No. _____

In The
Supreme Court of the United States

JAKE MENDEL, in his capacity as Personal Representative of the Estate of Thelma A. Mendel, and in his capacity as Trustee of the Thelma A. Mendel Lifetime Trust,

Petitioners,

v.

MORGAN KEEGAN & COMPANY INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Court of Appeals has, in two unpublished opinions, applied two rulings which present fundamental and far-reaching departures from clearly enunciated and controlling Supreme Court precedent. The Circuit Court has refused to apply the long-standing and unvarying rule of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), to a diversity case properly controlled by state law. It has, in addition, essentially federalized the substantive standards of review of arbitration awards, in contravention of clear precedent of this Court; and, finally, having chosen to apply a federal review standard to a challenged arbitration award in a diversity case, it has chosen the wrong standard – one in conflict with Supreme Court precedent, the plain language of the Federal Arbitration Act and with the rule in every other Circuit which has addressed the issue.

The questions thus presented for this Court are:

(1) Is the rule of *Erie Railroad* to be eroded or evaded in diversity cases merely because the Federal Arbitration Act compels states to give the same effect to arbitration clauses as to other contract provisions?

(2) Does the Federal Arbitration Act co-opt or preempt state standards of review of arbitration awards in diversity cases?

(3) Should the Eleventh Circuit decision on the application of the "evident partiality or corruption"

QUESTIONS PRESENTED – Continued

clause of the Federal Arbitration Act, 9 U.S.C. §10(a)(2), be overruled since it is in conflict with the decisions of this Court and of all other Circuits which have addressed the issue, and thus there is not only an inconsistent outcome arising from the mere accident of one venue as opposed to another, but also a standard which effectively makes review of even overt corruption and conflicts of interest by an arbitrator not susceptible of relief?

LIST OF PARTIES

Petitioners are an Estate and a Trust, both represented by a single individual, Jake Mendel, as Executor and Trustee. Respondent is Morgan Keegan & Company. Respondent Morgan Keegan is now a part of Raymond James Financial, Inc., but, at the time of this proceeding, was a subsidiary of Regions Bank, N.A.

CORPORATE DISCLOSURE STATEMENT

Petitioners are represented by an individual trustee and personal representative. Respondent is Morgan Keegan & Company, Inc., which is a subsidiary of Raymond James Financial, Inc., a publicly traded corporation.

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The decision of the United States District Court for the Northern District of Alabama was rendered on May 28, 2015 and is reproduced herein at App. pp. 17-33. The initial decision of the Eleventh Circuit Court of Appeals was rendered on March 23, 2016 and is reproduced herein at App. pp. 8-16. The second opinion of the Eleventh Circuit was issued August 2, 2017, and is reproduced at App. pp. 1-7. Application for Rehearing En Banc was denied on September 28, 2017.

JURISDICTION

The Eleventh Circuit Court of Appeals denied Petitioner's timely Application for Rehearing En Banc on September 28, 2017. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

A) 28 U.S.C. §1332 provides, in relevant part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between
>
> (1) citizens of different States; . . . .

B) Code of Alabama §6-6-14:

> An award made substantially in compliance with the provisions of this division is conclusive between the parties thereto and their privies as to the matter submitted and cannot be inquired into or impeached for want of form or for irregularity if the award determines the matter or controversy submitted, and such award is final, unless the arbitrators are guilty of fraud, partiality, or corruption in making it.

C) 9 U.S.C. §10 provides, in relevant part:

> (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.

D) Rule 71B, Ala. R. Civ. Proc.:

> (a) **Who may appeal**. Any party to an arbitration may file a notice of appeal from the award entered as a result of the arbitration.
>
> . . .
>
> (c) **Where filed**. The notice of appeal shall be filed . . . in the office of the clerk of the circuit court of the county where the award is made.

STATEMENT OF THE CASE

On March 22, 2011, Petitioners ("Mendel") brought claims against Morgan Keegan, Inc. pursuant to state and federal securities laws, and demanded arbitration of such claims under the arbitration provisions of brokerage contracts with Morgan Keegan. Those brokerage contracts (drafted by Morgan Keegan) required that the matter be arbitrated by and under the rules of the Financial Industry Regulatory Authority ("FINRA"). The brokerage accounts were opened and maintained in Alabama, and the purchases made though an Alabama broker. The arbitration was

conducted in Alabama, and the award was required by Rule to be challenged or confirmed, and judgment entered, in the Circuit Court of Jefferson County, Alabama.

The arbitration was held May 13-17, 2013, in Birmingham, Alabama. On July 30, 2013, the Arbitrators, led by Chairman John Allgood (a lawyer), issued a decision in favor of Mendel, but for less than 7% of the established damages. Shortly after the decision was rendered, Mendel discovered that the Panel Chairman, Mr. Allgood, had concealed the fact that his law firm actually currently represented both Morgan Keegan and its corporate parent, Regions Bank, N.A., *and had done so during the entirety of the time that the arbitration was pending*. FINRA Rule 12405 [App. p. 38] explicitly required disclosure of this information, but neither Chairman Allgood, nor Morgan Keegan, disclosed it, thus violating FINRA's rules and thereby the contractual terms upon which Mendel had a right to rely.

Pursuant to Rule 71B, Ala. R. Civ. Proc., Mendel filed an Appeal in the Circuit Court of Jefferson County, Alabama seeking vacatur of the arbitration award and a new arbitration. Mendel sought vacatur on the grounds enumerated by Alabama statutory law (§6-6-14, Code of Alabama), state common law and the Federal Arbitration Act 9 U.S.C. §10(a). The principal grounds were (i) that the award was procured by corruption, fraud or undue means; and (ii) the "evident partiality *or* corruption in the arbitrator or either of them," arising from Chairman Allgood's law firm's

representation of Morgan Keegan before, during and throughout the arbitration, and the non-disclosure of such by either the arbitrator or Morgan Keegan itself.

Morgan Keegan immediately removed the case from state court to the Northern District of Alabama solely on the basis of diversity jurisdiction. Upon removal, the District Court questioned whether Morgan Keegan could remove the case under Alabama's procedure, whether it would have jurisdiction of an appeal under an Alabama Rule, and whether Alabama substantive law governing vacatur would still apply in federal court. Mendel moved to remand the case, and the District Court held multiple hearings in regard to these issues. [App. pp. 17-33].

The District Judge explained to the parties that he was concerned that the removal, if allowed, must not and could not affect the outcome of the case, and believed, that as long as the exact same outcome was available in the federal court as would be available in the state court, the case would not be remanded. The District Judge expressly recognized that the removal could not be outcome-determinative, and that he did not want Morgan Keegan to later renege and assert that Alabama law was not decisive and controlling.

Morgan Keegan conceded and stipulated to the District Court that it recognized that Alabama law would apply, and that the removal would *not* affect the outcome of the case. [App. p. 21]. On this basis, the District Court denied Mendel's Motion to Remand.

While the case was pending before the District Court, the Alabama Supreme Court rendered a dispositive opinion dealing with the exact issue present in the instant case and reiterating Alabama's substantive law controlling vacatur on grounds of evident partiality or corruption.[1] Respondent Morgan Keegan was also the defendant in that case, and thus lost before the Alabama Supreme Court. In *Municipal Workers Compensation Fund v. Morgan Keegan & Co.*, 190 So.3d 895 (Ala. 2015), **the Alabama Supreme Court held what constituted "evident partiality" under Alabama law** and set aside a tainted arbitration award on that basis. The only operative difference in *Municipal Workers* and *Mendel* is that there was a non-diverse party in *Municipal Workers*, whose presence prevented removal on diversity grounds. Applying the rule enunciated in *Municipal Workers* to *Mendel* would have yielded the same outcome; that is, a vacatur of the tainted arbitration award. Morgan Keegan, the defendant in both cases, would have, as consistency and *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) require, lost both appeals.

The Alabama substantive rule, consistent with the rule in various other jurisdictions, held that the evident appearance of partiality was sufficient to support vacatur, and that proof of actual knowledge, intent to

[1] The District Court had actually stayed the case, pending the outcome of the Alabama case, due to its likely controlling effect. Morgan Keegan did not object to this, obviously agreeing prior to the Court's ruling against it, that the Alabama case would be controlling.

deceive and concealment by the arbitrator was not required. The Eleventh Circuit, however, applied its own uniquely restrictive rule which makes "evident partiality" equivalent to proof of actual mental intent (*i.e.*, a corrupt motive) to conceal the disqualifying facts (and that the arbitrator did not even need to make an inquiry), and ruled that such federal circuit rule applied, notwithstanding that the case was a removed diversity case, to which state law would apply under *Erie Railroad*. No other circuit applies so stringent a rule (all other circuits require, at a minimum, that the arbitrator demonstrate that he made a good faith inquiry to determine the conflict). The Eleventh Circuit went on to rule that the FAA was "effectively governed" by federal law – that is, that the FAA is a substantively preemptive statute.

After the Alabama Supreme Court issued its opinion in *Municipal Workers*, the District Court applied the controlling Alabama law and appropriately granted summary judgment in favor of Mendel, and against Morgan Keegan, and ordered the arbitration award vacated on the basis of the appearance of evident partiality or corruption of the Chairman. [App. pp. 32-33].

However, after it lost the *Municipal Workers* case and the District Court ruled in *Mendel*, Morgan Keegan then changed its position and argued that the District Court should not have followed the substantive law of Alabama, but should have only followed certain Eleventh Circuit cases dealing with **that court's definition of "evident partiality"** in non-diversity

cases arising in federal court. In other words, Morgan Keegan lost under Alabama law and then sought a completely different outcome through the Eleventh Circuit. It is undisputed that if the case had not been removed to federal court by Morgan Keegan, the arbitration award would have been vacated, and Morgan Keegan would have had no legitimate defense to such vacatur. *See Municipal Workers*, 190 So.3d 895.

In an inexplicable decision, the Eleventh Circuit agreed with Morgan Keegan and held that it was improper for the District Court to have followed Alabama law in this diversity case. The Eleventh Circuit acknowledged that it was perfectly proper for the Alabama Supreme Court to interpret the Federal Arbitration Act and to interpret the meaning of evident partiality. [App. p. 14]. Given the controlling holdings of this Court that the FAA is *not* a preemptive federal law except to make arbitration clauses enforceable on an equal footing with all contracts, and that the Alabama Supreme Court is empowered to interpret the FAA, the District Court could not have ruled otherwise than it did. The Eleventh Circuit also acknowledged that Morgan Keegan had, in essence, deceived the District Court and Petitioners, but held that such deception did not matter. [App. p. 11, 15]. The Eleventh Circuit ignored the fact that Morgan Keegan had made the removal outcome-determinative, and simply held that this was essentially just tough luck. The Eleventh Circuit acknowledged that applying its federal interpretation "risks divergent outcomes based on whether a case is heard in state court or a federal court

exercising diversity jurisdiction. But that's simply a reality of the exception built into *Erie*." [App. p. 14, n. 3]. The Eleventh Circuit reversed the District Court and remanded the case for the trial court to receive evidence on whether there was actual knowledge and concealment under the Eleventh Circuit standard for evident partiality. [App. p. 14].

On such remand, the District Court (acting through a new district judge) denied discovery into the partiality or knowledge of the arbitrator,[2] but simply applied the Eleventh Circuit's rule, also declined to follow *Erie Railroad*, and also treated the FAA as being substantively preemptive as to grounds for vacatur. The remand court thus granted summary judgment for Morgan Keegan without discovery or an evidentiary hearing, or even a then-pending motion for summary judgment. (Morgan Keegan's prior motion for summary judgment had been denied and that denial was not vacated on appeal.)

Mendel appealed that District Court decision; on the second appeal, the Eleventh Circuit panel, deeming itself bound by the earlier panel decision, affirmed. [App. p. 6] Mendel sought rehearing en banc, and Mendel's petition for review en banc was denied on

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[2] The Circuit opinion ruled that the question of whether the arbitrator knew or ought to have known was "fact-intensive," and one on which discovery was required, pointing to its own decision in *University Commons-Urbana v. Universal Contractors, Inc.*, 304 F.3d 1331 (11th Cir. 2002). Despite such holding, the new District Judge denied Mendel any discovery (none had been needed under the correct Alabama standard).

September 28, 2017. This Petition for Writ of Certiorari is timely filed following such denial.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' decision below is in direct conflict with the long-standing and unalterable rule of this Court in *Erie Railroad Co. v. Tomkins*, 304 U.S. 64 (1938), and an extended line of cases from 1938 to date.

In many ways, it seems almost preposterous for a party to be called to address the *Erie Railroad* rule in 2017, but the decision below represents a direct affront to that rule.

The *Mendel* case began and was conducted and decided in Alabama, arising from a series of transactions in Alabama by which the Mendel parties were defrauded of some $2,700,000.[3] The arbitration of the *Mendel* claims occurred in Alabama, and the tainted award was appealed to the Alabama state circuit court pursuant to Alabama state law and procedure.[4]

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[3] Morgan Keegan was charged and convicted of such fraud by both the Federal Securities Exchange Commission and the Alabama Securities Commission, and heavily fined.

[4] Rule 71B, Ala. R. Civ. P., expressly requires that the appeal of the arbitration award must be "filed with the clerk of the circuit court where the award was made." As found by the District Court – and neither challenged nor reversed – "Morgan Keegan conceded [in open court] that the law of Alabama, which had clearly been invoked by the Mendel parties, would follow the case from the Jefferson County Circuit Court to this Court, and would

Solely and expressly on the ground of diversity of citizenship, Morgan Keegan removed the appeal to the U.S. District Court, where the Court, as it was required to do, applied the controlling decision of the Alabama Supreme Court (*Municipal Workers Fund v. Morgan Keegan & Co.*, 190 So.3d 895 (Ala. 2015)) which ruled that, under Alabama's interpretation of the grounds for vacatur of an arbitration award, the award was due to be set aside on "evident" partiality when the arbitrator was shown to have a conflict which would reasonably be perceived to create partiality, without the necessity of proof of actual knowledge or intent by the arbitrator.

In both *Municipal Workers* and in *Mendel*, the fact of an arbitrator with undisclosed overt ties to Morgan Keegan was alone sufficient to set aside the award under state law. (In *Mendel*, that taint was the presiding arbitrator's firm's representation of Morgan Keegan, a lawyer-client relationship imputed by law to the arbitrator himself.)

On appeal, rather than affirming the application of state law as *Erie* commands, the Court of Appeals reversed, holding that the District Court should have applied an Eleventh Circuit rule that denied vacatur unless there was direct proof of actual knowledge of the conflict (without even a requirement to make an inquiry) and an intent to deliberately not make disclosure – a rule peculiar and unique to the Eleventh

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provide Mendel parties whatever means Alabama law provides for attacking the arbitration award. . . ." [App. p. 21]

Circuit, but not recognized or applied in any other Circuit. The Eleventh Circuit rule requires evidence "that Allgood knew of but failed to disclose" the conflict. [App. at p. 16] Moreover, "arbitrators don't have a duty to investigate potential conflicts" (*id*.).

Thus, the Court of Appeals' decision completely changed the outcome simply by the process of a diversity removal, literally across the street. The opinion of the Court described this event as simply an anomaly under *Erie*, and as bad luck for the Mendel parties.

But *Erie Railroad* and its progeny such as *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99 (1945); *Hanna v. Plumer*, 380 U.S. 460, 465-68 (1965); *Prima Paint v. Flood & Conklin*, 388 U.S. 395 (1967), command that a party cannot alter or determine the outcome of a case by carrying it across the street to federal court. Federal courts are bound in diversity cases to follow state rules of decision in matters which are substantive *or* where the matter is "outcome determinative." *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99 (1945). The decision here was *both*. Following state law is not optional but is mandatory. [*Prima Paint v. Flood & Conklin*, 388 U.S. 395, 404 (1967) "The point is made that whatever the nature of the contract involved here, this case is in federal court solely by reason of diversity of citizenship, and that, since *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938), federal courts are bound in diversity cases to follow state rules of decision in matters which are 'substantive,' rather than 'procedural' or where the matter is 'outcome determinative.'"] This Court, as well as *every* Circuit, has

repeatedly held to this rule. Eleventh Circuit precedent itself is to this effect, *Flintkote Co. v. Dravo Corp.*, 678 F.2d 942 (11th Cir. 1982); *Mesa v. Clarendon Nat. Ins. Co.*, 799 F.3d 1353 (11th Cir. 2015). A federal court sitting in diversity has no discretion under *Erie*, but is *required* to follow the substantive law of the state. And the state's highest court is unquestionably the ultimate expositor of what the state law is, *Riley v. Kennedy*, 553 U.S. 406 (2008). The Alabama Supreme Court is bound only by *this* Court's precedent, not by decisions of the Eleventh or any other Federal Circuit Court. Applying the Alabama law, Morgan Keegan would conclusively have lost this case and the tainted award would have been vacated. While many of the cases express the doctrine as being one of fundamental fairness or inequitable administration of the law, *Hanna*, *supra*, it is conceptually one of Constitutional equal protection. That concept is starkly highlighted here where, in two directly parallel cases against it involving disqualifying non-disclosures by arbitrators, Morgan Keegan lost one (*Municipal Workers*), but got a completely different and unequal outcome in *Mendel* by the expedient of a diversity removal to the court across the street. Oddly, the Eleventh Circuit itself recognized that the Alabama Supreme Court had complete power to interpret the Federal Arbitration Act, logically meaning that the FAA is *not* preemptive. [App. p. 14] ("While the Alabama Supreme Court was entitled to interpret the FAA for the benefit of its lower state courts, it had no power to contravene our interpretation in the federal courts as well." But if the FAA provides a substantively preemptive federal law, as the Court of Appeals held, ("*Erie* is inapplicable to those

issues effectively governed by federal law," (App. at p. 13)), then that conclusion simply cannot be true. If the FAA is preemptive of state rulings [it is not, as noted below], then contrary state rules cannot stand. If it were preemptive, then the state court could have no field of interpretation open. Despite the mandatory requirement that a federal court sitting in diversity is simply another state court, *Venn v. St. Paul Fire & Marine Ins. Co.*, 99 F.3d 1058 (11th Cir. 1996), the appellate court refused to apply state law, but instead applied a federal rule which exists only in the Eleventh Circuit.[5]

Such an outcome is not and must not be just bad luck; *Erie* plainly prohibits that outcome, and it is imperative that this Court's review by certiorari again settle this issue and re-impose a uniform adherence to *Erie* and *Guaranty Trust*.

II. The Eleventh Circuit has erroneously declared the conduct and incidents of arbitration and the review of arbitration awards to be substantive federal questions, and the Federal Arbitration Act to be "effectively governed by federal law" which preempts state law and is not subject to the rule of *Erie Railroad*.

In reaching its decision, the Eleventh Circuit sought to justify its failure to adhere to *Erie* by the

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[5] As noted briefly *infra*, Mendel would also have prevailed under the federal rules (for federal cases) in every other Circuit but the Eleventh. All other circuits also would have followed Alabama law.

unsupported statement that "*Erie* is inapplicable to those issues effectively governed by federal law, even if jurisdiction rests solely on diversity of citizenship." This Court has never sanctioned any such doctrine, and certainly has never defined it. In the context of the Federal Arbitration Act, in fact, this Court has expressly held that such Act does *not* create any federal preemption whatsoever except to require that states give the same effect to contractual arbitration provisions as to contracts generally.

In *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford, Jr. University*, 489 U.S. 468 (1989), this Court pointed out that preemption occurs *only*: (i) when Congress expresses an intent to preempt state law, or (ii) protection of some important federal policy makes such preemption necessary. The Eleventh Circuit's idea that the FAA is such a preemptive Act of Congress has been squarely rejected.[6] As this Court held: "The FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." 489 U.S. at 477. As the *Volt* court pointed out, the FAA does *not* generally preempt state arbitration laws or rules, and means nothing more than that a state must give an arbitration contract the same effect as any other contract. That is

[6] The Eleventh Circuit's asserted basis for failure to follow *Erie* was only an exception for "matters *governed by* the Federal Constitution or *by Acts of Congress*," not for the second branch set out in *Volt*. [App. p.14] Thus, no generally important federal policy not embodied in an Act of Congress is implicated here. The FAA is *not* such a preemptive Act of Congress.

what the Alabama Supreme Court did, and it would have applied the same rule on vacatur to *Mendel* as it did to *Municipal Workers*, enforcing arbitration, but interpreting the grounds for vacatur, as it was entitled to do.[7]

If a state law or ruling prevents arbitration – not an issue here – then the federal courts and the FAA will displace such rule *only to the extent of compelling arbitration*, nothing more. *Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17 (2012). The FAA does *not* create any federal right or federal standard for vacatur in diversity cases. In *Volt*, the same argument was advanced that the FAA did create substantive federal law beyond validating arbitration, but this Court plainly rejected such argument. That concept, this Court held, "fundamentally misconceives the nature of the rights created by the FAA."

The Eleventh Circuit ruling that the question of interpreting grounds for vacatur under the FAA is "effectively governed by federal law" is exactly that misconception. If this field is governed by federal law, then that federal law would be supreme and would preempt state law interpretations, not only in cases originating in federal court, but those originating in state court as well. There is no partial preemption which preempts state law in removed cases, but not if the case remains in state court;[8] if the issue is one of controlling federal

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[7] *See also ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989).

[8] The only distinction between *Municipal Workers* and *Mendel* is that there was a non-diverse co-defendant in *Municipal*

interest,[9] then that compels a uniform federal rule in both state and federal courts. But: "The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt*, 489 U.S. at 474. If the issue were a controlling federal law one, it must apply elsewhere and everywhere. A more stark departure from this Court's controlling precedent could scarcely be conceived than the Eleventh Circuit's decision here.

Even the Eleventh Circuit here recognized that "the Alabama Supreme Court was entitled to interpret the FAA" [App. p. 14] thereby, without expressing it, creating an anomalous kind of half-preemption, applicable only to cases removed to federal court, which "risks divergent outcomes based on whether a case is heard in state court or a federal court exercising diversity jurisdiction."[10] That is precisely what is *not* permitted under *Erie*.

The Circuit opinion offered no jurisprudential support for its view that arbitration vacatur for misconduct by an arbitrator is "effectively governed by federal law" under an Act of Congress, and, indeed, in an earlier case (not cited or acknowledged by the Court of

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Workers. Otherwise, the issues were identical and even the Defendant Morgan Keegan was the same, who, in both instances, tried to benefit from a material non-disclosure by an arbitrator who sided with it.

[9] The Eleventh Circuit did not find or suggest any such interest, but relied solely on the Act itself, which does *not* contain or express any preemption.

[10] Eleventh Circuit opinion, App. p. 14, n. 3.

Appeals), the Circuit itself held to the contrary and recognized that the rule it applied in *Mendel* is wrong. In *AIG Baker Sterling Heights, LLC v. American Multi-Cinema, Inc.*, 508 F.3d 995 (11th Cir. 2007), the issue was squarely before the Court on several aspects of a challenge to an arbitration award. On all of those matters, the same court as the one which decided *Mendel* held they were governed by state law, not federal law or rule.

For example, the District Court had applied a federal rule which gave discretion to the federal court to decline to grant prejudgment interest. But the appellate court reversed, holding that it was error to apply a federal standard in a diversity case. "The jurisdiction of the district court was based on diversity of citizenship." In diversity cases, the issue "is ordinarily governed by state law." The same argument adopted by the appellate court here was advanced that there was some "countervailing federal interest" at stake that would warrant application of federal law, much as was applied by the Eleventh Circuit under the rubric of being "effectively governed" by federal law. Such an assertion was flatly rejected:

> [T]he Federal Arbitration Act *does not place countervailing federal interests at stake*. . . . As the Supreme Court has explained, the [Federal Arbitration] Act 'is something of an anomaly in the field of federal-court jurisdiction.' It creates a body of federal substantive law establishing and *regulating the duty to honor an agreement to arbitrate*, *yet it does not*

> *create an independent federal-question jurisdiction* under 28 U.S.C. §1331 or otherwise. *Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25, n. 32. . . . The Act places arbitration agreements on the same footing under state law as other agreements. *Perry v. Thomas*, 482 U.S. 483. The Act serves federal interests adequately when state law answers [the] questions. . . . In the absence of a federal interest rate that requires the application of federal law, the existence of a federal rule of decision in a diversity case does not affect the question of whether the availability and amount of prejudgment interest is governed by state or federal law. (Emphasis added.)

Thus, the Court summarized, "*As in any other civil action based on diversity of citizenship*, the district court *must look to state law*" for its determination, *AIG*, 508 F.3d at 1002 (emphasis added). The decision of the Eleventh Circuit in *Mendel* thus creates an important issue of federalism. Arbitration is becoming more and more commonplace, and it is crucial that lower federal courts be clearly instructed by this Court on the limitations of the FAA. If arbitration is to be preempted – which this Court in *Volt* disavowed – then that new rule must be clearly communicated and enunciated. If this Court's long-standing jurisprudence is to be obeyed, then those rules must be enforced here. The *Mendel* decision presents a direct challenge to adherence to this Court's precedent, and a grant of a writ of certiorari should be issued, so that these issues can be definitively addressed. Allowing what amounts to the federal appellate court overruling the Alabama

Supreme Court simply by ignoring *Erie* and pronouncing the existence of some otherwise unknown federal preemptive rule will have far-reaching ill-effects, and, since all other Circuits have different *federal* rules (although they adhere to *Erie* in diversity cases), creates a chaotic patchwork of decisions.[11]

In this Court's heavy burden of important issues, these two may lack sex appeal, but they present fundamental questions central to federalism and to adherence to the rule of law. For this Court to act to protect adherence to its prior commands may be straightforward, but *Mendel* demonstrates that it is critically necessary.

III. The Eleventh Circuit standard is erroneous and in conflict with prior decisions of this Court and decisions of all other Circuits which have addressed the issue, even if a federal standard were permitted.

While *Erie* compels that the federal court sitting in diversity follow Alabama's state rule, the federal court may apply a federal standard in cases arising

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[11] For example, if the *Mendel* case had arisen in the Ninth Circuit, where the same rule as that applied by Alabama is the standard, the Mendel parties would have won outright. If it had arisen in the Second or Fifth Circuits, the arbitrator would, at a minimum, have been required to prove that he made a good-faith reasonable inquiry to "discover" his firm's clients, and Mendel would again have prevailed since a simple conflict check would have exposed that information. Only in the Eleventh Circuit could Mendel have lost even applying a federal test for "evident partiality or corruption."

directly under federal jurisdiction, however that might have occurred. But here, the Eleventh Circuit's enunciated rule is not only inherently wrong, but conflicts with controlling precedent of this Court, and the applicable rule in all other Circuits which have addressed the question of vacatur of an arbitration award on grounds of evident partiality or corruption.[12]

The Eleventh Circuit rule is one which makes vacatur under 9 U.S.C. §10(a)(2) essentially impossible, requiring as it does that the party challenging the award prove that the arbitrator actually knew of his disqualifying conflict and deliberately or knowingly made no disclosure. The Eleventh Circuit standard not only rejects the meaning of "evident" (as in "perceived" or "apparent" to a reasonable man), but does not even require that the offending arbitrator make an inquiry to ascertain the conflict. It requires that the victim produce proof of a corrupt state of mind, regardless of the fact that to any neutral observer, Mr. Allgood's firm's

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[12] To have the circumstance where the presiding arbitrator is a member of the law firm representing one of the parties, and to have not only that arbitrator fail to make disclosure as provided by the arbitration rules under which the matter was heard, but also to have the represented party sit silently when one of its own counsel is presiding would in ordinary parlance be about as close to corruption as could be defined short of a cash bribe.

The representation of a party by the adjudicator is also, in the context of a lawyer such as Arbitrator Allgood, an actual conflict of interest under Alabama's Rules of Professional Conduct. That actual conflict was also brushed aside by the appellate panel here, on the basis that there was not evidence that Mr. Allgood *knew* who his firm's clients were, and no evidence that he deliberately concealed it.

representation was a glaringly evident basis for his disqualification if it had been disclosed. *See* FINRA Rule 12405 [App. p. 38-39]. The Eleventh Circuit's standard equates "evident partiality" with overt "corruption," thus ignoring the plain language of the statute, which makes the two provisions distinct.

This Court, in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), refused to adopt the sort of draconian rule now adopted by the Eleventh Circuit. In *Commonwealth Coatings*, this Court had before it the exact same context as appears in *Mendel*. It was discovered that a contractor – one of the parties before the arbitration panel – had long-standing financial and business dealings with one of the arbitrators, which were not disclosed. As this Court noted, there was no proof, "apart from the undisclosed business relationship," that the arbitrator "was actually guilty of fraud or bias in deciding the case."

> But neither this arbitrator nor the prime contractor [the equivalent to Morgan Keegan] gave to petitioner even an intimation of the close financial relations that had existed between them for a period of years. We have no doubt that if a litigant could show that a foreman of a jury or a judge in a court of justice had, unknown to the litigant, any such relationship, the judgment would be subject to challenge. (393 U.S. at 147-149)

Directly contravening the Eleventh Circuit strictures, this Court applied a standard that the

appearance of bias was the correct test – *i.e.*, was the conflict "evident" to a reasonable man?

> This rule of arbitration . . . rests on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased *but must also avoid even the appearance of bias* (emphasis added).

This Court set aside the arbitration award in *Commonwealth Coatings* not because there was proof that the arbitrator or the party knowingly concealed the conflict (a species of fraud or corruption), but because the *appearance* was such that it "might *reasonably be thought*" that bias existed.[13]

The Eleventh Circuit's rule applied here is the polar opposite of this Court's rule, and merits review by writ of certiorari.

The Circuit Court's rule also conflicts with the precedents from other Circuits – an additional and distinct ground for review by this Court. In fact, the Eleventh Circuit has been noted by other Circuits to be the *only* circuit applying the restrictive rule applied here, *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1109 (9th Cir. 2007). The rule here

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[13] The *Commonwealth Coatings* Court also noted that full disclosure is contractually mandated when the arbitration contract is governed by a set of rules such as those of the AAA, or, here, FINRA, whose disclosure rule is particularly stringent. The Mendel parties were deprived of the benefit of their contract when Mr. Allgood and Morgan Keegan failed to make disclosure of the attorney-client relationship. That contract formed part of the law which should have governed the Eleventh Circuit opinion.

effectively makes vacatur under §10(a)(2) impossible and appears designed to foreclose any challenges under §10(a)(2).

The Ninth Circuit, in *Schmitz v. Silveti*, 20 F.3d 1043 (9th Cir. 1994), interpreting §10(a)(2) of the FAA, followed this Court's *Commonwealth Coatings* decision and held that proof of actual bias was not necessary, but a party must only show a reasonable impression of partiality. Application of a "reasonable appearance" standard is, the Court noted, the majority rule (the Eleventh Circuit alone comprising the minority).

Other Circuits require, at a minimum, that the arbitrator prove he or she made a diligent inquiry and did not discover the conflict or relationship, failing which, vacatur will follow based on the appearance or perception of bias, *Olsen v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157 (8th Cir. 1995).

Still other Circuits set a threshold that the non-disclosed facts not be trivial or so remote in time as to have no effect (for example, *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2d Cir. 2007); *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278 (5th Cir. 2007) (en banc, applying a standard for non-disclosed information being at least a "significant compromising connection," but not imposing any requirement of a mental intent not to disclose as the Eleventh Circuit does.[14] Five of the en banc judges would have applied

[14] In that case, the non-disclosed connection was seven years in the past and consisted only of the fact that the arbitrator had

the strict per-se "appearance" rule, whether or not it was remote, and which is inferred by the *Commonwealth Coatings* Court. Those five judges noted that a rule such as the Eleventh Circuit's requires proof that is "rarely possible" and thus, "It is imperative that we not allow even the good faith or memory of the potential arbitrator to control the disclosure decision, for, as the Justices made clear in *Commonwealth Coatings*, it is the protection and reassurance of the party that matters most.") *See also Sanko S.S. Co., Ltd. v. Cook Industries, Inc.*, 495 F.2d 1260 (2d Cir. 1973) (test was whether there was a non-disclosure of any facts "which might create an impression of possible bias"); *ANR Coal Co., Inc. v. Cogentrix of North Carolina, Inc.*, 173 F.3d 493 (4th Cir. 1999).

The resolution of this conflict alone merits this Court's review. It is one of widespread significance and application, and there should simply not be such a conflict. The Eleventh Circuit rule and the Ninth Circuit rule are poles apart, and the other Circuits are all aligned against the Eleventh Circuit rule. That rule is thus in conflict with binding precedent of this Court and in conflict with at least five other Circuits. If arbitration is to be imposed, it must at least be fully impartial and untainted by bias, and be seen to be such, avoiding even the appearance of partiality or

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been one of 34 lawyers working together with one of the lawyers before the panel. The Court agreed that a significant non-disclosed connection of recent vintage would have mandated disqualification of the arbitrator, but found the connection in that case to be too trivial and remote in time.

corruption. As the five Fifth Circuit judges who would have applied the per-se disqualification rule observed, "Nor should we miss the need to promote the impartiality of arbitrators in this time when that is the favored method of dispute resolution." 476 F.3d 278, 287-88.

This Court should grant review by issuance of the writ of certiorari, reinforce its *Commonwealth Coatings* rule and not miss the need and opportunity to promote the impartiality of arbitrators. Could any reasonable scenario do more to promote mistrust, hostility to arbitration and disgust with a system of dispute resolution than the Eleventh Circuit rule does?

CONCLUSION

This Court's guiding criteria for certiorari include prominently:

(1) Where decisions of the lower court conflict with controlling precedent of this Court;

(2) Where a decision of a court of appeals conflicts with other Circuits;

(3) Where the questions raised present fundamental far-reaching issues of federalism; and

(4) Where there is a clear need for uniform standards to be followed by all the Circuits in challenges of arbitration awards.

All of these are present here. The failure to follow *Erie Railroad* strikes at the very heart of federalism and equal protection; the failure to follow controlling precedent undercuts the rule of law.

On certiorari, petitioners seek this Court's review:

- To reinforce and apply the rule of *Erie Railroad*;
- To reinforce and make clear that, except for the validity of arbitration clauses, state law governs the substantive field of arbitration in diversity cases;
- To make clear that Congress has not preempted state law of arbitration, and that such is not "effectively controlled by federal law";
- To reconcile the Circuit decisions on the meaning of "evident partiality or corruption" contained in 9 U.S.C. §10(a)(2) even in federal non-diversity cases.

For all of these reasons and purposes, the Petition for Writ of Certiorari should be granted, and, ultimately, eighty years of this Court's precedent be honored, the Eleventh Circuit decision in *Mendel* be

reversed and vacated and the original district court decision granting vacatur be reinstated.

Respectfully submitted,

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