No. 19-1333

IN THE
Supreme Court of the United States

MONSTER ENERGY COMPANY, FKA
HANSEN BEVERAGE COMPANY,
Petitioner,

v.

CITY BEVERAGES, LLC, DBA
OLYMPIC EAGLE DISTRIBUTING,
Respondent.

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

BRIEF OF JAMS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF JAMS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The undersigned respectfully submits this amicus curiae brief in support of the petition for writ of certiorari.[1]

INTEREST OF AMICUS CURIAE

Founded in 1979, JAMS, Inc. is the world's largest private alternative dispute resolution ("ADR") provider, annually administering over 15,000 arbitrations, mediations, and reference proceedings throughout the country. JAMS currently has approximately 400 neutrals, and approximately one-third of those neutrals have a small ownership interest in the organization.

The key to JAMS's and any ADR service provider's success is providing fair, neutral dispute resolution, and in the context of arbitrations, providing reasoned, final decisions that put an end to the parties' dispute. To fulfill the policy goals of neutral arbitration—and ensure that unhappy litigants cannot easily unravel a final award so arbitration remains an efficient and final dispute resolution process—numerous statutes, rules, and canons of ethics have been promulgated to guide the scope of required arbitrator disclosures.

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[1] No counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person or entity, other than the amicus curiae or its counsel, made a monetary contribution to the preparation or submission of this brief. Amicus notified the parties of their intention to file this brief more than ten days before the due date, and all parties provided consent to the filing of this brief.

JAMS provides disclosures that meet or exceed all such standards.

The Ninth Circuit's decision creates two new disclosure requirements for potential arbitrators affiliated with an ADR provider conducting arbitrations within that Circuit, which were not found in any of the statutes, rules, standards, or cases: (1) whether the arbitrator has an ownership interest in the ADR provider, however small; and (2) whether the ADR provider has engaged in more than "nontrivial" business dealings with any of the parties. Despite a complete lack of evidence that this information is related in any way to an arbitrator's potential bias, the Ninth Circuit then applied these new disclosure requirements retroactively to vacate a final arbitration award merely because, according to the decision, the information created some possible "specter" of impartiality.

Although JAMS has always refrained from supporting or opposing challenges made by parties to the arbitral process or to specific arbitration awards, JAMS has an interest in this case because the Ninth Circuit's ruling risks undermining the key benefits of the arbitration system: efficiency, neutrality, and finality. JAMS submits this brief to assist the Court in understanding why clear guidelines are needed on what a party must establish to show "evident partiality" of an arbitrator meriting vacatur of a final arbitration award.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is the first time that JAMS has ever filed an amicus brief in its forty-plus year history. JAMS is a neutral ADR provider that has always refrained from supporting or opposing challenges to the arbitral process or arbitration awards. Yet the Ninth Circuit's decision is so harmful to efficient commercial arbitration, and so incorrect in its factual assumptions, that JAMS concluded it had no choice but to take this extraordinary step, first at the rehearing level before the Ninth Circuit and now before this Court.

The Ninth Circuit's decision requires that a potential arbitrator affiliated with an ADR provider such as JAMS make two new disclosures that were never previously required by any of the legislation and standards governing arbitration disclosures in the Circuit, and that go well-beyond existing disclosure requirements mandated by other Circuits and states within the Circuit. In and of itself, there is nothing wrong with requiring additional disclosures prior to selecting an arbitrator. But the Ninth Circuit did not apply its newly-announced disclosure requirements only *prospectively*. It applied its new disclosure requirements *retroactively* to vacate a final award because of the arbitrator's failure to comply with these previously not-required disclosures. And it did so without requiring any showing that the information, had it been disclosed, established the arbitrator's evident partiality as that phrase has been interpreted by other courts throughout the country.

The Ninth Circuit decision upends the Congressionally-mandated limitation on vacatur and, in the

process, undermines the key policy purpose of commercial arbitration: to provide an efficient, neutral, and *final* resolution of commercial disputes. If allowed to stand, the ruling will open the floodgates to unhappy litigants asserting post-hoc claims of nondisclosure of ever-expanding information to assert that the arbitrator *must have* been biased, without any showing that the non-disclosed information created any reasonable appearance of partiality at all. This creates uncertainty about the finality of any arbitration award issued in this Circuit, and, as noted in the dissenting opinion, "[t]he result will be to prolong disputes that both parties have already spent tremendous amounts of time and money to resolve." Pet. App. 25a (dissent).

This Court should therefore grant certiorari to provide guidance to the lower courts on what an aggrieved party must show to vacate an arbitration decision based on an arbitrator's "evident partiality." Without such guidance, lower courts are free to craft their own standards for vacatur and allow parties to escape final arbitration decisions based on nothing more than a "specter of partiality," as the Ninth Circuit did here.

ARGUMENT

I. Allowing Vacatur of a Final Arbitration Decision by Applying New Disclosure Requirements Retroactively to Create a *Presumption* of Bias Undermines the Public Policy Goals of Neutral and Final Dispute Resolution.

Congress passed the Federal Arbitration Act ("FAA") nearly a hundred years ago "in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (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). By design, arbitration decisions are subject to narrowly-circumscribed judicial review, and can only be vacated based on the exclusive grounds set forth in Sections 10 and 11. *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (the FAA allows vacatur only for "extreme arbitral conduct"). One such ground is "where there was *evident partiality* or corruption in the arbitrators." 9 U.S.C. § 10(a)(2) (italics added).

This Court interpreted the evident partiality standard fifty years ago in *Commonwealth Coatings Corp. v. Cont'l Cas. Co*, 393 U.S. 145 (1968). The Court held that potential arbitrators must disclose to the parties any personal or professional relationships or significant business dealings he or she has had with a party that might create an impression of bias, and failure to disclose such information may result in vacatur of a final arbitration decision. *Id.* at 149-50.

In the years since *Commonwealth*, numerous statutes, rules, and canons of ethics have been promulgated to guide the scope of required arbitrator disclosures.[2] These statutes and rules all require proposed arbitrators to disclose if they have (1) any financial or personal interest in the parties or outcome of the arbitration, (2) any financial, business, or personal relationships with any of the parties, and (3) previously mediated or arbitrated for any of the parties and the outcome of any such cases. The disclosed information provides parties with the information they need to vet the proposed neutral and to either accept or reject the appointment before the parties invest time and money into the arbitral process. Thus, extensive disclosures required before an arbitrator is selected protect not only the finality of the award, but also the legitimacy of the process itself.

The Ninth Circuit's decision expands arbitrators' disclosure requirements beyond anything found in existing law. Although none of the existing statutes, rules, or standards require an arbitrator affiliated with an ADR provider to disclose information about the *ADR provider's* prior dealings with a party in commercial arbitrations, the Ninth Circuit's decision requires that arbitrators in the Circuit now disclose, in addition to information about *their own* interests in and relationships to the parties or the proceeding,

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[2] *See, e.g.*, Revised Uniform Arbitration Act, § 12 (adopted by several states throughout the country); Cal. Code Civ. Proc. § 1281.9(a); ABA/AAA Code of Ethics for Arbitrators in Comm. Disputes, Canon II; Cal. Rules of Court Ethics Standards, Standards 1(a), 7 (d)(10), (11); JAMS Comp. Arb. R. 15 (h); AAA Comm. Arb. R. R-17(a); ADR Servs. Arb. R. 12; Judicate W. Comm. Arb. R. 5.A.4.b.

(1) whether they have any equity interest in the *ADR provider* administering the arbitration, no matter how small, and (2) whether the *ADR provider* had previously engaged in "nontrivial business dealings" with any of the parties at any time in the past.[3] Pet. App. 14a, 17a.

The problem with the decision, however, is not that it creates more disclosure obligations. The problem is that the decision allows a losing party to overturn an arbitration decision based on the arbitrator's failure to disclose information that no statute, rule, or opinion previously required to be disclosed. And it allows parties to do so without any showing that the information, had it been disclosed, established a reasonable appearance of the *arbitrator's* partiality at all. If allowed to stand, the decision invites disappointed parties in the Ninth Circuit to seek to unravel virtually any arbitration award, based on a post-hoc claim of nondisclosure—even though, as in this case, no statute, rule, or opinion required such a disclosure when the arbitrator was selected. *See* Pet. App. 22a-23a (dissent) (providing examples of disclosures that are not specifically required by the majority opinion, but which a party could claim after-the-fact should have been disclosed).

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[3] The Ninth Circuit's decision does not put any limit on how far back the disclosures must go. As it reads, the opinion requires the ADR provider to disclose how many matters the provider has *ever* administered for a party, even if it was 30 years ago and long before the arbitrator became affiliated with the provider. It is hard to imagine how that information would shed any light on whether the potential arbitrator might have some bias in favor of a party.

For example, assume a potential arbitrator discloses an ownership interest in his or her administrating organization and that the organization (not the arbitrator) had previously mediated ten cases with a party, but both parties nonetheless accept that arbitrator. If at any time during the pending arbitration, the arbitrator makes a ruling the party does not like or issues an award the party is unhappy with, that party can claim that additional information was not disclosed in an effort to have the arbitrator disqualified or the award vacated.[4] If the unhappy party learns that the ADR provider has administered more than ten cases involving the opposing lawyers, can the party obtain vacatur? If the party learns that the provider has administered more than ten cases involving any attorney in the opposing law firm, can the party obtain vacatur? As Judge Friedland noted in her dissent, "this slippery slope may have no bottom." Pet. App. 25a (dissent).

This is not at all speculative. Parties in pending and final arbitration proceedings in states in the Ninth Circuit have already begun requesting additional information from JAMS, beyond what is required by the decision or existing rules (including personal financial information of the arbitrator), seeking

[4] Although one would think there would be a waiver issue if the party did not seek to learn the information or object to the arbitrator *before* agreeing to him or her, the Ninth Circuit also foreclosed that possibility. *See* Pet. App. 6a-9a (holding that, despite disclosing his economic interest in JAMS's financial success and disclosing that Monster Energy had arbitrated other matters with JAMS, Olympic Eagle lacked notice that the arbitrator's "economic interest" in JAMS was an ownership interest, and therefore there was no waiver).

some basis to challenge the arbitrator or the final award.

The Court should grant certiorari so, at a minimum, it can establish guidelines for what information must be disclosed and what non-disclosures may give rise to an appearance of evident partiality.

II. Allowing Vacatur of a Final Arbitration Award Without Any Showing of Evident Partiality Undermines the Public Policy Goals of Neutral and Final Dispute Resolution.

The Ninth Circuit's decision was based on an *assumption* that if a neutral has an ownership interest in an ADR provider that has administered more than a "trivial" number of matters for a party, the neutral intrinsically has a financial incentive to rule in favor of the purported "repeat player." The majority adopted a "repeat player" bias theory which posits that the provision of prior services by a neutral or an ADR provider alone creates an impression of bias in future matters for the "repeat player." Pet. App. 15a. But, although there have been studies purportedly showing such a bias, the studies all involve mandatory consumer and employment arbitration where the consumer or employee has no power to negotiate the forum for any future arbitration, not commercial arbitration between sophisticated parties. *See* Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 Cal. L. Rev. 1, 6-7 & n.32-34 (Feb. 2019).

Moreover, by making an *assumption* of repeat-player bias, the Ninth Circuit's decision allows an unhappy litigant to obtain vacatur of an arbitration

award without *any* evidence of actual or even potential bias, and even if the evidence is contrary. This case is a great example.

Prior to being selected, the arbitrator disclosed: "Each JAMS neutral, including me, has an economic interest in the overall financial success of JAMS." Pet. App. 4a. He also disclosed his involvement in two arbitrations involving Monster Energy as a party, one that he had decided against Monster Energy and a pending one where he had been selected as the arbitrator, and he advised the parties they "should assume that one or more of the other neutrals who practice with JAMS has participated in [a] … dispute resolution proceeding with the parties … in this case and may do so in the future." *Id.* The arbitrator did not, however, disclose the total number of arbitrations JAMS had administered involving Monster Energy in the past using other neutrals (97 over approximately 13 years).[5]

The Ninth Circuit held that these disclosures were insufficient. The court held that the arbitrator's ownership interest in JAMS, coupled with the number of cases JAMS had previously administered involving Monster Energy, *necessarily* meant that the arbitrator had an appearance of bias. But the court's conclusion was based on the *assumption* that the arbitrator's ownership interest in JAMS was "sufficiently substantial" and an *assumption* that JAMS and Monster had engaged in "nontrivial business dealings" in the past, while acknowledging there was nothing to

[5] The Ninth Circuit stated that JAMS had administered 97 arbitrations for Monster "over the past five years," Pet. App. 11a, but that was inaccurate.

support those assumed facts. The court then concluded that these two "facts" created a *presumption* of bias requiring vacatur. Pet. App. 11a-12a.

The Ninth Circuit's assumptions were not based on any evidence in the record and were in fact inaccurate. At JAMS, a neutral's income is not affected in any material way by the amount of business a party has done with the organization, whether the neutral is an owner or not. As recognized by Judge Friedland's dissent, "arbitrators are hired and paid by the parties for whom they conduct private arbitrations." Pet. App. 19a (dissent). Therefore, although an owner-neutral receives a very small percentage of the firm's total revenues,[6] 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. There simply is no material relationship between an owner-neutral's income and the ADR provider's amount of prior business with a party.

Further, even if a neutral's ownership interest in an ADR provider was more significant than it is at JAMS, there is no basis for the Ninth Circuit's *presumption* that the neutral necessarily would favor a "repeat player." Though it should go without saying, revenue generated through service as a neutral

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[6] No owner-neutral has ever received more than *one-tenth of one percent* of JAMS's total revenue ($100 for every $100,000 of revenue) in a single year, and that small revenue share is untethered to the revenue from any specific party, lawyer, or law firm. Moreover, the revenue attributable to any one party in a given time period, even a "repeat player," is a small fraction of the organization's total revenues. For example, in the 13-year period in which JAMS administered 97 arbitrations involving Monster, it administered approximately 127,785 total cases.

and/or as a sponsoring organization is not dependent upon delivering a specific outcome; quite the opposite. JAMS neutrals do not receive financial credit or bonuses for the creation or retention of customer relationships, nor any financial reward if a party returns to JAMS for a subsequent matter. Indeed, to ensure arbitrators can provide decisions that are neutral, they are provided immunity. *See Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987). Like judicial immunity, arbitral immunity "protect[s] the decision-maker from undue influence and protect[s] the decision-making process from reprisals by dissatisfied litigants." *Id.* And while every neutral, regardless of ownership status, has a financial interest in being asked to arbitrate a subsequent matter for a party, that does not lead to favoritism of one party over the other because the arbitrator benefits if *either* party requests his or her services in the future. This case is a prime example, since the specific arbitrator had decided the only other case he arbitrated *against* Monster Energy.

In sum, 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, even a "repeat player." To the contrary, every neutral, *regardless of ownership status*, has the same interest in providing high quality neutral services so that even losing parties or their counsel will consider their appointment in other matters.

This Court should grant certiorari to provide guidance on what a party must actually prove to establish "evident partiality" meriting vacatur of a final arbitration decision.

CONCLUSION

For all these reasons and those set out in the petition, the Court should grant certiorari to provide guidance to the lower courts on what an aggrieved party must show to vacate an arbitration decision based on an arbitrator's "evident partiality."

Respectfully submitted,

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