No. 15-1537

In The Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY,
PHILIP MORRIS USA INC.,
COMMONWEALTH BRANDS, INC., *et al.*,

Petitioners,

v.

STATE OF MARYLAND,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Special Appeals Of Maryland

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are state courts permitted to apply state judicial review standards in reviewing an arbitration award where the underlying agreement requires the enforcement action to be filed in state court and selects state law as the governing law, and the state standards do not undermine the goals or policies of the Federal Arbitration Act?

2. Did the court below err in finding that the arbitration panel exceeded its powers when it disregarded the contract from which it derived its jurisdiction and instead rendered its decision based on its own notions of economic justice?

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STATEMENT

The petitioners, defendant tobacco companies ("Participating Manufacturers"), ask this Court to review a decision of Maryland's intermediate appellate court, the Maryland Court of Special Appeals, which determined that an arbitration panel exceeded its powers when it disregarded portions of the underlying agreement from which it derived its authority and effectively amended that agreement without the consent of all affected parties. The dispute originates from the 1998 Master Settlement Agreement ("MSA"), an agreement in which the State of Maryland and 51 other states and territories ("Settling States") settled their respective consumer fraud and health care cost recovery lawsuits against the Participating Manufacturers. The MSA required the tobacco companies to modify their marketing practices and to make annual settlement payments to the Settling States in perpetuity.

The MSA's Payment Mechanisms

Under the MSA, Maryland had a contractual right to a payment of approximately $145,000,000 for calendar year 2003, subject to limited potential adjustments. At issue here is the Non-Participating Manufacturer ("NPM") Adjustment, *see* Pet. App. 155a-173a, which the Participating Manufacturers sought to apply for 2003.

Under the NPM Adjustment, the Participating Manufacturers' payments to the Settling States for a

particular year are reduced if the Participating Manufacturers lose a certain percentage of market share to tobacco companies that are not parties to the MSA (*i.e.*, the non-participating manufacturers) and it is determined that disadvantages resulting from the MSA were a significant factor in such reduction. Pet. App. 158a-160a.

If the NPM Adjustment is triggered, all Settling States are subject to this payment reduction, MSA § IX(d)(2)(A), Pet. App. 160a, with one exception: if the State "diligently enforced" a Qualifying Statute[1] during the calendar year in question, MSA § IX(d)(2)(B), Pet. App. 160a-161a. Thus, Settling States that diligently enforced a Qualifying Statute during the year in question do not themselves suffer any payment reduction at all. MSA § IX(d)(2)(B), Pet. App. 160a-161a. However, their respective shares of the total NPM Adjustment do not simply disappear; instead, the MSA requires that the shares of such "diligent" states be reallocated to all of the remaining Settling States. MSA § IX(d)(2)(C), Pet. App. 161a. In other words, under the MSA, liability for the entire NPM Adjustment for any given year is borne, in proportionate shares, by all those Settling States that do not satisfy the "diligently enforced" exception. MSA § IX(d)(2), Pet. App. 160a-161a.

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[1] A Qualifying Statute, as relevant here, is a statute that imposes certain obligations on non-participating manufacturers that sell cigarettes in that state. MSA § IX(d)(2)(E), Pet. App. 162a-163a. Maryland enacted a Qualifying Statute by 2003. Pet. App. 7a.

For calendar year 2003, the criteria for application of the NPM Adjustment were met. Pet. App. 8a, 11a. However, each individual Settling State, including Maryland, claimed that it satisfied the "diligently enforced" exception, and so was exempt from the adjustment. Pet. App. 9a. In 2008, Maryland's Court of Special Appeals held that the MSA required arbitration of the dispute over the NPM Adjustment. *State v. Philip Morris, Inc.*, 179 Md. App. 140, 167 (2008).

The MSA provides that such arbitrations are to "be governed by the United States Federal Arbitration Act." MSA § XI(c), Pet. App. 173a. The MSA also provides that the governing law for the agreement shall be "the laws of the relevant Settling State." MSA § XVIII(n), Pet. App. 174a. Further, § VII(a)(2) of the MSA provides that the courts of each Settling State "shall retain exclusive jurisdiction for the purposes of implementing and enforcing" the MSA, and that each respective State court "shall be the only court to which disputes under [the MSA] . . . are presented as to such Settling State." Pet. App. 155a.

The 2003 NPM Adjustment Arbitration

The arbitration before the panel of three arbitrators ("Panel") commenced in July 2011. To determine which states' diligent enforcement was at issue, the Panel established a procedure in which the Participating Manufacturers first had to identify the Settling States whose diligent enforcement they contested. The

Settling States then could place the diligence of additional Settling States at issue. Pet. App. 12a n.4. After written discovery, the Participating Manufacturers filed a Notice of Contest in which they contested the diligent enforcement of 35 of the 52 Settling States and issued a "no contest" statement as to the remaining 17. Pet. App. 13a. No state challenged the diligent enforcement of any of the 17 "no contest" states, thereby leaving them uncontested. Pet. App. 12a n.4. The Panel scheduled individual diligence hearings for the 35 contested Settling States. Pet. App. 13a.

In December 2012, before the Panel issued any diligence rulings, 18 Settling States and the Participating Manufacturers entered into a side "Term Sheet" settlement. Pet. App. 13a-14a. The "Term Sheet States," including four states that joined the settlement later, agreed to significant reductions in their annual payments from the Participating Manufacturers for the years 2003 through 2012. Pet. App. 88a-90a; 125a-126a. Of 22 total Term Sheet States, 20 had been contested in the 2003 proceedings. Pet. App. 13a.

The Term Sheet itself "did not address the MSA's Reallocation Provision." Pet. App. 13a. Shortly after it was entered, the Participating Manufacturers and the Term Sheet States jointly filed with the Panel a "Proposed Stipulated Partial Award" that purported to present to the Panel different "alternatives for how the 2003 NPM Adjustment will be allocated . . . in light of the settlement." Pet. App. 14a (quotations omitted).

Maryland and other Settling States objected to the proposed "Partial Award" because none of the offered "alternatives" for reallocating the NPM Adjustment were authorized by the MSA, and all of those alternatives had the potential effect of shifting liability from Term Sheet States to States that did not agree to the settlement. The objecting States based their objection in part on § XVIII(j) of the MSA, which allows amendment of the MSA only "by a written instrument executed . . . by all Settling States affected by the amendment." Pet. App. 174a.

On March 12, 2013, the Panel issued the Partial Award over the objection of Maryland and other Settling States. The Partial Award split the NPM Adjustment in two, separating the proportional shares of the Term Sheet States from the proportional shares of all other Settling States. Pet. App. 15a-16a, 92a. In doing so, the Partial Award exempted the Term Sheet States from the reallocation provisions of the MSA, thus absolving them from bearing any portion of the allocable shares of states that qualified for the "diligently enforced" exception and imposing the entire burden of such reallocation on non-Term Sheet States.

Of the 35 contested states, 20 joined the Term Sheet. Pet. App. 13a. On September 11, 2013, the Panel issued diligence determinations for the remaining 15 states. Pet. App. 19a. The Panel determined that nine of those states had diligently enforced Qualifying Statutes and that six, including Maryland, had not. *Id.* As a result of these awards, Maryland's MSA payment was reduced by more than $95 million, approximately

$50 million of which is directly attributable to the Partial Award. Pet. 29. This occurred because, as a result of its new reallocation formula, the Partial Award shifted the entire NPM Adjustment liability of 26 states – the nine states found diligent and the 17 uncontested states – and imposed it on Maryland and the five other states that the Panel found did not diligently enforce a Qualifying Statute.

Post-Arbitration Events

Maryland moved to vacate both the Partial Award and the Panel's non-diligence finding in the Circuit Court for Baltimore City, the court designated in § VII(a)(2) of the MSA as the exclusive forum for "implementing and enforcing" most provisions of the MSA. Pet. App. 155a. The circuit court denied Maryland's motions on July 28, 2014. On October 2, 2015, Maryland's intermediate appellate court, the Court of Special Appeals, reversed the circuit court's ruling on the Partial Award but affirmed that court's ruling as to diligence. Pet. App. 1a-53a.

As to the Partial Award, the Court of Special Appeals first held that the applicable standard of review was supplied by Maryland's Uniform Arbitration Act ("MUAA"). Pet. App. 25a-26a. Interpreting the agreement under Maryland law, the court observed that although the MSA provides that the arbitration itself is to be governed by the FAA, the MSA separately provides that the governing law for all other purposes, including judicial review, consists of "'the laws of the

relevant Settling State.'" Pet. App. 27a (quoting MSA § XVIII(n)). Thus, the court concluded, the MSA dictates the application of Maryland law, provided it is not preempted. Pet. App. 27a.

As to preemption, the state court followed this Court's guidance that the FAA neither expressly preempts state law nor reflects "'a congressional intent to occupy the entire field of arbitration,'" and so only preempts state law "'to the extent that it actually conflicts with federal law.'" Pet. App. 28a (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989)). In concluding that there is no such conflict here, the intermediate appellate court observed that the judicial review provisions of the MUAA neither frustrate the underlying goals of the FAA nor result in a failure to carry out the arbitration provision of the MSA as intended. Pet. App. 29a. To the contrary, the court agreed with the Participating Manufacturers that the MUAA "'is virtually identical in substance to the FAA,'" *id.* (quoting Participating Manufacturers' merits brief), and concluded that the MUAA "promote[s] the goal of enforcing arbitration agreements," *id.*

In addressing the merits of the vacatur motion, the court concluded that the Panel exceeded its powers in ignoring, and then replacing, the MSA's requirement that all states that are not found to meet the "diligently enforced" exception share in any reallocation of the NPM Adjustment. Pet. App. 36a. Thus, the court held, the Panel did not merely misinterpret the MSA's

provision regarding reallocation of the NPM Adjustment; it "disregarded" that provision. *Id.* Relying on this Court's teaching that an "'arbitrator may not ignore the plain language of the contract,'" *id.* (quoting *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987)), the court held that "the Panel was not empowered to bypass the diligence determination [required by the MSA] in reallocating the NPM Adjustment." Pet. App. 37a.

As an alternative ground for vacatur, the Court of Special Appeals also held that the Panel lacked jurisdiction to enter an award that effectively amended the MSA without the consent of all affected parties. Pet. App. 38a-40a. As provided by MSA § XVIII(j), the MSA may be amended only by a writing executed by all parties who would be "'affected by the amendment.'" Pet. App. 38a (quoting MSA § XVIII(j)). The Panel's Partial Award altered the express terms of the MSA "'by changing the MSA's method for reallocating the NPM Adjustment among states that did not prove their diligence.'" Pet. App. 39a (quoting *Commonwealth ex rel. Kane v. Philip Morris USA, Inc.*, 114 A.3d 37, 63 (Pa. Commw. Ct. 2015)). The intermediate appellate court thus joined Pennsylvania's Commonwealth Court in holding that the Panel lacked jurisdiction to fundamentally alter the terms of the MSA without the consent of the affected parties. Pet. App. 39a-40a.

For both of these reasons, the Court of Special Appeals held that the Panel exceeded its powers. *Id.* The Participating Manufacturers petitioned for further review in Maryland's Court of Appeals, which denied the

petition on February 22, 2016. The Participating Manufacturers then petitioned to this Court for a writ of certiorari.

REASONS FOR DENYING THE WRIT

This case presents no significant issue of legal importance for this Court's review. To the contrary, this case presents a dispute over a state court's interpretation of a contract that is expressly governed by state law, and that dispute turns upon a fact-specific application of Maryland's provision for vacating an arbitration award that exceeds the authority of the panel. Neither of these issues merits the Court's review.

The questions the petitioners ask this Court to reach are either not presented by this case or do not present a substantial question meriting this Court's review. The Maryland court decided to apply the MUAA's judicial review standards based on a straightforward interpretation of the MSA under Maryland law, which the parties expressly adopted for disputes involving Maryland. Moreover, given the similarity in the provisions, the outcome under the FAA would have been no different, and the petition rests upon what is, at most, an illusory conflict among state courts regarding whether the FAA preempts application of state-law judicial review standards. The petitioners' handful of cited cases from state courts of last resort either do not

actually decide that issue or predate this Court's decision in *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

Similar flaws plague the petitioners' contentions regarding the Court of Special Appeals' application of judicial review in this case. Both the FAA and the MUAA preclude an arbitrator from ignoring the contract from which he or she derives authority or approving contract amendments without the consent of the affected parties. Whether the Maryland court correctly applied that prohibition in this case – and it clearly did – constitutes, at most, a fact-bound issue that does not warrant review by this Court.

The petition should be denied.

I. The Petition Does Not Present a Substantial Question of Federal Law.

The petitioners contend that this Court's review is necessary because the decision by the Court of Special Appeals to apply a state-law standard of review to an arbitration award presents "an especially grave threat to the FAA," Pet. 2, yet they are unable to articulate how Maryland's extremely deferential review of arbitration awards threatens anything other than the extreme outlier award in this case. Contrary to the petitioners' contention that "[n]o FAA award would be safe from judicial second-guessing" if the decision below is allowed to stand, Pet. 21-22, the decision below is a straightforward application of a standard that requires vacatur under both the FAA and the MUAA.

Even if the MUAA does provide slightly broader grounds for vacatur, it is not in conflict with the FAA and so is not preempted by it.

A. The Court of Special Appeals Interpreted a Contract under State Law.

By interpreting the MSA as providing for the application of Maryland standards of judicial review, the Court of Special Appeals' decision comports with the FAA, which "make[s] arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). The intermediate appellate court's straightforward application of state law to a contract that expressly makes state law its governing law does not merit this Court's review.

"[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt*, 489 U.S. at 474. Because Congress intended the FAA to "place[ ] arbitration agreements on equal footing with all other contracts," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), when a court construes an agreement containing an arbitration clause, the "important inquiry [is] the meaning of [all] provisions taken together." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995). It is thus "the parties' intentions [that] control." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

In the MSA, the parties chose (1) the FAA to govern arbitrations themselves, MSA § XI(c), Pet. App. 173a; (2) state law to apply to the agreement generally, including any proceedings to interpret or enforce the agreement, MSA § XVIII(n), Pet. App. 174a; and (3) state courts as the exclusive forum to implement, enforce, and resolve most disputes arising under the MSA with respect to each individual state, MSA § VII(a), Pet. App. 155a. Reviewing these provisions and applicable precedent from this Court and the Maryland Court of Appeals, the intermediate appellate court determined that MUAA standards of judicial review governed its review of the Partial Award. Pet. App. 24a-29a. In doing so, the Court of Special Appeals properly engaged in an exercise in contract interpretation under Maryland law. The court thus placed the MSA's arbitration agreement "on an equal footing with other contracts" and enforced it "according to [its] terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citing *Buckeye Check Cashing*, 546 U.S. at 443; *Volt*, 489 U.S. at 478)). Because Maryland's courts are the "ultimate authority" on the interpretation of Maryland contracts, *see DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015), the Court of Specials Appeals' interpretation of the MSA's arbitration clause does not present a question for this Court's review. *Id.*

Put simply, the first issue presented by the petitioners is the Court of Special Appeals' straightforward interpretation of a private contract in which the parties selected state law as the governing law and state

courts as the forum for enforcement proceedings.[2] In those circumstances, the decision as to the applicable judicial review standard is properly one for resolution by the respective state courts.

Moreover, the Maryland court's interpretation of the MSA was clearly correct. The parties chose the FAA to govern arbitrations, which may involve multiple states in the same proceeding. However, rather than identify a single judicial forum and single source of applicable law for enforcement of any resulting awards, the MSA entrusts enforcement proceedings, and thus the application and enforcement of applicable law and rules, to the courts of each individual state. In holding that the MSA does not require a state court to forgo its own laws and apply federal standards of judicial review in the state's courts, the Maryland court gave effect to the express terms of the MSA's choice-of-law provisions that make state law the rule for interpreting and enforcing the MSA.

There is no merit to the petitioners' contrary interpretation of the MSA, which posits that because the

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[2] Petitioners incorrectly contend that the Court of Special Appeals "separately held that the proper judicial-review standard is an issue that can be decided only by the courts, not by the parties." Pet. 11 n.1. The Court of Special Appeals made no such holding. Rather, it addressed petitioners' claims that the State had waived any argument about the applicable standard of review by "not raising it in the circuit court." Pet. App. 26a. The court determined that the standard of review could not be waived "because it is 'the court, not the parties, [who] must determine the standard of review[.]' " Pet. App. 26a (quoting *Worth v. Tyer*, 276 F.3d 249, 262 n.4 (7th Cir. 2001)).

agreement provides for the FAA to govern the underlying arbitration, it must be interpreted to mandate application of FAA standards to any subsequent judicial review. That interpretation was rejected below, and because interpretation of arbitration agreements, like other contracts, is "ordinarily a question of state law," *Volt*, 489 U.S. at 474, the Maryland court's interpretation is not reviewable by this Court.

Furthermore, to the extent that the petitioners argue that the FAA mandates application of its standards, that contention is without support in the FAA or in this Court's jurisprudence interpreting it. By its express terms, the FAA's standard of review applies only to federal courts. *See* 9 U.S.C. § 10 (limiting application to cases in "the United States court in and for the district wherein the award was made"); *see also Volt*, 489 U.S. at 477 n.6 ("[W]e have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, . . . are nonetheless applicable in state court."). Far from mandating that state courts review arbitration awards under the FAA's judicial review standards, this Court has stated that the FAA "is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable." *Hall St.*, 552 U.S. at 576. In the MSA, as the state court concluded, the parties chose state law. Contrary to the petitioners' contention that the FAA prohibits enforcement of that selection, the FAA requires enforcement of that selection.

B. The FAA Does Not Preempt the MUAA.

The intent of Congress in enacting the FAA was not to preempt state arbitration laws generally, or to occupy "the entire field of arbitration," *Volt*, 489 U.S. at 477, but to "overrule the judiciary's longstanding refusal to *enforce* agreements to arbitrate," *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985) (emphasis added); *see also Concepcion*, 563 U.S. at 339 (2011) (stating that the FAA was enacted in response to "widespread judicial hostility to arbitration agreements"). The FAA thus "reflects the fundamental principle that arbitration is a matter of contract," *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010), and sets forth "a substantive rule . . . to foreclose state legislative attempts to undercut the enforceability of arbitration agreements," *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

Contrary to the petitioners' argument, Pet. 16, the FAA thus preempts only state laws that stand "'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Concepcion*, 563 U.S. at 352 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *Volt*, 489 U.S. at 477. For example, the Act preempts state laws that would effectively invalidate or substantially alter the terms of arbitration agreements. *See, e.g.*, *Concepcion*, 563 U.S. at 346 (California law invalidating waivers of class arbitration is preempted); *Preston v. Ferrer*, 552 U.S. 346, 359 (2008) (state law mandating an alternative forum for resolution of disputes the parties agreed to arbitrate is

preempted); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (Montana law invalidating arbitration agreements that do not comply with a specific notice requirement is preempted).

By contrast, because the fundamental principle of the FAA is to implement the intent of the contracting parties, the FAA places no obstacle in the way of parties *choosing* different laws or rules. Thus, parties to an arbitration contract may "choose to have portions of their contract governed by the law of Tibet, [or] the law of pre-revolutionary Russia." *Imburgia*, 136 S. Ct. at 468. Similarly, "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt*, 489 U.S. at 476.

This principle extends as well to judicial review. Although judicial review of arbitration awards *in federal court* is limited to those grounds specified in the FAA, that limitation does not preclude "more searching review based on authority outside the [FAA]," such as "state statutory or common law, for example." *Hall St.*, 552 U.S. at 590. The preemption question is thus whether applying the MUAA to judicial review of an arbitration award, based on an agreement in which the parties have chosen Maryland law as the applicable law and a Maryland state court as the applicable forum, "would undermine the goals and policies of the FAA." *Volt*, 489 U.S. at 478. As the Court of Special Appeals properly determined, Pet. App. 29a, applying the MUAA supports, rather than undermines, the goals of

the FAA because it "give[s] effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA," *Volt*, 489 U.S. at 479.

As the Court of Special Appeals observed, far from standing as an "obstacle" to the objectives of the FAA, the MUAA judicial review provisions nearly mirror those of the FAA. Pet. App. 29a-32a. Both statutes authorize courts to vacate an arbitration award where the arbitrators "exceeded their powers." 9 U.S.C. § 10(a)(4); Md. Code Ann., Cts. & Jud. Proc. § 3-224(b)(3). As explained in more detail below in Part II, federal courts and Maryland courts also interpret these identical provisions in similar ways. Both federal law and Maryland law defend the integrity of the parties' agreement to arbitrate by setting a high bar for vacatur of arbitration awards. Thus, "[t]o encourage arbitration as a method of alternative dispute resolution, both the legislature and appellate courts of" Maryland, like their federal counterparts, "have narrowly circumscribed the scope of judicial review available upon the merits of an arbitrator's award." *Snyder v. Berliner Const. Co., Inc.*, 79 Md. App. 29, 34 (1989); *accord First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (an arbitrator's award should be set aside "only in certain narrow circumstances"). Accordingly, Maryland courts "generally defer to the arbitrator's findings of fact and applications of law," *Downey v. Sharp*, 428 Md. 249, 266 (2012) (quotation omitted), just as federal courts will set aside an arbitrator's decision "only in very unusual circumstances" and "grant arbitrators

considerable leeway when reviewing most arbitration decisions." *First Options of Chicago*, 514 U.S. at 942, 948.

Indeed, below the petitioners agreed that the "'Maryland arbitration statute is virtually identical in substance to the FAA,'" and that "'the Maryland standard of review is equally or nearly as narrow as the FAA standard.'" Pet. App. 29a, 25a (quoting petitioners' brief below). Maryland's judicial review standards are "consistent with the Federal Arbitration Act," *Imburgia*, 136 S. Ct. at 468, and in no way "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Volt*, 489 U.S. at 477 (quoting *Hines*, 312 U.S. at 67). The petitioners' disagreement with the state court's application of the Maryland standards to the facts of this particular case neither alters those standards nor presents an issue worthy of this Court's review.

C. Petitioners' Alleged Split Among State Court Decisions Is Illusory and, at Best, Not Ripe for Review.

There is no ripe split in authority for this Court to resolve relating to the application of the appropriate standard of judicial review. The petitioners allege that six courts of last resort mandate the application of § 10 of the FAA to state court review of arbitral awards. Pet. 18. To the extent those decisions are at all pertinent, their materially different circumstances prevent them from presenting an actual conflict.

In two of the six cases cited by the petitioners, the standard of review was not a contested issue, so the courts never analyzed or decided it. *See United States Elecs., Inc. v. Sirius Satellite Radio, Inc.*, 958 N.E.2d 891, 892 (N.Y. 2011) (where both parties agreed that the FAA applied, the court stated without analysis that "the vacatur of the arbitration award is governed by the Federal Arbitration Act"); *Vold v. Broin & Assocs., Inc.*, 699 N.W.2d 482, 486 (S.D. 2005) (in the absence of disagreement, applying the FAA standards without discussion or analysis). In a third case, the Nebraska Supreme Court applied the FAA's judicial review provisions, without discussion or analysis, apparently based only on the court's determination that the FAA's substantive requirement to enforce arbitration agreements preempted a conflicting provision of Nebraska law. *Dowd v. First Omaha Secs. Corp.*, 495 N.W.2d 36, 40, 42 (Neb. 1993).

In a fourth case, the Supreme Court of Alabama initially applied the FAA judicial review standards in *Birmingham News Co. v. Horn*, 901 So. 2d 27, 46-47 (Ala. 2004), also based only on the substantive application of the FAA to preempt conflicting Alabama law. However, that court subsequently retreated from that decision in light of this Court's decision in *Hall Street*, which the Alabama court reads to "acknowledge[] that state statutory or common law might permit arbitration awards to be reviewed under standards different from those enumerated" in the FAA. *Raymond James Fin. Servs., Inc. v. Honea*, 55 So. 3d 1161, 1168-69 (Ala. 2010). In *Honea*, the Alabama court applied the *de novo*

standard of review set forth in the arbitration agreement at issue, not the FAA standard.

Both of the petitioners' final two cases from courts of last resort, *Hilton Const. Co. v. Martin Mech. Contractors, Inc.*, 308 S.E.2d 830, 832 (Ga. 1983), and *Hecla Min. Co. v. Bunker Hill Co.*, 617 P.2d 861, 865 (Idaho 1980), have been superseded by intervening decisions of this Court. In both *Hilton Construction* and *Hecla Mining*, the courts reasoned, in essence, that if the underlying arbitration agreements touched upon interstate commerce, federal standards must apply. *See Hilton Const.*, 308 S.E.2d at 832 (stating that because the FAA created a "body of substantive federal law," federal, rather than state, standards would govern "the vacation of the award"); *Hecla Mining*, 617 P.2d at 865 (stating that because the "factual situation here clearly concerns interstate commerce," federal law would apply to review of the award). That simplistic analysis is no longer sustainable in light of this Court's subsequent decisions, including, for example, *Volt*, 489 U.S. at 476-79 (upholding the application of California procedural rules authorizing a court to stay arbitration), and *Hall Street*, 552 U.S. at 590 (stating that parties might be able to elect a "more searching review" of arbitration awards "based on authority" such as "state statutory or common law"). *See also Imburgia*, 136 S. Ct. at 468.

In summary, the petitioners have not identified a single state court of last resort that has, with the benefit of this Court's decision in *Hall Street*, (a) analyzed

whether to apply FAA or state judicial review standards in a state court enforcement action and (b) determined that it was required by law to apply the FAA standards. To the contrary, state courts of last resort appear to have taken *Hall Street* to heart. *See, e.g.*, *Honea*, 55 So. 3d at 1168-69; *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 599 (Cal. 2008); *Finn v. Ballentine Partners, LLC*, ___ A.3d ___, 2016 WL 3268852, at *5 (N.H. June 14, 2016); *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 100 (Tex.), *cert. denied*, 132 S. Ct. 455 (2011); *accord Katz, Nannis & Solomon, P.C. v. Levine*, 46 N.E.3d 541, 547-48 (Mass. 2016) (finding that *Hall Street* authorizes additional review "on grounds of State statutory law or common law," but concluding that state statute was identical to FAA).

Finally, the petitioners' reliance on the decision of Missouri's intermediate appellate court interpreting the MSA, Pet. 18, is misplaced because that decision presents, at best, a conflict that is not ripe for review by this Court.[3] That lower court decision is now pending review before the Missouri Supreme Court. *Missouri v. Am. Tobacco Co.*, No. ED 101542, 2015 WL

[3] As the petitioners correctly note, the Pennsylvania intermediate appellate court issued a decision that is in complete agreement with the decision below in this case as to the Partial Award. *Commonwealth ex rel. Kane v. Philip Morris USA, Inc.*, 114 A.3d 37 (Pa. Commw. Ct. 2015). That decision is the subject of a pending petition before this Court. No. 15-1299 (U.S. Apr. 22, 2016).

5576135 (Mo. Ct. App. Sept. 22, 2015), *appeal transferred to Mo. S. Ct.*, No. SC95422. There is thus no ripe split for this Court to resolve.

II. This Case Is a Poor Vehicle for Addressing the Questions Posed in the Petition.

Even if the Participating Manufacturers had identified an otherwise-appropriate basis for review by this Court, this case would be a poor vehicle for addressing it because the federal and Maryland standards are not materially different in relevant part, and application of the federal standards would not change the result. Whether the Participating Manufacturers are correct in characterizing the Maryland and federal standards as "virtually identical," Pet. App. 29a, or whether the respective standards are merely similar, the result in this case would not change.

Section 10(a)(4) of the FAA authorizes courts to vacate arbitration awards "where the arbitrators exceeded their powers." Maryland's nearly identical statutory language authorizes a court to vacate an award if "[t]he arbitrators exceeded their powers." Md. Code Ann., Cts. & Jud. Proc. § 3-224(b)(3). Case law interpreting the two statutory provisions is also aligned in most respects, as both federal and Maryland courts emphasize protecting the integrity of the parties' agreement to arbitrate. For that reason, both Maryland and federal courts are highly deferential to arbitration awards and will vacate awards only rarely, and then only when the specific statutory criteria are

satisfied. *See Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013) (a party seeking vacatur "bears a heavy burden," and an arbitrator exceeds his authority only when acting "outside the scope of his contractually delegated authority") (citation omitted); *Snyder*, 79 Md. App. at 37 ("[A]rbitrators exceed their powers . . . if, though having full power to consider the subject matter of a dispute, they issue an award which cannot be supported by any rational construction of the parties' *substantive contractual provisions*.") (emphasis in original).

The Participating Manufacturers' reliance on *Oxford Health* is misplaced. In that case, this Court held that vacatur is appropriate under § 10(a)(4) of the FAA when an arbitrator acts "'outside the scope of his contractually delegated authority'" by not "even arguably construing or applying the contract" but instead "issuing an award that 'simply reflect[s] [his] own notions of [economic] justice' rather than 'draw[ing] its essence from the contract.'" 133 S. Ct. at 2068 (quoting *Eastern Assoc. Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000) (brackets in original)).

Even if *Oxford Health*'s interpretation of the FAA's judicial review standards were applicable to this case – which, as discussed in Part I, it is not – that decision is not in tension with Maryland law or the decision of the Court of Special Appeals in this case. To the contrary, the Panel's actions in entering the Partial Award exceeded its authority under either standard.

An arbitration panel "derives [its] powers from the parties' agreement. . . ." *Stolt-Nielsen S.A. v. Animal-Feeds Int'l Corp*., 559 U.S. 662, 682 (2010). Courts and arbitrators are charged with giving effect to arbitration agreements, including contractual limitations, without "los[ing] sight of the purpose of the exercise: to give effect to the intent of the parties." *Id.* at 684. When an "arbitrator strays from interpretation and application of the agreement," *id.* at 671 (quotation omitted), and thus acts "outside the scope of his contractually delegated authority" by issuing an award that "simply reflects his own notions of economic justice rather than drawing its essence from the contract," a court may vacate the resulting award, *Oxford Health*, 133 S. Ct. at 2068 (internal quotations and brackets omitted); *see also Stolt-Nielsen*, 559 U.S. at 671-72.

In this case, the Court of Special Appeals held that the Panel exceeded its authority when it "disregarded" the provisions of the MSA in favor of the Panel's own reallocation rules, Pet. App. 36a-39a, and when it effectively amended the MSA without the consent of the affected parties, Pet. App. 38a-39a. Whether judged under the MUAA standards or the FAA standards, these actions exceeded the authority of the Panel and, therefore, required vacatur. Thus, even if the petitioners were correct that there is a ripe conflict regarding whether states are empowered to apply their own judicial review procedures in reviewing awards made in arbitrations that are themselves governed by the FAA,

this case would be a poor vehicle for resolving that dispute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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