NO. 23-_____

In the Supreme Court of the United States

AFFORDABLE CARE, L.L.C.,

Petitioner,

v.

RAELINE K. MCINTYRE, DMD and
RAELINE K. MCINTYRE, DMD, P.C.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

9 U.S.C. § 10(a)(2) provides that an arbitration award may be vacated where there was evident partiality by the arbitrators. The Ninth, Seventh, Eighth, Tenth, and Eleventh Circuits have adopted the standard that there must exist a "reasonable impression" of possible bias to vacate an arbitration award. While the Second, First, Third, Fourth, and Sixth Circuits have adopted the even stricter standard that a "reasonable person would have to conclude" there was bias. The Fifth Circuit has crafted its own strict standard akin to "actual bias."

In this case, the arbitrator failed to disclose his complete relationship with opposing counsel, including their status as co-faculty members at Duke Law, along with other connections.

The Questions Presented Are:

1. Where an arbitrator and opposing counsel fail to disclose significant connections, does a party just have to show the "reasonable impression" of bias to have the award vacated as the Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have held, or must the party make a more concrete showing as required by the First, Second, Third, Fourth, Fifth, and Sixth Circuits?

2. Should the party seeking vacatur at least be permitted to conduct limited discovery into the undisclosed connections prior to the award being confirmed?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- Affordable Care, L.L.C.

Respondents and Defendants-Appellees below

- Raeline K. McIntyre, DMD
- Raeline K. McIntyre, DMD, P.C.

CORPORATE DISCLOSURE STATEMENT

Affordable Care, LLC is a limited liability company with its principal place of business in Morrisville, North Carolina. Affordable Care, LLC's membership interests are 100% owned by ACI Intermediate Holdings, Inc. No public company owns 10% or more of Affordable Care, LLC or any parent company.

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit

No. 22-60245

Affordable Care, L.L.C., *Plaintiff-Appellant* v.
Raeline K. McIntyre, DMD and Raeline K. McIntyre, DMD, P.C., *Defendants-Appellees*

Date of Final Judgment: May 24, 2023

Date of Rehearing Denial: June 22, 2023

U.S. District Court, Southern District of Mississippi

No. 1:21-cv-85-TBM-RPM

Affordable Care, LLC, *Plaintiff* v.
Raeline K. McIntyre, DMD; Raeline K. McIntyre, DMD, P.C., *Defendants*.

Date of Final Judgment: March 31, 2022

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PETITION FOR A WRIT OF CERTIORARI

Affordable Care, LLC respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion is not reported but available at 2023 U.S. App. LEXIS 12837 (5th Cir. May 24, 2023) and is reproduced in the Appendix ("App.") at 1a. The District Court's opinion is not reported but available at 2022 U.S. Dist. LEXIS 59598 (S.D. Miss. Mar. 31, 2022) and is reproduced at App.11a.

JURISDICTION

The Fifth Circuit entered judgment on Petitioner's appeal on May 24, 2023. The Fifth Circuit denied Petitioner's timely petition for rehearing on June 22, 2023. (App.51a). Pursuant to Article III, Section 2, Clause 2 of the United States Constitution and 28 U.S.C. § 1254(1), this Court has appellate jurisdiction over this Petition because it seeks review of a final judgment from the United States Court of Appeals for the Fifth Circuit.

STATUTORY PROVISIONS INVOLVED

9 U.S.C. § 10

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

INTRODUCTION

This Court has held that it "can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias."[1] However, there is a substantial split between the circuits regarding how to interpret this Court's precedent and the standard applied to evident partiality cases.

In this matter, Arbitrator Charles Holton and counsel for Respondents Raeline K. McIntyre, DMD ("Dr. McIntyre") and Raeline K. McIntyre, DMD, P.C. (the "Practice") (collectively, "Respondents") failed to disclose significant, long-standing, and on-going connections between them. The conflicts were significant and included joint representation between Arbitrator Holton and counsel for Respondents, counsel for Respondents' law firm representing Arbitrator Holton's employer as counsel for many years, and Arbitrator Holton and counsel for Respondents', Paul Sun's, on-going employment as co-faculty members at Duke University while the underlying arbitration remained pending. Based on this undisclosed, material conflict and the bias of the arbitrator, Petitioner Affordable Care, LLC ("Petitioner" or "Affordable") sought to have the arbitration award vacated as it was made in violation of the Federal Arbitration Act 9 U.S.C. § 10(a)(1-4) and the rules of the American Arbitration Association ("AAA"). The District Court and Fifth Circuit improper-

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[1] *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 148 (1968).

ly applied a strict standard and denied Affordable's request to vacate the award. The lower courts also denied Affordable's request to conduct limited discovery to determine the full extent of connections between the arbitrator and opposing counsel.

The issues presented in this case warrant review by this Court because (1) there is a circuit split regarding evident partiality in arbitrations and, (2) as a popular and widely encouraged alternative to litigation, the rules and integrity of arbitration must be safeguarded, specifically the right to a hearing before a neutral, impartial arbitrator must be protected above all else.

STATEMENT OF THE CASE

A. The Arbitration Arose Out of a Services Contract Between a Dental Support Organization and a Dental Practice.

The underlying arbitration concerned an Agreement to Provide Management Services to a Dental Practice ("MSA") dated November 1, 2002 ("the MSA") between Affordable and the Practice. Dr. McIntyre is a dentist licensed to practice dentistry in the State of Mississippi and owns the Practice.

Affordable is a dental-support organization that provides "non-clinical business services" to affiliated dentists. ROA.312. Every dentist affiliated with Affordable, including the Respondents, enters into a master services agreement that sets forth the rights and obligations of the parties. ROA.313.

From November 1, 2002 until February 24, 2020, Respondents were affiliated with Affordable. ROA.283.

On September 18, 2019, the Practice sent a "Notice of Termination" to Affordable with a proposed disaffiliation date of November 4, 2019. ROA.1201-1202. This was the first time the Practice had raised any concerns or issues with Affordable. ROA.318. ROA.335. The Practice's "cause" for termination was an alleged breach of the MSA. ROA.1201-1202. The Practice alleged that its voluntary move into a new building owned by an entity owned by Dr. McIntyre and her husband in 2014 resulted in a breach of the MSA because no new sublease was executed related to the new premises. ROA.333. Dr. McIntyre admitted that the lack of a sublease was not an issue until she was reading the MSA to try and find a basis for ending the relationship with Affordable. ROA.975. Respondents later provided a second basis for termination, alleging breaches which Affordable cured. ROA.785-786.

Affordable responded to the Notice of Termination on September 27, 2019, taking the position that the MSA "remain in full force and effect. . . . " ROA.1205. Dr. McIntyre did not respond to Affordable's letter. ROA.339. Rather, the Practice continued to operate as normal until February 24, 2020. ROA.339.

On November 1, 2019, Affordable filed an arbitration demand pursuant to Section VI(D) of the Parties' MSA seeking to confirm the validity and enforcement of the MSA. ROA.30.

B. Respondents Unlawfully Terminated the MSA.

On January 17, 2020, a preliminary hearing was held in the Arbitration. The last day to amend the pleadings was February 17, 2020, and February 24, 2020 was designated as the witness disclosure date. ROA.1226.

On February 17, 2020, Dr. McIntyre created a new practice entity, Raeline McIntyre, DMD, PLLC (the "Raeline PLLC"). ROA.972. On February 24, 2020, Respondents sent notice that they were "immediately" terminating the MSA. ROA.1206. Notably, the February 24, 2020 termination letter did not reference the September termination letters and relied on a new provision of the MSA as a basis for its termination. ROA.1206.

February 24, 2020 was also the date of the last deposit into the Practice's checking account made by Dr. McIntyre. ROA.629. All patient revenue after February 24, 2020 was directed to Raeline PLLC's new checking account. ROA.629-630. All assets of the Practice were transferred to Raeline PLLC without any written agreement or consideration. ROA.623. Dr. McIntyre made clear that these "intentional" actions were done in order to divert patients and revenue from the Practice to Raeline PLLC. ROA.973. Raeline PLLC continued to offer economy denture services and offered the same services to former Practice patients. ROA.632. ROA.642. Respondents' abrupt breach of the MSA, via their improper termination attempt, and funneling of business away from the Practice damaged Affordable, which was no longer benefitting from the MSA and to which the Practice was indebted.

C. Just Seven Weeks Before Arbitration, Respondents Retained Additional Counsel, and Sought a Continuance.

Affordable was granted leave to amend its arbitration demand after Respondents repudiated the MSA. ROA.286 at ¶ 30. Arbitrator Holton issued a Report of Preliminary Hearing and Scheduling Order on March 5, 2020. ROA.286 at ¶ 30. ROA.1226-1229. The original date of the arbitration hearing was September 8-10, 2020, and it remained the same after the amendment. ROA.286 at ¶ 30. ROA.1226-1229.

On June 4, 2020, Respondents filed their Answer to Affordable's amended arbitration demand. ROA.286 at ¶ 31. ROA.1347-1381. ***The Answer did not include any counterclaims***. ROA.286 at ¶ 31. ROA.1347-1381. At the time of the Answer, Respondents were represented by the Balch & Bingham LLP law firm. ROA.286 at ¶ 31. ROA.1347-1381. All written discovery and depositions in the Arbitration were handled by the Balch & Bingham LLP firm. ROA.286 at ¶ 31.

Due to Covid-19, the arbitrator that the Parties had originally selected withdrew from the matter in June 2020. ROA.287 at ¶ 32. Through the AAA process, Arbitrator Holton was selected as the replacement. ROA.287 at ¶ 33. Per Rule 17(a) of the AAA Commercial Rules, Arbitrator Holton, the Parties, and counsel are required to fully disclose their relationships:

> Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias

> or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.[2]

ROA.287 at ¶ 33. Arbitrator Holton completed the General Arbitrator Oath Form on June 19, 2020. ROA.287 at ¶ 34. ROA.158-160. At the time, Arbitrator Holton reported no conflicts with the parties or counsel involved in the arbitration. ROA.287 at ¶ 34.

On July 22, 2020, a new law firm, Ellis & Winters LLP (the "Winters Firm") entered an appearance on behalf of Respondents in the arbitration. ROA.287 at ¶ 35. This surprise enrollment came after Arbitrator Holton's appointment as arbitrator, more than 10 months into the arbitration proceeding, after the close of discovery, and just 7 weeks before the scheduled arbitration hearing. The Winters Firm did not disclose any conflicts or connections to Arbitrator Holton. ROA.287 at ¶ 35.

On July 23, 2020, Arbitrator Holton provided the following supplemental disclosure of his conflict:

> I would disclose that I know Mr. Sun and probably have had one or more cases with him or against him during my career, but nothing in the last 10 years. **I do not believe that I have seen or communicated with him in over 10 years. His involvement would not affect my judgment in the case**.

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[2] AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, R. 17(a) (2013).

ROA.287 at ¶ 36 (emphasis added). ROA.211-212. The supplemental disclosure references Mr. Paul Sun, a partner at the Winters Firm ("Attorney Sun"), who had just enrolled as counsel for Respondents.

On August 7, 2020, Respondents notified Arbitrator Holton that Attorney Sun of the Winters Firm had been in an accident on July 31, 2020 and was recovering from his injuries. ROA.287 at ¶ 37. As of the date of the accident, Attorney Sun had been involved in the arbitration for just 8 days and had billed only 7.7 hours. ROA.287 at ¶ 37.

On August 18, 2020, Respondents advised Arbitrator Holton that Attorney Sun was unable to participate in the September hearing and moved for a continuance. ROA.288 at ¶ 38. On August 25, 2020, despite Attorney Sun's limited involvement in the arbitration, Arbitrator Holton granted Respondents' motion to continue the long-scheduled arbitration hearing. ROA.288 at ¶ 38.

Ultimately, the hearing was held in December 2020. ROA.288 at ¶ 39. As Respondents had not asserted any counterclaims, at the hearing, Respondents did not present any exhibits or evidence relating to attorney fees incurred. ROA.288 at ¶ 39. After the first post-hearing oral argument, however, Arbitrator Holton *sua sponte* indicated to the Respondents that they could submit evidence of their attorney fees—despite no counterclaims having been asserted and no law providing Respondents with the right to attorneys' fees. ROA.288 at ¶ 39. Following two oral arguments held after the hearing and the submission of proposed final decisions by both parties, Arbitrator Holton's Decision was issued on March 19, 2021. ROA.288 at ¶ 39. (App.53a).

D. Arbitrator Holton's Decision Adopted Respondents' Brief Virtually Verbatim.

Arbitrator Holton requested that the Parties submit proposed final decisions in advance of his ruling. ROA.289 at ¶ 44. A comparison of the arbitrator's decision and Respondents' proposed final decision makes obvious that Arbitrator Holton did not conduct an independent review of the hearing transcript and law, as he adopted, nearly word-for-word, Respondents' proposed final decision. ROA.289 at ¶ 45. ROA.1892-2138. A list of the clear factual misstatements that Arbitrator Holton adopted unquestioningly from the Respondents' briefing are in the record. ROA.2139-2144.

Arbitrator Holton granted judgment in favor of Respondents on all of Affordable's claims. ROA.289 at ¶ 46. In addition, despite the fact that the Respondents asserted no counterclaims, never presented evidence of attorney fees during the hearing, and there is no basis under applicable North Carolina law for such an award, Arbitrator Holton ordered Affordable to pay Respondents' attorney fees in the amount of $379,168.00 and costs in the amount of $14,430.75. ROA.289 at ¶ 46. Notably the majority of fees awarded by Arbitrator Holton were accrued by the Ellis Winters firm in the short period of time after Attorney Sun's enrollment in the matter.

As to the merits, Arbitrator Holton incredibly held that Respondents somehow terminated the MSA on September 18, 2019 despite the undisputed fact that Respondents complied with the MSA for another six months. ROA.103. As to the grounds, Arbitrator Holton found that Respondents had cause to terminate the MSA pursuant to Sections V(B)(2) and V(B)(9). ROA.

104-111. As to waiver, Arbitrator Holton found no evidence of waiver; wholly failing to cite or reference the federal court's summary judgment decision in a closely related litigation. ROA.111-116.

E. Arbitrator Holton and Attorney Sun Failed to Disclose Their Close Connections.

Arbitrator Holton is a full-time law professor for Duke University School of Law. ROA.290 at ¶ 48. Prior to joining Duke Law, Arbitrator Holton worked in private practice, where he represented Duke University in many lawsuits from 1983 through 2005. ROA. 290 at ¶ 48. Arbitrator Holton's published lawsuits for Duke University confirm that he jointly represented, at times, both Duke University and professors of Duke University. ROA.290 at ¶ 48.

During the course of the arbitration, Attorney Sun was also a member of Duke Law's faculty. ROA.290 at ¶ 52. ROA.2154-2158. Specifically, Attorney Sun was a faculty member for Duke Law in its "Winter Session 2021." ROA.291 at ¶ 53. Indeed, the Fall 2013 Duke Law Magazine states that Attorney Sun regularly teaches a class during the winter session. ROA.291 at ¶ 54. Attorney Sun and the other faculty members taught classes during the weekends of Friday, February 19–Sunday, February 21, and Friday, March 12–Sunday, March 14. ROA.291 at ¶ 53. All of these sessions took place *during* the briefing and oral arguments portion of the arbitration. ROA.291 at ¶ 53. Registration for Winter session opened on December 11, 2020. ROA.291 at ¶ 54. Accordingly, Attorney Sun was awarded a faculty position *prior* to the Arbitration hearing. ROA.291 at ¶ 54. Despite the fact that Attorney Sun and Arbitrator Holton were both Duke Law faculty members during some or all of the arbi-

tration, at no point did Attorney Sun, Respondents, the Winters Firm, or Arbitrator Holton disclose this connection. ROA.291 at ¶ 54.

In addition to his professor duties, Arbitrator Holton is the Director of Duke Law School's Civil Justice Clinic. ROA.290 at ¶ 49. The Civil Justice Clinic is a partnership between Duke Law and the Legal Aid of North Carolina. ROA.290 at ¶ 49. ROA.2150-2153. Arbitrator Holton is also the former chair of the board of directors for Legal Aid of North Carolina. ROA.290 at ¶ 49. Thus, Arbitrator Holton has a strong connection to both Duke's Civil Justice Clinic and Legal Aid of North Carolina.

The Winters Firm is also involved with Legal Aid of North Carolina. The Winters Firm touts its involvement with Legal Aid of North Carolina as one of its firm's seven *pro bono* activities. ROA.290 at ¶ 50. ROA.2145-2146. This mutual collaboration between Arbitrator Holton and the Winters Firm with the Legal Aid of North Carolina was never disclosed.

Finally, Attorney Sun and the Winters Firm took over representation of Duke University following Arbitrator Holton's long representation. ROA.290 at ¶ 51. Attorney Sun's experience section of his firm's website includes multiple cases representing Duke University. ROA.290 at ¶ 51. ROA.2147-2149. Neither Attorney Sun nor Arbitrator Holton disclosed their shared business relationship as representatives of Duke University.

F. Affordable Independently Learned of the Conflict After Arbitrator Holton Issued His Decision.

The Arbitration Award was issued on March 19, 2021, but not circulated to the Parties until March 22, 2021. ROA.291 at ¶ 55. Affordable learned of the contacts between Arbitrator Holton, Attorney Sun, and the Winters Firm on March 20, 2021 through independent research into North Carolina law for another lawsuit. ROA.291 at ¶ 56. Upon learning of the conflict, Affordable asked the AAA whether it had a process to review Arbitrator Holton's conflict in this matter. ROA.291 at ¶ 57. The AAA verified that neither Arbitrator Holton nor the Winters Firm disclosed their connections during the Arbitration, but the AAA does not have a process to review conflicts after a final decision has been issued. ROA.291 at ¶ 57. Despite being asked by Affordable's counsel why the conflict was not disclosed, to date, Attorney Sun has not provided a reason for failing to disclose the conflict with Arbitrator Holton.

G. Affordable Was Denied Both Vacatur and Discovery.

On June 17, 2021, Affordable filed both its Motion to Vacate the Arbitration Award and a Motion to Conduct Limited Discovery in the United States District Court for the Southern District of Mississippi. Affordable urged the District Court to allow it to conduct limited discovery into the connections between Arbitrator Holton and the Winters Firm. However, on March 31, 2022, the District Court denied both Affordable's Motion for Vacatur and Motion to Conduct Limited Discovery.

H. Procedural History

On March 19, 2021, the Arbitration Decision was rendered. (App.53a).

On March 22, 2021, the Arbitration Decision was circulated.

On March 24, 2021, Affordable filed its Complaint to Vacate the Arbitration Award in the District Court. The District Court's jurisdiction was based upon 28 U.S.C. § 1332, 9 U.S.C. § 10(a)(4), and 28 U.S.C. § 1391.

On June 17, 2021, Affordable filed its Motion to Vacate the Arbitration Award and to Remand to the American Arbitration Association for a Hearing on Petitioner's Damage. Also on June 17, 2021, Affordable filed its Motion to Conduct Limited Discovery.

On June 17, 2021, Respondents filed their Application to Confirm the Arbitration Award.

On March 31, 2022, the District Court issued its Judgment along with its Memorandum Opinion and Order. (App.11a). The District Court denied Petitioner's Motion to Vacate and Petitioner's Motion for Discovery. The District Court Granted Defendants' Motion to Confirm. The District Court dismissed the civil action with prejudice.

On April 22, 2022, Affordable timely filed its Notice of Appeal with the Fifth Circuit. On May 24, 2023, the Fifth Circuit filed its judgment denying Affordable's appeal. (App.1a). On June 22, 2023, the Fifth Circuit filed its order denying Affordable's motion for rehearing. (App.51a). This petition for certiorari is being filed within 90 days of June 22, 2023.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE SPLIT ABOUT THE STANDARD TO APPLY IN EVIDENT PARTIALITY CASES.

The seminal case from this Court on the issue of arbitral disclosure and evident partiality is *Commonwealth Coatings Corp. v. Continental Casualty Co*. In *Commonwealth*, this Court reasoned:

> This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.[3]

This Court held, "We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias."[4]

Since *Commonwealth* was decided in 1968, circuit courts have diverged regarding the standard to apply in cases where an arbitral tribunal has been accused of

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[3] *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968)150.

[4] *Id*. at 149 (emphasis added).

bias. The Ninth, Seventh, Eighth, Tenth, and Eleventh Circuits have adopted the standard that there must exist a "reasonable impression" of possible bias to vacate an arbitration award.[5] In these circuits, the impression of bias, if well supported, is enough to warrant vacatur. While the Second, First, Third, Fourth, and Sixth Circuits[6] have adopted the even stricter standard requiring that a "reasonable person would have to conclude" there was bias.[7] There are varying standards even within the two factions. For example, the Eleventh Circuit has specifically rejected the Ninth Circuit's ruling that an arbitrator's con-

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[5] The Seventh, Tenth, and Eleventh Circuits have noted that the "reasonable impression" of bias must be supported by evidence that is direct, definite, and capable of demonstration. *See Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994); *Olson v. Merrill Lynch, Pierce, Fenner & Smith*, 51 F.3d 157, 159-160 (8th Cir. 1995); *Tamari v. Bache Halsey Stuart, Inc.*, 619 F.2d 1196, 1200 (7th Cir. 1980)*;Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1150 (10th Cir. 1982); *Torres v. Morgan Stanley Smith Barney, LLC*, 839 F. App'x 328, 331 (11th Cir. 2020).

[6] The D.C. Circuit has not clearly articulated either standard, but it would appear to lean toward the standard of the Second Circuit. *See Thian Lok Tio v. Washington Hosp. Center*, 753 F.Supp.2d 9, 17 (2010) (a party alleging "evident partiality bears a heavy burden to establish specific facts that indicate improper motives on the part of an arbitrator.") (internal quotations omitted); *see also Ray v. Chafetz*, 236 F.Supp.3d 66 (D.D.C. 2017).

[7] *Morelite Const. Corp. v. New York City Dist. Council*, 748 F.2d 79, 84 (2d Cir. 1984); *JCI Communs., Inc. v. IBEW, Local 103*, 324 F.3d 42 (1st Cir. 2003);*Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 253 (3d Cir. 2013);*ANR Coal Co. v. Cogentrix of North Carolina, Inc.*, 173 F.3d 493, 500 (4th Cir. 1999); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 626 (6th Cir. 2002).

structive knowledge can demonstrate a reasonable impression of bias, adopting a stricter standard.[8]

The Fifth Circuit appears to have adopted the strictest standard of all, requiring a "concrete, not speculative impression of bias."[9] In this case, the Fifth Circuit noted that the standard for establishing evident partiality is "stern" and required Affordable to show "a concrete, not speculative impression of bias" that "stem[s] from a significant," not trivial, "compromising connection."[10] The Fifth Circuit further required Affordable to "produce specific facts from which a reasonable person would *have* to conclude that the arbitrator was partial to" Respondents.[11] A Fifth Circuit dissent in another case accuses the Fifth Circuit of substituting a requirement of "actual bias," as opposed to the impression of bias.[12]

As stated plainly by the Eighth Circuit, there is an "absence of consensus on the meaning of 'evident partiality'" under the FAA.[13] Circuit splits such as this one undermine the uniformity, consistency, and predictability of the court system. Uniformity in the application of law and justice has always been para-

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[8] *See Gianelli Money Purchase Plan and Trust v. ADM Inv. Services, Inc.*, 146 F.3d 1309 (11th Cir. 1998).

[9] *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 283, 286 (5th Cir. 2007); *see also OOGC Am., L.L.C. v. Chesapeake Expl., L.L.C.*, 975 F.3d 449, 453 (5th Cir. 2020).

[10] App.4a. (internal citations omitted).

[11] App.4a. (internal citations omitted)(italics in original).

[12] *See Positive Software*, 476 F.3d at 287 (dissenting opinion).

[13] *Montez v. Prudential Sec.*, 260 F.3d 980, 983 (8th Cir. 2001).

mount in the United States judicial system.[14] It is an unacceptable inequity that the impression of an arbitrator's bias based on the arbitrator's constructive knowledge is enough to vacate an arbitration award in the Ninth Circuit but not in other circuits. This inequity must be eliminated, and the interests of fairness and blind justice weigh in favor of a less strict standard, encouraging complete and forthcoming disclosures in arbitrations.

II. FULL DISCLOSURE PROTECTS THE INTEGRITY OF THE ARBITRATION PROCESS.

While there is no perceivable way the effectiveness of the arbitration process will be hampered by arbitrators disclosing to parties any dealings that might create an impression of possible bias,[15] the effectiveness of the arbitration process is greatly undermined when arbitrators fail to disclose such dealings. As noted by the Ninth Circuit:

> In a nondisclosure case, the integrity of the process by which arbitrators are chosen is

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[14] *See* THE FEDERALIST NO. 80 (Alexander Hamilton),

> As to the second point, it is impossible, by any argument or comment, to make it clearer than it is in itself. If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.

[15] *Commonwealth*, 393 U.S. at 149.

> at issue. Showing a "reasonable impression of partiality" is sufficient in a nondisclosure case because the policy of section 10(a)(2) instructs that the parties should choose their arbitrators intelligently. *Commonwealth Coatings*, 393 U.S. at 151 (White, J., concurring). The parties can choose their arbitrators intelligently only when facts showing potential partiality are disclosed. Whether the arbitrators' decision itself is faulty is not necessarily relevant.[16]

It is impossible for parties to intelligently choose arbitrators when arbitrators fail to disclose their connections to the parties.

Full and complete disclosures by arbitrators are even more important than disclosures by judges and are a cornerstone of arbitration. As eloquently explained by Judge Wiener of the Fifth Circuit in a poignant dissent:

> I refer in general to the key differences between arbitration under the FAA and litigation in federal court; I refer in particular to one difference that is of prime significance in this case, viz., the disparate ways that the decision maker—an Article III judge on the one hand and an arbitrator on the other–is selected, and the unique role of the potential arbitrator's unredacted disclosure of his relationships with the parties and their counsel to ensure selection of an impartial arbitrator. **These general and particular differ-**

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16 *Schmitz*, 20 F.3d 1043 at 1047.

ences underscore why such full and fair disclosure by a potential arbitrator of *every* conceivable relationship with a party or counsel, however slight, is a prerequisite. No relationship with a party or a lawyer is too minimal to warrant its *disclosure*, even if, in the end, it might be deemed to be too minimal to warrant *disqualification*. Such an evaluation by the potential arbitrator, and any withholding of information based on it, are simply not calls that he is authorized to make. . . .

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The trial judge who is to hear a case is almost never "selected" by or agreed on by the parties. . . . In stark contrast, it is the parties to arbitration themselves who have sole responsibility for the selection of their arbitrator or arbitrators.

It follows then that because they alone do the selecting, the parties to arbitration must be able to depend almost entirely on the potential arbitrator's good faith, sensitivity, understanding, and compliance with the rules of disclosure by candidates for the post. And, even then, appellate relief is an *avis rara* when it comes to questions of bias, prejudice, or non-disclosure in arbitration. Consequently, except for such background checks that the parties might be able to conduct, **the only shield available to the parties against favoritism, prejudice, and bias is full and frank disclosure, "up front,"**

> **by each potential arbitrator**. And even that is far less efficacious than the safeguards that are afforded to parties in litigation through the elaborate rules of professional conduct, disqualification, and recusal, and the body of law and procedure thereon developed in the crucible of the very formal and extensive judicial system.
>
> . . . [B]ecause parties to arbitration have virtually none of the protections against prejudice and bias (or the appearances thereof) that are automatically and routinely afforded to litigants in federal court, **the single arrow remaining in the otherwise-empty quiver of protection afforded to parties in arbitration—full, unredacted disclosure of every prior relationship—must be rigorously adhered to and strenuously enforced**. Indeed, it is these very differences in the *disclosure* standards—not *disqualification* standards—to which judges are held *vis-a-vis* those to which arbitrators are held that demand unyielding fealty to both the letter and spirit of the disclosure requirement: **With such a slim safeguard against bias or the appearance of bias in arbitration, the reason is obvious why such mandated disclosure of *every* relationship, without self-abridgment by the potential arbitrator, must be assiduously enforced.**[17]

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17 *Positive Software*, 476 F.3d 278, 286 (5th Cir. 2007) (J. Wiener concurring in J. Reavley's dissent) (italics in original, bold added).

In fact, Rule 17(a) of the AAA Commercial Rules mandates broad disclosure, not just from the arbitrator, but also from the parties and their representatives:

> Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.[18]

As recognized by the Judge Wiener and the AAA, the integrity of the arbitration process is protected by requiring arbitrators to make broad disclosures of any connections that could give the *impression* of bias, not just connections that constitute *actual* bias. Broad disclosure requirements with steep repercussions for failures to disclose are arbitration participants' sole safeguard against biased and unfair rulings. When an arbitrator fails to make such disclosures, the resulting award must be vacated to protect the integrity of the system.[19]

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[18] AAA Commercial Arbitration Rules and Mediation Procedures, R. 17(a) (2013).

[19] The "[i]nability to rely on the impartiality of the arbitrator frustrates the federal policy favoring arbitration and jeopardizes its continued use as an alternative method of dispute resolution." *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 337 F.Supp.2d 862, 880 (N.D. Tex. 2004) (citing *Commonwealth*, 393 U.S. at 150). It is "most important that the parties have complete confidence in the arbitrator's impartiality." *Positive Software*,

III. ARBITRATOR HOLTON'S NONDISCLOSURE WARRANTED VACATUR.

Arbitrator Holton and the Winters Firm failed to disclose facts that give the impression of bias and partiality warranting vacatur of the arbitration award under the standard propounded by this Court in *Commonwealth*.[20]

Initially, Arbitrator Holton and Attorney Sun of the Winters Firm are co-faculty of the same small law school. Arbitrator Holton is a full-time law professor for Duke University School of Law and, during the arbitration, Attorney Sun was reappointed as a winter term faculty member of Duke University School of Law. ROA.290 at ¶ 48. ROA.291 at ¶ 53. Duke University School of Law is not a large law school: per its website, the class of 2024 has a total of only 282 students.[21] Attorney Sun and Arbitrator Holton were co-faculty members of this law school during the hearing, and Attorney Sun was presenting oral argument before his co-faculty member, Arbitrator Holton. ROA.291 at ¶ 53. Despite the two sharing the role of being faculty of the same law school, their relationship was never disclosed.

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337 F.Supp.2d at 880.

[20] Notably, while Arbitrator Holton did make a disclosure, the disclosure was incomplete and misleading, failing to mention the many serious connections outlined in this section. Arbitrator Holton's incomplete disclosure should have resulted in the award being vacated for fraud under 9 U.S.C. § 10(a)(1), as well as evident partiality, another argument that was improperly ignored by the lowers courts.

[21] *Meet the JD Class of 2024*, Duke Law (September 9, 2021), https://law.duke.edu/news/meet-jd-class-2024.

Arbitrator Holton's relationship with the Winters Firm through his capacity as the Director of Duke University School of Law's Civil Justice Clinic was also substantial and not disclosed. Duke University School of Law's Civil Justice Clinic is a partnership between Duke University School of Law and the Legal Aid of North Carolina. ROA.290 at ¶ 49. ROA.2150-2153. As the Clinic Director, Arbitrator Holton is listed as the main point of contact for the Clinic.[22] The Clinic's administration is very small, listing only Arbitrator Holton and one other faculty member.[23] Both Arbitrator Holton's Duke biography and the Clinic's website state that Arbitrator Holton and the Clinic work with outside counsel through Legal Aid of North Carolina.[24] Arbitrator Holton's Duke biography touts that Arbitrator Holton is the former chairman of the board for the Legal Aid of North Carolina. ROA.290 at ¶ 49.

Respondents' counsel, the Winters Firm, touts its involvement with Legal Aid of North Carolina, one of the firm's only seven pro bono activities. ROA.290 at ¶ 50. ROA.2145-2146. Thus, Arbitrator Holton and the Winters Firm are directly connected through their mutual support of Legal Aid of North Carolina. Even further, Arbitrator Holton directly benefits from the Winters Firm providing pro bono representation to his organization. Arbitrator Holton has both a personal and professional interest in maintaining a

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22 *Clinics and Externships: Civil Justice Clinic*, Duke Law, https://law.duke.edu/civiljustice (last visited September 6, 2023).

23 *Id.*

24 *Id.*; *Directory: Charles R. Holton*, Duke Law, https://law.duke.edu/fac/holton (last visited September 6, 2023).

positive relationship with the Winters Firm, which provides *pro bono* assistance to the organization he directs. It is indisputable that this relationship creates the impression of bias, yet the relationship was never disclosed.

The Winters Firm and Attorney Sun also represent Duke University, where Arbitrator Holton is a professor and Clinic Director, creating a potential attorney-client relationship between the parties.[25] The Winters Firm represented Duke University in litigation as recently as June 2021, showing that the relationship was ongoing throughout the arbitration.[26] The attorney-client relationship between the Winters Firm and Arbitrator Holton's employer, Duke University, alone presents a conflict in the form of an attorney-client relationship between the Winters Firm and Arbitrator Holton. Thus, the relationship between the Winters Firm, Attorney Sun, and Arbitrator Holton extends to significant areas affecting educational, legal, and business relationships.

These significant relationships were never disclosed. Thus, Affordable did not have complete information when it agreed to the appointment of Arbitrator Holton and was not able to consent to Arbitrator Holton intelligently. Arbitrator Holton's undisclosed

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[25] Per the North Carolina State Bar, "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." N.C. Rule Prof. Conduct 1.13. Duke University is an organization represented by Attorney Sun which also employs Arbitrator Holton.

[26] *See Carlos Abreu Viltres v. Duke University*, Durham County, General Court of Justice, Superior Court Division, File No. 21 CVS 1869.

connections to Attorney Sun and the Winters Firm not only create the impression of bias, but they would cause any reasonable person to conclude there was bias. Thus, under both the Ninth and Second Circuit approaches to evident partiality, Affordable demonstrated that the award should have been vacated under 9 U.S.C. § 10(a)(2).[27] However, the Fifth Circuit improperly applied an even stricter standard, bordering on "actual bias."

The Fifth Circuit required Affordable to show "a concrete, not speculative impression of bias" that "stem[s] from a significant," not trivial, "compromising connection."[28] The Fifth Circuit further required Affordable to "produce specific facts from which a reasonable person would *have* to conclude that the arbitrator was partial to" Respondents.[29] The Fifth Circuit's "stern" standard applied to Affordable undermines the policy behind 9 U.S.C. § 10(a)(2), as explained by this Court in *Commonwealth*. The Fifth Circuit stripped Affordable and arbitration participants like Affordable of their one safeguard against biased arbitrations—the requirement of complete and forthright disclosure from the arbitrator of all connections that give the impression of partiality. This safeguard must be restored, uniformity through the circuits must be established, and Respondent's arbitration award must be vacated.

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[27] Arbitrator Holton's nondisclosures and misleading partial disclosure also constitute fraud, warranting vacatur under 9 U.S.C. § 10(a)(1).

[28] App.4a. (internal citations omitted).

[29] App.4a. (internal citations omitted)(italics in original).

IV. LITIGANTS SHOULD AT LEAST BE ALLOWED LIMITED DISCOVERY WHEN THE SPECTER OF BIAS AND EVIDENT PARTIALITY EXISTS.

Discovery in vacatur and confirmation proceedings is authorized by Federal Rule of Civil Procedure 81(a)(6)(B) and is proper when the movant requests information that is relevant and necessary to a showing of an arbitrator's conflict or bias and raises issues that implicate factual questions that cannot be reliably resolved without some further disclosure.[30] Challenges to arbitration awards, "may require evidentiary hearings outside the scope of the pleadings and arbitration record," recognizing that "[s]uch matters as misconduct or bias of the arbitrators cannot be gauged on the face of the arbitral record alone."[31] Simply put, "[t]he [discovery] inquiry is an entirely practical one, and is necessarily keyed to the specific issues raised by the party challenging the award and the degree to which those issues implicated factual questions that cannot be reliably resolved without some further disclosure."[32]

The Fifth Circuit thus permits discovery if the requesting party makes an initial showing of the need for the additional facts to support vacatur. Discovery is permissible when the discovery is "reasonable," "the requesting party provides more than 'vague assertions that additional discovery will produce

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[30] *See* Fed. R. Civ. Pro. 81(a)(6)(B); *Vantage Deepwater Co. v. Petrobras Am., Inc.*, 966 F.3d 361, 372 (5th Cir. 2020).

[31] *Legion Ins. Co. v. Ins. Gen. Agency, Inc.*, 822 F.2d 541, 542-43 (5th Cir. 1987).

[32] *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 364 F.3d 274, 305 (5th Cir. 2004).

needed, but unspecified facts,'" and "the court determines that more information is needed before the court can resolve the disputed issues."[33]

In this case, Affordable was not seeking a second bite at the proverbial apple. Affordable requested discovery which neither replicated the substance of the Arbitration nor attacked the merits of the Award. Rather, the record presented glaring red flags and proof of undisclosed facts that give the impression of impartiality and bias and indicate a flawed arbitration process, which denied Affordable fundamental fairness.

The district court possesses "broad discretion in discovery matters."[34] The "rules of discovery are to be accorded a broad and liberal treatment."[35] The Federal Rules of Civil Procedure enable parties to obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering (1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties' relative access to relevant information, (4) the parties' resources, (5) the importance of the discovery in resolving the issues,

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[33] *Pershing LLC v. Kiebach*, No. 14-2549, 2017 WL 604033, at *3 (E.D. La. Feb. 15, 2017) (citing *Karaha Bodas*, 364 F.3d at 304-05).

[34] *Estate of Boles v. Nat'l Heritage Realty, Inc.*, 2010 U.S. Dist. LEXIS 51604 (N.D. Miss. May 20, 2010) (citing *Bisby v. Garza*, 342 Fed. Appx. 969, 973 (5th Cir. 2009) (citing *Scott v. Monsanto Co.*, 868 F.2d 786, 793 (5th Cir. 1989)); *see also Wyatt v. Kaplan*, 686 F.2d 276, 283 (5th Cir. 1982)).

[35] *EEOC v. HWCC-Tunica, Inc.*, 2008 U.S. Dist. LEXIS 85830, *5 (N.D. Miss. Oct. 6, 2008) (citing *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)).

and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit.[36]

Affordable demonstrated that discovery post-arbitration was warranted in this matter. Arbitrator Holton had contacts and connections with Attorney Sun and his partnership, the Winters Firm, that were not disclosed to Affordable as required. Those contacts were of the type and degree that would warrant disclosure and give the impression of bias and partiality. Affordable discovered the connections after the conclusion of the arbitration using information publicly available, but the full extent of the connections between Arbitrator Holton and the Winters Firm remained unknown, meriting discovery.

Despite deriding Affordable's "internet research" and holding that the facts presented by Affordable were not "concrete" evidence of bias, the lower courts did not allow Affordable to conduct any discovery to identify more concrete evidence and facts to meet their stern standard.[37] The lower courts assigned Affordable a Sisyphean task, requiring Affordable to produce concrete evidence of bias but denying Affordable the means to acquire such evidence.

When a party makes a baseline showing of undisclosed bias and partiality, as here, that party must be allowed to conduct limited discovery to determine the full extent of the bias and identify concrete evidence sufficient to meet the stern vacatur standard.

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[36] *See* Fed. R. Civ. P. 26(b)(2)(C).

[37] App.4a.

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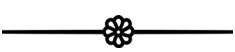
The right to an unbiased, impartial arbitrator is a cornerstone of the arbitral process. Full and complete disclosure by potential arbitrators of all connections that could possibly give the impression of bias or partiality is paramount in protecting the integrity of arbitrations.

The circuits have split regarding the standard applied in nondisclosure cases to determine if there is evident partiality to warrant vacatur of an arbitration award. Here, Arbitrator Holton's failure to disclose his significant connections to the Winters Firm and Attorney Sun demonstrated evident partiality and should have warranted vacatur of the arbitration award. Alternatively, Affordable at least should have been allowed to conduct limited discovery to determine the full extent of the undisclosed relationship.



CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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September 20, 2023