No. 14-211

In The

Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

v.

BG GROUP PLC,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court issue an advisory opinion as to whether "manifest disregard of the law" is a valid ground for vacatur of an arbitral award under the Federal Arbitration Act?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, respondent states that it has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

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REASONS FOR DENYING THE PETITION

The petition for certiorari presents for review a question the resolution of which cannot affect the outcome of the present case. Neither the district court nor the court of appeals decided the question presented by the petition. Instead, both courts assumed that manifest disregard of the law is a basis for vacatur under the Federal Arbitration Act (FAA), and, applying that assumed ground, held that the arbitral tribunal in this case did not manifestly disregard the law. The court of appeals' decision would therefore stand regardless of how the question presented by the petition is resolved. That is the very definition of an advisory opinion, and the petition for certiorari should be denied on that basis alone.

Further, Argentina does not suggest that the court of appeals applied the wrong legal standard in assuming the existence of the manifest disregard doctrine (which would not be a reason to grant certiorari in any event). Rather, Argentina argues that the court below erred in its application of that standard to the facts of this case. The Court does not grant certiorari to resolve disputes of fact.

Finally, because the lower courts assumed the existence of the manifest disregard doctrine, the question presented by the petition has not been decided below. This case thus presents a poor vehicle for the resolution of the question presented.

The Court should therefore deny review.

I. THE PETITION ASKS THE COURT TO RENDER AN ADVISORY OPINION.

Argentina states in its petition for certiorari that "a proper application of the manifest disregard standard in this case would call for vacating the Award," Pet. 21-22, and that "a proper application of the FAA demands that the Award be set aside." *Id.* at 23. However, the question presented by the petition does not relate to the circuit court's *application* of the manifest disregard standard, but rather to "*whether* a federal court with jurisdiction to vacate an arbitral award under the Federal Arbitration Act may do so on the ground that the arbitrators acted with manifest disregard of the law." *Id*. at i (emphasis added).[1]

[1] This Court has explained that it will reach only the precise issue raised in the question presented. *See Yee v. City of Escondido*, 503 U.S. 519, 536 (1992) ("To use our resources most efficiently, we must grant certiorari only in those cases that will enable us to resolve particularly important questions. Were we routinely to entertain questions not presented in the petition for certiorari, much of this efficiency would vanish. . . ."); *see also* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp*., 510 U.S. 27, 34 (1993). The circuit court's *application* of the manifest disregard standard is not "fairly included" in the question presented by the petition. A question is "fairly comprised within" the question presented when that question is a "predicate to intelligent resolution of the question on which we granted certiorari." *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980). Here, the question of whether the manifest disregard standard was properly applied by the circuit court is not a predicate to the resolution of the question presented; it is, rather, "distinct, both

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Resolution of that question would not affect the circuit court's decision, which assumed the existence of the manifest disregard standard, applied it, and concluded that the arbitral tribunal did not manifestly disregard the applicable law. Accordingly, if the question presented by the petition is answered in the affirmative, the decision below stands because it assumed, *arguendo*, the existence of the manifest disregard doctrine; if the question presented by the petition is answered in the negative, Argentina loses any basis for challenging the court of appeals' finding on the manifest disregard question, and the decision below likewise holds.

Where, as here, resolution of the conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari should be denied. *See, e.g.,* Eugene Gressman et al., *Supreme Court Practice* 248 (9th ed. 2007). This is the case even when a conflict is clear. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the [question presented] can await a day when the issue is posed less abstractly.").

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analytically and factually" from the question presented and thus not "fairly included" within it. *Izumi*, 510 U.S. at 31-32.

The Court's commitment to this practice is based on the bedrock principle that the "judicial power" of the Supreme Court is to be exercised to "render dispositive judgments." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (quotation omitted). As the Court has previously noted, "[w]ere we to pass upon the purely artificial and hypothetical issue tendered by the petition for certiorari we would not only in effect be rendering an advisory opinion but also lending ourselves to an unjustifiable intrusion upon the time of this Court." *Conway v. Cal. Adult Auth.*, 396 U.S. 107, 110 (1969) (dismissing writ as improvidently granted); *see also Medellín v. Dretke*, 544 U.S. 660, 664 (2005) (dismissing writ as improvidently granted because of "several threshold issues that could independently preclude federal habeas relief for Medellín, and thus render advisory or academic our consideration of the questions presented"); *Montana v. Imlay*, 506 U.S. 5, 6 (1992) (dismissing writ as improvidently granted because "no matter which party might prevail in this Court, the respondent's term of imprisonment will be the same. . . . Because it is not the business of this Court to render [advisory] opinions, it wisely decides to dismiss a petition that should not have been granted in the first place."); *Zacchini v. Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 566 (1977) ("[O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion. . . .").

II. THE COURT OF APPEALS' APPLICATION OF THE MANIFEST DISREGARD STANDARD TO THE FACTS OF THIS CASE DOES NOT WARRANT THIS COURT'S REVIEW.

Even if the question presented by the petition could be construed as also challenging the court of appeals' application of the manifest disregard standard to the facts of this case, that would not be an appropriate question on which to grant certiorari.

Argentina does not argue that the lower courts misstated the doctrine of manifest disregard when they assumed its existence. Indeed, Argentina's description of the manifest disregard standard – "willful refusal to apply the law the arbitrators are required by the arbitration agreement to apply," Pet. 17 – is functionally the same as the standard employed by the district court, Pet. App. 134a (defining manifest disregard as when "(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" (quotation omitted)), and the court of appeals, *id*. 359a (finding that Argentina "failed to show either that the [doctrine identified by Argentina] clearly applied or that the arbitral panel refused to apply it or ignored it").

Instead, Argentina asserts only that the court of appeals applied a "perfunctory" review, failed to apply the manifest disregard standard "in earnest," and

was "wrong" in its conclusion that the arbitral tribunal did not, in this case, manifestly disregard the applicable law. Pet. 18, 22. Certiorari is not appropriate where petitions allege mere "erroneous factual findings" or "the misapplication of a properly stated rule of law." Sup. Ct. R. 10; *see also* Gressman et al., *Supreme Court Practice* at 351 ("[E]rror correction . . . is outside the mainstream of the Court's functions [and] . . . not among the 'compelling reasons' . . . that govern the grant of certiorari.").

III. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED BY THE PETITION.

Finally, even if the question presented by the petition merited this Court's attention in the abstract, this case would be an inappropriate vehicle in which to decide it.

The district court addressed the question presented in one footnote, and assumed, without deciding, that manifest disregard was a valid ground for vacatur under the FAA. Pet. App. 117a n.7 ("[T]he Court need not conclusively determine whether precedent regarding the 'manifest disregard of the law' standard has continued viability in light of *Hall Street Associates*, for Argentina's claims nonetheless fail under that standard. . . ."). The court of appeals did not analyze the question at all, and likewise assumed the existence of the doctrine. *Id*. at 359a ("Assuming the manifest-disregard-of-law standard

applies, Argentina failed to show either that the 'state of necessity' doctrine clearly applied or that the arbitral panel refused to apply it or ignored it."). As a consequence, the question presented by the petition was not decided by the lower courts. This Court rarely addresses a legal question without the benefit of a prior decision on the issue. *See, e.g.*, *Yee*, 503 U.S. at 538 ("Prudence . . . dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question."); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551 n.3 (1990). No basis supports taking such an exceptional course here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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