NO. 20-_____

In the Supreme Court of the United States

COLIN MASSEAU AND EMILY MACKENZIE,

Petitioners,

v.

GUY HENNING,
BRICKKICKER/GDM HOME SERVICES, LLC,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Colin and Emily Masseau were a young couple looking to purchasing their first home and hired a local Vermont licensed home inspector to inspect that home. During the inspection he failed to point out patent and obvious signs of potential asbestos in the stucco ceiling as required by Vermont law. The Masseaus sued the inspector and the state court held the Federal Arbitration Act applied even though the transaction took place entirely in Vermont and was not in interstate commerce and did not substantially impact interstate commerce. At arbitration the Arbitrator decided the case on a motion to dismiss that was previously filed by the Defendant and fully responded to by both parties. The Arbitrator did not accept as true facts in the complaint and dismissed the claim without a hearing, even though Vermont has a very liberal notice pleading standard that was both pleaded and known to the Arbitrator. If the Vermont Arbitration Act had applied, the arbitration agreement would have been void for lack of notice and the matter would not have gone to arbitration.

1. Does a court have the right under the Federal Arbitration Act to review a decision of the Arbitrator where the Arbitrator has engaged in a manifest disregard of the law, and is this a separate duty or just judicial gloss of the grounds under 9 U.S.C. § 10(a)(3)&(4) for vacating an arbitration decision where the Arbitrator failed to consider evidence in the complaint in deciding a motion to dismiss and thus refused to consider evidence pertinent and material to the controversy?

2. Did the Federal Arbitration Act apply to the transaction between the Masseaus and the Defendants since it involved only intrastate commerce and did not substantially impact interstate commerce as required for the Federal Arbitration Act to be applicable?

3. Is the Federal Arbitration Act a rule of procedure or a substantive law and should the Supreme Court overturn *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852 (1984) and hold that the Federal Arbitration Act does not apply to proceedings in state courts and is its current application unconstitutional where it applies to contracts of adhesion pursuant to *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740 (2011)?

PARTIES TO THE PROCEEDINGS

Petitioners

- Colin Masseau
- Emily Mackenzie

Respondents

- Guy Henning
- Brickkicker/GDM Home Services, LLC

LIST OF PROCEEDINGS

Supreme Court of Vermont

No. 2020-131

Colin Masseau and Emily Mackenzie v. Scott Luck, Sharon Luck, Guy Henning, Brickkicker/GDM Home Services, LLC

Date of Final Opinion: February 19, 2021

Superior Court of Vermont Civil Division, Chittenden Unit

No. 616-6-17 Cncv

Masseau Et al v. Luck Et al

Date of Final Order: January 29, 2019

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Emily and Colin Masseau respectfully petition for writ of certiorari to review the judgment of the Vermont Supreme Court in this case.

OPINIONS BELOW

Masseau v. Luck, ___ A.3d ___, 2021 WL 647201, 2021 VT 9, Vermont Supreme Court. Opinion of the Supreme Court of Vermont entered February 19, 2021.(App.1a).

Masseau v. Luck, Docket No. 616-6-17 Cncv, Vermont Superior Court, Chittenden Unit. Entry Regarding Motion, entered January 29, 2019. (No citation available). (App.30a)

Masseau v. Luck, Docket No. 616-6-17 Cncv, 2018 WL 8666298, Vermont Superior Court, Chittenden Unit. Opinion and Order on Motions to Dismiss, entered August 9, 2018. (App.34a)

JURISDICTION

The judgment of the Vermont Supreme Court was entered on February 19, 2021. The petition for writ of certiorari is thus due on May 20th, 2021. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are several provisions of the United States Constitution and the Federal Arbitration Act that will be applicable to this appeal. The Constitutional provisions are the following:

U.S. Const. Preamble

> WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, . . . promote the general Welfare, and secure the Blessing of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

U.S. Const. Art. I, § 8, cl. 3

> To regulate Commerce . . . among the several states.

U.S. Const. Art. III, § 1

> The judicial Power of the United States, shall be vested in one supreme Court. . . .

U.S. Const. Art. III, § 2

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States. . . .

U.S. Const. Art. VI, cl. 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land;

> and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. amend. VII

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, ...

Federal Arbitration Act ("FAA")

9 U.S.C. § 1, defining commerce,

> "commerce", as herein defined, means commerce among the several States. . . .

9 U.S.C. § 2

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

Emily and Colin Masseau were a young couple, who after signing a purchase and sale agreement, hired a Vermont Licensed inspector to inspect their home prior to purchase. This matter arises from the failure of Guy Henning and Brickkicker/GDM Home Services, LLC (hereafter "Henning") to point out visible and patent signs of asbestos during an inspection of a home Plaintiffs planned to purchase. Henning failed to disclose signs of asbestos in the stucco ceiling (also referred to as popcorn or textured ceiling). Per the complaint "[i]t is commonly known in the housing industry that stucco ceilings installed in the 1970s contained asbestos. This is important information that any housing inspector should have known." Complaint at ¶ 12. "Defendant Henning conducted the inspection, at which Plaintiff Colin Masseau was present. Defendant Henning did not mention the textured ceilings were likely to contain asbestos. He was aware the house was built in 1972." *Id.* at ¶ 13.

"Plaintiffs started scraping the textured ceiling off in the kitchen of the property on November 27, 2016, and stopped immediately on the morning of November 28, 2016 after finding numerous articles warning that houses built in the 1960s and 1970s with textured ceilings often contained asbestos." Complaint at ¶17. Plaintiffs took a sample to be tested by Claypoint Associates which came back positive for asbestos. *Id.* at ¶¶ 18 & 19. Due to the widespread contamination the Plaintiffs had to hire an asbestos abatement contractor to clean their belongings and the house. *Id.* at ¶¶ 20 & 25. Henning failed to point out patent and obvious

signs of potential asbestos contained within the stucco ceiling of their home as required by Vermont law.

Henning filed a motion to dismiss based on failure to state a claim and that the contract was subject to binding arbitration. Plaintiffs opposed the motion arguing the arbitration clause was invalid because it failed to comply with the requirements of 12 V.S.A. § 5652 as it did not contain a prominently displayed acknowledgment clause. Plaintiff also argued that Henning was a licensed inspector and was thus required to follow the Vermont Administrative Rules for Property Inspectors. Section 3.2(e)(3)(C) specifically provides that an inspector is not required to inspect for "the presence, absence, or risk of asbestos . . . provided, however, that licensees shall report visible and patent evidence of asbestos. . . . " *See* Vermont Administrative Rules for Property Inspectors.

Henning argued the Vermont Arbitration Act did not apply as this agreement should be interpreted pursuant to the Federal Arbitration Act. In response, Masseau argued the Federal Arbitration Act did not apply because the transaction involved only intrastate as opposed to interstate commerce.

The trial court issued its decision on Henning's motion to dismiss on August 9, 2018. App.33a. The trial court addressed all of the issues being raised in this appeal. First, the trial court addressed that the Federal Arbitration Act preempted the Vermont Arbitration Act. App.37a. The judge acknowledged the dispute over whether the Federal Arbitration Act was meant to be a procedural or substantive law. *Id.* The judge acknowledged the dissents of Justice O'Connor in *Southland Corp. v. Keating*, 465 U.S. 1, 22-36 (1984), Justice Scalia and Justice Thomas in *Allied-Bruce*

Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 284 (1995), and Justice Stevens in *Southland*, 465 U.S. at 18. App.37a-40a.

The trial court judge next addressed whether the dispute involved interstate as opposed to intrastate commerce. App.39a. The trial court held that "contracts entered by a national company to inspect homes substantially impact interstate commerce." App.43a.

After meeting with the Arbitrator the parties agreed to allow the Arbitrator to rule on the motion to dismiss and submitted all the motions and memorandum related to the motion to dismiss to the Arbitrator. App.54a. On November 9, 2018, the Arbitrator issued the Arbitrator's Decision on the motions to dismiss. *Id.* The Decision noted that it was deciding the motions pursuant to V.R. Civ. P. 26(b)(6) and stated the following:

> The parties conferred with the arbitrator on 27 September, 2018 and agreed that the first order of business is to address and decide the pending V.R.C.P. 12(b)(6) motion to dismiss the claims of Mr. Masseau and Ms. McKenzie [now Ms. Masseau] against GDM and Mr. Henning. The parties have agreed that I may consider all submitted documents in addition to the motion papers and I am empowered to decide the pending motion.

Id. The Arbitrator decided the motion in favor of the Defendant but in doing so failed to consider all well-pleaded facts and inferences in favor of the Plaintiff. In the Arbitrator's decision he stated:

> While it is asserted that it is "common knowledge" that homes built in the 70s or homes

> with stucco ceilings might harbor hidden asbestos and while it is asserted that Vermont law 'requires" an inspector to give people such as these buyers recommendations for further evaluations by specialists (including disclosing the potential existence of asbestos), there is no support offered for these conclusory assertions.

App.56a. The Arbitrator failed to follow clearly established law, which was laid out in the memorandums presented to the Arbitrator, by failing to treat the well pleaded allegations in the complaint, and reasonable inferences that can be drawn from them, as true. App.56a. Arbitrator also ignored Vermont regulations provided as part of the memorandum. *Id.*

After the Arbitrator issued his decision, the Masseaus objected to the confirmation of the Award of the Arbitrator. App.30a. The Masseaus "argued that the arbitrator's decision can be reviewed because it showed a 'manifest disregard for the law.'" App.32a. The trial court then affirmed the ruling of the Arbitrator. *Id.*

The Masseaus then appealed the decisions of the trial court to the Supreme Court of Vermont. On appeal, the Masseaus argued the contract was in intrastate commerce and not interstate commerce and thus the Federal Arbitration Act was not applicable, that the decision of the Arbitrator should not have been affirmed for "manifest disregard" of the law, and mentioned that the Federal Arbitration Act did not preempt state law because it was a procedural rather than substantive act. The Supreme Court of Vermont concluded "that the underlying transaction in this case affects interstate commerce and the FAA therefore

applies." App.12a. The Supreme Court of Vermont also declined "to reverse the trial court's confirmation of the arbitrator's dismissal order on the basis that the arbitrator demonstrated manifest disregard of the law." App.14a.

In a concurring, opinion Chief Justice Reiber wrote "separately to make the point that the FAA was not intended to apply in this instance, and this outcome deprives the citizens of our state of a remedy under the Vermont Arbitration Act (VAA) that offers greater protection than the FAA." App.22a. He went on to state that "[t]he FAA was enacted as a procedural statute and 9 U.S.C. § 2 makes no express mention of state courts or state law." *Id.* Chief Justice Reiber concludes by stating that "[w]hile the majority outcome is consistent with the United States Supreme Court's FAA jurisprudence, I write to make the point that the FAA when passed by Congress was not originally intended to preempt state law in such situations." App.29a. The Opinion of the Supreme Court of Vermont was issued on February 19, 2021.

REASONS FOR GRANTING THE PETITION

I. THERE IS DISAGREEMENT BETWEEN THE CIRCUITS AND WITH THE SUPREME COURT OF VERMONT AS TO WHETHER A COURT MAY STILL REVIEW AN ARBITRATOR'S DECISION FOR MANIFEST DISREGARD OF THE LAW.

There is considerable disagreement between the Circuit Courts as to whether a court may review an arbitrator's decision for manifest disregard of the law. The Circuit Courts, and many of the highest courts in each state, have debated if review of an arbitrator's opinion is allowed after the decisions in *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S.Ct. 1396 (2008) and *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010). The Supreme Court of Vermont pointed this out below in *Masseau v. Luck*, 2021 VT 9, 2921 WL 647201 (2021).

> Whether "manifest disregard of the law" is a basis for vacating an arbitration award—either as an additional ground or as a corollary to the statutorily enumerated bases, remains an open question. In *Krolick*, we interpreted the United States Supreme Court's decision in *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008), as holding that under the FAA a court has no authority to review for an arbitrator's legal errors. 2008 VT 131, ¶ 13 n.2, 969 A.2d 80. However, in the wake of a subsequent U.S. Supreme Court decision,

> we concluded that the U.S. Supreme Court has left open the question of whether manifest disregard of the law is "'an independent ground for review'" of an arbitration award or "'a judicial gloss on the enumerated grounds for vacatur'" under the FAA. *Burlington Adm'rs' Ass'n*, 2016 VT 35, ¶ 15, 145 A.3d 844 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n.3, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010)); *see also Weiss v. Sallie Mae, Inc.*, 939 F.3d 105, 109 (2d Cir. 2019) ("[M]anifest disregard remains a valid ground for vacating arbitration awards whether applied as judicial gloss or as an independent basis. . . . " (quotation omitted)). Accordingly, whether courts are empowered to apply the manifest disregard doctrine under either the VAA or FAA is again an open question. *See Burlington Adm'rs' Ass'n*, 2016 VT 35, ¶¶ 16-17, 145 A.3d 844.

Id. at ¶ 30.

Prior to the decision in *Hall*, courts in all jurisdictions uniformly held that courts could review the decisions of arbitrators for manifest disregard of the law. In *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182 (1953), this Court implied that "interpretations of the law by arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." *Id.* 246 U.S. at 436-37, 74 S.Ct. at 187-88. Courts in all jurisdictions interpreted this as allowing courts to review arbitrator's decisions for manifest disregard of the law. After the decisions in *Hall* and *Stolt-Nielsen*, courts have become

split on whether an arbitrator's decision can be reviewed for manifest disregard of the law.

The United States Court of Appeals for the Second Circuit has set out the applicable standard of review to determine if a decision may be vacated for a manifest disregard of the law.

> An arbitral award may be vacated for manifest disregard of the law "only if" a reviewing court . . . find[s] both that
>
> (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and
>
> (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.

Wallace v. Buttar, 378 F.3d 182, 189 (2d Cir. 2004) (quotations and citations omitted and edited into list form). *See also Pike v. Freeman*, 266 F.3d 78, 86 (2d Cir. 2001) ("Federal court review of an arbitral judgment is highly deferential; such judgments are to be reversed only where the arbitrators have exceeded their authority or made a finding in manifest disregard of the law.")

The Circuit Courts are currently split into three different camps on whether to allow review of arbitrator's decisions for manifest disregard of the law. The First, Third, Fifth and Tenth Circuit Courts are undecided. The Ninth, Second, Fourth, Sixth and Federal Circuits allow review, and the District of Columbia Circuit assumes it is allowed, but has not specifically ruled on it. The Eighth and Eleventh circuits have

held review is not allowed, and the Seventh Circuit appears to also agree review is not allowed.

Five of the Circuit Courts have not yet determined if they use manifest disregard for the law as a basis for overturning an arbitrator's decision. *See* First Circuit, *Axia Netmedia Corp. v. Massachusetts Tech. Park Corp.*, 973 F.3d 133, 141 n.9 (1st Cir. 2020) ("We 'have not squarely determined whether our manifest disregard case law can be reconciled with *Hall Street*,' *Kashner Davidson Sec. Corp. v. Mscisz*, 601 F.3d 19, 22 (1st Cir. 2010)"), Third Circuit, *Bellantuono v. ICAP Sec. USA, LLC*, 557 F. App'x 168, 173 (3d Cir. 2014) ("Prior to the Supreme Court's decision in *Hall Street*, this Court and many others held that a court may vacate an arbitration award if the 'arbitrator's decision evidences a manifest disregard for the law' even though 'manifest disregard for the law' is not one of the statutorily prescribed grounds for vacatur enumerated in Section 10 of the FAA."), Fifth Circuit, *McKool Smith, P.C. v. Curtis Int'l, Ltd.*, 650 F. App'x 208, 212 (5th Cir. 2016) ("While we have yet to explicitly decide whether the bases for vacatur asserted by Curtis can be statutory grounds for vacatur, we need not decide this issue today."), but *see Citigroup Glob. Markets, Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009) ("We conclude that *Hall Street* restricts the grounds for vacatur to those set forth in § 10 of the Federal Arbitration Act (FAA or Act), 9 U.S.C. § 1 *et seq.*, and consequently, manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA."), Tenth Circuit, *Piston v. Transamerica Cap., Inc.*, 823 F. App'x 553, 557 (10th Cir. 2020) ("We need not decide whether any judicially created reasons to vacate an award survive

Hall Street."), and the DC Circuit, *Affinity Fin. Corp. v. AARP Fin., Inc.*, 468 F. App'x 4, 5 (D.C. Cir. 2012) ("Assuming without deciding that the 'manifest disregard of the law' standard still exists after *Hall St. Assocs. v. Mattel, Inc.*")

Three Circuits have held that review of an arbitrator's decision for manifest disregard of the law is not an appropriate standard of review after *Hall. See* Seventh Circuit, *Renard v. Ameriprise Fin. Servs., Inc.*, 778 F.3d 563, 567 (7th Cir. 2015) ("An arbitral award cannot be vacated pursuant to the FAA merely because the petitioner show[s] that the panel committed an error—or even a serious error. It may be set aside only if one of the criteria specified in 9 U.S.C. § 10 is present—as relevant here, only if the arbitrator deliberately disregards what he knows to be the law." (Quotations and citations omitted)), Eighth Circuit, *Beumer Corp. v. ProEnergy Servs., LLC*, 899 F.3d 564, 566 (8th Cir. 2018) (Holding "'manifest disregard of the law' is not a ground on which a court may reject an arbitrator's award under the Federal Arbitration Act." (Citations and quotations omitted)), Eleventh Circuit, *Campbell's Foliage, Inc. v. Fed. Crop Ins. Corp.*, 562 F. App'x 828, 831 (11th Cir. 2014) ("In view of Hall Street, we have held the 'judicially-created bases for vacatur' we had formerly recognized, such as where an arbitrator behaved in manifest disregard of the law, are no longer valid." (quotations and citations omitted)).

There are five Circuits which have held, and one which assumes, that a court may review an arbitrator's decision for manifest disregard of the law. *See* Second Circuit, *Seneca Nation of Indians v. New York*, 988 F.3d 618, 625 (2d Cir. 2021) ("We have held that as

judicial gloss on the specific grounds for vacatur of arbitration awards in the FAA, an arbitrator's 'manifest disregard' of the law or of the terms of the arbitration agreement remains a valid ground for vacating arbitration awards." (Quotations and citations omitted)), Fourth Circuit, *Williamson Farm v. Diversified Crop Ins. Servs.*, 917 F.3d 247, 253 (4th Cir. 2019) ("The permissible common law grounds for vacating such an award include those circumstances where an award fails to draw its essence from the contract, or the award evidences a manifest disregard of the law." (Quotations and citations omitted)), Sixth Circuit, *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 419 (6th Cir. 2008) ("In light of the Supreme Court's hesitation to reject the 'manifest disregard' doctrine in all circumstances, we believe it would be imprudent to cease employing such a universally recognized principle. Accordingly, this Court will follow its well-established precedent here and continue to employ the 'manifest disregard' standard."), Ninth Circuit, *Aspic Eng'g & Constr. Co. v. ECC Centcom Constructors LLC*, 913 F.3d 1162, 1166 (9th Cir. 2019) ("We have held that arbitrators 'exceed their powers' when the award is 'completely irrational' or exhibits a 'manifest disregard of the law.'"), Federal Circuit, *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 480 (4th Cir. 2012) ("[W]e find that manifest disregard did survive *Hall Street* as an independent ground for vacatur.").

The decision by the Arbitrator in Masseau shows why allowing review for manifest disregard of the law is necessary, as otherwise a person forced into arbitration can be denied their right to have their disputes resolved pursuant to the law. The Arbitrator below

knew the governing legal principal but refused to apply it by ignoring well pleaded facts, and all inferences of those facts, in dismissing the case brought by Masseau. The standard for a V.R. Civ. P. 12(b)(6) motion was well defined and was explicitly laid out in the parties' motions and applicable to the decision made by the Arbitrator.

The parties agreed to allow the Arbitrator to decide the motion to dismiss that had been filed in the Vermont Superior Court prior to it being ordered to arbitration. The Arbitrator acknowledged he was deciding the motion pursuant to V.R. Civ. P. 12(b)(6) and the legal basis for a motion to dismiss was well known to the Arbitrator and laid out in the motions. Vermont provides a liberal notice-pleading rule and only requires "(1) a short and plain statement of the claim showing that the pleader is entitled to relief . . . and (2) a demand for judgment for the relief the pleader seeks." V.R. Civ. P. 8. "Put another way, the threshold a plaintiff must cross in order to meet our notice-pleading standard is exceedingly low." *Bock v. Gold*, 2008 VT 81, ¶ 4 (2008). "No technical forms of pleading . . . [is] required." V.R.C.P. 8(e)(1). Prior to the adoption of Rule 8 in Vermont, a party was required to state "the facts relied upon." V.R.C.P. 8 Reporter's Notes. "The new language emphasizes that the rules do not require a specific and detailed statement of the facts which constitute a cause of action, but simply a statement clear enough 'to give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests.' *Conley v. Gibson*, 355 U.S. 41 (1957)." *Id.*

In Vermont "[t]he purpose of a motion to dismiss for failure to state a claim is to test the law of the

claim, not the facts that support it." *Powers v. Office of Child Support*, 173 Vt. 390, 395 (2002). "A motion to dismiss for failure to state a claim upon which relief can be granted should not be granted unless it is beyond doubt that there exist no facts or circumstances that would entitle [plaintiff] to relief." *Id.* This is a much more liberal standard than the federal pleading requirements. *See* in contrast *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974 (2007). (Stating that pursuant to F. R. Civ. P. 12(b)(6), a party is required to plead "enough facts to state a claim to relief that is plausible on its face.") and *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009) ("A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a Complaint suffice if it tenders naked assertions devoid of further factual enhancement." (citations and quotations omitted)).

The Arbitrator, against clearly established Vermont law, held the complaint failed to provide sufficient support to show the inspector knew or should have known about the presence of asbestos. The Arbitrator did this, even though the Complaint specifically alleged that it is common knowledge that stucco ceilings installed in the early 1970s contained asbestos and provided evidence for this assertion. The Arbitrator also ignored Vermont regulations which required a licensed inspector to identify patent and obvious signs of asbestos. Both the law and the facts were well briefed and the Arbitrator was clearly advised and had knowledge of the standard for a motion to dismiss. As such, the Masseaus were denied their vested legal right to a remedy under the law

and the Arbitrator's decision should have been vacated due to the Arbitrator's manifest disregard of the law.

II. THE SUPREME COURT OF VERMONT EXPANDED THE REACH OF THE INTERSTATE COMMERCE CLAUSE TO INCLUDE HOME INSPECTIONS WHICH ARE TRANSACTIONS THAT ARE TRADITIONALLY INTRASTATE AND CONFLICTS WITH DECISIONS BY OTHER STATE COURTS OF LAST RESORT.

There is a dispute between the courts of last resort as to what transactions involve commerce under the Federal Arbitration Act. The contract between the Masseaus and Henning was intrastate and did not involve "commerce" and thus the Federal Arbitration Act does not apply. The FAA applies to a written "contract evidencing a transaction involving commerce." 9 U.S.C. § 2 (emphasis added). Commerce is defined as "commerce among the several States" reflecting the power of Congress under the Commerce Clause of the United States Constitution. 9 U.S.C. § 1.[1] In *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995), this Court accepted "the 'commerce in fact' interpretation, reading the Act's language as insisting that the 'transaction' in fact 'involv[e]' interstate commerce, even if the parties did not contemplate an interstate commerce connection." *Id.* 513 U.S. at 281, 115 S.Ct. at 843.

The transaction between the Masseaus and Henning did not involve interstate commerce. Both

[1] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;" U.S. Const. Art. I, § 8, cl. 3

parties were in Vermont, the house inspected was in Vermont, the contract was signed in Vermont and all of the Defendants were Vermont residents. No services or products were provided from out of state. Henning was a Vermont licensed home inspector. The only connection to any business out of state was that Brickkicker/GDM Home Services, LLC, was a Vermont business which was a locally owned franchise of Brickkicker. There was no evidence the Masseaus used any services provided by the national Brickkicker business. Involving commerce should be viewed to determine if the "activities . . . substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17, 125 S.Ct. 2195, 2205 (2005). The decision in *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 123 S.Ct. 2037 (2003) does not diminish the requirement that the contracted for services provided substantially affect interstate commerce to be subject to the FAA. In *Alafabco* this Court held that "Congress' Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice subject to federal control. Only that general practice need bear on interstate commerce in a substantial way." *Id.* 539 U.S. at 56-57, 123 S.Ct. at 2040 (emphasis added). Private home inspections do not have a substantial impact on interstate commerce and thus the Masseaus' contract with Henning should not be subject to the FAA.

The Supreme Court of Vermont held that the "underlying transaction in this case affects interstate commerce and the FAA therefore applies." App.12a. Several State Courts of last resort are in conflict

with this decision. In *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012), the Supreme Court of South Carolina held that "none of the factors relied upon to establish the involvement of interstate commerce negate the intrastate nature of the sale and purchase of residential real estate" and thus held the FAA did not apply. *Id.* at 398 S.C. at 458, 730 S.E.2d at 317-18. The decision in South Carolina is in conflict with Vermont, since Vermont held that an inspection, which is only part of the process of purchasing a home, involves interstate commerce, where South Carolina held the actual purchase of the home does not.

The Supreme Court of Montana has held that a construction contract to "replace a water line, construct an access road and stabilize the surrounding coulee and ditch areas" "was a local transaction, not involving interstate commerce," and thus not subject to the FAA. *City of Cut Bank v. Tom Patrick Const., Inc.*, 1998 MT 219, ¶ 2 & ¶ 21, 290 Mont. 470, 471 & 478, 963 P.2d 1283, 1284 & 1287. Similarly the Supreme Court of Nebraska held that purchasers of a home were not subject to the FAA as the transaction did not involve commerce. *Garlock v. 3DS Properties, L.L.C.*, 303 Neb. 521, 529, 930 N.W.2d 503, 510 (2019). *See also* the Court of Appeals of Arkansas in *Lehman Properties, Ltd. P'ship v. BB & B Const. Co.*, 81 Ark. App. 104, 109, 98 S.W.3d 470, 473 (2003) (Holding that where the purchase of supplies was local, "all of the parties are situated in Arkansas, and the work was done in Arkansas. Moreover, the contract itself did not evidence a transaction involving interstate commerce. Thus, the judge was correct in finding that the FAA does not apply."). All of these decisions would be in

conflict with the Vermont Supreme Court as they found that home sales do not involve interstate commerce. Therefore, the Supreme Court of the United States should take up this case to resolve the extent to which contracts "involve commerce" and are thus subject to the Federal Arbitration Act.

III. THE FAR REACHING IMPACT OF THE FEDERAL ARBITRATION ACT AS A SUBSTANTIVE LAW, AS OPPOSED TO PROCEDURAL, AND ITS APPLICATION TO CONTRACT OF ADHESION, DEPRIVES THE PEOPLE OF THEIR CONSTITUTIONAL RIGHT TO HAVE DISPUTES DECIDED PURSUANT TO THE LAW.

The decisions of the United States Supreme Court in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852 (1984) holding the Federal Arbitration Act is a substantive law, as opposed to a procedural law, and *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740 (2011) allowing the FAA to apply to contracts of adhesion creates a Constitutional crisis because it takes away a vested Constitutional right to resolving disputes. Rather it forces any person to give up their right to have their disputes resolved by a court to obtain services necessary for daily life.

"The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. 137, 163, 2 L.Ed. 60 (1803). Allowing a private system of justice to hide itself under the guise of a contractual system that disenfranchises average citizens from their vested legal rights under the Constitution of the United States, the rule of law,

and the very idea that people deserve the right to have their disputes resolved in a fair and just manner is unconstitutional. "Those who are united into one Body, and have a common established Law and Judicature to appeal to, with authority to decide controversies between them, and punish offenders, are in a Civil Society one with another. . . . " Section 87 of Locke's "Second Treatise of Government" (1690). It is also the duty of the Courts "to declare all acts contrary to the manifest tenor of the Constitution void." FEDERALIST PAPER 78. "[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." *Id.* Without even the ability to review a decision for manifest disregard of the law, a citizen has been denied their right to justly resolve their legal disputes according to the law, which was a power the people gave to the Judiciary.

When arbitration is forced upon average citizens who wish to take part in society,[2] and the benefits of services offered to the general public, they are forced to give up these legally established rights by entering into contracts of adhesion which contain an arbitration clause. This is because most modern day services that people need to participate in society, and earn a living, are only offered if an individual agrees to a contract of adhesion which includes an arbitration clause. Though the decision to arbitrate would be just if a

[2] "In the general course of human nature, a power over a man's subsistence amounts to a power over his will." FEDERALIST PAPER NO. 79 (emphasis in original). This also applies to ones right to have the power to decide how to resolve their disputes, which contracts of adhesion do not allow.

person or business had a choice, the use of contracts of adhesion for services, or employment, needed to live in a modern society remove any real option for choice. This problem is further compounded because under the FAA a person has no method to ensure an arbitrator will issue a decision according to the rule of law. Without a method for review of an arbitration decision, a person loses the right to a fair and just resolution of their claims.

Section 1 of the United States Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. Art. III, § 1. This judicial Power extends "to all Cases, in Law and Equity, arising under [the] Constitution, [and] the Laws of the United States. . . . " U.S. Const. Art. III, § 2, cl. 1.[3] The Federal Arbitration Act, as applied, removes from the Court the power granted it under U.S. Const. Art. III, § 2 by creating a mandatory

[3] The power to resolve equitable disputes was a power given by the people to the courts. "There is hardly a subject of litigation between individuals, which may not involve those ingredients of FRAUD, ACCIDENT, TRUST, OR HARDSHIP, which would render the matter an object of equitable rather than of legal jurisdiction, as the distinction is known and established in several of the States. It is the peculiar province, for instance, of a court of equity to relieve against what are called hard bargains: these are contracts in which, though there may have been no direct fraud or deceit, sufficient to invalidate them in a court of law, yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties, which a court of equity would not tolerate." FEDERALIST PAPER No. 80.

alternative to the judicial Power vested in the Supreme Court.

The Constitution gives the right to the people to have their disputes resolved by the courts. The Constitution was established by the people of the United States to "establish Justice, insure domestic Tranquility, . . . promote the general Welfare, and secure the Blessing of Liberty to ourselves and our Posterity." U.S. Const. Preamble. All of the power given to the government comes from the people and those powers are given to different branches for the protection of the people. Though Article III sets out the power of the Courts, this power is given for the protection of the people. If the power to access the courts is denied without any opportunity for choice, it completely vitiates the power the people gave to the courts to protect their rights.

The Seventh Amendment to the Constitution provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . . " U.S. Const. amend. VII. These rights were enshrined in the Constitution for the citizens of the United States after they declared their independence. As part of the Declaration of Independence several self-evident truths were acknowledged; that all people are created equal and endowed "with certain unalienable Rights" which includes the right to "Life, Liberty and the pursuit of Happiness." The Declaration of Independence para 2. "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." *Id.* Because an individual has no right to reject the requirement for arbitration in a contract of adhesion, they are forced

to give up their Constitutional "right to a trial by jury" to live in a modern society.

The purpose of litigation is to resolve disputes in a fair and just manner. The Federal Civil Rules of Procedure provide that they are to "be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Similarly the purpose of the Federal Rules of Evidence are to "be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination." Fed. R. Evid. 102. Requiring a citizen to arbitrate disputes in a system where unjust results due to the failure of arbitrators to follow the laws of the land are allowed to go unchecked violates these very principals as well as the rights afforded citizens under the Constitution. If one has no free choice to choose arbitration, it then becomes an un-constitutionally oppressive system.

It is against this backdrop that the Supreme Court of the United States should review whether the Federal Arbitration Act is either a rule of procedure or a substantive law. It also should determine if a court has the right to review decisions of arbitrators for manifest disregard of the law. 9 U.S.C. § 1 *et seq*. In *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), the Supreme Court "held that § 2 of the FAA created substantive law that applies in both federal and state court, and accordingly preempts state law whenever state law creates requirements that apply to arbitration agreements but not to all contracts. *Southland Corp. v. Keating*,

465 U.S. 1, 16, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984)." *Masseau v. Luck*, 2021 VT 9, ¶ 35 (Vt. Feb. 19, 2021, Concurrence by Chief Justice Reiber). The Supreme Court of the United States has decided the FAA applies to even matters which states set out for resolution through an administrative process, local boards or any other forum when parties contract requires arbitration. This Court has held that "all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA." *Preston v. Ferrer*, 552 U.S. 346, 349-50, 128 S.Ct. 978, 981, 169 L.Ed.2d 917 (2008).

The court has also stated the FAA requires that statutory disputes subject to an arbitration agreement must also go to arbitration.

> It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. Indeed, in recent years we have held enforceable arbitration agreements relating to claims arising under the Sherman Act, 15 U.S.C. §§ 1–7; § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*; and § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l (2). *See Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490

> U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). In these cases we recognized that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi*, 473 U.S., at 628, 105 S.Ct., at 3354.

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26, 111 S.Ct. 1647, 1652, 114 L.Ed.2d 26 (1991). The application of the FAA was then expanded to include even contracts of adhesion in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). As such the FAA allows businesses to eliminate the ability of local boards, or other agencies with special skill and knowledge in resolving disputes, to be divested of that power. For example, the FAA would allow a landlord with an arbitration clause to deny a tenant the ability to participate in proceedings created by a municipality to resolve disputes over housing or security deposits and require the dispute be resolved by arbitration. This often requires parties pay costs of the arbitrator, and thus essentially denies low income individuals any practical means of resolving their disputes with their landlords.

This Court has stated that "[w]hile the interpretation of an arbitration agreement is generally a matter of state law, . . . the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681, 130 S.Ct. 1758, 1773, 176 L.Ed.2d 605 (2010) (quotations and citations omitted). However, with arbitration becoming mandatory as part of con-

tracts of adhesion, it is no longer a matter of consent and the basic precept of arbitration no longer exists. The Masseaus thus seek this Court to either overturn *Southland Corp* and find the Federal Arbitration Act is a rule of procedure, or in the alternative, hold that the Federal Arbitration Act cannot be a mandatory provision of a contract and that an individual has the right to reject, or strike, an arbitration provision from a contract at the time of signing and still be able to accept the remainder of the benefits under the contract, as otherwise the imposition of the FAA is unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be granted.

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