No. _____

In The
Supreme Court of the United States

THE COFFEE BEANERY, LTD., ET AL.,

Petitioners,

v.

WW, LLC; RICHARD WELSHANS;
AND DEBORAH WILLIAMS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Hall Street Associates, L.L.C.* v. *Mattel, Inc.*, 552 U.S. ___, 128 S. Ct. 1396 (2008), this Court held that § 10 of the Federal Arbitration Act (FAA), 9 U.S.C. § 10, provides the "exclusive" grounds for vacating an arbitration award under the FAA. Since *Hall Street*, federal and state courts have divided over whether manifest disregard of the law—a ground that is not listed in § 10—remains a valid ground for vacating an arbitrator's award under the FAA. The First and Fifth Circuits have concluded that the doctrine is no longer valid. The Second, Seventh, and Ninth Circuits have concluded that the doctrine survives as a judicial gloss on § 10—but each court has crafted a different standard for the doctrine. The Sixth Circuit in the decision below and in a prior published opinion, *Dealer Computer Services, Inc.* v. *Dub Herring Ford*, 547 F.3d 558, 561 n.2 (CA6 2008), took yet a third position, concluding in direct conflict with *Hall Street* that the doctrine of manifest disregard provides another ground, in addition to the grounds provided by § 10, for vacating an arbitration award. The decision below vacated an arbitration award solely on that basis. App. 7-10.

The questions presented for review in this case are:

1. Is manifest disregard of the law a valid common-law or statutory ground for vacating an arbitration award under the Federal Arbitration Act?

QUESTIONS PRESENTED – Continued

2. Did the Sixth Circuit err in vacating the arbitration award in this case for manifest disregard of the law?

RULE 14.1(b) AND RULE 29.6 STATEMENT

The complete list of parties to the proceeding in the Sixth Circuit are Petitioners The Coffee Beanery Ltd., Joanne Shaw, Julius Shaw, Kevin Shaw, Kurt Shaw, Ken Coxen, Walter Pilon, and Owen Stern, and Respondents WW, LLC; Richard Welshans; and Deborah Williams.

The Coffee Beanery Ltd.'s parent company is Shaw Coffee Company. No publicly held company owns 10% or more of Shaw Coffee Company's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully ask this Court to grant their petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The first opinion of the Sixth Circuit (App. 16-29), issued August 18, 2008, is unpublished. The amended opinion of the Sixth Circuit (App. 1-15), issued November 14, 2008, is unpublished and is reported at 300 Fed. Appx. 415. The order denying rehearing and rehearing *en banc* (App. 65-66) is unpublished. The published opinion of the district court (App. 30-49) is reported at 501 F. Supp. 2d 955. The unpublished order of the district court denying rehearing (App. 59-64) is unreported.

JURISDICTION

The Sixth Circuit entered judgment on August 18, 2008, then issued an amended judgment on November 14, 2008. Petitioners filed a timely petition for rehearing and rehearing *en banc*. The Sixth Circuit denied the petition on February 9, 2009. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The questions presented in this petition arise from the Federal Arbitration Act, 9 U.S.C. §§ 1-16, and in particular from sections 9 and 10 of the Act:

> § 9. Award of arbitrators; confirmation; jurisdiction; procedure. If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. . . .
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> * * *
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> § 10. Same; vacation; grounds; rehearing.
>
> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) where the award was procured by corruption, fraud, or undue means;

> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) 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. §§ 9, 10.

STATEMENT

The Sixth Circuit's decision below directly conflicts with this Court's holding in *Hall Street Associates, L.L.C.* v. *Mattel, Inc.*, 552 U.S. ___, 128 S. Ct. 1396 (2008), and contributes to a deep, post-*Hall Street* split in the circuits over whether manifest disregard of the law survives in any form as a ground for vacating arbitration awards under the FAA. *Hall Street* holds that § 10 of the Federal Arbitration Act "provide[s] the FAA's exclusive grounds for expedited vacatur." *Id.* at 1403. The Sixth Circuit nonetheless

held in a published opinion that a court may "vacate an award on *non-statutory* grounds if the arbitration panel demonstrates a 'manifest disregard of the law,'" citing this Court's *Hall Street* decision as a *"[b]ut see"* reference. *Dealer Computer Servs., Inc.* v. *Dub Herring Ford*, 547 F.3d 558, 561 n.2 (CA6 2008) (emphasis added). In the decision below, the Sixth Circuit repeated its rule that the grounds listed in § 10 are "*almost* exclusive[]" and held that courts "may *also* vacate an award found to be in manifest disregard of the law." App. 8 (emphases added). The Sixth Circuit's direct conflict with this Court's decision is itself a sufficient basis for granting review. S. Ct. R. 10(c).

The Sixth Circuit's decision also contributes to a deep, square circuit split on the validity and scope of the doctrine of manifest disregard. Two circuits have held or concluded that the doctrine of manifest disregard of the law does not survive *Hall Street*. *See Ramos-Santiago* v. *United Parcel Serv.*, 524 F.3d 120, 124 n.3 (CA1 2008); *Citigroup Global Mkts. Inc.* v. *Bacon*, 562 F.3d 349, 358 (CA5 2009). Three others have held that it does survive as a judicial gloss on § 10—but they disagree on its scope. *See Stolt-Nielsen SA* v. *AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94 (CA2 2008); *Halim* v. *Great Gatsby's Auction Gallery, Inc.*, 516 F.3d 557, 563-64 (CA7 2008); *Comedy Club, Inc.* v. *Improv W. Assocs.*, 553 F.3d 1277, 1281 (CA9 2009). The Court should grant review to resolve the conflict in the circuits. S. Ct. R. 10(a).

This case presents the ideal vehicle for reviewing the doctrine of manifest disregard of the law. The doctrine was the sole basis for the Sixth Circuit's decision below. App. 7-11. Petitioners presented, and the Sixth Circuit rejected, the arguments that manifest disregard of the law is not a valid ground for vacating an arbitration award under the FAA and that, whatever the doctrine is, it does not provide a basis for vacating the award in this case. Moreover, the Sixth Circuit's decision illustrates perfectly the danger of allowing courts to review arbitration awards for legal error. Claiming to have found a legal error in the arbitrator's interpretation of Maryland franchise law, the Sixth Circuit invalidated an arbitration award that was in fact fully consistent with the Maryland statute. The Court should grant review to reverse the judgment of the Sixth Circuit, resolve the divide in the circuits, and hold that manifest disregard of the law is not a basis for vacating an arbitration award under the FAA.

A. The Federal Arbitration Act.

Sections 9 and 10 of the Federal Arbitration Act establish the grounds for enforcing and vacating arbitration awards, respectively. Section 9 provides that, if the parties agreed to judicial enforcement of the arbitration award, a "court *must* grant" an order enforcing the award "*unless* the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9 (emphases added).

Section 10 states that courts may vacate an award for one of four reasons:

> (1) where the award was procured by corruption, fraud, or undue means;
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> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) 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.

In *Hall Street*, this Court held that the grounds provided by § 10 are the "exclusive grounds for expedited vacatur" under the FAA. 128 S. Ct. at 1403. The petitioner in *Hall Street* argued that the "statutory grounds for prompt vacatur and modification may be supplemented by contract." *Id.* at 1400. But the Court disagreed. It held that the statutory grounds cannot be supplemented because "the text compels a reading of the §[ ]10 . . . categories as exclusive." *Id.* at 1404. As the Court explained, "the three provisions, §§ 9-11,

. . . substantiat[e] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Id.* at 1405 (internal quotation marks and citations omitted). "Any other reading opens the door to the full-bore legal and evidentiary appeals that can rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process and bring arbitration theory to grief in post-arbitration process." *Ibid.* (internal quotation marks and citations omitted).

B. Factual Background.

In June 2003, respondent Richard Welshans entered a franchise agreement with Coffee Beanery. Coffee Beanery is a national franchisor of specialty coffee businesses that is headquartered in Michigan. Welshans' franchise agreement with Coffee Beanery contained a broad arbitration provision under which the parties agreed that

> any claim or controversy arising out of or related to this Agreement, or the making, performance, breach, interpretation, or termination thereof, shall be finally settled by arbitration pursuant to the then-prevailing Commercial Arbitration Rules of the American Arbitration Association or any successor thereto, by one arbitrator appointed in accordance with such rules. . . . The arbitration award shall be binding upon the parties and

> may be entered and enforced in any court of competent jurisdiction.

The parties excluded four enumerated categories of claims from the agreement to arbitrate, but none of the exclusions applies here. Two months after Welshans signed the franchise agreement, he assigned it to respondent WW, LLC, which Welshans owns together with respondent Deborah Williams (collectively, Respondents). Respondents opened and began to operate a Coffee Beanery café in Annapolis, Maryland.

This case arose when Respondents failed to succeed as a Coffee Beanery franchisee. Blaming Coffee Beanery for their failure, Respondents first demanded arbitration in January 2005, then changed positions and refused to arbitrate. They filed a complaint in the United States District Court for the District of Maryland against not only Coffee Beanery but also several of its officers, Petitioners Joanne Shaw, Julius Shaw, Kevin Shaw, Kurt Shaw, Ken Coxen, Walter Pilon, and Owen Stearn (collectively, "Coffee Beanery" or Petitioners). Coffee Beanery, in turn, filed a motion to compel arbitration in the United States District Court for the Eastern District of Michigan. The parties agreed to stay the Maryland action pending a ruling on the motion to compel arbitration. In July 2006, the district court for the Eastern District of Michigan granted Coffee Beanery's motion to compel arbitration. App. 5.

After the district court compelled arbitration, Coffee Beanery reached an agreement for a Consent Order with the Securities Commissioner of Maryland. App. 6. The Commissioner had commenced an investigation of Coffee Beanery related to Respondents' allegations. Under the Consent Order, Coffee Beanery was required to offer rescission to Respondents but was also entitled to "deny any statement of fact or conclusion of law of the Consent Order in any proceeding, litigation, or arbitration against them in which the Commissioner is not a party." App. 6. Coffee Beanery made the offer of rescission, but Respondents did not accept it.

In January 2007, Respondents arbitrated their claims against Coffee Beanery in an eleven-day hearing. At the conclusion of the hearing, the arbitrator issued a written award rejecting all of Respondents' claims and entering an award for Coffee Beanery. App. 51-52. The only claim relevant to this petition is Respondents' contention that Coffee Beanery violated Maryland's Franchise Registration and Disclosure Law by failing to disclose that one of its officers, Kevin Shaw, had previously been convicted of the felony of larceny for stealing traffic cones with a college buddy. Shaw's testimony at the arbitration hearing, which was the only the relevant evidence in the record, was the following:

> Q. Mr. Shaw, have you ever been convicted of a crime involving theft or dishonesty?
>
> A. Yes, I have.

> Q. And what was that crime?
>
> A. When I was in college, I was out with a buddy of mine and we were driving down the road picking up construction cones and throwing them in the back seat of the car, and we continued to drive down the road until the police officer saw all the orange construction cones in the back of the car and he stopped us and asked us what we were doing with them.
>
> We were—it was a stupid college thing to do.
>
> * * *
>
> Q. You were charged with grand larceny.
>
> A. Yes. It was over a hundred dollars so it was considered grand larceny.

The arbitrator considered Shaw's testimony, applied the relevant provisions of the Maryland statute, and concluded that Shaw's conviction was not the type of conviction that Maryland law requires a franchisor to disclose. App. 56. Maryland law requires franchisors to disclose to prospective franchisees only convictions for felonies that involved fraud, a breach of trust, or some type of dishonesty. Specifically, they must disclose whether

> any person identified in the prospectus has been convicted of a felony, [or] has pleaded nolo contendere to a felony charge . . . , if the felony . . . involved fraud, embezzlement, fraudulent conversion or misappropriation of property. . . .

Md. Code Ann., Bus. Reg. § 14-216(c)(8)(i). The arbitrator held that Kevin Shaw's conviction did not fall within this statute, reasoning:

> The Arbitrator finds that Respondent was not required to disclose to Claimants that Kevin Shaw has a felony conviction for grand larceny as it is not the type of felony conviction subject to disclosure. Michigan and Maryland franchise laws limit such disclosure to felonies that involve fraud, embezzlement, fraudulent conversion, or misappropriation of property.

App. 56.

C. Decisions Of The Lower Courts.

The United States District Court for the Eastern District of Michigan confirmed the arbitrator's award on Coffee Beanery's and Respondents' cross motions to confirm and vacate the award, respectively. App. 49. The district court's opinion does not address whether the arbitrator acted in manifest disregard of the law by concluding that Coffee Beanery was not required to disclose Kevin Shaw's conviction under § 14-216(c)(8)(i) of the Maryland Franchise Registration and Disclosure Law because Respondents did not initially argue the point. Respondents raised the argument in their motion to reconsider the district

court's order, which the district court denied.[1] App. 64.

On appeal, the Sixth Circuit issued an initial opinion on August 18, 2008, reversing the judgment of the district court and vacating the arbitration award solely on the ground that the arbitrator manifestly disregarded the law by holding that Coffee Beanery was not required to disclose Shaw's conviction. App. 24, 29. The Sixth Circuit exercised its discretion to address the question of manifest disregard "[b]ecause it is a pure question of law" and "there are no facts in dispute regarding this issue." App. 25. Indeed, manifest disregard of the law was the only issue the Sixth Circuit addressed:

> We begin and end with the very last argument, because we find it dispositive to the instant case. Because Shaw failed to disclose his prior felony conviction for grand larceny in violation of the Franchise Act, Md. Bus. Reg. Code Ann. § 14-216(c)(8)(i), we conclude that the Arbitrator's award shows a manifest disregard of the law.

App. 24. The court's entire rationale for finding manifest disregard by the arbitrator was its declaration that "misappropriation of property" "by definition

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[1] Because the Sixth Circuit addressed the question of manifest disregard on the merits, the question is squarely presented for this Court. *See Va. Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

would include a conviction for grand larceny, regardless of the conduct giving rise to the conviction." App. 26. The Sixth Circuit did not cite any Maryland case adopting its definition of "misappropriation of property." It nonetheless found that "the Arbitrator's contrary interpretation—that Shaw was not required to disclose this felony in the offering prospectus—fl[ies] in the face of clearly established legal precedent." App. 27 (internal quotation marks omitted). Because it found that Coffee Beanery had failed to make a statutorily required disclosure, it held that Respondents "need not resort to arbitration to vindicate [their] statutory rights but may instead seek appropriate relief in a court of law." App. 29. The court therefore remanded the case for litigation.

Coffee Beanery moved for rehearing and rehearing *en banc* on the ground that the Sixth Circuit's opinion directly contradicted this Court's decision in *Hall Street*. In response, the Sixth Circuit withdrew its original opinion and issued an amended opinion on November 14, 2008, that directly addresses whether manifest disregard of the law continues to exist as a valid common-law ground for vacating an arbitration award after *Hall Street*. App. 1, 8-10. The court noted that "[s]ection 10 of the FAA sets forth the statutory grounds to vacate an arbitration award" and held that its authority to vacate an arbitration award is "*almost* exclusively limited to these grounds," but that it "may also vacate an award found to be in manifest disregard of the law." App. 8 (emphasis added). An award is in manifest disregard, the court

held, if "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle." App. 9. Addressing *Hall Street*, the Sixth Circuit held that "the Supreme Court significantly reduced the ability of federal courts to vacate arbitration awards for reasons other than those specified in 9 U.S.C. § 10, but it did not foreclose federal courts' review for an arbitrator's manifest disregard of the law." *Ibid.* The court concluded that "it would be imprudent to cease employing such a universally recognized principle" and decided that it would "follow its well-established precedent here and continue to employ the 'manifest disregard' standard." App. 10; *see also Dealer Computer Servs.*, 547 F.3d at 561 n.2. The Sixth Circuit then repeated verbatim its initial analysis concluding that the arbitrator had manifestly disregarded the law and remanded for litigation. App. 10-15.

Coffee Beanery again moved for rehearing and rehearing *en banc*, arguing that the Sixth Circuit's application of the manifest disregard of the law standard conflicted with *Hall Street*. On February 9, 2009, the Sixth Circuit denied the petition. App. 65-66.

REASONS FOR GRANTING THE PETITION

I. The Opinion Below Implicates A Deep, Square Conflict In The Circuits Over Whether Manifest Disregard Of The Law Is A Valid Ground For Vacating An Arbitration Award Under The Federal Arbitration Act.

Congress enacted the FAA "[t]o overcome judicial resistance to arbitration" and create a uniform, "national policy favoring arbitration." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006). The Circuits' treatment of the doctrine of manifest disregard of the law, however, has been anything but uniform. Since this Court's decision in *Hall Street Associates, L.L.C.* v. *Mattel, Inc.*, 552 U.S. ___, 128 S. Ct. 1396 (2008), the Circuits have divided at least three ways over whether manifest disregard of the law—a ground for vacatur that is not listed in FAA § 10—remains a valid ground for vacating an arbitrator's award under the FAA. The First and Fifth Circuits have concluded that manifest disregard is a judicially created doctrine and thus is no longer a valid basis for vacating an award after *Hall Street*. *Ramos-Santiago* v. *United Parcel Serv.*, 524 F.3d 120, 124 n.3 (CA1 2008); *Citigroup Global Mkts. Inc.* v. *Bacon*, 562 F.3d 349, 358 (CA5 2009). The Sixth Circuit has taken the polar opposite view, agreeing that the manifest disregard doctrine is a judicially created doctrine, but holding that it remains a legitimate ground for vacating an award. App. 8-10; *Dealer Computer Servs., Inc.* v. *Dub Herring Ford*, 547 F.3d

558, 561 n.2 (CA6 2008). The Second and Ninth Circuits have concluded that the manifest disregard doctrine survives as a judicial gloss on section 10 of the FAA, *Stolt-Nielsen SA* v. *AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94 (CA2 2008); *Comedy Club, Inc.* v. *Improv W. Assocs.*, 553 F.3d 1277, 1281 (CA9 2009), a position that the Seventh Circuit had already taken before *Hall Street*, *see Halim* v. *Great Gatsby's Auction Gallery, Inc.*, 516 F.3d 557, 563-64 (CA7 2008). Each court, however, has crafted a separate standard for the doctrine.[2]

Several courts have acknowledged the conflict among the circuits. The Fifth Circuit recognized the split between the First and Second, Sixth, and Ninth Circuits, and joined the First Circuit. *Citigroup*, 562 F.3d at 355-58. The Second Circuit likewise recognized that, since *Hall Street*, some courts "have concluded or suggested that the doctrine simply does not survive," while "[o]thers think that 'manifest disregard,' reconceptualized as a judicial gloss on the

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[2] Federal district courts in circuits that have not yet addressed the issue are also divided. *Compare, e.g.*, *Prime Therapeutics LLC* v. *Omnicare, Inc.*, 555 F. Supp. 2d 993, 999 (D. Minn. 2008) (concluding that, after *Hall Street*, "courts can no longer vacate an arbitration award based on judicially-created grounds such as 'manifest disregard of the law'"); *Med. Shoppe Int'l, Inc.* v. *Simmonds*, No. 4:08CV90, 2009 WL 367703, at *3 (E.D. Mo. Feb. 11, 2009) (same); *Martik Bros.* v. *Kiebler Slippery Rock, LLC*, No. 08cv1756, 2009 WL 1065893, at *2 n.2 (W.D. Pa. Apr. 20, 2009) (same), *with Volk* v. *X-Rite, Inc.*, 599 F. Supp. 2d 1118, 1125-32 (S.D. Iowa 2009) (reviewing an arbitral award for manifest disregard).

specific grounds for vacatur enumerated in section 10 of the FAA, remains a valid ground for vacating arbitration awards." *Stolt-Nielsen*, 548 F.3d at 94. The Sixth and Ninth Circuits, as well as several district and state courts, have also recognized the conflict. *See, e.g.*, *Martin Marietta Materials, Inc.* v. *Bank of Okla.*, 304 Fed. Appx. 360, 362-63 (CA6 2008); *Comedy Club*, 553 F.3d at 1290; *N.J. Carpenters Funds* v. *Prof'l Furniture Servs.*, No. 3:08-cv-3690, 2009 WL 483849, at *4 n.1 (D.N.J. Feb. 25, 2009); *Hereford* v. *D.R. Horton, Inc.*, No. 1070396, 2009 WL 104666, at *5 n.1 (Ala. Jan. 9, 2009).

The Court should grant review in this case to resolve the conflict in the Circuits and to give a single, national answer to the question whether manifest disregard of the law is a valid common-law or statutory ground for vacating an arbitration award under § 10 of the FAA.

A. In the First and Fifth Circuits, manifest disregard of the law is no longer a valid ground for vacating an arbitration award under the FAA.

After *Hall Street*, two circuits have concluded that manifest disregard of the law is no longer a valid ground under the FAA for vacating an arbitration award. In *Citigroup Global Markets Inc.* v. *Bacon*, the Fifth Circuit held that "manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected" and

that "from this point forward, arbitration awards under the FAA may be vacated only for reasons provided in § 10." 562 F.3d at 358. "Indeed," the court declared, "the term itself, as a term of legal art, is no longer useful in actions to vacate arbitration awards." *Ibid.* Because the district court had vacated an arbitration award for manifest disregard of the law, the Fifth Circuit vacated the decision and remanded for review under the standard announced in § 10 of the FAA. In its decision in *Ramos-Santiago v. United Parcel Service*, the First Circuit took the same position. A party defending an arbitration award issued in a labor dispute asked the First Circuit to hold that manifest disregard of the law is no longer a valid ground for vacating an award under the National Labor Relations Act. 524 F.3d at 124-25 & n.3. Addressing the argument, the First Circuit declared that, after *Hall Street*, "manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the" FAA. *Id.* at 124 n.3. The court found it unnecessary, however, to decide whether the same was true of the NLRA. District courts in the First Circuit have applied *Ramos-Santiago* as controlling authority that abrogates the doctrine of manifest disregard in FAA cases. *See, e.g., ALS & Assocs.* v. *AGM Marine Constructors, Inc.*, 557 F. Supp. 2d 180, 185 (D. Mass. 2008).

B. The Sixth Circuit holds that manifest disregard continues to exist as a non-statutory ground for vacating arbitration awards.

In direct conflict with the First and Fifth Circuits, the Sixth Circuit has held that the doctrine of manifest disregard of the law survives as a common-law doctrine that exists in addition to and apart from the grounds listed in § 10 of the FAA. Citing this Court's *Hall Street* decision as a "*[b]ut see*" reference, the Sixth Circuit held in *Dealer Computer Services* that a court may "vacate an award on *non-statutory* grounds if the arbitration panel demonstrates a 'manifest disregard of the law.'" 547 F.3d at 561 n.2 (emphasis added; parallel citations omitted). In the decision below, the Sixth Circuit applied the same rule, explaining that manifest disregard is a standard separate from the statutory standards for vacatur in § 10(a) and is a separate ground for vacating an award. App. 8-10. As discussed above, the court acknowledged this Court's decision in *Hall Street* but concluded that "it did not foreclose federal courts' review for an arbitrator's manifest disregard of the law." App. 9.

C. The Second, Seventh, and Ninth Circuits construe manifest disregard as a gloss on FAA § 10(a)(4) but disagree on what falls within the doctrine.

In conflict with the First, Fifth, and Sixth Circuits, the Second, Seventh, and Ninth Circuits

construe manifest disregard as a judicial gloss on FAA § 10(a)(4), which allows courts to vacate an award if the "arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). Each circuit, however, has adopted a different rule of what manifest disregard includes, creating further conflict in the law.

Although the Second Circuit before *Hall Street* had repeatedly described "the 'manifest disregard' standard as a ground for vacatur entirely separate from those enumerated in the FAA," *Stolt-Nielsen*, 548 F.3d at 94, that court nevertheless held that *Hall Street* "did not, we think, abrogate the 'manifest disregard' doctrine altogether," *id.* at 95. Instead, the Second Circuit agreed with courts holding that "'manifest disregard,' reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA, remains a valid ground for vacating arbitration awards." *Id.* at 94. Under the Second Circuit's test, a legal error can be the ground for vacating an arbitration award "[i]f the arbitrator's decision strains credulity or does not rise to the standard of barely colorable." *Id.* at 92-93 (internal quotation marks and brackets omitted). According to the Second Circuit, when arbitrators so act, they have "exceeded their powers" under § 10(a)(4) of the FAA. *Id.* at 95.

The Seventh Circuit, even before *Hall Street*, "defined 'manifest disregard of the law' so narrowly that it fits comfortably under the first clause of the fourth statutory ground—'where the arbitrators exceeded their powers.'" *Wise* v. *Wachovia Sec., LLC*,

450 F.3d 265, 268 (CA7 2006) (Posner, J.). In the Seventh Circuit, "the 'manifest disregard' principle is limited to two possibilities: an arbitral order requiring the parties to violate the law . . . , and an arbitral order that does not adhere to the legal principles specified by contract, and hence unenforceable under § 10(a)(4)." *George Watts & Son, Inc.* v. *Tiffany & Co.*, 248 F.3d 577, 581 (CA7 2001) (Easterbrook, J.). An arbitrator who "rules that a particular Com Ed worker is required to work during mealtimes, but that it is such easy work that it is undeserving of the minimum wage, let alone of overtime," and thus orders the parties to violate the overtime provisions of the Fair Labor Standards Act going forward, provides an example of the first possibility. *Jonites* v. *Exelon Corp.*, 522 F.3d 721, 726 (CA7), *cert. denied*, 129 S. Ct. 198 (2008). An arbitrator who "ignor[es] a choice of law provision in an arbitration agreement" provides an example of the second possibility. *Halim*, 516 F.3d at 564. In conflict with the Second Circuit, the Seventh Circuit holds that "[f]actual or legal error, no matter how gross, is insufficient to support overturning an arbitration award." *Id.* at 563.

The Ninth Circuit, like the Second Circuit, has held that "an arbitrator's manifest disregard of the law remains a valid ground for vacatur of an arbitration award under § 10(a)(4)" after *Hall Street. Comedy Club*, 553 F.3d at 1281. Although earlier Ninth Circuit cases treated manifest disregard of the law as an extra-statutory ground for vacating an award, *see, e.g., Collins* v. *D.R. Horton, Inc.*, 505 F.3d 874, 879

(CA9 2007), *cert. denied*, 128 S. Ct. 1739 (2008); *Carter* v. *Health Net of Cal., Inc.*, 374 F.3d 830, 837-38 (CA9 2004); *Luong* v. *Circuit City Stores, Inc.*, 368 F.3d 1109, 1112 (CA9 2004), the Ninth Circuit now takes the position that "the manifest disregard ground for vacatur is shorthand for a statutory ground under the FAA, specifically 9 U.S.C. § 10(a)(4), which states that the court may vacate 'where the arbitrators exceeded their powers.'" *Comedy Club*, 553 F.3d at 1290 (citing *Kyocera Corp.* v. *Prudential-Bache T Servs.*, 341 F.3d 987, 997 (CA9 2003) (*en banc*)). The Ninth Circuit's test for manifest disregard is whether it is "clear from the record that the arbitrator recognized the applicable law and then ignored it." *Id.* at 1290 (brackets and internal quotation marks omitted). In practice, the Ninth Circuit finds this standard met by a sufficiently clear legal error, such as when "[t]he grounds given by the arbitrator for disregarding [the applicable law] are fundamentally incorrect." *Id.* at 1293.

Finally, the Fourth Circuit has continued to apply the standard of manifest disregard in reviewing arbitration awards after *Hall Street* without addressing the authority for that approach. In *Qorvis Communications, LLC* v. *Wilson*, 549 F.3d 303 (CA4 2008), the court considered and rejected on its merits a freestanding argument that "the arbitrator manifestly disregarded the law of damages," without addressing whether manifest disregard was a valid, nonstatutory ground for vacating an award. *Id.* at 311. The *Qorvis* court separately considered and rejected

an argument that the arbitrator had exceeded his powers under § 10(a)(4) of the FAA by making a legal error, concluding that it is the court's "role to review the correctness of the arbitrator's reasoning only if the arbitrator 'irrationally' disregarded the terms of the contract." *Id.* at 312. By considering on the merits an argument that arbitrators had manifestly disregarded the law in their rulings, it appears that the Fourth Circuit has implicitly joined those circuits that have held that the "manifest disregard" standard for vacatur of arbitration awards survives *Hall Street*. It is unclear, however, whether the Fourth Circuit regards the "manifest disregard" standard as a "judicial gloss" on § 10 of the FAA in line with the Second, Seventh, or Ninth Circuits, or whether it agrees with the Sixth Circuit that the statutory grounds for vacatur in the FAA are not exclusive.

D. The divide in the Circuits is ripe for this Court's intervention.

There is no benefit to allowing this issue to percolate further in the lower courts. The circuit split is deep, and it will not resolve without intervention by this Court. The Circuits have considered both this Court's decision and their own precedent, and have concluded that their respective positions are binding in their circuits. The Sixth Circuit, in the decision below, said that it was following "its well-established precedent" and denied rehearing *en banc*, indicating that the issue is settled. App. 10. The Fifth Circuit acknowledged the divide in the circuits and held that

"manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected." *Citigroup*, 562 F.3d at 356. The Ninth Circuit reached its position after this Court vacated its original decision and remanded for reconsideration in light of *Hall Street*. *See Improv W. Assocs.* v. *Comedy Club, Inc.*, 129 S. Ct. 45 (2008). On remand, the court held that it was bound by its *en banc* precedent in *Kyocera* because "[we] cannot say that *Hall Street Associates* is 'clearly irreconcilable' with *Kyocera*." *Comedy Club*, 553 F.3d at 1290. Until this Court intervenes, parties to arbitration agreements will encounter different sets of rules in the federal courts, based solely on where their arbitrations are held.

II. The Decisions That Continue To Apply The Doctrine Of Manifest Disregard Of The Law Are In Substantial Tension, If Not Outright Conflict, With *Hall Street*.

The Sixth Circuit's decision below directly conflicts with this Court's holding in *Hall Street*. *Hall Street* holds that § 10 of the Federal Arbitration Act "provide[s] the FAA's exclusive grounds for expedited vacatur." 128 S. Ct. at 1403. Yet in the decision below, the Sixth Circuit held that the grounds listed in § 10 are "*almost* exclusive[]" and concluded that it could "*also* vacate an award found to be in manifest disregard of the law." App. 9 (emphases added). The Sixth Circuit reached the same conclusion in an earlier, published opinion, where it held that a court

may "vacate an award on *non-statutory* grounds if the arbitration panel demonstrates a 'manifest disregard of the law.'" *Dealer Computer Servs.*, 547 F.3d at 561 n.2 (emphasis added). In the decision below, the Sixth Circuit also continued to rely on the comments regarding "manifest disregard" in *Wilko* v. *Swan*, 346 U.S. 427, 436 (1953), in direct conflict with this Court's rejection of those comments in *Hall Street*. App. 8. As *Hall Street* recognized, *Wilko*'s comments on manifest disregard were dicta. Its only holding "was that § 14 of the Securities Act of 1933 voided any agreement to arbitrate claims of violations of that Act." 128 S. Ct. at 1403. (And that holding was overruled by *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484-85 (1989).) The petitioner in *Hall Street* argued that *Wilko* "recogniz[ed] 'manifest disregard of the law' as a further ground for vacatur on top of those listed in § 10," and contended that, "if judges can add grounds to vacate (or modify), so can contracting parties." *Id.* at 1403. But the Court rejected this argument, saying that "this is too much for *Wilko* to bear" and holding that "now that [the] meaning" of *Wilko*'s dictum is "implicated, we see no reason to accord it the significance that Hall Street urges." *Id.* at 1404. Earlier this Term, the Court further undermined *Wilko* when it wrote that, in light of the "radical change" in the Court's receptivity to arbitration, "reliance on *any* judicial decision . . . littered with *Wilko*'s overt hostility to the enforcement of arbitration agreements would be ill advised." *14 Penn Plaza LLC* v. *Pyett*, 556

U.S. ___, 129 S. Ct. 1456, 1470 (2009) (emphasis added).

The decisions of the Second and Ninth Circuits holding that manifest disregard of the law continues to exist as a "judicial gloss" on § 10 are also in substantial tension, if not outright conflict, with *Hall Street*. *Hall Street* held that the "categories" listed in § 10 for vacating an award are "exclusive," 128 S. Ct. at 1404, and manifest disregard is not among those categories. Before *Hall Street*, all of the Courts of Appeals but one recognized that manifest disregard of the law was extra-statutory. *See, e.g.*, *Advest, Inc.* v. *McCarthy*, 914 F.2d 6, 9 n.5 (CA1 1990) (describing manifest disregard review as a "judicially created" ground for vacatur); *Duferco Int'l Steel Trading* v. *T. Klaveness Shipping A/S*, 333 F.3d 383, 388-89 (CA2 2003) (a ground in "addition to the grounds afforded by statute," used only "where none of the provisions of the FAA apply"); *Roadway Package Sys., Inc.* v. *Kayser*, 257 F.3d 287, 291 n.2 (CA3 2001) (an "additional, nonstatutory bas[i]s"); *Choice Hotels Int'l, Inc.* v. *SM Prop. Mgmt., LLC*, 519 F.3d 200, 207 (CA4 2008) (a "common law ground[]"); *Apache Bohai Corp. LDC* v. *Texaco China BV*, 480 F.3d 397, 405 (CA5 2007) ("a non-statutory ground"); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Jaros*, 70 F.3d 418, 421 (CA6 1995) ("an alternative to the[] statutory grounds, a separate judicially created basis for vacation"); *McGrann* v. *First Albany Corp.*, 424 F.3d 743, 749 (CA8 2005) (a basis "[i]n addition to" statutory grounds); *Luong*, 368 F.3d at 1112 (CA9 2004)

(manifest disregard is "a non-statutory escape valve")[3]; *Dominion Video Satellite, Inc.* v. *Echostar Satellite, L.L.C.*, 430 F.3d 1269, 1275 (CA10 2005) ("a judicially-created basis"); *B.L. Harbert Int'l, LLC* v. *Hercules Steel Co.*, 441 F.3d 905, 910 (CA11 2006) (a "nonstatutory ground[]"); *Kanuth* v. *Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1178 (CADC 1991) (a ground "in addition to the statutory grounds"). It is difficult, if not impossible, to reconcile the Circuits' pre-*Hall Street* treatment of the doctrine of manifest disregard of the law as extra-statutory with their conclusion that it nonetheless continues to survive post-*Hall Street.* The one circuit that escapes the tension is the Seventh Circuit, which properly refused to apply the doctrine to allow judicial review for legal error even before *Hall Street* and vacated awards only if the arbitrators exceeded their powers under § 10(a)(4) of the FAA, such as by applying a law different than the ones the parties selected, ordering the parties to violate the law, or deciding an issue outside their scope of authority. *See*, *e.g.*, *George Watts & Son*, 248 F.3d at 581.

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[3] In addition to characterizing manifest disregard as a non-statutory doctrine, the Ninth Circuit at other times called it a statutory doctrine. *See, e.g., Kyocera Corp.* v. *Prudential-Bache T Servs.*, 341 F.3d 987, 997 (CA9 2003) (*en banc*) (arbitrators "exceed their powers" under § 10(a)(4) when they exhibit manifest disregard of the law).

III. Allowing Courts To Review Arbitration Awards For Legal Error Through The Doctrine Of Manifest Disregard Undermines Arbitration's Core Benefits Of Finality And Efficiency.

The question whether manifest disregard of the law is a valid ground for vacating an arbitration award under the FAA warrants this Court's review because of the sweeping national consequences it has for the continued vitality of arbitration. More than any other ground for vacating an award, manifest disregard threatens to undermine arbitration's chief virtues of finality and efficiency by smuggling judicial review for legal errors into the FAA's expedited confirmation process.

One effect of allowing manifest disregard to introduce judicial review for legal errors is as obvious as it is destructive: it "rob[s] the [arbitral] process of its most essential feature—finality—by giving parties disappointed with the result reached in arbitration reason to believe they may be able to circumvent objectionable awards by resort to the courts." Stephen L. Hayford, *Reining in the "Manifest Disregard" of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, 1998 J. DISP. RESOL. 117, 118. Arbitration is supposed "to achieve 'streamlined proceedings and expeditious results,'" *Preston* v. *Ferrer*, 552 U.S. ___, 128 S. Ct. 978, 986 (2008), as well as "allow parties to avoid the costs of litigation," *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 123 (2001). It does none of these things if it is "merely a prelude to a more

cumbersome and time-consuming judicial review process." *Hall Street*, 128 S. Ct. at 1405. Already, courts are experiencing a "spurt of cases" challenging arbitration awards. Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 HARV. NEGOT. L. REV. 167, 205 (2008) (summarizing results from empirical study of challenges to awards in arbitration between individual employees and employers). Some courts have been driven to open frustration by the number of parties who, having lost in arbitration, turn to manifest disregard in an effort to gain legal review of the arbitrator's decision. The Eleventh Circuit remarked "that this Court is exasperated by those who attempt to salvage arbitration losses through litigation that has no sound basis in the law applicable to arbitration awards." *B.L. Harbert Int'l*, 441 F.3d at 914. And it warned "that in order to further the purposes of the FAA and to protect arbitration as a remedy we are ready, willing, and able to consider imposing sanctions in appropriate cases." *Ibid.* Better for this Court to clarify the law than for lower courts to attempt to enforce an unclear standard through sanctions.

Just as troubling as the litigation that manifest review can add to the end of the arbitral process is the corruption it can cause of the process itself. "By agreeing to arbitrate," parties are supposed to be able to "trade[ ] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp.* v.

Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). But judicial review for legal error puts irresistible pressure on arbitrators to produce awards that they can defend against legal review, thereby sacrificing the cost-effectiveness and informality that attract parties to arbitration in the first place. Arbitrators faced with legal review by courts will demand greater briefing from the parties, hold longer hearings, spend more time researching the issues, and write longer, more formal decisions—in a word, they will become more like courts. *See Hall Street*, 128 S. Ct. at 1405 (citing *Ethyl Corp.* v. *United Steelworkers of Am. AFL-CIO-CLC*, 768 F.2d 180, 184 (CA7 1985)). By the process of reviewing arbitral awards for legal error, "the very foundations of the institution of arbitration are eaten away." Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234, 246 (2007).

Inefficiency, heightened formality, increased costs, and eroded finality cannot be the path forward under the FAA. As Judge Posner wrote for the Seventh Circuit:

> It is tempting to think that courts are engaged in judicial review of arbitration awards under the Federal Arbitration Act, but they are not. When parties agree to arbitrate their disputes they opt out of the court system, and when one of them challenges the resulting arbitration he perforce does so not on the ground that the arbitrators made a mistake but that they violated the agreement to arbitrate, as by corruption, evident

> partiality, exceeding their powers, etc.—conduct to which the parties did not consent when they included an arbitration clause in their contract.

Wise, 450 F.3d at 269 (citation omitted).

IV. This Case Is An Ideal Vehicle For Deciding The Questions Presented.

This case cleanly presents the question whether manifest disregard of the law is a valid common-law or statutory ground for vacating an arbitration award under the FAA. Nothing in the history or procedural posture of the case will hinder or limit the Court's review.

First, all of the members of this Court will be able to address the question presented on its merits because the proceedings below were in federal court, not in a state court. *See, e.g.*, *Buckeye Check Cashing*, 546 U.S. at 449 (Thomas, J., dissenting) ("I remain of the view that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, does not apply to proceedings in state courts.").

Second, manifest disregard of the law was the sole basis for the Sixth Circuit's decision. The district court denied Respondents' motion to vacate the arbitration award and confirmed the award in favor of Coffee Beanery. App. 49. The Sixth Circuit reversed the district court and vacated the award, basing its decision entirely on its conclusion that the arbitrator's award evidenced a manifest disregard of the law.

App. 10-11. As Judge Cole wrote for the panel, "[w]e begin and end with" manifest disregard of the law, "because we find it dispositive to the instant case." App. 11. The Sixth Circuit also directly addressed *Hall Street* and concluded that it "did not foreclose federal courts' review for an arbitrator's manifest disregard of the law." App. 9. In so reasoning, the Sixth Circuit has laid all of the necessary groundwork for this Court to determine whether courts should continue to recognize the doctrine of manifest disregard—whether construed as an extra-statutory basis for vacatur under the FAA or as a "gloss" on the "exceeded their discretion" clause of § 10(a)(4).

The facts of this case also position it at the point of the Circuits' disagreement. The arbitrator here did not resolve a claim outside the scope of the agreement,[4] apply a different body of law than the arbitration agreement made applicable,[5] or order the parties to do something that violated the law[6]—actions that all Circuits would agree would exceed the arbitrator's

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[4] *See, e.g.*, *Coady* v. *Ashcraft & Gerel*, 223 F.3d 1 (CA1 2000) (deciding an issue that parties had already resolved by agreement); *Eljer Mfg., Inc.* v. *Kowin Dev. Corp.*, 14 F.3d 1250, 1256 (CA7 1994) (awarding relief against nonparty to arbitration agreement).

[5] *See, e.g.*, *Barnes* v. *Logan*, 122 F.3d 820, 823 (CA9 1997) (applying California law, where arbitration agreement contained Minnesota choice-of-law provision).

[6] *See, e.g.*, *George Watts & Son*, 248 F.3d at 580-81 (dictum), *citing E. Associated Coal Corp.* v. *United Mine Workers*, 531 U.S. 57 (2000).

powers under § 10(a)(4) of the FAA. Instead, the arbitrator correctly identified the governing Maryland franchise law, applied it to the evidence presented at the arbitration, and concluded that the law did not require disclosure of the type of conviction at issue. App. 56. The Sixth Circuit vacated the arbitrator's award simply because it concluded that the arbitrator had made a clear legal error. App. 12-14.

If the Court does not grant review in this case, it risks being unable to address the issue for lack of another good vehicle. The time for seeking review in this Court has already passed for the decisions of the First, Fourth, and Seventh Circuits discussed above without a petition for a writ of certiorari being filed. A petition for certiorari is pending before this Court seeking review of the Second Circuit's decision in *Stolt-Nielsen*, No. 08-1198 (Mar. 26, 2009), but it seeks review only of an unrelated question regarding class arbitration, likely because vehicle problems exist on the issue of manifest disregard of the law. *See Stolt-Nielsen*, 548 F.3d at 97 (noting that Stolt-Nielsen had "assured the [arbitration] panel that the [choice-of-law] issue was immaterial," and holding that "[t]his concession bars us from concluding that the panel manifestly disregarded the law by not engaging in a choice-of-law analysis"). The Fifth Circuit's decision in *Citigroup* remands the case to the district court for further analysis whether the arbitration award can be vacated on grounds other than manifest disregard, placing it in an interlocutory posture and raising the possibility that the case

will be resolved on alternative, independently sufficient grounds. *Citigroup*, 562 F.3d at 358. The time has not yet run for the losing party to seek review of the Ninth Circuit's decision in *Comedy Club*, but that case does not present the question whether manifest disregard of the law survives as a common-law doctrine. 553 F.3d at 1290. This case, in contrast, cleanly presents the complete question whether manifest disregard is a valid common-law or statutory ground for vacating an arbitration award under the FAA.

In addition, the result in this case demonstrates how little protection the doctrine of manifest disregard provides against courts finding manifest error even in close cases. Here, the arbitrator's interpretation of Maryland law was, if anything, better supported than the interpretation adopted by the Sixth Circuit. The issue of Maryland law was whether convictions for larceny fall within the category of convictions for "misappropriation of property," which the Maryland Franchise Registration and Disclosure Law requires franchisors to disclose, Md. Code Ann., Bus. Reg. § 14-216(c)(8)(i). The arbitrator held that they do not, App. 56, and her conclusion is well-supported by Maryland law because "misappropriation" requires an element of dishonesty, whereas larceny contains no such element. Under Maryland law, "misappropriation of property" is defined as the "application of another's property or money *dishonestly* to one's own use." *Schinnerer* v. *Md. Ins. Admin.*, 809 A.2d 709, 719 (Md. Ct. Spec. App. 2002) (emphasis added). There was no element of

dishonesty in Shaw's Michigan conviction for larceny, either factually or legally. *See People* v. *Ainsworth*, 495 N.W.2d 177, 178 (Mich. Ct. App. 1992); *People* v. *Parcha*, 575 N.W.2d 316, 321 (Mich. Ct. App. 1997). The Sixth Circuit, in contrast, cited no Maryland decision concluding that "misappropriation of property" includes "larceny." App. 13-14. It simply declared that the arbitrator was wrong—a result that demonstrates the clear threat to arbitration that is posed by the doctrine of manifest disregard.

Finally, after the Sixth Circuit incorrectly vacated the arbitration award for manifest disregard of the law, it compounded its error by remanding for litigation "in a court of law" instead of for further proceedings in arbitration. App. 15. Under this Court's decision in *Buckeye Check Cashing*, where a party disputes a contract's validity "but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court." 546 U.S. at 446. Here, Respondents did not specifically dispute the validity of the arbitration provision, so the Sixth Circuit should have remanded for further arbitration proceedings, not litigation. The questions whether manifest disregard continues to be a valid ground for vacating an arbitration award, and whether the Sixth Circuit erred in finding manifest disregard in this case, are logically antecedent to any question about what the Court should order on remand under *Buckeye*. Hence, the Sixth Circuit's *Buckeye* error does not create any

impediment to reviewing the questions presented. Granting review would, however, give the Court the opportunity to craft its own order on remand to be consistent with *Buckeye*.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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