No. 15-1408

In the Supreme Court of the United States

MASIMO CORPORATION,
Petitioner,

v.

MICHAEL RUHE, *ET AL.*,
Respondents.

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

BRIEF OF THE MEDICAL DEVICE MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Medical Device Manufacturers Association ("MDMA") is a national trade association based in Washington D.C. that provides educational and advocacy assistance to medical technology companies. MDMA represents more than 250 member companies across the United States that develop, manufacture, sell, and distribute innovative medical devices and diagnostic products. An important function of the MDMA is to represent the interests of its members before the courts, Congress, and the Executive Branch.

Many of MDMA's members regularly use agreements containing arbitration clauses in their business contracts. To avoid costly and time-consuming litigation in court, members, and the parties they contract with, agree to a dispute resolution mechanism that is speedy, fair, inexpensive and effective. Relying on the Federal Arbitration Act's ("FAA") policies promoting arbitration, and this Court's consistent endorsement of those policies over the last half-century, MDMA members have structured countless contractual relationships around arbitration agreements.

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[1] Pursuant to Rule 37.6, MDMA affirms that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than MDMA, its members, or its counsel made any financial contribution to this brief's preparation or submission. Counsel of record received timely notice that MDMA intended to file this brief. The parties have consented to the submission of this brief.

A key reason MDMA members willingly embrace arbitration is because they trust the fairness and integrity of the arbitration process and they trust that courts will enforce and ensure that the forthrightness of the process. Because MDMA's members sell revolutionary products that are not fully understood by the purchasing public or even sometimes the companies' own sales force, MDMA members often face whistleblower and other lawsuits brought out of a combination of ignorance and potential financial windfall. The companies that form the MDMA therefore require fair and thoughtful judicial review, and view the right to a neutral arbitrator of paramount importance to that process. The businesses that belong to MDMA reasonably expect that courts will vacate any arbitration award that is tainted by an arbitrator's bias, whether actual or apparent. The Ninth Circuit's decision below substantially undercuts businesses' ability to vacate arbitration awards based on "evident partiality," and erodes confidence in the impartiality of the arbitration process generally. It stands as another attempt by the Ninth Circuit to undermine the effectiveness of arbitration clauses. Because the advantages of arbitration for its members would be lost if the Ninth Circuit ruling stands, MDMA has a strong interest in this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Our judicial system is premised on the concept of neutral decisionmakers examining facts and law to come to conclusions. In light of the strong federal policy supporting arbitration embodied in the FAA, and the pro-arbitration climate fostered by the Court,

countless businesses and individuals have chosen to arbitrate their disputes. Businesses incorporate arbitration clauses into their contracts for a variety of reasons, including that arbitration provides a desirable alterative to more costly and time-consuming litigation.

By agreeing to arbitrate, however, the parties never expected to forfeit their right to present their case to a neutral decisionmaker. Like individuals, companies depend upon triers of fact and law to be neutral and objective. In adopting arbitration as an alternative dispute resolution mechanism, businesses have to come to trust that Congress enacted the FAA to ensure participants the right not "merely [to] *any* arbitration but [to] an impartial one." *Commonwealth Coatings Corp. v. Cont'l Cas.*, 393 U.S. 145, 147 (1968) (emphasis in original). As this Court recently affirmed, "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Williams v. Pennsylvania*, 579 U.S. ___ (2016), slip op. at 6 (citing *In re Murchinson*, 349 U.S. 133, 136 (1955)).

The Ninth Circuit's decision below strikes a blow against these settled expectations, and warrants this Court's review for several reasons.

First, the decision below cripples the promise embodied in the FAA and upheld by this Court that parties to an arbitration are entitled to a neutral decisionmaker. The Ninth Circuit opinion conflicts with the standard for "evident partiality" articled in *Commonwealth Coatings*, injects new requirements that an arbitrator act "irrationally" or engage in "affirmative misconduct" before courts are required to vacate arbitration awards challenged for bias, and casts doubt as to when, if ever, courts will vacate

awards for "evident partiality." As a result, without this Court's intervention, businesses can no longer trust that their disputes will be heard by a neutral arbitrator.

Second, the Court must intervene to ensure the business community and the public that the judiciary can and will vacate arbitration awards that are punitive and based on emotion rather than the evidence. If businesses who arbitrate risk falling prey to massive punitive damages awards that cannot be overturned even upon a showing of "evident partiality," they will simply cease to arbitrate their disputes. Intervention is necessary to ensure courts police biased arbitrators for "evident partiality" as the FAA requires.

Third, the decision below erodes trust and confidence in the arbitration process by removing one of its fundamental tenants: the right to a neutral arbitrator. In order for businesses to voluntarily agree to arbitration, and put their assets to risk therein, they must be able to trust that the person deciding their fate will be unbiased. The impact of the Ninth Circuit's remarkable holding spreads beyond the business community, and threatens the functioning of the arbitration system as a whole.

Finally, certiorari is warranted to resolve a circuit split regarding the proper standard for finding "evident partiality." The decision below injects further uncertainty as to when courts are required to vacate awards for arbitrator bias, resulting in a fractured.

For these important reasons, this Court should grant the writ of certiorari.

ARGUMENT

I. The Ninth Circuit Opinion Endangers Efficient Resolution of Commercial Businesses Disputes By Undercutting This Court's And The FAA's Guarantee That Arbitrations Shall Be Conducted By A Neutral Decisionmaker.

Businesses assume when they choose to arbitrate that they will be afforded the opportunity to have their dispute heard by an unbiased decisionmaker. *See* 9 U.S.C. § 10(a). This is because the right to a neutral arbitrator is a critical feature of the arbitration process. *See also Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617 (1993) ("[D]ue process requires a neutral and detached judge in the first instance, and the command is no different when a legislature delegates adjudicative functions to a private party") (internal quotations and citations omitted); Jill I. Gross, *McMahon Turns Twenty: The Regulation of Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 493, 506 & n.82 (2008) (collecting cases) (arbitration under the FAA "must include the classic hallmarks of fairness: notice, a right to be heard, and a neutral decision-maker").

To protect this right, the FAA permits judicial review of arbitration awards for "evident partiality." 9 U.S.C. § 10(a)(2). In *Commonwealth Coatings*, the Court held that this provision of the FFA requires courts to vacate any arbitration award that is tainted by either actual or apparent bias. 393 U.S. at 148—49. In writing the opinion for the Court, Justice Black expressly rejected the notion that, by agreeing to

arbitration as an alternative dispute resolution forum, participants abandon their right to a neutral decisionmaker. To the contrary, the FAA grants arbitration participants the right not "merely [to] any arbitration but [to] an impartial one." *Id*. at 147. Arbitrators "not only must be unbiased but also avoid even the appearance of bias." *Id*. at 150. "[W]here there is 'the slightest pecuniary interest' on the part of the judge" in its outcome, the judicial decision must be set aside. *Id*. at 148 (quoting *Tumey v. Ohio*, 273 U.S. 510, 524 (1927)). As this Court observed, "we should, if anything, 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." *Id*. at 149.

The Ninth Circuit opinion below contravenes this Court's holding in *Commonwealth Coatings*, and effectively strips parties of the right to an unbiased arbitrator. Instead of analyzing whether the arbitrator possessed actual or apparent bias, the Ninth Circuit held that the district court erred in finding "evident partiality" because the arbitrator did nothing that amounted to "'affirmative misconduct' or 'irrational[ity].'" Pet. App. 2a (citation omitted). This heightened standard imposes a new burden on parties and courts seeking to vacate awards under 9 U.S.C. § 10(a)(2) beyond those authorized by this Court in *Commonwealth Coatings* and undermines the expectations of businesses that contract for arbitration everywhere. No longer is it sufficient to demonstrate actual or apparent bias; instead, something more is required. *Id*.

Moreover, in *Commonwealth Coatings*, the Court expressly acknowledged that an arbitrator should not preside over any proceeding in which he has "the slightest pecuniary interest" in the outcome. 393 U.S. at 148 (citation omitted). It is fundamental that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Williams v. Pennsylvania*, 579 U.S. ___ (2016), slip op. at 6. But this is exactly what happened in the case below. Instead of referring Petitioner's motion to disqualify himself, the arbitrator decided, and denied, the motion himself. Pet. App. 17a. Unlike like Article III Judges, arbitrators are paid by the case. If the arbitrator disqualifies himself, he forfeits his paycheck. Accordingly, the arbitrator's "pecuniary interest" in deciding the motion creates an undeniable risk of bias. If, as the Ninth Circuit held, "evident partiality" does not encompass such a direct financial incentive, the standard provides essentially no safeguard at all.

If permitted to stand, the effect of the decision below is that businesses and other parties to an arbitration clause sacrifice their right to a neutral decisionmaker when they agree to arbitration. And, very likely, for businesses to refrain from using arbitration all together in order to avoid this unwarranted pernicious effect of bias arbitration. Under the Ninth Circuit opinion, biased arbitrators may continue to preside over disputes so long as they don't engage in "affirmative misconduct" or "irrationality." *Id*. This is not the impartial system of arbitration this Court and Congress by enacting the FAA have favored for at least the last half century.

The importance of the FAA's and this Court's guarantee of a neutral mediator extends beyond businesses. Regardless of whether or not arbitration is their preferred forum, all parties in an arbitration possess a vital interest in the neutrality of the decisionmaker.

Nor does the unpublished nature of the Ninth Circuit's opinion diminish its importance. The Ninth Circuit presides over a hotbed of industry, and its hostility towards arbitration has not gone unnoticed by this Court. In fact, the Ninth Circuit has been repeatedly reversed by the Court in arbitration cases. *See, e.g.*, *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63 (2010); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 289 (2010); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 505 (2001); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 213 (1985). If this Court does not intervene yet again to protect Congress' mandate in the FAA, the decision below will inject fear and uncertainty into the business community across the country.[2] The Court should grant certiorari to ensure the neutrality of arbitrators for all parties, and to make clear once and for all that courts will not and cannot tolerate arbitration awards tainted by bias.

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[2] Indeed, the Ninth Circuit's opinion below has already generated media attention. *See, e.g.*, Y. Peter Yang, *Masimo Asks Justices To Review Arbitrator Bias Row*, LAW360, http://www.law360.com/articles/801577/print?section=employment.

II. This Court Must Grant Certiorari To Protect Settled Expectations Of The Business Community From Falling Victim Of Potentially Crippling Arbitration Awards Issued by Biased Arbitrators Without Judicial Recourse.

Not only did the panel below misapply the appropriate standard for "evident partiality," it also impermissibly stripped away vital protections for businesses against punitive damages awards based on arbitrator bias. In choosing arbitration, businesses understand that punitive damages may be awarded if the parties provide as such in their arbitration agreement. *See, e.g.*, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995). This principle effectuates the FAA's central purpose of ensuring "that private agreements to arbitrate are enforced according to their terms." *Id*. at 54 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

Businesses, however, voluntarily subject themselves to punitive damages awards in arbitration because they reasonably expect that the arbitrator will be impartial and, if the arbitrator is not, the judicial check of the courts will vacate any such award. Arbitrators wield significant power over the outcome of arbitrations because they enjoy "free rein" over disputes and their awards, unlike those of judges or juries, are subjected to limited appellate review. *Commonwealth Coatings*, 393 U.S. at 149. The specter of punitive damages amplifies this power. The FAA's mandate that courts vacate punitive damages awards for "evident partiality" provides crucial protection to

businesses because it requires courts to grant relief if there is a showing of arbitrator bias. "Exacting appellate review ensures that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'" *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 436 (1994)). In this way, the "evident partiality" standard provides a necessary safeguard against arbitral awards that are the product of emotion or bias. *See* Thomas J. Stipanowich, *Punitive Damages and the Consumerism of Arbitration*, 92 NW. U. L. REV. 1, 18 (1997). Without judicial oversight to ensure that businesses and individuals are not victims of biased arbitrators, the system cannot function and the multiple decisions by this Court to uphold arbitration agreements will be rendered toothless.

Concerns over an arbitrator's ability to award punitive damages awards without sufficient judicial oversight are not new, nor are they confined to businesses. In the landmark case of *Garrity v. Lyle Stuart, Inc.*, the New York Court of Appeals held that punitive damages may not be awarded in arbitration. 353 N.E.2d 793, 797 (N.Y. 1976), *superseded by statute as stated in Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995). A primary concern animating the *Garrity* court's holding was that, if punitive damages were permitted, there would be insufficient judicial review of an arbitrator's ability to "impos[e] a social sanction." *Id*. at 795—96. The New York court observed that while an award of "actual damages is measurable against some objective standard . . . punitive damages takes shape from subjective criteria." *Id*. at 796. The court feared that

the absence of effective judicial supervision by courts would permit a party with superior bargaining strength to manipulate the process and abuse the coercive power. *Id*. Although *Garrity*'s holding has since been overruled, concerns regarding judicial oversight of punitive awards in arbitration persist. *See, e.g.*, Stipanowich, *Punitive Damages and the Consumerism of Arbitration*, 92 NW. U. L. REV. 1, 11 ("For twenty years, no other issue respecting commercial arbitration has generated more controversy than the authority of arbitrators to entertain and honor claims for punitive damages.").

The case below exemplifies and validates the fears articulated in *Garrity*. The arbitrator here exercised unlimited domain over the dispute and parties without judicial repercussion. First, the arbitrator decided the motion challenging his impartiality himself, rather than referring it to a neutral decisionmaker, in violation of the applicable arbitral forum rules. Pet. 22. Next, the arbitrator retaliated against Petitioner for raising the issue of his impartiality by awarding punitive damages in an amount sixteen times greater than actual damages, and expressly based that award in part on Petitioner's challenge to his partiality. Pet. 25—26. Indeed, the very amount of punitive damages compared to actual damages evinces bias. *Cf. Campbell*, 538 U.S. at 425 (cautioning that "an award of more than four times the amount of compensatory damages" suggests constitutional impropriety, and awards exceeding a single-digit ratio between punitive and compensatory damages rarely satisfy due process). Yet, in the face of this clear evidence of apparent and actual bias, the Ninth Circuit nonetheless refused to follow the lower court and vacate the award based on

the lower court's finding of "evident partiality." Pet. App. at 2a.

The impact of the Ninth Circuit's decision cannot be understated. If the business community is unable to seek judicial relief from potentially crippling punitive damages awards issued by arbitrators out of personal bias, businesses can and should question the entire arbitration system. Moreover, businesses must be free to challenge an arbitrator's potential bias without fear of retaliation, particularly in the form of punitive damages. Here, the district court found that Petitioner "properly raised the challenge to the Arbitrator's partiality." *Id*. at 17a. Petitioner did not wait until it was hit with a punitive damages award before raising the issue. Instead, Petitioner filed the appropriate motion within twenty-four hours of discovering the potential bias. Pet. 11. The arbitrator then not only refused to refer the challenge to a neutral decisionmaker, but he punished Petitioner for raising the challenge in the first place. Pet. App. at 17a. This decision, if allowed to stand, will have a chilling effect. If arbitrators are permitted to decide disqualification motions themselves, businesses and consumers cannot trust the fairness and impartiality of the process. If courts then refuse to vacate awards tainted by "evident partiality" as required under the FAA, public confidence in the system will erode rapidly.

III. Businesses Throughout The Country Request The Court's Intervention In Order To Preserve The Fairness And Integrity Of The Arbitration Process Upon Which Businesses Rely.

"[T]he most important feature of arbitration, and indeed, the key to its success, is the public's confidence and trust in the integrity of the process." Kathyrn A. Windsor, *Defining Arbitrator Evident Partiality: The Catch-22 of Commercial Litigation Disputes*, 6 SETON HALL CIR. REV. 191, 192 (2010). This Court has long favored arbitration as a means of dispute resolution. *See Burchell v. Marsh*, 58 U.S. 344, 345 (1854) ("As a mode of settling disputes, [arbitration] should receive every encouragement from courts of equity."). By enacting the FAA, Congress confirmed the strong national policy in favor of arbitration. *See, e.g.*, *CompuCredit Corp.*, 132 S. Ct. at 669 (citing several authorities); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (same).

With such forceful endorsement as a backdrop, arbitration has become nearly ubiquitous in a wide range of commercial agreements. Arbitration provides businesses with "the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l. Corp.*, 559 U.S. 662, 685 (2010) (citing authorities). Although often perceived to benefit only businesses, consumers also tend to "fare better in arbitration, both in terms of the likelihood of success on the merits and the size of the award, than litigation." Joshua S. Lipshutz, Note, *The Court's Implicit*

Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits, 57 STAN. L. REV. 1677, 1712 (2005).

In choosing to arbitrate under the FAA, businesses are placing their faith in arbitrators to effect justice. If businesses and consumers cannot rely on courts to vacate arbitration awards tainted by either actual or apparent bias as required under *Commonwealth Coatings*, they may abandon arbitration all together. Few companies will bind themselves to agreements that allow for arbitration if the companies cannot seek meaningful review of arbitration awards that may result from bias. To the extent such abandonment occurs, businesses, consumers and employees alike will lose many of the benefits of arbitration as they are forced into expensive and lengthy litigation. The rule adopted by the court below erodes confidence and trust in the arbitration process generally. The Court's intervention is warranted to protect the fundamental integrity of the arbitration process. *See, e.g.*, *Williams*, 579 U.S. ____, slip op. at 8 (participants in an adversarial process must be protected against the risk that judges may be influenced by improper motives).

IV. Granting Review To Clarify the "Evident Partiality" Standard Will Provide More Certainty and Efficiency in Arbitration Which Businesses Require.

Finally, certiorari is warranted to resolve a diffuse and splintered circuit split. As the Petition correctly notes, the decision below exacerbates current confusion amongst lower courts as to what exactly constitutes "evident impartiality" by an arbitrator. *See* Pet. 19—21. For example, the Sixth Circuit has expressly

held that the "standard requires a showing greater than an 'appearance of bias,' but less than 'actual bias.'" *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 329 (6th Cir. 1998) (quoting *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989)). Other courts require a "reasonable impression of bias," *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 283 (5th Cir. 2007), or bias "sufficiently obvious that a reasonable person would easily recognize it," *see, e.g.*, *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 253 (3d Cir. 2013). The decision below injects yet another variation, one that requires "'affirmative misconduct' or 'irrational[ity].'" Pet. App. 2a (citation omitted).

The inherent unpredictability stemming from the current variation jurisdiction to jurisdiction substantially undermines the certainty and value of the FAA's promise of enforcement of arbitration agreements. The current conflict is particularly troubling for businesses with employees, customers, vendors, dealers and other operations spanning multiple states or regions. Without a precise standard of arbitrator "evident partiality," businesses are left to wonder whether their contractual promise to arbitrate will guarantee them uniform access to a neutral decisionmaker in each and every jurisdiction in which a dispute may arise. This state of chaos is unacceptable, endangers businesses throughout the country and requires this Court's intervention.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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