No. _____

In The
Supreme Court of the United States

MONSTER ENERGY COMPANY, F/K/A
HANSEN BEVERAGE COMPANY, PETITIONER

v.

CITY BEVERAGES, LLC, D/B/A
OLYMPIC EAGLE DISTRIBUTING

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Disappointed arbitration participants often seek to vacate arbitration awards by asserting the "evident partiality" of the arbitrator. 9 U.S.C. § 10(a)(2). Yet this Court has construed the frequently-litigated "evident partiality" provision only once, and that was a half century ago. *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145 (1968). The Court's decision was so fractured and its reasoning so opaque that lower courts cannot agree on which rationale is controlling, much less on what standard to derive from it.

In the long absence of further guidance from this Court, the courts of appeals and state courts of last resort have adopted conflicting standards on what constitutes evident partiality. Six circuits hew to the plain text of the statute and will vacate an award only when a reasonable observer would have to conclude the arbitrator was partial toward one of the parties. Only two circuits, including the Ninth Circuit here, find evident partiality any time an arbitrator fails to disclose information that might create an impression of possible bias.

The questions presented are:

1. What is the standard for determining whether an arbitration award must be vacated for "evident partiality" under the Federal Arbitration Act, 9 U.S.C. § 10(a)(2)?

2. Under the correct "evident partiality" standard, must an arbitration award be vacated when the arbitrator does not disclose that (i) he has a de minimis "ownership interest" in his arbitration firm and (ii) that firm has conducted a "nontrivial" number of arbitrations with one of the parties?

PARTIES TO THE PROCEEDING

Pursuant to Rules 14.1 and 29.6, petitioner states the following:

The parties to the proceeding are listed in the caption.

Monster Energy Company, f/k/a Hansen Beverage Company, is a wholly owned subsidiary of Monster Beverage Corporation, a publicly traded holding company. The only publicly held corporation or other publicly held entity that owns 10% or more of Monster Beverage Corporation is The Coca-Cola Company.

STATEMENT OF RELATED PROCEEDINGS

Monster Energy Co. v. City Beverages, LLC, Nos. 17-55813, 17-56082, United States Court of Appeals for the Ninth Circuit. Judgment entered October 22, 2019.

Monster Energy Co. v. City Beverages, LLC, No. 17-cv-295, United States District Court for the Central District of California. Judgment entered July 19, 2017.

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PETITION FOR A WRIT OF CERTIORARI

Monster Energy Company ("Monster") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-27a) is reported at 940 F.3d 1130. The opinion of the district court (App. 28a-43a) is unreported.

JURISDICTION

The court of appeals entered judgment on October 22, 2019. App. 1a. Monster's timely petition for rehearing was denied on December 30, 2019. App. 44a-45a. On March 13, 2020, Justice Kagan extended the time to file a petition for a writ of certiorari until May 28, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Federal Arbitration Act provides in relevant part:

> (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.

9 U.S.C. § 10(a).

INTRODUCTION

This petition presents critical questions on the scope of judicially created arbitrator disclosure obligations and judicial review under the Federal Arbitration Act ("FAA"). Congress recognized that parties agree to arbitration because it provides a faster and cheaper alternative to litigation. Arbitration also allows parties to choose their decisionmaker, such as an industry expert. By congressional design, arbitration decisions are thus subject only to narrowly circumscribed judicial review limited to correcting extreme arbitrator misconduct.

The Ninth Circuit here dramatically disrupted that statutory scheme. It adopted an unprecedented, blanket rule requiring arbitrators to disclose any "ownership interests" in their arbitration firm and any "nontrivial" arbitrations the firm has administered for the parties. App. 17a. And it mandated vacatur of arbitration awards based on "evident partiality," 9 U.S.C. § 10(a)(2), in every case where arbitrators failed to satisfy that new rule. The court imposed this requirement based on its view (supported solely by citation to one law review article) that arbitrators likely favor "repeat players" and its entirely unsupported view that owners are more likely to be biased than non-owners.

The Ninth Circuit reached this result by applying that court's expansive interpretation of "evident partiality"—an interpretation many other circuits reject. To undo an arbitration award for "evident partiality" in the Ninth Circuit, the losing party need only show the arbitrator failed to disclose facts creating a "reasonable impression of partiality." The Ninth Circuit holds arbitrators to the same standard as Article III judges: they must avoid even the "appearance of bias." By contrast, six circuits require the challenger to prove "a reasonable person would *have* to conclude that an arbitrator was partial to one party to the arbitration." In other words, those circuits interpret "evident partiality" to mean *evident partiality*.

Courts and commentators pin responsibility for this widely recognized confusion on this Court's longstanding failure to provide needed guidance. The

Court has addressed the FAA's "evident partiality" provision only once, in a fractured decision issued more than 50 years ago: *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). Six Justices voted to vacate the arbitration award based on the egregious facts there, but no rationale commanded a majority. The circuits cannot even agree on which approach in *Commonwealth Coatings* is controlling, and they have struggled for decades to derive meaning from the opinions in that case.

It is now time for this Court to complete the task it left undone in *Commonwealth Coatings*: resolve what "evident partiality" means in the FAA. This case presents an ideal vehicle to do so. The Ninth Circuit's application of its erroneous, minority standard led it to fashion a novel, sweeping disclosure rule that will destabilize private arbitration. It prompted a strenuous dissent from Judge Friedland, who warned that the majority's rule requires redoing myriad arbitrations, "prolong[ing] disputes that both parties have already spent tremendous amounts of time and money to resolve." App. 25a (Friedland, J., dissenting). And, Judge Friedland cautioned, the Ninth Circuit's nebulous rule will turn the "evident partiality" provision into an escape hatch for losing parties, who may "think up after the fact some argument that an arbitrator's disclosure did not fully convey the arbitrator's financial interest." App. 25a (Friedland, J., dissenting). The majority's approach also prompted the first amicus brief JAMS has ever filed in any case, an "extraordinary step" JAMS believed the Ninth Circuit gave it no

choice but to take. In support of Monster's rehearing petition, JAMS identified the majority's basic misunderstanding of private arbitration and decried the disruption its decision is already causing.

This Court should grant review to provide guidance to lower courts on the meaning of "evident partiality" and to ensure arbitration remains available as an efficient and final means of dispute resolution.

STATEMENT

A. Statutory Background

1. Congress enacted the FAA to "counteract judicial hostility to arbitration and establish 'a liberal federal policy favoring arbitration agreements.'" *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019). The FAA's "overarching purpose" is to "ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). The FAA reflects "Congress's judgment" that arbitration provides "quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018).

The FAA's provisions work together to promote arbitration's availability, efficiency, and finality. Section 2 makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Sections 3 and 4 provide for enforcement of arbitration agreements through litigation stays and

orders to compel arbitration of arbitrable disputes. *Id.* §§ 3-4.

In turn, Sections 9, 10, and 11 "suppl[y] mechanisms for enforcing arbitration awards" through "expedited judicial review." *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582, 592 (2008). They provide "just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Id.* at 588.

Section 9 requires a court to "confirm[] the award * * * unless the award is vacated" under Section 10 or "modified[] or corrected" under Section 11. 9 U.S.C. § 9.

Section 10 provides the "exclusive regime[]" for vacating arbitration awards. *Hall St.*, 552 U.S. at 590. It authorizes vacatur only for "egregious departures from the parties' agreed-upon arbitration," *id.* at 586:

- "where the award was procured by corruption, fraud, or undue means," 9 U.S.C. § 10(a)(1);
- "where there was *evident partiality* or corruption in the arbitrators, or either of them," *id.* § 10(a)(2) (emphasis added);
- "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," *id.* § 10(a)(3);

- or "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," *id.* § 10(a)(4).

This case involves one of these limited, "egregious" bases for vacating arbitration awards: "evident partiality" in the arbitrator. *Id.* § 10(a)(2); *Hall St.*, 552 U.S. at 586.

2. This Court has interpreted the FAA's evident-partiality provision only once: in *Commonwealth Coatings*, decided in 1968. *Commonwealth Coatings* involved an arbitrated dispute between a contractor and a subcontractor. 393 U.S. at 146. One arbitrator provided "repeated and significant" consulting services for the contractor over "a period of four or five years," including on the "very projects involved in th[e] lawsuit." *Ibid.* The arbitrator did not disclose these "close business connections" until "after an award had been made." *Ibid.* The lower courts "refused to set aside the award" for evident partiality. *Ibid.*

This Court reversed. Justice Black "delivered the opinion of the Court," *id.* at 145, but, as explained below, two of the other five Justices joining it wrote a narrowing concurrence. Justice Black concluded the arbitrator's failure to disclose his "close financial relations" with the contractor established evident partiality requiring vacatur. *Id.* at 148. He considered it irrelevant that "the payments received were a very small part of the arbitrator's income." *Ibid.* Justice Black posited that a *judge*'s decision "should be set

aside where there is 'the slightest pecuniary interest' on the part of the judge." *Ibid.* And he saw "no basis for refusing to find the same concept" in the FAA. *Ibid.*

Justice Black "perceive[d] 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." *Id.* at 149. According to Justice Black, arbitrators "not only must be unbiased but also must avoid even the appearance of bias." *Id.* at 150.

Justice White, joined by Justice Marshall, concurred. He professed to be "glad to join" Justice Black's opinion, but his "additional remarks" rejected several of Justice Black's premises. *Ibid.* He stated "[t]he Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges." *Ibid.* And he emphasized "arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial." *Ibid.*

Justice White recognized an arbitrator "cannot be expected to provide the parties with his complete and unexpurgated business biography." *Id.* at 151. Rather, he concluded, an arbitration award should be vacated only where the arbitrator failed to disclose "a substantial interest in a firm which has done more than trivial business with a party" to the arbitration. *Id.* at 151-52.

B. Procedural History

1. Underlying dispute

Monster is an energy drink company, and Olympic a beverage distributor. ER551. Olympic distributes more than 6 million beverage cases each year and has annual revenues over $110 million. ER551-52, 557-58.

In 2006, Olympic and Monster agreed to make Olympic the exclusive distributor of Monster-branded beverages in part of Washington. ER552-53. The agreement had a 20-year term but permitted Monster to terminate earlier without cause by paying severance. ER552. It also required that any agreement-related disputes be settled by binding arbitration with JAMS. ER553, 591.

In 2015, Monster exercised its termination rights and sent Olympic the contractual severance of $2.5 million. ER553. Olympic objected, contending that, notwithstanding the agreements, Washington's franchise law prohibited termination without cause. ER553.

Monster demanded arbitration and moved in district court to compel it. ER553. Olympic opposed, arguing the arbitration provision was unconscionable. SER838. The court rejected that argument, noting Olympic's "obvious sophistication," and compelled arbitration before JAMS. ER553; SER839.

2. Arbitration proceedings

JAMS provided the parties a list of seven potential arbitrators. ER222. Absent the parties' agreement,

JAMS's rules allow each party to strike two names and rank the remainder; the arbitrator with the highest combined ranking is appointed. ER222; SER860. Using that procedure, JAMS appointed the Honorable John W. Kennedy, Jr. (Ret.). ER233.

Judge Kennedy provided disclosures using JAMS's standard form, ER236-51, which included this statement:

> I practice in association with JAMS. Each JAMS neutral, including me, has an economic interest in the overall financial success of JAMS. In addition, because of the nature and size of JAMS, the parties should assume that one or more of the other neutrals who practice with JAMS has participated in an arbitration, mediation or other dispute resolution proceeding with the parties, counsel or insurers in this case and may do so in the future.

ER241; *see* ER243-48. And during a hearing attended by Olympic officers, Judge Kennedy informed the parties he had served on JAMS's board. ER421, 426.

Judge Kennedy specifically disclosed a previous arbitration with Monster—where he ruled *against* it—and another pending distributor-termination arbitration with Monster. ER245. He disclosed that Monster's counsel represented Monster in those arbitrations. ER243-48. JAMS's website (which Olympic reviewed during arbitrator selection) featured records showing JAMS administered 81 arbitrations involving Monster. App. 19a-20a & n.3 (Friedland, J., dissenting).

Olympic was well aware of most of those arbitrations: Olympic knew that Monster had sent identical termination notices to hundreds of distributors with agreements requiring JAMS arbitration and that 60 terminated distributors were in then-pending JAMS arbitrations with Monster. ER389; SER952. The website Olympic reviewed during arbitrator selection also disclosed that "mediators and arbitrators" "own" JAMS. SER913. Olympic did not inquire further or move to disqualify the arbitrator.

After dispositive-motions practice and a two-week hearing, the arbitrator ruled for Monster. ER551-60. He found Olympic did not qualify for protection under Washington's franchise law and Monster thus properly terminated the agreements. ER558. He awarded Monster costs and attorney's fees. ER561-66.

3. District court proceedings

Monster petitioned to confirm the arbitration award. Olympic cross-petitioned to vacate, asserting evident partiality. Olympic stated that, after the arbitration, it learned through a law review article that JAMS is owned by its neutrals, and then learned in a phone call with JAMS's counsel that Judge Kennedy was a part-owner of JAMS. ER213, 218; SER899-900. Olympic argued Judge Kennedy's failure to disclose this "ownership interest," given Monster's status as a JAMS "repeat player," established evident partiality. App. 34a-36a.

The district court confirmed the award. App. 28a-43a. It found Olympic "waived its evident

partiality claim because Olympic failed to timely object when it first learned of the potential 'repeat player' bias." App. 35a. "As a sophisticated commercial entity," the court observed, "Olympic certainly should have been aware of the potential for a 'repeat player' bias after the Arbitrator disclosed his 'economic interest' in JAMS at the outset of the arbitration." App. 35a. And it noted Olympic failed to "investigate or object to the Arbitrator's potential conflict of interest" until *after* it lost. App. 35a.

The court also ruled against Olympic on the merits of its evident-partiality claim. It observed that "[a]n ownership interest in JAMS is merely a type of" the "economic interest" that the arbitrator disclosed. App. 31a. And it found "no reason to require that the Arbitrator have disclosed his particular economic interest at a granular level unless the parties inquired further after he made his initial economic interest disclosure." App. 31a.

4. Court of appeals proceedings

a. In a split decision, the Ninth Circuit reversed and vacated the award. App. 1a-27a.

First, the majority held Olympic "did not have constructive notice of the Arbitrator's potential non-neutrality, and therefore did not waive its evident partiality claim." App. 9a. It acknowledged Olympic "knew that the Arbitrator had some sort of 'economic interest' in JAMS," that the arbitrator "disclosed his previous arbitration activities that directly involved Monster," and that the arbitrator told the parties to

assume JAMS conducted other arbitrations for the parties or their counsel. App. 7a-8a. Nonetheless, the majority determined Olympic could not have discovered what the court deemed "the crucial fact" of "the Arbitrator's ownership interest." App. 8a.

Second, the majority concluded "the Arbitrator's failure to disclose his ownership interest in JAMS—given its nontrivial business relations with Monster"—"triggered the specter of partiality" and "creates a reasonable impression of bias." App. 8a, 17a. Applying that "reasonable impression of bias" standard, and favorably citing state laws requiring arbitrators to disclose "any ground for the disqualification of a judge," the court concluded the award must be vacated for "evident partiality" in the arbitrator. App. 12a-13a, 17a.

The court assumed—without citation or any factual support—that "as a co-owner of JAMS, the Arbitrator has a right to a portion of profits from *all* of its arbitrations, not just those that he personally conducts." App. 11a. It further presumed—again without citation or any factual support—that "[t]his ownership interest * * * greatly exceeds the general economic interest that all JAMS neutrals naturally have in the organization" and "is therefore substantial." App. 11a. The court determined JAMS's 97 Monster arbitrations over five years were "hardly trivial," while acknowledging it had no information about "the Arbitrator's specific monetary interest in Monster-related

arbitrations" or any other "empirical evidence." App. 11a-12a & n.3.[1]

Based on those unsupported assumptions, the majority announced a new rule: mandatory vacatur for evident partiality if arbitrators do not disclose (1) "their ownership interests, if any, in the arbitration organizations with whom they are affiliated in connection with the proposed arbitration," and (2) "those organizations' nontrivial business dealings with the parties to the arbitration." App. 17a.

b. Judge Friedland dissented. She concluded the additional disclosure of the arbitrator's ownership interest in JAMS would not "have made any material difference." App. 18a. The information the arbitrator disclosed, combined with other readily accessible information, "was more than enough" to allow Olympic "to consider whether the Arbitrator might have had an incentive to try to please Monster and thereby keep its repeat arbitration business." App. 21a. An arbitrator's "ownership interest in the arbitration firm," beyond "a financial interest in that firm more generally, is hardly the sort of 'real' and 'not trivial' undisclosed conflict" requiring vacatur. App. 22a.

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[1] When Olympic petitioned to vacate in 2017, JAMS's website showed 97 Monster arbitrations. ER219. When the arbitrator made his disclosures, it showed 81 Monster arbitrations. App. 20a n.3 (Friedland, J., dissenting). And "[t]he 97 arbitrations were administered for Monster over approximately 13 years," not five years. JAMS Br. 8 n.2.

Judge Friedland also recognized the new rule's disruptive impact. It "will require vacating awards in numerous cases decided by JAMS owners (who make up about a third of JAMS arbitrators)"—and other arbitration-firm owners—"who did not disclose their ownership interests." App. 24a-25a. The many "lingering questions" about "how detailed an arbitrator's disclosures must be" to satisfy the majority's "unclear" standard will "generate endless litigation over arbitrations that were intended to finally resolve disputes outside the court system." App. 22a-23a.

c. JAMS filed an amicus brief supporting Monster's rehearing petition. That was "the first amicus brief JAMS has ever submitted in any case." JAMS Br. 1. The majority's new rule will be "so deleterious to efficient commercial arbitration" and was "so incorrect in [its] factual assumptions" that JAMS "ha[d] no choice but to take this extraordinary step" of participating in litigation. JAMS Br. 1.

JAMS explained "an owner-arbitrator's interest in the revenue generated from any particular party's business is de minimis." JAMS Br. 6. And "there is simply no factual or record basis to *assume* that any ownership interest in an arbitration provider creates *any* potential bias in favor of any party or lawyer, even a 'repeat player.' " JAMS Br. 13.

JAMS also described how the majority's new rule will "greatly complicate the arbitrator selection and challenge process, undermine the important goals of efficiency and finality, and invite unhappy litigants to

engage in an unending effort to disrupt both pending and final arbitrations." JAMS Br. 15. This concern "is not at all speculative": JAMS reported "[p]arties in pending and final arbitration proceedings have already begun requesting additional information from JAMS, beyond what is required by the decision (including personal financial information of the arbitrator), seeking some basis to challenge the arbitrator or the final award." JAMS Br. 17.

The Ninth Circuit denied rehearing. App. 44a-45a. It stayed the mandate pending the filing and disposition of a certiorari petition. CA Dkt. 112, 129.

REASONS FOR GRANTING THE PETITION

The circuits are deeply divided on how to interpret the Federal Arbitration Act's "evident partiality" provision. Most circuits hold evident-partiality claimants to a heavy burden of proof, but the Ninth Circuit—here and in other cases—lowers the bar for such claims, contravening the FAA's text and exposing arbitration awards to unwarranted vacatur. The courts of appeals' disagreement springs from the inscrutability of *Commonwealth Coatings*, this Court's sole "evident partiality" decision. The Court should provide needed guidance and ensure lower courts apply a test consistent with the FAA's terms.

The Ninth Circuit's erroneous standard has great practical significance here. It led that court to act as a policymaker, adopting a sweeping and amorphous prophylactic rule requiring disclosure of arbitrators' "ownership interests" in their firms. As Judge

Friedland warned in dissent, that rule will lead to endless litigation over the adequacy of arbitrators' disclosures. And it will undermine the entire system of private arbitration by allowing collateral attacks on arbitral decisions based on private arbitration's inherent structure.

I. COURTS ARE DIVIDED ON THE STANDARD FOR EVIDENT PARTIALITY

There is an acknowledged "absence of a consensus on the meaning of 'evident partiality' amongst federal courts." *Ploetz v. Morgan Stanley Smith Barney LLC*, 894 F.3d 894, 898 (8th Cir. 2018); *see Burlington N. R.R. Co. v. TUCO Inc.*, 960 S.W.2d 629, 633-34 (Tex. 1997) (discussing conflict dividing federal courts of appeals and state high courts). Commenters agree that there is "longstanding, wide-ranging, and intractable judicial division over evident-partiality doctrine." Edward C. Dawson, *Speak Now or Hold Your Peace: Prearbitration Express Waivers of Evident-Partiality Challenges*, 63 Am. U. L. Rev. 307, 324 (2013).[2]

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[2] *See*, *e.g.*, Braydon Roberts, *An Evident Contradiction: How Some Evident Partiality Standards Do Not Facilitate Impartial Arbitration*, 43 J. Corp. L. 681, 683 (2018) (courts' "struggle" over "whether to apply the majority or concurrence" in *Commonwealth Coatings* "as the opinion of the court" has "resulted in multiple interpretations of what type of undisclosed relationship between a party and the arbitrator requires vacating the award"); Lee Korland, *What an Arbitrator Should Investigate and Disclose: Proposing A New Test for Evident Partiality Under the Federal Arbitration Act*, 53 Case W. Res. L. Rev. 815, 826, 828 (2003) (circuits' conflicting standards "suggest just how much courts have struggled in interpreting the *Commonwealth Coatings* decision,"

In particular, courts differ on how demanding a burden the FAA imposes on parties seeking to vacate arbitration awards for evident partiality. A majority require challengers to show a reasonable observer would *have to* conclude the arbitrator was "partial[ ]," and "evident[ly]" so. 9 U.S.C. § 10(a)(2). Several of these courts apply the same demanding standard for disclosure as they do for after-the-fact disqualification of an arbitrator for bias. They recognize the evident-partiality standard to vacate an arbitration award is more stringent than the appearance-of-bias standard for judge disqualification. And they generally base their analysis on Justice White's *Commonwealth Coatings* concurrence.

The minority, led by the Ninth Circuit, find evident partiality anytime an arbitrator does not disclose a fact that could create a "reasonable impression" of bias. App. 17a. The Ninth Circuit equates its "reasonable impression of partiality" standard for vacatur of arbitration awards with the "appearance of bias" standard for judge recusal. *Schmitz v. Zilveti*, 20 F.3d 1043, 1047 (9th Cir. 1994). Unlike courts that apply a single evident-partiality standard, the Ninth Circuit has two: an appropriately demanding one for after-the-fact disqualification but a lax one (applied here) for disclosure. And some minority courts view Justice Black's approach (rather than Justice White's) as controlling.

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and "hundreds of decisions relating to evident partiality and undisclosed conflicts of interest, often along similar fact patterns," have "generated a myriad of differing results").

This Court's intervention is needed to resolve these entrenched conflicts.

1. The First, Second, Third, Fourth, Fifth, and Sixth Circuits require those seeking vacatur of an arbitration award for evident partiality to show "a reasonable person would *have* to conclude that an arbitrator *was partial* to one party to the arbitration." *E.g.*, *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) (emphases added). Those courts hold a mere "appearance of bias," the "disqualification standard for federal judges," does not establish evident partiality. *E.g.*, *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 251-53 (3d Cir. 2013) ("The word 'evident' suggests that the statute requires more than a vague appearance of bias. Rather, the arbitrator's bias must be sufficiently obvious that a reasonable person would easily recognize it."). This standard is "[t]he prevailing view that has developed since *Commonwealth Coatings*." Roberts, *supra*, at 683 (discussing circuit split).

a. The Second Circuit formulated this standard in *Morelite*. To start, it concluded Justice Black's opinion in *Commonwealth Coatings* was in substance "a plurality of four justices" and thus not controlling. 748 F.2d at 82. It noted Justice Black's opinion "appeared to impose upon arbitrators the same lofty ethical standards required of Article III judges." *Ibid.* But it observed Justice White's concurrence "made clear the Court was not holding that arbitrators' and judges' ethical standards are coextensive." *Ibid.* "Because the two opinions are impossible to reconcile," the court

"narrow[ed] the holding to that subscribed to by both Justices White and Black." *Id.* at 83 n.3. It thus concluded "much of Justice Black's opinion," including its "appearance of bias" standard, "must be read as dicta." *Id.* at 83.

Finding "little guidance" in *Commonwealth Coatings* on the proper evident-partiality standard, the Second Circuit balanced "the competing interests inherent in the use of arbitration." *Ibid.* It recognized that "to disqualify any arbitrator who had professional dealings" or a "social acquaintanceship" with a party "would make it impossible, in some circumstances, to find a qualified arbitrator at all." *Ibid.* So it determined the FAA "requir[es] a showing of something more than the mere 'appearance of bias' to vacate an arbitration award." *Id.* at 83-84. Instead, the court held evident partiality "will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Id.* at 84.

b. The First, Third, Fourth, Fifth, and Sixth Circuits have adopted the Second Circuit's demanding formulation of the evident-partiality standard. *JCI Commc'ns, Inc. v. Int'l Bhd. of Elec. Workers, Local 103*, 324 F.3d 42, 51 (1st Cir. 2003) ("[E]vident partiality means a situation in which 'a reasonable person would have to conclude that an arbitrator was partial to one party to an arbitration.' "); *Freeman*, 709 F.3d at 253 (same); *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 500 (4th Cir. 1999) (same); *Cooper v. WestEnd Capital Mgmt., L.L.C.*, 832 F.3d 534, 545 (5th

Cir. 2016) (same); *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 328 (6th Cir. 1998) (same).

The Third, Fourth, Fifth, and Sixth Circuits, like the Second Circuit, expressly reject the "appearance of bias" standard applicable to judge disqualification. *Freeman*, 709 F.3d at 251-53; *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993); *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 285 (5th Cir. 2007) (en banc); *Andersons*, 166 F.3d at 325.

The Third, Fifth, and Sixth Circuits have also agreed with the Second Circuit that the approach in Justice White's *Commonwealth Coatings* concurrence is controlling. *Freeman*, 709 F.3d at 252 n.10; *Positive Software*, 476 F.3d at 282; *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 644 n.5 (6th Cir. 2005). And the Fourth Circuit gives Justice White's concurrence "particular weight." *ANR Coal*, 173 F.3d at 499 n.3.

Finally, the Third and Sixth Circuits have specifically held the same showing is required in "nondisclosure" cases as in "actual bias" cases (where a participant seeks after-the-fact arbitrator disqualification). The Third Circuit observed the FAA "does not distinguish between actual-bias and nondisclosure cases—instead, it condemns 'evident partiality' in all cases." *Freeman*, 709 F.3d at 254. It thus saw "no reason to adopt a different standard for each type of case." *Ibid.* Similarly, the Sixth Circuit has held no lesser "reasonable impression of bias" or "appearance of bias"

standard applies in nondisclosure cases. *Nationwide*, 429 F.3d at 644. Instead, both "actual bias" and "nondisclosure" cases are governed by the same standard: whether a "reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Id.* at 644-45.

c. Several state supreme courts interpreting the FAA or parallel state evident-partiality provisions have also adopted the Second Circuit's standard or a similarly demanding one. For example, the Nebraska Supreme Court follows "the standard enunciated in *Morelite*" and finds evident partiality only when "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Dowd v. First Omaha Sec. Corp.*, 495 N.W.2d 36, 43 (Neb. 1993). And the Delaware Supreme Court requires challengers to show "a reasonable person would conclude" the undisclosed facts are "powerfully suggestive of bias." *Del. Transit Corp. v. Amalgamated Transit Union Local 842*, 34 A.3d 1064, 1072 (Del. 2011).

2. By contrast, the Ninth and Eleventh Circuits have adopted a much less demanding, "reasonable impression of partiality" standard. That standard "is much broader than that articulated [by the Second Circuit in] *Morelite*, as circumstances can convey an *impression* of partiality without necessarily dictating a *conclusion* of partiality, as required under *Morelite*." *Burlington*, 960 S.W.2d at 634. The Ninth Circuit's rule represents the "minority" view among the circuits. Roberts, *supra*, at 684 (discussing circuit split); *see Positive Software*, 476 F.3d at 283 (describing Ninth

Circuit's standard "de-emphasiz[ing] Justice White's narrowing language" as "an outlier").

a. To start, the Ninth Circuit has treated Justice Black's opinion as a true "majority opinion" and "not a plurality opinion." *Schmitz*, 20 F.3d at 1045-46. The court reasoned "Justice White said he joined in the 'majority opinion'" and merely "wrote to make 'additional remarks.'" *Id.* at 1045. The court thought it "clear" that Justice Black's opinion, "including its 'appearance of bias' language" derived from "the standard applicable to judges," "received at least five votes." *Id.* at 1047.

Though the FAA includes a single "evident partiality" provision, the Ninth Circuit interprets it very differently in what it categorizes as "actual bias" and "nondisclosure" cases. *Ibid.* In the court's dichotomy, "actual bias" cases involve facts establishing the arbitrator "was not impartial." *Toyota of Berkeley v. Auto. Salesman's Union, Local 1095*, 834 F.2d 751, 756 (9th Cir. 1987). "In an actual bias case," the Ninth Circuit holds, "a court must find actual bias." *Schmitz*, 20 F.3d at 1047. But that court deviates from the "evident partiality" provision's text to what it deems "[t]he policies of 9 U.S.C. § 10" to "support the notion that the standard for nondisclosure cases should differ from that used in actual bias cases." *Ibid.* According to the Ninth Circuit, courts should vacate awards in nondisclosure cases as a prophylactic measure, not because "the arbitrators' decision itself is faulty." *Ibid.* The court believes that practice incentivizes disclosure so "parties can choose their arbitrators intelligently." *Ibid.*; *see* App. 14a ("[O]ur ruling in this case does not

require automatic disqualification or recusal—only disclosure.").

The Ninth Circuit's "reasonable impression of partiality" standard in nondisclosure cases (App. 17a) flows from these premises. In fashioning that standard, the court relied on Justice Black's descriptions of facts that must be disclosed: "those that show the 'appearance of bias,' and those that indicate that arbitrators 'might reasonably be thought biased against one litigant and favorable to another.'" *Schmitz*, 20 F.3d at 1045 (quoting *Commonwealth Coatings*, 393 U.S. at 149-50). It stated the *Commonwealth Coatings* "majority did not articulate a succinct standard," but the Ninth Circuit concluded "[r]easonable impression of partiality" was "the best expression of the *Commonwealth Coatings* court's holding." *Id.* at 1047. And it believed that, given the "policies" supporting a lower standard in "nondisclosure" cases than in "actual bias" cases, arbitrators must disclose even facts "showing *potential* partiality" or have their decisions vacated. *Ibid.* (emphasis added).

b. The Eleventh Circuit has adopted a similarly lax evident-partiality standard. That court observed *Commonwealth Coatings* "has been interpreted" as "requiring the award to be set aside" where the arbitrator "failed to disclose *potentially* prejudicial facts which *could* impair his judgment." *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1201 (11th Cir. 1982) (emphases added). Accordingly, it holds "an arbitrator is obligated to disclose those facts that 'create a reasonable impression of partiality,' or put another way,

'information which would lead a reasonable person to believe that a *potential* conflict exists." *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1339 (11th Cir. 2002) (emphasis added). And, like the Ninth Circuit, the Eleventh Circuit distinguishes between "actual conflict" cases and nondisclosure cases. *Ibid.*

c. A few state high courts follow approaches similar to the Ninth Circuit's when interpreting the FAA or parallel state evident-partiality provisions. The Texas Supreme Court, for example, rejects the Second Circuit's "more deferential standard" and holds an arbitrator's "failure to disclose information that might lead an objective observer to question his partiality establishes his evident partiality." *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 527-28 (Tex. 2014). And the Alabama Supreme Court, like the Ninth Circuit, uses a "reasonable impression of partiality" standard. *Waverlee Homes, Inc. v. McMichael*, 855 So. 2d 493, 508 (Ala. 2003).

II. THE NINTH CIRCUIT'S DECISION IS WRONG

The Ninth Circuit's lax "reasonable impression of partiality" standard cannot be squared with the FAA's text or *Commonwealth Coatings*. As a majority of circuits recognize, one seeking to vacate an award for "evident partiality" must show the arbitrator's partiality toward the other side would be "evident" to a reasonable observer. Under that standard, the Ninth Circuit's rule here—an arbitrator's failure to disclose

an "ownership interest" if the arbitration firm has conducted a "nontrivial" number of arbitrations with one of the parties automatically establishes evident partiality (App. 14a)—cannot stand.

A. The Ninth Circuit's Evident Partiality Standard Contravenes The FAA And This Court's Precedent

1a. Statutory interpretation "begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). The Ninth Circuit's "reasonable impression of partiality" standard (App. 17a) fails that first critical step.

"Partiality means bias, while 'evident' is defined as 'clear to the vision or understanding' and is synonymous with manifest, obvious, and apparent." *Positive Software*, 476 F.3d at 281 (quoting *Webster's Ninth New Collegiate Dictionary* 430 (1985)). The term "evident partiality" thus "conveys a stern standard" and "require[s] upholding arbitral awards unless bias was clearly evident in the decisionmakers." *Ibid.*; *see Freeman*, 709 F.3d at 253 ("The word 'evident' suggests that the statute requires more than a vague appearance of bias. Rather, the arbitrator's bias must be sufficiently obvious that a reasonable person would easily recognize it.").

The FAA thus "requir[es] a showing of something more than the mere 'appearance of bias' to vacate an arbitration award." *Morelite*, 748 F.2d at 83-84. Instead, vacatur is permitted only when "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Id.* at 84.

b. Statutory context confirms this conclusion. The "commonsense canon of *noscitur a sociis*" counsels that "a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008). Congress placed "evident partiality" in the same subsection as "corruption in the arbitrators." 9 U.S.C. § 10(a)(2) (court may vacate award "where there was evident partiality or corruption in the arbitrators, or either of them"). That linkage shows Congress intended "evident partiality" to mean grave misconduct analogous to corruption.

Likewise, "evident partiality" must be construed in light of Section 10(a)'s other bases for vacatur: "fraud," "undue means," "misconduct," "misbehavior," and "exceed[ing] * * * powers." *Id.* § 10(a)(1), (3)-(4). These grounds "address egregious departures from the parties' agreed-upon arbitration" and involve "extreme arbitral conduct." *Hall St.*, 552 U.S. at 586; *see Concepcion*, 563 U.S. at 350-51 ("[R]eview under § 10 focuses on misconduct rather than mistake."). For instance, to show arbitrators "exceeded their powers" under Section 10(a)(4), "[i]t is not enough * * * to show that the panel committed an error—or even a serious error." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010). Rather, an award may be vacated only where the arbitrator "effectively 'dispense[d] his own brand of industrial justice.'" *Ibid.*

Under the Ninth Circuit's interpretation, however, "evident partiality" is not limited to the "extreme arbitral conduct" contemplated by Section 10(a). Indeed,

that court does not require a party challenging an award to show the arbitrator was "partial" at all, much less evidently so.

"[P]arties often select arbitrators precisely because they are industry insiders," even if the arbitrator "already has some familiarity with the parties and issues." *Freeman*, 709 F.3d at 253. An arbitrator thus may have many "professional dealings" or "social acquaintanceship[s]" that could create an "*appearance* of bias." *Morelite*, 748 F.2d at 83 (emphasis added). But Section 10(a)'s plain terms do not require vacatur of every arbitration award for failure to disclose any one of those connections. Rather, Section 10(a)'s focus on extreme misconduct mandates a standard requiring vacatur only where one "would *have* to conclude that an arbitrator was partial to one party." *Id.* at 84 (emphasis added).

2. The Ninth Circuit's evident-partiality standard also conflicts with what can be discerned from *Commonwealth Coatings*.

To start, as most circuits have correctly recognized, Justice White's rationale in *Commonwealth Coatings* should be recognized as controlling. Justice Black's opinion analogized the evident-partiality standard for arbitrators to the disqualification standard for judges, invoked "the strict morality and fairness Congress would have expected on the part of the arbitrator," and pronounced a broad disclosure requirement of "any dealings that might create an impression of possible bias" or an "appearance of bias." 393 U.S. at

148-50. Justice White's concurrence reached the same result—that the record in that case compelled vacatur—but stated expressly that the Court was *not* deciding "arbitrators are to be held to the standards of judicial decorum of Article III judges." *Id.* at 150 (White, J., concurring). And it described a narrower rule in which "arbitrators are not automatically disqualified by a business relationship with the parties" if parties "are unaware of the facts but the relationship is trivial." *Ibid.* "Thus, Justice White's concurrence, pivotal to the judgment, is based on a narrower ground than Justice Black's opinion, and it becomes the Court's effective ratio decidendi." *Positive Software*, 476 F.3d at 282.

Justice Black's opinion should also be discounted for another reason: this Court later knocked out one of its critical premises. Justice Black analogized arbitrators to judges and stated court decisions must be set aside whenever the judge has "the slightest pecuniary interest" in the case. *Commonwealth Coatings*, 393 U.S. at 148. This Court later explained, however, that this statement about judges was based in part on a "misreading" of precedent. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 n.3 (1986) (citing *Commonwealth Coatings*, 393 U.S. at 148).

The Ninth Circuit's "reasonable impression of partiality" standard conflicts with Justice White's governing approach. As the Ninth Circuit itself has explained, its standard is tantamount to Justice Black's "appearance of bias" standard, *Schmitz*, 20 F.3d at 1047, which Justice White (and a majority of the

Court) rejected. And the Ninth Circuit's standard conflicts with Justice White's statement that "undisclosed relationships which are too insubstantial" do not "warrant vacating an award." *Commonwealth Coatings*, 393 U.S. at 152. Indeed, Justice White explained an arbitrator "cannot be expected to provide the parties with his complete and unexpurgated business biography." *Id.* at 151. But that is the result of a rule requiring disclosure of any facts that could create a "reasonable impression of partiality." Instead, Justice White's rationale mandates a more demanding evident-partiality standard, like the Second Circuit's rule requiring vacatur only when "a reasonable person would *have* to conclude that an arbitrator was partial to one party to the arbitration." *Morelite*, 748 F.2d at 84 (emphasis added).

B. Under The Correct Standard, The Ninth Circuit's Sweeping Disclosure Rule Cannot Be Sustained

The Ninth Circuit's (mis)interpretation of the evident-partiality standard was outcome-determinative here. The court nowhere found that Judge Kennedy was obviously partial to Monster or that a reasonable observer would have to so conclude. Instead, it stated the arbitrator's "failure to disclose his ownership interest in JAMS—given its nontrivial business relations with Monster—creates a reasonable impression of bias" mandating "vacatur of the arbitration award." App. 17a; *see* App. 12a (concluding undisclosed facts

"create an impression of bias, should have been disclosed, and therefore support vacatur").[3]

Had the Ninth Circuit here applied the heightened evident-partiality standard required by the FAA's text, *Commonwealth Coatings*, and most circuits, it would have reached the opposite result. An arbitrator's "ownership interest" in his firm is not a circumstance where "a reasonable person would *have* to conclude that an arbitrator was partial to one party to the arbitration." *Morelite*, 748 F.2d at 84 (emphasis added). The Ninth Circuit's contrary conclusion was impermissibly "based simply on speculation," and the court failed to hold "the party asserting bias" to its "burden of proving evident partiality." *Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 72 (2d Cir. 2012).

a. The Ninth Circuit's broad rule derived from two central factual premises, neither of which withstands scrutiny under the correct evident-partiality standard.

First, the court assumed arbitrators are biased in favor of "repeat players." *See* App. 15a. But in support of that empirical assumption, it cited only one 20-year-old law review article describing a single study of

[3] The Ninth Circuit purported to rely on Justice White's formulation that arbitrators must disclose any "substantial interest in a firm which has done more than trivial business with a party." App. 10a, 12a. But its lax "reasonable impression of partiality" standard led to its overbroad interpretation of what interests are "substantial" and what proceedings are "more than trivial."

employment arbitrations, unlike the commercial arbitration here. App. 15a (citing Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Emp. Rts. & Emp. Pol'y J. 189, 209-17 (1997)); *see* JAMS Br. 10 n.3 (studies "purportedly showing" repeat-player bias "all involve mandatory consumer and employment arbitration, not commercial arbitration between sophisticated parties" (emphasis omitted)). Other courts have rejected the hypothesis that arbitrators favor repeat players. *Malone v. Superior Court*, 226 Cal. App. 4th 1551, 1569 (2014) (rejecting "assumption" that "an arbitrator would be more likely to rule" for a "repeat player"). In reality, "[c]oncern with professional reputation" deters such bias. *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983). Indeed, a "one-off part[y]," App. 15a, could simply strike an arbitrator with a reputation for bias towards repeat players.

Second, the Ninth Circuit asserted that an arbitrator's ownership interest "greatly exceeds the general economic interest that all JAMS neutrals naturally have in the organization." App. 11a. Even assuming "repeat player" bias is real, however, it is not self-evident why it would influence owners more than non-owners. As Judge Friedland observed, if JAMS were motivated by repeat-player bias, it "might terminate the non-owner's JAMS affiliation" altogether if the non-owner finds against repeat players. App. 21a. Owners, by contrast, might lose only their share of profits from that repeat player's business. Thus, repeat-player bias theory would suggest both owners

and non-owners have "similar incentives to decide cases in a way that is acceptable to repeat player customers." App. 21a.

The majority also offered no support for its assumption that owners' economic interest in arbitration business "greatly" exceeds non-owners'. In fact, "no owner-neutral has ever received more than *one-tenth of one percent* of JAMS's total revenue" in a given year. JAMS Br. 7. Thus, "the vast majority of a neutral's compensation, whether an owner or not, is derived directly from work performed on matters over which they preside." JAMS Br. 11. Further, "the arbitration matters JAMS administered for Monster accounted for only approximately 0.09%"—97 arbitrations and 17 mediations out of about 127,785 cases—"of all matters administered by JAMS during" the relevant period. JAMS Br. 8. Thus, any owner's "profit allocation of Monster's extremely small slice of JAMS's overall business does not 'greatly exceed[]' the financial interest of non-owners in Monster's business." JAMS Br. 8 (quoting App. 11a).

b. Other circuits applying the correct standard have rejected evident-partiality challenges based on similarly speculative claims.

In *Andersons*, for example, the challenger alleged the arbitrators were "institutionally" biased because both the arbitrators and the prevailing party were members of the trade association administering the arbitration. 166 F.3d at 328-29. The Sixth Circuit rejected the argument that the trade association's

"arbitration system itself is evidently partial." *Id.* at 329. It explained "the party seeking invalidation must demonstrate more than an amorphous institutional predisposition toward the other side." *Ibid.* The trade association comprised "over 1000 businesses," and its rules required that "the arbitrators chosen be commercially disinterested in the particular matter before them." *Ibid.* In particular, the trade association "does not become a biased entity simply because smaller farms" like the challenger "tend not to be members." *Ibid.* "Like their smaller counterparts, large farmer-owned cooperatives" like the arbitrators' "have a vested interest in preventing agri-businesses" such as the prevailing party "from unfairly enforcing grain delivery contracts." *Ibid.*

That same reasoning requires rejection of the Ninth Circuit's ruling here. The majority's assertions about repeat-player bias amount to "an amorphous institutional predisposition." *Ibid.* Like the trade association in *Andersons*, JAMS has many arbitrators and administers matters for many parties besides Monster. JAMS Br. 7-8. And JAMS arbitrators "have a vested interest" in fairly administering arbitrations so they are selected for future matters. *See supra* p. 32. Indeed, Judge Kennedy ruled *against* Monster in his only previous arbitration involving it. ER245.

Similarly, in *Freeman*, the challenger sought to vacate an award because the arbitrator failed to disclose "she received $4,500 in campaign funds" from the prevailing party's affiliate. 709 F.3d at 254. The

Third Circuit found the undisclosed contributions "do not establish 'evident partiality,' and the reasons are many." *Id.* at 255. First, the arbitrator's "campaign funds [were] a matter of public record" that could be viewed "after a five-minute internet search." *Ibid.* Second, the contributions were "relatively small—far less than 1 percent of the $1.7 million" the arbitrator raised. *Ibid.* Third, the arbitrator also received a "contribution from the law firm representing" the challenger. *Ibid.*

Parallel circumstances exist here. Monster's previous JAMS arbitrations were publicly available on JAMS's website. App. 20a & n.3. So too was the fact that JAMS is owned by some of its neutrals. SER913. JAMS's revenues from Monster matters make up only "a small fraction of the organization's total revenues." JAMS Br. 8. And *Olympic's* lawyers were involved in hundreds of other JAMS proceedings. JAMS Br. 9 (JAMS administered 93 arbitrations, 65 references, and 429 mediations for one of Olympic's law firms and 28 arbitrations, 5 references, and 157 mediations for Olympic's other law firm). Because "lawyers often help their clients choose arbitrators," "it is possible that a JAMS arbitrator would have had an incentive to please the lawyers representing Olympic" instead of Monster. App. 20a n.2 (Friedland, J., dissenting); *see Freeman*, 709 F.3d at 255 (requiring reasonable conclusion " 'that the arbitrator was partial *to the other party*' ").

III. THE ISSUE IS IMPORTANT AND THE NINTH CIRCUIT'S DECISION WARRANTS THIS COURT'S REVIEW

The evident-partiality standard is a recurring issue of substantial importance—and one this Court's precedent has complicated rather than clarified. The Ninth Circuit's application of the incorrect standard here threatens to destabilize private arbitration.

1. Evident partiality is a "frequently" invoked basis for challenging arbitration awards. Kathryn A. Windsor, *Defining Arbitrator Evident Partiality: The Catch-22 of Commercial Litigation Disputes*, 6 Seton Hall Cir. Rev. 191, 192 (2009); *see* Dawson, *supra*, at 327 (noting an "increasing number of evident partiality challenges in court"). Losing parties have "increasingly focus[ed] on evident partiality (and its uncertainty) as their best hope for challenging undesired results." Dawson, *supra*, at 325. And "[t]he most popular means of proving evident partiality is to challenge the adequacy of the disclosures made by the arbitrator prior to confirmation." Will Pryor, *Alternative Dispute Resolution*, 65 SMU L. Rev. 247, 252 (2012).

A lax evident-partiality standard thus "seriously jeopardize[s] the finality of arbitration." *Positive Software*, 476 F.3d at 285. It provides "losing parties * * * an incentive to conduct intensive, after-the-fact investigations to discover the most trivial of relationships, most of which they likely would not have objected to if disclosure had been made." *Ibid.*; *see United Transp.*

Union v. Gateway W. Ry. Co., 284 F.3d 710, 713 (7th Cir. 2002) (a lax evident-partiality standard "encourage[s] losing parties to an arbitration to conduct a background check on the arbitrators, looking for dirt"). And "[e]xpensive satellite litigation over nondisclosure of an arbitrator's 'complete and unexpurgated business biography' will proliferate." *Positive Software*, 476 F.3d at 285.

2. While the circuits are divided on the standard for evident partiality, they agree on one thing: this Court's decision in *Commonwealth Coatings* fails to guide lower courts adjudicating the rising tide of evident-partiality claims. *E.g.*, *Morelite*, 748 F.2d at 83 ("[W]e are left in the dark" on the proper standard for evident partiality given the "murky" decision in *Commonwealth Coatings*); *Freeman*, 709 F.3d at 251 (noting "confusion" over the definition of evident partiality "stem[ming] from *Commonwealth Coatings*"); *Positive Software*, 476 F.3d at 281 ("Reasonable minds can agree that *Commonwealth Coatings* * * * is not pellucid."); *Ploetz*, 894 F.3d at 898 ("[T]he Court provided little guidance on how to evaluate cases where the arbitrator's undisclosed relationship reveals a relationship that is more tenuous."); *Merit Ins.*, 714 F.2d at 681 (observing that *Commonwealth Coatings* "provides little guidance because of the inability of a majority of Justices to agree on anything but the result"); *Schmitz*, 20 F.3d at 1047 (noting that *Commonwealth Coatings* "did not articulate a succinct standard").

Commentators agree with courts on *Commonwealth Coatings*' inadequacy. *E.g.*, Windsor, *supra*, at 198

(this "Court's evident partiality framework has failed to provide courts with much guidance in handling arbitrator evident partiality"); Elizabeth A. Murphy, *Standards of Arbitrator Impartiality: How Impartial Must They Be?*, 1996 J. Disp. Resol. 463, 470 ("[F]ederal courts have floundered in the wake of *Commonwealth Coatings*"); *see supra* p. 17.

Further percolation will not solve this 50-year-old problem. Only this Court can resolve the confusion among the circuits struggling to interpret the Court's precedent.

3. The evident-partiality standard is not an abstract question here. The Ninth Circuit deployed its minority interpretation to fashion a sweeping rule that jeopardizes arbitration awards' finality. Indeed, the decision has already caused alarm among litigants and practitioners. *E.g.*, Christopher Mason et al., *Ninth Circuit "Monster" Ruling*, Arbitration Alert (Oct. 28, 2019) (the decision "promises to reverberate through the alternative dispute resolution industry"); Eriq Gardner, *How a Dispute About Energy Drinks May Disrupt Legal Fights in Entertainment*, Hollywood Reporter (Oct. 22, 2019); Marc J. Goldstein, *Monstrous*, Arbitration Commentaries (Nov. 9, 2019) (arbitration practitioners are "uncomfortable with the Monster Majority's analysis," and their "distress is aggravated by the fact that the Monster Majority construes the mandate of *Commonwealth Coatings* in a fashion that most federal appellate courts have not").

The Ninth Circuit's rule "will require vacating awards in numerous cases." App. 24a (Friedland, J., dissenting). About one-third of JAMS arbitrators are owners. App. 11a n.2. Their decisions challenged in Ninth Circuit courts must fall if the arbitrator failed to disclose their ownership interest or JAMS's "nontrivial" arbitrations with the prevailing party. Arbitrations by other arbitration-firm owners must also be redone. This will "prolong disputes that both parties have already spent tremendous amounts of time and money to resolve." App. 25a (Friedland, J., dissenting).

The disruption will not stop there. The "uncertainty created by the" Ninth Circuit's unprecedented rule leaves many "lingering questions" about "the extent of disclosures required by arbitrators." App. 23a-26a (Friedland, J., dissenting). Must arbitrators disclose the nature and extent of their ownership interest? What qualifies as "nontrivial business dealings" requiring disclosure, and how should that be determined—by number of arbitrations or total arbitration fees? Must an arbitrator disclose "significant prior dealings even if he has no ownership interest, and vice-versa"? App. 23a n.5 (Friedland, J., dissenting). Must an arbitrator disclose "the arbitration firm's total profits" so "parties may assess * * * whether the business of the party in question is significant overall?" App. 23a (Friedland, J., dissenting).

These concerns are "not at all speculative." JAMS Br. 17. "Parties in pending and final arbitration proceedings have already begun requesting additional information from JAMS, beyond what is required by the decision (including personal financial information of the arbitrator), seeking some basis to challenge the arbitrator or the final award." JAMS Br. 17. Indeed, dissatisfied litigants across the country are now seeking to vacate arbitration awards based on the Ninth Circuit's decision here. *See*, *e.g.*, *Martin v. NTT Data, Inc.*, No. 20-cv-686 (E.D. Pa. Feb. 5, 2020), Dkt. 1; *Clean Culture Labs., LLC v. OZNaturals, LLC*, No. 20-cv-80156 (S.D. Fla. Mar. 3, 2020), Dkt. 12; *Biotronik, Inc. v. Fry*, No. 20-cv-94 (D. Or. Apr. 7, 2020), Dkt. 13.

That result frustrates the expeditious resolution Congress envisioned in enacting the FAA. The statute's "limited judicial review" protects "arbitration's essential virtue of resolving disputes straightaway." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 (2013). But under the Ninth Circuit's decision, parties and arbitrators can never be certain whether the arbitrator disclosed enough details for the award to withstand a post-hoc evident-partiality challenge. "If the losing party to an arbitration is less of a repeat player than its opponent, it will likely be able to think up after the fact some argument that an arbitrator's disclosure did not fully convey the arbitrator's financial interest in the potential future arbitration business of the winning party or its lawyers." App. 25a (Friedland, J., dissenting). In short, "the virtues Congress originally

saw in arbitration, its speed and simplicity and inexpensiveness," will be "shorn away," and arbitration will "wind up looking like the litigation it was meant to displace." *Epic Systems*, 138 S. Ct. at 1623.

Indeed, the Ninth Circuit's decision will undermine the entire system of private arbitration if left standing. The Ninth Circuit effectively concluded the arbitrator's "ownership interest" too closely aligned his economic interests with JAMS's interests for the arbitrator to be impartial. The court nowhere explained why this logic does not mean *JAMS itself*—and every other arbitration firm—is too biased to adjudicate disputes fairly because of alleged incentives to maintain repeat business. The Ninth Circuit's rule may allow litigants to accomplish on the back end what they cannot on the front end: avoid arbitration by invoking presumed bias towards repeat players. That would resurrect the very "judicial hostility to arbitration" the FAA was enacted to overcome. *New Prime*, 139 S. Ct. at 543.

This Court's review is necessary to protect arbitration's finality and its viability as an efficient dispute-resolution procedure.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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