No. 08-1396

SEP 8 - 2009

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

PETITIONERS' REPLY IN SUPPORT OF CERTIORARI

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REPLY

Since Coffee Beanery filed its petition four months ago, still more courts, in addition to those cited in the petition for certiorari (Pet. 16-17), have concluded that the circuits are split over whether manifest disregard survives *Hall Street Associates, L.L.C.* v. *Mattel, Inc.*, 552 U.S. ___, 128 S. Ct. 1396 (2008), and, if it does survive, how to define and apply it. *See Franko* v. *Ameriprise Fin. Servs.*, No. 09-09, 2009 U.S. Dist. LEXIS 48907, at *14 n.5 (E.D. Pa. June 11, 2009); *Transmontaigne Prod. Servs.* v. *Americas Ins. Co.*, No. 49A05-0810-CV-604, 2009 Ind. App. Unpub. LEXIS 1008, at *18 n.11 (Ind. Ct. App. Aug. 12, 2009); *Xtria L.L.C.* v. *Int'l Ins. Alliance*, 286 S.W.3d 583, 593 (Tex. App. 2009).

In the same short time, five academic articles have recognized the circuit split and have called on this Court to resolve it:

> Some courts have held that manifest disregard is dead after *Hall Street* because it is not a ground that is expressly included in the Section 10(a) grounds for vacatur. At the same time, some courts have held that manifest disregard does survive *Hall Street*. . . . Still other courts have simply found that it is an open question.
>
> Clearly, the U.S. Supreme Court is going to need to step in to resolve the schism in the lower courts and to settle the question once and for all.

Richard C. Reuben, *Building the Civilization of Arbitration: Personal Autonomy and Vacatur after* Hall Street, 113 Penn. St. L. Rev. 1103, 1145-46 (2009) (footnotes omitted); *see also* Hiro N. Aragaki, *The Mess of Manifest Disregard*, 119 Yale L.J. Online ___ (forthcoming 2009); Jane B. Morgan, *The Arbitration Exception in Third Party Legal Opinions: Dead or Alive?*, 28 Miss. C. L. Rev. 249, 252-53 (2009); Hans Smit, Hall Street Associates v. Mattel: *A Critical Comment*, 17 Am. Rev. Int'l Arb. 513, 519 (2006 [sic]); Robert Ellis, Recent Development, *Imperfect Minimalism: Unanswered Questions in* Hall Street Associates L.L.C. v. Mattel, Inc., *138 S. Ct. 1396 (2008)*, 32 Harv. J.L. & Pub. Pol'y 1187, 1192 (2009).

The recognition by these courts and commentators of a deep split in the circuits directly refutes Respondents' claim that no split exists.

I. Respondents Cannot Explain Away The Deep, Square Conflict In The Circuits Over Manifest Disregard Of The Law.

Despite all evidence to the contrary, Respondents argue that "[t]here is no circuit split," BIO 1, based on the twin premises that the doctrine of manifest disregard has "historically been viewed as an application of Section 10(a)(4) of the Federal Arbitration Act," *ibid.*, and that this Court endorsed that view in *Hall Street*, holding "that the manifest-disregard standard may properly be regarded as a gloss on

Section 10 and its 'exceeded their powers' clause." BIO 10. Respondents' claims about history and *Hall Street* are both wrong, and so is their argument on the circuit split.

As to history, after this Court used the phrase "manifest disregard" in dictum in *Wilko* v. *Swan*, 346 U.S. 427, 436 (1953), every circuit but one adopted it in some form as an extra-statutory, common law doctrine. Pet. 26-27 (citing cases from each circuit); *see Citigroup Global Mkts. Inc.* v. *Bacon*, 562 F.3d 349, 353-55 (CA5 2009) (describing the history of the doctrine's adoption). The pre-*Hall Street* cases that Respondents cite to support their unfounded claim of uniformity (BIO 8 & n.2) either recognize that manifest disregard exists in addition to the grounds for vacatur in FAA § 10(a), conduct separate analyses for § 10(a) and for manifest disregard, or fail to mention § 10(a) at all in discussing manifest disregard.

As to *Hall Street*, it did not hold "that manifest disregard may properly be viewed . . . as shorthand for those grounds enumerated in section 10," as Respondents wrongly claim. BIO 10. In the *Hall Street* passage Respondents quote, the Court listed various things that *Wilko*'s dictum "may have" meant to demonstrate "the vagueness" of its "phrasing" and to prove that the dictum did not have the significance Hall Street argued it did. 128 S. Ct. at 1404. Far from endorsing any particular meaning as the proper one, the Court distanced itself from *Wilko*, saying that "[w]e, when speaking as a Court, have merely taken

the *Wilko* language as we found it, without embellishment." *Ibid.*

Finally, there *is* a split in the circuits because of the irreconcilable conflict between this Court's holding in *Hall Street* that § 10 "provide[s] the FAA's exclusive grounds for expedited vacatur," 128 S. Ct. at 1403, and the settled understanding of manifest disregard as a common law doctrine. The lower courts have been forced to choose between holding fast to the common law roots of manifest disregard (the Sixth Circuit), trying to squeeze the common law doctrine into the text of § 10(a)(4) (the Second and Ninth Circuits), rejecting the doctrine in favor of applying the text of § 10(a)(4) on its own terms (the First and Fifth Circuits), and retaining the doctrine in name only, but applying it in a way that is in fact limited to the text (the Seventh Circuit). *See* Pet. 16-23.

A. The First and Fifth Circuits have rejected manifest disregard.

Straining to smooth out the conflict recognized by numerous courts and commentators, Respondents mischaracterize the positions the circuits have taken, beginning with the two circuits that have rejected manifest disregard altogether. The Fifth Circuit did not "carefully limit[]" its holding "to whether manifest disregard survives as an independent, *nonstatutory* ground for vacatur," as Respondents claim. BIO 13. It concluded that the very phrase

"manifest disregard," "as a term of legal art, is no longer useful in actions to vacate arbitration awards." *Citigroup*, 562 F.3d at 358. Later decisions from the Fifth Circuit interpret *Citigroup* as eliminating manifest disregard altogether. *See Saipem Am.* v. *Wellington Underwriting Agencies*, No. 08-20247, 2009 U.S. App. LEXIS 12673, at *7 & n.3 (CA5 June 9, 2009); *Nat'l Resort Mgmt. Corp.* v. *Cortez*, 319 Fed. Appx. 313, 313 (CA5 2009). Other courts, more numerous than petitioners have room to cite in this reply, interpret *Citigroup* in the same way. *See, e.g.*, *Waddell* v. *Holiday Isle, LLC*, No. 09-0040, 2009 U.S. Dist. LEXIS 67669, at *23 (S.D. Ala. Aug. 4, 2009); *Global Reinsurance Corp. of Am.* v. *Argonaut Ins. Co.*, No. 07 Civ. 7514, 2009 U.S. Dist. LEXIS 37460, at *10 (S.D.N.Y. Mar. 23, 2009).

Respondents also misrepresent the position of the First Circuit when they argue that *Ramos-Santiago* "expressly 'decline[d] to reach the question of whether *Hall Street* precludes a manifest disregard inquiry.'" BIO 12. In fact, *Ramos-Santiago* declared "that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the Federal Arbitration Act ('FAA')." *Ramos-Santiago* v. *United Parcel Serv.*, 524 F.3d 124, 124 n.3 (CA1 2008). The question the court "decline[d] to reach" was whether *Hall Street* also precludes a manifest disregard inquiry under the Labor Management Relations Act. *Ibid.* Lower courts in the First Circuit have consistently interpreted *Ramos-Santiago* to preclude the use of manifest

disregard under the FAA. *See, e.g.*, *Globe Newspaper Co.* v. *Int'l Ass'n of Machinists*, No. 08-cv-11945, 2009 U.S. Dist. LEXIS 69034, at *10 n.5 (D. Mass. Aug. 5, 2009); *ALS & Assocs.* v. *AGM Marine Constructors, Inc.*, 557 F. Supp. 2d 180, 185 (D. Mass. 2008).

The First Circuit's subsequent decision in *Kashner Davidson Secs. Corp.* v. *Mscisz*, 531 F.3d 68 (CA1 2008), does not revive manifest disregard, as Respondents claim, BIO 11-12, because it does not discuss either *Hall Street* or *Ramos-Santiago*. *Kashner* was briefed and argued before *Hall Street* issued, neither party submitted *Hall Street* as supplemental authority, and the opinion does not cite, much less discuss *Hall Street*. *See Kashner Davidson Sec. Corp.* v. *Mscisz*, No. 09-1356, Reply Brief for Defendants-Appellants at 4 (CA1 Aug. 14, 2009) (reply brief on second appeal after remand, re-counting history of first appeal). Another subsequent First Circuit decision similarly cites pre-*Hall Street* authority on manifest disregard without discussing *Hall Street* or *Ramos-Santiago* and thus similarly does not affect the issue presented in this petition. *See E. Seaboard Constr. Co.* v. *Gray Constr., Inc.*, 553 F.3d 1, 4 (CA1 2008). The only First Circuit district court to cite *Kashner* concluded that *Ramos-Santiago* was controlling and that "the court [in *Hall Street*] rejected the 'manifest disregard of the law' standard of review in cases filed under the provisions of the federal arbitration statute." *Horizon Lines of P.R., Inc.* v. *Local 1575, Int'l Longshoremen's Ass'n*,

No. 08-1611, 2009 U.S. Dist. LEXIS 17637, at *9 (D.P.R. Mar. 6, 2009).

B. The Sixth Circuit insists that manifest disregard is a viable extra-statutory ground for vacatur.

It is ironic that Respondents contend that the Sixth Circuit "has yet to produce a precedent on point," BIO 15, because the panel below ruled as it did based on its belief that it was bound by precedent: "[I]t would be imprudent to cease. . . . follow[ing] [the Sixth Circuit's] well-established precedent" on manifest disregard. App. 10. The panel squarely addressed whether manifest disregard remains an extra-statutory basis for vacatur after *Hall Street*, and concluded that it does. App. 8. In addition, as petitioners noted, a prior published decision in the Sixth Circuit also declared 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.* v. *Dub Herring Ford*, 547 F.3d 558, 561 n.2 (CA6 2008).[1]

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[1] Respondents devote a paragraph to *Grain* v. *Trinity Health*, 551 F.3d 374 (CA6 2008), before acknowledging that "*Grain* did not concern a motion for vacatur," and hence that it "did not decide the question presented for the Sixth Circuit." BIO 16. *Grain* is irrelevant to the question before the Court.

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

Respondents assert that "the conflict over the standard's scope" in the Second, Seventh, and Ninth Circuits "is nonexistent" because no court allows "judicial review for mere legal errors." BIO 16. This ignores the real circuit conflict that exists. The Seventh Circuit holds that "[f]actual or legal error, *no matter how gross*, is insufficient to support overturning an arbitration award." *Halim* v. *Great Gatsby's Auction Gallery, Inc.*, 516 F.3d 557, 563 (CA7 2008) (emphasis added). In practice, it is therefore closely aligned with the First and Fifth Circuits. The other two circuits disagree with the Seventh Circuit and allow some degree of legal error to justify vacating an award. In the Second Circuit, there must be an "egregious impropriety," such as when the "arbitrator explicitly rejected controlling precedent" or when the arbitrator "willfully flouted the governing law by refusing to apply it." *Stolt-Nielsen SA* v. *AnimalFeeds Int'l Corp.*, 548 F.3d 85, 92, 93 (CA2 2008). In the Ninth Circuit, the arbitrator need only be "fundamentally incorrect" in applying the law. *Comedy Club, Inc.* v. *Improv W. Assocs.*, 553 F.3d 1277, 1290, 1293 (CA9 2009), cert. pending, No. 08-1525. To claim that this conflict is "nonexistent" is to ignore reality: litigants face materially different standards in different circuits.

II. The History Of This Case Illustrates The Need For Review Without Further Delay.

The Court should grant review to resolve the circuit split now, because as long as losing parties in arbitration perceive that courts will entertain arguments of legal error through the doctrine of manifest disregard of the law, arbitration's core benefits of finality and efficiency will be undermined. Pet. 28-31.

The history of this case richly illustrates the danger. After an eleven-day hearing, the arbitrator fully vindicated Coffee Beanery on all counts. That was in March of 2007. App. 50-58. Respondents then moved to vacate the award in the district court, moved for reconsideration when they lost, and appealed to the Sixth Circuit when they lost again. Coffee Beanery was required to defend the award in the district court, defend it again in the Sixth Circuit, petition for rehearing when the Sixth Circuit held that manifest disregard of the law survived *Hall Street*, and petition this Court for review when the Sixth Circuit denied relief. Now it is September of 2009. Coffee Beanery has been forced to defend the arbitration award for more than two years in three levels of federal court.[2]

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[2] In this Court, moreover, Respondents write their brief in opposition as if the arbitrator had never ruled, offering a statement of facts drawn, not from the record, but from a political news article, BIO 2-3 & n.1, even though it is settled law that an arbitrator's factual findings are binding. *See, e.g.,*

(Continued on following page)

Coffee Beanery's experience is, unfortunately, a common one. Since *Hall Street*, losing parties in arbitration repeatedly have raised, lower courts have had to consider, and winning parties have had to defend against arguments based on manifest disregard of the law.[3]

The unsettled state of the law, and the resulting inefficiency in confirming arbitration awards, flows from this Court's cases and can only be corrected here. This Court's dictum in *Wilko* gave rise to manifest disregard. This Court's holding in *Hall Street* eliminated the only basis courts historically gave for manifest disregard and threw the lower courts into conflict. Manifest disregard plays too pervasive a role

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United Paperworkers Int'l Union v. *Misco, Inc.*, 484 U.S. 29, 37-38 (1987).

[3] *See, e.g.*, *Halliburton Energy Servs.* v. *NL Indus.*, 306 Fed. Appx. 843, 843 (CA5 2009); *Waddell*, 2009 U.S. Dist. LEXIS 67669, at *23; *Franko*, 2009 U.S. Dist. LEXIS 48907, at *15; *Jones* v. *PPG Indus.*, No. 07cv1537, 2009 U.S. Dist. LEXIS 20363, at *4 n.1 (W.D. Pa. Mar. 13, 2009); *Regnery Publ., Inc.* v. *Miniter*, 601 F. Supp. 2d 192, 196 (D.D.C. 2009); *Williams* v. *Mexican Rest., Inc.*, No. 1:05-CV-841, 2009 U.S. Dist. LEXIS 16561, at *21 (E.D. Tex. Feb. 27, 2009); *O'Leary* v. *Salomon Smith Barney, Inc.*, No. 05-6016, 2008 U.S. Dist. LEXIS 98483, at *9 (D.N.J. Dec. 5, 2008); *DMA Int'l, Inc.* v. *Qwest Commc'ns Int'l*, No. 08-CV-00358, 2008 U.S. Dist. LEXIS 76164, at *13 (D. Colo. Sept. 12, 2008); *Hartford Fire Ins. Co.* v. *Evergreen Org., Inc.*, No. 07 Civ. 7977, 2008 U.S. Dist. LEXIS 69301, at *14 n.3 (S.D.N.Y. Aug. 28, 2008); *AmeriCredit Fin. Servs.* v. *Oxford Mgmt. Servs.*, No. 07-CV-3948, 2008 U.S. Dist. LEXIS 76720, at *18 (E.D.N.Y. Sept. 18, 2008); *ALS & Assocs.*, 557 F. Supp. 2d at 185; *Xtria L.L.C.*, 286 S.W.3d at 594.

in the fights to vacate arbitration awards for the Court to stay its hand any longer.

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

Respondents do not address any of Coffee Beanery's six reasons why this case is an ideal vehicle for deciding the questions presented, Pet. 31-36, and the supposed vehicle problems they identify are baseless.[4] The unpublished status of the decision below is not a vehicle problem. *Hall Street* itself reviewed an unpublished decision, 128 S. Ct. at 1401, n.1, and fully ten percent of the Court's decisions last Term reviewed unpublished decisions. Respondents' claimed preservation of other arguments for vacating the award that might be raised on remand is also not a vehicle problem. This Court often decides the question presented and then remands for the lower court to consider alternative arguments. *See, e.g.*, *Travelers Indem. Co.* v. *Bailey*, 129 S. Ct. 2195, 2198 (2009); *I.N.S.* v. *Aguirre-Aguirre*, 526 U.S. 415, 433 (1999); *Johnson* v. *Home State Bank*, 501 U.S. 78, 88 (1991). Alternative arguments pose a vehicle problem only if the lower court addressed and relied on them, and it is undisputed here that the Sixth Circuit relied solely on manifest disregard as the basis for vacatur. This

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[4] The brief in opposition also does not defend the Sixth Circuit's error below in remanding for litigation instead of further proceedings before the arbitrator, as required by *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 446 (2006).

case is an ideal vehicle for addressing the questions presented by the petition.

Respondents also argue that this case is a poor vehicle for considering the full scope of the conflict in the circuits "[b]ecause the petition does not present a question concerning the substance of the manifest-disregard standard[.]" BIO 16. That is incorrect. "The statement of any question presented is deemed to comprise every subsidiary question fairly included therein," S. Ct. R. 14.1(a), including questions that are "essential to the correct disposition of the other issues in the case." *United States* v. *Mendenhall*, 446 U.S. 544, 552 n.5 (1980). The Court cannot decide the questions presented in this petition – whether manifest disregard of the law is a valid common-law or statutory ground for vacating an arbitration award under the FAA, and whether the Sixth Circuit erred below in vacating the arbitration award for manifest disregard of the law – without determining what the standard for manifest disregard is. That question is inherent in, and essential to the correct disposition of, the questions presented. Moreover, this Court has the discretion to craft its own questions presented and should do so if it would help present the full scope of the conflict.

Finally, Respondents accuse Coffee Beanery of "seeking a sweeping change" in the law and argue on that ground for denial of review. BIO 17. This is a merits argument, not an argument affecting review. This Court, moreover, already effected the change in *Hall Street* when it held that § 10 "provide[s] the

FAA's exclusive grounds for expedited vacatur." 128 S. Ct. at 1403. What remains is only to apply *Hall Street*'s holding to the doctrine of manifest disregard and to confirm the position already adopted by the First, Fifth, and Seventh Circuits – a position that has been applied for years by many state courts under their own arbitration statutes. *See, e.g.*, *Moncharsh* v. *Heily & Blase*, 832 P.2d 899, 904, 914-15 (Cal. 1992).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: September 8, 2009

Respectfully submitted,

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