question. Pet.App. 4a. Respondent's attempt to waive away this open disagreement among the circuits should be rejected.

1. Respondent is correct that the *Colorado River* inquiry ultimately involves a factbound weighing of factors to determine whether a stay is appropriate. Opp. 4. But respondent fails to acknowledge that before courts engage in that multi-factor analysis, they must first determine a threshold legal question—*viz.*, whether the state and federal court proceedings are "parallel." Pet. 17-18. As the Court explained in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), *Colorado River* cannot apply at all unless the district court "concludes that the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties." *Id.* at 28.

Respondent suggests (following the Ninth Circuit) that this statement from *Moses H. Cone* precludes a

finding of parallelism unless the state action will necessarily resolve the federal court action. Opp. 5. But as the petition explained—without any answer from respondent—*Moses H. Cone* simply did not consider, let alone resolve, the question presented here. Pet. 30-31. Respondent also notes that this Court quoted the relevant passage from *Moses H. Cone* in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 274 (1988), Opp. 2,[1] but the Court has not elaborated that passage's meaning, which has left the courts of appeals divided over the question presented here.

That precise question, as the Ninth Circuit explained, "is whether state and federal proceedings are sufficiently parallel when the state court proceedings will fully resolve the federal case *only if* the state court rules in one of two ways." Pet.App. 17a (emphasis in original). The court below held that *Moses H. Cone* precludes that result, Pet.App. 24a, but

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[1] *Gulfstream* had nothing to do with the scope of the parallelism requirement. *See Gulfstream*, 485 U.S. 271 (analyzing whether a denial of a request to issue a *Colorado River* stay or dismissal is immediately appealable under § 1291 or § 1292(a)(1)). The other cases the petition cites (Opp. 2) as having reaffirmed *Colorado River* do not discuss the parallelism language from *Moses H. Cone* and are even further afield. *See Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995) (discussing standards applicable to district court decision to stay declaratory judgment actions pending the outcome of related state court proceedings); *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 73 (2013) (considering scope of *Younger* abstention doctrine); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (evaluating scope of prudential standing doctrine); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014) (same).

acknowledged that the Seventh Circuit is "more permissive," Pet.App. 23a. The Ninth Circuit cited for that "more permissive" approach *Loughran v. Wells Fargo Bank, N.A.*, 2 F.4th 640 (7th Cir. 2021), which (like the Ninth Circuit) considered the scope of *Moses H. Cone*, *id.* at 646, and held (directly contrary to the Ninth Circuit) that the sort of "one-sidedness" at issue here "is neither unusual nor fatal to a finding that the two cases are parallel," *id.* at 649.

Respondent nevertheless insists that the Seventh Circuit's parallelism holding turned on what respondent characterizes as the Seventh Circuit's factbound skepticism of the plaintiff's underlying claim. Opp. 16-20. But the passage respondent block-quotes for pages comes almost entirely from the court's description of the facts, *see Loughran*, 2 F.4th at 643-45, and had nothing to do with its parallelism analysis. The court's skepticism about the plaintiff's underlying claims did play a role in its multi-factor stay analysis, *see id.* at 650-51, but the court engaged in that analysis only *after* concluding that the parallelism precondition was satisfied, *see id.* at 649-51.

The court decided *that* purely legal question based on its prior precedent: the court explained that in *Freed v. J.P. Morgan Chase Bank, N.A.*, 756 F.3d 1013 (7th Cir. 2014)—as in this case and in *Loughran*—"the plaintiff in concurrent state and federal actions raised claims in the federal court that would have been fully resolved if the state court ruled one way, but only partially addressed if the state court ruled in the other direction," yet the court "held that the state and federal actions were parallel." *Loughran*, 2 F.4th at 649 (citing *Freed*, 756 F.3d at 1021). Recall that

Moses H. Cone requires a district court to conclude that the state court litigation be "an adequate vehicle for the complete and prompt resolution of the issues between the parties." *Moses H. Cone*, 460 U.S. at 28. And *Loughran*, following *Freed*, concluded that this *Moses H. Cone* standard was satisfied so long as the state court litigation *could* resolve the federal litigation—in these circumstances, it is "'rational for the district court to determine that the state court litigation will be *an adequate vehicle for the complete and prompt resolution* of the larger dispute.'" 2 F.4th at 649 (quoting *Freed*, 756 F.3d at 1021) (alterations and omissions in original; emphasis added).

That legal determination would by its terms require a finding of parallelism in this case, as the Ninth Circuit acknowledged. *See* Pet.App. 23a-24a. And because this legal dispute turns on the meaning of this Court's precedent, only this Court can resolve the disagreement.

2. As the petition also explained, the precise circuit conflict presented here reflects a broader disagreement among the circuits about the scope of the parallelism requirement: several circuits (including the Fifth, Sixth, Seventh, and Eleventh) take a flexible approach to parallelism, rejecting "a mincing insistence on precise identity of parties and issues." *Afr. Methodist Episcopal Church v. Lucien*, 756 F.3d 788, 797 (5th Cir. 2014) (internal quotation marks omitted); other circuits (including the Fourth and Eighth) take a "strict[]" approach to parallelism, *Great American Ins. Co. v. Gross*, 468 F.3d 199, 208 (4th Cir. 2006); and the Second Circuit takes the

strictest approach of all, requiring that "the two proceedings are essentially the same; that is, there is an identity of parties, and the issues and relief sought are the same." *Nat'l Union Fire Ins. Co. v. Karp*, 108 F.3d 17, 22 (2d Cir. 1997); *see* Pet. 20-23 (describing this conflict).

Respondent writes this disagreement off to fact-bound differences among cases or different linguistic formulations of the same legal standard.[2] But the dispute between the Seventh and Ninth Circuits over the question presented belies that explanation. So too does a detailed scholarly study of how this disagreement in approaches—in particular, between the Second and Seventh Circuits—manifests in disparate outcomes for similarly situated litigants. Pet. 23-24. That study, which respondent ignores entirely, analyzed "decades of cases involving *Colorado River* abstention in two federal courts of appeals and two district courts" and reached a "startling conclusion": "the lower courts have taken wildly divergent approaches to *Colorado River*." Note, Owen W. Gallogly, Colorado

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[2] Respondent cites a slew of federal courts of appeals decisions for this proposition. *See* Opp. 13-14. Each misses the mark. Some cases concern the multi-factor *Colorado River* balancing that can occur only after a finding of parallelism and that is thus irrelevant here. *See, e.g.*, *Currie v. Grp. Ins. Comm'n*, 290 F.3d 1, 12 (1st Cir. 2002). Others cite *Moses H. Cone* for the uncontroversial proposition that there is a strong, but not unlimited, presumption in favor of exercising federal jurisdiction. *See, e.g.*, *Woodford v. Cmty. Action Agency of Greene Cnty., Inc.*, 239 F.3d 517, 521-23 (2d Cir. 2001). Others do not address the substantive contours of the *Colorado River* doctrine at all. *E.g.*, *McMurray v. De Vink*, 27 F. App'x 88, 92-94 (3d Cir. 2002) (correcting the district court's erroneous conflation of *Colorado River* and other abstention doctrines).

River *Abstention: A Practical Reassessment*, 106 Va. L. Rev. 199, 199, 231 (2020); *see also id.* at 205, 218, 230 (explaining the drastically different frequencies with which courts within the Second and Seventh Circuits grant and affirm *Colorado River* stays).

These divergent results cannot be explained away by factual differences among cases, and respondent does not even try. Rather, as the study concluded, the difference in results arises because of a legal dispute among the circuits over the scope of the parallelism requirement. *Id.* at 216, 226; *see* Pet. 24. This "story of confusion and unpredictability" results directly from lower courts "[s]truggling with a paucity of guidance from the Supreme Court." Gallogly, *supra*, at 206. Only this Court can resolve this manifest disuniformity among the lower courts.

B. The Petition Presents An Important And Recurring Question, And This Is An Ideal Vehicle To Resolve It

1. Respondent does not dispute that the petition raises an important and recurring question of federal law that only this Court can resolve. Pet. 25-27. The scope of the parallelism requirement recurs with substantial frequency in the lower courts. Pet. 25-26. And the importance of the question presented is self-evident, especially now that the Ninth Circuit has weighed in. Pet. 27. Respondent's failure to respond to any of this implicitly concedes the point.

2. Respondent likewise does not dispute that this case cleanly presents the question presented: respondent concedes that if the Steelmans prevail in state court and show that the contractual guarantees at issue are unenforceable, that would "defeat the

need for the Federal Action." Opp. 26. But according to respondent, the Ninth Circuit's parallelism decision did not matter to its resolution of the ultimate question whether a *Colorado River* stay was appropriate because the court would have denied a stay even if it had found the claims to be parallel. Opp. 22-23.

That argument is demonstrably false. The district court concluded that a stay was warranted because (i) the parallelism requirement was satisfied, and (ii) two of the other *Colorado River* factors—piecemeal litigation and the order of obtaining jurisdiction—weighed in favor of a stay. Pet.App. 14a (describing district court decision). The Ninth Circuit *affirmed* as to the latter two factors, and found that the other factors are "neutral or inconsequential," *id.* & n.12, but nevertheless concluded that "because the federal and state proceedings are not sufficiently parallel, a *Colorado River* stay may not issue," Pet.App. 16a. By the decision's terms, then, the Ninth Circuit's resolution of the parallelism issue was the *only* reason it reversed the district court's grant of a stay. As the court below put it, "[a]lthough we are sympathetic to the prudential concerns that the district court weighed in favor of a stay, we conclude that the federal and state proceedings are not sufficiently parallel to justify abdication of federal jurisdiction." Pet.App. 25a-26a.

Respondent's contrary argument rests primarily on a mischaracterization of a footnote in the decision below. Respondent suggests that the court below would have denied a stay "*even if* [it] found that the parallelism factor did not preclude a stay." Opp. 22 (quoting Pet.App. 22a n.17) (emphasis added by respondent). But the footnote respondent quotes has

nothing to do with whether a stay was appropriate; it instead explained why en banc review was not warranted even though two prior Ninth Circuit cases suggested that the parallelism requirement was satisfied in the circumstances here. *See* Pet.App. 22a n.17. The language respondent quotes comes from the last of several reasons the Court provided for why those cases did not create an intra-circuit conflict requiring en banc resolution—namely, the prior cases supporting parallelism were also distinguishable for reasons unrelated to parallelism. *Id.* That footnote did not suggest that the Ninth Circuit would have denied a stay even if it had found the parallelism precondition satisfied, and the body of the court's decision definitively precludes respondent's reading for the reasons just explained.

Respondent also argues that the Ninth Circuit's finding that several of the *Colorado River* factors are neutral would require denying a stay, citing the Ninth Circuit's prior decision in *R.R. Street & Co. v. Transport Ins. Co.*, 656 F.3d 966 (9th Cir. 2011). But *R.R. Street* shows just the opposite. There, as here, the Ninth Circuit found that the piecemeal-litigation and order-of-jurisdiction factors favored a stay, *id.* at 979-80, while other factors were either neutral or irrelevant, *id.* at 980-82. Respondent focuses on the court's statement that the neutrality of the "source of law" factor "does not weigh against jurisdiction." *Id.* at 980. But respondent fails to note that *the Ninth Circuit affirmed the district court's grant of a stay* anyway. The only difference between this case and that one was that in *R.R. Street*, the court found that the parallelism factor was satisfied, *id.* at 982-83,

whereas the decision below found it was not. *R.R. Street* thus confirms that the Ninth Circuit's resolution of that parallelism question was outcome determinative below, and that the petition provides the Court with an ideal vehicle to decide the question presented and resolve the circuit conflict.

C. The Decision Below Is Incorrect

The petition explained in detail why the Ninth Circuit resolved the question presented incorrectly. Pet. 28-32. It explained that the *Moses H. Cone* standard—i.e., that the state litigation must be an "adequate vehicle" for the "complete" resolution of the federal action, *Moses H. Cone*, 460 U.S. at 28—is satisfied in these circumstances: a state court action that *could* resolve the federal action is an "adequate vehicle" for its "complete" resolution, even if the state court action will not *necessarily* resolve the federal action. Pet. 29-30. The petition further explained that *Moses H. Cone* itself did not consider a case like this one, because the state court litigation in *Moses H. Cone* could not have resolved the federal litigation no matter what. Pet. 30-31. If anything, *Moses H. Cone* supports petitioner's reading. If parallelism were satisfied only if the state action will necessarily resolve the federal action, then there would never be a reason to stay rather than dismiss the federal action—there would never be anything further for the federal court to do. Yet *Moses H. Cone* sanctions both remedies, *see* 460 U.S. at 28, suggesting that the Ninth Circuit's perfect-parallelism is not required.

Finally, the petition explained that the Ninth Circuit's overly strict parallelism requirement precludes a court from staying the case under *Colorado River*

even when (as here) the principles underlying that decision would support a stay—that is, when (i) the state court litigation is much further along than the federal suit, (ii) allowing both lawsuits to be litigated simultaneously would necessarily result in piecemeal litigation, and (iii) if respondent loses in the New Jersey state court, based on that court's interpretation and application of New Jersey law, the basis for the federal case disappears. Pet. 31-32.

Respondent answers with a multi-page non sequitur. Opp. 23-26. The opposition's defense of the decision below does not even mention *Moses H. Cone*, let alone respond to petitioner's explanation for why that case does not support the Ninth Circuit's ruling. Rather, respondent ticks through its distorted version of the facts of this case that appear to be in support of its argument (rejected by both courts below) for why a stay under *Colorado River* would not be warranted under the multi-factor analysis—e.g., that the federal action includes allegations of fraudulent conduct not at issue in the state court action, Opp. 24, that it will experience undue hardship if it is not allowed to litigate its federal action now, Opp. 25, and that his claims in both state and federal court are (according to respondent) meritorious, Opp. 25-26. But none of these facts has anything to do with the question presented—whether the *threshold* parallelism requirement is satisfied when the state court action could but will not necessarily resolve the federal action.

Indeed, the only portion of respondent's defense of the decision below that *is* relevant is its concession that a win by the Steelmans in state court will "defeat

the need for the Federal Action." Opp. 26. That suffices to satisfy the *Colorado River* parallelism requirement. Pet. 28-32. This Court should grant review and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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