No. 101835-5

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

CHARLES SCHWAB & CO., INC. and
INTERACTIVE BROKERS LLC,

Petitioners,

v.

IRENE and PETER LEON GUERRERO, et al.,

Respondents.

MEMORANDUM OF AMICUS CURIAE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

Paul F. Rugani, WSBA No. 38664
Orrick, Herrington & Sutcliffe LLP
401 Union Street, Suite 3300
Seattle, WA 98101
Phone: (206) 839-4300

Richard A. Jacobsen
Gregory D. Beaman
Jennifer M. Keighley
Orrick, Herrington & Sutcliffe LLP
51 W. 52nd Street
New York, NY 10019
Phone: (212) 506-5000

Attorneys for Amicus Curiae Securities Industry and Financial Markets Association

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is the leading trade association representing the shared interests of hundreds of broker-dealers, banks, and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services, and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the market and the industry. Accordingly, SIFMA works to enhance the quality, and substantive and procedural fairness, of securities arbitration, ensuring that this process promotes fair, efficient, and economical dispute resolution for all parties.

INTRODUCTION

Each year, thousands of disputes between investors, brokers, and others in the securities industry are resolved through arbitration. Securities arbitration promotes fair, efficient, and economical dispute resolution for all parties. But the

effectiveness of securities arbitration—and arbitration in any other context—depends on maintaining the public's confidence in the fairness and integrity of the proceedings. The opinion by the Court of Appeals, which adopts an overly restrictive view of the bases on which an arbitration award can be vacated, risks undermining public confidence in the integrity of arbitration.

This Court should grant the Brokers' petition for review for at least two reasons:

First, this case raises a significant question of constitutional law that the lower court failed to address—namely, whether the Brokers' due process rights were violated by the participation by one of the arbitrators, Pamela Bridgen, in similar lawsuits relating to investment losses, as well as her failure to disclose those lawsuits. Ms. Bridgen's failure to disclose her similar investment lawsuits, while disclosing her non-investment litigation, at the very least reflects an undeniable flouting of FINRA's arbitrator disclosure rules and suggests intentional conduct that rightly calls into question her neutrality in a

securities dispute. Had she disclosed these lawsuits, as required by FINRA rules, she would have been struck—indeed disqualified—from the pool of potential arbitrators. Instead, she was appointed to the panel and participated in the decision that found the Brokers liable. The Court of Appeals, however, did not even consider the due process implications of the arbitrator's nondisclosure, relying instead on the fact that the Brokers contracted for FINRA arbitration and were therefore purportedly stuck with FINRA procedures for addressing the arbitrator's omissions. But when contracted-for procedures are applied in a way that deprives a party of a fundamentally fair arbitration hearing, courts must be empowered to vacate the award.

Second, review of this case is critical to clarify the courts' important role in assessing claims of evident partiality. The Court of Appeals took an overly narrow view of the bases for vacatur of an award, finding that, in nondisclosure cases, evident partiality can be established only when an arbitrator has a relationship with a party to the arbitration. But this restrictive

view of evident partiality ignores the many other circumstances in which an arbitrator may engage in conduct that reflects potential bias against one of the parties. Ensuring the neutrality of arbitrators, including the full disclosure of circumstances that could present bias, is an issue of substantial public interest because arbitrator neutrality is critical to maintaining public confidence in this important dispute resolution process. Indeed, clarification of the evident partiality standard is beneficial not only to the securities industry, but also to investors, employees, and other consumers, so that any biases (for or against a particular side) are identified prior to the hearing and certainly prior to any liability findings.

STATEMENT OF CASE

SIFMA adopts the statement set forth in the petition for review.

ARGUMENT

I. The Court Should Grant Review To Ensure that FINRA Arbitrations Comply with Constitutional Due Process Requirements

This Court should grant review because the Court of Appeals failed to address whether Ms. Bridgen's non-disclosure of her contemporaneous prosecution of at least one investment-related lawsuit reflected evident partiality that deprived the Brokers of fundamental due process rights. As such, this case raises significant questions of constitutional law and review is warranted under RAP 13.4(b)(3).

As this Court has acknowledged, "in the context of due process, arbitration must meet the same requirements as a traditional judicial action." *Int'l Ass'n of Fire Fighters, Loc. 46 v. City of Everett*, 146 Wn.2d 29, 38, 42 P.3d 1265 (2002). Federal courts have likewise stressed that, although the scope of judicial review of an arbitration award is limited, such review under Section 10 of the FAA—which applies in this case—is nevertheless intended to "preserve due process." *Kyocera Corp.*

v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 998 (9th Cir. 2003); *accord In re Wal-Mart Wage & Hour Emp. Pracs. Litig.*, 737 F.3d 1262, 1268 (9th Cir. 2013) (en banc) ("Through § 10 of the FAA, Congress attempted to preserve due process while still promoting the ultimate goal of speedy dispute resolution."). Of course, one of Section 10's due process protections authorizes vacatur of an arbitration award where there was "evident partiality" in any of the arbitrators, 9 U.S.C. § 10(a), which is a form of "outrageous conduct" that is an "egregious departure[] from the parties' agreed-upon arbitration," *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586, 128 S. Ct. 1936, 170 L. Ed. 2d 254 (2008).

Here, the undisputed facts demonstrate that the Brokers did not receive a fundamentally fair hearing. Despite FINRA procedures that require potential arbitrators to disclose lawsuits involving the same or similar subject matter, Ms. Bridgen failed to disclose that she had participated in several lawsuits relating to her investments, including an ongoing lawsuit alleging that her

financial advisor used a trading strategy that resulted in substantial losses. Had Ms. Bridgen disclosed these lawsuits against industry participants, she would have been struck from the pool of potential arbitrators. Indeed, she would have been precluded from serving as an arbitrator under FINRA's own procedural rules. But because the Brokers were not given the opportunity to identify and object to her potential biases, she was appointed to the arbitration panel and participated in the panel's finding of liability against the Brokers. When Ms. Bridgen's non-disclosures, and potential bias, were ultimately identified, the only remedy provided was to remove her from the panel and replace her with a different arbitrator. But that remedy was too little, too late: The panel's liability finding remained intact even though liability had been decided by an arbitrator who should have never been assigned to the panel in the first place.

Despite these significant procedural deficiencies, the Court of Appeals did not engage in *any* analysis of whether the Brokers were denied due process. Instead, the Court of Appeals

simply found that the Brokers were stuck with whatever remedies FINRA provided for arbitrator bias because their contracts with investors mandated FINRA arbitration. Indeed, the Court of Appeals repeatedly highlighted the "contracted framework" of the proceeding, which it then held against the Brokers as a "strategic choice." *Charles Schwab & Co. v. Leon Guerrero*, 25 Wn. App. 2d 1006, 2022 WL 17959777, at *2 (2022) (unpublished) (the "Opinion"); *see also id.* at *3 ("[T]he remedy of removing Bridgen for nondisclosure … was precisely one for which the Brokers negotiated by selecting arbitration under FINRA as part of the express terms of the contract.").

But simply because the Brokers agreed to arbitrate their dispute with the investors pursuant to FINRA rules does not mean that they contracted away their due process rights.[1] To the

[1] It bears noting that neither FINRA nor its arbitration process is run by the securities industry. FINRA is a regulatory organization under the umbrella of the Securities and Exchange Commission. It provides an independent arbitration forum, and the vast majority of investor and employment cases against brokerage firms are resolved through this arbitration process that

contrary, due process requires that courts evaluate the ***application*** of the contracted-for rules to ensure that the parties still received a proceeding that was fundamentally fair. In other words, the fact that the parties contractually agreed to arbitrate does not mean that they should be left without any recourse for a procedurally deficient proceeding. Private parties' "freedom to fashion their own arbitration process" does not mean they can amend by contract "the statutorily prescribed standards governing federal court review" of arbitration awards, including those standards designed to preserve due process. *Kyocera*, 341 F.3d at 1000; *see also, e.g., Wal-Mart*, 737 F.3d at 1268 ("Permitting parties to contractually eliminate all judicial review of arbitration awards … would … frustrate Congress's attempt to ensure a minimum level of due process for parties to an

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is intended to be completely neutral. Investors and employees are just as interested as brokerage firms in protecting their due process rights in forums provided by FINRA (or any other arbitration provider). The Court of Appeals' decision completely glosses over these interests.

arbitration."). Indeed, "[i]f parties could contract around" the FAA's provisions authorizing vacatur where one of the arbitrators had evident partiality, "parties would be left without any safeguards against arbitral abuse." *Id.*

To the extent that, as Respondents argue in their answer to the petition, some federal courts have held that due process protections do not apply in private arbitrations, *see* Respondents' Answer at 15-16 (citing *Elmore v. Chicago & Ill. Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986)), this Court's review is even more important. Conflicting holdings by different federal courts create the risk of inconsistent application by Washington courts. As such, this case provides the Court with the opportunity to clarify that fundamental due process protections apply to arbitrations and to set forth a framework for evaluating when those protections have been violated.

II. The Court Should Grant Review To Clarify the Grounds on Which Awards May Be Vacated due to Evident Partiality

This Court should also grant review to correct the Court of

Appeals' overly narrow interpretation of the circumstances that can give rise to evident partiality under the FAA. Because this issue is of central importance to ensuring public confidence in arbitrations, review is warranted under RAP 13.4(b)(4).

In finding that the Brokers failed to establish evident partiality on the part of Ms. Bridgen, the Court of Appeals relied principally on the fact that Ms. Bridgen did not have a relationship with the parties or their attorneys. *See* Opinion, 2022 WL 17959777, at *3. In support of that finding, the Court of Appeals cited federal cases for the proposition that where the basis for alleged evident partiality is an undisclosed relationship, the relationship must be substantial to warrant vacatur. *See id*.

But this narrow view of potential bases for evident partiality conflicts with holdings of several federal courts that look to the totality of the circumstances in determining whether an arbitrator's failure to disclose created an appearance of bias. *See, e.g.*, *Schmitz v. Zilveti*, 20 F.3d 1043, 1047 (9th Cir. 1994) (stating that standard for determining evident partiality in

nondisclosure cases is whether there is a "[r]easonable impression of partiality"); *Pitta v. Hotel Ass'n of New York City, Inc.*, 806 F.2d 419, 423 n.2 (2d Cir. 1986) (noting that "evident partiality" standard "may be met by inferences from objective facts inconsistent with impartiality"). Indeed, even Washington courts interpreting "evident partiality" under the state-law equivalent to the FAA have found that a basis for vacatur can be "actual or apparent conflicts of interest that existed before the arbitration that should have been, but were not, disclosed." *Newell v. Providence Health & Servs.*, 9 Wn. App. 2d 1038 (2019) (unpublished).

In light of the conflict between the approach of the Court of Appeals and these other courts, and because of the substantial public interest in maintaining public trust in the integrity of arbitrations, this Court should grant review and clarify that evident partiality can be a basis for vacatur even where an arbitrator does not have a relationship with a party. Each year, thousands of cases involving individual investors proceed

through FINRA arbitration. The parties' selection of neutral arbitrators is a hallmark of that process and is vital to maintaining public confidence in the fairness of arbitration. As SIFMA has explained in prior public statements, arbitrator neutrality contributes to fair case outcomes and to the parties' perceptions of fairness about the forum.[2] Thus, both the potential for bias and the appearance of bias are important factors to address to ensure that participants in and observers of the forum perceive it to be fair.[3] As SIFMA has stressed, "the pursuit of arbitrator neutrality underpins the integrity of the entire securities arbitration system."[4]

The Court of Appeals' holding that Ms. Bridgen's conduct did not give rise to evident partiality is the very type of ruling

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[2] *See* SIFMA Supplemental Comment on FINRA's Proposed Rule Change, Nov. 6, 2014, available at: https://www.sifma.org/wp-content/uploads/2017/05/sifma-submits-supplemental-comments-to-the-sec-on-finra-proposed-rule-change-to-definitions-of-public-non-public-arbitrator.pdf.
[3] *See id.*
[4] *Id.*

that threatens to undermine public confidence in the integrity of arbitration. It is undisputed that Ms. Bridgen failed to disclose her participation in an ongoing litigation against her financial advisor alleging that she suffered substantial losses, as well as other lawsuits relating to her investments. Ms. Bridgen's involvement in multiple, investor-side lawsuits, along with her failure to disclose those lawsuits, is, at the very least, suggestive of a potential bias against members of the financial services industry.[5] Indeed, the very purpose of FINRA's pre-arbitration disclosures is to identify potential conflicts of interest and biases

[5] In each of the other FINRA arbitrations against the Brokers arising out of Vita's purported mismanagement of brokerage accounts—in which Ms. Bridgen did not participate—the claims against the Brokers have been denied. *See Berg v. Charles Schwab & Co. et al.*, No. 21-02041, available at https://www.finra.org/sites/default/files/aao_documents/21-02041.pdf; *Ihrie v. Interactive Brokers LLC, et al.*, No. 19-02917, available at https://www.finra.org/sites/default/files/aao_documents/19-02917.pdf; *Dunstan v. Charles Schwab & Co., et al*, No. 20-03896, available at https://www.finra.org/sites/default/files/aao_documents/20-03896.pdf.

such as these and ensure that the arbitration is not tainted by even an appearance of bias.

In sum, the overly narrow view of evident partiality adopted by the Court of Appeals has the potential to erode public confidence in the arbitration process generally, not only for the thousands of FINRA arbitrations each year, but also for arbitrations in other contexts.

CONCLUSION

For the reasons set forth above, SIFMA respectfully requests that this Court grant the petition for review.

This document contains 2,362 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 23rd day of May 2023.

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: /s/ Paul F. Rugani

Paul F. Rugani, WSBA No. 38664
401 Union Street, Suite 3300
Seattle, WA 98101
Tel: (206) 839-4300

Richard A. Jacobsen
Gregory D. Beaman
Jennifer M. Keighley
51 W. 52nd Street
New York, New York 10019
Tel: (212) 506-5000

Attorneys for Amicus Curiae Securities Industry and Financial Markets Association

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Memorandum of Amicus Curiae Securities Industry and Financial Markets Association in Support of Petition for Review to be served on counsel for all other parties in this matter via this Court's e-filing platform.

Dated May 23, 2023.

/s/ Paul F. Rugani
Paul F. Rugani, WSBA No. 38664
Orrick, Herrington & Sutcliffe LLP
401 Union Street, Suite 3300
Seattle, WA 98101
Tel: (206) 839-4300

Attorneys for Amicus Curiae Securities Industry and Financial Markets Association

ORRICK, HERRINGTON & SUTCLIFFE LLP

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- tdo@mcnaul.com
- tfitzgerald@mcnaul.com

Comments:

Please file the attached Motion for Leave to File the Memorandum Amicus Brief and Memorandum Amicus Brief in Support. Thank you.

Sender Name: Malissa Tracey - Email: mtracey@orrick.com
Filing on Behalf of: Paul Francis Rugani - Email: prugani@orrick.com (Alternate Email: sea_wa_appellatefilings@orrick.com)

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Phone: (206) 839-4309

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