SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant-Cross-Respondent-Respondent,

-against-

WN PARTNER, LLC; NINE SPORTS HOLDING, LLC; WASHINGTON NATIONALS BASEBALL CLUB, LLC;

Respondents-Respondents-Cross-Appellants-Appellants,

THE OFFICE OF THE COMMISSIONER OF BASEBALL; and THE COMMISSIONER OF MAJOR LEAGUE BASEBALL,

Respondents-Respondents-Cross-Appellants,

-and-

THE BALTIMORE ORIOLES BASEBALL CLUB and BALTIMORE ORIOLES LIMITED PARTNERSHIP, in its capacity as managing partner of TCR SPORTS BROADCASTING HOLDING, LLP,

Nominal Respondents-Appellants-Cross-Respondents-Respondents.

Index No. 652044/2014

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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MASN and the Orioles[1] respectfully move pursuant to CPLR § 5602(b)(1) for leave to appeal to the Court of Appeals this Court's July 13, 2017 Decision and Order (the "Order").[2] The Order unanimously affirmed vacatur of an arbitral award conducted under Major League Baseball's ("MLB") auspices because of MLB's evident partiality. Yet, in a divided 2-1-2 decision that garnered no majority and resulted in a two-Justice dissent, the parties were ordered to arbitrate again under MLB's auspices. On that point, the Order comprised three divergent understandings of the court's power to order rehearing in a different arbitral forum, powerfully demonstrating that certification is necessary to settle the state of the law.

Fundamental fairness, the public's confidence in the procedural integrity of arbitrations held in New York and the preservation of judicial and party resources call for immediate resolution by the Court of Appeals as to whether the parties should be compelled to arbitrate in a forum that, *inter alia,* has been found to be evidently partial, has a $25 million vested financial interest in ruling against MASN, and whose Commissioner has testified in this litigation that the prior

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[1] The parties to this motion are Petitioner-Appellant-Cross-Respondent-Respondent TCR Sports Broadcasting Holding, LLP, d/b/a Mid-Atlantic Sports Network ("MASN"), Nominal Respondents-Appellants-Cross-Respondents-Respondents Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership, in its capacity as managing partner of MASN (collectively the "Orioles" and together with MASN, "Appellants").

[2] The Order is attached as Exhibit 1 to the Rachel W. Thorn Affirmation in Support of Motion for Leave to Appeal to the Court of Appeals, dated November 20, 2017 ("Thorn Aff.").

award is substantively correct and publicly declared that MASN will have to pay the amounts stated in that vacated award "*sooner or later*."

The Court of Appeals therefore should be asked to address: first, whether the court has the authority to replace the arbitral forum named in the parties' contract where the basis for disqualification rests with the arbitral forum itself. And second, whether the failure to order rehearing in a unbiased forum, independent of MLB, was an abuse of discretion as a matter of law under the legal standards governing the courts' exercise of its authority.

PRELIMINARY STATEMENT

This Court should certify for the Court of Appeals' immediate review the novel and important questions that split the members of the panel in this case. Supreme Court (Marks, J.) vacated the arbitral award under § 10(a)(2) of the Federal Arbitration Act (the "FAA") due to MLB's evident partiality, concluding that MLB had "objectively demonstrate[d] an utter lack of concern for the fairness of the proceeding" that was completely "inconsistent with basic principles of justice." R.41.

This Court unanimously affirmed, finding the award was "correctly vacated based on 'evident partiality' … arising out of the Nationals' counsel's unrelated representations at various times of virtually every participant in the arbitration except for MASN and the Orioles, and the failure of MLB and the RSDC, despite

repeated protests, to provide MASN and the Orioles with full disclosure or to remedy the conflict before the arbitration hearing was held." Order at 6 (Andrias, J., plurality). Justice Kahn, concurring, emphasized that "the conduct of Major League Baseball and its representatives has been far from neutral and balanced." *Id.* at 37. And Presiding Justice Acosta wrote that he "[could not] recall having previously encountered such a confluence of factors that call for judicial intervention in an arbitration." *Id.* at 39-40.

The panel divided 2-1-2, however, on whether it could and should order rehearing of the dispute in a different forum that is unbiased and independent of MLB. Two Justices concluded that they "lack[ed] the authority" to award such relief in the circumstances of this case, and declined to decide whether courts have such power in any case. *Id.* at 24 n.3, 35 (Andrias, J., plurality). One Justice, concurring, reached only the question that the plurality declined to decide, concluding that there is no remedial power to send a dispute to an arbitral forum different from the one designated in the parties' arbitration clause, and therefore that the relief could not be granted. *Id.* at 37-38 (Kahn, J., concurring).

The two-Justice dissent, in contrast, found *both* that the power exists, and that the power *must be* exercised to ensure a fundamentally fair arbitration in this case. The dissent explained that the court has the power "to override [the parties'] choice [of an arbitral forum] in the event that the forum is shown to be so corrupt

or biased as to undermine the reasonable expectations of the parties to have a fundamentally fair hearing." *Id.* at 59 (Acosta, P.J., dissenting).

That the Appellate Division's decision reflected three divergent understandings of the law underscores the compelling need for certification. The central issue is whether the same principles that govern removal of *individual arbitrators* when an award has been vacated for evident partiality also apply when the award has been vacated due to the evident partiality of the *arbitral forum* itself. It is settled that courts can, should and do remove arbitrators after a finding of evident partiality. In such cases, the courts override the contracting parties' original choice of arbitrators, made *prior to* the circumstances that gave rise to the arbitrators' removal, in order to ensure fundamental fairness in arbitration and preserve public confidence in these alternative tribunals for dispute resolution. And they do so even where the parties have named a specific arbitrator in their contract.

MASN and the Orioles contend, and the dissent agreed, that these same principles should also govern the replacement of an *arbitral forum* after an evident partiality finding. As aptly framed to this Court by an *amicus curiae*: "[F]or a court to order arbitration before a tribunal known to be unfair is neither required nor permissible." Brief of *Amicus Curiae* Robert S. Smith at 20. No prior case, however, definitively addresses whether courts have the same power to substitute a

different arbitral forum or what standards govern that power's exercise. The Order likewise does not provide a controlling rule because it did not produce a majority opinion with respect to the rehearing issue. Court of Appeals review is therefore needed to settle these questions, provide guidance to courts and litigants, preserve judicial and party resources, and safeguard the public interest in fundamentally fair and efficient arbitrations in New York.

QUESTIONS FOR REVIEW

The following issues warrant Court of Appeals review:

1. Where a court has vacated an arbitral award because of the evident partiality of an arbitral forum, does the court have the power to order rehearing in a different and unbiased forum not named in the arbitration clause?

2. If so, whether it was an abuse of discretion as a matter of law under the legal standards governing the exercise of such authority not to order rehearing in a different and unbiased forum in this case.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

The facts relevant to this motion are set forth in detail in MASN's and the Orioles' briefs on appeal, which are incorporated by reference here. For ease of reference, these facts and the three separate opinions issued as part of the Order are summarized briefly below.

This appeal arises from an arbitration conducted pursuant to a 2005 Settlement Agreement, which the parties executed to compensate MASN and the Orioles for the ongoing annual harms they would suffer as a result of MLB's decision to relocate the Montreal Expos to Washington, D.C.—in the core of the Orioles' historic and exclusive markets—and rebrand the Club as the Nationals. Under the Settlement Agreement, the Orioles' annual reparative compensation is derived from MASN's profits, which on the expense side are driven primarily by the telecast rights fees MASN pays to the Orioles and the Nationals. Starting in 2012, the Settlement Agreement provides that the telecast rights fees shall be set in five-year increments by agreement of the parties, and if no agreement is reached, through mediation, and if that is unsuccessful, through arbitration before an MLB committee called the Revenue Sharing Definitions Committee (the "RSDC").

MLB's RSDC is a standing committee appointed by the Commissioner of Baseball and comprised of three high-level MLB Club representatives. Staffed and advised entirely by MLB personnel, MLB lawyers and MLB consultants, the RSDC has no separate legal or practical existence. It is simply part and parcel of MLB.

The RSDC's contractual mandate was to resolve disputes concerning the amount of telecast rights fees payable by MASN to the Nationals by using a specific, clearly-defined and established methodology to determine the amount

due. This mandate, as set out in the express language of the Settlement Agreement, required the RSDC to use "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." R.203. That established methodology had been consistently applied on at least 19 occasions over a decade and a half by MLB and the RSDC, both prior to and after the arbitration. The parties thus bargained for and expected that a fair and unbiased tribunal would apply the well-understood contractual methodology to resolve any dispute that might arise. Testifying before Congress in 2006, Orioles owner Peter G. Angelos explained that the Settlement Agreement "guarantees each team a market rate as evaluated and set by a *neutral third party.*" R.1987. (emphasis added).

MASN and the Orioles did not get what they bargained for. Instead, they were subjected to a proceeding "*that may be the poster child for everything that an arbitration should not be.*" Brief of *Amicus Curiae* Kenneth R. Feinberg ("Feinberg Amicus Br.") at 4 (emphasis added); *see also* Order at 39-40 (Acosta, P.J., dissenting); R.41-42 (Marks, J.).[3] Among other glaring failings, MLB permitted its own long-time counsel to represent the arbitrators or their business

[3] MASN and the Orioles also did not receive the contractually-mandated application of the RSDC's established methodology. Instead, the RSDC deployed what the consultant who created the methodology for MLB testified were "outside the norm assumptions" and "cherry picked data," resulting in a process so "grossly different" from the established methodology that it "*completely corrupt[ed] the established methodology*." R.1180 (emphasis added).

interests, MLB and MLB's then-Commissioner at the same time those lawyers were representing the Nationals in the arbitration; misled MASN and the Orioles on the number and significance of those representations; ignored MASN's and the Orioles' repeated objections; and took a $25 million financial stake in the outcome of the dispute—a stake that it continues to hold today. Since the arbitration, MLB publicly proclaimed predetermined positions on the merits, including in statements made to the press at MLB Club owners' meetings and in submissions and sworn testimony that it filed in the proceedings below.

MASN and the Orioles commenced a CPLR article 75 special proceeding in New York County seeking to vacate the award and disqualify MLB and the RSDC from any rehearing. MLB and the Nationals opposed the petition. The Nationals cross-moved to confirm the award and MLB supported the Nationals in that effort through legal submissions, including affidavits submitted by the current Commissioner of Baseball. The Commissioner's testimony included a statement of his views on the central question in dispute between MASN and the Nationals–namely the correct meaning and application of the critical contractual phrase, "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry."

Supreme Court (Marks, J.) vacated the award because of MLB's evident partiality but, in a footnote, held that it lacked authority to disqualify MLB and the

RSDC from rehearing the dispute. R.42 n.21. MASN and the Orioles appealed the remedial ruling. The Nationals and MLB cross-appealed the vacatur ruling and sought reinstatement of the award.

On July 13, 2017, this Court unanimously affirmed the vacatur ruling, but sharply divided on the question of the forum for rehearing. The plurality opinion (Andrias and Richter, JJ.) declined to decide the question of whether courts have the power to remove the contractually-designated arbitral forum, and split with the dissent over the standards governing the exercise of that power, assuming it exists.

Despite upholding vacatur of the award for MLB's evident partiality and acknowledging that in a rehearing under MLB's auspices, "MLB would have significant influence over the arbitration process," the plurality declined to order rehearing in a forum unaffiliated with MLB and outside of MLB's purview. Order at 28. The plurality determined that MLB's evident partiality was not enough. Rather, MASN and the Orioles also had the burden to make the "extraordinary showing" that the new members of the RSDC—appointed by the Commissioner after Supreme Court's vacatur order—have already "shown themselves to be less than impartial." *See id.* at 35. The plurality found that this standard had not been met.

The concurrence (Kahn, J.) agreed with the plurality that the dispute could not be removed from MLB. But its conclusion rested on the distinct ground that,

in the concurrence's view, the Court was simply without power to replace the MLB forum with a different forum, even though "the conduct of Major League Baseball and its representatives has been far from neutral and balanced." *Id.* at 37.

Presiding Justice Acosta, joined by Justice Gesmer, dissented on the rehearing issue, expressing clear disagreement with the reasoning of both the concurrence and the plurality opinions. The dissent contended that the concurrence's view that courts "lack[] the power to substitute an arbitral forum even in the most compelling circumstances" was "belied by the case law indicating that fundamental fairness is a requirement in any arbitration" and that the Appellate Division has "inherent equitable power to dispense justice in every case that comes before it." *Id.* at 42. The dissent warned that requiring the parties to arbitrate before a fundamentally unfair forum will likely result "in an endless cycle of partial arbitrations, vacaturs, and remands," *id.* at 56-57.

Parting ways with the plurality as well, the dissent disagreed that a further "extraordinary showing" about the individual arbitrators was necessary. The dissent would have held that "the fact that the RSDC is comprised of three new members does not change the analysis." *Id.* at 65. Instead, it looked to other facts that demonstrate MLB's evident partiality and therefore the fundamental unfairness of requiring MASN to arbitrate its dispute with the Nationals in an MLB forum.

The dissent rested its conclusion on (i) MLB's proven "lack of concern for [] fairness," and its ability and motivation to influence the outcome of any RSDC award; (ii) MLB's support of the Nationals' attempts to confirm the vacated award and its opposition to MASN's and the Orioles' vacatur petition, including by threatening sanctions; (iii) the current Commissioner's statements that the vacated award was correctly decided and that MASN and the Orioles would pay the telecast rights fees stated in the vacated award "sooner or later"; (iv) MLB's continuing $25 million financial stake in the outcome; and (v) MLB's "significant influence over the panel." *See id.* at 61, 65.

In the dissent's view, these facts should have been sufficient to justify a determination that MLB had "frustrate[d] the parties' intent to submit their dispute to a fundamentally fair arbitration," *id.* at 74, making it "necessary and appropriate to exercise our inherent equitable power to reform the contract and refer the matter to a neutral arbitral forum," *id.* at 41.

JURISDICTION

On July 14, 2017, MASN timely filed an appeal as of right to the Court of Appeals, based on the two-Justice dissent. After a jurisdictional inquiry, on November 16, 2017 the Court of Appeals held that the Order is not presently appealable as of right because it does not "finally determine the proceeding" within the meaning of the New York State Constitution. *See* N.Y. Const. Art. VI §

3(b)(1).

This Court may grant permission to appeal to the Court of Appeals from an order of this Court that does not finally determine the action. CPLR § 5602(b)(1); *see also* N.Y. Const. Art. VI § 3(b)(4) ("Appeals to the court of appeals may be taken … where the appellate division allows the same and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals….").

The instant motion is timely because it is made within 30 days of service of a copy, with notice of its entry, of the Court of Appeals' November 16, 2017 Order. CPLR § 5514(a); *see Lazarcheck v. Christian*, 58 N.Y.2d 1033 (1983); Thorn Aff. ¶¶ 4, 5.

LEGAL STANDARD

Courts grant permission to appeal questions that are unsettled or novel, or implicate important matters of public policy. *See* 22 N.Y.C.R.R. § 500.22(b)(4) (issues that "are novel or of public importance" or that "conflict with prior decisions" merit review); *Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder*, 72 N.Y.2d 174, 183 (1988) (granting leave to appeal the "novel and significant issues tendered for review"); *In re Shannon B.*, 70 N.Y.2d 458, 462 (1987) (granting leave to appeal so the Court of Appeals could consider "the important issue" presented).

New York state courts also grant leave to appeal when a case presents issues of federal law having significance and impact not only statewide, but also nationally. *See, e.g.*, *Guice v. Charles Schwab & Co.*, 89 N.Y.2d 31, 38 (1996) (leave to appeal granted to consider whether federal law preempted state-law claims). This case—governed by the Federal Arbitration Act Chapter 1—is just such a case. The FAA governs any arbitration arising out of a "contract evidencing a transaction involving commerce," 9 U.S.C. § 2, and therefore controls judicial review of a vast sweep of arbitration agreements and awards. However, even though it creates substantive federal arbitration law, the FAA Chapter 1 "does not create any independent federal-question jurisdiction." *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984). As a result, federal courts do not have jurisdiction to hear disputes governed by the FAA where diversity of citizenship is lacking, and state courts are regularly called upon to decide cases governed by the FAA and develop the jurisprudence. *See Flanagan v. Prudential-Bache Securities, Inc.*, 67 N.Y.2d 500, 506 (1986) (New York state courts interpreting the FAA in light of novel or unsettled issues have "the same responsibility as the lower Federal courts").

Decisions of New York courts are particularly important in this regard because "the FAA was modeled after New York's arbitration law ... and no significant distinction can be drawn between the policies supporting the FAA and

arbitration provisions of the CPLR." Order at 58-59 (Acosta, P.J., dissenting) (quoting *Matter of Smith Barney, Harris Upham* & Co. *v Luckie,* 85 N.Y.2d 193, 205-06 (1995)); *see Hall St. Assocs., LLC v. Mattel, Inc*., 552 U.S. 576, 589 n.7 (2008) ("The text of the FAA was based upon that of New York's arbitration statute.").

Indeed, federal courts applying the FAA look to "[c]ases applying New York arbitration law analogous to the FAA" both in general and on the specific issues presented by this appeal. *In re Arbitration Between Tempo Shain Corp. v. Bertek, Inc.*, No. 96-3354, 1997 WL 580775, at *2 (S.D.N.Y. Sept. 17, 1997) (looking to New York state law on the issue of whether to remand dispute after vacatur to the same or new arbitration panel). Moreover, the issue presented here is not only federal; this case also implicates the "inherent discretion of the [New York] courts to fashion the appropriate remedy," Order at 54 (Acosta, P.J., dissenting); *see also id.* at 42.

In addition, leave to appeal to the Court of Appeals is particularly warranted when precedents conflict or the Appellate Division panel is divided. *See* 1-11 *New York Appellate Practice* § 11.04[4][b] (LexisNexis Matthew Bender, 2016 update). Finally, where leave to appeal is sought from a non-final order, "special considerations" are also relevant to the determination, including whether an immediate Court of Appeals decision would "spare[] litigants and the courts

considerable time and expense." *Id.*

ARGUMENT

I. LEAVE TO APPEAL SHOULD BE GRANTED

A. Certification Is Warranted to Settle Novel Questions Regarding the Courts' Authority to Replace Contractually Designated Arbitral Forums When Necessary to Ensure Fundamental Fairness and Integrity in the Arbitral Process.

The striking three-way division of opinion among the panel members provides powerful evidence that leave for immediate appeal to the Court of Appeals is merited. Indeed, it is precisely *because* such cases demonstrate a need for clarification and guidance from the Court of Appeals that New York's Constitution and the CPLR generally provide for Court of Appeals review as of right where, as here, two justices dissent on a legal issue. *See* Richard C. Reilly, McKinney Practice Commentary, CPLR § 5601 (2017). That the Court of Appeals deemed this Court's order non-final does not detract from the novelty or importance of the issues presented, or from the need for guidance from the Court of Appeals. *See Brad H. v City of New York*, 17 N.Y.3d 180, 185 (2011) (noting that Appellate Division granted leave to appeal on certified question of law after Court of Appeals initially dismissed plaintiffs' appeal as of right for lack of finality).

In fact, the need for immediate Court of Appeals review is all the more clear because no opinion garnered a majority vote. The Court's splintered opinions

highlighted, but did not resolve, the unsettled questions regarding the courts' remedial authority to remove a dispute from an arbitral forum that has already been found to be evidently partial. Until the appellate courts provide a definitive answer, the trial courts will not know what rules to apply when an arbitral award is vacated for evident partiality that implicates the designated arbitral forum, and parties will not know what relief is available and under what circumstances.

Review of these questions is particularly warranted because a host of analogous precedents all point in the opposite direction of the Order. As a whole, these precedents declare "a fundamentally fair hearing" is paramount in arbitration. *E.g.*, *Bell Aerospace Co. Div. of Textron, Inc. v. Local 516, Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW)*, 500 F.2d 921, 923 (2d Cir. 1974). Moreover, they require that courts remove individual arbitrators or forums even if named in the parties' arbitration agreement—when necessary to preserve confidence in the proceeding. Indeed, courts have inherent authority to appoint a neutral arbitrator where unforeseen post-contracting circumstances have frustrated the parties' reasonable expectations for a fundamentally fair arbitration to avoid the wasted time, effort, and money that would arise "when the potential bias of a designated arbitrator would make arbitration proceedings simply a prelude to later judicial proceedings challenging the arbitration award." *Morris v. New York Football Giants, Inc.*, 150 Misc.2d 271, 278 (Sup. Ct., New York Cnty.

1991) (quoting *Masthead Mac Drilling Corp. v. Fleck*, 549 F. Supp. 854, 856 (S.D.N.Y. 1982)).

First, courts hold that where a court has vacated an award for the evident partiality of an arbitrator, new arbitrators, untainted by the prior proceeding, must be appointed. *See, e.g.*, *Pitta v. Hotel Ass'n*, 806 F.2d 419, 423-25 (2d Cir. 1986) (where arbitrator was evidently partial, remanding the case "to be heard by a different arbitrator" not named in the agreement and rejecting the claim that there was "no provision in the ... Agreement for any other individual or forum to consider this matter"); *Matter of First Nat'l Oil Corp. (Arrieta)*, 2 A.D.2d 590, 592-93 (2d Dep't 1956) (where an award is vacated for evident partiality, it would be "anomalous" not to direct rehearing before new arbitrators); *Hyman v. Pottberg's Ex'rs*, 101 F.2d 262, 266 (2d Cir. 1939) (if an award is vacated for evident partiality "the arbitrators would then have shown themselves to be unfit to be judges, and *it would be a clear abuse of discretion to trust them further*") (emphasis added); *see also* THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 131:17 (2016 update) ("A new or different arbitrator should be appointed on remand if an award is vacated due to [the] arbiter's partiality, corruption, fraud, or misconduct."); Unif. Arbitration Act (2000) § 23 (if "the award is vacated" for evident partiality, "the rehearing must be before a new arbitrator").

Second, prior to arbitration, courts have likewise replaced contractually-

designated *arbitrators* where unforeseen post-contracting circumstances have frustrated the parties' reasonable expectations for a fundamentally fair arbitration. *See e.g.*, *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1067 & n.2 (2d Cir. 1972) (affirming district court's substitution of a neutral arbitrator for league commissioner who had been contractually designated as arbitrator "to insure a fair and impartial hearing"); *Morris*, 150 Misc.2d at 277-78 (substituting neutral arbitrator for league commissioner who had been contractually designated as arbitrator because his "past advocacy of a position in opposition to plaintiffs' position … deprive[d] him of the necessary neutrality").

Third, again prior to arbitration, courts have removed *arbitral forums* from a dispute when the basis for disqualification rests not on the individual arbitrators but the arbitral forum itself. *See Rabinowitz v. Olewski*, 100 A.D.2d 539, 540 (2d Dep't 1984) (affirming the trial court's order removing dispute from the industry group designated by the parties, because the prospect of bias "permeate[d] the entire" group); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999) (party could not be compelled to arbitrate in the contractually-designated forum where other party had been empowered under the agreement to establish a neutral forum, but created a biased process instead).

Thus, while there do not appear to be any authorities that directly address the removal of an arbitral forum following an evident partiality finding that implicates

the forum itself, *see* Order at 58 (Acosta, P.J., dissenting), many authorities, arising in analogous situations, contradict the rationale found persuasive by both the plurality and the concurrence—essentially that the parties' original designation of an MLB forum must control even though MLB has "significant influence over the arbitration process," *id.* at 28 (Andrias, J., plurality), and MLB's post-contracting conduct "has been far from neutral and balanced," *id.* at 37 (Kahn, J., concurring).

There is no sound reason to allow the tension between the Order and the above-cited authorities to persist. The Court of Appeals should instead have the opportunity to consider the scope and nature of a court's authority to order rehearing in a different forum after finding that the original forum is evidently partial and provide needed guidance to the courts and parties. Leave to appeal should be granted to facilitate this critically-needed review.

B. The Questions Presented are Vitally Important Because They Concern the Courts' Role in Upholding the Integrity and Fairness of the Arbitral Process and New York's Role as a Leading Center of Arbitration.

In enacting the FAA, Congress struck a careful balance between promoting private agreements to arbitrate on the one hand, and ensuring that arbitration is fundamentally fair and meets a basic level of due process, on the other. The questions this appeal presents center on the critical role courts have in maintaining that balance, and more specifically, their role in upholding the integrity and fairness of the arbitral process. As reflected in the fact that three different *amici*

curiae submitted briefs addressing these issues, they are unquestionably of public importance. Especially in light of New York's status "as the preeminent seat for arbitration in the United States," Feinberg Amicus Br. at 8, immediate leave to appeal is warranted.[4]

At its "essence," arbitration is "a tool for administering justice outside of the courts," Order at 73 (Acosta, P.J., dissenting), which is intended to "conserve the time and resources of the courts and the contracting parties," *Marracino v. Alexander*, 73 A.D.3d 22, 26 (4th Dep't 2010). Because arbitration is intended to give the parties the flexibility to design their own adjudicatory processes, an arbitration "is not required to comport with strictures of formal court proceedings." *Kaplan v. Alfred Dunhill of London*, No. 96-0256, 1996 WL 640901, *5 (S.D.N.Y. Nov. 4, 1996) (citations omitted). But this does not mean that arbitrations are permitted to abandon basic notions of fundamental fairness and procedural integrity.

To the contrary, courts recognize that for arbitration to serve its intended purpose, "it is *imperative* that the integrity of the process … be z*ealously safeguarded*." *Matter of Goldfinger v. Lisker*, 68 N.Y.2d 225, 231 (1986)

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[4] After Paris, London, Geneva and Singapore, New York City is the fifth most popular city for international arbitration in the world. *See* NYIAC Press Release, New York City Tops Popularity Ranking as Seat for International Arbitration (May 5, 2016), *available at* https://nyiac.org/nyiac-news/new-york-tops-popularity-ranking-as-seat-for-international-arbitration/.

(emphasis added). Arbitral proceedings must be fundamentally fair and meet the minimum standards for due process. *Kaplan*, 1996 WL 640901, *6 ("Before a district court may confirm an arbitration award, it must be satisfied that the parties were provided a fundamentally fair hearing."); *Bell Aerospace Co.*, 500 F.2d at 923 (arbitrator must "grant parties a fundamentally fair hearing"); *accord Bowles Fin. Grp., Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1012-13 (10th Cir. 1994) ("Courts have created a basic requirement that an arbitrator must grant the parties a fundamentally fair hearing").

These principles are reflected in Section 10 of the FAA and the "confirmation and vacatur safety net" that it creates. *See Hoeft v. MVL Group, Inc.,* 343 F.3d 57, 63 (2d Cir 2003), *overruled on other grounds by Hall St. Assocs.*, 552 U.S. 576. Through Section 10, Congress "impressed limited, but critical, safeguards onto this process, ones that respected the importance and flexibility of private dispute resolution mechanisms, but at the same time barred federal courts from confirming awards tainted by partiality, a lack of elementary procedural fairness, corruption, or similar misconduct." *Id.* at 64; *In re Wal-Mart Wage & Hour Emp't Practices Litig.*, 737 F.3d 1262, 1268 (9th Cir. 2013) (parties cannot waive FAA's statutory grounds for vacatur because that would "frustrate Congress's attempt to ensure a minimum level of due process for parties to an arbitration" and leave parties "without any safeguards against arbitral abuse").

These safeguards undergird the policy favoring arbitration. Indeed, it is only *because* these safeguards exist that courts can defer to private agreements to arbitrate in the first place. *Hoeft*, 343 F.3d at 63 ("Thus, while we have spoken in broad terms of deference to private agreements to arbitrate, we have always done so with an awareness of the confirmation-and-vacatur safety net that hangs below."); *see also Goldfinger*, 68 N.Y.2d at 231 (explaining that it is imperative to "zealously" safeguard the integrity of the arbitral process "[p]recisely *because* arbitration awards are subject to such judicial deference") (emphasis added).

At a minimum, fundamental fairness requires decisionmakers who are impartial and have not prejudged the merits of the dispute or predetermined its outcome. *See Commonwealth Coatings Corp. v. Cont'l Cas. Co.,* 393 U.S. 145, 147 (1968) (in enacting the FAA, Congress intended "to provide not merely for an arbitration *but for an impartial one*") (emphasis added); R.42 (Marks, J.) ("neutrality of the adjudicative process is the very bedrock of the FAA ... [and] [i]t is upon that foundation, and in great reliance upon it, that courts can defer to processes decided upon and designed by private contract"); *Bowles*, 22 F.3d at 1013 (a fundamentally fair hearing requires proceedings before "*decisionmakers [that] are not infected with bias*.") (emphasis added); THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 36:01 (Revised Ed., Cumulative Supp. 2001) ("The notion of decision-making by *neutrals who are independent* is central" to

arbitration; parties "have a right to be judged *impartially and independently*") (emphasis added).

It is thus well established that where a court has vacated an award for the evident partiality of an arbitrator, courts have the power to order rehearing before new arbitrators, untainted by the prior proceeding. *See, supra*, at 17. Courts exercise this power because basic principles of fairness and due process demand it. Analogous questions are presented here: where the award is vacated for the evident partiality of the *arbitral forum*, do courts have the power to order rehearing in a different arbitral forum, and do the same principles of fundamental fairness and due process equally demand that this power be exercised when necessary to protect a party from unfairness? The dissent answered these questions "yes," explaining that "while the parties' contractual choice to select a particular arbitral forum is entitled to great deference," courts have both the inherent judicial and statutory power "to override that choice in the event that the forum is shown to be so corrupt or biased as to undermine the reasonable expectations of the parties to have a fundamentally fair hearing." Order at 59.

The questions presented in this case thus bear directly on the integrity of the arbitral process and public confidence in arbitration as an alternative forum of dispute resolution. *See* Feinberg Amicus Br. at 9. Indeed, this case poses these questions in especially stark terms. The Order would consign MASN and the

Orioles to arbitrate again under the auspices of MLB even though the prior award was unanimously vacated due to MLB's evident partiality and "MLB still controls nearly every facet of the RSDC and has shown itself—through its past conduct and the Commissioner's statements—to be incapable of protecting fundamental fairness in administering an arbitration of the instant dispute," Order at 66 (Acosta, P.J., dissenting). Given these circumstances, the product of any arbitration controlled by MLB is certain to be challenged for the same reason as the last award: MLB is evidently partial, has prejudged the merits and has a $25-million financial stake in the outcome. Returning before MLB would only perpetuate a "cycle of partial arbitrations, vacaturs, and remands." *Id*. at 56-57.

Such a result would disserve the policy interest in ensuring that arbitration is consistent with fundamental fairness, and is viewed in those terms by the public—an interest that is particularly crucial given the ubiquity of arbitration agreements in modern life. It would equally disserve New York's global reputation as one of the leading centers for business arbitration. New York therefore has a unique and compelling interest in resolving the critical questions regarding the courts' power to order rehearing before a forum different from the one named in the parties' agreement in the unusual but troubling circumstance where that forum has been held partial.

C. Granting Leave to Appeal Will Avoid Unnecessary and Duplicative Judicial Proceedings and Conserve Party Resources.

Where a movant seeks leave to appeal from a non-final order, "special considerations" come into play, including whether an immediate Court of Appeals decision would "spare[] litigants and the courts considerable time and expense." *See New York Appellate Practice*, *supra*, § 11.04[4][b]. That is the precise situation here. Immediate review of the Order will prevent significant waste of court and party resources at multiple levels. If this motion is denied, the courts and the parties will be subjected to additional (and avoidable) litigation, procedural confusion and increased costs—none of which will bring the parties any closer to resolving the underlying business dispute.

The business dispute here centers on the amount of telecast rights fees that MASN must pay the Nationals for successive five-year periods. The vacated award concerned the Nationals' telecast rights fees for the 2012-2016 period. That period has come and gone, and the dispute for those years remains unresolved pending rehearing. In the meantime, the determination of the telecast rights fees for the *next* five-year period (2017-2021) is on hold pending the outcome of the 2012-2016 period. In short, the parties are stuck in a contractual traffic jam, with one dispute piling up behind the other. The gridlock will only get worse unless the Court of Appeals rules on the question of *where* the rehearing should take place

before the rehearing actually occurs.[5]

Justice Marks reached the very same practical conclusion when he stayed any arbitration before the RSDC until the appeals were decided, reasoning "the parties should not be arbitrating, again, without a *final* determination on the arbitral process or forum," R.121.19 (emphasis added). Justice Marks explained that "[i]f a new arbitration award were issued in this matter, the resulting motion and appellate practice could consume extensive resources of the courts." *Id*. He further observed that "[t]he parties themselves would ultimately be most harmed by potentially inconsistent results, as well as the costs and time expended." *Id*. Justice Marks was right, and his reasoning applies with equal force here.

If leave to appeal is denied and MASN and the Orioles are forced to arbitrate under the auspices of a fundamentally unfair and biased forum—where MLB has a financial stake in the dispute and has already expressed a predetermined view of the outcome—years of court and party resources will be wasted. The Commissioner has already made clear his desired result to any MLB representative

[5] This is all the more so because appeal of the Order lies as a matter of right when it becomes final. CPLR § 5601(a) (appeal as of right for a final Order where two Justices dissent on a question of law). Thus, for this motion, the question is not *whether* the Court of Appeals will review the Order, but *when*. *See* CPLR § 5601(d) ("An appeal may be taken to the court of appeals as of right … *from a final arbitration award* … where the appellate division has made an order on a prior appeal in the action which necessarily affects the … award and which satisfies the requirements of [the two justice dissent] except that of finality." (emphasis added)); *see also* Karger, Powers of the NY Court of Appeals § 6:10 (Sept. 2016 update) ("a direct appeal may be taken to the Court of Appeals as of right, on the basis of the requisite dissent, from the final determination of the … arbitration panel … for review of a prior nonfinal order").

that he might select to serve on the RSDC. Among other things, the Commissioner submitted sworn testimony about the merits of the dispute in the underlying proceedings and publicly stated that "sooner or later" MASN will be required to pay the telecast rights fees stated in the now vacated award.

In the immediate aftermath, additional litigation proceedings and procedural confusion will most certainly unfold. The issuance of the new award will allow for a petition to vacate the new award, accompanied by a cross-motion to confirm the award. It will also make the Order final, giving rise to an immediate appeal as of right on the question of whether MLB should have been permitted to conduct the rehearing at all.

If the Court of Appeals agrees with the dissent and holds that courts do have the authority to substitute a new arbitral forum and that this authority should have been exercised in this case, the second award, like the first, would be void and without effect. The parties would then have to begin a *third* arbitration to resolve the question of the telecast rights fees due to the Nationals for 2012-2016—a decision already many years overdue, with the 2017-2021 telecast fees still unresolved, and the 2022-2026 telecast rights fees (no doubt) looming on the horizon. This entire procedural morass, which will burden the court system while creating deep business uncertainty for MASN, the Orioles, and the Nationals alike, can be avoided if leave for immediate appeal is granted.

CONCLUSION

In the interests of efficiency, to resolve novel and unsettled questions of law that are critical to arbitration practice and New York's position as a center of arbitration, and to ensure that parties to arbitration agreements do not become stuck "in an endless cycle of partial arbitrations, vacaturs, and remands," Order at 56-57 (Acosta, P.J., dissenting), this motion for leave to appeal pursuant to CPLR § 5602(b)(1) should be granted.

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