No. 08-

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The decision below implicates a clear conflict among the Courts of Appeals as to whether "manifest disregard of the law" is a valid ground for vacatur of an arbitration award under the Federal Arbitration Act. This is the second petition for a writ of certiorari filed in this case. Last year, this Court granted the Petitioners' previous certiorari petition and vacated the Ninth Circuit's decision vacating in part an arbitrator's reasoned and good faith award on the non-statutory ground of "manifest disregard of the law." This Court remanded the case to the Ninth Circuit for further consideration in light of *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. ___, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008). The Ninth Circuit did not heed this Court's instructions on remand, but instead reinstated its prior decision with no more than a passing discussion of *Hall Street*. This petition presents the following questions:

1. Whether "manifest disregard of the law" is a valid ground for vacatur of an arbitration award under the Federal Arbitration Act.

2. Whether the Federal Arbitration Act allows for vacatur of an arbitration award based upon an arbitrator's good faith but, in the view of the reviewing court, "fundamentally incorrect" interpretation of state law.

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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PETITION FOR WRIT OF CERTIORARI

Petitioners Improv West Associates and California Comedy, Inc. petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on January 29, 2009. The Ninth Circuit denied the Petitioners' petition for rehearing *en banc* on March 10, 2009.

OPINIONS BELOW

The Arbitrator's Order Re Motions for Summary Adjudication is reprinted at Petitioner's Appendix ("App.") K. The Arbitrator's Opinion denying the Respondents' motion for reconsideration is reprinted at Petitioners' Appendix F.

The District Court's Order Confirming Arbitration Award, dated April 12, 2005, is reprinted at Petitioners' Appendix J.

The published opinion of the United States Court of Appeals for the Ninth Circuit affirming in part, vacating in part, and remanding to the District Court for further proceedings, dated September 7, 2007, is reprinted at Petitioners' Appendix D.

The published amended opinion of the United States Court of Appeals for the Ninth Circuit affirming in part, vacating in part, and remanding to the District Court for further proceedings, dated January 23, 2008, is reprinted at Petitioners' Appendix C.

The order of this Court granting Petitioners' petition for a writ of certiorari, dated October 6, 2008, is reprinted at Petitioners' Appendix B.

The published opinion of the United States Court of Appeals for the Ninth Circuit affirming in part, vacating in part, and remanding to the District Court for further proceedings, dated January 29, 2009, is reprinted at Petitioners' Appendix A.

The order of the United States Court of Appeals for the Ninth Circuit denying Petitioners' petition for rehearing *en banc*, dated March 10, 2009, is reprinted at Petitioners' Appendix M.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on January 29, 2009, and denied the Petitioners' petition for rehearing *en banc* on March 10, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act, 9 U.S.C. §§ 9-11, provides:

> § 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. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which

the adverse party may be found in like manner as other process of the court.

§ 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.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court

may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration –

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

STATEMENT OF THE CASE

This case comes before this Court for the second time in less than a year as a result of the Ninth Circuit's reinstatement of its previously vacated decision holding that an arbitrator's good faith but, in the view of the reviewing court, "fundamentally incorrect" interpretation of state law constitutes "manifest disregard of the law" for which an arbitration award may be vacated under the Federal Arbitration Act ("FAA").

The Petitioners and the Respondents are parties to a Trademark License Agreement dated June 13, 1999 (the "Agreement") pursuant to which the Petitioners granted the Respondents a license to use the Petitioners' "IMPROV" and "IMPROVISATION" trademarks, along with related trade dress and trade secrets, in connection with comedy club franchises across the country through May 13, 2019. The Agreement contains a covenant that restrains the Respondents from operating competing comedy clubs during the term of the Agreement. A number of disputes arose between the parties that were collectively

submitted to mandatory arbitration under the Agreement. One of those disputes was a challenge by the Respondents to the enforceability of the covenant under California Business and Professions Code § 16600 ("CBPC § 16600").

The arbitrator issued two reasoned orders in which he carefully considered CBPC § 16600 and cases applying the statute and ruled that the covenant not to compete was enforceable during the term of the Agreement. App. F & G. Pertinent portions of the arbitrator's analysis are excerpted below:

> . . . Although the language of Section 16600 is broad in scope, court decisions have upheld agreements limiting competition in a variety of contexts. For example, it has been held that Section 16600 applies only to covenants preventing one from engaging in an *entire* business, trade or profession." *Campbell v. Board of Trustees of Stanford University*, 817 F.2d 499, 502 (9th Cir. 1987). And covenants not to compete *during the term* of an employment agreement or distribution contract are regularly upheld. *Shaklee U.S., Inc. v. Giddens*, 1991 U.S. App. LEXIS 11617, *8-9 (9th Cir. 1991).
>
> . . .
>
> The authorities cited by the parties support the enforceability of in-term covenants not to compete. Such covenants have been held enforceable during the terms of employments agreements, *Fowler v. Varian Assoc's Inc.*, 196 Cal. App. 3d 34, 44 (1987),

supplier-distributor arrangements, *Shaklee U.S., Inc. v. Giddens*, 1991 U.S. App. LEXIS 11617 (9th Cir. 1991), and franchise agreements. *Keating v. Baskin-Robbins, USA, Co.*, 2001 WL 407017 (E.D.N.C.) (applying California law) and *Great Frame-Up Systems, Inc. v. Jazayeri Enterprises, Inc.*, 789 F. Supp. 253 (E.D. Ill. 1992) (applying California law). Although the reasoning in these decisions is sparse, they do emphasize that in-term restrictions are only "partial" restraints on competition, because the restrained party (whether employee, distributor or franchisee) may continue to engage in the relevant business during the term of his or her agreement with the employer, supplier or franchisor. Respondent has not cited any decision invalidating in-term covenants not to compete under Section 16600. The arbitrator finds, therefore, that paragraph 9.j of the Agreement is a valid and enforceable in-term covenant under California law.

. . .

Dayton Time Lock Service, Inc. v. The Silent Watchman Corp., 52 Cal. App. 3d 1 (1975), relied on by Respondent, is inapplicable. That case involved an attack on an exclusive dealing contract under the antitrust laws. The cases cited in the portion of the *Dayton* opinion relied on by Respondent involved the validity of exclusive dealing contracts under the federal Sherman Act. The type of "rule of reason" analysis applied in antitrust cases – involving the determination

> of whether a particular agreement unreasonably restricts competition generally in a defined geographic and product market – is not applicable to a determination of illegality under Section 16600.

App. F at 130-31; App. G at 145, 148-49 (footnote omitted).

The District Court confirmed the award by an order dated August 29, 2005. App. E. In confirming the award, the District Court observed that the arbitrator had "spent several pages explaining its position with regards to the non-compete clause" and that the arbitrator's ruling "finds support in the case law," including both California and out-of-state cases applying CBPC § 16600. *Id.* at 112. The Ninth Circuit nonetheless vacated in part the award based on its view that the arbitrator's reading of the decision of the California Court of Appeal in *Dayton Time Lock Service, Inc. v. Silent Watchman Corp.*, 52 Cal. App. 3d 1 (1975), was "fundamentally incorrect" and that the award was therefore in "manifest disregard of the law." App. D at 97.

The Petitioners filed a petition for a writ of certiorari with this Court. By order dated October 8, 2008, this Court granted the petition, vacated the judgment, and remanded to the Ninth Circuit for further consideration in light of *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. __, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008). On remand, the Ninth Circuit reinstated its prior decision practically verbatim, once again vacating the arbitration award for

"manifest disregard of the law" based on the arbitrator's "fundamentally incorrect" reading of *Dayton Time Lock*.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Decision Implicates A Clear Conflict Among The Circuits As To Whether "Manifest Disregard Of The Law" Is A Valid Ground For Vacatur After *Hall Street*.

This Court held in *Hall Street* that §§ 10 and 11 of the FAA set forth the *exclusive* grounds for vacatur or modification of an arbitration award, and that neither contracting parties nor the courts may prescribe expanded judicial review of awards. 128 S. Ct. at 1406. In the fourteen months since this Court decided *Hall Street*, a profound conflict has arisen among the circuits as to whether the federal common law doctrine of "manifest disregard of the law" remains a valid basis for vacatur.

Only the Fifth Circuit has held that this Court meant what it said in *Hall Street*, and that arbitration awards may not be vacated or modified for "manifest disregard of the law." *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009). The Sixth Circuit has held, in direct conflict with the Fifth Circuit, that the doctrine of "manifest disregard" survives *Hall Street* as a non-statutory ground for vacatur. *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed.

Appx. 415 (6th Cir. 2008). The Ninth Circuit has taken a third approach, acknowledging this Court's abrogation of "manifest disregard" as a non-statutory ground for vacatur but then grafting the entire doctrine onto the FAA itself. App. A at 24-25.[1]

As a consequence of these wildly inconsistent holdings, the finality of an arbitration award today turns on the fortuity of where an arbitral dispute happens to arise. This is an untenable situation that can be resolved only through the intervention of this Court.

A. "Manifest Disregard" Developed As A Non-Statutory Ground For Vacatur That Is Anchored In Federal Common Law.

Under the terms of 9 U.S.C. § 9, a court "must" confirm an arbitration award unless it is vacated,

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[1] The First Circuit has been internally inconsistent in its decisions after *Hall Street*, sometimes treating "manifest disregard" as having been abolished by *Hall Street*, and other times treating it as alive and well as a non-statutory ground for vacatur. *Compare Ramos-Santiago v. United Parcel Service*, 524 F.3d 120 (1st Cir. 2008), *with Zayas v. Bacardi Corp.*, 524 F.3d 65 (1st Cir. 2008). The Second Circuit has continued to apply the doctrine after *Hall Street*, sometimes as a non-statutory ground for vacatur and other times as a "reconceptualization" of the statutory grounds for vacatur. *Compare Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008), *with Vaughn v. Leeds, Morelli & Brown, P.C.*, 2009 WL 690024 (2d Cir. Mar. 16, 2009).

modified, or corrected "as prescribed" in §§ 10 and 11. The statutory grounds for vacatur and modification of an arbitration award all concern procedural aberrations in the manner in which an award was rendered. Most of those grounds rise to the level of gross misconduct – such as "corruption," "fraud," "evident partiality," "misconduct," "misbehavior," and "award[s] upon a matter not submitted." *See Hall Street*, 128 S. Ct. at 1404 (explaining that §§ 10 & 11 "address egregious departures from the parties' agreed-upon arbitration"). The only ground with a softer focus is "imperfect[ions]," and a court may correct those only if they go to "[a] matter of form not affecting the merits." 9 U.S.C. § 11(c); *see Hall Street*, 128 S. Ct. at 1404. None of the §§ 10 and 11 grounds allows for review of an arbitration award on the merits.

More than fifty years before *Hall Street*, this Court stated in dictum that "interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." *Wilko v. Swan*, 346 U.S. 427, 436-37, 74 S. Ct. 182, 98 L. Ed. 168 (1953). In the half century that followed, virtually every Court of Appeals construed *Wilko* as creating a *non-statutory* ground for vacatur that is rooted in federal common law.[2] As the First Circuit succinctly observed,

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[2] *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) ("judicially-created ground for vacating [an] arbitration award"); *Dluhos v. Strasberg*, 321 F.3d 365, 369 (3rd Cir. 2003) ("judicially created . . . standard"); *Three*

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"[t]he lane of review that has opened out of [the *Wilko*] language is a judicially created one, not to be found in 9 U.S.C. § 10." *Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 n.5 (1st Cir. 1990).

Although each Court of Appeals developed a somewhat different formulation of "manifest disregard," all of the formulations shared one thing in common: Unlike the statutory grounds for vacatur set forth in the FAA, all of which concern procedural aberrations in the manner in which an award is rendered, the common law doctrine of "manifest disregard" sanctioned review of an arbitration award *on the merits*. The scope of this merits-based review was generally quite narrow. Plain or even "clear" legal error would not suffice; rather, the legal error had be "manifest" – in the sense that no qualified person could have reached such a decision – before

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S Del., Inc. v. DataQuick Info. Sys., Inc., 492 F.3d 520, 527 (4th Cir. 2007) ("permissible common law grounds for vacating . . . an award"); *Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 381 (5th Cir. 2004) ("judicially-created 'nonstatutory' ground"); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995) ("judicially created basis for vacation"); *Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 788 (8th Cir. 2003) ("judicially created standard[ ] for vacating an arbitration award"); *Luong v. Circuit City Stores, Inc.*, 368 F.3d 1109, 1112 (9th Cir. 2004) ("non-statutory escape valve from an arbitral award"); *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001) (one of "a handful of judicially created reasons" for vacatur); *Peebles v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 431 F.3d 1320, 1326 (11th Cir. 2005) (one of several "non-statutory bases for vacatur").

vacatur could be ordered. *See, e.g.*, *Jaros*, 70 F.3d at 421 ("the decision must fly in the face of clearly established legal precedent"); *Bobker*, 808 F.2d at 933 ("error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator"); *Advest*, 914 F.2d at 8 ("based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling"). Even in its narrowest formulations, however, manifest disregard stood in stark contrast to the FAA grounds for vacatur, none of which sanctioned any review on the merits.

B. *Hall Street* Abrogated All Non-Statutory Grounds For Vacatur.

Prior to *Hall Street*, every circuit other than the Seventh Circuit had recognized one or more common law grounds for vacatur, such as where the award was "arbitrary and capricious," "completely irrational," "contrary to public policy," or "in manifest disregard of the law." *See, e.g.*, *Three S*, 492 F.3d at 527 ("permissible common law grounds for vacating . . . an award"); *Peebles*, 431 F.3d at 1326 ("three non-statutory bases for vacatur"); *Sheldon*, 269 F.3d at 1206 ("handful of judicially created reasons" for vacatur). Only the Seventh Circuit strictly limited judicial review of arbitration awards to the grounds enumerated in §§ 10 and 11. *See Chameleon Dental Products, Inc. v. Jackson*, 925 F.2d 223, 226 (7th Cir. 1991).

While judicial expansion of the statutory grounds for vacatur was widely accepted before *Hall Street*, the Courts of Appeals were more closely divided as to whether private parties could vary the FAA standards by contract. *See Hall Street*, 128 S. Ct. at 1403 & n.5. This was the issue squarely presented in *Hall Street*, in which this Court held that parties may not contract for expanded judicial review. *Id.* at 1406. *Hall Street*'s significance, however, is not limited to attempted contractual expansions of the statutory grounds for vacatur. Rather, *Hall Street* holds that the grounds set forth in § 10 of the FAA are the "exclusive grounds" under which an arbitration award may be vacated, plain and simple, and that neither private parties *nor the courts* may expand those statutory grounds. *Id.* ("[T]he statutory text gives us no business to expand the statutory grounds."). *Hall Street* thereby abrogated all of the federal common law grounds for vacatur.

C. The Circuits Are Sharply Divided As To The Validity Of "Manifest Disregard" As A Ground For Vacatur After *Hall Street*.

Although *Hall Street* should have laid to rest any suggestion that "manifest disregard of the law" is a valid ground for vacatur, it has not. Rather, a number of courts, including the Ninth Circuit in the decision below, have seized upon language in *Hall Street* to breathe new life into the doctrine of "manifest disregard." A sharp divide now exists between the circuits

as to whether and to what extent "manifest disregard of the law" remains a valid ground for vacatur in cases governed by the FAA.

1. The Sixth Circuit Continues To Recognize "Manifest Disregard" As A Valid Non-Statutory Ground For Vacatur.

The Sixth Circuit has held that "manifest disregard of the law" survives *Hall Street* as a non-statutory ground for vacatur. In *Coffee Beanery, supra,* the Sixth Circuit considered and rejected the suggestion that *Hall Street* abrogated this federal common law doctrine. The Sixth Circuit read *Hall Street* as limiting only the right of parties, and not of the courts, to expand the scope of judicial review beyond the grounds specified in the FAA. 300 Fed. Appx. at 419; *see id.* at 418 (describing the statutory grounds for vacatur as "almost exclusive[ ]"). Citing *Hall Street*'s discussion of *Wilko*, which the Sixth Circuit believed demonstrated a "hesitation to reject the 'manifest disregard' doctrine," the Sixth Circuit decided to "follow its well-established precedent . . . and continue to employ the 'manifest disregard' standard." *Id.* at 419. The Sixth Circuit proceeded to vacate an award under the common law doctrine of "manifest disregard." *Id.* at 421.[3]

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[3] Again in *Dealer Computer Services, Inc. v. Dub Herring Ford*, 547 F.3d 558 (6th Cir. 2008), the Sixth Circuit explained

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2. The Fifth Circuit Has Abrogated "Manifest Disregard" As A Ground For Vacatur.

The Fifth Circuit reached precisely the opposite holding in *Citigroup Global Markets, supra*, deciding that "manifest disregard of the law" has been abolished as a non-statutory ground for vacatur. 562 F.3d at 358. The Fifth Circuit considered at length the Sixth Circuit's *Coffee Beanery* decision, as well as the decisions of other circuits wrestling with the doctrine of "manifest disregard" in the wake of *Hall Street*, and determined that the doctrine has no continuing vitality:

> In the light of the Supreme Court's clear language that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest 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. *Hall Street* made it plain that the statutory language means what it says. . . . Thus from this point forward, arbitration awards under the FAA may

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that, in addition to the statutory grounds for vacatur, "[a] court may also vacate an award on non-statutory grounds if the arbitration panel demonstrates a 'manifest disregard of the law.'" *Id.* at 561 n.2 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)). The Sixth Circuit included a "*But see*" citation to *Hall Street*. *Id.*

be vacated only for the reasons provided in § 10.

Id.

3. The Ninth Circuit Has Grafted The Common Law Doctrine Of "Manifest Disregard" Onto The Statutory Grounds For Vacatur.

The Ninth Circuit took a third approach in the case below, neither reaffirming "manifest disregard of the law" as a non-statutory ground for vacatur nor abrogating the doctrine in light of *Hall Street*. In its first decision below, the Ninth Circuit held that the arbitrator's good faith but, in its view, erroneous application of California law provided a ground for vacatur under the common law doctrine of "manifest disregard." App. C at 58-67. This Court vacated that first judgment and remanded for further consideration in light of *Hall Street*. App. B. On remand, the Ninth Circuit did not heed this Court's instructions, but instead reinstated the prior decision practically verbatim, with only a passing discussion of *Hall Street*. App. A at 9 ("Finally, addressing the issue raised by the Supreme Court's remand, we conclude that *Hall Street Associates* did not undermine the manifest disregard ground for vacatur, as understood in this circuit to be a violation of § 10(a)(4) of the Federal Arbitration Act, and that the arbitrator manifestly disregarded the law."); *see id.* at 24-25. In so doing, the Ninth Circuit heedlessly reclothed "manifest disregard of the law" as a statutory ground

for vacatur notwithstanding the fact that the Ninth Circuit (like every other Court of Appeals) had for more than a quarter century recognized that the doctrine is firmly rooted in federal common law.[4]

4. The Decisions Of The First And Second Circuits Evidence Confusion As To The Continuing Vitality Of "Manifest Disregard" After *Hall Street*.

The decisions of the two other circuits that have addressed the validity of "manifest disregard of the law" as a ground for vacatur after *Hall Street* – the

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[4] *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"); *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").

First and Second Circuits – further evidence that burgeoning confusion regarding the permissible scope of judicial review of arbitration awards. The First Circuit was the first circuit to comment upon the validity of "manifest disregard of the law" after *Hall Street*. In *Ramos-Santiago, supra*, the First Circuit stated in dictum and with little discussion 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 Federal Arbitration Act." 524 F.3d at 124 n.3.

In at least two other cases decided after *Hall Street*, however, the First Circuit has specifically reaffirmed "manifest disregard of the law" as a valid non-statutory ground for vacatur. In *Zayas, supra*, the First Circuit described "two well-delineated traunches" for review of arbitration awards. 524 F.3d at 68. The first traunch, which encompasses the grounds for vacatur enumerated in 9 U.S.C. § 10(a), authorizes review for "certain specific types of break-downs" in the arbitration process. *Id.* The second traunch, which exists outside of the FAA and is "anchored in federal common law," provides a "small window of opportunity for vacation of arbitral awards that are 'in manifest disregard of the law.'" *Id. Zayas* reaffirmed, without any discussion of *Hall Street*, that an award may be vacated under either the statutory or the common law traunch. *Id.* Similarly, in *Kashner Davidson Securities Corp. v. Mscisz*, 531 F.3d 68 (1st Cir. 2008), the First Circuit distinguished the statutory grounds for vacatur in 9 U.S.C. § 10(a) from the

"common law grounds" for vacatur, the latter of which have been subsumed "into a general evaluation of whether a panel has acted in 'manifest disregard of the law.'" *Id.* at 74. *Kashner Davidson* then proceeded to analyze the subject award under the "common law" of "manifest disregard of the law," again without any discussion of *Hall Street*. *Id.*

The Second Circuit has recognized the continuing vitality of "manifest disregard of the law" in several decisions after *Hall Street*. It has been inconsistent, however, in its treatment of the doctrine as a statutory or common law ground for vacatur. In *Stolt-Nielsen, supra*, the Second Circuit recognized that *Hall Street*'s holding was in direct conflict with a long line of Second Circuit cases applying "manifest disregard of the law" as a non-statutory ground for vacatur. 548 F.3d at 94. *Stolt-Nielsen* purported to resolve this conflict by "reconceptualiz[ing]" the doctrine "as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA." *Id.* That "reconceptualization" has not stuck, however, and the Second Circuit has subsequently reaffirmed "manifest disregard of the law" as a "non-statutory ground" for vacatur. *Vaughn*, 2009 WL 690024, at *1; *see also Rich v. Spartis*, 307 Fed. Appx. 475, 478 (2d Cir. 2008) ("Although manifest disregard of applicable law is not included as a statutory basis to vacate an award under § 10(a) of the Federal Arbitration Act, we have recognized its validity. . . .").

D. This Court Should Resolve The Conflict Among The Circuits And Hold That "Manifest Disregard" Is Not A Valid Ground For Vacatur.

This conflict among the circuits will not resolve itself. Although the state of 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* held that it was following "well-established precedent" in vacating an arbitration award on the non-statutory ground of "manifest disregard of the law" and denied rehearing *en banc*. 300 Fed. Appx. at 419. The Fifth Circuit squarely held in *Citigroup* that the doctrine of "manifest disregard" must be abandoned and rejected in light of *Hall Street*. 562 F.3d at 358. The Ninth Circuit in its decision below held that a prior *en banc* decision required it to reimagine "manifest disregard" as a statutory ground for vacatur. App. A at 24-25. Until this Court intervenes, there will be no uniform national standard for judicial review of arbitration awards.

The primary goal of the FAA is to ensure recognition and enforcement of commercial arbitration agreements and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced. Whether or not "manifest disregard of the law" is ultimately determined to constitute a valid statutory or common law ground for vacatur, it is critical that the standards for judicial review of arbitration awards be uniform from one

circuit to the next. Congress did not intend for an arbitration award that must be confirmed in one part of the country to be subject to vacatur in another, such that the finality of an arbitration award turns on the fortuity of where an arbitrable dispute happens to arise. Thus, regardless of *how* the conflict among the circuits is resolved, it should be resolved.

This Court's *Hall Street* decision and the policies underlying the FAA dictate that the doctrine of "manifest disregard of the law" 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 § 10 grounds for vacatur are facially 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 rule on issues that have not been submitted to arbitration. *Id.* at 1404. The § 10 grounds are carefully delineated, and there is no "catch-all" that allows for review of an award on the merits – regardless of whether the review is for plain, "clear," or even "manifest" legal error. Indeed, the primary objectives of arbitration – swift, inexpensive, and conclusive resolution of disputes – are undermined by even narrow review of the merits of an arbitration award. And, as the Seventh Circuit has aptly observed, review for "manifest" error can "be even more complex than a

search for simple error – for how blatant a legal mistake must be to count as 'clear' or 'manifest' error lacks any straightforward answer." *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 579 (7th Cir. 2001).

The doctrine of "manifest disregard" is not saved by grafting the doctrine onto the statutory grounds for vacatur. The Second and Ninth Circuits' efforts to "reconceptualize" the doctrine in this manner rest on a misreading of the following passage in *Hall Street*:

> Maybe the term "manifest disregard" was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. Or, as some courts have thought, "manifest disregard" may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers." We, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment, and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.

128 S. Ct. at 1404. The Second and Ninth Circuits have regarded this passage as instructions for how to smuggle the common law doctrine of "manifest disregard" into the text of the FAA. However, it is one thing to suggest that *the phrase* "manifest disregard"

may have been used in *Wilko* as shorthand for one or more of the statutory grounds for vacatur.[5] It is quite another to hold, as the Ninth Circuit did below, that *the doctrine* of "manifest disregard," as it has been developed in federal common law in the half century after *Wilko*, fits within and adds substance to the statutory grounds for vacatur. *Hall Street* offers no support for that position. To the contrary, by limiting courts to a strict application of the statutory grounds for vacatur, *Hall Street* requires that every procedurally proper arbitration award be confirmed.

E. This Case Presents The Best Opportunity To Resolve The Conflict Among The Circuits.

This case presents the best opportunity for this Court to resolve the conflict among the circuits and determine whether "manifest disregard of the law" is a valid ground for vacatur of an arbitration award. This Court has already vacated the Ninth Circuit's original judgment in this action and remanded for further consideration in light of *Hall Street*. The Ninth Circuit did not heed this Court's instructions,

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[5] In other words, an award is in "manifest disregard of the law" if it is procured by corruption, fraud, or undue means; where there was evident partiality or corruption in the arbitrators; where the arbitration hearing itself was not full and fair; or where the arbitrator rules on issues that were not submitted for arbitration or renders an award that is too interim or indefinite to enforce. *See* 9 U.S.C. § 10(a).

but instead reinstated its prior decision that is so clearly at odds with *Hall Street*. It is unlikely that a better opportunity to impress upon the lower courts that *Hall Street* means what it says, and to thereby ensure uniformity in the standard for review of arbitration awards, will soon arise.

Although petitions for a writ of certiorari are pending before this Court in *Stolt-Nielsen* and *Coffee Beanery*, only the present case squarely presents the issue of whether "manifest disregard of the law" has any vitality after *Hall Street*. The petition in *Stolt-Nielsen*, No. 08-1198 (Mar. 26, 2009), seeks review of an unrelated question regarding class arbitration. The petition in *Coffee Beanery*, No. 08-1396 (May 11, 2009), does present the question of whether "manifest disregard of the law" is a valid ground for vacating an arbitration award under the FAA. *Coffee Beanery*, however, holds that "manifest disregard of the law" remains a valid *extra-statutory* ground for vacating an arbitration award, such that the question framed by that petition is broader than the Sixth Circuit's holding below. 300 Fed. Appx. at 419. The Ninth Circuit, by contrast, sought to circumvent *Hall Street* in the decision below by grafting the judge-made doctrine of "manifest disregard of the law" onto the statutory text. Unlike *Coffee Beanery*, this case squarely presents the question of whether the FAA allows a reviewing court to vacate an arbitration award for "manifest" legal error or instead requires that every procedurally proper arbitration award be confirmed.

Moreover, this case thoroughly demonstrates how even a limited merits-based review of an arbitration award for "manifest disregard of the law" opens the door for a results driven court to substitute its judgment for that of the arbitrator. The arbitrator here did not exceed his authority, but instead decided the precise issue that was submitted for arbitration – namely, the enforceability of the Agreement's in-term covenant against competition under CBPC § 16600. As the District Court acknowledged in confirming the award, the arbitrator's ruling finds ample support in the case law – including decisions of the California state courts, several United States District Courts, and even another panel of the Ninth Circuit. The only basis for the Ninth Circuit's determination that the arbitrator had "manifestly disregarded the law" was its view that the arbitrator's reading of *Dayton Time Lock*, an intermediate state appellate court decision from thirty years earlier, was "fundamentally incorrect." App. A at 31. Even if the arbitrator was "fundamentally incorrect" in his reading of *Dayton Time Lock* (and he was not), that is not an instance of "fraud," "corruption," "misbehavior," or "exceeding . . . powers." 9 U.S.C. § 10. The ease with which the Ninth Circuit nevertheless vacated the award simply by labeling it "manifest disregard" demonstrates the clear threat that is posed to the finality of arbitration awards until that doctrine has been conclusively abolished.

II. The Ninth Circuit's Vacatur Of An Award Based On An Arbitrator's Good Faith But, In Its View, Erroneous Interpretation Of State Law Conflicts With *Hall Street* And The Law Of Every Other Circuit.

Even if *Hall Street* did not abrogate "manifest disregard of the law" or any of the other common law grounds for vacatur, the decision below still grossly exceeds the permissible scope of judicial review of arbitration awards. The Respondents have never argued, and the Ninth Circuit did not suggest (much less find), that the arbitrator had acted in anything other than the utmost good faith. There is no contention that the arbitrator was partial or corrupt, or that he was guilty of any misbehavior. Nor is there any suggestion that he deliberately defied the law. Instead, the Ninth Circuit determined only that the arbitrator was "fundamentally incorrect" in his reading of the California Court of Appeal decision in *Dayton Time Lock*, and it vacated the award on that basis. The Ninth Circuit's holding that a *good faith* but erroneous interpretation of state law supports vacatur on any ground, however labeled, conflicts with *Hall Street* and the law of every other circuit.

Hall Street expressly limits vacatur under the FAA – and thus, necessarily, the scope of "manifest disregard" to the extent it survives at all – to instances of "outrageous" and "extreme arbitral conduct" that is tantamount to bad faith. 128 S. Ct. at 1404. As this Court explained in *Hall Street*:

> Sections 10 and 11 . . . address *egregious departures* from the parties' agreed-upon arbitration: "corruption," "fraud," "evident partiality," "misconduct," "misbehavior," "exceed[ing] . . . powers," "evident material miscalculation," "evident material mistake," "award[s] upon a matter not submitted"; the only ground with any softer focus is "imperfect[ions]," and a court may correct those only if they go to "[a] matter of form not affecting the merits."

Id. (emphasis added). That a finding of willful misconduct is required for vacatur is confirmed by the legislative history of the FAA, *see id.* at 1406 n.7, as well as by a leading law review article from the time of the FAA's enactment, which explained: "The courts are bound to accept and enforce the award of the arbitrator unless there is in it a defect so inherently vicious that, as a matter of common morality, it ought not be enforced." Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 272-73 (1926). Thus, a reviewing court's belief that the arbitrator's legal analysis is incorrect, or even "fundamentally incorrect," does not allow for vacatur. Rather, a finding of willful misconduct by the arbitrator is plainly required before an otherwise procedurally proper arbitration award may be vacated.

Every other Court of Appeals has carefully distinguished between a good faith error of law, which is never a basis for vacating an arbitration award, and deliberate defiance of the law. As the Eighth Circuit

explained in *Lincoln Nat'l Life Ins. Co. v. Payne*, 374 F.3d 672 (8th Cir. 2004):

> Manifest disregard requires something more than a mere error of law. If an arbitrator, for example, stated the law, acknowledged that he was rendering a decision contrary to law, and said that he was doing so because he thought the law unfair, that would be an instance of 'manifest disregard.' . . . To require anything less would threaten to subvert the arbitral process.

Id. at 674; *see, e.g., Advest*, 914 F.2d at 10 ("'[D]isregard' implies that the arbitrators appreciated the existence of a governing legal rule but *willfully* decided not to apply it.") (emphasis added); *Butler Mfg. Co. v. United Steelworkers of Am.*, 336 F.3d 629, 636 (7th Cir. 2003) ("[A]n arbitral decision is in manifest disregard of the law only when the arbitrator's award actually orders the parties to violate the law. That the arbitrator in this case may have misunderstood the [governing statute] is simply not relevant.") (internal citation omitted); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10th Cir. 2001) ("Requiring more than error or misunderstanding of the law, a finding of manifest disregard means the record will show the arbitrators knew the law and explicitly disregarded it.") (internal citation omitted); *Aldred v. Avis Rent-A-Car*, 2007 WL 2110720, at *2 (11th Cir. July 24, 2007) ("An arbitrator manifestly disregards the law if he was conscious of the law and

deliberately ignored it; merely misinterpreting, misstating, or misapplying the law does not suffice.").

The Ninth Circuit's decision below dramatically alters the standard for review of an arbitration award. Whether or not the arbitrator's understanding of *Dayton Time Lock* was "fundamentally incorrect," as the Ninth Circuit determined, it is abundantly clear that the arbitrator neither ignored nor acted in deliberate defiance of California law. Rather, the arbitrator engaged in a lengthy and deliberate analysis of CBPC § 16600 and the cases applying the statute and determined in good faith that *Dayton Time Lock* does not stand for the proposition that had been urged by the Respondents and was ultimately endorsed by the Ninth Circuit below. Whether the arbitrator was correct, incorrect, or even "fundamentally incorrect" in this regard lies far beyond the permissible scope of judicial review under the FAA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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