No. 15-1408

In the Supreme Court of the United States

MASIMO CORPORATION,
Petitioner,
v.
MICHAEL RUHE AND VICENTE CATALA,
Respondents.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITY

INTRODUCTION

All agree that it is the rare case when an arbitration award should be set aside for "evident partiality" or on any other ground. But as with other areas, identifying the rare case is critical to protecting the integrity of the entire process. That is why this Court's intervention is so essential when courts turn a blind eye to the truly egregious cases. *Cf., e.g.*, *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).[1]

This is one of those cases. As the district court found, the facts here demonstrated "clear partiality" on the part of the arbitrator that "undermined the integrity of the award and the entire arbitration proceeding." Pet. App. 19a, 23a. That the Ninth Circuit rashly dismissed the district court's careful decision—in "an unpublished, three-paragraph disposition," Opp. 1—is hardly a reason to *deny* review, as respondents claim. Rather, it simply reinforces that this Court's intervention is needed to safeguard the integrity of the arbitration process.

When it comes to trying to defend what the Ninth Circuit actually did, respondents first distort and ignore the facts found by the district court—which the Ninth Circuit did not disturb on appeal. And, second, respondents double down on the Ninth Circuit's reasoning and argue for such a limited conception of

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[1] Predictably, respondents' arguments against certiorari here echo the arguments made, and rejected, in *Williams* and *Caperton*. *See Williams* Opp. 13, 15 ("fact-bound error-correction"; "case does not present a suitable vehicle"); *Caperton* Opp. 13-14, 27 ("no split of authority"; "facts of this case provide a poor vehicle").

the "evident partiality" standard as to render this important provision meaningless.

While attempting to downplay the conflict and confusion over the "evident partiality" provision, respondents embrace the counter-intuitive notion—adopted by some lower courts—that "Justice White's concurrence" (Opp. 18) in *Commonwealth Coatings Corp. v. Continental Casuality Co.*, 393 U.S. 145 (1968), somehow rewrites, and waters down, *the Court's* decision in that case. And while declaring (at 17) that Masimo's assertion of a conflict "does not withstand scrutiny," respondents just ignore cases like *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278 (5th Cir.), *cert. denied*, 551 U.S. 1114 (2007), which expressly acknowledge the split.

In the end, respondents' brief just underscores why this Court's intervention is needed and needed now.

I. THE FIRST QUESTION MERITS REVIEW

A. This Case Is An Ideal Vehicle

1. Respondents' principal effort to avoid certiorari is to ignore or rewrite the record and then claim the case is not a good "vehicle." That effort fails.

Respondents claim (at 1) that the arbitrator did not base his punitive damages award on Masimo's disqualification challenge because "that decision had been made in the Interim Award, issued months *before*." But it was not until the Final Award, issued after the disqualification challenge, that the arbitrator set *the amount* of punitive damages—$2.5 million, or sixteen times the compensatory damages. Pet. App. 94a. And that award explicitly relied on Masimo's disqualification request. *Id.* at 84a, 86a. Thus, as the

district court found, and as Judge Hurwitz also recognized (*id.* at 4a), the arbitrator "impose[d] punitive damages against Masimo *in retaliation*" for making the challenge. *Id.* at 16a-17a (emphasis added).

Respondents claim (at 1, 9-10) that Masimo did not, "at any time," ask JAMS to review the arbitrator's disqualification decision. But Masimo sent the disqualification challenge directly to JAMS in the first place. ER610-11. As the district court found, "[t]he integrity of the process required that the challenge be referred to JAMS for determination in accordance with JAMS's rules, under which the parties had agreed to arbitrate." Pet. App. 18a. And, as Judge Hurwitz acknowledged, the arbitrator should have referred Masimo's motion to a neutral decisionmaker—"regardless of the JAMS procedural rules"—"given his financial interest in continued employment." *Id.* at 4a.

Respondents argue (at 1-2, 5-6) that Masimo should have known that the arbitrator's own brother was the lead litigator for its chief rival, claiming that the facts were readily available from "a simple Google search." But the article they cite is from a publication whose content is hidden behind a paywall, not searchable by Google, *see* Daily Journal, http://www.dailyjournal.com (last visited Aug. 24, 2016), and the 1.5-hour YouTube video was not posted until nine months *after* the parties chose the arbitrator. Moreover, the district court found that Masimo discovered the relationship "shortly before the final arbitration hearing," Pet. App. 12a, and timely filed its disqualification challenge, *id.* at 19a. The Ninth Circuit did not assert otherwise.

Finally, respondents contend (at 6-7, 8-11) that Masimo improperly sought to thwart or delay the arbitration. But the district court—which heard the

same story—found that "Masimo had every right" to make its collateral-estoppel argument, Pet. App. 21a; that its disqualification motion was "properly raised," *id.* at 19a; and that Masimo had undertaken "reasonable acts of advocacy," *id.* at 23a, not procedural abuse. Indeed, in the parallel *qui tam* case brought by respondents, the courts found "no evidence" that Masimo misled anyone about the performance of the medical devices and "overwhelming evidence" of Masimo's "good faith belief in the[ir] medical value," *United States ex rel. Ruhe v. Masimo Corp.*, 977 F. Supp. 2d 981, 984, 992-95, 996 (C.D. Cal. 2013), *aff'd*, 640 F. App'x 666 (9th Cir. 2016)—findings that the arbitrator just disregarded in finding liability.

In short, the facts of this case really are as troublesome as the petition (at 3-10) explained. Yet, without disturbing a single factual finding by the district court, the Ninth Circuit summarily reversed.

2. Respondents also contend (at 22-23) that this case is not a good vehicle because Masimo's argument is premised on the "mistaken belief that the standard should be applied to the Arbitrator's conduct after a bias challenge is raised." This argument goes to the merits and only underscores respondents' narrow conception of the "evident partiality" provision.

In any event, the argument fails. Nothing in the text of the FAA suggests that evident partiality protection is limited to failures to disclose or that it somehow excludes consideration of the arbitrator's conduct *during* the proceeding. As is true for conflicts of interests generally, any conduct could potentially establish actual or apparent partiality, and there is no basis to artificially limit the relevant facts.

Commonwealth Coatings happened to involve a failure to disclose certain information, but the Court's reasoning is in no way confined to disclosures. Rather, the Court stated generally that "it was [not] the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another." 393 U.S. at 150.

Lower courts also have interpreted the provision broadly. *See, e.g.*, *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) ("'[E]vident partiality' within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.").

3. Respondents also argue (at 23-25) that this case is not a good vehicle because, they claim, the Ninth Circuit applied the most favorable (to Masimo) evident partiality standard and still rejected Masimo's challenge. That is absurd. The Ninth Circuit disregarded overwhelming evidence of partiality. It stated that Masimo did not "establish specific facts indicating *actual* bias." Pet. App. 2a (emphasis added) (citation omitted). And it excused the arbitrator's misconduct on the ground that it "did not rise to the level of 'affirmative misconduct' or 'irrational[ity].'" *Id.* (alteration in original) (citation omitted).[2] That is a far cry from the "reasonable impression of partiality"

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[2] Contrary to respondents' assertion (at 24), the Ninth Circuit invoked an "affirmative misconduct" test to reject Masimo's "evident partiality" challenge. The court did not even address "manifest disregard" until the *next* paragraph. *See* Pet. App. 2a-3a.

standard that the district court properly applied. *Id.* at 16a (citation omitted).

B. Respondents' Attempt To Defend The Ninth Circuit Fails

Respondents fare no better in attempting to defend the Ninth Circuit's ruling on the merits.

1. Unable to justify the arbitrator's undeniable pecuniary interest in deciding a request to disqualify *himself* and thus end his paychecks, respondents try to create a diversion. They contend (at 25-26) that vacating an award on that ground would amount to "an unbridled expansion of the 'evident partiality' test in ways that are unprincipled and unworkable," and "would render suspect *any* ruling that may, as a byproduct, increase an arbitrator's fee." Not so.[3]

Masimo's position is not that an arbitrator has a conflict of interest anytime a decision might incidentally affect his fees. Masimo's position is only that the arbitrator should not, in blatant disregard of the governing arbitration rules, decide himself whether his service should end, and that doing so creates at least the *appearance* of bias. *See Pitta v. Hotel Ass'n of New York City, Inc.*, 806 F.2d 419, 424 (2d Cir. 1986) (A "strong[] risk of unfairness exists here where the arbitrator, acting alone, determines the validity of his own dismissal from a lucrative position.").

As respondents' own formulation implicitly concedes, a disqualification decision that *directly*

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[3] Regardless of how many hundreds of thousands of dollars the arbitrator received for his service (it was many), the point is, as Judge Hurwitz recognized, he had an undeniable "financial interest in his continued employment." Pet. App. 4a.

determines whether an arbitrator will keep his position based on an evaluation of his own conduct is fundamentally different than a decision that may increase or decrease prospective fees solely "as a byproduct." The Second Circuit drew precisely that line in *Pitta*, explaining that "a dispute concerning the employment of a particular arbitrator for a considerable period of time at a substantial salary" is different in kind from any number of other rulings he might make. *Id.* Although the petition cited *Pitta* (at 23), respondents have no answer, and so just ignore it.

Respondents' position also flouts this Court's recent decision in *Williams v. Pennsylvania*. In *Williams*, the Court invoked the "maxim 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.'" 136 S. Ct. at 1905-06. The arbitrator who decides his own disqualification motion crosses both lines. The "evident partiality" standard would have "little substance" if it did not apply in these circumstances. *Id.* at 1906.

2. Respondents next attempt (at 16-17, 28-30) to hide behind the narrow standard of review applicable to the *merits* of an arbitration decision. Again, respondents are just arguing the merits, and again they are wrong. "Evident partiality" and "manifest disregard of the law" are separate grounds for invalidation—it is certainly possible to meet one and not another. Here, for example, the arbitrator's decision to "punish[]" Masimo for seeking to disqualify him helps demonstrate his *partiality*, regardless of whether his excessive punitive damages award also manifestly disregards the law. Pet. App. 19a.

Indeed, respondents' reliance on the narrow standard of review for arbitration awards generally has

it exactly backwards. As this Court recognized in *Commonwealth Coatings*, courts must "scrupulous[ly] safeguard the impartiality of arbitrators" *because* they "are not subject to appellate review." 393 U.S. at 149. It is all the more reason why the Ninth Circuit's startling decision should not be allowed to stand.

C. This Court's Guidance Is Needed

Respondents' efforts to deny the conflict and confusion in the lower courts are also unavailing.

1. The lower courts have expressly, repeatedly, and recently noted such conflict and confusion and pointed out the need for this Court's guidance. *See* Pet. 19-20. And far from the picture of consensus respondents try to paint, the Circuits have explicitly *disagreed* about whether Justice Black's opinion for the Court or Justice White's concurrence is controlling. *See* Pet. 20 (citing cases). In asking (at 18) this Court to follow Justice White's concurrence rather than the Court's opinion, respondents are simply picking a side in a split that only this Court can resolve.

Respondents also try to manufacture clarity where there is none. For example, they claim that Justice White "clearly articulated his view that the FAA required arbitrators to disclose only those relationships that would lead a 'reasonable person [to] ... conclude that an arbitrator was partial,'" Opp. 19 (alterations in original)—purportedly quoting *Commonwealth Coatings*, 393 U.S. at 151-52. But that language appears nowhere in any opinion from this Court. Rather, it appears to come from a Second Circuit opinion authored fifteen years after *Commonwealth Coatings*. *See Morelite*, 748 F.2d at 84.

2. Respondents proclaim (at 22) that there is not a "single case" in which Justice Black's—and the Court's—evident partiality standard "would have made a difference." But how about this case? Applying a standard that looks to whether an arbitrator "'might reasonably be thought biased'" in light of all the circumstances, the district court concluded that evident partiality was "clear." Pet. App. 16a, 19a (quoting *Commonwealth Coatings*, 393 U.S. at 150). Only by applying its far more limited, "affirmative misconduct" standard, and disregarding key facts, did the Ninth Circuit reverse. *Id.* at 2a.

And while this case may well be one of the more flagrant examples, it is not the only one. In *Positive Software, Inc. v. New Century Mortgage Corp.*, a Fifth Circuit panel found "evident partiality" under Justice Black's "appearance of bias" standard. 436 F.3d 496, 501-02 (5th Cir. 2006). But the *en banc* court reversed, reasoning that "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." 476 F.3d at 282. Unsurprisingly, the standard matters.

3. Respondents also note (at 21 & n.3) that this Court has denied certiorari in other cases. But the fact that the Court has yet to find a proper vehicle to provide further guidance does not prove that further guidance is not needed. To the contrary: these prior cases are powerful proof that issues surrounding the evident partiality standard are recurring and that confusion is widespread. None of these cases, however, presents as clear a case of evident partiality as this one in as clean a vehicle. The time to intervene is now.

II. THE SECOND QUESTION MERITS REVIEW

The Ninth Circuit's unprecedented waiver ruling also independently warrants review.

1. Respondents contend (at 30) that "[t]here is simply no hard and fast rule" concerning waiver in these circumstances. But all the Circuits line up against the Ninth Circuit (Pet. 32-33), and respondents fail to identify a single case where a court of appeals has held that an appellee forever waived an argument by not raising it as an alternative ground where (as here) the appellee had pressed the argument in the district court and that court had not yet passed on it.

In *Johnson v. Wainwright*, the appellee had never advanced the waived defense at any point. 806 F.2d 1479, 1481 n.2 (11th Cir. 1986), *cert. denied*, 484 U.S. 872 (1987). In *Parker v. Franklin County Community School Corp.*, the Seventh Circuit held only that it would not consider an argument on appeal, not that it was forever waived (on remand), and it effectively granted the requested relief in any event. 667 F.3d 910, 924-25 (7th Cir. 2012). And, in *Hamilton v. Southland Christian School, Inc.*, the Eleventh Circuit held only that the appellee had waived an alternative ground the district court had already *rejected*. 680 F.3d 1316, 1318-19 (11th Cir. 2012).[4]

Nor is there any "arbitration exception" to settled waiver rules. Opp. 32-33. Yes, arbitration is attractive to many potential litigants because it typically offers "lower costs, greater efficiency, and speed." *Id.* at 33

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[4] Respondents do not claim that any other case they cite found that an appellee had waived an alternative ground to affirm in similar circumstances—and none did.

(citation omitted). But the FAA does not require litigants to pursue those benefits at *any* cost—*e.g.*, by giving courts discretion to create novel waiver rules taking away rights with no advance notice.

Respondents' repeated calls for a "flexible" waiver rule is a recipe for arbitrary and punitive rulings with a predictable but utterly inefficient prospective impact: appellees will now be forced to litter their briefs with every conceivable alternative ground to the benefit of neither the litigants nor the courts.

2. Respondents argue (at 30, 33-35) that the panel correctly found that the arbitrator did not "manifestly disregard the law" anyway. But that conclusion was premised on the panel's (misguided) ruling that Masimo had waived the heart of its challenge. Pet. App. 2a n.1. The panel's passing observation, in a footnote, that "'*low* awards of compensatory damages *may* properly support a higher ratio' of punitive to actual damages," *id.* (citation omitted) (emphasis added), is hardly an alternative holding—especially when the compensatory damages in this case, which ran into the *hundreds of thousands*, were hardly "low." *See* Pet. App. 99a.

More fundamentally, in arguing the merits of the "manifest disregard" issue, respondents miss the point. The merits of this argument were not before the Ninth Circuit and they are not before this Court. They should be addressed in the first instance by the district court on remand. That is precisely what would have happened if this case had been litigated in any other Circuit. This clear, outcome-determinative conflict also warrants review, if not summary reversal.

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Respondents are right about one thing—that a petition is necessary here is "unfortunate." Opp. 1. As

Judge Hurwitz aptly observed, this is, in many respects, a "troubl[ing] ... case." Pet. App. 4a. The answer is not to sweep it under the rug, as the Ninth Circuit did. To protect the integrity of the arbitration process, give effect to the FAA, and ensure fair procedures on appeal, this Court should grant review and provide the careful scrutiny this case deserves.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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