An Evident Contradiction: How Some Evident Partiality Standards Do Not Facilitate Impartial Arbitration

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I. INTRODUCTION

As arbitration becomes more important in settling legal disputes,[1] the methods available to vacate an unfavorable decision will likely become more popular. One such method is for a court to determine that the arbitrator in an arbitration was evidently partial.[2]

1. *See* Ann Carrns, *More Big Banks Are Using Arbitration to Bar Customer Lawsuits*, N.Y. TIMES (Aug. 17, 2016), http://www.nytimes.com/2016/08/18/your-money/arbitration-bank-checking-accounts.html?_r=0 (explaining that more banks are using arbitration to prevent customers from filing suit despite 95% of customers wanting to have any issues heard in court).

2. Federal Arbitration Act, 9 U.S.C. § 10(a)(2) (2002).

The evident partiality standard is most often applied when a party learns after its arbitration that an arbitrator had some relationship with the opposing party he or she did not disclose.[3] Though it is rarer, parties can also argue evident partiality if they know of an arbitrator's relationship to a party before the proceeding.[4] In either case, the party appeals the award, claiming the arbitrator's relationship to the opposing party influenced the result. The Supreme Court's only decision on evident partiality, *Commonwealth Coatings Corp. v. Continental Causality Co.*, came in 1968[5] and did not specify how close a party-arbitrator relationship needed to be to make the arbitrator partial.[6] What was clear from the decision was that the Court believed Congress' goal for creating the standard was to have impartial arbitration.[7] The Court's inconclusive decision on evident partiality has caused varying interpretations by the circuit courts, as they try to apply a standard faithful to *Commonwealth Coatings* while maintaining Congress' goal of impartial arbitration.[8]

This Note will explore the evident partiality standard with a particular focus on how the standard is applied when a contract determines how the arbitrator is selected. Part II will explore the history of the evident partiality standard and the three interpretations of the standard that have been articulated by courts. It will also explore the facts, decision, and standard applied in *National Football League Management Council v. National Football League Players Association* (hereinafter *NFLMC*), a case where a contract determined how the arbitrator was selected. Part III will analyze each of the articulated standards to determine whether they accomplish Congress' goal of impartial arbitration. It will also examine how the standard applied in *NFLMC* helped ensure the decision was maintained despite a partial arbitrator. Part IV will recommend that the reasonable person standard be universally adopted by courts for evident partiality because it best ensures Congress' goal of impartial arbitration.

A few Notes have explored evident partiality.[9] None have explored in-depth evident partiality when a contract determines how the arbitrator is selected. Nor have they recommended the reasonable person standard be accepted as the evident partiality standard in all circumstances.

II. BACKGROUND

This Part will explore the history of the evident partiality standard, starting with the

3. Lee Korland, Comment, *What an Arbitrator Should Investigate and Disclose: Proposing a New Test for Evident Partiality Under the Federal Arbitration Act*, 53 CASE W. RES. L. REV. 815, 822 (2003).

4. *See, e.g.*, Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527 (2d Cir. 2016) (discussing Tom Brady and the National Football League Players Association (NFLPA) accusing National Football League (NFL) Commissioner Roger Goodell of being partial despite knowing his relationship with the NFL before the arbitration; the NFLPA argued this before arbitration but Goodell decided to continue as arbitrator).

5. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145 (1968).

6. Jennifer C. Bailey, Note, *The Search to Clarify an Elusive Standard: What Relationships Between Arbitrator and Party Demonstrate Evident Partiality?- ANR Coal Co. v. Cogentrix of North Carolina, Inc.*, 2000 J. DISP. RESOL. 153, 156–58 (2000).

7. *See Commonwealth Coatings*, 393 U.S. at 147 (stating Congress' goal with the standard was impartial arbitration).

8. *Id.*

9. *See* Bailey, *supra* note 6; Korland, *supra* note 3; Kathryn A. Windsor, *Defining Arbitrator Evident Partiality: The Catch-22 of Commercial Litigation Disputes*, 6 SETON HALL CIR. REV. 191 (2009) (reviewing evident partiality standards).

Supreme Court's only decision on it in *Commonwealth Coatings*. Because the decision left the standard ambiguous, this part will examine the standards that have been used by various circuit courts and an alternative approach that has been proposed. It will then examine the standard when a contract determines how the arbitrator is selected. This Part will end by discussing *NFLMC*, a case where the contract selected the arbitrator that demonstrates how the standard is applied and its problems.

A. The Evident Partiality Standard

1. Commonwealth Coatings *and Interpretation Issues*

Writing for the majority in *Commonwealth Coatings*, Justice Black said that an arbitrator, "not only must be unbiased but also must avoid even the appearance of bias."[10] Black also said that arbitrators must disclose to parties "any dealings that might create an impression of possible bias,"[11] and that arbitrators should be held to the same ethical standards as judges.[12] In attempting to clarify the Court's position, Justice White said in his concurrence that arbitrators should not be disqualified for having a trivial relationship to one party, even though Justice Black's opinion could be read to require it.[13] He also said that the Court did not decide that arbitrators should be held to the same standard as judges.[14] Because of the contradictions Justice White's concurrence presented and the fact that his vote was needed to reach a majority, courts have struggled with whether to apply the majority or concurrence as the opinion of the court.[15] That struggle has resulted in multiple interpretations of what type of undisclosed relationship between a party and the arbitrator requires vacating the award.[16]

2. The Reasonable Person Majority

The prevailing view that has developed since *Commonwealth Coatings* is that an arbitrator is partial under evident partiality "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."[17] Evidence of an arbitrator being partial must be clear and convincing.[18] It also likely requires something more than a trivial relationship.[19] That standard is closer to White's concurrence, as it is an objective view that requires clear evidence that a relationship was close enough to make an arbitrator partial.[20] The reasonable person standard has gained a significant following amongst the circuit courts, becoming a majority view for determining a relationship under

10. *Commonwealth Coatings*, 393 U.S. at 150.
11. *Id.* at 149.
12. *Id.*
13. *See id.* at 150 (saying trivial relationships should not disqualify arbitrators; Justice White's statement implies that Justice Black's opinion could be read to disqualify arbitrators with trivial relationships, hence his clarification).
14. *Id.*
15. Korland, *supra* note 3, at 825.
16. *Id.* at 825–26.
17. Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co., 668 F.3d 60, 72 (2d Cir. 2012) (quoting Morelite Const. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984)).
18. Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr., 729 F.3d 99, 106 (2d Cir. 2013).
19. Korland, *supra* note 3, at 826.
20. *Id.*

the evident partiality standard.[21] Some courts have gone further still, adding factors to consider when determining if a reasonable person would believe an arbitrator was partial.[22] These factors have not been adopted by a majority of courts using the reasonable person standard, however, and thus can be helpful in analyzing the standard, but are not binding for most circuits.[23]

3. Minority Approaches

Another approach courts have used is based on the appearance of bias standard that Justice Black articulated in *Commonwealth Coatings*.[24] The court in *Schmitz v. Zilveti* determined that, even though Justice White's concurrence contradicted the majority in some areas, it did not explicitly disavow the appearance of bias language from the majority.[25] The *Schmitz* court then implemented a reasonable impression of partiality standard.[26] Though the *Schmitz* court called its standard something other than the appearance of bias, it acknowledged it is based on the appearance of bias standard from *Commonwealth Coatings*.[27] The appearance of bias standard is seen as a lower standard than reasonable person,[28] because it can vacate awards where an arbitrator seemed biased even if there is evidence a relationship did not impact the arbitration.[29] Despite being based on the *Commonwealth Coatings* majority, the appearance of bias standard is the minority.[30]

Another standard higher than both appearance of bias and reasonable person is showing actual bias in the arbitrator's decision.[31] It has not been adopted by courts as the standard for most evident partiality cases,[32] however, because evidence of it would be

21. JCI Commc'ns, Inc. v. Int'l Bhd. of Elec. Workers, Local 103, 324 F.3d 42, 51 (1st Cir. 2003); *Morelite*, 748 F.2d at 84 (showing the Second Circuit using the standard); ANR Coal Co. v. Cogentrix of N.C., Inc., 173 F.3d 493, 500 (4th Cir. 1999); Nationwide Mut. Ins. Co. v. Home Ins. Co., 278 F.3d 621, 626 (6th Cir. 2002).

22. *ANR Coal*, 173 F.3d at 500 (listing the four factors as: "(1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of the relationship to the arbitration; and (4) the proximity in time between the relationship and the arbitration proceeding").

23. *See* Bailey, *supra* note 6, at 160 n.75 (showing courts that have applied the factors from *ANR Coal*).

24. Schmitz v. Zilveti, 20 F.3d 1043, 1046 (9th Cir. 1994).

25. *Id.* at 1046–47.

26. *Id.* at 1048.

27. *See id.* at 1047 (explaining that the reasonable impression of partiality standard is based on an understanding of the appearance of bias standard as articulated in the majority of *Commonwealth Coatings*).

28. *See* Morelite Const. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984) (demonstrating that the appearance of bias standard is lower than the reasonable person standard).

29. This is demonstrated in *Schmitz*. In the case, the court vacated an arbitration award because the firm of one of the arbitrators represented the parent company of one of the parties several times in its history. *Schmitz*, 20 F.3d at 1044, 1048–50. The court concluded the relationship created a reasonable impression of partiality even though the record shows the arbitrator did not know of the relationship; he only investigated whether his firm represented the party, not its parent company. *Id.* The court notes that having no knowledge of a relationship would not make the arbitrator partial during the arbitration, but could still create a reasonable impression of partiality. *See id.* at 1048 (saying that a lack of knowledge of a relationship can prohibit actual bias, but not the reasonable impression of partiality).

30. *See* Korland, *supra* note 3, at 834 n.133 (showing many courts follow the reasonable person standard, not appearance of bias).

31. *Morelite*, 748 F.2d at 84.

32. *But see infra* Part II.A.5 (discussing how a showing of actual bias has become the standard when a contract determines how the arbitrator is selected, because courts give deference to contracts).

difficult to obtain.[33] The standard likely requires an admission by the arbitrator that his or her partiality prejudicially affected the decision.[34]

4. An Alternative Approach Proposed

In a law review comment, Lee Korland proposed an alternative approach to the evident partiality standard because of the uncertainty after *Commonwealth Coatings* and his belief that no standard presents a clear framework for when party-arbitrator relationships result in biased arbitrations.[35] Korland first argued that arbitrators should be encouraged, but not compelled, to investigate any relationship he or she has to either party and then disclose such relationships to both parties.[36] Korland then recommended that the appearance of bias standard articulated in *Schmitz* be followed for undisclosed relationships.[37] Under his proposal, once a party has proven evident partiality under the lower appearance of bias standard, the party that opposes vacating the award has a potential affirmative defense, whereby it can have the award maintained if it shows the arbitrator completed a reasonable investigation and did not know about the relationship.[38] Korland's approach has not been widely followed.

5. Evident Partiality When a Contract Determines How the Arbitrator is Selected

Sometimes arbitrators are selected by the contract the parties agree to. Such situations have generally been given a different standard for questions of arbitrator partiality.[39] Courts in those situations often give deference to the contract, as demonstrated by the court in *Winfrey v. Simmons Foods, Inc.*, which said "parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen."[40] The *Winfrey* court also said, "[W]here the parties have expressly agreed to select partial party arbitrators, the award should be confirmed unless the objecting party proves that the arbitrator's partiality prejudicially affected the award."[41] Thus, the standard when contracts select the arbitrator requires a showing that the arbitrator was actually biased, which places a heavy burden[42] on the party claiming partiality, because proving actual bias is difficult.[43] The court's rationale is that parties knew the arbitrator could be selected because of the contract; if a party wanted a different selection method, the party should have made a different agreement.[44] Though the standard is high when a contract determines how the arbitrator is selected, it can also be overcome if an arbitrator

33. Bailey, *supra* note 6, at 157.
34. *Id.* at 157 n.46.
35. Korland, *supra* note 3, at 817.
36. *Id.* at 817, 832.
37. *Id.* at 817.
38. *Id.*
39. *See* Winfrey v. Simmons Foods, Inc., 495 F.3d 549, 551 (8th Cir. 2007) (showing a different standard being used).
40. *Id.* (quoting Delta Mine Holding Co. v. AFC Coal Props., Inc., 280 F.3d 815, 821 (8th Cir. 2001)).
41. *Id.* (quoting *Delta*, 280 F.3d at 821).
42. Williams v. Nat'l Football League, 582 F.3d 863, 886 (8th Cir. 2009).
43. Bailey, *supra* note 6, at 157 n. 46.
44. Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 548 (2d Cir. 2016).

is not properly construing the contract,[45] which would violate the Labor Management Relations Act.[46]

Though evident partiality claims most frequently arise when a party learns of an arbitrator's possible bias after its arbitration, they can arise in other circumstances too.[47] A party can claim evident partiality when it knows an arbitrator was partial before the arbitration and raises concern, but the arbitrator is not removed from the arbitration.[48]

B. NFLMC *and Tom Brady's Claim Commissioner Goodell was Partial*

The arbitration in *NFLMC* was an appeal of Tom Brady's four game suspension for his role in the *Deflategate* scandal that took place before and during the 2015 American Football Conference Championship Game.[49] After examining evidence of Brady's guilt, NFL Executive Vice President Troy Vincent Sr. decided upon the suspension, which NFL Commissioner Roger Goodell authorized.[50] Brady then appealed the suspension through the NFLPA, and Goodell exercised his authority under Article 46 of the Collective Bargaining Agreement (CBA) to be the arbitrator in that appeal.[51] Brady made several motions before the arbitration, including to have Goodell recuse himself, to compel NFL General Counsel Jeff Pash to testify about his knowledge of the evidence, and to get notes from the head investigators.[52] Goodell denied each, saying he had no first-hand knowledge of the events at issue, that Pash did not play a significant role in the investigation, and that the CBA did not require the NFL to give Brady the notes.[53] Before the arbitration, additional evidence about Brady having his cellphone destroyed came to light.[54] After a ten hour hearing, the Commissioner decided to affirm the four game suspension due to the evidence from before and because he drew an adverse inference that Brady's cellphone would have contained incriminating evidence had it not been destroyed.[55]

Brady subsequently appealed the arbitration award, and the district court vacated it, holding that Brady lacked notice that he could be suspended for his actions and that the Commissioner deprived Brady of fundamental fairness by denying his motions.[56] The Court of Appeals for the Second Circuit reversed that decision.[57] For evident partiality, the Court of Appeals followed the rationale of *Winfrey*,[58] claiming that Brady could ask for no more of an impartial arbitrator than the NFLPA bargained for in the CBA.[59] Thus, it

45. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987).

46. *NFLMC*, 820 F.3d at 532.

47. *See generally id.* at 527 (showing a case where a party claimed the arbitrator was partial before the arbitration).

48. *See id.* at 535 (showing that Commissioner Goodell denied the NFLPA's motion to recuse himself in *NFLMC*).

49. *Id.* at 531.

50. *Id.* at 534.

51. *NFLMC*, 820 F.3d at 534.

52. *Id.*

53. *Id.* at 535.

54. *Id.*

55. *Id.*

56. *NFLMC*, 820 F.3d at 536.

57. *Id.* at 548.

58. Winfrey v. Simmons Foods, Inc., 495 F.3d 549, 551 (8th Cir. 2007) (quoting Delta Mine Holding Co. v. AFC Coal Props., Inc., 280 F.3d 815, 821 (8th Cir. 2001)).

59. *NFLMC*, 820 F.3d at 548.

determined that if the NFLPA wanted a different and more impartial arbitrator, it could have bargained for a better selection method.[60]

What the court did not settle was whether Goodell was partial. There is evidence in favor of that conclusion, meaning the arbitration might have violated Congress' goal of impartial arbitration.[61] First, Goodell, as NFL Commissioner, had a strong relationship to one party, the NFLMC, which represented the NFL.[62] Additionally, Goodell had authorized the previous decision,[63] meaning it was possible he might overlook contrary evidence to maintain that decision.[64] Finally, another arbitrator concluded that Goodell's actions, "were biased from the outset," demonstrating the opinion of an expert in the field.[65] Because of the heightened standard to a showing of actual bias when a contract determines how the arbitrator is selected and because Goodell never admitted partiality influenced the decision, Brady was not able to prove evident partiality, despite the above evidence.

1. Arguments for and Against Evident Partiality

The NFLMC argued that the NFLPA had to prove actual bias, but that it could not even show that a reasonable person would conclude Goodell was partial, though it provided little evidence for the latter claim.[66] The NFLPA's argument first demonstrated that a court could substitute a neutral arbitrator where a commissioner was disqualified.[67] It also argued that having an agreement about arbitrator selection did not end all judicial scrutiny.[68] It then provided an example of a court preventing the NFL Commissioner from being the arbitrator of a case, despite what the CBA allowed, because the court determined he was evidently partial.[69] Further, the NFLPA argued that Goodell removed himself as arbitrator in the *Bountygate* scandal—where players were paid bonuses if they hurt their opponents—because he knew he was partial, and that he was evidently partial in this case, too.[70] Finally,

60. *Id.*

61. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 147 (1968).

62. *NFLMC*, 820 F.3d at 551.

63. *Id.* at 534.

64. *See generally* CAROL TAVRIS & ELLIOT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME) (2007) (examining why, psychologically, humans do not like to admit they made mistakes and are prone to overlooking evidence that they were wrong).

65. *See* Washington Post Staff, *The Case for Tom Brady: An Arbitrator's Take*, WASH. POST (June 10, 2016), https://www.washingtonpost.com/news/early-lead/wp/2016/06/10/the-case-for-tom-brady-an-arbitrators-take/ (giving the opinion of David Evans, an attorney and arbitrator on several different arbitration panels).

66. The NFLPA's Memorandum of Law in Opposition to the NFL's Motion to Confirm Arbitration Award, Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 125 F.Supp. 3d 449 (S.D.N.Y. 2015), rev'd, 820 F.3d 527 (2d Cir. 2016).

67. Erving v. Va. Squires Basketball Club, 468 F.2d 1064, 1067 (2d Cir. 1972).

68. Brief for Appellees Nat'l Football League Players Ass'n and Tom Brady at 60, *NFLMC*, 125 F.Supp. 3d 449, *rev'd*, 820 F.3d 527 (quoting Nat'l Hockey League Players' Ass'n v. Bettman, No. 93 CIV. 5769 (KMW), 1994 WL 738835, at *13 (S.D.N.Y. Nov. 9, 1994)).

69. *Id.* at 61; *see* Morris v. N.Y. Football Giants, Inc., 575 N.Y.S.2d 1013, 1016–17 (App. Div. 1991) (explaining that the then NFL Commissioner, Paul Tagliabue, had once argued as chief outside counsel that the CBA had continued effect after it expired, and he needed to decide that exact issue at the arbitration in question; the court determined he was partial to the argument he had made previously).

70. *See* Brief for Appellees at 61, *NFLMC*, 125 F. Supp. 3d 449, *rev'd*, 820 F.3d 527 (explaining former NFL Commissioner Paul Tagliabue was the arbitrator in *Bountygate*; the Commissioner's suspensions were overturned by arbitration due to lack of notice about the possibility of suspension for their actions).

the NFLPA pointed to comments made by Goodell touting the initial investigation's independence and conclusions before arbitration to show he was partial to upholding the award.[71]

III. ANALYSIS

This Part will first describe how the reasonable person standard is the clear majority that best aligns with Congress' goal of impartial arbitration. It will then examine in-depth the decision in *NFLMC*, how the heightened actual bias standard—when a contract determines how the arbitrator—is selected led to the decision that Goodell was not partial, and why actual bias ensured that Brady did not receive an impartial arbitration as Congress intended. It will conclude by analyzing how the reasonable person standard would be more successful in accomplishing impartial arbitration for cases when the contract determines how the arbitrator is selected.

A. The Reasonable Person Standard is the Majority and Likely to Remain as Such

In their reviews of evident partiality, both Korland and Jennifer Bailey claim there is no definite standard for evident partiality.[72] While it is true that no standard is shared by all circuits, such a view undersells the reasonable person standard.[73] It has been accepted by several circuit courts and has become a majority interpretation for evident partiality.[74] In accepting the reasonable person standard, courts have rejected the appearance of using the bias standard Justice Black articulated in *Commonwealth Coatings*.[75] They have done so because Justice White's concurrence was needed to get the decision to a majority, and it contradicted Black's appearance of bias standard by stating that trivial relationships would not be enough to vacate an award.[76] The reasonable person standard represents a higher standard than appearance of bias,[77] and is closer to Justice White's interpretation.[78] A Supreme Court decision on evident partiality could upset that majority interpretation if the Court chooses Justice Black's appearance of bias standard instead.

If the Supreme Court does reexamine evident partiality, one of its focuses might be how the various standards align with Congress' goal for impartial arbitration.[79] The highest

71. Memorandum of Law in Support of Motion to Vacate Arbitration Award, *NFLMC*, 125 F. Supp. 3d 449, *rev'd*, 820 F.3d 527.

72. Korland, *supra* note 3, at 826; Bailey, *supra* note 6, at 158.

73. *See supra* note 21 (showing four different circuit courts accepting the reasonable person standard).

74. *See id.* (showing four circuits accepting the reasonable person standard, which helps demonstrate it is the majority view).

75. Korland, *supra* note 3, at 826–27; Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150 (1968).

76. Korland, *supra* note 3, at 826–27; *Commonwealth Coatings*, 393 U.S. at 150.

77. The *Schmitz* case mentioned above helps demonstrate how reasonable person is a higher standard. In *Schmitz*, the court vacated an award because an arbitrator's firm represented the parent company of a party. Schmitz v. Zilveti, 20 F.3d 1043, 1044, 1048–50 (9th Cir. 1994). The court concluded an appearance of bias was created. *See id.* at 1049 (saying a reasonable impression of partiality was created; as mentioned above, that standard is basically the same as appearance of bias). The court also acknowledged the arbitrator did not know about the relationship during arbitration. *Id.* Because there is clear evidence the arbitrator did not know about the relationship, a reasonable person likely would not have believed the arbitrator was partial, and would have maintained the award. Both standards will be analyzed further below.

78. Korland, *supra* note 3, at 826–27.

79. *Commonwealth Coatings*, 393 U.S. at 147.

standard, actual bias, which is only used when a contract determines how the arbitrator is selected,[80] often does not create an impartial arbitration as Congress intended. The actual bias standard says that an award will only be vacated if a party can prove the arbitrator's partiality prejudicially affected the award.[81] Evidence for proving actual bias is difficult to find,[82] because it likely requires an admission from the arbitrator.[83] Because it is unlikely an arbitrator would admit his or her partiality toward one side impacted the award, utilizing the standard may often result in maintaining the award of a partial arbitrator, which was not Congress' goal for evident partiality.[84]

Appearance of bias is the lowest standard for evident partiality; it vacates far more awards than actual bias and can even vacate awards made by impartial arbitrators.[85] As its name suggests, the appearance of bias standard, or the reasonable impression of partiality standard as it is sometimes called, vacates an award if there is a relationship between an arbitrator and party that creates an appearance of bias.[86] Justice White's concurrence shows that even a trivial relationship might be enough for the standard to vacate an award.[87] At first this might seem to fit Congress' goal of impartial arbitration, as an award is vacated if partiality on the arbitrator's part is even possible.[88] The possibility of bias does not mean an arbitrator was biased, however.[89] Because the standard is so low, impartial arbitrators who have only a trivial relationship to one party can have their awards vacated, which was

80. *See* Winfrey v. Simmons Foods, Inc., 495 F.3d 549, 551 (8th Cir. 2007) (showing that a party needs to demonstrate an arbitrator's partiality prejudicially impacted the award to vacate it).

81. *Id.*

82. Bailey, *supra* note 6, at 157.

83. *Id.* at 157 n.46.

84. The burden of the actual bias standard is shown via the following hypothetical. A woman is selected by a contract to be an arbitrator. One party is her best friend, the other party she does not know. The other party does not know of the friendship between the woman and her best friend. The woman ultimately finds for her best friend. Afterward the other party discovers the relationship and challenges the arbitration in court. With the actual bias standard, the arbitration is unlikely to be vacated. Though it is easy to see why the woman would be biased in favor of her best friend, without a confession it cannot be shown that bias impacted the award. It is not impossible that she made her decision without the bias impacting it (perhaps the facts strongly favored her best friend).

85. Morelite Const. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984).

86. *See supra* Part II.A.3. (showing that the reasonable impression of partiality standard is built from the appearance of bias standard); *see* Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150 (1968) (detailing the appearance of bias standard).

87. *Commonwealth Coatings*, 393 U.S. at 150. That Justice Black's appearance of bias standard might vacate an award for a trivial relationship relies on an inference. The inference is that Justice White mentioned that trivial relationships are not enough to vacate an award not to clarify Justice Black's opinion, but to narrow it. As a result, courts that believe Justice White's concurrence is controlling tend to use a higher standard than appearance of bias, while those that believe the majority opinion controls apply Black's appearance of bias standard. Korland, *supra* note 3, at 826. For an example of the appearance of bias standard vacating an award based on a seemingly trivial relationship *see* Schmitz v. Zilveti, 20 F.3d 1043, 1046 (9th Cir. 1994).

88. *Commonwealth Coatings*, 393 U.S. at 150.

89. This problem can be illustrated by another hypothetical. Suppose an arbitrator went to the same college as one of the parties in a case for a four-year period. That fact creates an appearance of bias, as the two could have been friends or the arbitrator might favor a fellow alumnus. Suppose, however, that the arbitrator did not even know the party attended the same school. In that scenario, the relationship was trivial and the arbitrator did not even know it existed. The arbitrator was still impartial. Appearance of bias would likely vacate the award in that case, however.

not Congress' goal for evident partiality.[90]

The reasonable person standard is a middle ground between actual bias and an appearance of bias that comes closest to achieving Congress' goal of impartial arbitration.[91] An award is vacated under the reasonable person standard, "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."[92] Evidence set forth must be clear and convincing.[93] An appearance of bias in a relationship is not enough under the standard; a showing that the relationship is more than trivial is required.[94] The standard does not require that a party show an arbitrator's partiality impacted an award, though; it is enough to show an arbitrator was partial to a party.[95] Reasonable person strikes a middle ground that does not pose a significant risk of vacating decisions made by impartial arbitrators,[96] while not being high enough that a partial arbitration is virtually impossible to vacate.[97] Thus, the reasonable person standard more often ensures impartial arbitration as Congress intended.[98] Lee Korland saw problems with each of the evident partiality standards,[99] so he proposed his own alternative. His approach starts with encouraging arbitrators, but not compelling them, to investigate and disclose relationships to the parties before an arbitration.[100] He then applies the lower appearance of bias standard anytime an arbitration award is challenged.[101] If there is an appearance of bias, the party hoping to maintain an award has an affirmative defense whereby an award is not vacated if the arbitrator conducted a reasonable investigation before and did not know about the relationship.[102]

Korland's solution potentially alleviates the problem that the appearance of bias standard has with vacating awards made by impartial arbitrators, as it prevents vacating

90. *See* Korland, *supra* note 3, at 826 (showing a trivial relationship is likely not enough under the reasonable person standard); *see Commonwealth Coatings*, 393 U.S. at 147 (showing Congress' goal was impartial arbitration).

91. *See supra* Parts II.A.2., II.A.3. (explaining the reasonable person standard and how it is a middle ground).

92. Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co., 668 F.3d 60, 72 (2d Cir. 2012) (quoting Morelite Const. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984)).

93. Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr., 729 F.3d 99, 106 (2d Cir. 2013).

94. *See* Korland, *supra* note 3, at 826 (showing a trivial relationship is likely not enough under the reasonable person standard).

95. *See Scandinavian Reinsurance*, 668 F.3d at 72 (quoting *Morelite*, 748 F.2d at 84) (stating the reasonable person standard). The standard implies that a reasonable person could find an arbitrator was partial without proving that a relationship impacted the award.

96. Like the appearance of bias standard does.

97. This would often occur under the actual bias standard.

98. Evidence, that the reasonable person standard ensures impartial arbitration more often than actual bias or the appearance of bias, is shown by applying it to the hypotheticals used above. For the actual bias hypothetical in footnote 84, a reasonable person would believe a woman is partial to her best friend and vacate the award. For the appearance of bias hypo in footnote 89, a reasonable person would want to know more about a potential relationship than that one party and an arbitrator went to the same college. If there is no more evidence of a relationship, or if the arbitrator says he or she did not know the party, the award would not be vacated. *See supra* notes 84, 89.

99. *See* Korland, *supra* note 3, at 826–28 (explaining the failure to create a clear standard and the differing results the various circuit standards have created. Differing results are implied to be an effect of unclear standards).

100. *Id.* at 817, 832.

101. *Id.* at 817.

102. *Id.*

them if the arbitrator did not know about a relationship. Where the standard fails, however, is that it does not compel an arbitrator to investigate before. If the arbitrator does not complete an investigation or if the investigation is not reasonable, the affirmative defense does not apply, and impartial arbitrators could still have decisions vacated by the appearance of bias. Because impartial arbitrations could still be vacated frequently under Korland's proposed standard, it does not align with Congress' goal of impartial arbitration. Thus, the reasonable person standard still best ensures impartial arbitration. Given that it is already used by the majority of jurisdictions, it is unlikely to be abandoned for another standard.

B. Brady's Argument in NFLMC

In *NFLMC*, Tom Brady's strongest argument for evident partiality was that there was precedent preventing the NFL Commissioner from being the arbitrator of a case due to evident partiality that should be applied.[103] In *Morris v. New York Football Giants, Inc.*, (former) NFL Commissioner Paul Tagliabue was not allowed to be the arbitrator of a case despite the CBA authorizing him to be.[104] The court made that conclusion because he once argued the CBA had continued effect after it expired, and he needed to decide that exact issue at the arbitration in question.[105] The court determined that his previous opinion on the issue made him evidently partial.[106] Though the case does show an example of an NFL Commissioner being ruled evidently partial, it was not without problems. *Morris* is a state court ruling, meaning it was not binding precedent for the Second Circuit when considering the case. The *Morris* decision also did not discuss the evident partiality standards or how the standard is heightened to actual bias when a contract determines how the arbitrator is selected.[107] The NFLPA did argue that an arbitrator selected by a contract did not foreclose judicial scrutiny, but it did not present evidence of actual bias or argue that a lower standard should be applied.[108]

C. The Actual Bias Standard Led to a Partial Arbitration in NFLMC

In addressing evident partiality in Brady's claim against Commissioner Goodell, the Second Circuit said that Brady could ask for no more of an impartial arbitrator than the NFLPA bargained for in the CBA.[109] Because Article 46 of the CBA allowed Goodell to appoint himself arbitrator, the Court determined that if the NFLPA wanted a different arbitrator, it should have bargained for it.[110] Though never explicitly stated, the court

103. *See supra* Part II.B.1 (detailing the NFLPA's arguments for evident partiality).

104. Morris v. N.Y. Football Giants, Inc., 575 N.Y.S.2d 1013, 1016–17 (Sup. Ct. 1991).

105. *Id.*

106. *Id.*

107. *See generally Morris*, 575 N.Y.S.2d at 1013 (showing the Court not mentioning these things in its analysis).

108. Brief for Appellees Nat'l Football League Players Ass'n and Tom Brady at 60, Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 125 F.Supp.3d 449 (S.D.N.Y. 2015) (No. 15-2801(L)), *rev'd*, 820 F.3d 527 (2d Cir. 2016) (quoting Nat'l Hockey League Players' Ass'n v. Bettman, No. 93 CIV. 5769 (KMW), 1994 WL 738835, at *13 (S.D.N.Y. Nov. 9, 1994)).

109. Winfrey v. Simmons Foods, Inc., 495 F.3d 549, 551 (8th Cir. 2007) (quoting Delta Mine Holding Co. v. AFC Coal Props., Inc., 280 F.3d 815, 821 (8th Cir. 2001)).

110. Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 548 (2d Cir. 2016).

indicated that the standard for contracts was higher than the reasonable person standard.[111] That standard was, of course, a showing of actual bias.[112] Because Brady could not show that Goodell's partiality impacted the award, the court did not find Goodell evidently partial.[113]

The problem with the court maintaining Goodell's decision is that there was significant evidence that Goodell was partial to the NFLMC.[114] First, he is the NFL Commissioner, and the NFLMC represented the NFL in the proceeding.[115] Put more simply, Goodell was the arbitrator of a proceeding where the league he runs was one of the parties.[116] That a person might be partial to the organization they run is elementary. Goodell also authorized Brady's initial suspension.[117] Psychological research suggests people do not like to admit they are wrong and might ignore evidence that suggests it.[118] Such feelings are likely magnified when there is significant media attention on an issue, like what Goodell faced when deciding Brady's arbitration. Finally, at least one arbitrator believed Goodell was partial from the start.[119] Though evidence points to Goodell being partial, without him admitting it influenced the award, it was not enough to overcome the actual bias standard.[120] Thus, the standard ensured that Brady did not receive an impartial arbitration.

D. Giving Deference to the Contract Does Not Justify the Partial Arbitrations Caused by the Actual Bias Standard

The justification for applying actual bias when a contract determines how the arbitrator is selected is that both parties bargained for the selection method, and that deference should be given to that bargain.[121] The court in *NFLMC* articulated that, saying that if the NFLPA wanted a different arbitrator, it should have bargained for it.[122] That rationale presumes a party has power to fight each provision it disagrees with. *NFLMC* demonstrates why this might not be the case.

There are several reasons to believe that the NFLPA could not have declined a deal on the CBA just because it did not like the arbitration selection clause. First, the CBA is 316 pages long, while the relevant provision giving the Commissioner power to select an

111. *See id.* (showing that the court mentioned the reasonable person standard but said the case involves a matter of contract before it stated the no more impartial arbitrator than it bargained for language).

112. *See supra* Part II.A.5 (showing the actual bias standard being applied in cases where a contract determines how the arbitrator is selected).

113. *See Winfrey*, 495 F.3d at 551 (showing that the actual bias standard requires that a party demonstrate an arbitrator's partiality prejudicially impacted the award to vacate it).

114. *See supra* Part II.B (showing Goodell's relationship to the league and why he would not want to overturn a decision he authorized).

115. *NFLMC*, 820 F.3d at 535.

116. It should be noted that in bargaining for the CBA, Goodell is on the opposite side of the NFLPA.

117. *NFLMC*, 820 F.3d at 534.

118. *See generally* TAVRIS & ARONSON, *supra* note 64 (examining why, psychologically, humans do not like to admit they made mistakes and are prone to overlooking evidence that they were wrong).

119. *See* Washington Post Staff, *supra* note 65 (giving the opinion of David Evans, an attorney and arbitrator on several different arbitration panels).

120. Bailey, *supra* note 6, at 157 n.46 (noting the difficulty in obtaining proof of partiality).

121. *See NFLMC*, 820 F.3d at 548 (stating that parties can ask for no more impartial of an arbitrator than they bargained for).

122. *Id.*

arbitrator (Art. 46 Sec. 2) spans only 7 lines.[123] In other words, it is a minor part of the agreement. The NFLPA also represents over 2000 players,[124] yet only a fraction, 61 during the 2015 season,[125] received a suspension for which the clause might become necessary on appeal. With so many players to represent, it is unlikely the NFLPA would reject the CBA based on the selection clause for player suspension arbitrations when it impacts, at most, three percent of players,[126] and likely far less.[127] Rejecting the CBA would cost each player the entirety of their salary during a potential lockout, which could be very costly considering players have a short career length.[128]

The above evidence shows why the NFLPA might not have rejected the CBA if the lone sticking point was the arbitration selection method. Such evidence makes giving deference to contracts problematic, because parties might not always have the power to bargain for arbitrator selection methods they want. Certainly, giving deference to a contract is important, but the actual bias standard makes vacating an award made by a partial arbitrator nearly impossible, as *NFLMC* demonstrates.

E. The Reasonable Person Standard Would Alleviate Some of the Problems of Actual Bias

NFLMC helps demonstrate how the reasonable person standard has fewer problems than actual bias when applied to a case where a contract determines how the arbitrator is selected. Under the standard, a reasonable person likely would have concluded that Goodell's connections to the NFLMC made him partial.[129] There would have been no need for Goodell to confess that his connection to the NFLMC influenced his decision. Thus, the award would have been vacated, and another arbitration with an impartial arbitrator would have been necessary, ensuring that Brady got an impartial arbitration.

The reasonable person standard would still allow bargained-for contracts to have weight. As an example, under the CBA, Commissioner Goodell was able to appoint himself, but he also had the power to appoint anyone he wanted.[130] In fact, in another notable case, called *Bountygate*, Goodell used that power to select former NFL Commissioner Paul Tagliabue as the arbitrator, and the appealed suspensions were overturned.[131] The reasonable person standard still allows parties with the power to select

123. *Collective Bargaining Agreement*, NFL, 204–05 (Aug. 4, 2011), https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf [hereinafter *NFL-CBA*].

124. There are 32 teams in the NFL with 53 players on an active roster and 10 players on a practice squad. 63 x 32 = 2016.

125. *NFL Fines & Suspensions*, SPOTRAC (2015), http://www.spotrac.com/nfl/fines-suspensions/2015/suspensions.

126. 61 is approximately 3% of the over 2000 players the NFLPA represents.

127. There are many reasons not every suspended player would be impacted. For example, the Commissioner could appoint an impartial arbitrator, or the player might not appeal a suspension at all.

128. *See* Dashiell Bennett, *The NFL's Official Spin on Average Career Length Is A Joke*, BUS. INSIDER (Apr. 18, 2011, 5:18 PM) http://www.businessinsider.com/nfls-spin-average-career-length-2011-4 (showing that the average length of a career for an NFL player is 3.2 years).

129. *See supra* Part II.B (showing Goodell's relationship to the league and why he likely would not want to overturn a decision he authorized).

130. *NFL-CBA*, *supra* note 123.

131. *See* Brief for Appellees Nat'l Football League Players Ass'n and Tom Brady at 61, Nat'l Football

an arbitrator to do so while compelling them to make a selection that is not partial in their favor, or risk having that arbitrator's decision vacated on appeal. Thus, the reasonable person standard aligns closest with Congress' goal of impartial arbitration when a contract determines how the arbitrator is selected, while still giving deference to the contract.

IV. RECOMMENDATIONS

This Part will make several recommendations regarding the standard used in arbitration cases. First, it will recommend that the federal circuit courts adopt the reasonable person standard if they have not already. It will further recommend they apply that standard to cases where a contract determines how the arbitrator is selected. Second, it will recommend that the Supreme Court of the United States decide a controversial evident partiality case to help settle the ambiguities of *Commonwealth Coatings* and the current circuit split that exists. It will also recommend the Court adopt the reasonable person standard. Third, it will recommend that parties bargaining over an arbitrator selection clause utilize a selection method that requires both parties, or a neutral third party, to approve the arbitrator. Finally, this Part will recommend that parties that have the ability to unilaterally select an arbitrator, such as the NFL in *NFLMC*, choose an impartial one.

A. Recommendations for Federal Circuit Courts

Though a majority of courts have adopted the reasonable person standard,[132] not all have.[133] This means the results of arbitration appeals might differ based on which circuit the case arises in. For courts that use appearance of bias, there is the additional problem that some decisions under the standard would vacate the awards of impartial arbitrators,[134] which goes against Congress' goal of impartial arbitration.[135] The reasonable person standard does not suffer from the same flaws.[136] Thus circuits that do not apply the reasonable person standard should implement it instead of the appearance of bias standard to better ensure impartial arbitration. Circuits for which evident partiality has not been addressed, or that have not settled on a standard, should choose reasonable person for the aforementioned reasons. Finally, circuits that use the reasonable person standard should continue to do so.

There remains an additional evident partiality issue that circuits have not applied the reasonable person standard to. Circuits have instead implemented the heightened actual

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League Mgmt. Council v. Nat'l Football League Players Ass'n, 125 F. Supp. 3d 449 (S.D.N.Y. 2015) (No. 15-2801(L)), *rev'd*, 820 F.3d 527 (2d Cir. 2016) (claiming Goodell made that selection because he knew he was partial).

132. *See supra* note 21 (demonstrating four different circuits that use the reasonable person standard).

133. *See* Schmitz v. Zilveti, 20 F.3d 1043, 1046 (9th Cir. 1994) (demonstrating a Ninth Circuit case not using the reasonable person standard. It used a reasonable impression of partiality standard that is basically the same as the appearance of bias standard).

134. *See supra* Part.III.A (demonstrating that some decisions under the standard would vacate the awards of impartial arbitrators).

135. *See* Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 147 (1968) (stating Congress' goal is impartial arbitration).

136. *See supra* Part III.A (discussing how the reasonable person standard is less likely to vacate a decision made by an impartial arbitrator because it requires evidence beyond a trivial relationship to a party).

bias standard for cases where a contract determines how the arbitrator is selected.[137] *NFLMC* demonstrates the problem with the standard, however, as the decision of a partial arbitrator was upheld.[138] Such a result does not fulfill Congress' goal of impartial arbitration.[139] Circuits could better accomplish that goal by instead implementing the reasonable person standard. The standard, as with other evident partiality cases, best ensures impartial arbitration as Congress intended.[140] It also would likely lead parties with bargaining power to select impartial arbitrators, as they would have advanced warning that selecting arbitrators who are partial to them could result in the decision being reversed on appeal.

B. Recommendations for the Supreme Court of the United States

Circuit courts have struggled since the *Commonwealth Coatings* decision to determine what undisclosed party-arbitrator relationships prejudice the award.[141] Such struggles are based on how Justice White's concurrence contradicted Justice Black's majority and his appearance of bias standard.[142] The Supreme Court should grant certiorari and rule on an evident partiality case to help clarify which standard should be applied. In its decision, the Court should examine how the standards accomplish Congress' goal of impartial arbitration as articulated in *Commonwealth Coatings*.[143] In the end, the Court should adopt the reasonable person standard, which is the majority approach in the circuits,[144] because it best accomplishes that goal.[145] Applying that standard is also a reasonable interpretation of *Commonwealth Coatings*, because Justice White's concurrence was needed to get to a majority and seemed to articulate a higher standard than appearance of bias.[146] In fact, his concurrence was the foundation of the reasonable person standard.[147]

C. Recommendations for Parties When Bargaining for an Arbitrator Selection Clause

In theory, evident partiality in arbitration need not be an issue at all. Parties could

137. Winfrey v. Simmons Foods, Inc., 495 F.3d 549, 551 (8th Cir. 2007) (quoting Delta Mine Holding Co. v. AFC Coal Props., Inc., 280 F.3d 815, 821 (8th Cir. 2001)) ("[W]here the parties have expressly agreed to select partial party arbitrators, the award should be confirmed unless the objecting party proves that the arbitrator's partiality prejudicially affected the award."). That is, basically, an articulation of the actual bias standard. *See supra* Part III.A (discussing the actual bias standard).

138. *See supra* Parts III.B, III.C (demonstrating how Commissioner Goodell was partial and how the standard led to maintaining his decision).

139. *See Commonwealth Coatings*, 393 U.S. at 147 (stating Congress' goal is impartial arbitration).

140. *See supra* Part III.A (showing how the reasonable person standard best ensures impartial arbitration).

141. Korland, *supra* note 3, at 825.

142. *See supra* Part II.A1 (detailing the problems circuit courts have had in interpreting *Commonwealth Coatings*).

143. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 147 (1968).

144. *See supra* Part II.A.2 (showing that the reasonable person standard is the majority approach in circuits).

145. *See supra* Part III.A (showing how the reasonable person standard best ensures impartial arbitration).

146. *Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring) (saying that a trivial relationship does not disqualify an arbitrator). The appearance of bias standard likely would vacate a decision made by an arbitrator with a trivial relationship to a party. *See supra* Part.III.A (demonstrating why the appearance of bias standard would likely vacate a decision made by an arbitrator with a trivial relationship to a party).

147. *See supra* Part II.A.2 (describing the reasonable person standard and how it likely requires something more than a trivial relationship between the arbitrator and a party as Justice White articulated in *Commonwealth Coatings*).

select impartial arbitrators that give neither party cause to believe an outcome was biased. While that is not realistic,[148] parties can reduce the number of issues if both sides must approve the selection of an arbitrator. In *ANR Coal Co. v. Cogentrix of North Carolina, Inc.*, the arbitrator selection clause specified that three arbitrators would rule on the arbitration.[149] Each party selected an arbitrator, and the two arbitrators then mutually agreed upon a third neutral arbitrator.[150] Though there were still issues in that arbitration,[151] the selection method creates a far lower likelihood of a partial arbitrator than having a single party pick.[152] Both parties having a choice in the arbitrator selection is ideal, and parties should strive to put such a selection method in their contracts. Parties do not always have equal bargaining power, however, and some parties cannot afford to decline a deal due only to arbitrator selection concerns.[153] Because all parties will not forgo their bargaining power for a fairer selection method, contracts that allow a single party to select an arbitrator will persist.

D. Recommendations for Parties Able to Select the Arbitrator

Just because an arbitrator can be selected by one party does not mean that arbitrator will be partial to it. Parties with such power can, and should, select an arbitrator they reasonably believe is impartial, as that would lead to more impartial arbitration that is unlikely to be vacated by a court.[154] The NFL is a good example of this point. Under the CBA, the Commissioner had the power to appoint himself arbitrator for *Bountygate* like he did for Brady's *Deflategate* arbitration.[155] Instead of appointing himself, however, Commissioner Goodell appointed former NFL Commissioner Paul Tagliabue in his stead.[156] Tagliabue, as the NFL's former Commissioner, still had a relationship with the NFL that might have made him partial.[157] One notable difference is that he did not face the same difficulty in deciding whether to uphold a suspension he initially affirmed like Goodell did in Brady's case.[158] In *Bountygate*, Tagliabue ultimately overturned Goodell's

148. In at least some cases an arbitrator will have some sort of relationship to a party that is unknown when the arbitrator is selected.

149. Bailey, *supra* note 6, at 154.

150. *Id.*

151. *See id.* at 154–55 (detailing the problems that occurred with the arbitrators in *ANR Coal*).

152. *See* Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 534 (2d Cir. 2016) (demonstrating a single party having selection power, with a partial arbitrator as the result).

153. *See supra* Part III.D (showing that the players that the NFLPA represented faced significant losses if they did not sign the CBA due only to concerns about the arbitrator selection clause).

154. The recommendations in Part IV should not be read to mean that all evident partiality issues will cease if the recommendations are followed. Even parties attempting to select an impartial arbitrator in good faith might not realize there is a relationship the makes an arbitrator partial. Additionally, even under the reasonable person standard, parties might try selecting partial arbitrators while hoping a party will not appeal or that a court will not vacate the award.

155. *See NFLMC*, 820 F.3d at 534 (showing the Commissioner has the power to select the arbitrator for a suspension appeal; he used that power in both *NFLMC* and *Bountygate*).

156. Brief for Appellees Nat'l Football League Players Ass'n and Tom Brady at 61, Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 125 F.Supp.3d 449 (S.D.N.Y. 2015) (No. 15-2801(L)) , *rev'd*, 820 F.3d 527 (2d Cir. 2016).

157. *See supra* Part III.C (demonstrating why Commissioner Goodell was likely biased towards the NFLMC). Many of these factors would apply to Tagliabue as the former Commissioner of the NFL.

158. Research shows it is hard for people to admit they were wrong. *See* TAVRIS & ARONSON, *supra* note

initial suspension for the players involved.[159] That demonstrates that a more impartial arbitrator can lead to different, and fairer, arbitration results. A completely impartial arbitrator would be better still and would fulfill Congress' goal of impartial arbitration.

V. CONCLUSION

With arbitration on the rise,[160] Congress' goal of impartial arbitration is more important than ever.[161] One way to ensure impartiality is the evident partiality standard, which says a decision must be vacated if it is determined the arbitrator was partial.[162] An exact standard for evident partiality has not been created, however, as circuit courts have struggled to understand the standard established by the Supreme Court in *Commonwealth Coatings*.[163] Of the three standards that have been articulated by circuits, the reasonable person standard best ensures impartial arbitration.[164] Reasonable person has become the majority standard, but it is not accepted by all courts,[165] and is not applied at all when a contract determines how the arbitrator is selected.[166] The problems of applying a standard other than reasonable person, where a contract determines how the arbitrator is selected, is demonstrated in *NFLMC*.[167] In that case, NFL Commissioner Roger Goodell, sitting as the arbitrator of the appeals hearing, affirmed a suspension against Tom Brady despite an abundance of evidence he was partial towards the NFLMC.[168] The decision was affirmed by the Second Circuit because the actual bias standard was applied; it is very difficult to prove a party was biased under the standard.[169] If the reasonable person standard had been applied instead, Goodell's decision would have been vacated. To best ensure Congress' goal of impartial arbitration, courts should universally apply the reasonable person standard for evident partiality.

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64 (examining why, psychologically, humans do not like to admit they made mistakes and are prone to overlooking evidence that they were wrong).

159. Brief for Appellees Nat'l Football League Players Ass'n and Tom Brady at 61, *NFLMC*, 125 F.Supp.3d 449, *rev'd*, 820 F.3d 527.

160. *See* Carrns, *supra* note 1 (showing banks using arbitration more frequently with customers).

161. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 147 (1968).

162. Federal Arbitration Act, 9 U.S.C. § 10(a)(2) (2002).

163. *See supra* Parts II.A.1–3 (demonstrating the interpretational issues circuit courts have with *Commonwealth Coatings*).

164. *See supra* Part III.A (demonstrating how the reasonable person standard best ensures impartial arbitration).

165. *See supra* Part II.A.3 (showing courts using minority approaches).

166. *See supra* Part II.A.5 (showing that the reasonable person standard is not applied by courts when a contract determines how the arbitrator is selected).

167. *See* Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 548 (2d Cir. 2016) (showing Commissioner Goodell exercising his power under the CBA to sit as arbitrator for the appeal).

168. *Id.* at 535.

169. *See supra* Part III.A (showing that the actual bias standard is so high that it likely requires an arbitrator to admit his or her partiality influenced the award).