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ARBITRATOR BIAS: WHY WE SHOULD ADOPT THE NINTH CIRCUIT'S REASONABLE IMPRESSION STANDARD

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I. INTRODUCTION

Litigating parties have a high expectation that their presiding judge is impartial. Likewise, when parties submit to arbitration, they trust that their arbitrator will resolve their dispute in a fair and unbiased manner. Unlike judges, however, arbitrators are often selected by the parties because of their expertise and experience in the relevant field.[1] The problematic implication is that with such proficiency come connections, prior relationships, and professional bonds that could impact the arbitrator's neutrality.[2] In *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673 (7th Cir. 1983), Judge Posner explained that these practical realities demand a "tradeoff between impartiality and expertise" for the resolution of disputes for which Article III judges are unpracticed.[3] Essentially, Judge Posner meant that if parties had wanted their particular disputes adjudicated by an Article III judge, they would have chosen to litigate.[4] The fact that parties *voluntarily* chose to have their dispute adjudicated in arbitration means they likely prioritized their arbitrator's familiarity with the subject matter at the expense of complete impartiality.[5] Posner's assumption, however, that both parties knowingly made a deliberate tradeoff, is no longer warranted because of the vast changes in the arbitration landscape in the forty years since the *Merit* decision.

Today, forced arbitration provisions in the consumer and employment contexts are far more commonplace than they were in 1983.[6] In 1992, 2% of employees were

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1. Heather Cameron, *Blind Justice and Just Arbitrators: Understanding the Federal Arbitration Act's Evident Partiality Standard*, 89 FORDHAM L. REV. 2233, 2235 (2021).

2. *Id.*

3. Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679 (7th Cir. 1983) ("If Leatherby had wanted its dispute" to be resolved by an Article III judge "it would not have inserted an arbitration clause in the contract or having done so move for arbitration against Merit's wishes. . . . Leatherby wanted something different…it wanted dispute resolution by experts in the insurance industry, who were bound to have greater knowledge of the parties, based on previous professional experience, than an Article III judge or jury").

4. *Id.*

5. *Id.*

6. Alexander J.S. Colvin, *The growing use of mandatory arbitration*, ECON. POL'Y INST. (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.

subject to mandatory arbitration.[7] In the early 2000s, that percentage had jumped to nearly 25%.[8] By 2017, a whopping 56.2% of employees were subject to mandatory arbitration provisions.[9] This means that today, more than 60.1 million American workers have "elected" to face arbitration with an arbitrator of their employer's choosing.[10] This situation is surely not what Judge Posner envisioned when he declared that "parties to an arbitration choose their method of dispute resolution and can ask no more impartiality than inheres in the method they have chosen."[11] Herein lies the first problem this note will address: in today's employment and consumer contexts (which is where most disputes arise), *both* parties do not choose their arbitrator—*one* party does—the more powerful party.

Indeed, the problem is two-fold. First, as noted above, in today's employment and consumer contexts, the more powerful party selects the arbitrator. Second, this problem is further exacerbated by arbitrator bias. While there are several studied forms of arbitrator bias, this note will focus on the two most rampant in arbitration: "repeat player" bias and affiliation bias. The "repeat player" bias is the fact that a party that appears more than once before a particular arbitration provider (JAMS or AAA, for example), will win more often.[12] Affiliation bias, on the other hand, focuses on the *individual* arbitrator as opposed to the arbitration provider and suggests that arbitrators are more likely to choose outcomes that are more favorable to the side that appointed them.[13]

Several recent studies have shown that an overwhelming number of arbitrators across around the world suffer from some form of bias, conscious or unconscious.[14] Two such studies were the 2011 and 2015 analyses of the American Arbitration Association's (AAA) outcome reports (released publicly for the first time that year pursuant to new California Code requirements), which provided strong evidence of a repeat player effect in which employee win rates and awards were significantly lower when the employer was involved in multiple arbitration cases with the AAA.[15] More recently, a 2017 survey conducted by faculty at the James E. Rogers College of Law, University of Arizona concluded that a large number of individual arbitrators across the country suffer from "a cognitive predisposition to favor the appointing party."[16]

Such studies raise questions about whether the arbitrators are adequately impartial, which is particularly salient given the current circuit split on what constitutes permissible bias towards a party. Section 10 of the Federal Arbitration Act (FAA) grants courts the authority to vacate an arbitral award on several grounds, including (1) if the award was procured by corruption, fraud, or undue means or (2)

7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679 (7th Cir. 1983) (in fact, it likely was not because, in 2015, Judge Posner, still serving on the Seventh Circuit, questioned why parties seek arbitration over litigation, and admonished telecommunications giant, Sprint, for seeking arbitration to preclude class actions (as is the norm in almost all arbitration clauses)).
12. Colvin, *supra* note 6.
13. Colvin, *supra* note 6.
14. Colvin, *supra* note 6.
15. Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 CORNELL J. EMPIRICAL LEGAL STUD. 1, 19 (2011).
16. Sergio Puig & Anton Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approach*, 46 CHI. J. LEGAL STUD. 371, 371 (2017).

if there was evident partiality or corruption in the arbitrators, or either of the parties.[17] The Act, however, fails to define the term "evident partiality" or establish a baseline impartiality standard that must be met by arbitrators.[18] As a result, the meaning of "evident partiality" has been the subject of much litigation over the past fifty-three years and has resulted in several circuit splits.[19] In 2020, courts nearly got clarification on the evident partiality standard when *Monster Energy Co. v. City Beverages, LLC* almost reached the Supreme Court.[20] Unfortunately, the Supreme Court denied certiorari on Monster Energy's petition and left the splits standing.[21]

This certiorari denial was especially problematic because of the *Monster* court's acknowledgement of the "repeat player" phenomenon in arbitration.[22] The pervasiveness of forced arbitrations and the acknowledged existence of arbitrator bias in the present-day arbitration landscape inevitably raise the question of whether the American judiciary is properly protecting weaker parties' right to neutral adjudication. This note argues that the answer is no, and that the Supreme Court should clarify that "evident partiality" means "possible bias" as the Ninth Circuit has established. Part two of this note will discuss how the Ninth Circuit's "possible bias" standard favors of the lesser-connected and resourced party. Part three will examine in more depth the arbitrator bias studies mentioned earlier. Part four will argue that because arbitrators cannot be sufficiently impartial as to not exhibit bias for the party they have the prior relationship with or have been appointed by,[23] the repeat player phenomenon should constitute "evident partiality" under the "possible bias" standard.

II. "EVIDENT PARTIALITY" AND THE CIRCUIT SPLITS

As stated earlier, Section 10 of the Federal Arbitration Act (FAA) grants courts the authority to vacate an arbitral award for evident partiality or corruption on part of the arbitrators, or either of the parties. This section will explore the Supreme Court's limited remarks on "evident partiality" and the resulting lack of consensus on its meaning.

A. Commonwealth Coatings Corp. v. Continental Cas. Co

The last time the Supreme Court examined the FAA's evident partiality standard was in 1968 in *Commonwealth Coatings Corp. v. Continental Cas. Co.*[24] In that case, the arbitrator, who was designated by the parties (per the parties' agreement) to be neutral, failed to disclose that he had actually served as an engineering consultant for one of the parties on many projects, including the one in dispute.[25] The arbitrator disclosed those facts only *after* the award was made.[26] The Court found

17. 9 U.S.C. § 10 (2012).
18. *Id.*
19. Cameron, *supra* note 1, at 2236.
20. Cameron, *supra* note 1, at 2236.
21. Cameron, *supra* note 1, at 2236.
22. Petition for Writ of Certiorari, Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130 (9th Cir. 2019).
23. *See generally* Puig & Strezhnev, *supra* note 16.
24. Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (P.R. 1968).
25. *Id.* at 146.
26. *Id.*

that an arbitrator's failure to make a required disclosure to the parties is grounds for vacating an arbitration award even if there is no proof of actual bias.[27]

In the dictum contained in his majority opinion, Justice Black suggested that arbitrators should avoid even the *appearance* of bias.[28] He conceded that arbitrators, unlike judges, do not usually generate all their income from deciding cases and, thus, cannot sever their ties from the business world.[29] Nonetheless, he emphasized that courts should be "even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review."[30] He did not perceive a way in which the effectiveness of the arbitration process would be hampered by the simple requirement that arbitrators disclose any dealings that might create an impression of possible bias.[31] Thus, Justice Black seemingly interpreted "evident partiality" "as being coextensive with the judicial standard for bias, requiring that arbitrators must not only be unbiased, but they 'must also avoid even the appearance of bias.'"[32]

Justice White joined Justice Black's opinion, further remarking that the judiciary should "minimize its role in arbitration as judge of the arbitrator's impartiality."[33] He believed that role is best assigned to the parties, who are the "architects of their own arbitration process" and likely far better informed of the prevailing ethical standards within their business area.[34] He saw no reason to automatically disqualify "the best informed and most capable potential arbitrators" based on a prior business relationship with one of the parties; he would require only disclosure of the fact to the parties.[35] He further opined that an arbitrator should be disqualified only on the basis of a "substantial interest" in the underlying dispute.[36]

Justice Black's dictum, plus Justice White's additional remarks, created a confusing framework for evident partiality that necessitated a case-by-case approach throughout the circuits, giving birth to the circuit split in the decades following *Commonwealth*.[37]

B. "Reasonable Person Would Have to Conclude" Standard

With uncertainty as to what exactly constituted "evident partiality" following *Commonwealth*, the Second Circuit established its own interpretation of "evident partiality" in *Morelite Const. Corp. v. N.Y.C. Dist. Council Carpenters Ben. Funds* (1984).[38] Because the Second Circuit perceived Justice Black's "possible impression" standard to be too low, and proof of actual bias too high (if not impossible to

27. *Id.* at 150.
28. *Id.*
29. *Id.* at 148.
30. Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 149 (P.R. 1968).
31. *Id.*
32. Cameron, *supra* note 1, at 2244.
33. Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 151 (P.R. 1968) (White, J., concurring).
34. *Id.*
35. *Id.*
36. *Id*. at 151–52.
37. *Id.*
38. Morelite Const. Corp. v. N.Y.C. Dist. Council Carpenters, 748 F.2d 79 (1984).

prove in many instances), the *Morelite* court adopted something in the middle.[39] The Second Circuit would find evident partiality where "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."[40]

Since then, several other courts of appeal have adopted or slightly modified the Second Circuit's "reasonable person would have to conclude" standard.[41] The First, Third, Fourth, Fifth, and Sixth Circuits also closely follow the Second Circuit, essentially ruling that a party must show that "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration" because the arbitrator failed to disclose facts perceived to impact the arbitrator's neutrality.[42] Under the exacting standard adopted by these six circuits, successful award challenges for evident partiality are exceedingly rare.[43]

C. The "Reasonable Impression" Standard

In contrast, the Ninth Circuit and the Eleventh Circuits have adopted Justice Black's less demanding "reasonable impression" standard whereby awards may be vacated if an arbitrator fails to disclose facts that could give third parties a "reasonable impression" that the arbitrator was partial to one of the parties.[44] This standard arguably favors the inherently weaker party (i.e., the consumer or employee), because showing that a person "might reasonably" "question" a decisionmaker's impartiality is considerably easier than proving that a "reasonable person would *have* to conclude" that a decisionmaker was partial.

The dispute in *Monster Energy v. City Beverages, LLC* (2020) arose out of a disagreement between Monster, maker of a popular brand of energy drinks, and City Beverages, a franchisee that did business as Olympic Eagle.[45] Under the distribution agreement, which was governed by Washington law, Monster could terminate the parties' relationship without cause so long it paid a severance of $2.5 million.[46] When Monster sought to exercise this right and terminate the distribution agreement, Olympic Eagle rejected the severance payment, claimed breach of contract, and invoked the state's Franchise Investment Protection Act (FIPA), which requires good cause for termination.[47]

Monster then moved to compel arbitration with JAMS, the arbitration service specified in the distribution agreement.[48] The Arbitrator ruled in Monster's favor, finding that Olympic Eagle was not entitled to protection under FIPA, and awarded the company 3 million dollars in attorney's fees.[49] When Monster petitioned to confirm the award, Olympic Eagle moved for vacatur arguing that the arbitrator had

39. Cameron, *supra* note 1, at 2244.
40. Seung-Woon Lee, *Arbitrator's Evident Partiality: Current U.S. Standards And Possible Solutions Based On Comparative Reviews*, 9 ARB. L. REV. 159 (2017).
41. *Id.*
42. Cameron, *supra* note 1, at 2244.
43. Cameron, *supra* note 1, at 2244.
44. Cameron, *supra* note 1, at 2244.
45. Theodore Folkman & David Evans, *Monster Energy v. City Beverages—Ninth Circuit's New Disclosure Rules for Owner-Neutral*, ABA (Jan. 2, 2020), https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2020/ninth-circuits-new-disclosure-rules-for-owner-neutral/.
46. Petition for Writ of Certiorari, *supra* note 22, at 10.
47. Petition for Writ of Certiorari, *supra* note 22.
48. Petition for Writ of Certiorari, *supra* note 22.
49. Petition for Writ of Certiorari, *supra* note 22.

failed to disclose his ownership interest in JAMS.[50] Olympic argued the arbitrator's failure to disclose this "ownership interest," combined with Monster's status as a JAMS "repeat player," established evident partiality.[51]

The Arbitrator's multi-page disclosure statement, provided to the parties at the start of arbitration, contained the following provision:

> 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.[52]

Olympic Eagle later discovered, however, that the arbitrator's "economic interest in the overall financial success of JAMS" was based on the fact that the Arbitrator was part *owner* of JAMS.[53] Further, the arbitrator failed to disclose the true volume of JAMS' involvement with Monster cases in the past—97 administered arbitrations to be exact.[54]

In its decision, the Ninth Circuit established a two-fold inquiry to determine whether to vacate an arbitration award when the arbitrator's neutrality is in question: vacatur of an arbitration award is supported when 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."[55] In applying its standard, the court of appeals reasoned that the arbitrator's co-ownership of JAMS was a substantial interest because he had a right to "a portion of profits from all of its arbitrations, not just those that he personally conducted." [56] Next, the court pointed to Monster's 97 JAMS-administered arbitrations over the past five years, reasoning their dealings were "hardly trivial." [57] Thus, the court held that the award should be vacated because "the Arbitrator's ownership interest in JAMS was sufficiently substantial" and "JAMS and Monster were engaged in nontrivial business dealings."[58]

The U.S. Supreme Court declined to grant a writ of certiorari in this case, which is unfortunate because the standard that the judge applies to evaluate a claim of an

50. Folkman & Evans, *supra* note 45.
51. Petition for Writ of Certiorari, *supra* note 22, at 11.
52. Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130, 1133 (9th Cir. 2019).
53. *Id*. Upon this discovery, Olympic Eagle requested information from JAMS regarding the Arbitrator's financial interest in JAMS and Monster's relationship with JAMS, *id.* When JAMS refused to divulge this information, Olympic Eagle served JAMS with a subpoena, *id.* In the face of further resistance, Olympic Eagle later moved to compel JAMS's response to the subpoena, *id.* The presiding Ninth Circuit judge later remarked that JAMS "repeatedly stymied Olympic Eagle's efforts to obtain details about JAMS' ownership structure and the Arbitrator's interest post-arbitration, *id.*
54. *Id*. at 1132.
55. Petition for Writ of Certiorari, *supra* note 22, at 14.
56. Cameron, *supra* note 1, at 2250.
57. Cameron, *supra* note 1, at 2250.
58. Cameron, *supra* note 1, at 2249–50.

arbitrator's evident partiality is likely dispositive to the motion's outcome and, therefore, essential to the final nature of the judgment and award.[59]

D. The Eighth Circuit

Much like the other circuits after *Commonwealth*, the Eighth Circuit had some initial difficulty determining how to construct the existence of "evident partiality."[60] Their earliest constructions indicated that "evident partiality" existed wherever an undisclosed relationship created an "impression of possible bias."[61] Later, "evident partiality" was deemed to exist wherever an undisclosed relationship casted "significant doubt on the arbitrator's impartiality."[62] More recently, in cases where parties allowed interested arbitrators, the Eighth Circuit held that the relationship must "objectively demonstrate such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives."[63] *See Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742, 750 (8th Cir. 2003) ; *see also Williams v. NFL* , 582 F.3d 863, 885 (8th Cir. 2009). In 2018, in *Ploetz v. Morgan Stanley Smith Barney LLC, 894 F.3d 894*, the Eighth Circuit declined to define a standard because the case before it did not deal with a disinterested arbitrator.[64] As such, the appellate court instead looked for evidence of prejudicial effect.[65]

Essentially, the court of appeals in *Ploetz* did not (and did not need to) settle on one interpretation or another, because the challenger could not prove evident partiality under any of them.[66] The Eighth Circuit's hesitancy to define "evident partiality" creates uncertainty for parties whose challenges to arbitrator neutrality will be heard in the five states making up the circuit, Missouri being one of them. Supreme Court clarification would be especially helpful for companies operating in those states.

III. ARBITRATOR BIAS STUDIES

Recent empirical studies of arbitrator bias demonstrate a need to protect the party likely to be disadvantaged by the bias, which the Ninth Circuit's "reasonable impression" standard can help remedy.[67] These studies have shown that arbitrators often suffer from some form of bias,[68] some specifically focusing on and examining affiliation bias and repeat player bias because of their pervasiveness in arbitration.[69]

As stated earlier, the repeat player phenomenon is the increased statistical probability that a party appearing more than once before an arbitration provider will win more often and have lower damages awarded against them than will parties

59. Cameron, *supra* note 1, at 2235.
60. Ploetz v. Morgan Stanley Smith Barney LLC, 894 F.3d 894, 898 (8th Cir. 2018).
61. *Id.*
62. *Id.*
63. *Id*. *See also* Dow Corning Corp. v. Safety Nat'l Cas. Corp., 335 F.3d 742, 750 (8th Cir. 2003); Williams v. Nat'l Football League, 582 F.3d 863, 885 (8th Cir. 2009).
64. *Ploetz*, 894 F.3d at 898.
65. *Id.* at 899.
66. *Id*. at 899–90.
67. *See generally* Colvin, *supra* note 15; Puig & Strezhnev, *supra* note 16.
68. Puig & Strezhnev, *supra* note 16.
69. Puig & Strezhnev, *supra* note 16.

appearing before an arbitrator for the first time.[70] The affiliation bias suggests that arbitrators are more likely to choose outcomes that are more favorable to the side that appointed them.[71] Taken together, this means a party can be at an inherent disadvantage because the opposing party has appeared before the arbitrator or the arbitrator service before, and they may be more likely to be hit with punitive costs because of the fact. Thus, the damage is potentially two-fold for the losing party.

The studies mentioned earlier demonstrate that the Supreme Court should adopt the Ninth Circuit's interpretation of the "evident partiality" standard because the Ninth Circuit's more relaxed standard, which requires vacatur for the "possible impression" of bias, makes it more difficult for a repeat player situation to go unnoticed by a party appearing for the first time before the arbitration provider (a "one-shot" party). A one-shot party would be able to successfully object to the suggested arbitrator in favor of a more neutral adjudicator, thus increasing their chances of receiving a truly neutral evaluation of their case. In essence, the Ninth Circuit standard creates a more level playing field because it gives additional power to the party most likely to be both disadvantaged by the bias and unaware of the bias.

A. The Repeat Player Phenomenon

Two related studies out of Cornell University, with a focus on the employment context, provided strong evidence of a repeat player effect in which employee win rates and award amounts are significantly lower when the employer is involved in multiple arbitration cases with the same arbitration provider.[72] These studies, one in 2011 and the other in 2015, were conducted by Professor Alexander J.S. Colvin, an expert in employment dispute resolution and empirical research at Cornell University's School of Industrial and Labor Relations (ILR).[73]

The 2011 study analyzed 1,213 AAA employment awards filed between January 1, 2003, and December 31, 2007. [74] In that study, Colvin found that the employee win rate was 32% against one-shot parties, but just 17% against repeat players.[75] Next, he found that employees prevailed 23% of the time when the individual arbitrator was new to both parties, but only 12% of the time when there was a "repeat pairing" (appearance at least twice before the same individual).[76] Third, he performed a logit regression analysis, using employee win rates as a dependent variable, and repeat employer, repeat employer-arbitrator pairing, and pro se status as independent variables.[77] The mere fact that an employer was a repeat player reduced the likelihood of an employee victory by about 49%.[78] Additionally, repeat pairings decreased the employee's chance of winning by 40%.[79]

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70. Colvin, *supra* note 15, at 1.
71. Puig & Strezhnev, *supra* note 16, at 373.
72. *See* Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CAL. L. REV. (2019).
73. *Id.*
74. *Id.* at 21.
75. *Id.*
76. *Id.*
77. *Id.*
78. *See* Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CAL. L. REV. (2019).
79. *Id.*

The follow-up 2015 study revisited the employment files of the AAA examining 10,355 cases and 2,802 awards between January 1, 2003, and December 31, 2013.[80] That study differed slightly from the first. Among other things, Colvin added independent variables including the arbitrator's gender, judicial experience, membership in the National Academy of Arbitrators, as well as whether the case was filed in either the reportedly pro-employee jurisdiction of California or the allegedly pro-employer state of Texas.[81]

This second study revealed several important things. First, for every additional case in which an employer was involved with the arbitration provider, the odds of an employee win fell by 0.3% ($p < 0.001$).[82] Second, with each instance of a repeat pairing, the chances of the employee prevailing decreased by 6.2% ($p < 0.05$).[83] Third, there was no evidence that "repeat players are more or less likely than one-shot employers to settle cases prior to the final adjudicatory stage."[84] This last point suggested that the divergence in win rates "between one-shot and repeat players is not simply a function of differences in settlement behaviors in the two groups."[85]

In conclusion, both of the Colvin studies strongly suggested that employers that are involved in more arbitration cases with the AAA tend to have higher win rates and lower damage awards rendered against them.[86]

B. Affiliation Bias Hypothesis

In 2017, Professor Sergio Puig, a professor at the University of Arizona James E. Rogers College of Law reported the results of a study showing that an overwhelming number of arbitrators across the country suffer from affiliation bias.[87] The affiliation-bias hypothesis states that arbitrators told that they were appointed by the winning party (after deciding the winner) will be more punitive toward the loser in terms of cost allocation than those who were told that they were appointed by the losing party.[88] Because evaluating data on historical disputes is problematic due to the nonrandom selection of arbitrators, Professor Puig designed a novel experimental approach to measuring the causal effect of the appointing party.[89]

In short, the subjects of the study—arbitrators—were presented with a hypothetical investment arbitration case and asked to make a choice about allocation of costs.[90] Participants were randomly told that they were appointed in one of three ways: by one of the parties, jointly or by agreement of the parties, or simply that they were appointed without any information about the identity of the appointer (this last condition is what the study called the "blind appointment").[91] The study

80. *Id.*
81. *Id.* at 22.
82. *Id.*
83. *Id.*
84. *See* Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CAL. L. REV. (2019).
85. *Id.*
86. *Id.*
87. *Id.* at 371.
88. Sergio Puig & Anton Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approach*, 46 CHI. J. LEGAL STUD. 371, 380 (2017).
89. *Id.* at 371.
90. *Id.* at 373.
91. *Id.*

found that on average, arbitrators were about 18% more likely to award all costs to the winning party when they were told they had been appointed by the winner rather than the loser.[92] However, an arbitrator's assignment to the winning party appeared to have little to no effect on "the arbitrators' propensity to cost shift in the first place."[93] When an arbitrator chose to follow the unwritten rule of "costs follow the event" whereby the losing party pays the legal fees of both parties, the winner's appointee was more likely to punish the losing party by having it reimburse all the winner's costs,[94] while the loser's appointee was more likely to protect its appointing side by having it pay only some of the winner's costs.[95]Puig found this to be consistent with the affiliation-bias theory because, "[w]hile arbitrators do not completely advance their appointing party's interests, when room for discretion arises, they appear to be more likely to choose outcomes that favor the side that appointed them."[96]

In the follow up replication study, Puig manipulated two elements: the amount of proposed damages and the appointing party.[97] Puig added the manipulation on damages "to evaluate whether differences in the magnitude separating each of the parties' proposals affected the choice of damages or moderated the affiliation-bias effect."[98] This was done "to ensure that [the] findings would not be driven exclusively by the values [chosen] for the claimant's and respondent's proposed damages."[99] Additionally, to increase observation and identification of the affiliation effect, Puig increased the number of arbitrators assigned to a party-appointed condition from one-half in the first experiment to two-thirds in the second.[100] In the end, Puig found no evidence for effect modification or a statistically significant effect of the size of the proposed damages on the probability that the arbitrator would choose either the claimant's or the respondent's position.[101] These findings, which were nearly identical to the findings of the original study, strongly suggest that affiliation bias remains even for more substantive questions and beyond just decisions on costs.[102]

In conclusion, the two studies strongly suggested a meaningful affiliation effect when arbitrators are tasked with allocating some amount between the parties (which is a fundamental aspect of arbitration).[103] When given substantial discretion, as is the case for cost awards, "party appointees tend to give the party that appointed them a more favorable outcome."[104] Those assigned to the winning-party demand more from the loser, while those assigned to the losing-party try to mitigate their appointer's losses.[105]

92. *Id.* at 381.
93. *Id.*
94. Sergio Puig & Anton Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approach*, 46 CHI. J. LEGAL STUD. 371, 381 (2017).
95. *Id.* at 382.
96. *Id.*
97. *Id.* at 383–84.
98. *Id.* at 384.
99. *Id.*
100. Sergio Puig & Anton Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approach*, 46 CHI. J. LEGAL STUD. 371, 384 (2017).
101. *Id.*
102. *Id.* at 385.
103. *Id.* at 387.
104. *Id.*
105. *Id.*

IV. ANALYSIS: WHY SCOTUS SHOULD FIND THAT HE "EVIDENT PARTIALITY" IS EQUIVALENT TO THE "POSSIBLE IMPRESSION" STANDARD

The Supreme Court should establish the "evident partiality" standard to be equivalent to the "possible impression" standard because our current system has few substantive mechanisms for detecting and deterring biased arbitrators.[106] Defenders of mandatory arbitration align with Judge Posner's view that rational parties will not enter into fundamentally unfair agreements with biased decision makers, but if they do, they must accept the consequences of that decision.[107] This argument holds up when the parties hold equal bargaining power, but breaks down in the context of mandatory arbitration (where the parties do not hold equal bargaining power).[108] The "possible impression" standard will thus serve as a substantive check on non-trivial relationships between parties and their arbitrators, the resulting arbitrator bias that arises from those relationships, and the power imbalance inherent in mandatory arbitration.

As mentioned in the introduction of this note, the inherently weaker party in the mandatory arbitration context does not truly "choose" their arbitral forum, much less their arbitrator. Because forced arbitration is likely not to be eradicated anytime soon, consumers and employees should receive protection in some other form to increase access to a truly neutral arbitral forum. Thus, an inherent reason for why the "possible impression" standard should be adopted as a substantive check on the arbitral system, is that it would provide a more level playing field for both parties (i.e., fairness). A judicial safeguard such as the "possible impression" standard would be a great start towards that goal.

Second, because repeat player bias is now a proven and well-studied phenomenon,[109] uniformly setting the lowest bar for "evident partiality" used by courts might cause employers and corporations to spread their business around and not use one sole arbitral forum out of fear that doing so would begin to look like evident partiality. The reasonable impression of partiality standard creates a showing of evident partiality when the disclosed and undisclosed facts about an arbitrator give rise to a "reasonable" impression that the arbitrator may be partial to one of the arbitration parties.[110] This standard, like the "would have to conclude" standard, does not require a showing of *actual* bias or partiality, but allows for evident partiality "when the facts would permit a mere reasonable inference of partiality."[111] Thus, repeat business is likely to create a "reasonable impression" that the arbitrator may be partial to one party because of the recognized repeat player phenomenon.

As it presently stands, client companies displeased with a provider's results can easily switch to another provider's services, creating a natural and inherently problematic incentive to provide client companies with favorable results in the name of repeat business.[112] Beyond that, some providers have reportedly removed individual

106. Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2359 (2012).
107. *Id.*
108. *Id.*
109. Colvin, *supra* note 15.
110. Cameron, *supra* note 1, at 2246–47.
111. Cameron, *supra* note 1, at 2247–48.
112. Drew J. Hushka, *How Nice to See You Again: The Repetitive Use of Arbitrators and the Risk of Evident Partiality*, 5 Y.B. ARB. & MEDIATION 325, 332 (2013).

arbitrators who have previously ruled against the company, in an effort to remain on friendly terms with the company.[113] Our current system has few substantive mechanisms for detecting and deterring biased arbitrators, and in most cases, even fewer liability consequences when bias occurs.[114] Critics of the existing arbitration scheme argue that our current system produces a dangerous moral hazard "because the decision to choose a biased arbitrator often holds few consequences and affords a company the opportunity to save costs on unfavorable judgments.[115] Thus, by spreading business around to avoid the appearance of evident partiality under the "possible bias" standard, arbitration providers and their individual arbitrators would feel less pressure to retain the companies or employers that hired them. Hence, a lowered standard would create less pressure for individual arbitrators to provide favorable results to these hiring companies or employers. Establishing "evident partiality" to be equivalent to the "possible impression" standard would usher in an era of more case-focused adjudications rather than adjudications that partly rest on exogenous factors, such as who hired the arbitration provider/individual arbitrator or how many times a particular party has appeared before the arbitration provider/individual arbitrator.

Opposition to the Ninth Circuit's "possible impression" standard seems to focus on two main points: (1) the lingering questions that will inevitably need to be resolved[116] and (2) the concern that losing parties will be more likely to invoke "evident partiality" to get out having to pay arbitration awards.[117] The first concern is characterized by critics as a "disruption" to the arbitral system[118] because the uncertainty that would be created by the "possible impression" standard would leave many lingering questions about the extent of disclosures required by arbitrators.[119] Among the questions that would need answers are: what would qualify as "nontrivial business dealings" requiring disclosure,[120] how that would be determined (by number of arbitrations or by total arbitration fees?),[121] and whether an arbitrator must disclose significant prior dealings even if they had no ownership interest in the arbitration provider.[122] However, it is a fact that every new ruling of law brings about some short of change and raises questions as to how to properly implement the new rule. Lingering questions that arise from the uniform establishment of the "possible impression" standard can easily be answered in subsequent rulings. The inevitable influx of clarifying questions should not impede the establishment of a fairer standard of evident partiality.

Critics' second concern is characterized as a "backdoor" avenue for dissatisfied parties to avoid final judgement.[123] As argued by the petitioner in the *Monster* case in their brief to the Supreme Court for writ of certiorari, a relaxed "evident

113. *Id.*
114. Farmer, *supra* note 101, at 2359.
115. Farmer, *supra* note 101, at 2359.
116. Petition for Writ of Certiorari at 15, Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130 (9th Cir. 2019).
117. *Id.* at 36.
118. *Id.* at 15.
119. *Id.* at 39.
120. *Id.*
121. *Id.*
122. Petition for Writ of Certiorari at 39, Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130 (9th Cir. 2019).
123. *Id.* at 41.

partiality" standard "seriously jeopardizes the finality of arbitration" because 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."[124] However this is also an inappropriate reason to resist the "possible impression" standard because the two-part inquiry set forth by the Ninth Circuit in the *Monster* case explicitly states as part of the second prong that vacatur of an arbitration award is supported when "individual arbitrators do not disclose their *nontrivial* business dealings" (or their employer's nontrivial business dealings) with the parties to the arbitration.[125] Thus, this concern is already dealt with in the Ninth Circuit's two-part inquiry and would be further defined in subsequent rulings that deal with the question of what constitutes "nontrivial."[126]

V. CONCLUSION

The circuit courts are deeply divided on how to interpret the FAA's "evident partiality" provision.[127] The majority of the circuits hold evident-partiality claimants to a heavier burden of proof than do a minority of the circuits.[128] This lack of uniformity is problematic because of the pervasiveness of forced arbitrations and the existence of arbitrator bias in the present-day arbitration landscape. These facts have raised the question of whether the American judiciary is properly protecting weaker parties' right to neutral adjudication. As it stands, the answer to that question is no. The Supreme Court should clarify that "evident partiality" means "a possible impression of bias", as the Ninth Circuit has established, because our current system has few substantive mechanisms for detecting and deterring biased arbitrators. The "possible impression of bias" standard increases the power of the lesser-connected and resourced party, thus establishing a fairer playing field in the arbitral system.

124. *Id.* at 36.
125. Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130, 1135–36 (9th Cir. 2019).
126. *Id.*
127. Petition for Writ of Certiorari at 16, Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130 (9th Cir. 2019).
128. *Id.*