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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

VNA contends that the decision below does not conflict with decisions of this Court, does not conflict with decisions of federal courts of appeals, and is a poor vehicle for resolving the question presented by JMC. VNA is mistaken in all respects.

A. This Case Is An Ideal Vehicle For Resolving The Important Question Presented By JMC.

In an effort to cast this case as a poor vehicle for resolving the question presented by the petition, VNA suggests that (i) JMC waived the issue by not raising it in the arbitration, (ii) an order of the federal district court dismissing JMC's petition to vacate for lack of jurisdiction precluded JMC from seeking the same relief in state court, (iii) the case arises from state court, and (iv) even if JMC were to prevail in this Court, it would lose on remand.

These arguments are all red herrings because the Florida Supreme Court actually decided—for all cases and for all time—the precise issue presented by the petition, holding that under the FAA "courts cannot review the claim that an arbitrator's construction of a contract renders it illegal" (Pet. App. 31a).

"There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959). Whether or not JMC timely raised the issue in the arbitration and whether or not the federal court's ruling should have been given preclusive effect, because the state court "reached and decided" the federal question, that question is properly before

this Court. *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974).

In any event, each of the supposed reasons why this case is not a good vehicle is erroneous on its own merits. To begin with, as the District Court of Appeal expressly found, "JMC did not waive the [illegality] defense." Pet. App. 48a.

The District Court of Appeal likewise rejected the preclusion argument, explaining that the illegality issue "was raised in federal court, *but not decided*, because of the dismissal for lack of [federal-question] jurisdiction." Pet. App. 48a (emphasis added).

As for VNA's assertion (Opp. 26-27) that this case is an "unsuitable vehicle" because this Court has not yet decided whether Section 10 of the FAA applies in state courts, the Court has on multiple occasions held that the FAA applies in state court. See, *e.g.*, *Preston* v. *Ferrer*, 552 U.S. 346, 349, 353 & n.2 (2008); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995). Moreover, it has granted certiorari and decided a case arising from state court following a motion to vacate under Section 10. See *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444 (2003). In any event, insofar as the applicability of Section 10 in state court remains an open issue, that is a reason for granting certiorari, not denying it.

Finally, VNA's suggestion that JMC's illegality argument is so lacking in merit as to make this case an inappropriate one in which to review the far-reaching decision of the Florida Supreme Court (Opp. 18-20) is fanciful. As VNA sees it, the illegality argument applies only when the contract is illegal on its face and only when the arbitrator awards specific performance. Because it is undisputed that the con-

tract is not illegal on its face, but instead was construed by the arbitrators in a way that would require the parties to engage in illegal conduct, and because the arbitrators awarded damages, not specific performance, VNA concludes that JMC could never prevail on its illegality argument.

Both of VNA's assumed limitations on the illegality argument go to the scope of that basis for vacatur—an issue that the Court has not fully resolved but could potentially address in this case. They hardly are so entrenched as to justify prejudging an argument that JMC has heretofore not been permitted to raise. On the contrary, neither limitation is valid.

The notion that the illegality ground for vacatur is limited to cases in which the contract is illegal on its face is impossible to square with this Court's holding that "[i]f [a] contract *as interpreted by [an arbitrator]* violates some explicit public policy, [courts] are obliged to refrain from enforcing it." *W.R. Grace & Co.* v. *Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 766 (1983) (emphasis added).[1] Thus, if this Court were to agree with JMC that illegality remains a basis for vacatur under the FAA, the fact that JMC's argument is directed at an interpretation of the agreements with VNA rather than the actual language of the agreements is no basis for rejecting it.

At the same time, the distinction that VNA draws between specific performance and damages is

[1] VNA's repeated reliance on *Oxford Health Plans LLC* v. *Sutter*, 133 S. Ct. 2064 (2013) (cited at Opp. 11, 18, 25), is misplaced. That case involved a misinterpretation of a contract that did not render the contract illegal.

irreconcilable with foundational principles of both contract law and the law of remedies. Damages are the usual remedy for breach of contract; specific performance is an extraordinary remedy that is rarely available. See 3 E. Allan Farnsworth, Farnsworth on Contracts § 12.4, at 163-164, 166 (3d ed. 2004). Damages are typically calculated based on an injured party's expectation, "measured by the actual worth that performance of the contract would have had to that party." *Id.* § 12.8, at 190; accord 3 Dan B. Dobbs, Dobbs Law of Remedies § 12.2(1), at 25 (2d ed. 1993).

For that reason, the rule is not now, nor has it ever been, that courts may award damages rather than specific performance for breaches of illegal contracts; rather, it is that courts may not award *any* relief in such cases, because "the law will not lend its support to a claim founded upon its violation." *Coppell* v. *Hall*, 74 U.S. (7 Wall.) 542, 559 (1868). Because entitlement to expectation damages is a "right[] directly springing from [the] contract," if the contract is illegal, so is any damages award for breach of the obligations created by the contract. *McMullen* v. *Hoffman*, 174 U.S. 639, 654 (1899). Were the rule otherwise, then the inherent power and duty of courts not to support illegal transactions would be meaningless, for damages are almost always adequate to remedy a breach. See generally 3 Farnsworth on Contracts § 12.4.[2]

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[2] VNA's suggestion that this Court adopted the contrary rule in *W.R. Grace* (Opp. 19-20) is mistaken. In *W.R. Grace*, the Court rejected a public-policy challenge to an arbitral award not because the arbitrator awarded damages rather than specific performance but because the contractual provision at issue (which established a seniority system for unionized workers) was not illegal. The Court declined to decide "whether some public pol-

Here, the arbitrators construed the parties' agreement to entail the purchase of future Medicare patient referrals; calculated damages based on the "profit" that VNA "expected to earn" from those patient referrals; and then excluded the profits that VNA had hoped to earn but did not realize for other reasons. Pet. App. 66a-69a. In other words, the arbitrators made JMC pay VNA damages for JMC's failure to violate the Medicare laws and regulations. That award implicates the illegality concern every bit as much as if the arbitrators had required JMC to steer patients to VNA on a going-forward basis.

B. There Is An Acknowledged Split Of Authority Among The U.S. Courts Of Appeals.

VNA insists that there is no circuit split here. But the Florida Supreme Court expressly recognized the "federal circuit court split regarding whether *Hall Street* prohibits all extra-statutory grounds for vacating an award, including judicially created grounds." Pet. App. 28a.

1. VNA contends that these conflicts are not genuine because the cases cited in the petition do not actually vacate any arbitral awards. That is both wrong and irrelevant.

It is wrong because the Seventh Circuit *has* vacated an arbitral award after concluding that *Hall Street* "did not overrule *Eastern Associated Coal* or *W.R. Grace*, both of which recognized a public policy exception to the general prohibition on overturning

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icy would be violated by an arbitral award for a breach of seniority provisions ultimately found to" violate Title VII—without distinguishing between damages and equitable relief. 461 U.S. at 767 n.9.

arbitrator awards." *Titan Tire Corp.* v. *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union*, 734 F.3d 708, 717 n.8 (7th Cir. 2013).[3]

More importantly, whether or not any particular decision actually vacated an arbitral award is beside the point. The question here is whether the FAA permits courts even to *consider* vacating an arbitral award on public-policy/illegality grounds. Despite VNA's assertions to the contrary, at least five circuits have recognized that it does.

The Second Circuit has recognized the exception under the FAA and relied on *W.R. Grace* and *United Paperworkers* in specifying how challenges should be adjudicated. *Schwartz* v. *Merrill Lynch & Co.*, 665 F.3d 444, 452 (2d Cir. 2011). The Seventh Circuit has held under the FAA that "a court may set aside an award that directs the parties to * * * violate any rule of positive law designed for the protection of third parties." *Affymax, Inc.* v. *Ortho–McNeil–Janssen Pharms., Inc.*, 660 F.3d 281, 284 (7th Cir. 2011). The Eighth and Ninth Circuits have reached similar conclusions under *both* the LMRA *and* the FAA—not just the former, as VNA contends. Compare Opp. 21 with *Williams* v. *National Football League*, 582 F.3d 863, 884 (8th Cir. 2009), and *Matthews* v. *National Football League Mgmt. Council*,

[3] While the employer in *Titan Tire* challenged the arbitral award under the LMRA, the FAA also applied because the case involved tire manufacturing, not transportation (734 F.3d at 710), and the Seventh Circuit relied on *Hall Street* and the FAA in deciding it (*id.* at 717 n.8).

688 F.3d 1107, 1115 (9th Cir. 2012).[4] And the Tenth Circuit has held that "[a]n arbitration award will only be vacated for the reasons enumerated in the [FAA] or for 'a handful of judicially created reasons,'" including violations of public policy. *Burlington N. & Santa Fe Ry.* v. *Public Serv. Co.*, 636 F.3d 562, 567 (10th Cir. 2010) (referring to grounds identified in *Sheldon* v. *Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001)).[5]

In keeping with the policy favoring finality of arbitral awards, these courts generally impose a high bar for public-policy/illegality challenges. But there is a world of difference between bearing a heavy burden to obtain vacatur and having vacatur unavailable as a matter of law—which is what the Eleventh Circuit and the court below have held. See *Frazier* v. *CitiFinancial Corp.*, 604 F.3d 1313, 1324 (11th Cir. 2010); Pet. App. 27a-29a. The split is clear and unambiguous.

2. VNA also denies that this case presents the broader federal question whether *any* judicially created grounds for vacatur survive *Hall Street*—though

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[4] Although initially the Eighth Circuit described the claims of the *Williams* plaintiffs with reference to the LMRA, it invoked both statutes when analyzing those claims. And while the Ninth Circuit in *Matthews* assumed rather than decided that the FAA applies to collective-bargaining agreements (688 F.3d at 1115 n.7), its recognition that judicially created grounds survive *Hall Street* was a determination under the FAA, not the LMRA.

[5] Additionally, although the First Circuit did not formally decide whether the public-policy exception remains valid, it left little doubt how it would rule on that question. See *Bangor Gas Co.* v. *H.Q. Energy Servs. (U.S.) Inc.*, 695 F.3d 181, 188 (1st Cir. 2012).

that is precisely the question that the Florida Supreme Court asked and answered (Pet. App. 28a). VNA asserts that "[i]f JMC were correct that the public policy exception arises from the courts' 'inherent power,' then acceptance of JMC's position in this case would do nothing to resolve whether manifest disregard survives *Hall Street*." Opp. 25. But what matters is not whether this case resolves the question about manifest disregard; it is whether the circuit split on manifest disregard speaks directly—and in some jurisdictions dispositively—to cases like this one.

Both the Eleventh Circuit and the court below held that it does. In their view, *Hall Street* bars *all* judicially created grounds for vacatur, including both manifest disregard and illegality. See *Frazier*, 604 F.3d at 1324; Pet. App. 27a-29a.

By contrast, the Fourth Circuit held that manifest disregard remains a valid ground for vacatur, meaning that judicially created grounds are not absolutely foreclosed (see *Wachovia Sec. LLC* v. *Brand*, 671 F.3d 472, 483 (4th Cir. 2012)), and subsequently identified the public-policy/illegality exception as one such ground (see *Wells Fargo Advisors, LLC* v. *Watts*, 540 F. App'x 229, 231 (4th Cir. 2013) (per curiam), cert. denied, 135 S. Ct. 210 (2014)). And the Sixth Circuit has held that *Hall Street* applies solely to *parties'* efforts to expand the permissible grounds for vacatur under the FAA—and therefore does not affect courts' authority to vacate arbitral awards on judicially created grounds. See *Coffee Beanery, Ltd.* v. *WW, L.L.C.*, 300 F. App'x 415, 418 (6th Cir. 2008).

If *any* judicially created grounds survive, surely the deeply entrenched rule that courts will not enforce illegal contracts is one of them. In all events,

whether there can be any non-statutory, judicially created grounds for vacatur is a threshold question in determining whether any particular exception exists. If the expansive rulings of the court below and the Eleventh Circuit are correct, whether manifest disregard and illegality are permissible grounds for vacatur is the same question, and *Hall Street* provides the same answer: They are not. If the Fourth and Sixth Circuits are correct, those rulings are wrong as a matter of law.

C. The Decision Below Is Irreconcilable With This Court's Decisions.

VNA maintains that the decision below does not conflict with this Court's precedents on the inherent judicial authority to refuse to enforce arbitral awards on illegality grounds because those precedents arose under the LMRA, not the FAA (Opp. 14); they predate this Court's holding in *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001), that the FAA applies to labor cases involving workers in fields other than interstate transportation (Opp. 16 n.6); and they create federal common law that is inapplicable in cases like this one that arise in state court (Opp. 2-3, 12, 14). None of these efforts to reconcile the decision below with this Court's case law is valid.

This Court explained in *W.R. Grace* that the inherent power and duty not to enforce illegal contracts applies to "any contract"—not just to collective-bargaining agreements under the LMRA. 461 U.S. at 766 ("As with any contract, * * * a court may not enforce a collective bargaining agreement that is contrary to public policy."). That holding follows directly from the bedrock principle that the power "to enforce the terms of private agreements is *at all times* exercised subject to the restrictions and limita-

tions of the public policy of the United States." *Hurd* v. *Hodge*, 334 U.S. 24, 34-45 (1948) (emphasis added); accord *McMullen*, 174 U.S. at 654 ("The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract."). That *W.R. Grace*, *United Paperworkers*, and *Eastern Associated Coal* predated *Circuit City* matters not at all because this Court has never held that the judicial authority they acknowledge is unique to labor law.

What is more, the U.S. Courts of Appeals routinely apply the FAA to arbitrations under collective-bargaining agreements. See, *e.g.*, *International Bhd. of Elec. Workers, Local #111* v. *Public Serv. Co.*, 773 F.3d 1100, 1106 (10th Cir. 2014); *Humility of Mary Health Partners* v. *Teamsters Local Union No. 377*, 517 F. App'x 301, 302 (6th Cir. 2013); *International Bhd. of Teamsters Local Union No. 50* v. *Kienstra Precast, LLC*, 702 F.3d 954, 957 (7th Cir. 2012); *Pierce* v. *Delmonte*, 474 F. App'x 1, 5 (2d Cir. 2012); *New Jersey Reg'l Council of Carpenters* v. *Jayeff Constr. Corp.*, 495 F. App'x 230, 232-233 (3d Cir. 2012); *Mawing* v. *PNGI Charles Town Gaming, L.L.C.*, 426 F. App'x 198, 198-199 (4th Cir. 2011) (per curiam); cf. *Matthews*, 688 F.3d at 1115 n.7 (assuming without deciding that "FAA applies to collective bargaining agreements").

Thus, it should come as no surprise that, since *Circuit City*, at least two circuits have applied *W.R. Grace*, *United Paperworkers*, and *Eastern Associated Coal* when considering public-policy challenges to arbitral awards in cases that they expressly recognized were governed by the FAA as well as the LMRA. See *Williams*, 582 F.3d at 884-885; *Mercy*

Hosp., Inc. v. *Massachusetts Nurses Ass'n*, 429 F.3d 338, 343 (1st Cir. 2005). The court below did the opposite. Accordingly, insofar as there is any question whether *W.R. Grace*, *United Paperworkers*, and *Eastern Associated Coal* apply to cases governed by the FAA, that is a reason for granting certiorari, not denying it.

Finally, the issue here is not one of federal *common* law but of federal *statutory* law—namely, whether Section 10 of the FAA bars vacatur when a contract or the arbitrators' construction of it is illegal. And the principle that courts need not and ought not enforce illegal agreements predates *both* the FAA and federal labor law. See *Coppell*, 74 U.S. at 559 (recognizing principle as already long settled). It is a matter of inherent judicial authority that applies equally to all courts—state, federal, or otherwise. See, *e.g.*, *McMullen*, 174 U.S. at 654 ("The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract."); Pet. App. 46a-47a (Florida courts consistently recognize principle). VNA is thus simply wrong in suggesting that a federal statute and this Court's precedents are inapplicable to cases like this one that arose in state court.

Respectfully submitted.

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