No. 24-1145

IN THE

Supreme Court of the United States

LIVE NATION ENTERTAINMENT, INC., *et al.*,

Petitioners,

v.

SKOT HECKMAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NEW ERA ADR, INC. IN SUPPORT OF PETITION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

INTERESTS OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. RECENT LEGAL TRENDS, INCLUDING THE PROLIFERATION OF MASS ARBITRATION, HAVE NECESSITATED INNOVATIONS IN ARBITRATION TO ENABLE PARTIES TO HAVE THEIR DISPUTES HEARD 3

II. THE NINTH CIRCUIT MISCONSTRUED NEW ERA AND ITS MASS ARBITRATION RULES, WHICH ARE DESIGNED TO HAVE CLAIMS ACTUALLY CONSIDERED ON THEIR MERITS 8

CONCLUSION 18

TABLE OF CITED AUTHORITIES

Page(s)

Cases:

Abadilla v. Uber Techs., Inc.,
No. 3:18-cv-07343-EMC (N.D. Cal. Dec. 5, 2018) 4

Armendariz v. Foundation Health Psychcare Servs., Inc.,
24 Cal.4th 83 (Cal. 2000) 15

Coinbase, Inc. v. Bielski,
599 U.S. 736 (2023) 4

Heckman v. Live Nation Entertainment, Inc.,
686 F. Supp. 3d 939 (C.D. Cal. 2023)
..... 3, 7-11, 13, 15-17

In re Intuit Free File Litig.,
No. 3:19-cv-2546-CRB (May 12, 2019) 4

Jones v. Starz Entertainment, LLC,
129 F.4th 1176 (9th Cir. 2025) 12, 13

McGrath v. DoorDash, Inc.,
438 F. Supp. 3d 1062 (N.D. Cal. 2020) 4

Poublon v. C.H. Robinson Co.,
846 F.3d 1251 (9th Cir. 2017) 17

Wallrich, et al. v. Samsung Electronics Am., Inc., et al.,
No. 1:22-cv-5506-MSS (N.D. Ill. Oct. 7, 2022) 4

Statutes & Other Authorities:

AAA Commercial Arbitration Rules and Mediation Procedures, R-52(a), available at: https://tinyurl.com/pcyrsktb 15

AAA Consumer Arbitration Rules, R-49(a), available at: https://tinyurl.com/4vpcdm46 15

AAA Mass Arbitration Supplementary Rules at Introduction, available at: https://tinyurl.com/3ehmu37u 7-8

Andrew Pincus et al., Mass Arbitration Shakedown: Coercing Unjustified Settlements, U.S. Chamber of Com. Inst. For Legal Reform (Feb. 2023), available at: https://tinyurl.com/43bkp8fz..... 4-5

JAMS Mass Arbitration Procedures and Guidelines, Effective May 1, 2024, available at: https://tinyurl.com/496kv785 7

JAMS Optional Appeal Procedures § (A), available at: https://tinyurl.com/mnemjxzn 15

New Era ADR Rules FAQ, available at: https://tinyurl.com/2s3nucrr..... 11

New Era ADR, "A Note From Our Founders," available at: https://tinyurl.com/ypz56h9e..... 5

New Era Neutrals Program, available at: https://tinyurl.com/4khhmnp7..... 16

Sup. Ct. R. 37.6..... 1

INTERESTS OF THE *AMICUS CURIAE* [1]

New Era ADR, Inc. ("New Era") is a technology company that delivers an impartial alternative dispute resolution platform for use by parties on all sides of any given dispute. Its mission is to provide a cost-effective, fast, and fair method for obtaining enforceable resolutions to legal disputes. New Era provides litigants with a user-friendly platform where their disputes can be considered and resolved by well-qualified neutrals in a timely fashion and without the exorbitant process and costs associated with litigation and legacy alternative dispute resolution.

This case concerns the applicability of the Federal Arbitration Act ("FAA") to variations of "traditional" bilateral arbitration, such as those developed in response to the nationwide proliferation of mass arbitration. New Era writes in support of the Petition for Writ of Certiorari ("Petition") so that the Court may confirm the scope of the FAA and underscore its objective of allowing parties, by contract, to address their disagreements via innovative alternative dispute resolution fora—so long as they afford due process—that are quick, affordable, and ultimately increase all parties' access to justice.

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[1] Counsel of record for all parties received notice of *amicus's* intent to file this brief at least 10 days before the due date. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made a monetary contribution to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

All litigants should have an opportunity for their disputes to be considered and resolved on the merits in a timely and cost-effective way. Arbitration has historically been a faster and less expensive means for parties to resolve certain disputes than litigation in the court system. But the arbitration landscape has dramatically changed over the past decade, including with the rise of mass arbitration filings. Mass arbitration employs bilateral arbitration on a bulk scale. With the filing of hundreds, thousands, or even tens of thousands of like cases, mass arbitration can trigger substantial upfront filing fees and overwhelm arbitral resources, thereby actually impeding the swift resolution of disputes on their merits under the legacy bilateral arbitration model.

To address these challenges, alternative dispute resolution providers, led by New Era, have developed adaptive solutions to ensure that even mass numbers of arbitrated disputes can actually be decided on their merits, and not simply settled on leverage. By using technology, developing flat-rate pricing structures, and looking for procedural efficiencies, New Era—and the legacy arbitration forums like AAA and JAMS that have followed—sought to stabilize the playing field with the goal of keeping arbitration accessible and responsive to the legal challenges of the day. The FAA should be interpreted to embrace this flexible, pragmatic approach, so long as core due process safeguards are ensured.

New Era submits this brief to further contextualize the first question raised in the Petition—whether the Ninth Circuit erred in holding

that the FAA is limited to traditional, bilateral arbitration as it existed in 1925. Critically, mass arbitration as set forth in New Era's Mass Arbitration Rules and Procedures *is* bilateral arbitration, and the Court should confirm that it is therefore afforded the protections of the FAA. Indeed, New Era's Mass Arbitration Rules and Procedures, when interpreted fairly and correctly—something that the Ninth Circuit did not do—retain the core due process elements of bilateral arbitration, while realistically addressing the challenges presented by mass arbitration. New Era's Mass Arbitration Rules and Procedures—as they existed before and during the *Heckman* case, and as they have evolved now—seek to eliminate gamesmanship by *all* parties and focus on addressing the merits of a dispute in a cost-effective and time efficient manner. Such an alternative dispute resolution system squarely falls within the ambit of the FAA.

This Court should review—and then reverse—the Ninth's Circuit decision and confirm the applicability of the FAA to a broader variety of arbitration formats, including mass arbitrations.

ARGUMENT

I RECENT LEGAL TRENDS, INCLUDING THE PROLIFERATION OF MASS ARBITRATION, HAVE NECESSITATED INNOVATIONS IN ARBITRATION TO ENABLE PARTIES TO HAVE THEIR DISPUTES HEARD.

Over the past decade, a torrent of mass arbitration cases have been filed, overwhelming arbitral forums with more cases than they can timely handle and

meaningfully hear.[2] The threat of millions of dollars in upfront arbitration fees when mass arbitrations are filed often leads to settlement payments for claims that never actually get heard. Even if individual defendants can shoulder the significant filings fees, the mass filings put an untenable burden on the arbitral forum, such that most claims can never actually be adjudged on their merits within a reasonable amount of time, if at all. Instead, parties are pressured to settle for amounts with no connection to an individual's actual claim.[3] This is antithetical to arbitration's original promise of a faster, more efficient path to resolution on the merits and a system of justice for individuals and companies alike. Mass arbitration filings have significantly disrupted the functioning of traditional bilateral arbitration. *See* Andrew Pincus et al., Mass Arbitration Shakedown:

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[2] *See, e.g., Abadilla v. Uber Techs., Inc.*, No. 3:18-cv-07343-EMC (N.D. Cal. Dec. 5, 2018) (case where Uber faced similar arbitration filings from over 12,000 drivers and more than $18 million (eventually up to $92 million) in arbitration fees); *In re Intuit Free File Litig.*, No. 3:19-cv-2546-CRB (May 12, 2019) (mass arbitration against Intuit filed by over 125,000 TurboTax users, incurring over $13 million in arbitration fees); *Wallrich, et al. v. Samsung Electronics Am., Inc., et al.*, No. 1:22-cv-5506-MSS (N.D. Ill. Oct. 7, 2022) (mass arbitration against Samsung filed by more than 50,000, claimants incurring over $4 million in arbitration fees); *McGrath v. DoorDash, Inc.*, 438 F. Supp. 3d 1062 (N.D. Cal. 2020) (mass arbitration involving between 5,000 and 6,000 arbitration demands against DoorDash, incurring $9.5 million in arbitration fees).

[3] *See, e.g., Coinbase, Inc. v. Bielski*, 599 U. S. 736, 743, 758 (2023) (both majority and dissent discussing, in *dicta,* how costs and time pressures may compel parties to settle disputes rather than adjudicate them on the merits).

Coercing Unjustified Settlements, U.S. Chamber of Com. Inst. For Legal Reform at 3, 25 (Feb. 2023), https://tinyurl.com/43bkp8fz (mass arbitration has been characterized as a "shakedown" and "coercive gambit," "paved with abusive practices," to "impose the risk of massive arbitration fees" as a means toward settlement).

Enter New Era—an alternative dispute resolution forum designed to resolve individual legal disputes in 100 days, via an accessible, user-friendly online platform, and for a fraction of the cost of more traditional arbitration. Founded on its "fundamental belief" that litigants should have an opportunity to resolve their disputes on the merits without "the long, drawn out processes—and the accompanying gamesmanship, expense, and acrimony[,]" New Era was created to address an enormous demand in the legal industry for more accessible and efficient dispute resolution for all litigants, on both sides of the "v." *See* New Era ADR, "A Note From Our Founders," available at: https://tinyurl.com/ypz56h9e. Its objective is to promote fairness and ensure that disputes are resolved expeditiously and on the merits, not based on leverage, power dynamics, or procedural games from either side. As stated on its website, New Era is designed to prevent companies from "wield[ing] their considerable resource advantage to leverage the inefficiencies and volumes of procedural maneuvers available to them in courts and legacy arbitration forums . . . and outlast legitimate claims brought against them," and plaintiffs from "fil[ing] meritless claims with the sole objective of leveraging the inefficiency of courts and legacy arbitration forums to extract a nuisance settlement from a company." *Id.*

New Era was not created specifically for mass arbitration, but in its quest to make arbitration more workable and accessible, its founders recognized the need for a solution to the logistical problems that mass arbitrations posed. In fact, mass arbitration remains a very limited part of New Era's arbitration platform. But understanding the burden on the arbitral forum caused by mass arbitration, New Era developed a set of rules and processes—inspired by the federal court MDL process—to administratively manage similar cases together; avoid redundancy by limiting discovery, as overseen by the neutral, to only what is necessary given the cases' similarities and common representation of claimants; select bellwether cases whose outcomes on the merits might facilitate settlements for other cases with common facts and law; and devise innovative pricing models to mitigate the onerous fees created by mass filings, which only serve to delay and diminish the effectiveness of the arbitration process for all parties.

While New Era's Mass Arbitration Rules and Procedures administratively group and consolidate cases together under the management of a single neutral, the cases remain, at all times, ***bilateral arbitration***. Each claimant has the opportunity to present his, her, or its claims to a neutral, with a respondent defending against those claims based on the facts and the law. No party is bound to precedent; instead, precedent is consulted (in the discretion of the neutral) as persuasive authority. Each litigant is still afforded notice and an opportunity to raise new legal arguments and have them considered on the merits. New Era's initial set of Mass Arbitration Rules and Procedures were not perfect, as early

drafting attempts rarely are, but over time, they have been clarified and refined (including in response to the District Court) to ensure compliance with due process standards. And they have remained centered on keeping mass arbitration workable, accessible, fast, and merits-based for all parties involved.

More recently, legacy arbitration forums have followed New Era's lead and are now recognizing the strain mass filings put on the traditional arbitration system. In response, these forums also developed new rules and approaches to meet those challenges. Since the District Court's 2023 decision in *Heckman v. Live Nation Entertainment, Inc.*, 686 F. Supp. 3d 939 (C.D. Cal. 2023), JAMS has adopted mass arbitration procedures and guidelines to "facilitate the fair, expeditious and efficient resolution of Mass Arbitrations[.]" JAMS Mass Arbitration Procedures and Guidelines, Effective May 1, 2024, available at: https://tinyurl.com/496kv785. In doing so, JAMS recognized that "[t]he filing of dozens, hundreds or even thousands of individual claims may create an administrative burden and onerous fees, as well as delay and potential unfairness to all Parties, all of which may impair the integrity of the Arbitration process." JAMS Mass Arbitration Procedures and Guidelines, Effective May 1, 2024, available at: https://tinyurl.com/496kv785.

AAA also has followed suit, adopting "Mass Arbitration Supplementary Rules" effective April 1, 2024, that "were developed specifically to streamline the administration of large volume filings involving the same or related party, parties, and party representatives." *See* AAA Mass Arbitration

Supplementary Rules at Introduction, available at https://tinyurl.com/3ehmu37u.

New Era may have been the first to implement rules that introduce resourceful variations on so-called "traditional" bilateral arbitration to meet the demands of mass arbitration filings. But mass arbitration rules that feature additional procedural mechanisms to make bilateral arbitration more feasible in the mass filing context are becoming increasingly commonplace in the industry. The FAA should be read to encompass this reality.

II. THE NINTH CIRCUIT MISCONSTRUED NEW ERA AND ITS MASS ARBITRATION RULES, WHICH ARE DESIGNED TO HAVE CLAIMS ACTUALLY CONSIDERED ON THEIR MERITS.

In advancing a myopic view of the FAA, the Ninth Circuit also misconstrued several key elements of New Era's Mass Arbitration Rules and Procedures, and the role and mission of New Era more generally.[4] Significantly, New Era has never been a party to the *Heckman* case, and while it submitted to limited discovery, New Era and its Mass Arbitration Rules and Procedures were only presented to the court in the

[4] The propriety of New Era's Standard Arbitration Rules and Procedures and Individual Expedited Arbitration Rules and Procedures are not in question. The Ninth Circuit's ruling is limited to New Era's Mass Arbitration Rules and Procedures, which in any event were revised to incorporate the District Court's feedback. Like every arbitration forum, New Era has continued to iterate and revise its rules over the years to ensure fairness and due process.

context of the characterizations of two battling parties and the court's misreading of the rules themselves.

The Ninth Circuit's misinterpretation of New Era's Rules and Procedures provides no impediment to this Court's review. The questions raised in the Petition involve pure matters of law that should be resolved in Petitioners' favor, irrespective of the Ninth Circuit's interpretation of New Era's Mass Arbitration Rules and Procedures. If the Petition is granted, this Court would not need to interpret the Mass Arbitration Rules and Procedures or decide whether the Ninth Circuit's interpretation was correct. *See* Petition at 12, n.2. But given that the Petition's question about the scope of the FAA arose in the context of a challenge to New Era's Mass Arbitration Rules and Procedures—which the Ninth Circuit erroneously held were not bilateral arbitration and therefore not covered by the FAA—it is important to augment the record by correcting the Ninth Circuit's many misconceptions of the Rules and New Era itself.

First, the Ninth Circuit held that New Era's "stated mission" is to be a "critical prophylactic measure for client's mass arbitration risk." *Heckman*, 120 F.4th at 677. That is incorrect. The Court's quoted language comes from Respondents' briefing, not from any New Era "mission statement." While New Era offers a platform for mass arbitration claims (and was a pioneer in creating a practical solution for the logistical challenges presented by mass arbitrations), New Era was created primarily to provide a more accessible and streamlined forum for *all* bilateral arbitration, not just mass arbitration. Indeed, only a small fraction of arbitrations conducted

on New Era's platform could qualify as mass arbitrations. The overwhelming majority are the very traditional bilateral arbitrations that the Ninth Circuit finds acceptable—albeit more streamlined, efficient, and cost effective versions thereof.

Similarly, in direct contravention of the record and clear holding of the District Court, the Ninth Circuit wrongly characterized as "undisputed" that New Era and Petitioners' counsel "have shown a 'remarkable degree of coordination' in devising a set of procedures to be followed" in mass arbitrations. *Heckman*, 120 F.4th at 677. In fact, the District Court held the direct opposite and stated, "it is not readily apparent to the Court that [Petitioners' counsel] has in fact helped *craft* or *modify* the Rules (as opposed to relying on them after the fact)." *Heckman*, 686 F. Supp. 3d at 958, n.13 (emphasis in original). Again, the Ninth Circuit's decision parroted factual mischaracterizations asserted by Respondents' counsel that the District Court specifically rejected.

The Ninth Circuit's failure to distinguish between arguments made by Respondents and record statements—such as New Era's actual mission statement and the District Court's finding of no collaboration between New Era and Live Nation—may evince a resistance to fairly consider New Era's Mass Arbitration Rules and Procedures, a skepticism of New Era as a relatively new entrant to the alternative dispute resolution market, and perhaps a failure to appreciate the unique challenges presented by mass arbitration filings. Regardless of the reasons, the appellate court vastly mischaracterized New Era's

origins and its status as a legitimate and independent arbitration provider.

In fact, New Era's Rules were carefully created by its attorney co-founders in consultation with seasoned ADR practitioners, practicing litigators with experience on both the plaintiff and defense bars, and a highly-regarded law school dean. New Era regularly updates its Rules in response to changes in the "laws around arbitration and litigation" "to continue to optimize [its] goal of providing cost-effective, fast, and fair resolutions." *See* New Era ADR Rules FAQ, available at https://tinyurl.com/2s3nucrr. Petitioners' counsel was in no way involved in the drafting of New Era's Rules, as the District Court correctly concluded.

The appellate court also misread and misinterpreted New Era's Mass Arbitration Rules and Procedures themselves. While subsequent revision to those Rules has rectified any ambiguity and wholly mooted the due process concerns raised, a brief synopsis of these misapprehensions highlights that the Rules at issue actually were, in fact, variations of bilateral arbitration designed to find efficiencies and allow for consideration of cases on the merits in the unwieldy mass arbitration context.

The Ninth Circuit's interpretation of New Era's Mass Arbitration Rules and Procedures is flawed for numerous reasons, including the following:

(1) The Ninth Circuit held that under the Rules, "New Era, and only New Era, will unilaterally make a determination to group, or 'batch,' similar cases." *Heckman*, 120 F.4th at 678. This is false. New Era

does not batch cases in mass arbitration, and there is no mention of "batching" in New Era's Rules. "Batching"—a term of art in mass arbitrations—is when numerous cases are combined into one case and adjudicated and disposed of as such.

New Era does not batch its cases, and all of its arbitrations—even mass arbitrations—are bilateral. New Era administratively groups cases based on common issues of law and fact and whether the same law firm or a coordinated group of law firms brings the cases against common respondents. *See* 2-ER-190 (Rule 6.b.ii.2.b). The grouped cases retain all elements of bilateral arbitration. Pursuant to Rule 6.b.ii.2.b, "[s]olely for administrative purposes, New Era ADR may group similar cases filed by the same law firm or group of law firms and have them proceed through the Mass Arbitration process unless and until the presiding neutral makes a determination otherwise." *Id.* The assigned neutral (and not New Era) "will make a determination about whether Common Issues of Law and Fact exist as a threshold issue in determining the case but has sole discretion in determining how such a decision will be made." 2-ER-191 (Rule 6.b.iii.3.a).

New Era's grouping of cases is analogous to the consolidation of cases under JAMS Rules, which the Ninth Circuit recently examined in *Jones v. Starz Entertainment, LLC*, 129 F.4th 1176 (9th Cir. 2025). In *Jones*, the Ninth Circuit observed that "[c]onsolidation is not the same as class or representative arbitration" and the "critical difference" is that "a claimant in a consolidated arbitration brings the claim in her *individual*

capacity." *Id.* at 1182. The same is true under New Era's Rules grouping similar cases to manage mass arbitrations—each claimant still proceeds in his or her individual capacity. When New Era's Rules are correctly interpreted, they fall squarely within the Ninth Circuit's decision in *Jones.*

(2) The Ninth Circuit held that New Era's Mass Arbitration Rules and Procedures are substantively unconscionable because they apply precedent to claimants who are not present and may not even have notice of a prior adjudicated bellwether dispute. That has never been the case. Indeed, such a system would actually deprive litigants of any due process at all and would necessarily be invalidated by the courts. It defies common sense to suggest that an alternative dispute resolution provider would develop a process expressly designed to summarily deny due process to its users. In any event, that is also not what the Rules provide. Following the District Court's decision in 2023, New Era clarified in its Rules that cases filed later in time that do not contain common issues of law and fact or that are not filed by the same or coordinated group of law firms are considered separate from the mass arbitration, independent of any precedent, and restarted *de novo*.

But even under the original July 2021 Rules, the Ninth Circuit's finding that absent claimants could be bound by prior merits decisions involving other claimants is not correct. *Heckman*, 120 F.4th at 684; *see also Jones*, 129 F.4th at 1182 (Under New Era's rules, "[c]laimants in non-bellwether cases had . . . no notice of the bellwether cases, no opportunity to be heard, and no right to opt out of the batch"). As

previously discussed, New Era administratively groups cases based on common issues of law and fact where the same law firm or a coordinated group of law firms brings the cases against common respondents. All of the claimants in grouped cases are, by definition, represented by the same counsel, who will receive notice of the relevant decisions potentially affecting their clients. It is then in the discretion of counsel to handle and use those decisions as they see fit. New Era's Mass Arbitration Rules and Procedures further provide that from the collective group of cases, the parties together select bellwether cases, which are then tried, thereby creating precedent. Critically, each non-bellwether party has an opportunity to raise new legal arguments as to why the precedent is wrong or otherwise should not apply to their individual case. 2-ER-192 (Rule 6.b.iii.4.d); 2-ER-193 (Rule 6.b.iii.6). The parties also have the right to argue why any particular case should be removed from the mass arbitration entirely. *Id.* The precedent is not binding in follow-on cases, but instead serves as persuasive authority that can be used as guidance to the extent subsequent litigants offer no compelling reason to the contrary. Even if a party does not argue against the application of precedent, New Era's Rules provide that the neutral will independently consider whether precedent should apply. 2-ER-193 (Rule 6.b.iii.5.a); *see also* 2-ER-178 (Rule 2.y). The notion that any party would be bound by a decision in another case is belied by the original July 2021 Rules themselves, which have since been amended to make that point even more clear.

(3) The Ninth Circuit held that "New Era's Rules are inadequate vehicles for the vindication of

plaintiffs' claims" because "[t]here is no right to discovery." *Heckman*, 120 F.4th at 685. That is incorrect. Discovery needs are in the discretion of the neutral, who is best suited to determine what discovery is "necessary to vindicate th[e] claim." *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 106 (Cal. 2000). Indeed, Rule 2.o.vi provides that "[t]he parties may customize discovery provisions pursuant to the needs of the individual(s) and/or business(es) by written agreement." *See* 2-ER-174 (Rule 2.o.vi). Further, following the District Court's decision, New Era revised its Rules to more expressly articulate the right to discovery in all actions, further evincing its original intention to allow reasonable discovery.

(4) In citing an asymmetric right to appeal as another basis for unconscionability, the Ninth Circuit focused on the contractual terms in Live Nation's terms of use concerning arbitration and did not actually address New Era's Mass Arbitration Rules and Procedures regarding appeals. In fact, New Era's Rules regarding appeals comply with industry-standard and are not unconscionable. New Era's default rule is not to allow appeals "unless otherwise specified in the contractual agreement between the parties." 2-ER-193 (Rule 6.b.iii.7). This approach is common across all ADR forums. *See, e.g.*, AAA Commercial Arbitration Rules and Mediation Procedures, R-52(a) (allowing only for clerical or computational corrections and not permitting any re-determination of already-decided substantive claims); AAA Consumer Arbitration Rules, R-49(a) (same); JAMS Optional Appeal Procedures § (A) (appeal

procedure only applicable where all parties have agreed in writing to the application of the procedures).

(5) The District Court and the Ninth Circuit did not explain how New Era's neutral selection provisions are not in accord with California law. Indeed, New Era's Rules put neutral selection in the control of the parties, who have the full discretion to choose a neutral in compliance with applicable law related to selection, conflicts, and disqualification.

Importantly, and contrary to the mischaracterizations in the courts below, New Era does not employ and has never employed its neutrals. *Cf. Heckman*, 120 F.4th at 694. New Era's neutrals are non-exclusive, independent contractors who all maintain their own independent arbitration, mediation, and/or legal firms and are free to work for other arbitration providers, in addition to New Era. 2-ER-169 (Rule 2.f.i). Indeed, New Era has a highly qualified and experienced bench of neutrals to preside over cases. Among other stringent criteria, New Era's neutrals are required to have a minimum of 15 years of experience as professional attorneys in civil or commercial practice, or have formerly served as practicing judges. *See* New Era Neutrals Program, available at: https://tinyurl.com/4khhmnp7. New Era's bench of neutrals is diverse, highly qualified, and deep, consisting of more than 100 legal professionals. New Era's neutrals receive no more or less financial compensation based on the outcome of a case. In fact, New Era's flat fee model ensures that neutrals receive one fee, regardless of the outcome, and are incentivized to efficiently arrive at a fair outcome for the benefit of all parties. The suggestion

that New Era's neutrals would be biased in favor of company customers of New Era is false and completely without factual support. Indeed, courts in the Ninth Circuit are to "assume that the arbitrator will operate in a reasonable manner in conformity with the law." *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1265 (9th Cir. 2017).

In sum, the Ninth Circuit's analysis and conclusions about New Era's Mass Arbitration Rules and Procedures were significantly flawed and likely colored by the Court's own unfamiliarity with New Era. Fortunately, since the *Heckman* plaintiffs first challenged New Era as an arbitration forum, New Era has significantly grown, refined its Rules with the benefit of experience, and built its reputation as a trusted, fair, innovative, and highly effective alternative dispute resolution provider across a range of industries and constituencies. To date, New Era has had hundreds of arbitrations and mediations of varying case types—*e,g.*, employment, commercial, consumer, financial, athletic, etc.—filed and resolved on its platform.

While the Mass Arbitration Rules and Procedures are innovative and designed to overcome certain challenges posed by mass arbitration, at core, they are (and always have been) bilateral arbitration. And New Era—now a well-established provider of arbitration services—has blazed a trail in the mass arbitration space that legacy arbitration providers have since followed.

CONCLUSION

The nature of arbitration has changed over time, and arbitration forums have had to adapt and evolve to meet new challenges, including those posed by mass arbitrations. The FAA needs to be read broadly enough to encompass pragmatic variations on bilateral arbitration. Forums like New Era seek to offer a cost effective and efficient solution to the mass arbitration filings being increasingly employed nationwide to allow individual parties to have their claims resolved on the merits. Parties need to know that if they agree to use one of these arbitration forums, with innovative rules to address complex arbitration matters, their contract will be honored under the FAA, so that their claims may be heard. The Court should grant the Petition.

Respectfully submitted,

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