No. 14-944

IN THE

Supreme Court of the United States

JUPITER MEDICAL CENTER, INC.,

Petitioner,

v.

VISITING NURSE ASSOCIATION OF FLORIDA, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Florida Supreme Court properly refused to vacate an arbitral award that requires petitioner to pay damages for its breach of two concededly legal contractual obligations based on the argument that the arbitration panel misconstrued the parties' agreement and thereby rendered an "illegal" arbitral award.

RULE 29.6 STATEMENT

Visiting Nurse Association of Florida, Inc. is a Florida not-for-profit corporation. It has no corporate parent, and no publicly held corporation owns ten (10) percent or more of its stock.

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INTRODUCTION

Respondent Visiting Nurse Association of Florida, Inc. (VNA) respectfully submits this Opposition to the Petition for Writ of Certiorari filed by Jupiter Medical Center, Inc. (JMC) to review the judgment of the Florida Supreme Court in this case.

OPINIONS BELOW

The Petition, Pet. 1, 9, omits the decision of the federal district court dismissing petitioner's lawsuit seeking vacatur of the interim arbitral award under Section 10 of the Federal Arbitration Act (FAA). In that unpublished decision, *see* Opp. App. 1a–5a, the federal district court ruled that petitioner's claim that the arbitral panel misconstrued the contract to render an "illegal" arbitral award did not present a "'substantial question of federal law,'" *id.* at 4a–5a ("[T]his Court would not be called upon to decide any issue of federal law, but rather only whether the Panel properly interpreted and construed the Agreement."). Petitioner did not appeal that judgment.[1] JMC also omits that, on December 22, 2014, JMC sought a stay of the damages award in this Court pending the filing and resolution of its petition for certiorari, which Justice Thomas denied on the same day.

COUNTERSTATEMENT OF THE CASE

The petition should be denied because the judgment of the Florida Supreme Court does not conflict with this Court's decisions, implicates no conflict among the federal courts of appeals, and, in all events, is a

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[1] The Florida Supreme Court noted the state trial court's "concer[n] with res judicata principles (the motion to vacate was previously dismissed from federal court)." Pet. App. 11a n.5.

poor case for resolving whether federal common law or the FAA requires a state court to vacate an arbitral award that enforces an "illegal" contract.

During the arbitration, JMC expressly disavowed any claim that the underlying contract is illegal, and it has never contended that the two obligations it breached that were the basis for the damages award are unlawful. Fundamentally, JMC disagrees with the arbitral award issued by the panel and seeks to avoid it, notwithstanding that JMC agreed to resolve disputes arising from the Agreement through arbitration. The Florida Supreme Court's refusal to vacate the arbitral award in the face of what the state trial court viewed as JMC's "disingenuous" argument, Pet. App. 11a n.5, warrants no further review.

First, the decision below does not conflict with this Court's decisions under the Labor Management Relations Act (LMRA), stating that courts may decline to enforce arbitral awards that would require illegal conduct on public policy grounds. *See* Pet. 10. The cases relied upon by JMC arose under Section 301(a) of the LMRA, which this Court has construed to authorize the development of a body of federal common law to govern labor disputes, including the review of arbitral awards arising out of collective bargaining agreements subject to federal law.[2]

The decision below properly explained that those cases were inapposite because they "did not involve

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[2] *See E. Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 60 (2000) (explaining that case involved "parties to a collective-bargaining agreement with arbitration provisions"); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 31 (1987) (same); *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 759 (1983) (same).

arbitration under the FAA." Pet. App. 22a. Nor do those LMRA decisions purport to impose sweeping obligations on *state* courts to exercise an "inherent power" derived from federal common law when reviewing arbitral awards addressing state-law breach of contract claims. Pet. 10. Any such legal principle would not affect the judgment here because the award does not obligate JMC to violate the federal Anti-Kickback Statute or Medicare regulations, but only to pay damages for breaching specific lease and patient discharge obligations that were drafted by JMC's counsel and that JMC conceded were valid.

Second, the decision below does not conflict with the decisions of the federal courts of appeals construing Section 10 of the FAA. None of the federal appellate decisions relied upon by JMC refuses to affirm an arbitral award under Section 10 or adopts a legal standard that would have altered the judgment below. Indeed, the decision below is a poor vehicle to determine the standards for vacatur of arbitral awards that "mandat[e] illegal conduct or impos[e] damages for a party's failure to engage in such conduct," Pet. 10, because the arbitral award requires only that JMC pay damages for breaching two unambiguous contractual obligations that JMC has repeatedly conceded are legal. Pet. App. 14a n.6.

FACTUAL BACKGROUND

A. The Agreement And JMC's Breach

This case arises from the February 2005 purchase of a hospital-based home healthcare agency (HHA) by respondent VNA from JMC. Pet. App. 3a. JMC agreed to sell its in-house HHA to VNA after receiving a fair-market appraisal for the HHA of $639,000. *Id.* at 86a. Under the "Agreement," VNA

was to obtain all rights and interests in JMC's HHA. *Id.* at 4a. Specifically, VNA purchased from JMC "[a]ll provision of services for patient accounts of the Home Health Agency" and "all assets owned by JMC as part of the Home Health Agency." *Id.* at 85a. As explained by the Florida Supreme Court, VNA believed that it could streamline the HHA's operations and generate $1.5 million in revenue based on the volume of Medicare patients serviced by JMC. *Id.* at 3a.

The Agreement provided that "[t]o facilitate the efficient discharge of patients from JMC, [VNA] shall provide on-site home health discharge planning personnel located in the discharge planning department who shall be provided with reasonable work site accommodations." Pet. App. 85a (emphasis omitted). That obligation was memorialized in a separate "office lease" agreement that provided that "[t]his Lease will terminate upon dissolution of Tenant." *Id.* at 103a. JMC also agreed to "follow the discharge planning procedures described in Exhibit 'D'," which required JMC to inform outgoing patients in need of home health care who expressed no preference for any particular service provider of JMC's relationship with VNA. *Id.* at 86a.[3] Finally,

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[3] Exhibit "D" required that "'[f]or any patient requiring home health services post discharge, [JMC] will include in the discharge plan a list of home health agencies that are available to the patient, that are participating in the Medicare program and that serve the geographic area in which the patient resides, consistent with the requirements of 42 CFR [482].43.'" Pet. App. 4a (second alteration in original). Among other things, JMC was required to "'inform the patient or the patient's family of their freedom to choose among participating Medicare home health agencies and ... when possible, respect patient and family preferences, when they are expressed to [JMC].'" *Id.* at 5a (alteration in original). Further, JMC agreed that it would "'not

the parties specified that the Agreement "shall be governed by and construed in accordance with the law of the State of Florida," *id.* at 95a, and that "[a]ny dispute, controversy or claim arising out of or related to this Agreement or breach hereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules." *Id.* at 99a.

Notwithstanding JMC's clear contractual obligations, by letter dated September 10, 2007, JMC's Chief Medical Officer Dr. Ketterhagen notified VNA that "due to a shortage of office space, VNA could not continue to maintain office space in the hospital." Pet. App. 6a. The same letter informed VNA that "JMC would no longer notify its patients of its relationship with VNA" as required by Exhibit "D" to the Agreement. *Id.* In response to these violations of the Agreement, VNA invoked the parties' dispute resolution agreement and instituted arbitration proceedings on November 1, 2007.

B. The Arbitration Proceeding And Award

The arbitral panel heard testimony and accepted exhibits at a two-day hearing. As the Florida Supreme Court explained, "[n]either party argued that the contractual arrangement itself was illegal during the arbitration proceedings." Pet App. 6a. After the last witness testified, VNA alerted the

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specify or otherwise limit the qualified providers that are available to the patient.'" *Id.* Finally, JMC agreed that "'[i]f after following the foregoing procedures the patient expresses no preference, [JMC] will inform the patient of its relationship with the VNA. The purpose of establishing a working relationship with the VNA is to facilitate the smooth transfer of patients into post-hospital care and thereby reduce the average stay for hospitalization.'" *Id.* (second alteration in original) (emphasis omitted).

panel to JMC's interrogatory response on the issue of contract illegality:

> "*Respondent has never contended that the Home Health Agreement was invalid pursuant to any State or Federal law.* Respondent also does not contend that the agreement is specifically addressed or validated by any State or Federal law."

2/5/09 Hrg. Tr. 845 (emphasis added). After the hearing, the parties filed final briefs on April 15, 2009, setting forth their claims and defenses. On the issue of breach, JMC argued that VNA failed to prove (i) that JMC "violated the terms of Exhibit 'D'" and (ii) that JMC violated the lease provision because there was "no term of duration ... specified by the parties in any agreement." JMC Final Br. 8, 18. As to damages, JMC understood that VNA sought damages for lost revenues and profits caused by JMC's breach, but argued that VNA had failed to prove that there had been any breach by JMC and that VNA's damages expert "had not looked at other factors which may have influenced or caused any lost profits from those VNA hoped to make." *Id.* at 30. JMC did not raise any issue about the Agreement's purported illegality either as a basis for construing the parties' obligations under the Agreement, as justification for its actions in violation of the Agreement, or as a defense to the damages sought by VNA.

The arbitral panel considered the arguments the parties actually advanced and ruled in favor of VNA. The panel explained that "[t]here is no question here that the parties to the Agreement—two health care companies—understood and appreciated the risks and benefits involved in the transaction and in particular how government regulations might affect

the terms of their Agreement." Pet. App. 63a–64a. The Panel found that "JMC never made its Discharge Planning Department aware of Exhibit 'D' after the closing, much less took steps to train them or require adherence to the negotiated 'script.'" *Id.* at 64a. The panel pointed specifically to the September 10, 2007 letter in which JMC stated that it "'will no longer be informing patients of the previous relationship that existed'" between JMC and VNA. *Id.* at 65a. The panel highlighted that JMC did not make the contractually mandated disclosure to patients and instead employed a "rotation system to ensure equal distribution of HHA referrals." *Id.* at 62a. The panel rejected JMC's argument that, in fact, its "discharge planners followed Exhibit 'D,'" *id.* at 64a n.14, finding instead that "JMC did not even provide its staff with a copy of Exhibit 'D.'" *Id.*

Second, the panel found that JMC breached the Agreement when it "terminated VNA's office lease." Pet. App. 65a. The panel explained that JMC argued that the office lease had not been breached because the lease lacked a defined term and VNA had failed to prove its last date of occupancy. *Id.* at 65a–66a. The panel again rejected these fact-intensive arguments, finding that the term of the office lease continued "'until dissolution of Tenant'" and that JMC's September 10, 2007 letter "unambiguously notified VNA that it would no longer be able to 'maintain an office at JMC Medical Center.'" *Id.*

After finding that JMC breached these specific obligations, the arbitral panel did not order JMC (i) to comply with Exhibit "D" or (ii) to grant VNA access to the office space to which it was entitled under the Agreement. Instead, it concluded that JMC's material breaches were "causally related" to harm suffered by VNA. Pet. App. 66a, 68a. The panel

acknowledged, and accepted in part, JMC's argument that factors separate from JMC's contractual breaches "impacted VNA's ability to achieve the expected return on investment." *Id.* at 66a. The panel found that JMC caused VNA to incur damages of "$1,350,000 which must be reduced to its present day value of $1,251,213.00." *Id.* at 68a.

After the panel issued its award, JMC retained new counsel, who filed an application and request to reopen the arbitration hearing. JMC argued that the arbitral panel "issued the award based on an erroneous construction of the parties' purchase agreement." Pet. App. 9a. The arbitral panel denied JMC's motion to reopen the hearing because the panel had "'considered the matters stated in the motion in its deliberations.'" *Id.* at 10a.

C. The Federal And State Court Decisions

1. JMC filed suit in the Southern District of Florida, arguing that "the award should be vacated because the award impermissibly construed the parties' contract in a manner that violated multiple federal laws, regulations, and specific, well-defined public policy." Pet. App. 10a. JMC insisted, as it does here, that its petition required the federal court to resolve "substantial questions" under the federal Anti-Kickback Statute and under federal Medicare Regulations. *See* Petition to Vacate Arbitral Award at 3. The federal district court disagreed and dismissed the petition for lack of subject matter jurisdiction. Opp. App. 5a. The court explained that "JMC's right to relief was not dependent on resolution of federal law, but rather only [on] whether the panel properly interpreted and construed the agreement." Pet. App. 10a; *see* Opp. App. 4a–5a. JMC did not appeal the federal court's determination

that JMC's claims did not raise a substantial question of federal law.

2. JMC instead sought to vacate the arbitral award in Florida state court. Although JMC correctly states that the trial court's written order dismissing JMC's petition to vacate provides no "'explanation or analysis,'" Pet. 9 (quoting Pet. App. 11a), JMC omits that the Florida trial court made a record for its ruling in open court. 3/30/10 Hrg. Tr. 55–56 (Court: "I'm trying to make a record here so you understand"). The court summarized the events leading to JMC's current contract illegality argument:

> Now, it [the Agreement] was okay before, it was okay when you wrote it, and it was okay when you litigated, it was okay when you arbitrated it and now it's not okay, *I find that kind of a disingenuous kind of argument at this point.*

Id. at 56 (emphasis added). Next, the trial court noted that the federal district court that first considered JMC's request to vacate the arbitral award "did not feel that that was a substantial issue," *id.*, and that a contrary ruling by the state trial court would "negate the whole procedural process which [JMC] incorporated in the first place." *Id.*[4] Finally, in response to JMC's argument that JMC had obtained new counsel since the original arbitration, the court stated that "the fact that [JMC's prior counsel] have conceded these particular points and that you're saddled with that, that is not my

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[4] When asked by the state trial court why JMC did not appeal the federal district court's judgment, JMC responded that the federal court's decision addressed jurisdiction and thus "has no res judicata effect." 3/30/10 Hrg. Tr. 38. *But see Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 166 (1932) ("principles of *res judicata* apply to questions of jurisdiction").

responsibility." *Id.* The trial court denied JMC's request to vacate the arbitral award and ordered JMC to pay damages and attorney's fees under the arbitral award. Pet. App. 50a.

3. The Florida Court of Appeal reversed on state law grounds. It did not discuss the FAA, and concluded that, under Florida law, "[w]hen the issue of a contract's legality is raised, the trial court must make that determination prior to deciding whether to enforce an arbitral award." Pet. App. 48a.

4. The Florida Supreme Court then quashed the Florida Court of Appeal's decision, thereby reinstating the trial court's judgment. Pet. App. 43a. It noted that "JMC does not argue that the contract itself is illegal, but only that the arbitrator's erroneous construction of the contract rendered it unlawful," *id.* at 14a n.6, and that, at its core, "JMC disagrees with the arbitrator's application of the law to the facts," *id.* The court also noted that because the parties' transaction involved interstate commerce, both the FAA and the Florida Arbitration Code applied. *Id.* at 16a.

Analyzing JMC's public policy claim under the FAA, the court rejected JMC's reliance on cases such as *United States Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987), and *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983). Pet App. 21a–22a. The court explained that:

> these cases did not involve arbitration under the FAA and thus are inapplicable to the question of whether extra-statutory grounds for validating an arbitration award survived the decision in *Hall Street* [*Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008),] in cases, such as this one, that are governed by the FAA.

Id. at 22a. The court then reviewed this Court's FAA cases, which hold that claims of contract illegality, if raised by a party, are properly addressed in arbitration and subject to the "review provided in 9 U.S.C. § 10." *Id.* at 21a.

The court below then reviewed this Court's decision in *Hall Street*, discussed various circuit decisions interpreting *Hall Street*, and ultimately agreed with this Court that "'it makes more sense to see [FAA Sections 9–11] as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightway.'" Pet. App. 30a–31a (quoting *Hall Street*, 552 U.S. at 588). Given JMC's admission that the Agreement was legal on its face, the court determined that, under the FAA, "courts cannot review [a] claim that *an arbitrator's construction of a contract renders it illegal.*" *Id.* at 31a (emphasis added). Thereafter, applying this Court's recent decision in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), the court rejected JMC's argument that the arbitral panel exceeded its powers under Section 10(a)(4) of the FAA because JMC was arguing that "the arbitrators exceeded their powers because they *interpreted* the contract in a manner allegedly inconsistent with the contract's terms." Pet. App. 33a.

Lastly, the Florida Supreme Court declined to vacate the award under Florida arbitration law because "the parties to the agreement received the benefit of their bargain—arbitral construction of the agreement as opposed to litigation in the court system." Pet. App. 38a. Here, again, the court highlighted "that neither party contested the legality of the contract during the arbitration proceeding; only after an adverse award did JMC raise the issue

of the contract's illegality by asserting that the arbitration panel's construction of the contract rendered it unlawful." *Id.* at 38a n.14 (emphasis omitted). The court explained that "[w]here, as here, a contract is not patently illegal and criminal in nature, more expansive judicial review of an arbitral decision would amount to simple disagreement with an arbitrator's application of the law to the facts." *Id.* at 39a n.14. The court declined, under Florida law, "to adopt a public policy exception *under these circumstances* because such an exception would evince resistance to arbitration and deprive the parties of perhaps arbitration's ultimate benefit of finality." *Id.* at 38a–39a (emphasis added).

REASONS FOR DENYING THE PETITION

The decision below warrants no further review.

I. The Florida Supreme Court did not disregard this Court's precedents, as JMC contends, Pet. 9, 14, but rather correctly held that cases applying federal common law under the LMRA do not control in a state court vacatur action arising from a breach of contract dispute unrelated to any collective bargaining agreement. Likewise, the decision below is a poor vehicle to assess whether federal common law developed under the LMRA creates an "inherent" obligation, binding on both federal and state courts, to review arbitral awards to assess whether the arbitral panel's construction of the agreement might violate federal law. Here, JMC does not contend that the Agreement is illegal, but instead advanced an eleventh-hour claim, after the arbitral panel had rejected its arguments under Florida law, that the arbitral panel's award implicates this Court's "public policy" decisions even though the award requires only the payment of money as a remedy for JMC's

undisputed breach of contract obligations that JMC itself drafted.

II. The decision below implicates no conflict among the courts of appeals over this Court's ruling in *Hall Street* regarding the grounds for vacating an arbitral award under the FAA. JMC identifies no federal circuit court decision setting aside an arbitral award on extra-textual "public policy" grounds under the FAA after *Hall Street*. Indeed, many of the circuits have yet to rule on whether the FAA recognizes extra-textual bases for setting aside an arbitral award. In any event, this is not an appropriate case to consider whether and when an arbitral award can be vacated for illegality under the FAA because the award merely requires JMC to pay damages for breaching two admittedly legal contractual obligations, and because a case arising in state court presents no opportunity to consider the existence and extent of any "inherent" authority separate from the FAA that might bind *federal* courts.

Ultimately, JMC seeks to avoid an arbitral award that requires it to pay $1.25 million in damages based upon the panel's determination that JMC violated two material terms in the Agreement, which resulted in lost revenues to VNA. JMC should not be permitted to evade paying damages for the violation of contract provisions that it admits are lawful.

The petition should be denied.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISIONS.

The Florida Supreme Court properly recognized that the decisions from this Court on which JMC relies are inapposite because they were decided not under the FAA, but under federal labor law pursuant

to LMRA Section 301. Those decisions do not purport to create a body of federal common law that displaces substantive state law standards in cases unrelated to collective bargaining agreements. Nor would application of the standards from those cases lead to a different outcome here because the arbitral award merely requires JMC to pay damages for breaching contractual obligations that are concededly legal.

A. There Is No Conflict Because The Cases Relied Upon By Petitioner Were Decided Under The LMRA.

1. The trio of cases on which JMC relies, *see* Pet. 11–15, were not decided under the FAA, but under Section 301 of the LMRA, 29 U.S.C. § 185(a). As this Court has explained, Section 301(a) "authorizes federal courts to fashion a body of federal law for the enforcement of ... collective bargaining agreements," *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 451 (1957), including common law governing review of arbitral awards arising from labor disputes under such agreements, *see United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596–99 (1960). This case does not involve a collective bargaining agreement subject to the LMRA, but instead arises from the breach of a contract that the parties agreed would be governed by Florida law. The court below was thus correct that the cases cited by JMC were inapplicable because they "did not involve arbitration under the FAA." Pet. App. 22a.

In the first case, W.R. Grace "instituted [an] action under § 301 of the [LMRA] to overturn," on public policy grounds, an arbitral award granting backpay to laid-off employees. *W.R. Grace*, 461 U.S. at 764 (noting that the case presented an "important issue of federal labor law"). Although this Court acknowledged that violation of "some explicit public policy"

was a basis for declining to enforce an arbitral award, *id.* at 766, it upheld the award there because the arbitrators "simply held, retrospectively, that the employees were entitled to damages for the prior breach" of the company's collective bargaining agreement, *id.* at 768–72. The Court emphasized "federal labor policy," *id.* at 771, and never mentioned the FAA.

Misco similarly "involve[d] several aspects of when a federal court may refuse to enforce an arbitration award rendered under a collective-bargaining agreement." 484 U.S. at 31. There, the company sued to vacate, on public policy grounds, an arbitral award that reinstated an employee who violated its drug-use policies. This Court rejected the challenge to the award, *id.* at 44, and, in doing so, emphasized the "preference for private settlement of labor disputes" embodied in the LMRA. *Id.* at 37.[5]

Finally, in *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000), the issue was again the enforceability of an arbitral award under "a collective-bargaining agreement with arbitration provisions." *Id.* at 60. As in *Misco*, the company sued to vacate an arbitral award that mandated reinstatement of an employee who violated its drug policy. *See id.* at 60–61. The Court emphasized that "the public policy exception is narrow," *id.* at 63, and concluded that the award could not be vacated, *id.* at 67. The Court again emphasized "labor law policy," *id.* at 65, and did not refer to the FAA.

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[5] *Misco* noted that, while federal courts sometimes look to the FAA for "guidance" in LMRA cases, the FAA "does not apply to 'contracts of employment of ... workers engaged in foreign or interstate commerce.'" 484 U.S. at 40 & n.9 (omission in original) (quoting 9 U.S.C. § 1).

These cases all involved union grievances under collective bargaining agreements under LMRA Section 301(a). *See* 29 U.S.C. § 185(a); *Lincoln Mills*, 353 U.S. at 451. None mentioned the FAA, apart from *Misco*'s statement that the FAA "does not apply to 'contracts of employment of ... workers engaged in foreign or interstate commerce.'" 484 U.S. at 40 n.9 (omission in original) (quoting 9 U.S.C. § 1)).[6] As a result, the court below correctly explained that "these cases did not involve arbitration under the FAA and are thus inapplicable to the question of whether extra-statutory grounds for invalidating an arbitration award survived the decision in *Hall Street* in cases, such as this one, that are governed by the FAA." Pet. App. 22a.

2. JMC argues that this conclusion "is a patently erroneous basis for refusing to apply this Court's illegality precedents." Pet. 14. That is wrong. As noted, this Court was applying the LMRA rather than the FAA in each of these cases. *See E. Associated Coal*, 531 U.S. at 60; *Misco*, 484 U.S. at 31; *W.R. Grace* 461 U.S. at 759. The rulings in these cases adopted standards for the review of arbitral awards under the open-ended language of Section 301(a) of the LMRA and nowhere purported to set

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[6] JMC notes that *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), subsequently held that FAA Section 1 exempts only employment contracts of transportation workers, and not other employment contracts. Pet. 15. JMC admits that *Eastern Associated* "involved a truck driver," but argues that *W.R. Grace* and *Misco* must have been resolved under the FAA because they did not involve transportation workers. *See id.* at 14–15 & n.3. That is revisionist history. *W.R. Grace* and *Misco* both predate *Circuit City* by more than a decade, and in both, the Court applied "federal labor law" under the LMRA, *see* 461 U.S. at 764; *accord* 484 U.S. at 40 n.9, and not the FAA.

standards applicable under the reticulated language of FAA Section 10(a).

There is no suggestion that the LMRA could apply here, because this case does not involve a "contract[] between an employer and a labor organization." 29 U.S.C. § 185(a). Consequently, the court below was entirely correct that the cases on which JMC relies "did not involve arbitration under the FAA." Pet. App. 22a. JMC's lead claim that the Florida Supreme Court must be brought "back in line with this Court's precedents," Pet. 15, is meritless.

B. The Decision Below Is Not An Appropriate Case To Address The Scope Of Any Federal Common Law Public Policy Exception.

This case also is a poor vehicle to address any conflict over the proper scope of the public policy exception recognized in this Court's LMRA cases.

1. During the arbitration proceeding, JMC informed the arbitral panel that JMC "'never contended that the Home Health Agreement was invalid pursuant to any State or Federal law.'" 2/5/09 Hrg. Tr. 845. It instead defended against VNA's breach claim by arguing that VNA had failed to show a breach of either relevant contract provision. JMC Final Br. 8, 18. It was "only after an adverse arbitration award [that] JMC raise[d] the issue of the contract's illegality by asserting that the arbitration panel's *construction* of the contract rendered it unlawful." Pet. App. 38a n.14.[7] And JMC notably did

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[7] *See AAOT Foreign Econ. Ass'n (VO) Technostroyexport v. Int'l Dev. & Trade Servs., Inc.*, 139 F.3d 980, 981 (2d Cir. 1998) (by disavowing any illegality claim "until an adverse award was rendered," petitioner "waived its right to assert the public policy exception"); *see also U.S. Postal Serv. v. Nat'l Ass'n of Letter*

not, and still does not, argue that the two obligations that it breached—(i) to comply with Exhibit "D" and (ii) to provide VNA with office space in the hospital—violate any federal law or rule. As the state trial court aptly put it, this was just a "disingenuous" attempt to avoid paying damages for breaching a contract that JMC's own counsel drafted. *Id.* at 11a n.5

What JMC really seeks is a do-over of the arbitrators' interpretation of the contract. After the interim award was issued, JMC (represented by new counsel) moved to reopen the arbitration, arguing that the award was "based on an erroneous construction of the parties' purchase agreement," which created the supposed issue of illegality. Pet. App. 9a. The arbitrators denied the motion, explaining that the panel had "'considered the matters stated in the motion in its deliberations.'" *Id.* at 10a. Thus, like the petitioner in *Oxford Health*, JMC "submitted th[e] issue to the arbitrator[s] not once, but twice." 133 S. Ct. at 2068 n.2. At this point, "the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all." *Id.* at 2071. Because the arbitrators plainly did so, JMC "does not get to rerun the matter in a court." *Id.*

2. In any event, this case also is a poor candidate to consider the applicability of the public policy exception. JMC says the arbitral award cannot stand

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Carriers, AFL-CIO, 330 F.3d 747, 752 n.4 (6th Cir. 2003) ("there appears to be merit to the argument that the Postal Service waived its public policy challenge ... by failing to raise it during arbitration"); *Dist. 17, United Mine Workers v. Island Creek Coal Co.*, 179 F.3d 133, 140 (4th Cir. 1999) ("We need not address this [public policy] argument ... because the Union failed to raise it before the arbitrator.").

because it endorses an unlawful kickback scheme for Medicare referrals. Pet. 2–3. The arbitrators' damages award does no such thing. Instead, the panel concluded that JMC's breaches of the contract—*i.e.*, failing to inform patients of its relationship with VNA and ejecting VNA from its office space—caused VNA to lose revenues that VNA would have obtained had JMC complied with these admittedly lawful contractual obligations. Pet. App. 64a–65a, 68a. Thus, the arbitral award requiring JMC to pay damages for breaching admittedly legal contract terms does not violate or conflict with the law.[8]

The Court's decision in *W.R. Grace* is instructive. There, the company argued that the arbitral award, which required backpay for laid-off workers, violated public policy because the company's conciliation agreement with the EEOC (as reinforced by a district court order) required the company to maintain the existing proportion of women in the plant's bargaining unit, which meant laying off male workers. *See* 461 U.S. at 760, 767. The Court rejected that argument, explaining that the "award neither mandated layoffs nor required that layoffs be conducted according to the collective bargaining agreement." *Id.* at 768–69 (footnote omitted). Instead, "[t]he award simply held, retrospectively, that the employees were entitled to damages for the prior breach of the seniority provisions." *Id.* at 769. In doing so, the Court explained that "[c]ompensatory

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[8] JMC is wrong when it contends that the court below "accepted JMC's contention that, as construed by the arbitration panel, the parties' contract called for illegal patient steering and kickbacks." Pet. 3–4. To the contrary, the Florida Supreme Court concluded that the parties' "contract is *not* patently illegal and criminal in nature." Pet. App. 39a n.14 (emphasis added).

damages may be available to a plaintiff injured by a breach of contract even when specific performance of the contract would violate public policy." *Id.* at 769 n.13.

The same is true here. The award provides "retrospectively, that [VNA was] entitled to damages for the prior breach" of the parties' Agreement. *Id.* at 769. Thus, "even [if] specific performance of the contract would violate public policy"—and it would not—the damages award presents no ground for vacatur. *See id.* at 769 n.13. And, as in *W.R. Grace*, JMC's dilemma is of its own making. JMC voluntarily entered into the agreement—which its own counsel drafted—and disavowed any claim that the agreement itself was illegal. It nevertheless chose to breach the contract. JMC was thus "cornered by its own actions, and it cannot argue now that liability under the ... agreement violates public policy." *Id.* at 770.

II. THE DECISION BELOW IMPLICATES NO DECISIONAL CONFLICT AMONG THE COURTS OF APPEALS THAT WARRANTS THIS COURT'S REVIEW.

A. The Case Implicates No Decisional Conflict Among The Federal Courts Of Appeals.

Contrary to JMC's claims, this case implicates no conflict among the federal courts of appeals over whether a court may vacate an arbitral award on public policy grounds separate and apart from the requirements of FAA Section 10(a). Indeed, none of the cases identified by JMC holds that an award must be set aside under the FAA because it violates public policy. Rather, many of the courts of appeals have found it unnecessary thus far to resolve whether

extra-textual public policy grounds are available for vacating arbitral awards under the FAA.

1. The Eighth and Ninth Circuits have not, contrary to JMC's claim, "affirmed the continued vitality" of the public policy ground under the FAA, Pet. 18; rather, the relevant analysis in the cases on which JMC relies was conducted under the LMRA and thus does not suggest any conflict with the decision below. In *Williams v. National Football League*, 582 F.3d 863 (8th Cir. 2009), the Eighth Circuit considered claims arising under a collective bargaining agreement and addressed arguments for vacatur under both the LMRA and the grounds enumerated in the FAA. The Court explained that the union plaintiff sought vacatur of the award for, inter alia, a violation of public policy, "pursuant to section 301." *Id.* at 883–86. Likewise, in *Matthews v. National Football League Management Council*, 688 F.3d 1107 (9th Cir. 2012), the plaintiff filed suit pursuant to Section 301, *id.* at 1110, and the court emphasized "federal labor policy," *id.* at 1111–15. Indeed, the Ninth Circuit explained that it had not decided whether the FAA applies to a case involving a collective bargaining agreement. *See id.* at 1115–16 & n.7. Both cases relied on this Court's LMRA decisions and, as JMC admits, Pet. 18, neither mentioned *Hall Street*.

In fact, the Eighth Circuit, along with the Fifth and Eleventh Circuits, agrees that extra-textual grounds for vacatur are unavailable under the FAA. The Eighth Circuit has twice held "that an arbitral award may be vacated only for the reasons enumerated in the FAA." *Med. Shoppe Int'l, Inc. v. Turner Invs. Inc.*, 614 F.3d 485, 489 (8th Cir. 2010); *accord Crawford Grp., Inc. v. Holekamp*, 543 F.3d 971, 976 (8th Cir.

2008).[9] As JMC acknowledges, the Eleventh Circuit has similarly held that "judicially-created bases for vacatur," including public policy, "are no longer valid in light of *Hall Street*." *Frazier v. CitiFinancial Corp*, 604 F.3d 1313, 1324 (11th Cir. 2010). In turn, the Fifth Circuit has taken the same position, ruling that "arbitration awards under the FAA may be vacated only for reasons provided in § 10." *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009). These rulings are consistent with this Court's decision in *Hall Street*, and create no conflict with the decision below.

2. Nor does the decision below conflict with the Third, Fourth, or Tenth Circuits, which have not yet decided whether "public policy" provides a basis for vacatur after *Hall Street*. Specifically, although one unpublished Third Circuit case rejected a public policy argument under the FAA without citing or mentioning *Hall Street*, *see Remote Solution Co. v. FGH Liquidating Corp.*, 349 F. App'x 696, 699 (3d Cir. 2009), three others explain that the Third Circuit has not decided whether a public policy ground remains viable after *Hall Street*.[10] Likewise, the Fourth Circuit case relied upon by JMC states only that the plaintiff had not "presented a basis for

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[9] JMC acknowledges that *Medicine Shoppe* involved a public policy claim, which the court did not consider because it was waived. Pet. 21 n.7. JMC suggests that the court's rejection of the claim on waiver grounds "is in line with [its] subsequent recognition of the illegality exception in *Williams*." *Id.* As noted, *Williams* involved review under the LMRA, not the FAA.

[10] *See CD & L Realty LLC v. Owens Ill., Inc.*, 535 F. App'x 201, 205 n.3 (3d Cir. 2013); *Rite Aid N.J., Inc. v. United Food Commercial Workers Union, Local 1360*, 449 F. App'x 126, 129 (3d Cir. 2011); *Andorra Servs. Inc. v. Venfleet, Ltd.*, 355 F. App'x 622, 628 n.6 (3d Cir. 2009).

vacating ... the arbitration award on public policy grounds," *Wells Fargo Advisors, LLC v. Watts*, 540 F. App'x 229, 231 (4th Cir. 2013) (per curiam), *cert. denied*, 135 S. Ct. 210 (2014), without addressing whether such a claim survives *Hall Street*. Finally, the Tenth Circuit decision on which JMC relies, Pet. 18, merely noted in a parenthetical that a pre-*Hall Street* circuit case had recognized the public policy ground for vacatur (among others) but did not apply it or discuss *Hall Street*. *See Burlington N. & Santa Fe Ry. v. Pub. Serv. Co.*, 636 F.3d 562, 567 (10th Cir. 2010); *see also Abbott v. Law Office of Patrick J. Mulligan*, 440 F. App'x 612, 624 n.20 (10th Cir. 2011) (noting that "*Hall Street* ... necessarily calls the public policy basis for [vacatur] into question"). None of these cases conflicts with the decision below.

3. Likewise, the decision below implicates no conflict with dicta from the First, Second, or Seventh Circuits, none of which has vacated an award under the FAA on public policy grounds after *Hall Street*.

In *Bangor Gas Co., LLC v. H.Q. Energy Services (U.S.) Inc.*, 695 F.3d 181 (1st Cir. 2012), the court "assume[d] (*arguendo* but with some confidence) that an arbitration award would be vulnerable to the extent that it directed one or both of the parties clearly to violate" an agency rule or regulation, but affirmed the arbitral award because there was no such conflict in that case. *Id.* at 188. In *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444 (2d Cir. 2011), the court explained that the Second Circuit had already concluded that manifest disregard was still viable after *Hall Street* and noted this Court's LMRA public policy cases, but affirmed the arbitral award because the petitioner's arguments for vacatur were meritless. *See id.* at 454. Finally, in *Affymax, Inc. v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 660

F.3d 281 (7th Cir. 2011), the court acknowledged that, after *Hall Street*, Section 10(a)'s "list [of vacatur grounds] is exclusive," while noting that pre-*Hall Street* circuit cases allowed a district court to "set aside an award that directs the parties to violate the legal rights of third persons who did not consent to the arbitration." *Id.* at 284. The court affirmed the award because *Hall Street* foreclosed the petitioner's arguments. *See id.* at 285. Although JMC says that *Affymax* "expressly held" that the public policy ground survived *Hall Street*, Pet. 16, the court had no occasion to do so because the petitioner "d[id] not contend that the panel's award direct[ed] [a party] to violate any rule of positive law designed for the protection of third parties." 660 F.3d at 284.[11]

In any event, JMC does not and cannot claim that the award requiring it to pay money damages to VNA "direct[s] one or both of the parties clearly to violate" a law or regulation, *Bangor Gas*, 695 F.3d at 188, or "directs the parties to violate the legal rights of third persons who did not consent to the arbitration," *Affymax*, 660 F.3d at 284. Thus, the decision below implicates no conflict with these cases.

4. Finally, this case does not implicate any disagreement among the circuits over whether manifest disregard of the law is still a viable ground

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[11] JMC argues that a later Seventh Circuit case recognized that, because *Hall Street* did not overrule *W.R. Grace* or *Eastern Associated*, the public policy exception is still viable. Pet. 17–18; *see Titan Tire Corp. of Freeport, Inc. v. United Steel Workers Int'l Union*, 734 F.3d 708, 717 n.8 (7th Cir. 2013). Of course, *Hall Street* had no occasion to overrule the public policy standard applied in these LMRA cases because *Hall Street* addressed vacatur under the FAA. Insofar as *Titan Tire* recognized a "public policy" exception under the LMRA, 734 F.3d at 716–17, it does not conflict with the FAA decision below.

for vacatur under the FAA. *See* Pet. 19–26. No manifest disregard claim was made here. And, as JMC admits, "public policy (i.e., illegality) is distinct from manifest disregard as a basis for vacatur." *Id.* at 20 n.5. If JMC were correct that the public policy exception arises from the courts' "inherent power," *id.* at 10, then acceptance of JMC's position in this case would do nothing to resolve whether manifest disregard survives *Hall Street*. Conversely, because "manifest disregard" may simply be "a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10," *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n.3 (2010), a holding that the FAA bars extra-statutory grounds for vacatur would not resolve whether "manifest disregard" remains viable.

B. The Decision Below Is A Poor Vehicle To Address The Proper Scope Of The FAA.

This case is in all events a poor candidate to resolve the issues raised by JMC. As described above, JMC's illegality claim is an afterthought designed to give JMC yet another bite at the litigation apple. *See supra* p. 18. As the court below noted, this is not a case where an arbitral panel manifestly disregarded a claim that a contract was "patently illegal and criminal in nature." Pet. App. 39a n.14. Rather, JMC never "contested the legality of the contract during the arbitration proceedings." *Id.* at 38a n.14. The arbitral panel and the court below properly declined to permit JMC to relitigate its substantive claims after receiving an adverse award. *See id.* JMC's underlying complaint is that "the award [was] based on an erroneous construction" of the Agreement, *id.* at 9a, which is not grounds for vacatur and does not justify this Court's review. *See Oxford Health*, 133 S. Ct. at 2071.

Moreover, this case is a poor candidate for resolving whether and when an arbitral award can be vacated on public policy grounds under the FAA because it arises from a state court proceeding that followed a federal district court's determination that JMC's claims raised no "'substantial question of federal law.'" Opp. App. 4a–5a. The Court would need to assess the *res judicata* effect of that unappealed ruling on its consideration of the nature and scope of any "inherent" authority to vacate an arbitral award. Further, although *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), permits the application of federal common law in labor arbitration cases because Section 301 "empowers the federal courts to fashion rules of federal common law to govern" those disputes, *Misco*, 484 U.S. at 40 n.9, "federal courts do not have inherent power to promulgate *federal* common law rules that do bind the states," Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 14 (1985); *cf. Erie*, 304 U.S. at 78. These concerns are especially pronounced here, where Florida's Supreme Court held that, as a matter of state law, the relief sought by JMC is unavailable "under these circumstances" because it "would evince resistance to arbitration and deprive the parties of perhaps arbitration's ultimate benefit of finality." Pet. App. 38a–39a.

A case coming from a state court presents a particularly unsuitable vehicle for another reason: Justice Thomas has "stated on many previous occasions" that, in his view, "the Federal Arbitration Act ... does not apply to proceedings in state courts." *Preston v. Ferrer*, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting) (citation omitted) (collecting cases). Accordingly, if the Court were to grant certiorari in this case, he would presumably adhere to that view,

and not address whether there are extra-textual grounds under the FAA to vacate an arbitral award that is valid under state law. Although this Court has held that Sections 1 and 2 of the FAA apply in state court, it has not decided whether or not Section 10 of the FAA applies in state courts.[12]

In any event, the court below correctly held that the FAA does not authorize state courts to refuse to confirm arbitral awards for public policy reasons, because that is not among the vacatur grounds listed in FAA section 10. As *Hall Street* explained, "[u]nder the terms of [FAA] § 9, a court 'must' confirm an arbitration award 'unless' it is vacated ... 'as prescribed' in §[] 10," which "lists grounds for vacating an award." 552 U.S. at 582. Thus, section 10 "provide[s] the FAA's exclusive grounds for expedited vacatur." *Id.* at 584.[13]

Finally, JMC's claim that review is necessary to prevent the courts from enforcing arbitral awards that "order contracting parties to form a cartel, discriminate on the basis of race or sex, [or] violate

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[12] *Cf. Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 477 n.6 (1989) ("While ... the FAA's 'substantive' provisions ... are applicable in state as well as federal court, we have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, are nonetheless applicable in state court." (citations omitted)).

[13] Congress expressly has adopted public policy as a ground to vacate *foreign* arbitral awards. Chapter 1 of the FAA, which includes Section 10, applies generally to any arbitration covered by the Act. Chapter 2 of the Act incorporates into U.S. law the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," 9 U.S.C. § 201, which includes additional defenses to enforcement not found in 9 U.S.C. § 10, including, as relevant here, that "the award would be contrary to the public policy of th[e] country" asked to recognize or enforce it. Art. V(2)(b), 21 U.S.T. 2517, 330 U.N.T.S. 38; *see* 9 U.S.C. § 207.

wage-and-hour or child-labor laws," Pet. 26 (citation omitted), reflects the same distrust of arbitration that the FAA and parallel State law rules were designed to combat. Under the FAA, arbitrators, rather than courts, presumptively assess claims that contracts containing arbitration agreements are unlawful. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006). Such claims remain subject to review under Section 10 of the FAA and applicable state-law standards. *Cf. Stolt-Nielsen*, 559 U.S. at 677 (vacating award under Section 10(a)(4) where the arbitral panel "imposed its own policy choice and thus exceeded its powers"). Here, however, the panel did not impose its own conception of policy, disregard a contract's patent illegality, or ignore a party's argument that "explicit contractual language prohibit[ed] [the panel's] interpretation." Pet. 26. Rather, the panel ruled based on the arguments actually advanced by a sophisticated party whose counsel drafted the Agreement in light of applicable law. Further review in this case would deny VNA the finality that is a chief benefit of arbitration and reward gamesmanship of a party that disavowed, with eyes open, Pet. App. 63a–64a, any claim of illegality until *after* it received an adverse award, *id.* at 38a n.14.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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March 27, 2015

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Nov. 25, 2009]

No. 09-81119-MC-DIMITROULEAS

JUPITER MEDICAL CENTER, INC.,
Movant,

vs.

VISITING NURSE ASSOCIATION OF FLORIDA, INC.,
Respondent.

ORDER GRANTING MOTION TO DISMISS

THIS CAUSE is before the Court upon Respondent's, Visiting Nurse Association of Florida, Inc., Motion to Dismiss Movant's, Jupiter Medical Center, Inc., Petition/Motion to Vacate Arbitration Award for Violation of Federal Laws [DE-4], filed herein on August 31, 2009. The Court has carefully considered the Motion, Jupiter Medical Center, Inc.'s Response in Opposition [DE-9], Visiting Nurse Association of Florida, Inc.'s Reply [DE-10], and is otherwise fully advised in the premises.

I. BACKGROUND

On July 31, 2009, Jupiter Medical Center, Inc. ("JMC") filed a Petition/Motion to Vacate Arbitration Award for Violation of Federal Laws [DE-1], requesting that the Court vacate the Interim Award dated May 20, 2009 (the "Award") entered by the Arbitration Panel (the "Panel") in the underlying arbitration

between JMC and Visiting Nurse Association of Florida, Inc. ("VNA"). JMC asserts that the Award should be vacated on the grounds that (i) the Award impermissibly construes the parties' contract in a manner that directly violates multiple federal laws, regulations and specific, well-defined public policy; and (ii) the Panel exceeded its powers by contravening the express contractual limitations imposed by the parties' contract and by issuing an Award in direct violation of the applicable federal laws, rules and regulations.

The Award relates to a February 28, 2005 purchase agreement ("Agreement") between VNA and JMC whereby VNA would purchase JMC's home health agency business. VNA subsequently alleged that JMC breached the Agreement and arbitration proceedings were held in Palm Beach Gardens, Florida on May 20, 2009. The Panel issued a fourteen (14) page written Award in favor of VNA and awarded VNA $1,251,213.00 in damages for JMC's material breach of the Agreement. Thereafter, JMC filed its Petition on July 31, 2009 and VNA filed the instant Motion to Dismiss on August 31, 2009 [DE-4].

II. DISCUSSION

VNA argues that the Petition should be dismissed on the following grounds: (i) lack of subject matter jurisdiction, (ii) the Petition is premature as the Panel has not issued a final award, (iii) the Petition constitutes an impermissible attempt to reconsider the Panel's findings, (iv) the argument that the Panel exceeded its authority is meritless since the Agreement granted the Panel the authority to determine all issues between the parties, (v) the Award does not compel JMC or VNA to take any action in derogation of public policy, and (vi) JMC has waived any argument that the

Agreement is illegal. In response, JMC argues: (i) the Court has jurisdiction over the Petition since JMC's right to relief depends upon the resolution of substantial questions of federal law, (ii) the written arbitration is a final award and judicial review is appropriate, (iii) the Petition represents a rare and extraordinary circumstance where an arbitration award should be vacated, (iv) the Panel exceeded its authority by construing the Agreement in a manner that violates applicable state and federal laws, (v) public policy and illegality vacatur grounds are well established common law, and (vi) JMC is not attempting to retry this cause.

"In a given case, a federal district court must have at least one of three types of subject matter jurisdiction: (1) jurisdiction under a specific statutory grant; (2) federal question jurisdiction pursuant to 28 U.S.C. § 1331; or (3) diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)." *Baltin v. Alaron Trading Corp.*, 128 F. 3d 1466, 1469 (11th Cir.1997). The Federal Arbitration Act does not confer subject matter jurisdiction over petitions to vacate arbitration awards, nor does it create independent federal question jurisdiction. *Id.* at 1471-72. Thus, a petition to vacate arbitration must demonstrate independent grounds for subject matter jurisdiction. *Id.*[1]

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[1] The parties go to great length in briefing the issue as to whether the Supreme Court's holding in *Vanden v. Discovery Bank*, 129 S.Ct. 1262 (2009) applies in the context of petitions/motions to vacate under Section 10 of the FAA. The Court need not reach the issue of whether it may "look through" to the underlying complaint in determining subject matter jurisdiction as this Court concludes that the present jurisdictional issues may be resolved based entirely on the Petition itself.

Federal question jurisdiction exists only when the "well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. of the State of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 27-28 (1983) (noting that "[l]eading commentators have suggested that for purposes of § 1331 an action 'arises under' federal law 'if in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law.'"). However, mere incantation of a federal statute does not confer jurisdiction; rather the dispute must actually involve a "substantial question of federal law." *Id.* at 28.

No party contends that there is diversity jurisdiction over this cause. Instead, JMC asserts that this Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 due to JMC's allegations that its right to relief is dependent upon resolution of substantial questions of federal law. The Court disagrees. JMC moved to vacate the Award based only on the Panel's construction of the Agreement. JMC asserts that the Award should be vacated on the grounds that (i) the Award *impermissibly construes the parties' contract* in a manner that directly violates multiple federal laws, regulations and specific, well-defined public policy; and (ii) the Panel exceeded its powers by *contravening the express contractual limitations* imposed by the parties' contract and by issuing an Award in direct violation of the applicable federal laws, rules and regulations. In effect, JMC is directly challenging the Panel's interpretation and construction of the Agreement. Thus, in addressing JMC's Petition, this Court would not be called upon to decide

any issue of federal law, but rather only whether the Panel properly interpreted and construed the Agreement. Accordingly, since the resolution of this issue relies principally—if not exclusively—on state law governing the interpretation of contracts and does not require the resolution of any federal issue, let alone a "substantial question of federal law," the Court concludes it lacks subject matter jurisdiction over JMC's Petition.[2]

III. CONCLUSION

Accordingly, for the aforementioned reasons, it is ORDERED AND ADJUDGED as follows:

1. Respondent's, Visiting Nurse Association of Florida, Inc., Motion to Dismiss Movant's, Jupiter Medical Center, Inc., Petition/Motion to Vacate Arbitration Award for Violation of Federal Laws [DE-4] is hereby GRANTED. This cause is hereby DISMISSED for lack of subject matter jurisdiction;
2. The Clerk is directed to CLOSE this case and DENY all pending motions as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 24th day of November, 2009.

/s/ William P. Dimitrouleas
William P. Dimitrouleas
United States District Judge

Copies furnished to:
Counsel of record

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[2] Having concluded that the Court lacks subject matter jurisdiction over this cause, the Court refrains from considering VNA's remaining arguments.