ORIGINAL

No. 23-730

IN THE

Supreme Court of the United States

ANNA PEZHMAN,

Petitioner,

—v.—

BLOOMINGDALES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Federal Law pre-empt New York's mandatory equitable doctrine of seeking court intervention in mid-arbitration proceedings to remedy arbitral impartiality?
2. What is evident partiality?
3. Is the implementation of a mandatory quota system vis-à-vis hiring Blacks, in response solely to the Black Lives Movement demonstrations, violative of the Civil Rights Act 1964, Title VII?

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PETITION FOR WRIT OF CERTIORARI

Anna Pezhman, Esq., respectfully petitions for writ of certiorari to review the judgment of the Appellate Division, First Department in this case.

OPINIONS BELOW

The New York Court of Appeals denied petitioner's motion to appeal on October 19, 2023. 14a. The Appellate Division, First Department refused to grant petitioner's petition to vacate the arbitration award on April 27, 2023, affirming the Lower Court decision that also rejected petitioner's move to vacate the arbitration award on October 4, 2022. 1a-13a.

JURISDICTION

This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution of the United States and Title VII of the Civil Rights Act 1964.

STATEMENT OF THE CASE

Bloomingdales, Inc., hired petitioner, a licensed attorney, to be a lingerie stylist at its Soho location in Manhattan, New York in 2017. Petitioner received stellar reviews, accolades, bonuses and peer praise up until she registered a complaint regarding the hostile work environment at Bloomingdales, Soho based on upper management's double standards and the reckless disregard of the safety of White employees. After the Covid quarantine at Bloomingdales Soho,

management, Laura Saio, gave a seminar on the Black Lives Matter demonstrations and informed staff that if a client evinced any hostility toward an employee based on race to call management straightaway. At the same seminar, Laura Saio enunciated a twenty percent remedy—that Bloomingdales Soho would increase its employment of Blacks by twenty percent. Later, during the time of the demonstrations, two Black men attempted to harass petitioner's co-worker; petitioner tried to intervene and the two Black men accosted plaintiff, calling her a "Karen," a racial slur for a White woman. Petitioner sought out the help of security and management, Courtney Saavedra, yet neither responded. Thereafter, petitioner made a grievance and then faced a campaign of harassment in the form of disciplinary write-ups, a four-week suspension, one day suspensions, threats of suspension and dismissal.

Petitioner, then, instituted the arbitration process provided by Macy's, which owns Bloomingdales. Respondent moved for summary judgment during the arbitration to which petitioner submitted a Brief, bolstered by arguments and data detailing the pervasive discrimination against White employees, including the implementation of the twenty percent quota vis-à-vis hiring Blacks in response to the Black Lives Matter Movement.

During the arbitration, the arbitrator Theo Cheng, evinced evident partiality, to which petitioner objected but did not seek court intervention in the form of removal of the arbitrator since the Federal Arbitration Act, and thus Second Circuit law, governed the arbitration accord. New York state law, via equitable doctrines and statutes, force a petitioner to seek redress, owing to partiality, via court intervention, quite opposite to the federal standard. The Appellate

Division, First Department in its Decision and Order, dated April 27, 2023, clearly stated that the FAA applied but applied the state standard, penalizing petitioner for failing to seek removal of the arbitrator in state court.

The Appellate Division, First Department refused to vacate the award on April 27, 2023 as did the lower court on Octobe 4, 2022. The New York Court of Appeals denied petitioner's motion to appeal on October 19, 2023.

REASONS FOR GRANTING THE PETITION

A plethora of cogent reasons undergird the dire need for the United States Supreme Court to grant certiorari.

I. The Equitable State Doctrine of Seeking Redress in mid-Arbitration Proceedings, Defeats the Purpose of Arbitration and Should Be Pre-Empted by Federal Law Since State Law Conflicts with Federal Law, in Contravention of the Supremacy Clause of the Constitution.

A juxtaposition of New York state common law and federal law reveals different standards that contradict one another vis-à-vis addressing evident partiality once an arbitration proceeding has commenced. New York has implemented an equitable doctrine whereby a petitioner must seek removal of the arbitrator based on a low standard—the appearance of bias. *In re Mays-Carr,* 43 A.D.3d 1439, 1440 (4th Dept. 2007); *Bronx-Lebanon Hosp. Ctr. v. Signature Med. Mgmt. Grp. L.L.C.*, 775 N.Y.2d 279, 280 (1st Dept. 2004*); Matter of Lipschutz*, 304 N.Y. 58, 64 (1952). Which is, a heightened form of objection via visits and expenses

to the court to remove the arbitrator forms the requisite when treating arbitral partiality. (A gallop through many New York cases, pertaining to arbitration in general, reveals that participation in the arbitration will defeat any attempt by a petitioner to vacate an award *even if objections were made.* See *Matter of State Insurance Fund*, 225 A.D.2d 1068, 1069 (4th Dept. 1996). See *Peters v. Florentino*, 117 A.D.3d 232 (1st Dept. 2014). See *Elul Diamonds Co. Ltd. v. Z Kor Diamonds, Inc.*, 50 A.D.3d 293, 294 (1st Dept. 2008).).

Federal law, however, has a different standard—diametrically opposite to New York. Federal law demands that a petitioner continue with the proceedings, without court intervention, just objections. The Second Circuit has unequivocally ruled that an affront on the qualifications of an arbitrator can only be made after the rendition of the award. *Avail, Inc. v. Ryder Sys.*, 110 F.3d 892, 895 (2d Cir. 1997). Indeed, "it is well established that a district court cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and rendition of an award." *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 n. 4 (2d Cir. 1980). Still, under federal law, as long as petitioners object before the issuance of an award, they will be able to vacate based on evident partiality after the rendition of an award. *Bernstein Seawell & Kove v. Bosarge*, 813 F.2d 726, 732 (5th Cir. 1987). A petitioner, according to the Second Circuit, would need to muster a higher level of bias, a reasonable person standard. See *Morelite v. N.Y.C. Dist. Council Carpenters*, 748 F.2d 79, 84 (2d Cir. 1984). Federal law dovetails with the objective of arbitration—"to permit a just and expeditious result with a minimum of judicial interference." *Marc Rich &*

Co. A.G. v. Transmarine Seaways Corp. of Monrovia, 443 F. Supp. 386 (S.D.N.Y. 1978).

In a different note, the FAA, Federal Arbitration Act, speaks for itself respecting Congressional intent. Since Congress can indicate pre-emptive intent in the structure and purpose of a statute, a look at the structure of the FAA reveals a vacuum when addressing the removal of an arbitrator once arbitration has commenced. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973). In interpreting the FAA, "Congress's clear intent [with the FAA was] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *John Hancock Life Ins. Co. (U.S.A.) v. Emp'rs Reassurance Corp.*, '15-cv-13626 at 11 (D.Mass. Jun. 21, 2016). Seeking court intervention nullifies the objective of an expedited process since a claimant can seek court intervention many times, searching for the most suitable arbitrator. Moreover, the requisite of seeking removal of an arbitrator in mid-proceedings eviscerates the objective of arbitration as being less costly—especially since judges have the proclivity to award costs, disbursements, attorney's fees, and reproduction to the losing party. It, further, discourages a petitioner from finding other portals of prosecuting a case, i.e. summoning a witness to appear for the actual hearing when arbitrators abuse their discretion by disallowing extra discovery—or when other obstacles appear regarding the prosecution of the case.

Still, as in the instant case, the different routes to addressing evident partiality based on Federal and New York standards further complicates the resolution of a controversy given to arbitration. Which is, Federal law pre-empts State law since the two conflict with one another and the dictates of both

cannot be reconciled. See *Gade v. Nat'l Solid Wastes Management, Ass'n*, 505 U.S. 88, 98 (1992). The Appellate Division, First Department, shamefully and carelessly, imposed the state standard—removing the arbitrator—when the contract clearly indicated the FAA applied, or federal standard. That is, the Appellate Court has imposed a rule that mandates a petitioner to seek removal of an arbitrator, at a lower level of bias, in contravention of the parties' contract, which explicitly states the FAA applies, or demands that the party simply object and seek resolution of partiality after arbitration with a higher level of bias. The Court has, hence, nullified the contractual expectations of the parties' arbitration accord and essentially nullified the objective of arbitration.

II. The Time Has Come for the United States Supreme Court to Reconcile the Conflicts Between the Different Circuits vis-à-vis the Meaning of Evident Partiality, Since, as Demonstrated above, Federal Law Should Pre-Empt State Law Not Only to Resuscitate the Objective of Arbitration but to Create Harmony Between the Different Circuits—in a Time Where Arbitration Has Become a Staple and Complexity in Societal Interactions.

There exists a difference amongst the Circuits respecting the standard for evident partiality. The Ninth and Eleventh Circuits have demanded a lower threshold called "reasonable impression." See *Monster Energy Co. v. City Beverages LLC*, 940 F.3d 1130, 1135 (9th Cir. 2019) and *Gianelli Money Purchase Plan and Trust v. ADM Inv. Services, Inc.*, 146 F.3d 1309, 1312-13 (11th Cir. 1998). By contrast, the Second, First, Third, Fourth, Fifth and Sixth Circuits have adopted

a more exacting standard, a "reasonable person" one. *Morelite v. N.Y.C. Dist. Council Carpenters*, 748 F.2d 79, 84 (2d Cir. 1984). See *Andersons, Inc. v. Horton Farms, Inc.,* 166 F.3d 308, 329 (6th Cir. 1988) where the "[t]he alleged partiality must be direct, definite, and capable of demonstration." Still, the party asserting bias "must establish specific facts that indicate improper motives on the part of the arbitrator." *Peoples Sec. Life Ins. v. Monumental Life Ins.*, 991 F.2d 141, 146 (4th Cir. 1993).

The difference in standards of evident partiality can further complicate an arbitration in view of the different standards, Federal and State, in terms of the procedure for contesting bias as described above. Arbitration, accordingly, can be mired down in a complexity of different standards vis-a-vis Federal and State and vis-a-vis different circuits, which could result in a facile indifference to the complexity, as exemplified in the instant case. The Appellate Court applied the wrong standard regarding the procedural treatment of arbitral partiality and the wrong level of bias. Again, the Court vitiated the dictates of the arbitration agreement and the objective of arbitration as being an expedited and less costly process.

III. Ever Since The George Floyd Incident Occurred, Which Catapulted the Black Lives Matter Movement Into the Forefront of the Media, Numerous Corporations Have Sought to Find Ways to Remedy the Racism Showcased by the Incident at the Corporate Front. One Way, as Bloomingdales Soho Has Shown, Illegally Leans Upon a Hiring Quota Which Contravenes Title VII of The Civil Rights Act of 1964. It Not Only Has Violated The Act but Has Created Incendiary Work Environments, Fraught with Racial Tensions of a Different Scope.

The quota system, alone, without reference to its response to the Black Lives Movement violates Title VII of the Civil Rights Act of 1964. It violates the Act given the industry at issue, in the instant case, and the times. Which is, an evolving reading of the Civil Rights Act of 1964, Title VII, cannot be made without bringing to the forefront the purpose of the Act during the time in which it came into fruition. The Supreme Court of the United States in *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) summed it up: Congress' objective rested upon providing equal opportunity and removing obstacles that gave preference to White employees over Black ones. A review of Census Bureau data demonstrates that Blacks possess an overrepresentation in retail: In a recent Census Bureau article, dated September 8, 2020, D. Augustus Anderson, in "Retail Jobs Among the Most Common Occupations," documented that "Blacks and Hispanics were overrepresented in retail work." Given the lack of barriers, for Blacks, in terms of obtaining retail jobs, a quota imperative, in this case—upping the number of Blacks by twenty percent—does not serve the Civil Rights Act of 1964,

Title VII, but serves instead to create impediments for the White employee. It obstructs the White employee not only by jettisoning the qualified White applicant but by creating a work environment inflamed by favoritism of one race merely by reason of a movement, at times violent, unrelated to employment.

The quota system, employed by Bloomingdales Soho, violates the Civil Rights Act of 1964, Title VII, because the ambit of minority should pronounce, more distinctly, the White claimant. Which is, the "traditional" minority has gone beyond Blacks and Hispanics, now, given the industry at issue. See *Mele v. United States Department of Justice*, 395 F. Supp. 592, 597 (D.N.J. 1975) where the Court rejected the White claimant since Whites dominated the industry at issue. As described in the article above, Blacks and Hispanics dominate the retail industry now. Failing to give recourse to the White claimant violates Title VII of the Civil Rights Act but more so, in this case, since Bloomingdales implemented a quota system not to remedy inequal opportunity but to remedy police brutality. Hence, the White employee loses an opportunity by paying twice, one for a work environment already ameliorated vis-à-vis racial equality and two for police brutality. Moreover, a tenuous link exists between remedying police brutality and augmenting the number of Blacks in an industry as such. The reflexive response, on behalf of corporations, to movements, as BLM, cannot be a quota system without further justification—data or study.

CONCLUSION

The Supreme Court of the United States should grant this petition.

Dated December 29, 2023

Respectfully submitted by

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