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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondents do not dispute that the courts of appeals are divided four to three over the Question Presented: Whether and when the Federal Arbitration Act permits a court to vacate an arbitral award as the product of "manifest disregard of the law." That conflict results directly from irreconcilable readings of this Court's precedents, which only this Court can resolve. Nor do respondents dispute the petition's showing that – properly understood – this Court's precedents preclude the application of "manifest disregard" to vacate arbitration awards. As the petition demonstrated and the *amicus* brief confirms, no question in arbitration law in the United States provokes more significant disagreement. Denying review in this closely watched case would leave the law in a state of "great uncertainty about the doctrine's scope and foster[] expansive and often frivolous judicial challenges that undermine the advantages that are associated with arbitration and that underpin the Court's consistently pro-arbitration jurisprudence." *Amicus* Br. of Professors & Practitioners of Arbitration 5. Because respondents' arguments for denying review are not persuasive, the petition should be granted.[*]

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[*] While the petition has been pending, the criminal case against respondent Kiran M. Dewan has proceeded. Respondent has pleaded guilty to bribery in violation of 18 U.S.C. § 201(b)(1)(B). *See* Plea Agreement, *United States v. Dewan*, 12-cr-400-WDQ, ECF No. 90 (D. Md. Dec. 13, 2013). He admitted not only to bribing an undercover agent posing as an immigration official to obtain immigration benefits for clients, but also to paying a $5000 bribe for the purpose of having petitioner

1. Respondents' central argument is that "the panel did not rely on manifest disregard of the law to decide the case," but instead applied "the 'fails to draw its essence from the agreement' standard," which the Court recognized in the labor-management context in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). BIO 1. That is an obvious, gross mischaracterization of the ruling below. The court of appeals explained that it was "hold[ing] that the award in favor of Walia is the product of a manifest disregard of the law by the Arbitrator." Pet. App. 3a. The court "agree[d]" with respondents that the award "is the product of the Arbitrator's manifest disregard of the law," because "the Arbitrator could not find the Release valid and enforceable but nonetheless make an award to Walia." *Id.* 12a. Based on its view that the release was categorical, the court "h[e]ld that the Arbitrator manifestly disregarded the law by holding the Release valid and enforceable but nevertheless arbitrating Walia's counterclaims." *Id.* 19a. In reaching that conclusion, it recognized the "considerable uncertainty" regarding the continuing validity of the manifest disregard standard, but explained that the Fourth Circuit had reaffirmed that it is a valid "ground[] for vacatur." *Id.* 14a n.5.

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deported. *See id*. 11-12. Respondent did so because he was "afraid that [petitioner] was going to start his own accounting business and compete with Dewan and because [petitioner] knew all of Dewan's clients." *Id*. 12. Respondent's sentencing is scheduled for June 11, 2014.

The court also explicitly described that standard as distinct from whether the "'award fails to draw its essence from the contract,'" which it recognized as a different "'common law ground[] for vacating such an award.'" Pet. App. 13a (quoting *MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849, 857 (4th Cir. 2010)). And the court never cited *Enterprise Wheel*. Respondents point to no language in the opinion below suggesting that the court of appeals applied the "essence of the agreement" test in this case, because none exists.

2. Respondents next argue that, "to the extent the panel applied a manifest disregard of the law standard, it was applied as a gloss on 9 U.S.C. § 10(a) and as a common law ground." BIO 1. But the Question Presented asks whether the court was permitted to do so in light of this Court's precedents. Four circuits have applied this Court's decision in *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008), to hold that manifest disregard is no longer available as a basis for vacatur – whether as a "gloss" on the Federal Arbitration Act or as an extra-statutory, common law ground. *See* Pet. 22. Three circuits have reached the opposite conclusion, *id*. 24; two have held that manifest disregard remains available *only* as a gloss on the statute, *id*. 26, and the Fourth Circuit has held "that manifest disregard did survive *Hall Street* as an independent ground for vacatur," *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 480 (4th Cir. 2012). As the petition demonstrated, it does not matter whether the Fourth Circuit actually deems "manifest disregard" a gloss on the Federal Arbitration Act, or – as the court described it in this

case – an "extra-statutory," "common law" ground for vacating an award. Pet. App. 14a n.5, 13a. Either way, certiorari is warranted because the court of appeals' holding deepens the circuit split and contradicts this Court's decisions in *Hall Street* and *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013).

3. Respondents next argue that the judgment is correct under the "essence of the agreement" standard because "the arbitrator abandoned her interpretive role." BIO 2. Consequently, they assert, the "question of 'whether' and 'when' the FAA authorizes vacatur for manifest disregard of the law is immaterial and thus unnecessary to the outcome of the case." *Id.* 3. According to respondents, because the judgment can otherwise be affirmed, "[w]hatever th[is] Court's decision might be, it would for practical purposes be an advisory opinion." *Id.* 30. That argument lacks merit for several reasons.

First, if certiorari is granted, the Court will decide the Question Presented, which was the sole basis for the ruling below, before turning to respondents' alternative theory for affirmance. Indeed, this Court routinely grants certiorari when, as here, respondents contend in the brief in opposition that there is an alternative basis for affirmance. For example, in its most recent arbitration ruling, this Court rejected the respondents' indistinguishable effort to evade review on the ground that the court of appeals' decision could be recharacterized or affirmed on an alternative basis. *See Republic of Arg. v. BG Grp. plc*, 665 F.3d 1363 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 2795 (2013)

(mem.), *rev'd*, --- S. Ct. ----, No. 12-138, 2014 WL 838424 (Mar. 5, 2014).

Second, the Court's disposition of the Question Presented would also likely resolve – or at least substantially inform – the question whether the "essence of the agreement" standard remains a valid basis for overturning an arbitration award. Neither "manifest disregard" nor "essence of the agreement" appears in the Federal Arbitration Act, and so, when this Court resolves the ongoing confusion about the meaning of *Hall Street*, its decision will provide useful guidance regarding both of these extra-statutory grounds. *See, e.g.*, *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010) (holding that *Hall Street* eliminated "grounds other than those listed in the FAA," including if an award "fails to draw its essence from the agreement, or if the award evidences a manifest disregard for the law") (internal quotation marks omitted).

In any event, respondents' construction of the release as prohibiting – much less categorically prohibiting – petitioner from asserting counterclaims in arbitration lacks merit. Despite its high level of detail, the release never mentioned arbitration or counterclaims. Thus, although the arbitrator found that petitioner was not permitted to bring suit in state or federal court, she permitted him to assert his counterclaims in the parties' arbitration. Two federal judges – the district judge and Circuit Judge Wynn – concluded that this was a permissible interpretation of the release. *See* Pet. App. 48a; *id.* 24a (Wynn, J., dissenting).

Respondents disagree, arguing that the arbitrator "transformed the 'essence' of th[e] Agreement – which on its face states its purpose was 'to resolve any claim by [Petitioner] against [Respondents] and all other existing differences' – into neither a settlement nor a release of claims but instead into a mere waiver of the right to have claims heard in a judicial forum." BIO 2. That theory suffers from two independent, fatal flaws.

First, it rests on a precatory introductory clause, rather than on what respondents recognize are the operative "release provisions and a covenant not to sue." *Id.* 5. In the release itself, petitioner promised "never to file a lawsuit or assist in or commence any action." Pet. App. 16a. But the phrases "file a lawsuit" and "assist in or commence any action" can readily be interpreted – as the arbitrator interpreted them – to refer to litigation, and not to the assertion of counterclaims in arbitration.

Second, respondents take language from the introductory clause out of context, and thus assume their own conclusion that the parties intended to preclude both litigation and arbitration. The language that respondents purport to quote actually states that the parties wished to resolve all their "existing differences completely and amicably, *without litigation*." BIO App. 1 (emphasis added). The arbitrator quite reasonably read that language to refer to avoiding the costs of court proceedings, not arbitration.

No court would hold in these circumstances that the arbitrator abandoned her interpretive role and failed to rest her ruling on the essence of the parties'

agreement. As respondents recognize, all that is required is that "the arbitrator must at least 'arguably' 'interpret,' 'construe or apply the contract.'" BIO 18 (quoting *Oxford Health*, 133 S. Ct. at 2068) (alterations omitted). So long as the arbitrator does not forgo the task of interpretation to "dispense[] his own brand of industrial justice," the award will not be disturbed. *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 663 (2010) (citations omitted); *see also Oxford Health*, 133 S. Ct. at 2068 (court may vacate award under this standard only if "the arbitrator act[s] outside the scope of his contractually delegated authority – issuing an award that simply reflect[s] [the arbitrator's] own notions of [economic] justice") (internal quotation marks omitted); *Hall Street*, 552 U.S. at 586 (holding that the Federal Arbitration Act permits vacatur only for "egregious departures from the parties' agreed-upon arbitration"). As the appellate decision that respondents quote explains, courts will uphold an arbitral award under this standard "even if we disagree with the arbitrator's interpretation of the contract." *Timegate Studios, Inc. v. Southpeak Interactive, LLC*, 713 F.3d 797, 802 (5th Cir. 2013). *See also, e.g.*, *Verizon Wash., D.C. Inc. v. Commc'ns Workers of Am.*, 571 F.3d 1296, 1302-03 (D.C. Cir. 2009) ("'[A] court should not reject an award on the ground that the arbitrator misread the contract.'") (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)); *Mich. Family Res., Inc. v. SEIU Local 517M*, 475 F.3d 746, 756 (6th Cir. 2007) (en banc) (enforcing award even though the arbitrator "made a legal error, perhaps even a serious legal error, but an error of interpretation

nonetheless"); *Brentwood Med. Assocs. v. United Mine Workers of Am.*, 396 F.3d 237, 241 (3d Cir. 2005) ("[W]e will not disturb an arbitration award even if we find the basis for it to be ambiguous or disagree[] with [the arbitrator's] conclusions under the law.") (internal quotation marks omitted).

Here, the arbitrator studied the parties' agreement and construed its terms to refer to actions in court rather than arbitration. Respondents seek to overturn the resulting award based on the garden-variety claim that the arbitrator misinterpreted the agreement. In their view, the agreement is better read to provide that petitioner waived every claim in every forum. But that difference in opinion is not a basis under the Federal Arbitration Act to vacate an arbitration award. The district court correctly found that there is "substantial support for the decisions made by the arbitrator, that the arbitrator did not go beyond the scope of the submissions, and that the arbitrator's determinations were not arbitrary." Pet. App. 48a. "Because the arbitrator unquestionably construed the release agreement at issue, [a court is] not at liberty to substitute [its] preferred interpretation for the arbitrator's." *Id.* 24a (Wynn, J., dissenting).

Respondents' argument to the contrary rests on the court of appeals' statement that, "[o]bjectively viewed, the language of the Release could not be more expansive, clear, or unambiguous." Pet. App. 19a. In that passage, the majority below disagreed strongly with the arbitrator's interpretation of the contract. But even those judges did not doubt that the arbitrator

had "attempt[ed] to parse the language of the Release"; they merely found that reading "untenable." *Id.* 17a. The opinion does not suggest, much less conclude, that arbitrator decided the case without regard to the parties' agreement.

5. Respondents next argue that the judgment should be affirmed to ensure that parties retain confidence in the arbitral system. Actually, the opposite is true. It is undisputed that the parties agreed to resolve any "dispute . . . concerning" the release "by binding arbitration administered by the American Arbitration Association under its commercial dispute resolution rules," and thus empowered the arbitrator to determine the scope of the release and covenant not to sue. BIO App. 4-5. Notwithstanding this agreement, the court of appeals overturned the arbitrator's award because it disagreed with her reading of the parties' contract. Such "'judicial meddling' threatens to undermine the very reason parties choose to arbitrate," and encourages further "frivolous merits-based challenges" that impose substantial unnecessary costs on the arbitral system. *Amicus* Br. of Professors & Practitioners 16-17.

6. Respondents next argue that the court of appeals' ruling, which decided the Question Presented in their favor, should evade review because that question was not "briefed or argued to the courts below." BIO 30. Respondents note that they sought to overturn the arbitral award under Maryland law rather than federal law, and petitioner answered that argument. *Id.* 30-31. (Inexplicably, respondents refer

to "[p]etitioner's arguments for vacatur under Maryland arbitration law." *Id*. 31. It was respondents who sought to vacate the award.) In support of this argument, respondents invoke the principle that this Court will not "decide, in the first instance," a question not resolved below or briefed in this Court. *Id*. 32 (quoting *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2861 n.14 (2010)).

That principle has no application here. The court of appeals squarely addressed the applicability of the federal law, Pet. App. 10a-12a ("We hold that the FAA controls."), and then decided the Question Presented, which was the only basis for its ruling. It is well settled that *sua sponte* rulings of the courts of appeals do not evade this Court's review. Rather, this Court will decide a properly presented question that has been pressed in or passed upon below. *See, e.g.*, *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002) ("Any issue 'pressed or passed upon below' by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari.") (internal citation omitted); *United States v. Williams*, 504 U.S. 36, 41 (1992) ("[T]his rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon.").

7. Respondents finally argue that the Question Presented lacks significance because arbitration awards are rarely overturned under the manifest disregard standard. BIO 33. This case is an obvious counterexample. But respondents' argument misses the point. As the many cases cited in the petition (at 28-29 & n.6) demonstrate, the Question Presented has

great significance because it is frequently litigated, as losing parties in arbitration routinely invoke the manifest disregard standard to commence expensive and time-consuming collateral litigation, "render[ing] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process . . . and bring[ing] arbitration theory to grief in post-arbitration process." *Hall Street*, 552 U.S. at 588. *See also Amicus* Br. of Professors & Practitioners 18-19. As the expert *amici* explain, "'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." *Id*. 3. It is the very prospect of that costly post-arbitration judicial fight that undermines the arbitral system. "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." *Id.* 5.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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