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 OF INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AND FLORIDA HOSPITAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether, in articulating several specific grounds for vacating an arbitral award in Section 10 of the Federal Arbitration Act, Congress barred courts from vacating arbitral awards on any other ground, including illegality of the underlying contract as construed by the arbitrators.

## RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amici curiae* state the following:

The International Association of Defense Counsel has no corporate parents or subsidiaries and no publicly held company owns ten percent (10%) or more of any of its stock.

The Florida Hospital Association, a nonprofit 501(c)(6) organization, has no corporate parents and has a for-profit subsidiary, Florida Hospital Management Corporation. No publicly held company owns ten percent (10%) or more of any of its stock.

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## INTEREST OF *AMICI CURIAE*[1]

The International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC membership is comprised of partners in large and small law firms, senior counsel in corporate law departments, and corporate and insurance executives. Members represent the largest corporations around the world, including the majority of companies listed in the FORTUNE 500. The IADC is dedicated to the just and efficient administration of civil justice and the continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost. In support of these principles, the IADC regularly files briefs in pending cases throughout the United States on civil justice issues of broad application.

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[1] *Amici curiae* affirm, in accordance with this Court's Rule 37.6, that no counsel for a party to this case authored any part of this brief, nor did any party, or counsel to any party, make any monetary contribution to fund the preparation or submission of this brief.

Moreover, pursuant to this Court's Rule 37.2(a), timely notice of intent to file this *amici* brief was provided to the parties. The parties have consented to the filing of this brief; consent letters have been lodged with the Court.

Founded in 1927, the Florida Hospital Association (FHA), is the leading voice of Florida hospitals at the state and national levels. FHA is a resource for demonstrating the community value of hospitals, for building consensus with other groups and for securing needed resources so its members can continue to provide high-quality, affordable care to their communities.

## INTRODUCTORY STATEMENT

The Florida Supreme Court, in considering a challenge to an underlying arbitral award that construed a contract in a way that violated laws prohibiting kickbacks for referrals of Medicare patients, held that the award could not be vacated. *Visiting Nurse Ass'n of Florida, Inc. v. Jupiter Med. Ctr., Inc.*, No. SC11-2468, 2014 WL 6463506, at *1 (Fla. Nov. 6, 2014). In so doing, the Florida court ignored long-standing United States Supreme Court precedent stating that courts can neither enforce illegal contracts nor enforce arbitral awards that would condone illegal conduct, and added to the already well-developed split of authority concerning whether any judicially-created grounds for vacatur survive this Court's decision in *Hall St. Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008) ("*Hall Street*"). *See, e.g., Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17*, 531 U.S. 57, 63 (2000); *Abbott v. Law Office of Patrick J. Mulligan*, 440 F. App'x 612, 618-19 (10th Cir. 2011) (describing the

split of authority concerning whether "manifest disregard" survives *Hall Street* as a ground for vacatur).

The Florida Supreme Court purported to follow the approach of the Fifth, Seventh, Eighth, and Eleventh Circuit Courts of Appeals in holding that the statutory bases for vacating or modifying an arbitral award could not be judicially supplemented. *Visiting Nurse Ass'n of Florida, Inc.*, 2014 WL 6463506, at *14. But the Seventh Circuit does allow courts to overturn an arbitral award on public policy grounds to the extent the arbitrator's decision directs parties to violate the law. *Affymax, Inc. v. Ortho-McNeil-Janssen Pharm., Inc.*, 660 F.3d 281, 284 (7th Cir. 2011). Moreover, the Third and Sixth Circuits have held that judicially-created grounds for vacating arbitration awards remain valid after *Hall Street*, while the Second and Ninth Circuits have held that manifest disregard remains a valid ground for vacatur. *See* section I.A. below.

This Court's guidance is now desperately needed to resolve the issue which has long divided the circuit courts: Are there any judicially-created grounds on which federal courts can vacate arbitral awards? More narrowly, can federal courts vacate an award on the ground that the arbitrators have construed the underlying contract to be illegal (and, as here, violative of the rights of nonparties)? Answers to these questions are urgently needed, and this case provides a proper vehicle to decide them.

## ARGUMENT

### I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE WIDESPREAD CIRCUIT SPLIT CONCERNING WHETHER ARBITRATION AWARDS CAN BE VACATED ON JUDICIALLY-CREATED GROUNDS

#### A. The Time is Ripe to Intervene. Virtually Every Circuit Has Interpreted this Court's Decision in *Hall Street,* Resulting in a Myriad of Conflicting Approaches to Arbitration Review.

Since 2008, when this Court decided *Hall Street*, the circuit courts have struggled with the scope and meaning of the decision, and in particular, this Court's holding that "§§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification." 552 U.S. at 584. The *Hall Street* court concluded that the FAA's statutory grounds could not be expanded *by party agreement* (*id*. at 583), but did not decide whether *judicially-created grounds* for vacatur under the FAA nonetheless remain viable. *See, e.g*., *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662, 672 (2010) ("We do not decide whether "'manifest disregard'" survives our decision in *Hall Street*. . . ."). *See, e.g., Comedy Club, Inc. v. Improv W. Associates*, 553 F.3d 1277 (9th Cir. 2009), *cert. denied*, *Improv W. Associates v. Comedy Club, Inc.*, 558 U.S. 824 (2009); *Grain v. Trinity Health, Mercy Health Servs. Inc.*, 551 F.3d 374 (6th Cir. 2008), *cert. denied*, *Grain v. Trinity Health*, 558 U.S. 820 (2009); *Coffee Beanery, Ltd. v.*

*WW, L.L.C.*, 300 F. App'x 415 (6th Cir. 2008), *cert. denied*, 558 U.S. 819 (2009).

This Court should grant certiorari to resolve this issue. The time is ripe for this Court to intervene. Courts from virtually every Circuit have announced their interpretation of *Hall Street*, creating a patchwork of different standards across the country. The Third and Sixth Circuits have interpreted *Hall Street* narrowly, holding that it foreclosed private parties from supplementing the FAA's statutory grounds for vacatur by contract, but did not preclude vacatur on judicially-created grounds. *Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account*, 618 F.3d 277, 292, n. 11 (3d Cir. 2010), as amended (Dec. 7, 2010); *Coffee Beanery, Ltd.*, 300 F. App'x at 418-19. The Seventh Circuit has held that while neither parties nor judges can expand the statutory grounds of vacatur (*Affymax, Inc.*, 660 F.3d at 284), a court can overturn an arbitral award on public policy grounds when it directs parties to violate the law. *See Titan Tire Corp. of Freeport v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union*, 734 F.3d 708, 717 (7th Cir. 2013). The Fourth Circuit has held that manifest disregard survives *Hall Street*, either as an independent ground or as a judicial gloss on the enumerated grounds for vacatur. *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 480 (4th Cir. 2012). Meanwhile, the Second and Ninth Circuits have held that manifest disregard constitutes a judicial interpretation of the district court's powers under § 10(a)(4) to

vacate an award where the arbitrator "exceeded [his] powers," and therefore remains a valid ground to vacate an arbitration award after *Hall Street*. *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 340 (2d Cir. 2010); *Comedy Club, Inc.*, 553 F.3d at 1290. On the other hand, the First, Fifth, Eighth, and Eleventh Circuits have held that no judicially-created bases for vacatur survive *Hall Street*. *Ramos-Santiago v. United Parcel Service*, 524 F.3d 120, 124 n. 3 (1st Cir. 2008); *Citigroup Global Markets Inc. v. Bacon*, 562 F.3d 349, 350, 355 (5th Cir. 2009); *Med. Shoppe Int'l, Inc. v. Turner Investments, Inc.*, 614 F.3d 485, 489 (8th Cir. 2010); *Frazier v. CitiFinancial Corp., LLC,* 604 F.3d 1313, 1323 (11th Cir. 2010).[2]

[2] The Tenth Circuit has acknowledged the split of authority, but in the absence of guidance from this Court, has declined to decide the issue whether any judicially-created grounds survive *Hall Street*. *See, e.g.*, *Legacy Trading Co. v. Hoffman*, 363 F. App'x 633, 635 (10th Cir. 2010) ("[W]e need not decide what, if any, judicially-created grounds for vacatur survive in the wake of *Hall Street Associates*, because neither [parties have] established the right to vacatur under any judicially-created exceptions."); *Hicks v. Cadle Co.*, 355 F. App'x 186, 197 (10th Cir. 2009) ("We need not decide whether § 10 provides the exclusive grounds for vacating an arbitrator's decision, because defendants demonstrate neither manifest disregard of the law nor violation of public policy."); *Abbott*, 440 F. App'x at 620 ("But in the absence of firm guidance from the Supreme Court, we decline to decide whether the manifest disregard standard should be entirely jettisoned. And it is not necessary to do so because this case does not present exceedingly narrow circumstances supporting a vacatur based on manifest disregard of the law.").

This Court should clarify the scope and application of *Hall Street* and the availability of judicial review of arbitration awards. Arbitration is rapidly becoming a preferred, and sometimes mandatory, mechanism for resolving disputes concerning employment agreements, business-to-business agreements, government contracts, and consumer contracts. *See* Stipanowich, Thomas, *Arbitration: The "New Litigation,"* 2010 U. Ill. L. Rev. 1 (2010). Individuals, businesses, attorneys, and the lower courts share a strong and urgent interest in this Court's guidance concerning whether its holding in *Hall Street* forecloses the application of longstanding judicially-created grounds for vacatur.

### B. This Case is the Right Vehicle to Address the Legacy of *Hall Street* Because It Allows This Court to Consider One of the Most Fundamental Judicially-Created Grounds for Vacating an Arbitral Award Under the FAA

As this Court has consistently explained, "[a] court's refusal to enforce an arbitrator's award . . . because it is contrary to public policy is a specific application of the more general doctrine, rooted in common law, that a court may refuse to enforce contracts that violate law." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42 (1987); *see also Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77

(1982) ("[O]ur cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law.").

The principle that courts will not enforce illegal contracts based on public policy grounds is longstanding. In *McMullen v. Hoffman*, 174 U.S. 639, 640-41 (1899), two bidders for public work agreed to secretly share work if one of them was awarded the contract. When one party secured the work and the other sued to enforce the agreement, the Court refused to enforce it, finding the contract to be illegal. *Id*. at 642-43. The Court reasoned: "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. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it. . . ." *Id.* at 654. "[T]o permit a recovery in this case is in substance to enforce an illegal contract, and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest." *Id*. at 669. This Court again confirmed this rule in *Continental Wall Paper Co. v. Louis Voight & Sons Co*., 212 U.S. 227 (1909), refusing to enforce a buyer's promise to pay for purchased goods on the ground it was part of an illegal bargain. "In such cases the aid of the court is denied, not for the benefit of the defendant, but

because public policy demands that it should be denied without regard to the interests of individual parties." *Id*. at 262; *see also Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020, 1023 (10th Cir. 1993) ("The public policy exception is rooted in the common law doctrine of a court's power to refuse to enforce a contract that violates public policy or law. It derives legitimacy from the public's interest in having its views represented in matters to which it is not a party but which could harm the public interest."). Thus, both this Court and its circuit courts have long recognized that the purpose of this principle is not to protect the parties to an agreement, but the public at large.

This principle applies not only where the court is asked to enforce an illegal contract, but when a court reviews an arbitral award. In constructing an award, an arbitrator may not direct the parties to violate the law. *George Watts & Son, Inc. v. Tiffany and Co.*, 248 F.3d 577, 580 (7th Cir. 2001). Where an arbitrator has done so, the judiciary may step in. *Id*., citing to *Eastern Associated Coal Corp*., 531 U.S. at 62.

The Arbitration Act did not change this deep-rooted principle. In passing the Arbitration Act in 1925, Congress intended courts to "place such [arbitration] agreements 'upon the same footing as other contracts.'" *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 271 (1995) (emphasis added); *see also Johnson v. Wells Fargo Home Mortg., Inc.*, 635 F.3d 401, 412 (9th Cir. 2011) ("Congress could not have meant to authorize district courts to confirm

corrupt awards, especially where one of the parties had properly objected to the award's illegality.").

Following this reasoning, one court has held that even if "manifest disregard" is no longer a ground on which courts may vacate an arbitral award, the public policy exception continues to allow courts to vacate an award. *Affymax, Inc.*, 660 F.3d at 284 ("Thus an award directing the parties to form a cartel, and fix prices or output, could be vacated as a violation of the Sherman Antitrust Act, even though the Federal Arbitration Act does not authorize the award's vacatur. Arbitration implements contracts, and what the parties cannot do through an express contract they cannot do through an arbitrator."); *Titan Tire Corp. of Freeport*, 734 F.3d at 717. In *Titan Tire Corp. of Freeport*, which was decided well after this Court's decision in *Hall Street*, the court held that the district court could not confirm an arbitration award that enforced an agreement that violated a statute meant to prevent conflicts of interest. The court concluded that because the promised payments to union officials were illegal, the arbitrator's decision violated explicit public policy; thus, the court was "obliged to refrain from enforcing [the agreement]." *Id*. at 716.

This case calls for this Court to resolve not only whether any judicially-created grounds can support vacatur, but also whether the fundamental and long-standing public policy exception applies when courts are faced with an arbitral award that condones illegal

conduct.[3] This case therefore presents a particularly good vehicle for resolving the questions left open by *Hall Street*.

## CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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[3] In contrast, many of the prior petitions filed with this Court concerning the scope of *Hall Street* have presented narrower issues. *See, e.g., Dewan v. Walia*, 544 F. App'x 240 (4th Cir. 2013), *cert. denied, Walia v. Kiran M. Dewan, CPA, P.A.*, 134 S. Ct. 1788 (2014) (sole question presented was whether the FAA permits a court to vacate an award on the ground of manifest disregard of the law).