TOWARDS THE FAA'S NEXT CENTURY: CLARIFYING DISCLOSURE REQUIREMENTS IN ARBITRATION

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I. INTRODUCTION[1]

In the summer of 2024, all eyes were on Paris. Thousands of athletes from over 200 countries competed in over 300 sports. The Olympics is nationalism at its healthiest: cheering for one's own nation, while recognizing the fundamentally transnational human values of pluralism, diversity, and aspiration.

As the world watched, on August 5, 2024, American gymnast Jordan Chiles competed in the women's floor exercises.[2] The judges originally gave her a score of 13.666. Her coach challenged the score, claiming that the difficulty portion had not been correctly assessed. Following a review of the coach's challenge, the score was adjusted to 13.766, just enough to secure a third-place finish over Romanian gymnast Ana Bărbosu. Chiles was presented with the bronze medal.

The next day, the Romanian Gymnastics Federation filed a proceeding in the Court of Arbitration for Sport (CAS). CAS is an international body that is charged with quickly and effectively resolving disputes in sports and has been part of the fabric of the Olympics since 1994.[3] At a high level, Romania argued that the applicable rules only permitted one minute for scoring challenges, and Chiles' coach filed the challenge slightly beyond that limitation.[4] The CAS arbitral panel agreed. It stripped Chiles of her bronze medal and awarded it to Bărbosu.[5]

But the panel's rapid decision was not the end of the story. It soon came to light that the panel's chair, Hamid G. Gharavi, had a long relationship with the Romanian government. Not only had he served as legal counsel to

1. This article is based upon a shorter treatment of the same issues in a book chapter. *See* Andrea Kupfer Schneider & Brian Farkas, *Clarifying the Conflict in the FAA's Conflict of Interest Requirements: What and When Must Arbitrators Disclose?*, *in* THE FEDERAL ARBITRATION ACT: SUCCESSES, FAILURES, AND A ROADMAP FOR REFORM (Richard A. Bales & Jill I. Gross eds., 2024).

2. Martin Ross et al., *Paris 2024: Court of Arbitration for Sport Decisions*, LEXOLOGY (Aug. 26, 2024), https://www.lexology.com/library/detail.aspx?g=28eadca6-50b4-46ad-961a-d528451baa09.

3. *History of the CAS*, TAS/CAS, https://www.tas-cas.org/en/general-information/history-of-the-cas.html (last visited Oct. 18, 2024).

4. *See* Jonathan Baren & Emily Giambalvo, *New Audio Disputes Ruling That Stripped Jordan Childes of Olympic Medal*, WASH. POST (Sept. 19. 2024, 9:59 AM), https://www.washingtonpost.com/investigations/2024/09/19/jordan-chiles-olympics-medal-appeal/.

5. CAS OG 24-15, Fed'n Romanian Gymnastics v. Donatella Sacchi, Award of 14 August 2024, at 28–29, https://www.tas-cas.org/fileadmin/user_upload/CAS_Award_OG_15-16__for_publication_.pdf.

Romania for over a decade, but he currently represents Romania in a number of international investment disputes.[6]

That public revelation resulted in widespread speculation that the process was tainted.[7] Was this arbitrator acting neutrally, or was he pushing the result in the direction of his "client"?

Whether Chiles actually earned a bronze is almost beside the point. The *process* — in the eyes of the athletes and the public — felt corrupted. In this way, no one really "won" the bronze medal at all, because the decision-making process itself will always carry a footnote.[8]

This recent example illuminates an obvious truth that exists far beyond the world of sports: arbitrators must be neutral.[9] Virtually all parties, judges, policymakers, and scholars would agree with this foundational principle. After all, arbitrators wield tremendous power to adjudicate disputes with minimal judicial oversight. For the process to be trustworthy — and *perceived* as trustworthy — the arbitrator cannot have a stake in the outcome, whether that stake is personal, professional, financial, or

6. Kelly McCarthy, *Head of Panel Who Ruled Against US Gymnast Jordan Chiles Represented Romania in Past Cases*, ABC NEWS (Aug. 14, 2024, 9:12 AM), https://tinyurl.com/44sev7fa.

7. *See, e.g.*, Tariq Panja, *Head of Panel That Ruled Against Jordan Chiles Represents Romania in Other Cases*, N.Y. TIMES (Aug. 13, 2024), https://www.nytimes.com/2024/08/13/world/europe/olympics-jordan-chiles.html (explaining that a "detailed document outlining the full reasoning" will eventually be sent to all involved parties).

8. For an analysis of how the CAS process was broken at a few different stages of this case, *see* Katherine Simpson, *The Olympics Chiles Arbitration Debacle, Part 3: A Sham Award Following a Sham Arbitration?*, INT'L INST. FOR CONFLICT PREVENTION & RESOL. (Aug. 22, 2024), https://www.cpradr.org/news/the-olympics-chiles-arbitration-debacle-part-iii-a-sham-award-following-a-sham-arbitration. Notably, the U.S. parties had no opportunity to object because the emails containing the instructions went to the wrong email address. *See* Jovonne Ledet, *CAS Sent Emails to Wrong Address Amid Jordan Chiles Medal Dispute, US Says*, 94.9 THE BEAT (Aug. 15, 2024), https://949thebeat.iheart.com/content/2024-08-15-cas-sent-emails-to-wrong-address-amid-jordan-chiles-medal-dispute-us-says/.

9. Even *Forbes* has weighed in noting the problem with these kinds of conflicts of interests, analogizing these to board of directors' decisions: "[F]or most American companies and their leaders, those rules are pretty clear. First, you try to avoid conflicts where possible — and when can't, you make full and prompt disclosure. Second, those tasked to review a disclosure do so with independence and diligence, in the best interests of the company and its stakeholders. You're trying to make sure that board decisions aren't the byproduct of self-interest that no business would want for its own reputation." Michael Peregrine, *Jordan Chiles and Olympian-Level Conflicts of Interest*, FORBES (Aug. 19, 2024, 10:08 AM), https://www.forbes.com/sites/michaelperegrine/2024/08/19/jordan-chiles-and-olympian-level-conflicts-of-interest/.

ideological. Neither the plaintiff's mother nor the defendant's business partner would make a very good arbitrator.

The Chiles case spotlighted the lack of transparency surrounding disclosure requirements in arbitration. Perhaps some assume that arbitration under U.S. law would have been handled differently — that any conflict of interest would have been disclosed or that the arbitrator would have not been appointed in the first place. But, in reality, the Federal Arbitration Act (FAA) can be just as opaque as the rules governing the Court of Arbitration for Sport, if not more so.[10]

As the FAA turns 100 years old, we have the opportunity to reflect on how this critical piece of legislation might be improved. As private dispute resolution continues to expand, the FAA should embrace more robust disclosure requirements to ensure public confidence.

Neutrality is more complex than it initially appears. Unlike judges, arbitrators are private individuals. They are often selected to adjudicate disputes within certain industries precisely because they are deeply connected to those industries.[11] As a practical matter, that means they may have all sorts of connections to the parties, the witnesses, and the broader subject matter of the dispute.

This begs the question: what makes an arbitrator "neutral"? The Federal Arbitration Act says shockingly little about the concept of neutrality. At most, the FAA provides that an arbitral award may be vacated where an arbitrator shows "evident partiality or corruption."[12] But it never actually defines those terms.[13] Equally absent from the FAA is any discussion of disclosure. If the arbitrator discloses her "partiality," does that cure the problem? If so, what potential biases must an arbitrator disclose to the parties? When must those disclosures occur? And how does a court later evaluate whether an undisclosed potential bias rises to the level of "evident partiality"? Because the FAA itself does not answer these questions, we are

10. *See Code: Procedural Rules*, CT. ARB. FOR SPORT, https://www.tas-cas.org/en/arbitration/code-procedural-rules.html (last visited Oct. 26, 2024). At least the CAS rules (arguably not followed in the Chiles case) say specifically that "No CAS arbitrator may act as counsel for a party or other interested person before the ad hoc Division" (Article 12). *See Arbitration Rules for the Olympic Games*, CT. ARB. FOR SPORT, https://www.tas-cas.org/fileadmin/user_upload/CAS_Arbitration_Rules_Olympic_Games__EN_.pdf (last visited Oct. 26, 2024).

11. *See, e.g.*, *How Parties Select Arbitrators*, FINRA, https://www.finra.org/arbitration-mediation/about/arbitration-process/arbitrator-selection (last visited Dec. 2, 2024).

12. 9 U.S.C. § 10(a)(2).

13. *Id.*

left with a hodgepodge of caselaw, assorted provider rules, and idiosyncratic arbitrator practices.

The lack of clear guidance creates real problems. If an arbitrator fails to disclose a potential source of bias, the hearings will proceed, and an award will be rendered. Not only does this risk a biased award, but even if the award was *not* actually affected by any bias, huge inefficiencies could result in trying to "prove" bias. If one party later believes that there was bias and moves to vacate the award under the theory that the arbitrator was not neutral, the court will need to determine whether vacatur is warranted. Under the current system, neither the arbitrator nor the parties will know whether the potential bias should have been disclosed until *after* the arbitration concludes and *after* the motion to vacate is resolved. The result? Tremendous inefficiency. Hundreds of thousands of dollars of legal fees could be wasted to obtain an award that will ultimately be vacated. The parties would then need to arbitrate their dispute from scratch. This type of post-hoc system wastes time and money, directly contradicting arbitration's goals of expediency and efficiency.[14]

This essay provides a roadmap to the current landscape of neutrality and disclosure. It then suggests three possible reforms to the FAA that would provide better guidance to arbitrators, parties, and courts. Moreover, this essay argues that if the FAA cannot be sufficiently amended, states should take the lead. States can continue to more clearly outline disclosure requirements and enforce clearer standards than the current version of the FAA.

II. WHAT IS NEUTRALITY?

Black's Law Dictionary defines neutrality as the "quality, state, or condition of being impartial or unbiased."[15] Like many legal definitions, this one is slippery. What, exactly, makes an arbitrator "impartial" or "unbiased"? To paraphrase Justice Potter Stewart's famous definition of pornography, you know it when you see it.[16] Consider the following examples of potential personal, financial, and ideological bias:

A. Personal Bias

- The arbitrator and the Chief Executive Officer of the claimant corporation are neighbors and play golf together a few weekends

14. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010) (describing the primary benefits of bilateral arbitration as "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes").

15. *Neutrality*, BLACK'S LAW DICTIONARY (12th ed. 2024).

16. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

each year. They have never discussed this particular case, but often discuss work in general.

- The arbitrator's sister-in-law serves as the expert witness for the respondent and will testify at the hearings. They see each other at family gatherings, including a Thanksgiving dinner that will fall right after the hearings.
- The arbitrator and the respondent's lead attorney are both graduates of Vassar College, where they co-chair a fundraising campaign. They see each other on weekly Zoom planning calls with the College's staff and speak together at fundraising dinners throughout the year. They never discuss work.

B. Financial Bias

- The arbitrator, an amateur investor, holds a significant amount of stock in the respondent corporation. The size of the claims is large enough that an adverse decision could move the stock price, though the arbitrator has no plans to sell the stock for many years.
- The arbitrator regularly receives referrals, three or four per year, from the law firm representing the claimant-employee in an employment arbitration. The arbitrator's awards are about seventy percent in favor of the claimants in those cases, although in the arbitrator's view, those claimants simply had much stronger cases on the merits.[17]
- The arbitrator's daughter is currently applying for a competitive internship with the respondent, a large hedge fund. None of the witnesses for the hedge fund have any role in the hiring process, and the child's grade point average suggests that she is independently qualified for the internship.[18]

17. For a discussion of win rates in various types of consumer arbitration, *see, e.g.*, Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130, 1132 (9th Cir. 2019) (concluding that the arbitrator insufficiently disclosed the extent of his ownership interest in the arbitration organization specified in the parties' arbitration agreement, and that organization had administered ninety-seven arbitrations for one of the parties over the past five years); Christopher R. Drahozal, *Arbitration Innumeracy*, 4 ARB. L. REV. 89, 92 (2012); Nancy A. Welsh, *What Is "(Im)partial Enough" in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395, 406 (2010) (describing cases of financial bias in arbitrations).

18. *See e.g.*, Golden v. O'Melveny & Myers LLP, No. 19-56371, 2021 WL 3466044, at *1 (9th Cir. Aug. 6, 2021) (noting no evident partiality where the losing party at arbitration, a law firm, did not extend an interview to the arbitrator's son, a law student, who applied to that firm for employment).

C. Ideological Bias

- The arbitrator, a lifelong conservative and regular donor to the Republican Party, presides over an arbitration between a liberal not-for-profit organization and its commercial landlord. If the landlord wins, the not-for-profit will need to pay a significant sum of money to the landlord, impacting the organization's ability to engage in its advocacy programs. The arbitrator's background is commercial leasing, largely representing tenants in disputes against their landlords.
- The arbitrator, who spent her entire career at a plaintiff-side employment firm, presides over a discrimination dispute between an employee and employer. In her personal view, most discrimination claims have some degree of merit, and she believes claimants are unlikely to pursue legal claims unless something egregious really happened to them.
- The arbitrator, whose wife is an outspoken environmentalist and executive at Greenpeace USA, presides over an arbitration between an oil company and one of its vendors. His wife has written numerous op-eds about the nefarious practices of the oil industry, though the arbitrator is not specifically aware of those writings, nor does he discuss specific cases with his wife.

Each of these vignettes reveals the challenges of defining "neutrality." Clever lawyers could argue that the arbitrator should (or must) recuse from the adjudication of each dispute based on an apparent conflict. Clever lawyers could also argue that an arbitrator should (or must) disclose the apparent conflict to the parties before they are appointed but may hear the dispute so long as the parties do not object.[19] On the other hand, clever lawyers could *also* argue that no recusal or disclosure is required because these situations are too attenuated to create any actual bias. Like many ethical issues, "neutrality" evades black-and-white definitions.

III. WHY DOES NEUTRALITY MATTER?

For multiple reasons, neutrality is crucial to the sustainability of arbitration as a method of conflict resolution.

First, an arbitrator's neutrality gives the process legitimacy in the eyes of the parties. As the FAA creates exceedingly narrow grounds for vacating an

19. *See* Mitch Zamoff & Leslie Bellwood, *Proposed Guidelines for Arbitral Disclosure of Social Media Activity*, 23 CARDOZO J. CONFLICT RESOL. 1, 3 (2022).

arbitral award, essentially whatever the arbitrator says goes.[20] These high stakes reinforce the need for arbitrators to be unbiased as they approach each new set of facts. If parties cease to view arbitration as legitimate, they would either refuse to participate or refuse to follow awards, resulting in a breakdown of the private dispute resolution system.[21]

Second, neutrality gives arbitration legitimacy in the eyes of the public. Arbitration substitutes a public decision maker (i.e., a judge) for a private decision maker (i.e., an arbitrator).[22] While U.S. courts have some degree of independence, they are ultimately accountable to the elected branches of government.[23] At the federal level, most judges are appointed by the President and confirmed by the U.S. Senate.[24] Federal bankruptcy and magistrate judges are selected by other appointed judges, but only after a robust process governed by statute and court rules.[25] At the state level, each state has its own process for the selection of judges that generally involves a combination of judicial elections, local appointments, and state-wide appointments.[26] Most states have term limits for judges, meaning that a judge's unpopular decisions are ultimately reviewable by the voters or by other elected representatives who can then kick them out of office.[27]

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20. 9 U.S.C. § 10(a) (listing bases for vacating award); *see also* Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 568 (2013) ("Under the FAA, courts may vacate an arbitrator's decision 'only in very unusual circumstances.' That limited judicial review, we have explained, 'maintain[s] arbitration's essential virtue of resolving disputes straightaway'") (citations omitted).

21. For example, after several decisions under the International Centre for Settlement of Investment Disputes (ICSID) investor-state arbitration system were perceived as illegitimate in the early 2000s, more than one Latin American country withdrew from the entire system, creating years of precarity and uncertainty. *See, e.g.*, Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1523 (2005).

22. *See generally* Stephen J. Ware, *Is Adjudication a Public Good? "Overcrowded Courts" and the Private Sector Alternative of Arbitration*, 14 CARDOZO J. CONFLICT RESOL. 899 (2013) (discussing the relationship between public and private adjudication).

23. *See* Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections*, 114 MICH. L. REV. 929, 930 (2016) (discussing judicial selections and elections in the United States).

24. *Id.*

25. *See* 28 U.S.C. §§ 631(b)(2), 152.

26. *See generally* Kang & Shepherd, *supra* note 23.

27. *See* Michael P. Seng, *What Do We Mean by an Independent Judiciary?*, 38 OHIO N. U. L. REV. 133, 137–39 (2011) (discussing judicial accountability and selection); Natalie Gomez-Velez, *Judicial Selection: Diversity, Discretion, Inclusion, and the Idea of Justice*, 48 CAP. U. L. REV. 285, 303 (2020) (outlining models of judicial selection among states).

Moreover, the work of courts is almost entirely public, meaning that journalists regularly cover the judiciary — including critiques of judicial decision-making.[28] This public accountability gives judges a high degree of democratic legitimacy.

By contrast, arbitrators' powers derive from the parties' agreement.[29] The parties intend to have their dispute decided by a neutral, impartial, and competent decision maker. Arbitrators are private individuals, and their decisions are largely shielded from any public scrutiny.[30] If they act improperly or render a sloppy award, those misdeeds may remain confidential and unreviewable by a court. Moreover, if the arbitrator is biased, this thwarts the parties' intent to have an impartial arbitrator. In short, arbitrators are imbued with a significant amount of power in our legal system granted to them by the parties and blessed by courts. Confidence in their neutrality is key to ensuring that the public generally believes the process is legitimate. The arbitration involving Chiles' bronze medal showed exactly what happens when the public distrusts the neutrality of the process.[31]

Third, arbitration has become ubiquitous.[32] Indeed, it is almost easier to list the areas of law *not* yet subject to widespread arbitration (e.g., family law and criminal law), than to outline the myriad areas where arbitration has become commonplace (e.g., commercial, construction, securities, employment, labor, real estate, healthcare, entertainment).[33] The expansion of arbitration throughout the economy makes it even more important that the public view arbitration as a legitimate alternative to litigation.

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28. *See generally* Kang & Shepherd, *supra* note 23.

29. 21 WILLISTON ON CONTS. § 57:90 (WEST 2024) ("[A]rbitrators are private judges whose powers are defined by contract . . . .").

30. *Id.*

31. *See* Peregrine, *supra* note 9.

32. *See generally* Lara Traum & Brian Farkas, *The History and Legacy of the Pound Conferences*, 18 CARDOZO J. CONFLICT RESOL. 677 (2017) (discussing growth of alternative dispute resolution over the twentieth and twenty-first centuries).

33. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638–39 (1985) (holding that arbitration agreements can apply to statutory claims in addition to contractual claims); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 105 (2001) (discussing arbitration of employment discrimination claim); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991) (discussing arbitration of age discrimination claim); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 338, 352 (2011) (holding that FAA preempted state rule that invalidated class action waivers in consumer contracts).

In sum, for parties and the public to have faith in arbitration, the process must be perceived as fundamentally fair.[34] If arbitrators instead appear biased, legitimacy will decline. Without legitimacy, the government may regulate arbitration out of existence, or alternatively, parties themselves will begin to avoid arbitration for fear of unprincipled decisions. Neutrality is critical to the long-term viability of arbitration.

IV. FEDERAL STANDARDS OF NEUTRALITY

Despite the importance of neutrality in arbitration, there is little authority to guide arbitrators and parties under federal law. This Part will outline the relevant language of the FAA, as well as the primary Supreme Court and circuit court cases that attempt to define the concept of neutrality in arbitration. This Part then turns to the concept of disclosure, about which the FAA is silent.

A. The Federal Arbitration Act

The FAA does not require any showing of neutrality for someone to be appointed as an arbitrator, nor does the FAA define neutrality. Instead, the FAA only references an arbitrator's potential bias in the context of vacating an award. Section 10(a) provides, in relevant part:

> 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 . . . where there was evident partiality or corruption in the arbitrators, or either of them[.][35]

Thus, an arbitral award may be vacated where an arbitrator showed "evident partiality" towards one of the parties.[36] As noted, the statute provides no definition for this phrase, nor is case law particularly clear. Only one Supreme Court case analyzes the question; meanwhile, as one court

34. Given the tumult over the Chiles arbitration, one could easily imagine serious future fall-out over the CAS system that might, in fact, weaken it over time and defeat its purpose. Writings on procedural justice make this point in both adversarial and consensual dispute resolution processes — people who use these processes will only find them legitimate when they have voice and participation in the process and believe that neutrals are indeed impartial. *See generally* Nancy Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice,* 2002 J. DISP. RESOL. 179 (2002).

35. 9 U.S.C. § 10(a)(2).

36. *See id.*

recently observed, "[t]he circuits have not reached a consensus on the meaning of 'evident partiality.'"[37]

B. The Supreme Court's Leading Case

The only Supreme Court case discussing the meaning of evident partiality is over fifty years old. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*,[38] an arbitrator in a construction dispute failed to disclose that he had a periodic business relationship with the party that prevailed in the arbitration — including services specifically related to the subject of the arbitration.[39] Over a period of about four or five years, the arbitrator had been paid roughly $12,000 in consulting fees (approximately $100,000 in today's dollars adjusted for inflation).[40] The arbitrator never revealed this information, which was discovered by the losing party only after the final award was rendered.[41] The losing party moved to vacate the award, claiming that the arbitrator exhibited "evident partiality" based on his financial relationship with the winning party.[42]

The Court agreed and vacated the award.[43] In a plurality opinion, Justice Hugo Black stated that the arbitrator's "repeated and significant" consultations for the winning party on various business projects generated sizeable fees over time, and although there was no explicit evidence that this financial relationship resulted in favoritism, disclosure was still required.[44] The plurality opinion emphasized that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."[45] Justice Black found that it was not the intent 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."[46]

Meanwhile, Justice Byron White (joined by Justice Thurgood Marshall) concurred in the judgment but emphasized that arbitrators should not be

37. UBS Fin. Servs., Inc. v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico, 997 F.3d 15, 19 (1st Cir. 2021) (citations omitted).

38. 393 U.S. 145 (1968).

39. *Id.*

40. *Id.* at 146.

41. *Id.*

42. *Id.* at 147.

43. *Commonwealth Coatings Corp.*, 393 U.S. at 150 (White, J., concurring).

44. *Id.* at 146.

45. *Id.* at 150.

46. *Id.*

"held to the standards of judicial decorum of Article III judges, or indeed of any judges."[47] Indeed, the concurrence emphasized the fact that arbitrators are commonly chosen specifically because of their connections and expertise in particular industries: "It is often because they are men [and women] of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function."[48] In other words, the fact that an arbitrator does business in a specific field, or has contacts with the players in that field, does not disqualify him to serve as an arbitrator (as it might for a judge). Justice White continued:

> This does not mean the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility. But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. I see no reason automatically to disqualify the best informed and most capable potential arbitrators.[49]

Through this language, courts and arbitrators have adopted a general standard for requiring informed disclosure of potential conflicts.[50] If an arbitrator has a possible bias, relationship, or connection that could give rise to "evident partiality," it still can be excused so long as "both parties are informed of the relationship in advance" or if that relationship turned out to be "trivial."[51]

C. Standards for Vacatur

Commonwealth Coatings Corp. left important questions unanswered: What exactly are arbitrators required to disclose? And what standard applies when courts consider motions to vacate arbitral awards? Are arbitrators required to avoid even the *appearance* of bias (i.e., Justice Black's plurality opinion), or may arbitrators have some degree of potentially problematic background so long as there is disclosure and/or the bias is trivial (i.e., Justice White's concurrence)? The former approach is more restrictive; the latter is more permissive of business experience and interactions.

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47. *See id.*
48. *Commonwealth Coatings Corp*., 393 U.S. at 150.
49. *Id.*
50. *See, e.g.*, *supra* notes 43–44.
51. *Commonwealth Coatings Corp*., 393 U.S. at 150.

Absent clarity from the Supreme Court, the circuit courts have fashioned their own tests.[52] The First, Second, and Fourth Circuits generally consider four non-exclusive factors for evident partiality where a party seeks to vacate an arbitral award based on an arbitrator's non-disclosure: (1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceedings; (2) the directness of the relationship between the arbitrator and the party the arbitrator is alleged to favor; (3) the connection of that relationship to the arbitrator; and (4) the proximity in time between the relationship and the arbitration proceeding.[53] This approach essentially follows Justice White's concurrence: vacatur should be granted only when, on balance, a reasonable person would conclude that the arbitrator was more favorable to one party than the other. So, for example, vacatur has *not* been granted when the arbitrator and the party's lawyer had joined the same law firm[54] or had served as co-counsel, as these relationships were too distant.[55] On the other hand, partiality was found (and vacatur granted) where the arbitrator's new job was with one of the parties[56] and when the arbitrator was related to one of the parties.[57]

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52. The Supreme Court recently declined to hear a case that could have resolved the circuit split. *See* Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130, 1132 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 164 (2020) (mem.).

53. UBS Fin. Servs., Inc. v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico, 997 F.3d 15, 20–21 (1st Cir. 2021) (quoting Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins., 668 F.3d 60, 74 (2d Cir. 2012)); *accord* Three S Del., Inc. v. DataQuick Info. Sys., Inc., 492 F.3d 520, 530 (4th Cir. 2007).

54. No evident partiality where one of losing party's counsel in arbitration joined a different office of the same firm as one of the arbitrators six months into arbitration proceedings, but did not know of the connection, and had never spoken to the arbitrator otherwise. *See* Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 145 (4th Cir. 1993).

55. No evident partiality, relationship deemed trivial, where: (1) The arbitrator and counsel for the licensee represented an unrelated client in protracted patent litigation that lasted for six years; (2) they each signed the same ten pleadings, but they never met or spoke to each other before the arbitration and had never attended or participated in any meetings, telephone calls, hearings, depositions, or trials together; and (3) they were two of 34 lawyers, and from two of seven firms, that represented the unrelated client during the lawsuit, which ended at least seven years before the instant arbitration. *See* Nationwide Mut. Ins. Co. v. Home Ins. Co, 278 F.3d 621, 625–26 (6th Cir. 2002).

56. Arbitrator disclosed, but did not further investigate, that a branch of his company was negotiating with the company potentially acquiring plaintiff's company. Further investigation showed more significant potential for conflict. *See* Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 138–40 (2d Cir. 2007).

57. An arbitrator failed to disclose that his father was an officer in one of the unions of which the winning party was a local unit. *See* Morelite Const. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 82 (2d Cir. 1984).

Meanwhile, the Ninth and Eleventh Circuits follow Justice Black's approach in assessing motions to vacate for evident partiality: courts can vacate awards if there is a reasonable *appearance* of partiality. Under this approach, vacatur can occur where (1) an actual conflict exists; or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists.[58] If an actual conflict does not exist, the movant must show that the partiality is "direct, definite and capable of demonstration rather than remote, uncertain and speculative."[59] Under this higher standard, for example, regular representation of one of the parties qualified as evident partiality and vacatur was granted.[60]

In short, different courts have adopted different standards for assessing whether an arbitrator's award must be vacated for evident partiality. Some consider whether there actually was any bias that infected the award; others consider whether a reasonable person would believe that any such bias existed; and still others use some intermediate approach.[61]

V. FILLING IN THE GAP: DISCLOSURE AND DISQUALIFICATION RULES IN STATES AND BY PROVIDERS

Commonwealth Coatings Corp. and the cases that interpret it are consistent in finding that an arbitrator's early disclosure can cure potential conflicts.[62] After all, if parties are informed of an arbitrator's relationships

58. World Bus. Paradise, Inc. v. Suntrust Bank, 403 F. App'x 468, 470 (11th Cir. 2010) (quoting Univ. Commons–Urbana, Ltd. v. Universal Constructors, Inc., 304 F.3d 1331, 1337 (11th Cir. 2002)).

59. *Univ. Commons*, 304 F.3d at 1339 (internal citations and quotations omitted); *see* A. Miner Contracting, Inc. v. Dana Kepner Co., 696 F. App'x 234, 235 (9th Cir. 2017) (quoting Lagstein v. Certain Underwriters at Lloyd's, 607 F.3d 634, 646 (9th Cir. 2010)) (showing "evident partiality" in an arbitrator under section 10(a)(2) of the FAA, plaintiff "either must establish specific facts indicating actual bias toward or against a party or show that [the arbitrator] failed to disclose to the parties information that creates '[a] reasonable impression of bias'").

60. Evident partiality found where the arbitrator's law firm had represented the parent company of a party "in at least nineteen cases during a period of [thirty-five] years[,] the most recent representation end[ing] approximately [twenty-one] months before [the] arbitration was submitted." Schmitz v. Zilveti, 20 F.3d 1043, 1044 (9th Cir. 1994).

61. *See* Seung-Woon Lee, *Arbitrator's Evident Partiality: Current U.S. Standards and Possible Solutions Based on Comparative Reviews*, 9 Y.B. ON ARB. & MEDIATION 159, 159–60 (2017) (discussing circuit split on "evident partiality").

62. *See* Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 149–50 (1968); *Univ. Commons*, 304 F.3d at 1339.

or history, they can decide for themselves whether to move forward with the arbitration — or alternatively, whether to find a different arbitrator.

What should arbitrators disclose to foster early identification of potential conflicts? While a comprehensive list is challenging, one can identify several obvious areas that have been outlined in the Revised Uniform Arbitration Act (RUAA),[63] various state rules, and arbitration provider guidelines[64]:

Personal Relationships

- Is the arbitrator a family member of any party or witness?[65]
- Does the arbitrator have any repeated interactions with any party or witness (e.g., customer, friend, neighbor)?[66]
- Does the arbitrator have any professional or volunteer associations with any party or witness (e.g., sitting on the same committees, nonprofit boards)?

Financial Relationships

- Does the arbitrator serve as a vendor or customer of any party or witness (i.e., is the arbitrator hired regularly by one party)?[67]

63. UNIF. ARB. ACT. § 12 (Unif. L. Comm'n 2000), https://my.uniformlaws.org/viewdocument/final-act-2?CommunityKey=a0ad71d6-085f-4648-857a-e9e893ae2736&tab=librarydocuments.

64. Private provider rules include additional examples of what disclosure is expected. *See, e.g.*, *Disclosure Guidelines*, ADR.ORG (Sept. 2019), https://www.adr.org/sites/default/files/document_repository/Disclosure_Guidelines.pdf; *JAMS Comprehensive Arbitration Rules & Procedures*, JAMS ARBS. & ARB. SERVS. (June 1, 2021), https://www.jamsadr.com/rules-comprehensive-arbitration/#Rule-15; NAT'L ARB. & MEDIATION, COMPREHENSIVE DISPUTE RESOLUTION RULES AND PROCEDURES 25 (2024), https://www.namadr.com/content/uploads/2024/10/Comprehensive-Rules-as-of-10.1.2024.pdf.

65. *See, e.g.*, SUP. CT. OF N.C. OFF. OF ADMIN. COUNSEL, N.C. CANONS OF ETHICS FOR ARB. Canon II (1999), https://tinyurl.com/28w55rrm (providing arbitrators shall disclose "any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias. Persons asked to serve as arbitrators shall disclose any such relationships which they personally have with any party or its lawyer, or with any individual whom they have been told will be a witness. They shall also disclose any such relationships involving their spouses or minor children residing in the household or their current employers, partners or business associates . . .").

66. For a discussion of arbitrators' social media contacts, *see, e.g.*, Zamoff & Bellwood, *supra* note 19, at 37.

67. *See* CAL. CIV. PROC. CODE § 1281.9(a)(1), (6) (2024) (requiring disclosure of "all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial" including prior work as a lawyer or arbitrator for the parties).

- Does the arbitrator have direct investments (as opposed to mutual fund ownership) in any of the parties or companies associated with any of the parties?
- Has the arbitrator, or the arbitrator's immediate family, ever worked for any party?

Ideology

- Does the arbitrator have any strong political commitments that would directly impact an evaluation of the case?
- Has the arbitrator ever taken any public positions concerning the subject matter of the dispute (e.g., op-eds, position statements)?[68]

VI. IDEAS FOR REFORM

The FAA's silence on neutrality has generated considerable confusion. There is no national standard for what arbitrators must disclose, when they must disclose, or how courts should understand the relationship between disclosure and vacatur. Here, this essay proposes three simple amendments that could answer these questions.

A. Mandatory Disclosure Before Appointment

The FAA should explicitly require arbitrators to disclose potential sources of bias before they are appointed. This early disclosure makes sense for two reasons.

First, most obviously, it aims to surface any material biases that could render the process unfair for the parties. As discussed above, arbitration has become increasingly common in the United States since the FAA was enacted a century ago. That prevalence means the parties and the public must have some degree of faith in the fairness of the arbitral process. Ensuring that biases are disclosed early in the process will instill confidence in the neutrality and commitment to fairness both in a specific arbitration and in arbitration more broadly.

68. *See* INT'L BAR ASS'N COUNCIL, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION 23, 25–26 (Oct. 23, 2014), https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918 (mirroring the concept of the language in the International Bar Association guidelines requiring disclosure if the "arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties" (Rule 3.1.5) or any "previously expressed . . . legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration" (Rule 4.1.1)).

Second, early disclosure promotes efficiency. It prevents situations where the parties expend the tremendous time and cost of going through an arbitration, only later to have the award challenged by the losing party because of an alleged conflict that could have been disclosed at the outset. As the Supreme Court has long held, arbitration should be efficient.[69] Part of that efficiency is finality; awards should not be subject to avoidable challenges.

B. The Substance of the Disclosure Requirements

Where does the requirement belong? The natural place for Congress to insert a disclosure requirement in the FAA is section 2, which currently provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.[70]

Because this section governs the general enforcement of agreements to arbitrate, it makes sense to include disclosure language here. We propose making the existing language above part (a) of section 2, and adding a part (b):

> For any arbitration conducted pursuant to an agreement under section 2(a), the arbitrator shall make a written disclosure to the parties of any material biases that could reasonably impede the arbitrator's ability to render a fair and impartial award before that arbitrator is appointed. Biases include but are not limited to (1) any material prior or ongoing financial relationship with any party or witness; (2) any material prior or ongoing personal relationship with any party or witness (including any relationship of any member of the arbitrator's household); or (3) any material prior statements, publications, or pronouncements on the subject matter of the arbitration. Trivial or hypothetical conflicts need not be disclosed. Each party has seven days from the date of the arbitrator's disclosures to object to the appointment of the arbitrator based on such disclosures. Failure to object constitutes a waiver of the ability to challenge an award based on any of the disclosures.[71]

This addition to section 2 would clarify that an arbitrator must disclose potential conflicts to the parties before formal appointment. However, the

69. *See, e.g.*, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010).

70. 9 U.S.C. § 2.

71. *See* AM. ARB. ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES 17–18 (2016), https://adr.org/sites/default/files/Commercial%20Rules.pdf.

nature of those conflicts must be material, rather than trivial. Moreover, if parties fail to object, they lose their ability to complain post-award that the arbitrator was somehow biased against them.

C. Standards for Vacatur Equal the Standards for Disclosure

Section 10(a)(2) provides that an arbitral award can be vacated "where there was evident partiality or corruption in the arbitrators, or either of them."[72] As previously explained, a flaw in the FAA is its failure to define "evident partiality" or to connect that partiality to any required disclosure.[73] To address these issues, we propose the following new section, which would be labeled as section 10(b), moving the existing 10(b) and 10(c) to 10(c) and 10(d), respectively:

> Evident partiality, as used in section 10(a)(2), means any material bias that likely impeded the arbitrator's ability to render a fair and impartial award. Examples of biases applicable here are the same as those listed in section 2(b). Awards shall not be vacated based on biases that are trivial or hypothetical. Awards shall not be vacated based on any bias that the arbitrator disclosed pursuant to section 2(b) and that the party seeking vacatur waived.

This addition to section 10 clarifies the definition of evident partiality by linking it to the same types of biases requiring disclosure under section 2(b).[74] It also specifies that courts may not vacate awards for inconsequential alleged bias. This strict language will discourage parties from filing frivolous motions to vacate — a tactic that can impede the enforcement of awards. Finally, this new section further clarifies that a party's failure to object to the arbitrator's initial disclosures constitutes a waiver of its ability to claim "evident partiality" down the road.

D. State Standards Should Govern

Even in the absence of any reform to the FAA, states should apply the disclosure standards of the RUAA discussed above.[75] Only twenty-three states have adopted it so far, yet far more states have crafted their own version of arbitration rules that encompass conflict of interest disclosures

72. 9 U.S.C. § 10(a).
73. *See supra* Part IV.
74. 9 U.S.C. § 2(b).
75. *See supra* Part V.

and recusal.[76] These often mirror guidelines established by states for state judges.[77]

Admittedly, it can be risky for states to attempt to regulate arbitration. Since 1984, the Supreme Court has taken a tough approach in striking down state statutes that conflict with the FAA. The Court has found that by enacting the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims that the contracting parties agreed to resolve by arbitration."[78] Following this reasoning, the Court routinely invalidates state laws that attempt to curtail, regulate, or otherwise impede arbitration.[79] The doctrine of federal preemption has effectively prevented states from meaningfully regulating arbitration.

But state procedural rules requiring arbitrator disclosures are unlikely to offend rules of federal supremacy. First, there is no conflicting prohibition on arbitrator disclosures in the FAA. Indeed, as discussed above, the FAA is totally silent on the subject. Second, disclosure requirements are unlikely to be challenged through new federal litigation, given that both parties have an interest in full and fair disclosure. Third, states that adopted disclosure requirements have already done so successfully for decades without any challenge.[80]

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76. *See, e.g.*, CAL. CIV. PROC. CODE § 1281.9 (2024).

77. *See, e.g.*, *id.* ("[T]he proposed neutral arbitrator shall disclose all matters . . . including . . . [t]he existence of any ground specified in Section 170.1 for disqualification of a judge.").

78. Southland Corp. v. Keating, 465 U.S. 1, 2–3 (1984).

79. *See, e.g.*, Allied–Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281, 285–86 (1995); Doctor's Assocs. v. Casarotto, 517 U.S. 681, 682, 687 (1996); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 457 (2003); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006).

80. *See, e.g.*, Mun. Workers Comp. Fund, Inc. v. Morgan Keegan & Co., 190 So. 3d 895, 901, 925 (Ala. 2015) (vacating arbitration award for undisclosed business relationship); Beebe Med. Ctr. v. InSight Health Servs. Corp., 751 A.2d 426, 427, 433, 443 (Del. Ch. 1999) (vacating arbitration award for undisclosed attorney-client relationship); Barcon Assocs. v. Tri-County Asphalt Corp., 430 A.2d 214 (N.J. 1981) (vacating arbitration award for undisclosed business relationship). Not surprisingly, California leads in both the extensive requirements for disclosure and in caselaw vacating awards where disclosure is not given. In *Grabowski v. Kaiser Found. Health Plan, Inc.*, the court vacated the award after the court determined that an arbitrator's derogatory comments to the attorney for the opposing party about a pro per litigant's decision to litigate in pro per in an arbitration proceeding had a nature and tone showed an objective possibility of bias, were unethical, and created a duty to disclose them (which the arbitrator failed to do). 278 Cal. Rptr. 3d 553, 560–62 (Ct. App. 2021). In *Roussos v. Roussos*, the appellate court reversed the trial court's refusal to vacate an award where the arbitrator had not disclosed two prior arbitrations within two years with one of the

For all these reasons, states should freely adopt their own disclosure requirements modeled on those contained in the RUAA, other states' statutes, or provider requirements. Enforcing their own requirements is unlikely to draw the fire of the federal courts. In the absence of FAA guidance, states can push to create a system that is more trustworthy.

VII. CONCLUSION

Everyone agrees that arbitrators must be neutral. The public's reaction to the arbitral panel's decision to strip Jordan Chiles of her Olympic medal demonstrates the sense of fundamental fairness implicated by our conceptions of neutrality, as well as our response to undisclosed conflicts of interest.

Yet the FAA offers frustratingly little guidance on what neutrality means or how to achieve it. Instead, the FAA offers only a single tool for handling arbitrator bias: vacatur. That blunt instrument is insufficient. *First*, the FAA provides no definition of "evident partiality," leaving that to the discretion of individual arbitrators and courts to interpret. *Second*, while the Supreme Court has suggested that disclosure of conflicts can cure any potential "partiality," the FAA itself is silent on what must be disclosed and when it must be disclosed. *Third*, any failure to disclose can be addressed only after an award has been issued, meaning that parties could waste enormous time and expense to obtain an award only to return to square one after vacatur.

A modest set of amendments to the FAA could resolve these concerns. Section 2 should require that before an individual is appointed as an arbitrator they must disclose any material personal, financial, or ideological conflicts. Either party can then waive the conflict, or decline to waive the conflict and choose a different arbitrator. Section 10 could then add a simple definition of evident partiality that can result in vacatur, and further clarify that any alleged bias *cannot* result in vacatur if (1) it is disclosed in advance or (2) it is trivial or hypothetical.

These amendments would harmonize the field's approach to disclosure and "evident partiality," enhance arbitrators' perceived and actual neutrality, and avoid the current inefficiencies of motions to vacate for non-disclosure. With these tweaks, the FAA could enshrine the critical importance of neutrality to the arbitration process while also safeguarding efficiency.

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parties. 275 Cal. Rptr. 3d 196, 202 (Ct. App. 2021); *see also* Ovitz v. Schulman, 35 Cal. Rptr. 3d 117, 127–28 (Ct. App. 2005); Azteca Constr., Inc. v. ADR Consulting, Inc., 18 Cal. Rptr. 3d 142, 151 (Ct. App. 2004) (affirming that the court may rely on state statutes requiring disclosure beyond provider rules).

In the alternative, states should continue to take the lead, providing rigorous guidelines for conflicts of interest, requirements for timely disclosure, and clear remedies for violations of these rules.

Without a system that promotes neutrality, the arbitration process will continue to come under attack. That loss of legitimacy will do irreparable damage to the dispute resolution movement.