No. 13-722

IN THE

Supreme Court of the United States

ARUN WALIA,

Petitioner,

—v.—

KIRAN M. DEWAN, CPA, P.A. and KIRAN MOOLCHAND DEWAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PROFESSORS AND PRACTITIONERS OF ARBITRATION LAW AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

George A. Bermann
Walter Gellhorn Professor of Law and Director, Center for International Commercial and Investment Arbitration
COLUMBIA UNIVERSITY SCHOOL OF LAW
435 West 116th Street
New York, New York 10027

David M. Lindsey
Counsel of Record
James M. Hosking
Jennifer L. Gorskie
Yujing Yue
CHAFFETZ LINDSEY LLP
505 Fifth Avenue, 4th Floor
New York, New York 10017
Tel. (212) 257-6960
Fax (212) 257-6950
d.lindsey@chaffetzlindsey.com

Counsel for Amici Curiae Professors and Practitioners of Arbitration Law

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Other Authorities

STATEMENT OF INTEREST OF *AMICI* [1]

Amici are professors of law and lawyers engaged in the field of arbitration. Their work has included rendering arbitral awards that may be subject to vacatur under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. (the "FAA"), arguing for confirmation or vacatur of arbitration awards as counsel, and/or writing scholarly articles regarding arbitration in the United States, including the standards for vacatur of arbitral awards available under the FAA.

The primary interest of *amici* is the orderly and consistent review of arbitral awards by courts in the United States when a party seeks vacatur under Section 10 of the FAA. *Amici* believe that the decision of the United States Court of Appeals for the Fourth Circuit in *Dewan v. Walia*, — F. App'x —, 2013 WL 5781207 (4th Cir. Oct. 28, 2013), applying the manifest disregard doctrine as an independent basis for vacatur and relying on an expansive view of that doctrine to vacate the arbitral award in this case, is contrary to this Court's arbitration precedents and deepens the existing circuit divide on the proper bases for vacatur. This is a highly opportune moment for this Court to clarify whether manifest disregard is a proper basis for vacatur of arbitral awards rendered in the United States and, if so, how that doc-

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[1] Counsel for amici affirm that no counsel for any party authored this brief in whole or in part. Nor was any monetary contribution made regarding its preparation or submission. Consent to file this brief as amicus curiae under Supreme Court Rule 37.2(a) was received from Petitioner on January 3, 2014 and from Respondents on January 6, 2014. A list of amici subscribing to this brief is included herein as Appendix 1.

trine should be understood. Otherwise, vacatur proceedings will be defined by a patchwork of different analyses across the circuits. This is detrimental for commerce and for the future of arbitration proceedings, whether domestic or international, seated in the United States. For these reasons and those elaborated further below, *amici* strongly believe that the Petition for a Writ of Certiorari (the "Petition") should be granted.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has repeatedly affirmed that arbitral determinations are entitled to judicial deference and may be disturbed only in specific and exceptional circumstances. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) ("the court will set [the arbitrator's] decision aside only in very unusual circumstances"). Those circumstances are set forth in the FAA, which establishes an "emphatic federal policy" in favor of arbitration. 9 U.S.C. § 1 *et seq.*; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636 (1985). FAA Section 10 provides that courts may vacate arbitral awards on one of four grounds: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators; (3) where the arbitrators were guilty of misconduct or other misbehavior; or (4) where the arbitrators exceeded their powers. 9 U.S.C. § 10. The Court has acknowledged that these grounds are designed to permit vacatur only in cases of "extreme" or "outrageous" arbitral misconduct. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008).

Despite the clear statutory language of FAA Section 10, parties unhappy with the outcome of their arbitration often test the limits of that language by seeking to vacate arbitral awards based on alleged "legal" errors by the arbitrator. Some courts have permitted such challenges by relying on a fifth, judicially-created ground for vacatur that is not found in the FAA: "manifest disregard of the law." Typically formulated as permitting vacatur where the arbitrator knew of a controlling legal principle but rejected or ignored it, "manifest disregard of the law" is frequently relied upon by litigants to challenge awards rendered in both domestic arbitrations and in non-domestic or "international" arbitrations seated in the United States, as in *Walia* here.

In its 2008 decision in *Hall Street*, this Court rejected the creation of additional, non-statutory grounds for vacatur. 552 U.S. at 583. It made clear that the grounds listed in Section 10 of the FAA are the *exclusive* grounds available to vacate an arbitral award. *Id.* After *Hall Street*, some courts eliminated "manifest disregard of the law" from the grounds available to vacate an arbitral award. Other courts, including the Fourth Circuit in this case, have continued to rely on manifest disregard as an independent, non-statutory ground for vacatur. Still other courts have retained the concept of manifest disregard, but have re-characterized it as shorthand for one or more of the statutory grounds for vacatur, typically sections 10(a)(3) (arbitral misconduct) or 10(a)(4) (excess of authority) of the FAA.

The circuits acknowledge the divisions among them on the availability and meaning of manifest disregard. *See*, *e.g.*, *Citigroup Global Mkts., Inc. v.*

Bacon, 562 F.3d 349, 355-56 (5th Cir. 2009) (describing the positions of the various circuits after *Hall Street*). They also profess some confusion about the Supreme Court precedents on the matter. *See*, *e.g.*, *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) ("We cannot say that *Hall Street Associates* is 'clearly irreconcilable' with *Kyocera* and thus we are bound by our prior precedent.") (internal citations omitted); *Agility Pub. Warehousing Co. K.S.C. v. Supreme Foodservice GmbH*, 495 F. App'x 149, 153 n.2 (2d Cir. 2012) ("In *Stolt–Nielsen* . . . the Supreme Court expressly declined to decide whether an arbitral award may be vacated under this standard. As such, we are bound to follow our precedents that recognize manifest disregard of the law as a permissible ground for vacatur of an arbitral award.") (internal citations omitted).

Even more problematically, some circuits have applied an expansive formulation of manifest disregard that undermines the U.S. policy against judicial interference with arbitral awards and the principles on which Section 10 of the FAA are based. The Fourth Circuit's decision in this case is a striking example. In *Walia*, the appellate court vacated an arbitral award rendered in favor of a Canadian employee based not on specific arbitral misconduct of the sort targeted by the FAA's four statutory grounds for vacatur, but simply because it disagreed with the arbitrator's interpretation of the contract at hand. Regardless of whether manifest disregard should exist at all as an independent ground for vacatur, it should not be used to second-guess the arbitrator's interpretation of a contract, as the Fourth Circuit used it here. The Fourth Circuit's formulation of manifest disregard invites a judicial "appeal" from

what was purportedly a final and binding arbitral award. This creates great uncertainty about the doctrine's scope and fosters expansive and often frivolous judicial challenges that undermine the advantages that are associated with arbitration and that underpin this Court's consistently pro-arbitration jurisprudence.

Walia therefore presents a particularly apt opportunity for this Court to address the proper interpretation of manifest disregard. Even while applying manifest disregard as it did, the Fourth Circuit in *Walia* itself described the fate of that standard in the Supreme Court as "uncertain[]." *Walia*, 2013 WL 5781207, at *5 n.5. The Court's guidance is imperative to resolve the division among the circuits and bring clarity and uniformity to the review of arbitral awards rendered in the United States.

ARGUMENT

This Court should grant the Petition for at least four reasons. First, the Fourth Circuit's decision in *Walia* perpetuates the incorrect view that manifest disregard exists as an independent basis for vacatur after *Hall Street*. Second, the decision is emblematic of an entrenched circuit divide over the availability and meaning of manifest disregard in vacatur proceedings. Third, the Fourth Circuit's application of the manifest disregard doctrine to overturn an arbitrator's contract interpretation defies this Court's precedents and fosters frivolous appeals of arbitral awards on their merits, which the FAA sought precisely to prevent. Fourth, the current state of the law on manifest disregard has negative implications for the United States as a seat for arbitration and may

deter arbitration users from selecting the United States as an arbitral forum.

I. The Fourth Circuit's Decision Directly Conflicts with this Court's Holding in *Hall Street* that the FAA Section 10 Grounds Are Exclusive

This Petition is important because the *Walia* decision perpetuates the improper use of "manifest disregard" as a so-called "non-statutory" ground for vacatur. In *Walia*, the Fourth Circuit first considered the statutory grounds for vacatur, then went on to entertain additional "permissible common law grounds" for vacating an arbitral award, among them "manifest disregard of the law." *Walia*, 2013 WL 5781207, at *5 and n.5. Applying this "common law" standard, the Fourth Circuit vacated the award, finding that the arbitrator's interpretation of a contractual release was in manifest disregard of the law. This was the *only* ground for vacatur relied on by the Fourth Circuit. By so holding, the Fourth Circuit perpetuated the erroneous view that manifest disregard exists as an independent ground for vacatur of an arbitral award.

The Fourth Circuit's professed "uncertainty" appears to arise from this Court's decisions in three cases: *Wilko v. Swan,* 346 U.S. 427 (1953), *overruled on other grounds by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989), *Hall Street*, 552 U.S. 576, and *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010). The manifest disregard doctrine as an independent ground for vacating arbitral awards has its origins in one sentence of dicta in a 1953 Supreme Court case

that states, "[T]he 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,* 346 U.S. at 436-37 (emphasis added). The decision in *Wilko* did not even review an award for manifest disregard of the law, but the dicta had a clear impact.[2] After *Wilko*, most circuit courts permitted a non-statutory ground for vacatur of arbitral awards, namely those made in "manifest disregard of the law." The circuits differed in their understanding of this standard, but most commonly formulated it as warranting vacatur where "the arbitrators appreciated the existence and applicability of a controlling legal rule but intentionally decided not to apply it." *See*, *e.g., Cytyc Corp. v. DEKA Prods. Ltd. P'ship*, 439 F.3d 27, 35 (1st Cir. 2006).

In its 2008 decision in *Hall Street*, the Court considered the question of whether parties could supplement the grounds for vacatur in Section 10 of the FAA by contracting for additional grounds in their arbitration agreement. 552 U.S. at 583. In support of its argument that parties should be permitted to contract for additional grounds for vacatur, the appellant pointed to the existence of the judicially created doctrine of "manifest disregard of the law." *Id.* at 584-85. It argued that just as the courts were permitted to expand the Section 10 vacatur grounds by permitting manifest disregard review, so too should the parties be permitted to contractually expand the grounds for review applicable to their arbitration. *Id.*

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[2] *See* Christopher R. Drahozal, Codifying Manifest Disregard, 8 Nev. L.J. 234, 234-35 (2007) (explaining common law background of "manifest disregard of the law").

The Court rejected the appellant's argument. *Id.* at 585. It stated that *Wilko*'s "vague" phrasing could not sustain the weight that appellant gave it. *Id.* It also stated that *Wilko* left unclear whether manifest disregard was meant to "name a new ground for review" or "as some courts have thought . . . may have been shorthand for [FAA] 10(a)(3) or 10(a)(4)." *Id.* It then went on to hold that Sections 10 and 11 of the FAA "provide the FAA's exclusive grounds for expedited vacatur and modification" of an arbitral award. *Id.* at 584.

Although *Hall Street* focused on the question of whether the *parties* may empower a court to vacate or modify an award on non-statutory grounds, the decision should also be read—as many circuits have indeed read it—to foreclose the possibility that courts may continue to rely on independent, non-statutory grounds for vacatur, including manifest disregard. *See infra*, Section II at 10-13 (summarizing the views of those courts that have found that manifest disregard does not survive *Hall Street*). In *Hall Street*, the Court emphasized that the FAA's statutory grounds are meant to permit vacatur only in instances of "extreme arbitral conduct," permitting review only for "specific instances of outrageous conduct." *Id.* at 586. The Court explicitly stated that FAA Sections 9-11 "substantiat[e] a national policy favoring arbitration" and that the "statutory text [of the FAA] gives us no business to expand the statutory grounds." *Id.* at 588, 589. Accordingly, *Hall Street* supports the view that the FAA Section 10 grounds for vacatur are exclusive, and forecloses reliance on manifest disregard of the law as an independent, non-statutory basis for review.

After *Hall Street,* this Court decided *Stolt-Nielsen*, 559 U.S. 662, where it found that the arbitrators had exceeded their powers under Section 10(a)(4) of the FAA. In a footnote, the Court specifically reserved judgment as to whether manifest disregard survived its decision in *Hall Street* "as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10." 559 U.S. at 672 n.3. Seizing on this footnote, the Fourth Circuit invoked what it termed "considerable uncertainty" as to the "continuing viability of extra-statutory grounds for vacating arbitration awards," and then proceeded to apply manifest disregard as an independent ground for vacatur. *Walia*, 2013 WL 5781207, at *5 n.5 (citation omitted). It held that, based on this "uncertainty" in the law, manifest disregard continues to exist in the Fourth Circuit, post-*Hall Street,* as an independent, non-statutory ground for review. *Id.* (citing *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012)).

This Court should correct the Fourth Circuit's error and thereby inform other circuits that manifest disregard does not constitute an independent ground for vacatur, and—more broadly—that the courts are not permitted to supplement the FAA with "common law" grounds for vacatur. Such clarification is necessary to provide certainty to parties in arbitration that an arbitral award is subject to vacatur only for those grounds set forth in the FAA.

II. The Division Among the Circuits Regarding Manifest Disregard Creates Uncertainty and Unpredictability in Arbitration

The Fourth Circuit's decision in *Walia* is emblematic of an entrenched divide among the circuits as to whether manifest disregard continues to exist after *Hall Street* and, if it does exist, what it means. The circuit divide creates uncertainty and unpredictability for arbitration in the United States, and subjects arbitral awards rendered in this country to different standards of review based solely upon the place of arbitration.

Since *Hall Street*, the circuit courts have reached widely diverging views as to whether manifest disregard continues to exist as a ground for vacatur. Several circuits, including the Fifth, Eighth, and Eleventh, have held that manifest disregard of the law is no longer a valid basis to vacate an arbitral award. *See Air Line Pilots Ass'n Int'l v. Trans States Airlines, LLC*, 638 F.3d 572, 578 (8th Cir. 2011) (holding that *Hall Street* "eliminated judicially created vacatur standards under the FAA, including manifest disregard for the law"); *Frazier v. CitiFinancial Corp.,* 604 F.3d 1313, 1324 (11th Cir. 2010) ("judicially-created bases for vacatur are no longer valid in light of *Hall Street*"); *Citigroup Global Mkts.,* 562 F.3d at 355 ("to the extent that manifest disregard of the law constitutes a non-statutory ground for vacatur, it is no longer a basis for vacating awards under the FAA"). In these circuits, the fact that an arbitrator may have disregarded the law or "manifestly" erred in applying the law is not a recognized ground under Section 10 of the FAA and is therefore not cognizable. *See, e.g., Citigroup Global*

Mkts., 562 F.3d at 355; *Frazier*, 604 F.3d at 1324.

The Seventh Circuit has also rejected "manifest disregard of the law" as an independent basis for vacatur. The Circuit has further found that if the doctrine exists at all, it must fall under the "exceeding powers" provision found at Section 10(a)(4) of the FAA, and should apply only where an arbitrator "directs the parties to violate the law." *Affymax, Inc. v. Ortho-McNeil-Janssen Pharma., Inc.*, 660 F.3d 281, 284-85 (7th Cir. 2011); *Johnson Controls, Inc. v. Edman Controls, Inc.*, 712 F.3d 1021, 1026 (7th Cir. 2013); *Halim v. Great Gatsby's Auction Gallery, Inc.*, 516 F.3d 557, 563 (7th Cir. 2008). The Seventh Circuit's exceedingly narrow approach to this doctrine does not permit review on the basis that the arbitrator misapplied the law—even manifestly—, or on the basis of disagreement with the arbitrator's contract interpretation.

Other circuits have taken an opposing view. At least two circuits, the Fourth and the Sixth, hold that manifest disregard of the law survives *Hall Street* as an independent ground for vacatur. *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 480 (4th Cir. 2012); *see also Wells Fargo Advisors, LLC v. Watts*, Nos. 12-1464, 12-1484, 2013 WL 5433635, at *1 (4th Cir. Oct. 1, 2013) (describing manifest disregard as among "common law grounds" for vacatur); *Ozormoor v. T-Mobile USA, Inc.*, 459 F. App'x 502, 505 (6th Cir. 2012) (describing manifest disregard as a "separate judicially created basis" for vacatur) (internal citation omitted); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 418-19 (6th Cir. 2008) (suggesting that *Hall Street* only precluded the parties from adding to the standards for vacatur, but did not prohibit judi-

cially created doctrines such as manifest disregard). The Fourth Circuit's application of the doctrine is the most expansive. According to at least one recent formulation, an award will be overturned on manifest disregard grounds when an arbitrator "refuse[s] to heed a legal principle" that is "clearly defined and not subject to reasonable debate." *Wachovia Sec.*, 671 F.3d at 481 (internal citation omitted).

The Second and Ninth Circuits also continue to recognize manifest disregard of the law after *Hall Street*. These circuits refer to manifest disregard as a "judicial gloss" on FAA Section 10(a)(4)'s "exceeding powers" provision, to be relied upon when the arbitrator's erroneous interpretation of the law is "egregious" enough to constitute an excess of powers. *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339-40 (2d Cir. 2010). In applying this standard, the courts require a showing that the arbitrator ignored a legal principle that was both "clear" and directly applicable to the arbitration and that the arbitrator knew of the applicability of the principle but "intentionally" disregarded it. *See id.* at 339; *see also Comedy Club*, 553 F.3d at 1290 ("it must be clear from the record that the arbitrator recognized the applicable law and then ignored it.") (citation omitted); *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003) (en banc) ("arbitrators exceed their powers in this regard . . . when the award is completely irrational or exhibits a manifest disregard of law.") (internal quotation marks and citation omitted).

Finally, the First, Third and Tenth Circuits have declined to decide whether manifest disregard survives *Hall Street*, pending further instruction from

this Court. *See Kashner Davidson Sec. Corp. v. Mscisz*, 601 F.3d 19, 22 (1st Cir. 2010) (stating that the First Circuit "ha[s] not squarely determined whether our manifest disregard case law can be reconciled with *Hall Street*" and declining to do so in that case); *CD & L Realty LLC v. Owens Illinois, Inc.*, —F. App'x—, 2013 WL 4423412, at *3 n.3 (3d Cir. Aug. 20, 2013) (assuming without deciding that manifest disregard survived *Hall Street*, and holding that the standard for manifest disregard was not met in any case); *Abbott v. Law Office of Patrick J. Mulligan*, 440 F. App'x 612, 620 (10th Cir. 2011) ("in the absence of firm guidance from the Supreme Court, we decline to decide whether the manifest disregard standard should be entirely jettisoned").

The circuit split is significant, deep-rooted, and antithetical to the national uniformity and consistency sought by the FAA. Restat. (3d) Int'l Arb. §4-22, rep. note g(iv) (Council Draft 3, 2011); *see also Citigroup Global Mkts.*, 562 F.3d at 351-55 (describing a long history of confusion among the circuits about manifest disregard). By application of the concept of manifest disregard of the law, arbitral awards are subjected to vastly different levels of scrutiny merely because of the circuit in which they were rendered. This is contrary to the very purpose of the FAA. *See Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and HR. 646 Before the Subcomms. of the Judiciary*, 68th Cong. 28 (1924) (testimony of Alexander Rose) ("There is one excellent result to be achieved in the enactment of [the FAA], . . . it will set a standard throughout the United States. . . . [T]he enactment of this law, extending its effect all over the United States, will have an effect upon the cause of that much-desired

thing-uniform legislation on a subject of this character."); *see also Bakoss v. Certain Underwriters at Lloyds of London*, 707 F.3d 140, 143-44 (2d Cir. 2013) ("The circuits that apply federal common law have relied on congressional intent to create a uniform national arbitration policy."); *Salt Lake Tribune Publ'g Co., v. Mgmt. Planning, Inc.*, 390 F.3d 684, 689 (10th Cir. 2004) ("Congress did not plainly intend arbitration to mean different things in different states. Rather, it sought a uniform federal policy favoring agreements to arbitrate.").

The American Law Institute's Restatement of the Law (Third) on the U.S. Law of International Commercial Arbitration, representing the consensus of the legal community as to a set of unified rules governing international arbitration in the United States, takes the view that manifest disregard does not constitute an independent ground for vacatur of arbitral awards. Restat. (3d) Int'l Arb. §4-22, rep. note g. If the concept of "manifest disregard" is to exist at all, it must fall within one of the statutory categories for vacatur.

Among those circuits that have considered manifest disregard to fall within the FAA grounds for vacatur, the Seventh Circuit's approach to manifest disregard is the only approach that can unify the circuits and fit comfortably within the FAA's statutory categories of review. Restat. (3d) Int'l Arb. §4-22 rep. note g. The Seventh Circuit's limited view permits vacatur on the ground of "manifest disregard" only when the arbitrator directs the parties to violate the law. Under this view, to apply manifest disregard is to apply Section 10(a)(4), which permits vacatur when an arbitrator has exceeded his or her power. It

is well accepted that an arbitrator exceeds his power when he issues an award that directs the parties to violate the law, the enforceability of which would be repugnant to U.S. public policy. *Id.* at §4-22(5), cmt.1. This formulation comports with the FAA's goal of preventing procedural abuses and/or arbitral "misconduct," *see Hall Street*, 552 U.S. at 585, while ensuring that an arbitrator's decisions on contract interpretation and matters of law are given substantial deference.

III. The Fourth Circuit's Application of Manifest Disregard to Interfere with the Arbitrator's Contract Interpretation Violates the Court's Precedents and Leads to Frivolous "Appeals" of Arbitration Awards

Even if this Court determines that manifest disregard should survive in some form, the Fourth Circuit's expansive application of the doctrine clearly is at odds with this Court's precedents and should be reversed. The Fourth Circuit used the doctrine to overturn an award based on its disagreement with the arbitrator's merits determination, in this case a contract interpretation. But this Court has always rejected the notion that disagreement with an arbitrator's interpretation of a contract is a basis for vacating an arbitral award. *See United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) (reversing a decision where the "Court of Appeals' opinion refusing to enforce . . . the award was not based upon any finding that the arbitrator did not premise his award on his construction of the contract. It merely disagreed with the arbitrator's construction of it."); *see also Hall Street*, 552 U.S. at 586.

Most recently, this Court re-affirmed this position in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), a decision with which the Fourth Circuit's opinion directly conflicts. In *Oxford Health*, the arbitrator was asked to determine whether class arbitration could be brought under an arbitration clause that did not explicitly address the availability of class arbitration. The arbitrator decided that because the arbitration clause required all "civil actions" to be brought in arbitration, the parties intended to permit all forms of civil actions, including class actions, to be brought in arbitration. *Id*. at 2067. In affirming the Third Circuit and upholding the arbitral award, the Court held that "convincing a court of an arbitrator's error—even his grave error—is not enough. So long as the arbitrator was 'arguably construing' the contract—which this one was—a court may not correct his mistakes." *Id.* at 2070.

In *Walia*, the Fourth Circuit ignored this recent precedent and vacated the arbitral award based on what the court viewed as the arbitrator's "objectively" erroneous interpretation of a contractual release. 2013 WL 5781207, at *7. The Fourth Circuit's decision directly conflicts with *Oxford Health*.[3] The appellate court expressly acknowledged that the arbitrator had "attempt[ed] to parse the language of the [contractual] Release," but found that it did so erroneously. *Walia,* 2013 WL 5781207, at *7. Its decision to vacate the award was based on its disagreement with the arbitrator's interpretation of the contract. Such "judicial meddling" threatens to undermine the very reason parties choose to arbitrate by

[3] The Court decided Oxford Health in June 2013. Oral argument took place in Walia in September 2013, and the Fourth Circuit issued its decision in October 2013.

"render[ing] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process." *Hall Street*, 552 U.S. at 588 (internal citation omitted); W.W. Park, Arbitration of International Business Disputes Ch. II-D-2, at 390 (2d ed. 2012).

The Fourth Circuit's broad application of the manifest disregard doctrine encourages the very sort of "frivolous" challenges to arbitral awards that has led some circuits to sanction litigants for bringing baseless appeals cloaked in "manifest disregard" language. *See, e.g., B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 907, 913-14 (11th Cir. 2006) ("The laudatory goals of the FAA will be achieved only to the extent that courts ensure arbitration is an alternative to litigation, not an additional layer in a protracted contest."); *DMA Int'l, Inc. v. Qwest Commc'n Int'l, Inc.*, 585 F.3d 1341, 1346 (10th Cir. 2009) ("unjustified, protracted attempts to vacate arbitration awards destroy the 'promise of arbitration' . . . only by imposing sanctions in cases like this can we give breath to the 'national policy favoring arbitration.'") (citing *Hall Street*, 552 U.S. at 588).

Thus, even if this Court were to uphold manifest disregard of the law in some form, granting the Petition will permit the Court to discourage litigants from frivolous merits-based challenges and to narrow the expansive and potentially dangerous form of manifest disregard review applied by the Fourth Circuit in this case.

IV. The Current State of the Law on Manifest Disregard Has Negative Implications for Arbitration in the United States

The current state of the law on manifest disregard has significant negative implications for both domestic and non-domestic (or "international") arbitrations in the United States. Several circuit courts, including the Second Circuit (within which many international arbitrations are seated), have held that the grounds set out in Section 10 of the FAA apply to the vacatur of awards rendered in the United States, whether those awards are domestic or international.[4] *See Yusuf Ahmed Alghanim & Sons W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997) ("The [New York] Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law . . . .").[5] Accordingly, the uncertainty surrounding manifest disregard affects both domestic and international arbitrations.

The concern is more than academic. Studies have found that manifest disregard is the most common

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[4] Chapter 1 of the FAA applies to "domestic" arbitrations—that is, arbitrations brought within the United States between U.S. parties. Chapter 2 of the FAA applies to "non-domestic awards," which include awards rendered in an arbitration involving at least one non-U.S. citizen, or in an arbitration between U.S. citizens that involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. Chapter 2 of the FAA implements the New York Convention, an international treaty entered into by 149 states that governs the recognition and enforcement of arbitration awards.

ground for challenging an arbitral ruling in the United States. *See, e.g.,* Christopher R. Drahozal, Codifying Manifest Disregard, 8 Nev. L.J. 234, 237 (2007). The broad availability of manifest disregard encourages litigants to mount challenges based on the very same legal questions that were argued at length in the arbitration, essentially giving themselves a merits-based appeal. Even if such challenges are ultimately denied, the party prevailing in an arbitration is nonetheless deprived of many of the cost and efficiency benefits of arbitration, by having to re-litigate substantive issues before a trial court, and then an appellate court, despite the fact that the primary decision-maker (the arbitrator) has already found in its favor. This has detrimental effects on the system as a whole: the judicial system is robbed of the efficiency gains that arbitration offers, while the arbitrator may feel pressure to "over-paper" legal arguments to protect the award from challenge. *See, e.g., B.L. Harbert Int'l, LLC*, 441 F.3d at 907 ("If we permit parties who lose in arbitration to freely relitigate their cases in court, arbitration will do nothing to reduce congestion in the judicial system; dispute resolution will be slower instead of faster; and reaching a final decision will cost more instead of less.").

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[5] Not all jurisdictions follow the Second Circuit's approach. For example, the Eleventh Circuit has held that the New York Convention's grounds for non-recognition of an arbitral award are the exclusive grounds available for vacatur of a non-domestic award made in the United States. *See Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1445-46 (11th Cir. 1998); *see also* Restat. (3d) Int'l Arb. §4-3, rep. note (c)(i) ("the grounds for denying confirmation of a [non-domestic] award are furnished exclusively by the Convention.").

Moreover, in today's competitive global arena, expansive judicial review of arbitration awards places the United States at a disadvantage when compared to other popular "seats" for international arbitration. *See* Queen Mary Univ. of London, International Arbitration: Corporate Attitudes and Practices 14 (2006), http://www.arbitrationonline.org/docs/IAstudy_2006.pdf (ranking the United States as the fourth most popular seat of arbitration for corporate users, after England, Switzerland, and France); *see also* Gary Born, International Arbitration And Forum Selection Agreements: Drafting and Enforcing 64 (3d ed. 2010) ("Nations with interventionist . . . local courts should always be avoided as arbitral seats."). The very existence of the doctrine of manifest disregard, in particular as applied by the Fourth Circuit, creates uncertainty that in turn has undermined the reputation of the United States as a seat for international arbitration.

Indeed, the availability of manifest disregard may lead commercial users of arbitration to turn away from the United States when selecting an arbitral seat. The doctrine has been the subject of sustained criticism by pre-eminent scholars and practitioners of international arbitration. One leading commentator notes:

> The problem is not necessarily in the 'manifest disregard' doctrine itself . . . . Rather, the difficulty lies in the doctrine's potential for mischief and misuse in large international cases . . . .
>
> [. . .]
>
> When parties by contract agree to have

> the merits of their dispute decided by arbitrators, not judges, the prospect of judicial meddling by local courts will understandably alarm foreign enterprises. The procedural and political neutrality of international dispute resolution is compromised each time a local judge reviews the merits of an award.

W.W. Park, Saving the FAA, Int'l Arb. News, Summer 2004, at 14, 16. *See also* Restat. (3d) Int'l Arb. §4-22, rep. note g(ii) ("the availability of manifest disregard review causes uncertainty about the enforceability of arbitral awards and discourages parties from choosing the United States as an arbitral seat."); Hans Smit, Manifest Disregard of the Law in the New York Supreme Court, Appellate Division, First Department, 15 Am. Rev. Int'l Arb. 111, 122 (2004) (stating that review for manifest disregard of the law results in "the very foundations of the institution of arbitration [being] eaten away").

The Petition presents this Court with an important opportunity to clarify the status of the manifest disregard doctrine in United States arbitration law and ensure that the Court's long-standing support of a deferential approach to arbitration is maintained.

CONCLUSION

For all the reasons discussed above, *amici* respectfully request that the Petition be granted.

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Respectfully Submitted,

/s/ David M. Lindsey

George A. Bermann
Walter Gellhorn Professor of Law and Director, Center for International Commercial and Investment Arbitration
COLUMBIA UNIVERSITY SCHOOL OF LAW
435 West 116th Street
New York, New York 10027
Tel. (212) 854-4258
Fax (212) 854-7946
gbermann@law.columbia.edu

David M. Lindsey
Counsel of Record
James M. Hosking
Jennifer L. Gorskie
Yujing Yue
CHAFFETZ LINDSEY LLP
505 Fifth Avenue, 4th Floor
New York, New York 10017
Tel. (212) 257-6960
Fax (212) 257-6950
d.lindsey@chaffetzlindsey.com

Counsel for *Amici Curiae* Professors and Practitioners of Arbitration Law

APPENDIX

Appendix 1
List of *Amici Curiae*

Gerald Aksen is an independent international arbitrator and the 2005 recipient of the American Bar Association Dispute Resolution Section's D'Alemberte/Raven Award for outstanding ADR service. He formerly served as General Counsel of the American Arbitration Association, President of the College of Commercial Arbitrators, Vice-Chairman of the ICC International Court of Arbitration and adjunct professor of law at New York University School of Law.

Arif Hyder Ali is Co-chair of the International Arbitration Group at Weil, Gotshal & Manges LLP and an Adjunct Professor of Law at Georgetown University Law School where he teaches courses in international commercial arbitration and investor-state arbitration. Mr. Ali has represented parties from the United States and Canada, Central and South America, Europe, the Middle East and North Africa, and across Asia in arbitrations under many of the major international and regional arbitral regimes. Several of his cases have set important precedents and are the subject of academic commentary.

George A. Bermann is the Walter Gellhorn Professor of Law, the Jean Monnet Professor of European Union Law, and the Director of the Center for International Commercial and Investment Arbitration at Columbia Law School, as well as a faculty member of the Institut d'Études Politiques (Sciences Po) in Paris, France, and the Collège d'Europe in Bruges, Belgium. He is a member of the

Board of Directors of the American Arbitration Association and the Chief Reporter for the American Law Institute's Restatement of the Law Third: The U.S. Law of International Commercial Arbitration.

Andrea K. Bjorklund is the L. Yves Fortier Chair in International Arbitration and International Commercial Law at McGill University Faculty of Law. She previously taught at UC Davis School of Law. She is Chair of the Academic Council of the Institute of Transnational Arbitration, co-rapporteur of the International Law Association's Study Group on the Role of Soft-Law Instruments in International Investment Law and an adviser to the American Law Institute's project on restating the U.S. law of international commercial arbitration. She also serves as Director of Studies for the American Branch of the International Law Association.

Lea Brilmayer is the Howard M. Holtzmann Professor of International Law at Yale Law School. She is the author of *Justifying International Acts* and *American Hegemony: Political Morality in a One-Superpower World*. Professor Brilmayer has served as lead counsel in state-to-state arbitrations dealing with island sovereignty, maritime delimitation, land boundaries, and mass claims for violations of the laws of war. Professor Brilmayer's affiliation with Yale Law School is provided for identification purposes only. She joins this brief in her individual capacity; it does not purport to present the Yale Law School's institutional views, if any.

John Fellas is a partner in the New York office of Hughes Hubbard & Reed LLP, and co-chair of its Arbitration Practice and International Practice. He is

a member of the Board of Directors of the American Arbitration Association and of the Subcommittee on the Revision of the International Centre of Dispute Resolution Arbitration Rules. He is co-editor of *International Commercial Arbitration in New York* (Oxford University Press 2010).

Franco Ferrari is professor of law at NYU School of Law, where he is also the Executive Director of the Center for Transnational Litigation, Arbitration and Commercial Law. Previously, he was chaired professor at Verona University School of Law and Bologna University School of Law (Italy) as well as Tilburg University in the Netherlands. Professor Ferrari also served as Legal Officer at the United Nations Office of Legal Affairs, International Trade Law Branch (2000-2002). He also acts as an arbitrator in international commercial arbitrations and investment arbitrations.

Howard O. Hunter is Professor of Law at Singapore Management University, of which he was for six years the President. He is also Professor of Law and Dean Emeritus of the School of Law of Emory University and is the author of *Modern Law of Contracts*. Professor Hunter is a member of the Board of Directors of the American Arbitration Association.

Carolyn Lamm is a partner in the firm of White & Case LLP. She is a former President of the American Bar Association, former President of the D.C. Bar, a member of the Council of the American Law Institute, and a member of the Executive Committee of the Board of Directors of the American Arbitration Association.

David M. Lindsey is a founding partner of Chaffetz Lindsey LLP in New York. His 26-year practice focuses primarily on international commercial and investment arbitration, as well as U.S. litigation, in a broad range of sectors including the power, oil and gas, engineering, manufacturing, and pharmaceuticals industries. He also represents foreign sovereigns before international tribunals and U.S. courts. Mr. Lindsey regularly sits as arbitrator. He is a member of the International Commercial Disputes Committee of the New York City Bar Association and is licensed to practice in New York, Florida, and the District of Columbia.

Lawrence W. Newman is Of Counsel to the firm of Baker & McKenzie LLP in New York. He is co-editor of *International Arbitration Checklists* and *The Leading Arbitrators' Guide to International Arbitration*. Mr. Newman is past Chair of the Arbitration Committee of the International Institute for Conflict Prevention & Resolution (CPR), past Chair of the International Disputes Committee of the New York City Bar Association, and the current Chair of the International Legal Practice Committee of that Association.

Alan Scott Rau holds the Mark G. and Judy G. Yudof Chair of Law at the University of Texas at Austin School of Law. Professor Rau is an Advisor to the American Law Institute Project on the Restatement of International Commercial Arbitration; he also frequently serves as an arbitrator and is a member of the panel of the American Arbitration Association and the panel of mediators of the Court of Arbitration for Sport. He has taught as a Visiting Professor at the University of Toronto

Faculty of Law; as a Fulbright Professor at the China University of Political Science and Law in Beijing; at the University of Geneva Faculty of Law; and at the University of Paris-I and the University of Paris-II.

The Honorable **Stephen M. Schwebel** is an independent arbitrator and counsel. He is a former judge and president of the International Court of Justice, and has also served as Deputy Legal Adviser to the U.S. State Department. He was also a member of the United Nations' International Law Commission.

Ben H. Sheppard, Jr. is a Distinguished Lecturer at and the director of the A.A. White Dispute Resolution Center of the University of Houston Law Center. Mr. Sheppard is a retired partner of Vinson & Elkins LLP in Houston. He is a former Chairman of the Disputes Division of the International Law Section of the American Bar Association and is co-editor of *The AAA Yearbook on Arbitration & the Law*.

Edna Sussman is an independent arbitrator and the Distinguished ADR Practitioner in Residence at Fordham University School of Law. Formerly a partner in the firm of White & Case LLP, she serves on the Boards and the Executive Committees of the American Arbitration Association and of the College of Commercial Arbitrators. She is a former co-chair of the Arbitration Committees of the American Bar Association's Section of International Law and Section of Dispute Resolution, former Chair of the Dispute Resolution Section of the New York State Bar Association and serves as co-editor-in-chief of the New York Dispute Resolution Lawyer.

John M. Townsend is a partner in the firm of Hughes Hubbard & Reed LLP in Washington, D.C. He is a former Chairman of the Board of Directors of the American Arbitration Association, former Chairman of the Mediation Committee of the International Bar Association, and one of the United States appointees to the Panel of Arbitrators of the International Centre for Settlement of Investment Disputes.