In the Supreme Court of the United States

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON,

Petitioner,

v.

ZEV LAGSTEIN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition arises out of an arbitration over a rejected claim for "total-disability" insurance. Even though respondent had returned to work soon after his surgery and was earning millions of dollars a year in his cardiology-consulting practice, a two-arbitrator majority awarded "disability" benefits for the full five-year term of the policy, added $1.5 million for "emotional distress," and set a second hearing – beyond the deadline agreed to by the parties for issuing any award – resulting in a further award of $4 million in punitive damages. During the proceedings, petitioner discovered that (a) one of the arbitrators in the majority had resigned from the state-court bench to avoid federal prosecution for judicial misconduct and was subject to a lifetime ban from state judicial service, and (b) the other, when a member of the state supreme court, had unlawfully sought to frustrate the State's investigation into his co-arbitrator's judicial misconduct. The arbitrators had failed to disclose this information to the parties. The questions presented are:

1. (a) Whether review of an arbitration award for "manifest disregard of the law" or "complete irrationality" remains available after *Hall Street Associates, L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576 (2008), a question that this Court again expressly reserved in *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 559 U.S. __, 130 S. Ct. 1758 (2010), and on which there is a clear Circuit conflict; and

(b) If such review is available, may a reviewing court determine whether an award is irrational under the totality of the circumstances (as the district court did here and as the Second Circuit permits), or are awards impregnable unless it is "clear

from the record that the arbitrators recognized the applicable law and then ignored it" (as the Ninth Circuit below held).

2. Whether the Federal Arbitration Act ("FAA") requires vacatur of an arbitral award issued by arbitrators who failed to disclose material facts bearing on their integrity and their relationships with each other, in violation of the applicable rules governing arbitrations, or (as the Ninth Circuit held) are arbitrators required to disclose only their relationships with the parties and counsel, with the burden to investigate and unearth other material facts falling on the parties.

3. Whether arbitrators "exceed their powers" within the meaning of Section 10(a)(4) of the FAA when they issue an arbitral award after the deadline expressly agreed to by the parties in accordance with the governing arbitration rules.

RULE 29.6 STATEMENT

Petitioner Kiln, which appeared below on behalf of those Certain Underwriters at Lloyd's, London subscribing to Certificate No. 997401, is a wholly owned subsidiary of Tokio Marine & Nichido Fire Insurance Co., which is held by Tokio Marine Holdings, Inc., a company traded on the Japanese stock market.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Certain Underwriters at Lloyd's, London ("Underwriters"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the district court vacating the underlying arbitration awards (App. 22a-27a) is unreported. The opinion of the Ninth Circuit reversing the district court (App. 1a-21a) is reported at 607 F.3d 634.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 2010. App. 1a. The order of the court of appeals denying Underwriters' timely petition for rehearing was entered on July 27, 2010. App. 35a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act provides in pertinent part:

"*Section 5.* If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; ...." 9 U.S.C. § 5.

"*Section 10.* (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

"(1) where the award was procured by corruption, fraud, or undue means;

"(2) where there was evident partiality or corruption in the arbitrators, or either of them;

"(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

"(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)

INTRODUCTION

This Court has recognized that arbitration offers advantages to parties in commercial disputes. It is prompt and cost effective. The parties may determine the procedures to be followed, including the time within which the dispute must be resolved. Most important, they can select the persons in whom they repose confidence to resolve their dispute objectively, independently, and rationally in light of the law and the facts.

In this case, however, the Ninth Circuit held that parties are not entitled to these assurances.

STATEMENT

A. Lagstein's Disability-Insurance Policy

Respondent Zev Lagstein is a successful cardiologist and disability examiner. He conducts an office-based practice administering and interpreting non-invasive diagnostic tests. DER502-03, 527-29. (Defendant's Excerpts of Record). In 1999, he purchased an insurance policy from Underwriters covering "total disability." If he became unable to "perform

in ***any professional capacity*** within the medical profession" for at least 90 days (the "elimination period"), he would accrue a $15,000 monthly benefit (up to five years) so long as he remained unable to perform in any professional capacity. DER276-85 (emphasis added).

B. Lagstein's Surgery

In August 2001, Lagstein learned that he had "Moderate Aortic Stenosis." His cardiologist advised him to undergo "elective" heart-valve replacement surgery, a significant but common procedure. DER213-15. Lagstein scheduled this surgery for November 21, 2001, but stopped working on October 23. DER505. After surgery, his surgeon predicted full recovery within eight weeks. DER511-12, 553-54.

C. Lagstein's Claim and Clandestine Return to Work

Lagstein filed a claim under his total-disability policy on December 4, 2001. DER539-41. On December 10, Underwriters informed him of additional information needed to process his claim, much of which he failed to submit, and updated him monthly on outstanding issues. See, *e.g.*, DER209, 216, 440, 542-49.

The earliest that Lagstein could have received a payment under his policy was February 21, 2002 (30 days after the 90-day elimination period, even using October 23 as the disability date). DER272, 285, 532-34. On January 22, 2002 – eight weeks after his surgery, 91 days after he stopped working, and 29 days before the earliest date that benefits could be paid – Lagstein certified to his hospital that he was fit and ready to work. DER218-23. Consistent with that certification and his surgeon's post-operative

prognosis, Lagstein returned to work on February 8, 2002. DER225-28, 532-33.

By the end of that year, Lagstein was again making millions of dollars at his practice (DER74), performing tasks that he admitted were "easy," "not difficult," and "like reading the paper for me" (DER528-29). When pressed about his ability to practice, Lagstein insisted that his practice is "an easy way of working," is "no big thing," and asked, rhetorically, "why shouldn't I do it?" DER523-28.

Lagstein concealed his return to work. Underwriters discovered Lagstein's deception, fortuitously, in April 2002, when a claim-handler noticed that one of Lagstein's recent medical records described him as wearing a doctor's coat. DER559-63. What followed was a protracted investigation into Lagstein's surreptitious return to work. See, *e.g.*, DER510, 568-71 (Lagstein refused to allow an investigator to review his office calendar and later claimed that it was destroyed in a fire). After Underwriters received materials from Lagstein's lawsuit against another insurer, it denied his claim because he had failed to meet the 90-day elimination period. Underwriters concluded that Lagstein was unable to "perform in any professional capacity within the medical profession" only from November 21, 2001, until February 8, 2002 – for only 80 days. DER590-93.

D. Selection of Arbitrators

After Lagstein sued, the district court ordered arbitration under the policy's arbitration clause, which made the arbitration subject to the American Arbitration Association ("AAA") Commercial Arbitration Rules (DER286). Those rules require that arbitrators be impartial and independent. AAA

Rules R-12(b), R-17. The arbitrators here explicitly acknowledged their obligation to act as independent neutrals. DER287.

Lagstein proposed former Nevada state judge Jerry Carr Whitehead as sole arbitrator. Whitehead was unknown to Underwriters' counsel, and Underwriters declined to accept him as sole arbitrator. DER185-92. Underwriters proposed Ralph Williams as a second arbitrator. Whitehead provided Williams with a short list of potential third arbitrators, and the two agreed on former Nevada Supreme Court Justice Charles Springer, who served as chairman. DER289-90.

As required by AAA Rules, the arbitrators provided disclosure statements. DER289-90. Whitehead disclosed several prior mediations for Lagstein's counsel and indicated that he had "mediated multiple cases" for other insurance syndicates using Lloyd's administrative infrastructure.[1] DER289-90. However, he had never mediated – or arbitrated – a dispute in which Underwriters had been involved. DER491-93. Springer's disclosure indicated merely that he had no prior relationships with the parties or attorneys. PER85-86 (Plaintiff/Appellant's Excerpts of Record).

Counsel for Underwriters (attorneys based in California) performed routine background research looking for published opinions that Springer or Whitehead had authored on legal issues pertinent to Lagstein's claim. They did not look for, suspect, or

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[1] For a general description of the Lloyd's of London insurance market, see *Society of Lloyd's* v. *Jaffray*, [2000] EWHC 51, §§ 10, 21, 2000 WL 1629463 (Q.B. Nov. 3, 2000), aff'd [2002] EWCA Civ 1101 (Court of Appeal).

discover anything extraordinary about Springer or Whitehead or their prior relationship. DER185-92. Relying on the disclosures they were given – along with the fact that both Whitehead and Springer held themselves out as retired judges (DER289-90, PER85-86) – Underwriters raised no objection to them.

E. Arbitration

At the close of the hearing in July 2006, the arbitrators acknowledged that "[u]nder AAA rules" – which are binding here (see DER286) – "a decision is required generally within 30 days," but they requested a "15-day extension" of their authority. DER598-99. The parties stipulated that the award could be issued as late as "September 1st, 2006." *Ibid.*

On September 1, the arbitrators issued a split decision. Whitehead and Springer found that Lagstein was permanently unable to perform *in any capacity within the medical profession* – even though he continued to work at a multi-million-dollar medical practice that he described as "easy." App. 43a-62a. They also found that Underwriters had "repudiated" the policy by violating "highly critical language of the Policy" (*id.* at 50a, 96a-97a), even though that language appeared in an *optional* coverage that Lagstein had ***not*** purchased, and that was thus ***not*** part of his contract.[2] Whitehead and Springer then awarded Lagstein the maximum five years of "accelerated" benefits under the policy

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[2] The language was contained in the definitions for "Section 2" coverage. DER282. Lagstein had not purchased this option. DER272.

($900,000), plus $1,500,000 for "mental distress," and his attorneys' fees. App. 101a-108a.

The majority also found Underwriters liable for punitive damages and ordered a second hearing, after the September 1 deadline, to determine the amount. *Id.* at 108a.

Williams dissented, concluding that the majority had rewritten the policy, exceeded its authority, and acted in manifest disregard of the law and facts. App. 110a-128a. He found, however, that Underwriters should have used October 23 as the date of Lagstein's disability and thus owed Lagstein (only) approximately two weeks of benefits. *Ibid.*

F. Discovery of the Whitehead Affair

1. The majority's seemingly inexplicable rulings made Underwriters' counsel suspicious that something untoward was occurring. DER185-92. They discovered some remarkable facts that had not been disclosed.

Counsel learned that the Nevada Commission on Judicial Discipline had filed a complaint against Judge Whitehead alleging a pattern of willful misconduct on the bench. Nevada law affords each party a right to strike the judge initially assigned to a case; the Commission alleged that Whitehead had systematically sought to nullify that right by:

(i) initiating *ex parte* contacts with the adversaries of parties who had exercised the strike right, allowing the adversary to select the replacement judge;

(ii) contacting partners of lawyers who exercised the strike right, threatening to retaliate against their firms; and

(iii) directly contacting parties whose counsel had exercised the strike right to complain about their counsel, resulting in several replacing their counsel, in one instance with Whitehead's son's law firm. DER310-21.

Whitehead had sued to stop the investigation. During appeals in that lawsuit, Springer, as a member of the Nevada Supreme Court, invariably ruled in favor of Whitehead. (Springer earlier had solicited Whitehead to run for the state supreme court. See DER449.) Springer and another justice undertook a series of increasingly aggressive efforts to stack the panel of the court hearing the appeal, quash the complaint against Whitehead, and punish the Discipline Commission that had issued the complaint, as well as the Nevada Attorney General who supported it, dissenting justices of the Nevada Supreme Court, and others. See, *e.g.*, *Whitehead* v. *Nev. Comm'n on Judicial Discipline*, 878 P.2d 913, 923-934 (Nev. 1994) (Springer, J, concurring); *Whitehead* v. *Nev. Comm'n on Judicial Discipline*, 920 P.2d 491 (Nev. 1996).

Later panels of the Nevada Supreme Court declared Springer's defense of Whitehead to be *ultra vires*. For example, Springer and another judge used their "personal funds" to hire a "special master" to investigate alleged violations of their "secret orders" trying to protect Whitehead. The court later condemned this "extra-constitutional" "witch hunt" on Whitehead's behalf, striking Springer's orders as *ultra vires*. See *Del Papa, Attorney General* v. *Steffen, Springer et al.*, 920 P.2d 489, 489-91 (Nev. 1996) (per curiam); see also *Del Papa, Attorney General* v. *Steffen, Springer et al.*, 915 P.2d 245, 253 (Nev. 1996).

While this was presumably a matter of local notoriety in the Nevada legal community at the time, it was unknown to Underwriters (an English insurer) or to its California-based counsel. Ultimately, the FBI launched its own investigation of Whitehead, and the Justice Department began a grand jury probe. DER120-21. Although Whitehead held himself out as a "retired judge" (DER289-90), Underwriters' counsel discovered that federal prosecutors had *forced* him to leave the bench and accept a *lifetime ban* on judicial service *to avoid prosecution for this judicial corruption* (DER385-86). For years – including the period when Underwriters was considering Whitehead as a potential arbitrator – the fact of the non-prosecution agreement and his lifetime ban from state judicial service was obscured from the public. See note 4, *infra*.

2. After uncovering this remarkable history, Underwriters sought opinions from two experts on professional ethics, Professors Geoffrey Hazard and Stephen Gillers. Both opined that (i) Whitehead was obligated to have disclosed his non-prosecution agreement and (ii) Springer was obligated to have disclosed his previous adjudication of the cases in which Whitehead was the plaintiff and what the Nevada Supreme Court had found were his "extra-constitutional" efforts to help Whitehead block the investigation into his misconduct. DER94-184.

Underwriters then asked Whitehead and Springer to recuse themselves. They refused and, over Underwriters' objection, proceeded to hold a hearing on punitive damages.

G. Separate Punitive Damages Hearing and Award

The punitive-damages hearing was held in November 2006, over Underwriters' objections that Springer and Whithead should have recused themselves and that, under AAA rules and the parties' express agreement at the end of the first hearing, the arbitrators had no power to act past September 1.

Nevertheless, Whitehead and Springer teamed up again to award Lagstein $4,000,000 in punitive damages. App. 129a-155a. That made Lagstein's total recovery for less than four months off work approximately $7,000,000.

Williams again dissented, concluding that the arbitrators had lost authority to act beyond September 1, making the second award *ultra vires*. App. 156a-167a.

H. Proceedings Below

1. Underwriters moved to vacate both Awards. The district court (Judge Robert Jones) found that the Whitehead-Springer award was irrational and in manifest disregard of the law, and that the arbitrators had behaved so egregiously that their conduct implied a bias against Underwriters or its counsel.[3] Among other findings, the court concluded that it

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[3] Whitehead and Springer stepped out of their proper role as neutral arbitrators to become advocates for their award. They submitted unsolicited statements defending their non-disclosures, employing injudicious language. See, *e.g.*, DER466 (Springer quoting Hitler's words from MEIN KAMPF to accuse Underwriters of "the grossly impudent lie" for suggesting that there was a connection between Springer and Whitehead that they should have disclosed).

"shocked the conscience" to award Lagstein $15,000 a month in "total disability" benefits for the full five-year period covered by the policy, even though Lagstein was working at his lucrative profession virtually all that time. App. 25a, 30a-32a.

The court vacated the punitive award because Whitehead and Springer had exceeded their powers by conducting the second hearing and issuing the punitive award months after the explicit deadline for arbitral action set by the parties. The court held that their punitive award "certainly goes beyond jurisdiction[al] time with respect to the punitive damages." App. 33a; see also App. 25a.

2. Lagstein appealed. The Ninth Circuit (Judges Canby, Betty Fletcher, and Graber) reversed and ordered both arbitration awards confirmed. App. 1a-21a. The Ninth Circuit concluded that the district court exceeded the scope of review under the FAA when vacating the arbitration awards as irrational and in manifest disregard of the law. The court held that any such review is limited to situations in which it is "clear from the record that the arbitrators recognized the applicable law and then ignored it." App. 9a.

The Ninth Circuit also held that the FAA requires a potential arbitrator to disclose only information concerning the arbitrator's "relationships with the parties, their attorneys, and those attorneys' law firm," *but nothing else*. App. 20a. The court ruled that the burden is on the parties to investigate po-

tential arbitrators to discover any other types of information that might be material.[4]

Finally, the panel held that the district court erred in vacating the untimely punitive award. The panel declared that arbitrators are entitled to almost complete deference when setting or revising the "procedures" for the arbitration, including the number and length of hearings and the time for issuing the award, regardless of the parties' contrary agreement. App. 12a-17a.

REASONS FOR GRANTING THE PETITION

Every year, hundreds of thousands of disputes that otherwise would clog court dockets are resolved through arbitration. The AAA alone, whose Rules governed this arbitration, "administers approximately 150,000 cases" each year. AAA, *Statement of*

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[4] The Ninth Circuit asserted (incorrectly) that Underwriters could have discovered information about Whitehead's resignation to avoid federal prosecution and about the Springer-Whitehead history. App. 20a n.11. Although there recently has been some resurgence of interest in Whitehead's downfall – because of both this case and the 2007 publication of a book taking Whitehead and Springer's side in this controversy (see Donald Dickerson, WHITEHEAD REVISITED: THE CONSPIRACY TO STACK THE NEVADA SUPREME COURT (2007)) – the situation was different in 2005, when Underwriters accepted them as arbitrators.

Until Underwriters moved to vacate, the full truth about these men was harder to uncover. See, *e.g.*, DER185-92, 423-36, 480-90. Indeed, the only "source" for the critical information that Lagstein alleged Underwriters could have discovered is the website of a small Nevada on-line journal. That website first went on-line three months ***after*** Underwriters moved to vacate the awards. See DER480-90.

Ethical Principles for the American Arbitration Association, an ADR Provider Organization, Preface, at http://www.adr.org/sp.asp?id=22036. Parties to arbitration voluntarily forfeit many of the procedural rights that they would have enjoyed if they had chosen to litigate in court. In exchange, however, they gain several important advantages. See *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. __, 130 S. Ct. 1758, 1773-1775 (2010).

The decision below upsets the balance that makes arbitration a viable and often attractive alternative to litigation. It forces parties choosing arbitration not only to forfeit normal appellate review of the arbitrator's award, but also to accept an unlimited financial risk, with no recourse even for fundamental breakdowns in the adjudicative process. The decision also strips arbitration of three of its core benefits: the rights (i) to make an informed selection of the persons who will exercise nearly final authority to resolve the dispute; (ii) to agree upon efficient and effective procedures for the adjudication; and (iii) to control the costs of the process.

I. The Court Should Resolve the Acknowledged Conflict About The Circumstances Under Which An Arbitration Award May Be Vacated.

A. The Circuits Are In Disarray Over The Scope Of Review Of Arbitration Awards.

1. In *Hall Street Associates, L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576 (2008), this Court held that parties may not *expand* the scope of review of arbitration awards under the FAA, explaining that "§§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification." *Id.* at 583.

Specifically, the Court held that Section 10 does not allow parties to authorize federal courts to review arbitration awards for "mere" factual and legal errors. *Id.* at 583-85.

The Court recognized, however, that Section 10 had been interpreted as supporting vacatur, in certain limited circumstances, based on a review of the merits of the award. *Id.* at 586. Before *Hall Street*, courts conducting this limited review of the merits had held that an arbitration award could be vacated if it

- was in "manifest disregard of the law" (see, *e.g.*, *Porzig* v. *Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F.3d 133, 139 (2d Cir. 2007));
- was "completely irrational" (see, *e.g.*, *Kyocera Corp.* v. *Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997-998 (9th Cir. 2003) (en banc); *Hoffman* v. *Cargill Inc.*, 236 F.3d 458, 461 (8th Cir. 2001));
- failed to "draw its essence" from the underlying contract (*Broadway Cab Coop.* v. *Teamsters & Chauffeurs Local Union No. 281*, 710 F.2d 1379, 1382 (9th Cir. 1983)); or
- was "arbitrary and capricious" (*Peebles* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 431 F.3d 1320, 1326 (11th Cir. 2005)).[5]

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[5] Review of the merits of an award also is implicit in Section 10(a)(2), which authorizes vacatur for "evident partiality or corruption in the arbitrators." See *Commonwealth Coatings Corp.* v. *Cont'l Cas. Co.*, 393 U.S. 145, 147 n.1 (1968). Partiality or corruption may become evident in the award itself. For example, here the district court found that "internally the bias [of the

The Court in *Hall Street* reserved the question whether any of these pre-existing judicial doctrines survived (i) as an independent basis of review, (ii) as a gloss on one of the enumerated provisions in Section 10, or (iii) as a type of penumbral review that "refer[s] to the § 10 grounds collectively." 552 U.S. at 585.

Last Term, in *Stolt-Nielsen*, the Court again declined to reach this issue, stating: "We do not decide whether 'manifest disregard' survives our decision in [*Hall Street*] as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10." 130 S. Ct. at 1768 n.3.

2. Meanwhile, the courts of appeals have fallen into further disarray and reached conflicting conclusions on the answer to these questions.

The First, Fifth, Eighth, and Eleventh Circuits have held that, in light of *Hall Street*, the grounds for vacatur identified in Section 10 are exclusive and that there is no room for inquiry into the merits, such as considering whether the award is "irrational," "fails to draw its essence from the agreement," or is in "manifest disregard of the law." See *Ramos-Santiago* v. *United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008); *Citigroup Global Mkts.* v. *Bacon*, 562 F.3d 349, 358 (5th Cir. 2009); *Medicine Shoppe Int'l, Inc.* v. *Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010); *Frazier* v. *CitiFinancial Corp.*, 604 F.3d 1313, 1323-1324 (11th Cir. 2010).

The Second and Ninth Circuits, in contrast, have held that their prior standards of review survive as

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arbitrators] is demonstrated by the amount of the award." App. 33a, see also App. 25a.

judicial glosses on the grounds enumerated in Section 10. See *Stolt-Nielsen SA* v. *AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008) ("'manifest disregard of the law'"), vacated on other grounds, 130 S. Ct. 1758 (2010); *Comedy Club Inc.* v. *Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) ("completely irrational" and "manifest disregard of the law"), cert. denied, 130 S. Ct. 145 (2009).

Other Circuits are treating the issue as open. See, *e.g.*, *Paul Green Sch. of Rock Music Franchising, LLC* v. *Smith*, 2010 WL 2993835, at *3-*4 (3d Cir. Aug. 2, 2010); *MCI Constructors, LLC* v. *City of Greensboro*, 610 F.3d 849, 857 n.5 (4th Cir. 2010); *Regnery Publ'g, Inc.* v. *Miniter*, 368 F. App'x 148, 149 (D.C. Cir. 2010); *Hicks* v. *Cadle Co.*, 355 F. App'x 186, 196 (10th Cir. 2009) (per curiam); *Grain* v. *Trinity Health, Mercy Health Servs., Inc.*, 551 F.3d 374, 380 (6th Cir. 2008), cert. denied, 130 S. Ct. 96 (2009).

As many commentators have recognized, there is no hope of certainty or consistency on this issue unless this Court intervenes. See, *e.g.*, Maureen Weston, *The Other Avenues of* Hall Street *and Prospects for Judicial Review of Arbitral Awards*, 14 LEWIS & CLARK L. REV. 929 (2010); Karly Kauf, *'Manifest' Destiny: The Fate of the 'Manifest Disregard of the Law' Doctrine After* Hall Street *v.* Mattel, 3 J. BUS. ENTREPRENEURSHIP & L. 309 (2010); Hiro Aragaki, *The Mess of Manifest Disregard*, 119 Yale L.J. Online 1 (2009); Timothy O'Shea, *Arbitration's Appeal: The Grounds Have Narrowed*, 66-JUL BENCH & B. MINN. 31 (2009); Robert Ellis, *Imperfect Minimalism: Unanswered Questions in* Hall Street Associates, L.L.C. *v.* Mattel, Inc., *128 S. Ct. 1396 (2008)*, 32 HARV. J.L. & PUB. POL'Y 1187 (2009); Alan Leeth, *et al.*, *Have Courts Shown a "Manifest Disre-*

gard" for Hall Street Associates, LLC *v.* Mattel, Inc.*?*, 28 No. 5 BANKING & FIN. SERVICES POL'Y REP. 13 (2009).

B. This Issue Is Profoundly Important.

The Court should grant review to resolve the conflict and settle the issue.

The vacatur standards under the FAA apply to hundreds of thousands of arbitrations conducted every year. The current state of uncertainty defeats the very purpose that the Court cited for limiting review of arbitration awards in the first place: "maintain[ing] arbitration's essential virtue of resolving disputes straightaway." *Hall Street*, 552 U.S. at 588. Until this Court resolves the question that it twice recently has deferred, parties and courts will be forced to expend resources guessing at what constitutes permissible grounds for appropriate judicial review of arbitration awards.

This Court has frequently recognized the "national policy favoring arbitration" (*Hall Street*, 552 U.S. at 588) that Congress endorsed when it enacted the FAA. A holding that Section 10 has sufficient play in the joints to permit vacatur when the reviewing court is convinced, under the totality of circumstances, that there has been a fundamental breakdown in the adjudicative process will promote the use of arbitration and will further that policy. Indeed, although couched in pro-arbitration language, the Ninth Circuit's decision is decidedly hostile to arbitration. The message it sends is that defendants can be exposed to limitless liability in arbitration and that the federal courts are incapable of intervening to remedy even a pervasive series of arbitral abuses.

Review is urgently needed, lest more parties conclude that the Ninth Circuit's approach – and the even more aloof approaches of the First, Fifth, Eighth, and Eleventh Circuits – make the risks of arbitration too great to accept.

C. The Ninth Circuit Took An Unduly Narrow View Of The Circumstances Under Which An Arbitration Award May Be Vacated.

1. This case provides an excellent vehicle for resolving the conflict and determining the statutory and jurisprudential basis for reviewing aberrant arbitration awards. The Ninth Circuit correctly held that the doctrines of "manifest disregard of the law" and "complete irrationality" survive *Hall Street*. App. 9a-10a. But the court's extremely chary conception of those doctrines (*ibid.*) both deepens the divide among the courts of appeals and conflicts with the actual language of Section 10.

As this Court implied in *Hall Street*, "the § 10 grounds collectively" may create a penumbra that encompasses such long-standing bases for vacatur as "manifest disregard of the law" and "complete irrationality." 552 U.S. at 585. The provisions of Section 10, individually, authorize vacatur upon a showing that

- the award was "procured by corruption, fraud, or *undue means*" (§ 10(a)(1));
- there was "*evident partiality or corruption*" on the part of the arbitrators (§ 10(a)(2));
- the arbitrators engaged in "*misbehavior*" that prejudiced one of the parties (§ 10(a)(3)); or

- the arbitrators "*exceeded their powers*" under the arbitration agreement or so imperfectly executed those powers as to render the resulting award inherently defective (§ 10(a)(4)). (Emphases added)

Together, these enumerated grounds reflect that Section 10 was meant as a safeguard against the possibility of a fundamental breakdown in the adjudicative process itself – *i.e.*, conduct by the arbitrators that effectively deprives the parties of the fair and neutral arbitration for which they contracted.

2. As the Second Circuit has explained, the "manifest disregard of the law" standard is intended to address "'those exceedingly rare instances' of 'egregious impropriety on the part of the arbitrators.'" *Stolt-Nielsen*, 548 F.3d at 95 (quoting *Duferco Int'l Steel Trading* v. *T. Klaveness Shipping A/S*, 333 F.3d 388, 389 (2d Cir. 2003)). It is "a mechanism to enforce the parties' agreements to arbitrate" and is not the equivalent of unauthorized "judicial review" of the arbitrators' decision. *Ibid.*; *cf. Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976) (review of merits allowed where conduct "seriously undermines the integrity of the arbitral process"); *id.* at 571 ("Congress ... anticipated, we are sure, that the contractual machinery would operate within some minimum levels of integrity.").

That court's 2007 decision in *Porzig* is illustrative of this process-protecting review. There, the court vacated an award based on a *pattern* of legal and factual irregularities, explaining:

> "Taken individually, in all likelihood, such circumstances would not have overcome the deference owed to the Panel's award. Taken

> together, however these circumstances create, if not the perfect storm, then a disturbance ample enough to give us pause." 497 F.3d at 140.

Applying a "totality of the circumstances" test, the Second Circuit vacated the award.

Here, just as in *Porzig*, the district court conducted a comprehensive assessment of the arbitration process and found that it had gone fundamentally wrong. The court explained that its decision to vacate the awards was based on several factors, including the irrational finding that Lagstein was "totally disabled," as the insurance policy required; the "total size of the award," which "shocks the Court's conscience" and "is biased"; and Whitehead's and Springer's disregard for the limits the parties placed on their jurisdiction by express agreement. App. 25a. Mirroring the *Porzig* methodology, the district court concluded: "Taken together, the size and scope of the awards shock the Court's conscience and contravene public policy. They must be overturned." *Ibid.*

In reversing, the Ninth Circuit missed the forest for the trees. It asked simply whether, ***viewed in isolation from each other***, particular errors in the arbitration awards satisfied the court's narrow conception of "manifest disregard." That limited conception focuses on only a single inquiry: Did the arbitrators recognize a particular, controlling rule of law and deliberately flout it? App. 7a-12a. That myopic focus is not faithful to the essential premises of voluntary arbitration, which Section 10 was designed to have the courts enforce.

3. Indeed, the factors that "shocked" the district court, which caused it to conclude that the presumption of validity had been overcome, raise a compelling inference of "bias," "misbehavior," and "excess of powers." Review for "irrationality," as the district court concluded, is a legitimate way to enforce the various, interrelated standards set out in Section 10.

(a) Lagstein's surgeon predicted that Lagstein would make a full recovery and return to work within eight weeks. Consistent with that assessment, Lagstein certified to his hospital that he was fit and ready to work approximately eight weeks after surgery. Lagstein clandestinely returned to work ten weeks after surgery (and 13 days before the earliest date on which he could have received his first benefit payment). Lagstein continued (through the hearing) to work at a multi-million-dollar medical practice. When pressed why he promptly had gone back to work despite his claim of "disability," Lagstein admitted that his job is "easy" and asked, rhetorically, "why shouldn't I do it?" Nevertheless, Whitehead and Springer found that Lagstein was permanently unable to "perform in ***any professional capacity*** within the medical profession." See pages 3-4, *supra*.

(b) Whitehead and Springer based their conclusion that Underwriters breached the contract on what they described as "highly critical" policy language, even though it is undisputed that the relevant language was ***not*** part of Lagstein's policy. See page 6 & n.2, *supra*.

(c) As an alternative basis for awarding the full five years' worth of benefits to Lagstein, Whitehead and Springer concluded that Underwriters violated Nevada Revised Statute § 689A.410(2) by failing to

pay or deny Lagstein's claim within 30 days. App. 48a-49a. In fact, however, that Section expressly exempts insurers from the 30 day-deadline when, as here, the insurer has timely informed the insured of additional information needed to decide the claim. See page 3, *supra*. Thus, the case presents a clear example of "manifest disregard" of law.

(d) Lagstein had promptly returned to work to earn millions of dollars a year performing tasks that he characterized as equivalent to reading the newspaper. See pages 3-4, *supra*. Nevertheless, Whitehead and Springer concluded that Underwriters' handling of his claim had caused him "emotional distress" – and awarded $1,500,000 for this alleged "distress," a figure the district court concluded had "no support in the record" and "comes out of space." App.31a-32a.

(e) They then imposed $4,000,000 in punitive damages, an amount deemed conscience-shocking by the district court. But Lagstein's only witness at the punitive-damages hearing acknowledged that the lead syndicate on Lagstein's policy (which handled the claim) has an outstanding reputation for paying claims (DER603-07); other witnesses confirmed that the syndicate had never before been held liable for breach of insurance contract, much less bad faith or punitive damages (DER631-32).

4. The Ninth Circuit was plainly uncomfortable with the array of errors on which the awards rested, but pronounced the courts impotent to respond. In addressing the fundamental issue whether Lagstein was "totally disabled" and thus entitled to benefits, even though he actually had returned to his lucrative job promptly after surgery, the court shrugged: "Whether or not the panel's findings are supported

by the evidence in the record is beyond the scope of our review." App. 11a (internal quotation marks omitted).

It also disregarded the majority's reliance on a facially inapplicable policy provision, concluding that the "fact that the majority may have made a mistake in citing a benefit that Lagstein had not purchased does not establish irrationality of its ultimate conclusion that Lloyd's breached its contract," because "[t]he majority provided several independent reasons for finding a breach of contract." App. 11a. For that excuse, the court cited the majority's (mis)reading of Nevada Revised Statute § 689A.410(2), (App. 48a-49a) even though that statute manifestly does ***not*** support the award.

Finally, the court held that the district court "erred in concluding that the size of the arbitration awards demonstrated manifest disregard of the law." The Ninth Circuit held that, as a matter of law, the "manifest disregard" doctrine applies only when it is "clear from the record that the arbitrators recognized the applicable law and then ignored it" (App. 9a). That narrow and exclusive focus, however, would require a reviewing court to enforce even a billion-dollar punitive award here, except in a highly implausible scenario in which arbitrators brazenly confess their decision to flout a particular legal duty. The FAA simply cannot command federal courts to enforce arbitral awards in such circumstances. There is no evidence that Congress intended that the general language of the vacatur standards in Section 10 must be construed to hamstring reviewing courts so severely.

II. The Court Should Make Clear That Arbitrators Have An Affirmative Duty To Disclose Material Information Bearing On Their Integrity And Independence.

A. The Courts Of Appeals Are Divided Over The Scope Of Disclosure Required Under The FAA.

1. For parties to make an informed judgment whether to appoint particular candidates to arbitrate their disputes, they must have enough information about the candidates to evaluate their competence, independence, and neutrality. The FAA presupposes that the candidates will take the initiative to supply this information.

Thus, over forty years ago, this Court held that the FAA imposes the "simple requirement" that arbitrators must "disclose to the parties ***any*** dealings that ***might create an impression*** of possible bias." *Commonwealth Coatings Corp.* v. *Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968) (emphasis added). Accordingly, in order to protect the integrity of the process for selecting arbitrators, the Court held that Section 10 requires vacatur of any award issued by an arbitrator who violated a disclosure obligation. *Ibid.*

During the ensuing decades, however, the courts of appeals have expressed divergent views regarding the scope of disclosures required under the FAA. Recognizing that disclosures are a critical component of the arbitration process, some have taken a comparatively broad view of the disclosure obligation. See, *e.g.*, *Olson* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157, 159-160 (8th Cir. 1995); *Morelite Constr. Corp.* v. *New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 81, 84 (2d

Cir. 1984); *Middlesex Mut. Ins. Co.* v. *Levine*, 675 F.2d 1197, 1199-1202 (11th Cir. 1982) (per curiam).

Others have taken a much narrower approach, effectively imposing a burden of investigation on the parties except with respect to certain limited categories of information. See, *e.g.*, *Positive Software Solutions, Inc.* v. *New Century Mortgage Corp.*, 476 F.3d 278, 283-85 (5th Cir. 2007) (en banc); *Winfrey* v. *Simmons Foods, Inc.*, 495 F.3d 549, 552 (8th Cir. 2007); *ANR Coal Co.* v. *Cogenetrix of N.C, Inc.*, 173 F.3d 493, 500 (4th Cir. 1999); *Merit Ins. Co.* v. *Leatherby Ins. Co.*, 714 F.2d 673, 678-679 (7th Cir. 1983).

2. The decision below falls within the latter camp. The Ninth Circuit held that arbitrators have no obligation to disclose information bearing on their integrity or independence, unless that information can be tied directly *to their relationships with the parties to the dispute or their counsel.* No other information bearing on their competence, integrity, or independence need be disclosed. If the parties and their counsel want to know more, they must undertake their own independent investigation – of unspecified intensity and expense – in order to ferret out that additional, material information. Thus, the Ninth Circuit has opted for the most circumscribed standard of disclosure possible.

The present case both adds to the confusion in the courts of appeals and constitutes an ideal vehicle for resolving that confusion.

B. The Ninth Circuit Took An Unduly Narrow View Of Arbitrators' Disclosure Obligation Under The FAA.

1. This Court in *Commonwealth Coatings* characterized a potential arbitrator's disclosure obliga-

tion under the FAA as "broad." 393 U.S. at 148. To give content to that "broad" language, the Court invoked two types of external standards. First, it noted that the AAA Rules and the AAA/American Bar Association Code of Ethics for Arbitrators are "highly significant" when interpreting the disclosures that are required under the FAA. *Id.* at 149. Second, it relied on the canons of judicial ethics to create a floor for arbitral disclosures, noting that the consensual nature of arbitration and the limited nature of appellate review dictate arbitral disclosures that go beyond those required of judges. *Id.* at 148-149 ("we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges").

The Ninth Circuit's narrow view of arbitrators' disclosure obligations cannot be squared with this Court's direction to find enforceable standards in the AAA Rules and the canons of arbitrator ethics.

The AAA Rules require potential arbitrators to disclose "*[a]ny circumstance* likely to give rise to justifiable doubt as to the arbitrator's impartiality ***or independence***." AAA Rule R-16(a) (emphasis added).

The AAA/ABA Code of Ethics for Arbitrators implements this general directive by specifically requiring disclosure of "any known existing or past financial, business, *professional or personal relationships* which might reasonably affect impartiality ***or lack of independence*** in the eyes of any of the parties," including "any such ***relationships ... with any co-arbitrator***." *AAA/ABA Code of Ethics for Arbitrators*, Canon II(A)(2) (emphasis added).

Similarly, applicable Nevada law expressly required that potential arbitrators "shall disclose ... any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the proceeding, ***including ... (b) An existing or past relationship with ... another arbitrator***." Nev. Rev. Stat. § 38.227(1) (emphasis added).

Thus, these "highly significant" sources require potential arbitrators to disclose their relationships *with each other*, not just with the parties and the parties' attorneys, as the Ninth Circuit held. As the eventual voting pattern here illustrated, it was certainly material for both arbitrators to have disclosed that they had been closely aligned personally and professionally – and improperly – during the investigations into Whitehead's judicial misconduct. Disclosure of that relationship would have flagged the risk that his compatriot, Springer, would tend to line up with Whitehead, who was Lagstein's chosen arbitrator, rather than to serve as a truly "independent" decision-maker as the governing rules and ethics standards required.

2. The Ninth Circuit's overly narrow reading of the disclosure obligation under the FAA is even more obviously unsound when, as here, the parties have contracted for more stringent disclosures. As this Court repeatedly has stated, "the central or 'primary' purpose of the FAA, is to ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen*, 130 S. Ct. at 1773 (internal quotation marks omitted). Here, and in hundreds of thousands of other arbitrations every year, the rules of the AAA (or other arbitration service providers) are not just "highly significant," but are binding. DER286.

Under Section 5 of the FAA, that contractual agreement to conduct an arbitration according to the AAA Rules has legal force:

> "If in the [arbitration] agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed." 9 U.S.C. § 5.

Thus, when the parties contract to have their arbitration conducted according to AAA Rules (including the cognate AAA/ABA ethics rules, which apply to all arbitrations), those standards establish the "method" by which the parties are entitled to screen potential arbitrators. To make an informed judgment about the candidates, the parties are entitled to receive disclosures satisfying the governing standards. When the candidates fail to make disclosures that the parties had agreed must be made, they have frustrated the parties' mandatory "method" of selecting arbitrators. That failure constitutes "misconduct" or "misbehavior," which are explicit grounds for vacatur under Section 10(a)(3).

By failing to enforce the broader disclosure obligations that bound the arbitrators here, the Ninth Circuit has rendered this critical aspect of hundreds of thousands of arbitration agreements meaningless.

3. The Ninth Circuit's approach also ignored another statutory basis for broader disclosure. Section 10(a)(2) requires a court to vacate an award where there is "evident partiality." Underwriters argued that Whitehead's failure to disclose his non-prosecution agreement and Springer's failure to disclose his controversial alignment with Whitehead during the scandal were indicative of "evident parti-

ality or corruption" necessitating vacatur under Section 10(a)(2) and *Commonwealth Coatings*.

The Ninth Circuit concluded that there was no direct link between Whitehead's non-prosecution agreement and either of the parties or between the Whitehead/Springer relationship and the instant dispute. Therefore, the court concluded that they did not have to disclose these facts in order to dissipate an inference of "evident partiality." According to the Ninth Circuit, if Underwriters wanted to know "additional information about the arbitrators' backgrounds, it was free to seek that information by its own efforts." App. 20a.

The court took the same view of the "evident corruption" prong of Section 10(a)(2), stating: "[Underwriters'] evidence of alleged corruption at some time in the past does not relate to this case or the parties to it, nor does it raise a 'reasonable impression of corruption' in the present case." *Ibid.*

Read as a whole, however, as it must be, the statutory phrase "evident partiality or corruption" is broad enough to encompass any fact that would lead a reasonable observer to question whether the proposed arbitrator can be both fair and independent. The dictionary definition of "corruption" is "impairment of integrity, virtue, or moral principle." Merriam-Webster Online Dictionary, at http://www.merriam-webster.com/dictionary/corruption. A non-prosecution agreement certainly bears on that fundamental question, particularly one arising out of the subject's abuses of judicial power. Nothing in the statutory language suggests that arbitrators are free to conceal such information so long as it does not relate *directly* to the parties or the dispute.

More fundamentally, *Commonwealth Coatings* rejected the assertion that Section 10(a)(2) allows vacatur only upon proof that the arbitrator would financially benefit – corruptly – by ruling for one of the parties. Instead, the Court relied on this standard as a prophylactic disclosure standard *to give the parties confidence* that the arbitrator will be able to act fairly, capably, and independently. As the Court said, Congress expected "strict morality and fairness" from arbitrators, and the broad, pre-arbitration disclosure standard is designed to offer this assurance. 393 U.S. at 148; *cf. Hines*, 424 U.S. at 571.

By contrast, the Ninth Circuit's holding that arbitrators have no obligation to disclose information regarding their integrity and independence cannot be squared with this Court's view. Indeed, information about a candidate's checkered judicial past or his alliance with a co-arbitrator may well be ***more*** important to a party than the two, limited categories of relationships that the Ninth Circuit deemed to be the exclusive concern of Section 10(a)(2).

C. Strong Disclosure Requirements Are Critically Important To The Integrity And Acceptability Of Arbitration.

1. The parties' right to make an informed choice of their arbitrators, based on candid disclosure of material information, is a core premise of arbitration. Indeed, it is critical to the entire FAA framework precisely because judicial review of the actions of an arbitrator, once appointed, is so limited. Requiring "arbitrators [to] err on the side of disclosure" promotes "the public interest in efficient and final arbitration," because the "arbitration process functions best" when full disclosure by the arbitrators fosters "an amicable and trusting atmosphere" con-

ducive to "voluntary compliance with the decree." *Commonwealth Coatings*, 393 U.S. at 151-152 (White, J., concurring).

2. The Ninth Circuit has turned this principle on its head, creating a regime that allows arbitrators to conceal information from the parties and places the burden on each party to ferret out what the arbitrators might be hiding, lest the party be irrevocably saddled with a rogue arbitrator or a furtive cabal of co-arbitrators. App. 18a-20a.

For example, if Whitehead (the arbitrator whom Lagstein proposed for this very profitable engagement), had disclosed his history with Springer (the person Whitehead suggested to serve as the third arbitrator and chairman), Underwriters would have had good reason to doubt their ability to act with true independence. Independence is one of the core values that parties expect from co-arbitrators. See *AAA/ABA Code of Ethics for Arbitrators*, Canon II(A)(2). Underwriters was entitled to *three independent* arbitrators, independent not only from the adverse party but from each other. That is why the applicable rules (and indeed the Nevada statute) expressly require disclosure of relationships *with other arbitrators*.

This case graphically illustrates the importance of having arbitrators who are independent of each other. Whitehead and Springer acted in lockstep on myriad rulings, which in the aggregate the district court deemed to be shocking and suggestive of bias (App. 25a, 28a-34a) and which the Ninth Circuit either acknowledged to be wrong (App. 11a ("the majority may have made a mistake")) or found, at best, merely "plausible" (App. 9a-17a).

It goes without saying that a party informed of Whitehead's non-prosecution agreement (and the charges of judicial misconduct, abuse of power, and favoritism leading to enforced resignation from the bench) might reasonably question his capacity to maintain an attitude of impartiality or independence. What reasonable party, armed with such disclosure, would confidently accept such a decision-maker nominated by the adverse party and comfortably assume that he would receive a fair shake from the adversary's nominee (especially when eventually paired with a close ally)? Indeed, if a party in Underwriters' position had been informed of the forced resignation under threat of prosecution, the party might reasonably doubt the nominee's basic judicial temperament and trustworthiness. That was evidently the federal government's judgment when it made a lifetime ban on judicial service one of the conditions of dropping its threatened prosecution.

The Ninth Circuit's decision establishes that parties have no right to expect – and no enforceable right to demand – disclosures necessary to ensure that they are not ceding authority to individuals whom they would not trust, if they knew the facts. The message to arbitrators is that, far from "err[ing] on the side of disclosure, as they should" (*Commonwealth Coatings*, 393 U.S. at 152 (White, J., concurring)), they can obtain lucrative engagements by concealing information bearing on their integrity and independence and hope that no one finds them out in time. Review is warranted to rectify this dramatic and deleterious deviation from the "broad" view of disclosure announced in *Commonwealth Coatings*.

III. The Court Should Make Clear That Arbitrators "Exceed Their Powers" When They Disregard The Parties' Agreements Governing Arbitration Procedures, Including The Time Limits On Issuing Any Award.

A third aspect of the Ninth Circuit's ruling warrants review: its decision that arbitrators are not bound to observe the limits that the parties impose on their powers.

A. The Ninth Circuit's Holding Conflicts With A Consistent Line Of Decisions From This Court.

1. Rule R-41 of the AAA's Rules, which the parties' contract made applicable here, provides that an arbitration award "*shall be made* promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, *no later than 30 days from the date of closing the hearing*." DER241 (emphasis added).

At the close of the hearing here, arbitrator Williams stated:

> "We will treat this matter as submitted today at the close of argument. Under AAA rules, a decision *is required generally within 30 days* ... we would solicit a stipulation from Counsel that *we may produce an award on or about September 1st 2006*, a 15 day extension." DER598-99 (emphasis added).

The parties stipulated that the award could be returned as late as September 1, 2006, and chairman Springer declared that "[t]he matter will stand submitted." *Ibid.*

On September 1, Whitehead and Springer issued an award holding that Underwriters had breached the "disability insurance" contract, assessing damages for "lost" benefits and "emotional distress." They also decided that Underwriters should be socked with punitive damages, but they did not include such an assessment in the award. Instead, without further agreement by the parties to extend the deadline for issuing their final award, they ordered the parties to attend a second hearing, months later, devoted only to the amount of punitive damages. App. 108a. Underwriters attended that hearing under protest. DER193-202. In his dissent from the ensuing punitive award, arbitrator Williams concluded that "the Arbitration Panel's jurisdiction terminated with the Award and Dissent filed on September 1, 2006." App. 158a-160a.

2. The district court agreed that Whitehead and Springer "exceeded [their] powers in ... retaining jurisdiction to enter [an] untimely punitive damages award[]" months after the parties' agreed deadline for arbitral action. App. 25a.

The Ninth Circuit, however, held that the arbitrators have effectively unreviewable discretion to ignore even this explicitly agreed-upon end-date for the arbitration. App. 12a-17a. The court reasoned that (i) the "question of the time frame within which an arbitration panel may issue an award is a procedural matter"; (ii) the arbitrators' interpretation of procedural matters is entitled to the same near-total deference under the FAA as their decision on the merits; and (iii) Whitehead and Springer offered "plausible" rationales for scheduling additional hearings and extending the time within which they were authorized to act. App. 14a-17a.

3. The Ninth's Circuit's holding is irreconcilable with this Court's precedents insisting that arbitration is purely a matter of contract and that the arbitrators have only those powers that the parties agree to confer on them. Thus, "an arbitrator derives his or her powers from the parties' agreement" and the "parties are generally free to structure their arbitration agreements as they see fit ... and may agree on rules under which any arbitration will proceed." *Stolt-Nielsen*, 130 S. Ct. at 1774 (internal quotation marks omitted); see also, *e.g.*, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *United Steelworkers* v. *Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

In the most recent case, *Stolt-Nielsen*, the Court held just last Term that an arbitration panel "exceeded its powers" so that its award had to be vacated under Section 10(a)(4). The Court explained that, although the arbitrators were purportedly endeavoring to ascertain the parties' intention, the parties' agreement "left no room for an inquiry regarding the parties' intent." 130 S. Ct. at 1770.

Here, responding to the time limit set in the AAA Rules, which called for the arbitrators to issue an award within 30 days after the close of the hearing, the parties stipulated, at the panel's request, that the panel could have until September 1 – but only until September 1 – to issue an award. Just as in *Stolt-Nielsen*, the parties' stipulation regarding the time for issuing the award "left no room for an inquiry" regarding the time limit on the arbitrators' authority, and "any inquiry into that settled question would have been outside the panel's assigned task." *Ibid.* (internal quotation marks omitted).

B. Unless Overturned, The Ninth Circuit's Holding Will Have Serious Deleterious Consequences.

1. Under the Ninth Circuit's policy, control over the arbitration process passes from the parties to the arbitrators the moment that the arbitrators are appointed. The only limit on their authority is that they must be able to invent a "plausible" rationale for overriding the parties' agreement.

By effectively ceding control over the arbitration process to the arbitrators, and thereby denying parties the ability to establish the rules under which the arbitration will proceed, the Ninth Circuit has created a legal framework that "is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Stolt-Nielsen*, 130 S. Ct. at 1775.

2. The parties' right to establish the ground rules for their arbitration, including deadlines for resolving the case, is an important device for controlling the cost of litigation, which is supposed to be one of the key advantages of arbitration. The parties' loss of control over the procedures for the arbitration translates directly into a loss of control over the costs of adjudication.

For example, in this arbitration the parties and the arbitrators originally set a four-day hearing. The parties were free to (and did) structure their individual presentation of evidence to cover all issues in the case within that agreed-upon time frame. The arbitrators distorted that agreed-upon framework by ordering the parties to present another two days of evidence solely on the amount of punitive damages.

This meant that the arbitrators expanded the agreed-upon process by one-third.

Moreover, when Whitehead and Springer took it upon themselves to change the length of the arbitration from four days to six days and to extend their post-hearing jurisdiction from the agreed-upon 45 days to an undefined term that dragged out to 149 days, they dramatically increased their own fees, effectively awarding themselves a "bonus" of 50 to 100 percent by increasing the hours for which they eventually billed. They also forced the parties to bear commensurate increases in their attorneys' fees, witness preparation and attendance costs, transcript preparation costs, and so on.

The dollar amount of these additional costs here reaches into six figures. But there is nothing in the Ninth Circuit's framework that would prevent arbitrators from making unilateral decisions that would cost the parties millions of dollars (while adding hundreds of thousands of dollars to the arbitrators' coffers in the form of continuously accruing fees).

As it stands, the Ninth Circuit has placed parties entirely at the mercy of the individuals they hire to arbitrate a dispute. Stripped of the ability to shape the arbitration to their needs and to control their costs, parties will be significantly less apt to consider arbitration to be a viable alternative to litigation.

As we have noted, thousands of disputes are arbitrated annually under the AAA Rules. All of the parties to these disputes, along with the arbitrators who are handling them, deserve to know whether the FAA allows the federal courts to enforce the procedural limits on which the parties have agreed. The undesirable alternative is to leave in place the Ninth

Circuit's rule that an arbitrator's "plausible" ability to characterize the limits as "procedural" prevents the courts from intervening.

Congress has expressly authorized the courts to vacate awards when arbitrators "exceed[] their powers." 9 U.S.C. § 10(a)(4). It is extremely important that this Court determine how far arbitrators may go to side-step the limits the parties have placed on those powers.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for full briefing and oral argument.

In the alternative, the Court should reverse summarily to the extent that the Ninth Circuit upheld the second award, which assessed punitive damages, as "exceed[ing] the powers" of the arbitrators in violation of Section 10(a)(4) of the FAA.

Respectfully submitted.

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