No. 08-1525

In The
Supreme Court of the United States

IMPROV WEST ASSOCIATES and
CALIFORNIA COMEDY, INC.,

Petitioners,

v.

COMEDY CLUB, INC. and
AL COPELAND INVESTMENTS, INC.,

Respondents.

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

REPLY BRIEF

ROBERT N. KLIEGER
Counsel of Record
KENDALL BRILL & KLIEGER LLP
10100 Santa Monica Blvd.
Suite 1725
Los Angeles, CA 90067
Tel: (310) 556-2700

Counsel for Improv West Assocs. and California Comedy, Inc.

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CORPORATE DISCLOSURE STATEMENT

The Petitioners, Improv West Associates and California Comedy, Inc., have no parent corporations, and no publicly held company owns 10% or more of their stock.

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REPLY BRIEF FOR PETITIONERS

I. Review Of The Ninth Circuit's Decision Is Critical To Ensure Uniformity In The Scope Of Judicial Review Of Arbitration Awards Under The FAA.

In their opposition, Respondents do not dispute that the scope of judicial review of arbitration awards under the Federal Arbitration Act ("FAA") generally, and the validity of manifest disregard as a basis for vacating arbitration awards in particular, are important issues. Respondents grudgingly acknowledge that the circuits have not been consistent in their approach to manifest disregard following this Court's decision in *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. ___, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008), resulting in disparities in judicial review of arbitration awards. And Respondents tacitly concede that this case presents an appropriate vehicle for considering these important issues and ensuring uniform application of the statutory grounds for vacatur. Nonetheless, Respondents offer three arguments as to why this Court should decline review and reserve the circuit conflict for another day. As discussed below, none of these arguments has any merit.

Respondents first assert that there is "no true and mature circuit split" as to the validity of manifest disregard as a ground for vacatur after *Hall Street*. Resp. Br. at 12. This is simply untrue. The Fifth Circuit has held that *Hall Street* abrogated manifest disregard as a ground for vacatur. *See Citigroup*

Global Mkts., Inc. v. Bacon, 562 F.3d 349, 358 (5th Cir. 2009) ("[M]anifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected. Indeed, the term itself, as a term of legal art, is no longer useful in actions to vacate arbitration awards."). The Sixth Circuit has reached precisely the opposite conclusion and has held that manifest disregard is alive and well as a non-statutory ground for vacatur. *See Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. Appx. 415, 419 (6th Cir. 2008) ("The Court's ability to vacate an arbitration award is almost exclusively limited to [the statutory] grounds, although it may also vacate an award found to be in manifest disregard of the law."), *petition for cert. filed* (U.S. May 11, 2009) (No. 08-1396). The Ninth Circuit, in the decision below, charted a third course and held that the common law doctrine of manifest disregard survives as a judicial gloss on the statutorily enumerated grounds for vacatur. App. A at 25 ("manifest disregard of the law remains a valid ground for vacatur because it is part of § 10(a)(4)"). These three disparate approaches cannot be reconciled with one another and reflect a genuine circuit split that is ripe for this Court's review.

The confusion underlying these disparate views is further reflected in sets of internally inconsistent decisions from both the First and Second Circuits. In its first decision addressing the doctrine of manifest disregard after *Hall Street*, the First Circuit held that the manifest disregard is no longer a valid ground for

vacatur. *See Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008). In two subsequent cases, however, the First Circuit has specifically reaffirmed manifest disregard as a valid common law ground for vacatur. *See Kashner Davidson Secs. Corp. v. Mscisz*, 531 F.3d 68, 74 (1st Cir. 2008); *Zayas v. Bacardi Corp.*, 524 F.3d 65, 68 (1st Cir. 2008). The Second Circuit has been equally inconsistent in its approach. In *Stolt-Nielsen SA v. AnimalFeeds International Corporation*, 548 F.3d 85 (2d Cir. 2008), *petition for cert. granted*, 129 S. Ct. 2793, 174 L. Ed. 2d 289 (2009), the Second Circuit "reconceptualized" manifest disregard "as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA." *Id.* at 94. In at least two cases decided after *Stolt-Nielsen*, however, the Second Circuit has reaffirmed manifest disregard as a "non-statutory ground" for vacatur. *See Vaughn v. Leeds, Morelli & Brown, P.C.*, 315 Fed. Appx. 327, 330 (2d Cir. 2009); *Rich v. Spartis*, 307 Fed. Appx. 475, 478 (2d Cir. 2008).[1]

In sum, the decisions of the five circuits that have weighed in on the validity of manifest disregard after *Hall Street* do not demonstrate anything close to consensus, as Respondents suggest, but instead evidence the type of clear conflict and abject confusion

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[1] Contrary to Respondents' suggestion (Resp. Br. at 14 n.9), neither the *Vaughn* nor *Rich* decision is a "summary order" covered by Second Circuit Local Rule 32.1, and both decisions are therefore citable as authority.

that can be resolved only through this Court's intervention.

Respondents next argue that the conflict among the circuits is not so "meaningful" as to warrant review. Resp. Br. at 17. Respondents' dismissive attitude ignores one of the foremost goals of the FAA, which is to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced. Congress did not intend for an award that must be confirmed in one circuit to be subject to vacatur in another, such that the finality of an award turns on the fortuity of where a dispute happens to arise. Rather, in keeping with the strong federal policy in favor of arbitration, the FAA requires uniformity in the scope of judicial review. The conflict among the circuits regarding the validity of manifest disregard as grounds for vacatur deprives contracting parties of any certainty regarding the finality of arbitration awards and demands this Court's attention.

Respondents' final argument, that the Court should not address judicial review of arbitration awards "so soon after *Hall Street*" (Resp. Br. at 17), is equally flawed. Indeed, the fact that a profound circuit split has arisen so soon after *Hall Street* is precisely *why* this Court's prompt and decisive intervention is necessary. Although the law in the First and Second Circuits remains hopelessly confused, the Fifth, Sixth, and Ninth Circuits are locked into their respective positions. The Sixth Circuit in *Coffee Beanery* followed "well-established precedent"

in vacating an arbitration award on the non-statutory ground of manifest disregard and denied rehearing *en banc*. 300 Fed. Appx. at 419. The Fifth Circuit squarely held in *Citigroup* that the doctrine of manifest disregard has been abrogated by *Hall Street*. 562 F.3d at 358. The Ninth Circuit in its decision below held that a prior *en banc* decision compelled it to reimagine manifest disregard as a statutory ground for vacatur. App. 24-25. Consequently, unless and until this Court intervenes, there can be no uniform national standard for judicial review of arbitration awards. The time for review is now, and there is nothing to be gained by allowing the conflict to deepen.

II. Manifest Disregard Has No Place In Judicial Review Of Arbitration Awards Under The FAA.

The policies underlying the FAA require that the doctrine of manifest disregard be abrogated. Sections 9 through 11 of the FAA "substantiat[e] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Hall Street*, 128 S. Ct. at 1405. The exclusive grounds for vacatur enumerated in § 10 are limited to procedural aberrations that are "egregious departures from the parties' agreed-upon arbitration," such as where the award is procured by "fraud" and where the arbitrators are "corrupt[ ]," refuse to hear pertinent evidence, or exceed their powers by ruling on issues that have not

been submitted to arbitration. *Id.* at 1404. There is no allowance for review of an award on the merits, regardless of whether the review is for plain, "clear," or even "manifest" legal error.

The view that manifest disregard survives *Hall Street* as a non-statutory ground for vacatur – which was adopted by the Sixth Circuit in *Coffee Beanery*, as well as by recent decisions of the First and Second Circuits – runs directly counter to *Hall Street*. In *Hall Street*, this Court held in the plainest of terms that the statutory grounds for vacatur are the "exclusive grounds" for vacatur, and that neither contracting parties *nor the courts* may expand those grounds. 128 S. Ct. at 1406 ("[T]he statutory text gives us no business to expand the statutory grounds.").

The Ninth Circuit in the case below, as well as the Second Circuit in *Stolt-Nielsen*, have paid lip service to *Hall Street* by recharacterizing manifest disregard as a judicial "gloss" on some or all of the statutory grounds for vacatur. In so doing, these courts have taken a doctrine that was developed and applied for more than five decades as a *non-statutory, common law ground for vacatur*[2] and have grafted it

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[2] *See, e.g.*, *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007) ("Although § 10 does not sanction judicial review of the merits of arbitration awards, we have adopted a narrow 'manifest disregard of the law' exception under which a procedurally proper arbitration award may be vacated."); *Carter v. Health Net of Cal., Inc.*, 374 F.3d 830, 837 (9th Cir. 2004) ("manifest disregard" is a "federal common law doctrine for vacatur"); *Luong v. Circuit City Stores, Inc.*, 368 F.3d 1109, 1112

(Continued on following page)

wholesale onto the FAA. Neither the statutory text nor this Court's *Hall Street* decision authorizes this stealth expansion of the enumerated grounds for vacatur. Indeed, to allow vacatur based on a "gloss" on the enumerated grounds – regardless of whether that gloss is labeled "manifest disregard" or something else – would open an escape hatch from the extremely limited scope of judicial review authorized by the FAA and would afford reviewing courts the opportunity to substitute their own views as to the proper interpretation of the law for those of the arbitrator as the Ninth Circuit has done below.

Of the various circuits' conflicting views regarding the continuing validity of manifest disregard as a ground for vacatur, only that of the Fifth Circuit in *Citigroup* – *i.e.*, that manifest disregard has no role to play in judicial review of arbitration awards – is

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(9th Cir. 2004) (describing manifest disregard as a "non-statutory escape valve from an arbitral award"); *Coutee v. Barington Capital Group, L.P.*, 336 F.3d 1128, 1132 (9th Cir. 2003) (distinguishing "manifest disregard" from the FAA grounds for vacatur); *G.C. & K.B. Invs., Inc. v. Wilson*, 326 F.3d 1096, 1106 (9th Cir. 2003) ("manifest disregard" is a "judicially-developed ground[ ] for vacating an award"); *Sheet Metal Workers Int'l Ass'n Local Union # 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 746 (9th Cir. 1985) ("Independent of section 10 of the Act, a district court may vacate an arbitral award which exhibits manifest disregard of the law."); *Coast Trading Co., Inc. v. Pacific Molasses Co.*, 681 F.2d 1195, 1197 n.2 (9th Cir. 1982) ("manifest disregard" is a "non-statutory addition to the power of courts to vacate or modify arbitrator's awards").

consistent with the language of and policies underlying the FAA and can withstand scrutiny under *Hall Street*. Consistent with *Citigroup*, this Court should resolve the conflict among the circuits by holding that manifest disregard has no role to play in judicial review of arbitration awards under the FAA, either as a non-statutory ground for vacatur or as a "gloss" on the statutorily enumerated grounds. Rather, the § 10 grounds for vacatur are truly exclusive.

III. The Ninth Circuit's Ruling That An Arbitrator's Good Faith But Erroneous Interpretation Of State Law Supports Vacatur Conflicts With *Hall Street* And The Law Of Every Other Circuit.

Even if manifest disregard has survived *Hall Street*, either as a common law ground for vacatur or as a "gloss" on the statutory grounds, the Ninth Circuit's decision below dramatically expands the scope of judicial review of arbitration awards and conflicts with *Hall Street* and the law of every other circuit. The import of the Ninth Circuit's decision becomes clear when one considers what was *not* in dispute below. Respondents did not contend, and the Ninth Circuit did not find, that the award was procured by corruption, fraud, or undue means (FAA § 10(a)(1)). Respondents did not contend, and the Ninth Circuit did not find, that the arbitrator was partial or corrupt (FAA § 10(a)(2)). Respondents did not contend, and the Ninth Circuit did not find, that the arbitrators were guilty of misconduct in refusing

to postpone the hearing or to hear evidence or of any other prejudicial misbehavior (FAA § 10(a)(3)). And Respondents did not contend, and the Ninth Circuit did not find, that the arbitrator ruled on any issues that had not been submitted by the parties for arbitration (FAA § 10(a)(4)).

Instead, the Ninth Circuit's reversal in part of the district court's order confirming the arbitration award was based on its view that the arbitrator had misapplied the law, to which it affixed the label "manifest disregard." Although couched as manifest disregard, the Ninth Circuit's reasoning (App. 24-33) reveals that its reversal rests on no more than the arbitrator's supposed misreading of two intermediate state appellate court decisions, *Dayton Time Lock Service, Inc. v. The Silent Watchman Corp.*, 52 Cal. App. 3d 1 (1975), and *Kelton v. Stravinski*, 138 Cal. App. 4th 941 (2006). The Ninth Circuit did not suggest, much less find, that the arbitrator ignored those decisions, that he understood yet willfully defied their import, or that he acted with anything less than the utmost good faith.[3] Rather, the court held only that the arbitrator's reasoning was "fundamentally

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[3] Indeed, the suggestion that the arbitrator "manifestly disregarded the law" under any reasonable construction of that phrase is belied by the arbitrator's lengthy and reasoned analysis of California law. *See* App. 129-131 & 145-150.

incorrect" (App. 31), and that vacatur was warranted on that basis alone.[4]

Contrary to Respondents' suggestion, no other circuit has held, either before or after *Hall Street*, that an arbitrator's good faith error of law constitutes manifest disregard or triggers any of the statutory or common law grounds for vacatur. Indeed, Respondents cannot point to a single decision from this Court or any other circuit in which an award has been vacated for legal error, or even clear legal error, as opposed to deliberate defiance of the law. There is no such case. Simply put, the decision below conflicts with *Hall Street* and the law of every other circuit, undermines the finality of arbitration awards, and opens the door for a results-driven court to substitute

[4] The Ninth Circuit's reasoning is not saved by reconceptualizing manifest disregard as shorthand for § 10(a)(4). Whether or not arbitrators "exceed[ ] their powers" when they consciously refuse to follow the law, the statutory grounds for vacatur do not apply when arbitrators make a good faith but, in the view of the reviewing court, erroneous application of the law. It is bedrock in the FAA that parties to an arbitration agreement bargain not for an award free of legal error, however clear or "manifest" that error may be, but instead for an award that is limited to the issues submitted for arbitration and is untainted by arbitrator misconduct.

its judgment for that of an arbitrator, which is precisely what the Ninth Circuit has done below.

Respectfully submitted,

ROBERT N. KLIEGER
Counsel of Record
KENDALL BRILL & KLIEGER LLP
10100 Santa Monica Blvd.
Suite 1725
Los Angeles, CA 90067
Tel: (310) 556-2700

Counsel for Improv West Assocs. and California Comedy, Inc.