No. 25-925

IN THE

Supreme Court of the United States

PETER MALKIN, *et al.*,

Petitioners,

v.

VIRGINIA SHASHA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

REPLY BRIEF

KEARA A. BERGIN
Counsel of Record
THOMAS E.L. DEWEY
DAVID S. PEGNO
DANIEL SHTERNFELD
DEWEY PEGNO & KRAMARSKY LLP
777 Third Avenue, 29th Floor
New York, NY 10017
(212) 943-9000
kbergin@dpklaw.com

Attorneys for Petitioners

392144

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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PRELIMINARY STATEMENT

The arbitration panel in this case ignored settled, workaday contract principles retroactively to nullify consideration that was indisputably provided for valuable contractual interests. Petitioners challenged that irrational decision under the doctrine of manifest disregard of the law, and the New York courts rubber-stamped it, holding that there was "a barely colorable justification for the outcome reached." (Pet. App. B at 4a). This Court should grant certiorari to resolve the open issue of whether manifest disregard of the law still exists. That question has dogged arbitration practitioners and the courts for nearly two decades as they have repeatedly implored this Court to decide it. The Court should then rule that manifest disregard is still viable, give it the substance that it has always lacked, and reverse the decisions below.

None of the peripheral issues that the opponents to certiorari (the "Shasha Parties") raise preclude review of this important issue. The lower New York courts perforce decided the issue by applying manifest disregard and this Court thus has jurisdiction over this question; the email service issue does not apply to one Respondent, thus presenting a "clean" application of manifest disregard as to that Respondent; the issues presented are legal based on undisputed facts, and therefore do not involve "manifest disregard of the facts"; and a long and pronounced circuit split exists notwithstanding the Shasha Parties' perplexing contention to the contrary.

Furthermore, the Court should grant certiorari to determine whether under the Federal Arbitration Act ("FAA") parties who consent to email service during

an arbitration implicitly consent to such service in post-arbitration court proceedings. That is a question of significant practical importance to practitioners and the courts and has divided the lower federal courts. Once again, none of the purported impediments to this Court's determination of that issue raised in the opposition apply. The issue was squarely raised and decided in the lower New York state courts, and it involved no factual determinations that would prevent review.

ARGUMENT

I. THIS COURT HAS JURISDICTION

None of the arguments that the Shasha Parties make against this Court's jurisdiction has any merit.

First, the Shasha Parties assert that jurisdiction under 28 U.S.C. § 1257 is limited to constitutional questions decided by state courts. (Opp. at 5). This is of course not the case, and this Court has jurisdiction where a state court decision "rested on federal law." *Hawaii v. Off. of Hawaiian Affs.*, 556 U.S. 163, 172 (2009) (state court decision "rested" on Congressional joint resolution). Here, the questions presented involve interpretation of the FAA, a federal statute, and the Court has jurisdiction.

Second, the New York Court of Appeals' denial of discretionary review rendered the Appellate Division's decision a "[f]inal judgment[] or decree[] rendered by the highest court of a State in which a decision could be had" under section 1257, and thus the Court has jurisdiction.

The cases that the Shasha Parties cite for the proposition that the Court "should refrain from deciding questions not presented or decided to the highest court of the state" (Opp. at 6), concern questions that were not raised in the state courts *at all*. *E.g., State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945) (issue "was not raised below"). Here, by contrast, the questions presented were raised and decided in both the Appellate Division (with respect to the email service issue, at all times, and with respect to manifest disregard, in the motion to reargue or for leave to appeal) and in the leave motion to the Court of Appeals. Section 1257 requires no more. Indeed, the Appellate Division had to decide that manifest disregard still existed to apply it as it did. This Court has jurisdiction to review a decision of a state intermediate appellate court where discretionary review is declined by the state's highest court. *E.g., Gallick v. Baltimore & O. R. Co.*, 372 U.S. 108, 109 (1963) (reviewing Ohio intermediate appellate court's decision after the Ohio Supreme Court declined further appellate review).[1]

1. The Shasha Parties make an unfortunate, irrelevant citation to the Second Circuit's dismissal of the federal vacatur action to argue that "[n]or does the petition raise a federal question." (Opp. at 7) (*citing Malkin v. Shasha,* Case No. 21-2675, 2023 WL 3012381 (2d Cir. Apr. 20, 2023)). In making that ruling, the Second Circuit applied *Badgerow v. Walters,* 596 U.S. 1 (2022), which requires that a federal court petition have an independent jurisdictional basis. That jurisdictional ruling has nothing to do with whether the issues in *this Petition* raise significant federal issues, which they do.

II. THE ISSUES ARE RIPE FOR RESOLUTION AND THERE ARE NO OBSTACLES TO THIS COURT'S REVIEW OF THEM

The Shasha Parties fail to show that this case presents a poor vehicle to address the important questions presented.

A. The Issue Decided Below Was Manifest Disregard of the Law, Not Facts

The Shasha Parties assert that "[t]he Appellate Division found the Malkin Parties were actually arguing that the arbitrators *manifestly disregarded the facts*" rather than the law. (Opp. at 12 (emphasis in original); *see also* 15-16). Not so.

First, the Appellate Division specifically stated that the issue Petitioners raised was "manifest disregard of the law." (Pet. App. B at 4a). In support of its ruling concerning consideration, which is the subject of this Petition, the Appellate Division cited to the portion of a case that applied manifest disregard. (*Id.* (*citing Matter of Daesang Corp. v. NutraSweet Co.*, 167 A.D.3d 1, 19 (App. Div. 2018) (detailed analysis of manifest disregard))). The Appellate Division *did* reject a *different* argument, not raised on this Petition, concerning defamation claims based on "manifest disregard of the facts" (*id.* at 5a), which it nowhere mentioned in its ruling on consideration. Thus, the Appellate Division clearly applied manifest disregard of the law to the consideration issue.

Second, despite the Shasha Parties' arguments (Opp. at 16), there was no dispute that there was consideration for the overrides. The Panel recognized that Malkin

Holdings gave up fees to which it was otherwise entitled: "In return for signing the Consent Agreement, the Supervisor assigned a *pro rata* portion of the Supervisor's potential incentive compensation due to reductions in rent for the Master Lease, from 1992 to 2076." (Pet. App. G at 81a). The Panel made no reference to this statement being Petitioners' factual assertion as it did elsewhere (*see, e.g.,* Pet. App. G at 95a, 181a, 184a), the Shasha Parties' assertion (Opp. at 16) notwithstanding.

Moreover, the documentary evidence established that the assignment took place. (Pet. App. L at 250 (quoting consent solicitation as stating "Approving Participants receive each year a pro rata portion of additional compensation to which Wien & Malkin is otherwise entitled")). The Shasha Parties' irrelevant riff on what certain witnesses testified regarding what the overrides were *called* (as opposed to what they *were*) (Opp. at 16) does not change the fact a fee reduction was given in exchange for them. And, these parties admitted as much below. (Respondents' Brief in Opposition to First Department Appeal, dated January 2, 2025, at 21 ("Fee payments began in 2009 and were in effect for five years" as "part of the voluntary compensation program.")).

Accordingly, the consideration issue in the Petition squarely raises manifest disregard of the law.

B. The Petition Properly Presents the Manifest Disregard and Email Service Issues for This Court's Review

The Shasha Parties' contention that the manifest disregard issue "is not ripe" because Petitioners' vacatur

petition was not timely served on those parties (Opp. at 8), puts the cart before the horse. This Petition also raises the service by email issue, and this Court should hold that the vacatur petition was timely served on them as well. Having done so, it can properly turn to the manifest disregard issue.

Moreover, the Shasha Parties elide that there is no timeliness issue as to one party, Danielle P. Barger, Trustee of the Edelman Family Trust, because she consented to timely email service. (*See* Opp. at *ii*). Accordingly, even if, contrary to fact, the timeliness issue were an impediment to this Court's review as to the Shasha Parties, the issue is cleanly raised as to Ms. Barger.

Nor is there any impediment to the Court deciding the email service issue. Petitioners squarely raised it below and the Appellate Division squarely decided it. (Pet. App. B at 3a). It does not raise a fact question (*see* Opp. at 11) since there was never any contention that counsel for the Shasha Parties expressly consented to service of the vacatur petition. Instead, the email service issue raises the purely legal question of whether under the FAA, as the Appellate Division put it, "counsel's acceptance of email service of filings in the arbitration and other proceedings . . . establish[ed] consent to email service of the federal petition." (Pet. App. at 4a, *citing Dalla-Longa v. Magnetar Cap. LLC*, 33 F.4th 693, 695 (2d Cir 2022)). Thus, the Appellate Division made the legal ruling that only express consent to service was permitted, and rejected Petitioners' argument that the FAA, as a legal matter, permits implicit consent to service of post-arbitration petitions by email as other courts have held, *see Day & Zimmerman, Inc. v. SOC-SMG, Inc.*, No. 11-6008, 2012 WL 5232180, at *4 (E.D. Pa. Oct. 22, 2012).

The Shasha Parties' contention that Respondents "waived" the email service issue by filing affidavits of service (Opp. at 7) likewise presents no obstacle to this Court's review. When deciding whether a previous inconsistent position bars a later contention, courts should consider whether the parties' current contention is "clearly inconsistent" with the earlier position, whether the party "has success in a prior proceeding" based on the earlier contention, and if the change in position will "impose an unfair detriment on the opposing party." *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001). The Shasha Parties' contention flunks each of these elements, and by definition does not meet the "success" prong.

Nor do the Shasha Parties meet the more general standard of waiver, which "'is the intentional relinquishment or abandonment of a known right.'" *Morgan v. Sundance, Inc.*, 596 U.S. 411, 417 (2022) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). The filing of affidavits concerning when *personal* service was effected (Pet. App. F at 38a), has nothing to do with whether *email* service was effected. Petitioners raised the email service issue throughout the lower court proceedings and no court ever ruled that the contention was waived. Indeed, no court even discussed the issue, likely because the Shasha Parties only raise this argument for the first time here, which is itself a forfeiture of their waiver contention. *Olano*, 507 U.S. at 731.[2]

2. Though not part of the record here, the Shasha Parties note that Petitioners paid the underlying money judgment after the New York Court of Appeals denied leave to appeal and the trial court denied a further stay of that judgment. (Opp. at 4). That payment was under a full reservation of rights to recover those amounts if there was subsequent relief from that judgment.

III. THE QUESTIONS RAISED IN THE PETITION ARE IMPORTANT AND FAR-REACHING

A. A Split Persists as to the Existence of Manifest Disregard, and Clarity Is Needed in How It Is to Be Applied

The Shasha Parties' assertion that *Hall Street Assocs. LLC v. Mattel, Inc.*, 552 U.S. 576 (2008), "did settle th[e] question" whether manifest disregard still exists and compels a conclusion that it does not (Opp. at 6-7) would come as a surprise to the four circuits that have ruled that manifest disregard is still viable. (*See* Petition at 17-19). Indeed, such a conclusion would be news to Justice Alito, who authored *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, which noted that the issue was open. 559 U.S. 662, 672 n.3 (2010) ("We do not decide whether manifest disregard survives our decision in *Hall Street* . . . ") (internal quotation marks omitted).

The fact of the matter is that there is a sharp 4-4 Circuit split on whether manifest disregard survived *Hall Street*. The lower courts would benefit greatly from this Court's resolution of this issue. The Shasha Parties simply ignore the mountain of case law and commentary cited in the Petition that demonstrates this point, and the calls from courts and commentators for this Court to

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See Bank of U.S. v. Bank of Washington, 31 U.S. 8, 17 (1832) ("On the reversal of the judgment, the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party"); *Polipo v. Sanders*, 170 Misc. 2d 833, 835 (Sup. Ct. 1996), *aff'd*, 245 A.D.2d 2 (N.Y. App. Div. 1997) (judgment creditor obligated to pay restitution of partial satisfaction of judgment after reversal).

address the issue. *See* Petition 19-21 (*citing, inter alia, GS Equities, Ltd. v. Blair Ryan Co.,* No. 08 CIV. 1581, 2011 WL 3278909, at *3 n.1 (S.D.N.Y. July 26, 2011) ("the lower courts would appreciate guidance from the Supreme Court on this question."); Michael H. LeRoy, *Are Arbitrators Above the Law? The "Manifest Disregard of the Law" Standard*, 52 B.C. L. Rev. 137, 186 (2011) ("[t]he split among federal circuit courts is creating inconsistency in the law of arbitration.")).

Indeed, after the Court declined to hear *Zeidman v. Lindell Mgmt. LLC*, 145 F.4th 820 (8th Cir. 2025), *cert. denied* No. 25-504, 2026 WL 79757 (Jan. 12, 2026), which as noted in the Petition (at 18 n.9) sought to raise the manifest disregard issue, additional commentators lamented that the Court did not take the opportunity to decide the issue.[3] Moreover, the law in the Eighth Circuit is in flux after that denial of certiorari. One court in that Circuit recently applied manifest disregard, citing *Zeidman*. *Elec. Contr. Co. v. K.C. Page & Assocs.*, No. 4:25-CV-3127, 2026 WL 810047, at **2-3 (D. Neb. Mar. 24, 2026). That was so even though as noted in the Petition (at 18 n.9), the Eighth Circuit previously very clearly rejected manifest disregard post-*Hall Street.* So the confusion caused by this open issue continues to deepen, and the split not only exists between Circuits, but within at least one of them.

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3. https://www.law360.com/articles/2446292/manifest-disregard-remains-source-of-consternation-for-now (quoting several practitioners, including one stating this is "one of the most important issues in arbitration — which quite simply is, what are the grounds for challenging an arbitration award. That comes up every time someone loses").

Similarly, the Shasha Parties do not address, let alone dispute, the decades' worth of calls for the Court to define the parameters of the doctrine, and the evident confusion about how to apply the doctrine from the varying outcomes that lower courts have reached. (Petition at 21-25). This case is an ideal vehicle for the Court to hear these important issues, which bear directly on the fair and equal administration of the law.

It cannot be disputed that consideration is a bedrock, basic, settled contractual principle. *See Hamer v. Sidway*, 124 N.Y. 538 (1891) (discussing the requirement of consideration). As noted, it was likewise undisputed that Malkin Holdings gave up fees to which it was otherwise entitled in exchange for the overrides. (*See* Petition at 10 & n.2). Notwithstanding those facts, the Panel ruled that there was no consideration because of a statement in a securities filing years later. This straightforward, clean issue presents the Court with the ideal opportunity to apply and explain the manifest disregard doctrine—and, Petitioners submit, hold that this illogical ruling cannot survive even the most deferential review.

B. The Email Service Issue Is an Important One That Has Divided the Lower Federal Courts

The Shasha Parties repeat their mistaken argument that "New York's highest court has not addressed the issue raised here" in opposing certiorari on the issue of email service in post-arbitration proceedings. (Opp. at 9). It fares no better here. The Appellate Division expressly considered and rejected Petitioners' arguments, and thus this Court has jurisdiction over this issue after the New York Court of Appeals denied discretionary review. *Gallick*, 372 U.S. at 109.

The Shasha Parties further contend certiorari is inappropriate because the email service issue involves "fact based findings." (Opp. at 11). Not so. It was uncontested both that counsel for the Shasha Parties consented to email service in the arbitration and that their counsel did not expressly consent to email service of the vacatur petition. There were no facts for the lower courts to find.

The Shasha Parties assert certiorari should be denied because "there is no evidence of a split in the circuits" on this issue. (Opp. at 10). Petitioners have never contended that there was a *circuit* split, but rather that there is a significant split among lower federal courts, including one circuit (the Second) and multiple other district courts. (Petition at 27-28). *Compare Dalla-Longa v. Magnetar Cap. LLC*, 33 F.4th 693 (2d Cir. 2022) (not accepting email service) *with Corinthian Colls., Inc. v. McCague*, No. 09 C 4899, 2010 WL 918074, at *2 (N.D. Ill. Mar. 4, 2010) (permitting email service). These considerations fully warrant this Court's attention to this issue. *See* Sup. Ct. R. 10(c) (factors in deciding whether to grant certiorari include whether "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court").[4] Nor do the Shasha Parties point to any further development of the law or percolation that will benefit the Court's consideration of this issue, and none is apparent.

4. The Shasha Parties cite other circuit cases that they assert stand on the side of *Dalla-Longa* on the email service issue. (Opp. at 10). Petitioners cited one of those cases. (Petition at 28 (*citing O'Neal Constructors, LLC v. DRT Am., LLC*, 991 F.3d 1376, 1380-81 (11th Cir. 2021))). The other three cited cases have nothing to do with email service, two of them having been decided in 1983 and 1986, before email itself was in common usage.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
April 10, 2026

Respectfully submitted,

Keara A. Bergin
Counsel of Record
Thomas E.L. Dewey
David S. Pegno
Daniel Shternfeld
Dewey Pegno & Kramarsky LLP
777 Third Avenue, 29th Floor
New York, NY 10017
(212) 943-9000
kbergin@dpklaw.com

Attorneys for Petitioners