No. __-____

IN THE
Supreme Court of the United States

LAURENCE STONE,
Petitioner,
v.

BEAR, STEARNS & CO., INC.; J.P. MORGAN SECURITIES LLC; BEAR, STEARNS SECURITIES CORP.; AND BEAR STEARNS ASSET MANAGEMENT INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Arbitration Act authorizes a district court to vacate an arbitration award "where there was evident partiality or corruption in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2). This case presents two questions regarding the proper interpretation and application of that provision on which the federal courts of appeals are deeply divided.

1. Whether an arbitrator's failure to disclose facts creating a reasonable impression of partiality warrants vacating an arbitration award, or whether an arbitration award should stand despite an arbitrator's failure to disclose conflicts of interest unless a reasonable person would have to conclude that the arbitrator was partial to one party to the arbitration.

2. Whether a party waives a challenge to an arbitrator's failure to disclose conflicts of interest only if it knows of the conflicts and fails to raise them during the arbitration, or whether a party waives such a challenge unless it fully investigates the arbitrator's undisclosed conflicts, and objects to the arbitrator's participation, during the arbitration.

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Petitioner Laurence Stone respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

INTRODUCTION

This case presents important questions regarding the standard for vacating an arbitration award based on an arbitrator's undisclosed conflicts of interest. The Federal Arbitration Act ("FAA") provides several grounds for vacating an award, including "where there was evident partiality or corruption in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2). In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), this Court held, in a 6-3 decision, that the FAA required an award to be vacated where one arbitrator on a three-member panel had an undisclosed prior business relationship with a party. *See id.* at 146, 150. The Court reached that conclusion even though the party challenging the award did not argue that the arbitrator "was actually guilty of fraud or bias in deciding th[e] case." *Id.* at 147. The Court "perceive[d] no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." *Id.* at 149.

Justice White, a member of the six-Justice majority, authored a concurring opinion, joined by Justice Marshall (who was also among the majority). Justice White wrote that, "[w]hile I am glad to join my Brother Black's opinion in this case, I desire to make these additional remarks." *Id.* at 150 (White, J., concurring). Justice White cautioned that "[t]he judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality." *Id.* at 151. To

that end, he supported the Court's holding that potential conflicts of interest "be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with knowledge of the relationship." *Id.*; *see id.* at 152 ("If arbitrators err on the side of disclosure, as they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award."). After suggesting that the disclosure obligation need not be so broad as to encompass irrelevant information ("[an arbitrator] cannot be expected to provide the parties with his complete and unexpurgated business biography"), Justice White observed that "it is enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed." *Id.* at 151-52.

This case implicates two divisions of authority that have developed in the wake of *Commonwealth Coatings*.

First, the courts of appeals are sharply divided over the standard for determining when an arbitrator's undisclosed conflicts of interest establish "evident partiality." Consistent with the Court's opinion in *Commonwealth Coatings*, two courts of appeals have held that "the legal standard for evident partiality is whether there are 'facts showing a "reasonable *impression* of partiality."'" *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1106 (9th Cir. 2007) (quoting *Schmitz v. Zilveti*, 20 F.3d 1043, 1048 (9th Cir. 1994)) (emphasis added); *see University Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1339 (11th Cir. 2002) ("an arbitrator is obligated to disclose those facts that create a reasonable impression of partiality") (internal quota-

tions omitted). That standard faithfully implements *Commonwealth Coatings* and provides a sensible role for federal courts under the FAA – ensuring the disclosure of possible sources of bias, rather than making close calls about whether particular undisclosed information reveals an arbitrator to have been actually biased.

Other courts of appeals, including the Third Circuit, have held that "evident partiality" can be shown only "'where a reasonable person would *have* to conclude that an arbitrator was partial to one party to the arbitration.'" *Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 72 (2d Cir. 2012) (quoting *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984)) (emphasis added); *see Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 252-53 (3d Cir. 2013); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 644-45 (6th Cir. 2005); *ANR Coal Co. v. Cogentrix of North Carolina, Inc.*, 173 F.3d 493, 500 (4th Cir. 1999); *see also Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 281-83 (5th Cir. 2007) (en banc). Those courts claim to have derived that standard from Justice White's concurrence in *Commonwealth Coatings*, and they have dismissed Justice Black's opinion for the Court as "dicta." *E.g.*, *Morelite*, 748 F.2d at 83.

Second, the courts of appeals have reached divergent conclusions regarding whether a party waives the right to seek vacatur based on undisclosed arbitrator conflicts unless it discovers and raises those conflicts during the arbitration. Several courts of appeals have held that, "[a]lthough it is true that a disgruntled party cannot object after an award has been made, this rule applies only where the party

has actual knowledge of the facts that form the basis of the objection." *Morelite*, 748 F.2d at 84 n.5 (citation omitted); *see University Commons-Urbana*, 304 F.3d at 1340; *ANR Coal*, 173 F.3d at 501 n.5; *see also Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358-59 (6th Cir. 1989).

The courts below followed a different approach, under which a party waives its challenge unless it fully investigates the arbitrator's background during the arbitration. *See JCI Communications, Inc. v. International Bhd. of Elec. Workers*, 324 F.3d 42, 52 (1st Cir. 2003) ("evident partiality" claim waived because party did not "inquire about the backgrounds of the [arbitrators] either before or during the hearing"); *see also Fidelity Fed. Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1313 (9th Cir. 2004) ("waiver doctrine applies where a party to an arbitration has constructive knowledge of a potential conflict but fails to timely object"). That approach eviscerates the disclosure obligation adopted in *Commonwealth Coatings* and imposes unreasonable and inefficient investigative burdens on parties.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-3a) is not reported (but is available at 2013 WL 5788762). The memorandum order of the district court (App. 4a-46a) is reported at 872 F. Supp. 2d 435.

JURISDICTION

The court of appeals entered its judgment on October 29, 2013. On January 22, 2014, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to and including February 11, 2014. App. 55a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, are reproduced at App. 54a.

STATEMENT

1. Petitioner invested in a fund holding residential mortgage-backed securities that was sponsored and managed by respondents.[1] Bear Stearns induced petitioner to invest in the fund, and to maintain and increase his investment, by misrepresenting and omitting material facts, notably regarding exposure to subprime credit. When the market for residential mortgage-backed securities collapsed in 2007, the fund began reporting significant losses, respondents suspended fund redemptions, and petitioner suffered millions of dollars in losses. App. 7a; C.A. App. 249a-250a.

2. Petitioner's subscription agreement with Bear Stearns required disputes to be resolved through arbitration proceedings conducted by a predecessor of the Financial Industry Regulatory Authority ("FINRA"). Resp. C.A. Br. 41. In April 2008, petitioner initiated an arbitration against Bear Stearns before FINRA, asserting various federal and state statutory and common-law claims and seeking recovery of losses resulting from his investment. App. 7a; C.A. App. 406a, 719a. In submitting the dispute to FINRA, the parties agreed that "the arbitration will be conducted in accordance with the Constitution, By-Laws, Rules, Regulations, and/or ***Code of Arbi-***

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[1] In March 2008, J.P. Morgan Chase & Co. ("J.P. Morgan") agreed to acquire Bear Stearns in a well-publicized transaction. *See* Robin Sidel et al., *J.P. Morgan Rescues Bear Stearns*, Wall St. J., Mar. 17, 2008, at A1. Unless otherwise noted, this petition refers to respondents collectively as "Bear Stearns."

tration Procedure of" FINRA. C.A. App. 631a; *see id.* at 719a-720a.

For claims exceeding $100,000, such as petitioner's claim against Bear Stearns, FINRA's rules require the appointment of a three-person panel consisting of two "public" arbitrators and one "non-public" arbitrator. *See* FINRA Rule 12401(c); App. 8a.[2] A "non-public" arbitrator, generally speaking, is one who has worked in the securities industry. *See* FINRA Rule 12100(p). A "public arbitrator," by contrast, is one who lacks affiliations with the securities industry. *See* FINRA Rule 12100(u); App. 8a. Among other requirements, a public arbitrator cannot be "the spouse or an immediate family member of a person who is a director or officer of[] an entity that directly or indirectly controls, is controlled by, or is under common control with, any partnership, corporation, or other organization that is engaged in the securities business." FINRA Rule 12100(u).

FINRA requires arbitrators to investigate and disclose potential conflicts of interest. Before being appointed to a panel, an arbitrator "must make a reasonable effort to learn of" and disclose "any circumstances which might preclude the arbitrator from rendering an objective and impartial determination in the proceeding." FINRA Rule 12405(a). Such circumstances include "[a]ny existing or past financial, business, professional, family, social, or other relationships or circumstances with any party [or] any party's representative . . . that are likely to affect impartiality or might reasonably create an appearance of partiality or bias," as well as "[a]ny such

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[2] The cited FINRA Rules are available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096.

relationship or circumstances involving members of the arbitrator's family." FINRA Rule 12405(a)(2)-(3). FINRA will inform the parties of disclosures made by potential arbitrators. *See* FINRA Rule 12405(c).

FINRA's rules also empower parties to act on conflict-of-interest information disclosed by potential arbitrators. The provisions governing arbitrator selection provide a process for parties to strike and rank prospective arbitrators. *See* FINRA Rule 12403; App. 8a. Parties also may request recusal of an arbitrator, *see* FINRA Rule 12406, and FINRA may remove an arbitrator before hearings begin "if it is reasonable to infer, based on information known at the time of the request, that the arbitrator is biased[] [or] lacks impartiality," FINRA Rule 12407(a)(1).

In September 2008, FINRA informed the parties to this dispute that, based on their arbitrator rankings, it had appointed a three-member arbitration panel. App. 8a-9a; C.A. App. 464a. Jerrilyn G. Marston was appointed as a public arbitrator. App. 9a; C.A. App. 469a. Ms. Marston's arbitrator disclosure report (also known as an "ADR") stated: "Family Member has a relationship with [the] University of Pennsylvania." App. 11a (alteration in original); C.A. App. 471a. The report neither identified which family member had a "relationship" with the University of Pennsylvania nor provided any description of the "relationship." App. 11a-12a; C.A. App. 471a. The report contained no hint of any connection between Ms. Marston's "family member" and the securities industry. App. 11a-12a; C.A. App. 470a-472a.

On her oath of arbitrator form and conflict checklist – which should have been signed at the outset, but instead was executed after the arbitration concluded, C.A. App. 508a-509a – Ms. Marston repre-

sented that she had no potential conflicts to disclose, *id.* at 522a. She also answered "No" to the following question: "Are you . . . the spouse . . . of a person who is a director or officer of[] an entity that directly or indirectly controls, is controlled by, or is under common control with, any partnership, corporation, or other organization that is engaged in the securities business?" *Id.* at 524a.

The arbitrator serving as chair began several hearings by stating that he had no further conflict disclosures to make and asking the other two arbitrators if they had any additional disclosures. App. 12a; C.A. App. 528a-534a. Each time, Ms. Marston stated that she had nothing to disclose. App. 12a; C.A. App. 528a-534a; *see* FINRA Rule 12405(b) (imposing on arbitrators a continuing duty to disclose "interests, relationships, or circumstances that might preclude an arbitrator from rendering an objective and impartial determination").

In July 2011, following several hearing sessions, the panel issued an award denying petitioner's claim. App. 47a-53a.

3. Petitioner subsequently learned through laborious online research that Ms. Marston's spouse (Dr. Richard Marston) is a finance professor at the Wharton School who has performed extensive speaking, consulting, and advisory work for a number of securities firms, including J.P. Morgan (which agreed to acquire Bear Stearns before petitioner initiated the arbitration). After a period of discovery in the district court, the full record revealed the following facts, among others, regarding Dr. Marston's undisclosed ties to the securities industry:

- Dr. Marston "regularly lecture[s] to brokerage firms, insurance consultants, banks, and investors," App. 2a, and has been "a consultant . . . to firms such as Citigroup, JP Morgan, and Morgan Stanley" and "an advisor to Morgan Stanley's Portfolio Advisory Services," C.A. App. 136a.
- Approximately two months after Ms. Marston's appointment to the panel, and long before arbitration hearings commenced, Dr. Marston signed a contract to serve as the paid keynote speaker at a J.P. Morgan Asset Management Conference. App. 12a; C.A. App. 571a. He received $12,000 for that one-hour speech. C.A. App. 571a; Resp. C.A. Br. 6.
- For years during the mid- to late 1990s, ending in 2000, Dr. Marston conducted an in-depth training program for J.P. Morgan personnel. App. 12a & n.4; C.A. App. 560a; Resp. C.A. Br. 5.
- At the time of the arbitration, Dr. Marston was a party to a long-term contract with Smith Barney covering recurring speaking engagements, and he served on advisory committees for that firm before and after the arbitration. C.A. App. 561a; Resp. C.A. Br. 11.
- Dr. Marston annually delivers the opening address for Morgan Stanley's "Client University" – a day-long event that the firm describes as "a place for our clients to exchange information and ideas with financial experts of national and international prominence." C.A. App. 199a.
- Dr. Marston's speaking and consulting activities for financial-services firms generated a

substantial portion of his income during the relevant period. C.A. App. 580a.

- Beginning in 2009, when the arbitration was underway but before any hearings had occurred, Dr. Marston joined the board of a firm that controls a securities broker-dealer. App. 13a; C.A. App. 539a.

The record also reflected the following additional facts (*see supra* pp. 7-8) regarding Ms. Marston's repeated failures to inform the parties and FINRA of her husband's many ties to the securities industry:

- On her 1996 arbitrator application, Ms. Marston responded affirmatively to a question asking whether she had family in the securities business. App. 11a. She stated that her spouse was a professor at the Wharton School and that "*[i]n that capacity*" – i.e., in his capacity as a university professor – "he has spoken to brokers, traders, and financial consultants from various investment banks and brokerage houses, and Industry Groups." *Id.* Ms. Marston did not disclose that her husband receives significant income from many securities firms in his personal capacity for speaking, consulting, and advisory activities.
- FINRA "inexplicably translated" Ms. Marston's disclosure regarding her husband's connections to the securities industry into the single opaque line on her disclosure report. App. 11a. Ms. Marston attempted to amend that description in 2005 to state that Dr. Marston "gives seminars to financial consultants and investors." *Id.* "[F]or reasons unknown," that information never appeared on the report. *Id.*

- The district court found that, "[d]espite the fact that FINRA imposes an ongoing duty to disclose on its arbitrators, Marston did not clarify or supplement her ADR disclosures at any point throughout Stone's arbitration, even though she was given the opportunity to do so at the beginning of each hearing." App. 12a.

4. In August 2011, petitioner filed an application to vacate the award under FAA § 10. Petitioner argued that Ms. Marston's undisclosed conflicts of interest arising from her spouse's work for the securities industry demonstrated "evident partiality." Among other points, petitioner explained that, in light of Dr. Marston's many ties to the securities industry (including but not limited to his service on the board of an entity controlling a broker-dealer), Ms. Marston was ineligible to serve as a "public" arbitrator under FINRA's rules. C.A. App. 439a-440a.[3]

In May 2012, the district court issued a published decision comprehensively analyzing the parties' contentions and denying petitioner's application. App. 4a-46a. The court recognized at the outset that

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[3] Shortly after petitioner filed his application, FINRA issued a communication to its arbitrators reiterating at length the obligation to investigate and disclose potential conflicts of interest and stating as follows: "Arbitrators who fail to disclose may be subject to permanent removal from the roster. Because arbitrators have a responsibility to do due diligence to ensure that all disclosures are made, excuses will not be tolerated." C.A. App. 331a; *see id.* at 333a-350a. Ms. Marston has not served as a FINRA arbitrator since petitioner's case. *Id.* at 513a-514a. She acknowledged in her deposition that, in light of her husband's board position, she is ineligible to serve as a public arbitrator for FINRA. *Id.* at 514a ("[I]t's pretty clear if he was on the board of a public company that owned a broker-dealer . . . [FINRA] would have had to take me off the list.").

this case presents "several interesting and open questions of law concerning judicial review of an arbitration award." App. 5a.

Addressing first the standard for determining "evident partiality," the district court acknowledged that "determin[ing] what 'evident partiality' means . . . is no easy task, as . . . the courts[] disagree on the appropriate standard." App. 17a. The court surveyed various cases and distilled two approaches. It traced one approach, which it labeled "the 'appearance of bias' standard," to Justice Black's opinion of the Court in *Commonwealth Coatings*. App. 18a-19a. The court derived a second approach, which it termed "the 'actual bias' standard," from a footnote in *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503 (3d Cir. 1994), *aff'd on other grounds*, 514 U.S. 938 (1995). App. 17a-18a. There, the Third Circuit stated that, "to show 'evident partiality,' 'the challenging party must show "a reasonable person would have to conclude that the arbitrator was partial" to the other party to the arbitration.'" 19 F.3d at 1523 n.30 (quoting *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989)). The district court noted that *Apperson* had based its approach on Justice White's concurrence in *Commonwealth Coatings*. App. 21a.

Applying the "actual bias" standard, the district court stated that it had "no difficulty concluding that Stone has failed to show circumstances *so powerfully suggestive of bias* that a reasonable person would *have* to believe that Marston was partial to Respondents." App. 25a. The court opined that "Dr. Marston's relationship with J.P. Morgan is much too tenuous for us to conclude that Marston was evidently partial against Stone." App. 26a. The court reasoned

that Dr. Marston's "paid keynote speech at a J.P. Morgan-sponsored conference in May of 2009" was not indicative of bias because "nothing in the record suggests that this was anything more than a one-time deal" and because Ms. Marston testified that she "'doubt[ed]' she knew that J.P. Morgan sponsored this event." App. 26a-27a.[4]

The district court also suggested that Ms. Marston's attempts in 1996 and 2005 to disclose "her husband's securities industry ties to FINRA" weighed against vacating the arbitration award, even though petitioner never received that information. App. 25a. But the court failed to reconcile that suggestion with its own finding that, "[d]espite the fact that FINRA imposes an ongoing duty to disclose on its arbitrators, Marston did not clarify or supplement her ADR disclosures at any point throughout Stone's arbitration, even though she was given the opportunity to do so at the beginning of each hearing." App. 12a.

The district court alternatively concluded that, "even assuming the circumstances warranted vacatur," petitioner "waived" his challenges by failing to raise them during the arbitration. App. 38a-39a. As with the standard for evident partiality, the court recognized that "[c]ourts have split on the conditions precedent for waiver to apply." App. 40a. "Some courts limit waiver to situations in which the party seeking review of an arbitration award had *full knowledge* of the facts beforehand, but despite that knowledge, did not object until he or she lost." App. 41a (citing

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[4] Although the district court speculated that "Dr. Marston may not have even known the identity of the conference sponsor before he agreed to speak," App. 26a, the contract that Dr. Marston signed for that speech clearly identified J.P. Morgan as the client, C.A. App. 571a.

cases). Other courts hold that "waiver applies if a party either knew or *should have known* of the arbitrator's later-complained-of conflict or bias." *Id.* (citing cases). Although the court acknowledged that what it dubbed "the 'actual knowledge' approach" had the "virtue" of "fostering (more) arbitrator disclosure on the front-end," the court preferred "the 'should have known' approach." App. 42a.

Applying that "should have known" approach, the district court concluded that petitioner waived his challenges because he did not personally investigate Ms. Marston's background during the arbitration. App. 43a ("Stone waived his right to challenge the award by waiting to conduct his full-blown background investigation until after he lost."). The court acknowledged that petitioner's attorneys conducted "due diligence" during the arbitrator-selection process, including "researching the potential arbitrators (including Marston) by running internet searches and reviewing their ADRs and past awards." App. 44a. But the court deemed that investigation insufficient to avoid waiver, even though many of Ms. Marston's most serious conflicts were uncovered only through discovery in the district court. *Id.*

4. The Third Circuit affirmed. App. 1a-3a. It stated that the district court had "in a thoughtful and thorough opinion rejected Stone's arguments" and that "the District Court's reasoning as to all of the arguments raised – as set forth in its 35 page opinion – [was] in no need of amplification or improvement." App. 2a-3a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT'S REVIEW IS WARRANTED TO ADDRESS THE STANDARD FOR DETERMINING WHEN AN ARBITRATOR'S UNDISCLOSED CONFLICTS OF INTEREST ESTABLISH "EVIDENT PARTIALITY" UNDER THE FAA

A. The Courts Of Appeals Are Divided Over The Meaning Of This Court's Decision In *Commonwealth Coatings*

1. Five courts of appeals have adopted what the district court described as the "actual bias" standard for determining when an arbitrator's failure to disclose conflicts of interest warrants vacating an award under FAA § 10(a)(2).

Second Circuit. The "actual bias" standard originated with *Morelite Constructions Corp. v. New York City District Council Carpenters Benefit Funds*, 748 F.2d 79 (2d Cir. 1984). There, the Second Circuit described the standard for determining "what constitutes 'evident partiality' by an arbitrator" as "elusive" and "troublesome." *Id.* at 80, 82. It stated that this Court "attempted to resolve the issue" in *Commonwealth Coatings*, but "the result of that decision appears to be ongoing uncertainty." *Id.* at 82. The Second Circuit characterized Justice Black's opinion for the Court as having been written "for a plurality of four justices" and opined that "much of [his] opinion must be read as dicta." *Id.* at 82, 83. The court further suggested that the opinion of Justice White, who it thought "concurred in the result," represented "the holding" of *Commonwealth Coatings*. *Id.* at 82-83 & n.3. The court ultimately concluded, however, that this Court's "murky" precedent left

it "in the dark" regarding the proper standard for "evident partiality" under § 10. *Id.* at 83.

Operating on what it perceived to be "a relatively clean slate," the *Morelite* court concluded that § 10 requires "a showing of something more than the mere 'appearance of bias' to vacate an arbitration award." *Id.* at 83-84. It held that "'evident partiality' within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Id.* at 84.[5] The court declined to "attempt to set forth a list of familial or other relationships that will result in the *per se* vacation of an arbitration award, except to suggest that such a list would most likely be very short." *Id.* at 85.

The Second Circuit has applied *Morelite* in multiple subsequent cases, involving both disclosed and undisclosed conflicts. For example, in *Lucent Technologies Inc. v. Tatung Co.*, 379 F.3d 24 (2d Cir. 2004), the court held that, despite an arbitrator's very recent service as a paid expert witness for one of the parties, it could not "say that 'a reasonable person would have to conclude that [the] arbitrator was partial to one party to the arbitration.'" *Id.* at 31 (quoting *Morelite*, 748 F.2d at 84); *see also id.* at 30 (quoting from Justice White's opinion in describing what "the Court observed" and what "[t]he Court explained").

In *Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire & Marine Insurance Co.*, 668 F.3d 60 (2d Cir. 2012), the Second Circuit applied *Morelite* to an

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[5] The *Morelite* court concluded that the conflict of interest at issue there – the arbitrator was the son of an officer of a party – was so plainly "unfair[]" that it required vacating the award even under the high bar the court adopted. 748 F.2d at 84.

undisclosed conflict of interest. It explained that, "[a]lthough it would have been far better for [the arbitrators] to have disclosed [the asserted conflict of interest], we do not think disclosure was required to avoid a vacatur of the Award in light of the fact that the relationship did not significantly tend to establish partiality." *Id.* at 78. The court emphasized the high bar for vacatur under *Morelite*: "'[A]n arbitrator is disqualified only when a reasonable person, considering all the circumstances, would *have* to conclude that [the] arbitrator was partial to one side.'" *Id.* at 72 (quoting *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007)) (emphasis in *Applied Indus. Materials*).

Sixth Circuit. The Sixth Circuit adopted the *Morelite* standard in *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344 (6th Cir. 1989). There, the court explained: "We agree with the *Morelite* court's analysis; accordingly, to invalidate an arbitration award on the grounds of bias, the challenging party must show that 'a reasonable person would have to conclude that an arbitrator was partial' to the other party to the arbitration." *Id.* at 1358 (quoting *Morelite*, 748 F.2d at 84).[6] The Sixth Circuit also "agree[d] with the Second Circuit . . . that, in view of Justice White's concurrence in *Commonwealth Coatings*, the plurality's appearance of bias discussion should be considered dicta." *Id.* at 1358 n.19 (citation omitted). Applying the *Morelite* standard, the Sixth Circuit refused to vacate the award even

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[6] Although the arbitration in *Apperson* arose from a labor contract to which the FAA did not apply, the Sixth Circuit "looked to the Act's terms for guidance in reviewing labor arbitration cases." 879 F.2d at 1353 n.9.

though one of the arbitrators had been a law partner of an attorney who had represented one of the parties. *See id.* at 1360-61. According to the *Apperson* court, "[t]hese facts do not amount to the outright chicanery against which Justice White warned in *Commonwealth Coatings*." *Id.* (internal quotations omitted).

In *Nationwide Mutual Insurance Co. v. Home Insurance Co.*, 429 F.3d 640 (6th Cir. 2005), the Sixth Circuit applied *Morelite* and *Apperson* in declining to vacate an arbitration award based on an arbitrator's undisclosed conflicts of interest. The party challenging the award cited *Commonwealth Coatings* in urging the court to apply a "reasonable impression of bias" standard and "to limit application of the *Apperson* standard to so-called 'actual bias' cases, where the evident partiality claim is based on facts known or disclosed and objected to by the challenging party prior to or during the arbitration." *Id.* at 644. The court "disagree[d]" and concluded that the failure to disclose did "not warrant deviation from" *Apperson*. *Id.* at 644-45.

Fourth Circuit. The Fourth Circuit followed *Apperson* in *Peoples Security Life Insurance Co. v. Monumental Life Insurance Co.*, 991 F.2d 141 (4th Cir. 1993). As in *Apperson* and *Morelite*, the court in *Peoples* disregarded Justice Black's opinion of the Court in *Commonwealth Coatings* and instead treated Justice White's concurrence as controlling. *See id.* at 146. The Fourth Circuit held that a party challenging an award "'must show that "a reasonable person would have to conclude that an arbitrator was partial" to the other party to the arbitration.'" *Id.* (quoting *Apperson*, 879 F.2d at 1358); *accord Consolidation Coal Co. v. Local 1643, United Mine Workers*

of Am., 48 F.3d 125, 129 (4th Cir. 1995) (citing *Peoples*); *ANR Coal Co. v. Cogentrix of North Carolina, Inc.*, 173 F.3d 493, 500 (4th Cir. 1999) (quoting *Consolidation Coal*). Applying that standard in a subsequent case, the Fourth Circuit reversed a decision vacating an award, holding that the arbitrator's failure to disclose that his brother was an employee of one of the parties did not establish evident partiality. *See Consolidation Coal*, 48 F.3d at 129-30.

Fifth Circuit. The Fifth Circuit adopted a similar standard in *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278 (5th Cir. 2007) (en banc). There, the original panel relied on *Commonwealth Coatings* in holding that an arbitrator's failure to disclose conflicts of interest "that might create a reasonable impression of the arbitrator's partiality" required vacating the award. *Id.* at 281 (internal quotations omitted). The en banc court rejected that approach, citing *Morelite* and other cases discussed above to support its conclusion that "[a]n arbitrator's failure to disclose must involve a significant compromising connection to the parties." *Id.* at 282-83. Five judges dissented, arguing that "this court may not overrule a decision of the Supreme Court" (i.e., *Commonwealth Coatings*). *Id.* at 286 (Reavley, J., dissenting).

Third Circuit. After the parties in this case filed their appellate briefs, but before the Third Circuit ruled, that court issued a published decision definitively adopting the "actual bias" standard. *See Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240 (3d Cir. 2013). In *Freeman*, the Third Circuit "reaffirm[ed] what [it] said in *Kaplan*" and held that "[a]n arbitrator is evidently partial only if a reasonable person would have to conclude that she was

partial to one side." *Id.* at 253. The court expressly declined to follow the Court's opinion in *Commonwealth Coatings*, dismissing Justice Black's opinion for the Court as a "nonbinding" "plurality opinion" supposedly joined by "only three other justices." *Id.* at 251-52. In light of *Freeman*, it is unremarkable that the Third Circuit resolved this appeal based on the district court's reasoning.

2. Two other courts of appeals have adopted a different approach, faithfully adhering to this Court's actual holding in *Commonwealth Coatings*.

Ninth Circuit. The Ninth Circuit has held that "the legal standard for evident partiality is whether there are 'facts showing a "reasonable *impression* of partiality."'" *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1106 (9th Cir. 2007) (quoting *Schmitz v. Zilveti*, 20 F.3d 1043, 1048 (9th Cir. 1994)) (emphasis added). When it adopted that standard in *Schmitz*, the Ninth Circuit observed that other courts had given "particular weight" to Justice White's concurrence in *Commonwealth Coatings*. 20 F.3d at 1045. Declining to follow that approach, the court explained that "*Commonwealth Coatings* is not a plurality opinion" and noted that "Justice White said he joined in the 'majority opinion.'" *Id.* "Given Justice White's express adherence to the majority opinion," the court concluded, "'[r]easonable impression of partiality' . . . is the best expression of the *Commonwealth Coatings* court's holding." *Id.* at 1047.

Applying the "reasonable impression of partiality" standard, the *Schmitz* court held that an NASD arbitrator's failure to disclose his law firm's former representation of a party's parent company required vacating the award. *See id.* at 1048-49. In *New*

Regency, the Ninth Circuit applied the same standard in holding that an arbitrator's failure to disclose his relationship to a company negotiating a business arrangement with an employee of one of the parties required vacating the award, even though that employee was not acting on the party's behalf in connection with that arrangement. *See* 501 F.3d at 1110-11.

Eleventh Circuit. The Eleventh Circuit applies the same standard as the Ninth Circuit, holding that "an arbitrator is obligated to disclose those facts that create a reasonable impression of partiality." *University Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1339 (11th Cir. 2002) (internal quotations omitted). In *University Commons-Urbana*, the court held that a hearing was required on allegations that an arbitrator and counsel for one of the parties had represented co-defendants in an unrelated matter and that the arbitrator had discussed a potential business arrangement with a non-party whose interests were indirectly implicated in the arbitration. *See id.* at 1340, 1343, 1345; *see also Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1204 (11th Cir. 1982) (per curiam) ("Because the neutral arbitrator failed to disclose his significant connection to some of the parties, thus creating a reasonable appearance of bias, we hold that the district court properly vacated the arbitration award on the ground of evident arbitrator partiality.").

* * *

In sum, there is now a firm, five-circuit rule under which an arbitrator's failure to disclose conflicts of interest warrants vacatur only when a person "would *have* to conclude" that the arbitrator was biased in favor of one party. *Scandinavian Reinsurance*, 668

F.3d at 72 (internal quotations omitted). The Ninth and Eleventh Circuits have declined to follow that "actual bias" approach, however, and have vacated arbitration awards when an arbitrator's undisclosed conflicts of interest create a "reasonable *impression* of partiality." *New Regency*, 501 F.3d at 1106 (internal quotations omitted; emphasis added).

3. Numerous courts have acknowledged the division of authority and confusion in the lower courts regarding the standard for "evident partiality" and the meaning of *Commonwealth Coatings*. The district court below expressly acknowledged that "the courts[] disagree on the appropriate standard" under § 10(a)(2). App. 17a. In *Positive Software*, the Fifth Circuit recognized that the Ninth Circuit "interpret[s] *Commonwealth Coatings* to mandate a 'reasonable impression of bias' standard," contrary to the Second, Fourth, and Sixth Circuits. 476 F.3d at 283. The dissent in *Positive Software* also identified the circuit conflict; it observed that "the *Commonwealth Coatings* ruling has not been well received by some of the circuit courts," but that "[t]he Ninth Circuit followed *Commonwealth Coatings* in *Schmitz*." *Id.* at 287-88 (Reavley, J., dissenting).

The Eighth Circuit has twice noted the circuit conflict, without definitively taking a side. *See Montez v. Prudential Sec., Inc.*, 260 F.3d 980, 983 (8th Cir. 2001) ("The absence of a consensus on the meaning of 'evident partiality' is evidenced by the approaches adopted by the different circuits.") (citing cases); *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157, 159 (8th Cir. 1995) ("[T]here is some uncertainty among the courts of appeals about the holding of *Commonwealth Coatings*.") (citing cases). And, in *Burlington Northern Railroad Co. v. TUCO*

Inc., 960 S.W.2d 629 (Tex. 1997), the Texas Supreme Court analyzed the division of authority in the federal courts of appeals in depth, *see id.* at 633-34, and observed that "[s]tate courts, interpreting the scope of 'evident partiality' under their respective arbitration statutes, are also divided between the broader view reflected by *Schmitz* and the narrower view of *Morelite*," *id.* at 634 (collecting cases).

Commentators have likewise recognized the conflicting decisions and confusion regarding the standard for evident partiality. *See* Bryn Fuller, *Arbitrary Standards for Arbitrator Conflicts of Interest: Understanding the "Evident Partiality" Standard*, 20 PIABA Bar J. 59, 66 (2013) ("Courts are conflicted about the standard for evident partiality."); Kathryn A. Windsor, *Defining Arbitrator Evident Partiality: The Catch-22 of Commercial Litigation Disputes*, 6 Seton Hall Circuit Rev. 191, 193 (2009) ("[T]here is presently no uniformity regarding the definition of evident partiality."); Linas E. Ledebur, *Plurality Rule: Concurring Opinions and a Divided Supreme Court*, 113 Penn. St. L. Rev. 899, 908-09 (2009) (*Commonwealth Coatings* "has led to a large amount of debate and confusion over the Court's true holding" and "[l]ower courts have wrestled with what standard" to apply to evident-partiality challenges); Elizabeth A. Murphy, Note, *Standards of Arbitrator Impartiality: How Impartial Must They Be?*, 1996 J. Disp. Resol. 463, 470 ("federal courts have floundered in the wake of *Commonwealth Coatings*").

In short, the first question presented has been debated extensively in the lower federal courts in the decades since *Commonwealth Coatings*. The result has been a well-developed, deeply entrenched, and widely acknowledged conflict in the circuits regard-

ing the standard for evident partiality under FAA § 10(a)(2). The time is ripe for this Court's review.

B. The Third Circuit's Approach Conflicts With *Commonwealth Coatings*

1. The "reasonable impression of partiality" standard followed by the Ninth and Eleventh Circuits best implements *Commonwealth Coatings*. This Court vacated the award there based on one arbitrator's undisclosed conflict of interest even though the challenger did not argue that the arbitrator "was actually guilty of fraud or bias in deciding th[e] case." 393 U.S. at 147. The Court endorsed "the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." *Id.* at 149. It also noted that it could not "believe that it was the purpose of Congress [in the FAA] to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another." *Id.* at 150. Justice White agreed in his concurring opinion that "it is far better" that any potential conflicts "be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with knowledge of the relationship." *Id.* at 151 (White, J., concurring).

The Ninth and Eleventh Circuits' approach comports with *Commonwealth Coatings* by providing for vacatur when an arbitrator's undisclosed conflicts create a "reasonable impression of partiality." That standard flows from this Court's teaching that vacatur is required when an arbitrator fails to disclose facts that "might create an impression of possible bias" or might "reasonably" cause a party to think that the arbitrator is biased. *Id.* at 149-50. It also comports with Justice White's caution that vacatur might not

be appropriate when the relationship is "trivial" and "too insubstantial to warrant vacating an award," *id.* at 150-52 (White, J., concurring) – that is, when any perceived "impression of partiality" would not be "reasonable" under the circumstances.

2. Courts that have adopted what the district court here described as the "actual bias" standard have erroneously treated Justice White's concurrence as the controlling opinion in *Commonwealth Coatings*. Those courts have reasoned that "Justice White's concurrence [joined by Justice Marshall] was pivotal to the Court's judgment because three Justices dissented." App. 20a. Relying on *Marks v. United States*, 430 U.S. 188 (1977), those courts have seen *Commonwealth Coatings* as a case in which "no one view garners a majority of the Justices," and so "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." App. 20a (internal quotations omitted).

That reasoning is incorrect, however, because a *Marks* analysis is appropriate only when there is no opinion of the Court. In *Marks*, the Court addressed the meaning of *Memoirs v. Attorney General of Massachusetts*, 383 U.S. 413 (1966). In *Memoirs*, Justice Brennan "announced the judgment of the Court and delivered an opinion in which the Chief Justice and Mr. Justice Fortas join[ed]." *Id.* at 414. Without an opinion of the Court explaining the result, this Court determined that "the holding of the Court may be viewed as that position taken by those Members *who concurred in the judgments* on the narrowest grounds." *Marks*, 430 U.S. at 193 (internal quotations omitted; emphasis added). In *Commonwealth Coatings*, by contrast, Justice Black "delivered the

opinion of the Court." 393 U.S. at 145. Justice White did not "concur[] in the judgment[]," *Marks*, 430 U.S. at 193 (internal quotations omitted), but instead simply "concurr[ed]," writing that he was "glad to join [Justice] Black's opinion" and "desire[d] to make . . . additional remarks," 393 U.S. at 150 (White, J., concurring). The existence of an authoritative opinion of the Court in *Commonwealth Coatings* renders *Marks* inapplicable.

Regardless, the courts of appeals that have adopted the "actual bias" standard have misapprehended Justice White's concurrence as rejecting the Court's holding that arbitrators must disclose facts creating a reasonable impression of partiality. *See*, *e.g.*, App. 20a ("Justice Black and Justice White actually agreed on little but the result."). Justice White agreed that an arbitration award must be vacated when an arbitrator fails to disclose a non-trivial conflict, such as having "a substantial interest in a firm which has done more than trivial business with a party." 393 U.S. at 151-52 (White, J., concurring). He opined that vacatur could be avoided only if "both parties are informed of the relationship in advance" or if "the relationship is trivial." *Id*. at 150.

3. Allowing an arbitration award to stand unless the arbitrator's undisclosed conflicts are so egregious that a person "would *have* to conclude that she was partial to one side," *Freeman*, 709 F.3d at 253 (emphasis added), also conflicts with this Court's repeated recognition that "arbitration is a matter of contract," *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013). As Justice White explained in *Commonwealth Coatings*, arbitrators should disclose potential conflicts of interest "at the outset," so that parties can be "free to reject the arbi-

trator or accept him with knowledge of" those potential conflicts. 393 U.S. at 151 (White, J., concurring). Nondisclosure deprives parties of that free choice.

That is especially so in this case, because Ms. Marston's failure to disclose her spouse's extensive relationships with securities firms denied petitioner his contractual right to an arbitration panel composed of a majority of "public" arbitrators – that is, arbitrators unaffiliated with the securities industry. Petitioner's investment agreement with Bear Stearns provided for arbitration proceedings governed by FINRA's rules. *See supra* pp. 5-6. FINRA's rules, in turn, required this arbitration to be conducted by a panel of three arbitrators – two public, and one non-public. *See* FINRA Rule 12401(c); App. 8a.[7]

Although Ms. Marston was designated as a public arbitrator throughout the proceeding, she was in fact not eligible for that designation. *See supra* p. 11. When, as here, parties bargain for their disputes to be resolved by arbitrators meeting certain standards of impartiality, courts should not enforce awards

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[7] When this Court held that claims under the federal securities laws could be resolved through arbitration, it relied on federal agency oversight and approval of the rules promulgated by self-regulatory organizations ("SROs") to govern the arbitration of those claims. *See Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 233-34 (1987) ("[T]he [Securities and Exchange] Commission has broad authority to oversee and to regulate the rules adopted by the SROs relating to customer disputes, including the power to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights."); *see also id.* at 258 n.16 (Blackmun, J., concurring in part and dissenting in part) ("The rules of the Uniform Code [of Arbitration] provide for the selection of arbitrators and the manner in which the proceedings are conducted.").

rendered by arbitrators who violate those standards. *See Commonwealth Coatings*, 393 U.S. at 149 (describing rules of arbitral body as "highly significant" although not "controlling"). Doing so undermines public confidence in arbitration as a system of dispute resolution.

II. THIS COURT'S REVIEW IS WARRANTED TO ADDRESS THE STANDARD FOR WAIVER OF AN EVIDENT-PARTIALITY CLAIM

A. The Circuits Are Divided Over The Waiver Standard

The courts of appeals are also divided over whether a party "waives" its right to seek vacatur based on an arbitrator's undisclosed conflict of interest unless it discovers and objects to that conflict during the arbitration.

1. Several courts of appeals have concluded that a party waives its evident-partiality challenge only when that party has actual knowledge of the facts that form the basis of the challenge but fails to object during the arbitration.

In *Middlesex*, one of the arbitrators failed to disclose his personal involvement in an unrelated legal dispute with one of the parties. When that party later discovered the conflict and sought to vacate the award, its opponent argued that the party "should have known" about the dispute between itself and the arbitrator and that it waived its challenge by "fail[ing] to exercise diligence in investigating [the arbitrator's] identify and background." 675 F.2d at 1202.

The Eleventh Circuit observed that, "[b]y positing that appellants have the duty to inquire into the

background of the arbitrator, appellant attempts to shift to the parties to the arbitration the burden of determining and disclosing bias or the reasonable appearance thereof." *Id.* at 1204. The court rejected that approach, holding that "[w]aiver applies only where a party has acted with full knowledge of the facts" and explaining that "the onus must be placed on the arbitrator to reveal potential bias." *Id.* (internal quotations omitted); *accord University Commons-Urbana*, 304 F.3d at 1340 ("[w]aiver applies only where a party has acted with full knowledge of the facts") (internal quotations omitted).

The Second Circuit followed *Middlesex* in *Morelite*. In vacating the award there, the court rejected an argument that the challenger "waived any objection by its failure to object in a timely fashion." *Morelite*, 748 F.2d at 84 n.5. The *Morelite* court explained that, "[a]lthough it is true that a disgruntled party cannot object after an award has been made, this rule applies only where the party has actual knowledge of the facts that form the basis of the objection." *Id.* (citation omitted); *accord Applied Indus. Materials*, 492 F.3d at 139 n.2 ("Because the arbitrator never disclosed the fact [creating the conflict of interest], petitioner's argument that respondents waived any objection on that basis is without merit.") (citing *Morelite*, 748 F.2d at 84 n.5).

In *Apperson*, the Sixth Circuit agreed with the waiver standard adopted in *Morelite*. The court explained that "[t]he successful party in the [arbitration] may not rely on the failure to object for bias . . . unless [a]ll the facts now argued as to [the] alleged bias were known . . . at the time" the arbitrators heard the dispute. *Apperson*, 879 F.2d at 1359 (inter-

nal quotations omitted; fourth, fifth, and sixth alterations in original).

The Fourth Circuit likewise followed *Morelite* in *ANR Coal*. The court reasoned that, because the party seeking to vacate the award "first learned of the challenged relationships *after* the award," it "certainly ha[d] not waived its rights to object to this information." 173 F.3d at 501 n.5 (citing *Morelite*, 748 F.2d at 84 n.5). The Fourth Circuit further opined that, "because a court must look at all relevant facts to determine evident partiality," the party seeking vacatur had "not waived its right to object to the cumulative effect of the information disclosed pre-award when combined with that learned post-award." *Id.*

2. But other circuits have taken a different approach, holding that a party waives its objections to an arbitrator's undisclosed conflicts unless it investigates the arbitrator's background during the arbitration.

In *JCI Communications, Inc. v. International Brotherhood of Electrical Workers*, 324 F.3d 42 (1st Cir. 2003), the First Circuit concluded that a party waived its evident-partiality claim because it did not "inquire about the backgrounds of the [arbitrators] either before or during the hearing." *Id.* at 52. The court accordingly refused to consider the party's evident-partiality claim. *See id.*

The Ninth Circuit followed a similar approach in *Fidelity Federal Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306 (9th Cir. 2004). There, the court acknowledged the division of authority in the circuits. *See id.* at 1313. Citing *JCI Communications*, the court held that "the better approach" is that "the waiver doctrine applies where a party to an arbitration has

constructive knowledge of a potential conflict but fails to timely object." *Id.*

Based solely on the fact that the assertedly biased arbitrator had been chosen by one of the parties (the panel was composed of two party-appointed arbitrators and one neutral arbitrator), the court concluded that the challenger was "on notice" of potential conflicts. *Id.* at 1312-13. Because the challenger failed to demand a disclosure statement from the arbitrator, the court held that it "waived its right to seek vacatur." *Id.* at 1312. On that basis, the Ninth Circuit did "not reach the issue whether [the arbitrator's] past and present personal and professional relationships with [one party's] attorneys create[d] a reasonable impression of partiality." *Id.*; *see also Kiernan v. Piper Jaffray Cos.*, 137 F.3d 588, 593 (8th Cir. 1998) (challengers "waived their evident partiality claim" because, "[w]hile they did not have full knowledge of all the relationships to which they now object, they did have concerns about [the arbitrator's] impartiality and yet chose to have her remain on the panel rather than spend time and money investigating further until losing the arbitration").

* * *

In sum, a mature division of authority exists in the courts of appeals regarding the standard for waiver of an evident-partiality challenge. Several circuits hold that a party does not waive its challenge unless, with knowledge of the conflicts, it chooses not to object during the arbitration; other courts impose on parties an obligation to investigate arbitrators' backgrounds, on pain of waiver.

B. The Lower Courts' Waiver Holding Is Erroneous

1. In this case, the district court – and the court of appeals, which affirmed "for the reasons set forth by the District Court," App. 3a – held that petitioner waived his evident-partiality challenge because he did not personally investigate Ms. Marston's background during the arbitration. App. 42a-45a. That approach undermines the disclosure obligation adopted in *Commonwealth Coatings* and imposes an inefficient and untenable investigative burden on arbitrating parties.

First, the lower courts' approach in this case cannot be reconciled with *Commonwealth Coatings*. There, the arbitrator's connections to the prevailing party "were unknown to petitioner and were never revealed to it by th[e] arbitrator . . . or by anyone else until after an award had been made." 393 U.S. at 146. The party defending the arbitration award argued that "if appellant desired knowledge as to the existence of such past relationships it was incumbent upon him to inquire." 382 F.2d 1010, 1011 (1st Cir. 1967) (per curiam). This Court rejected that position in favor of "the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." 393 U.S. at 149.

Despite this Court's rejection of the argument that it was "incumbent upon [the arbitrating party] to inquire" about an arbitrator's potential conflicts of interest, 382 F.2d at 1011, the courts below held that petitioner "waived" his evident-partiality challenge because he did not conduct a "full-blown background investigation" during the arbitration, App. 43a. If the lower courts' holdings were correct, *Commonwealth Coatings* would have come out the other way.

Second, the lower courts' waiver standard imposes an unwarranted investigative requirement on arbitrating parties. During the arbitrator-selection process, petitioner's counsel performed "due diligence" on the potential arbitrators, including "running internet searches and reviewing their [disclosure reports]." App. 44a. But Ms. Marston's disclosure report did not reveal her husband's extensive ties to the securities industry, including to respondent J.P. Morgan.

In light of the lower courts' conclusion that petitioner waived his evident-partiality claim despite his counsel's "due diligence," no party can safely rely on an arbitrator's disclosure report to identify conflicts of interest. Instead, parties must conduct a "full-blown background investigation" on every potential arbitrator to preserve the right to challenge an award tainted by undisclosed conflicts. That highly inefficient approach shifts the burden from the arbitrator, who is best positioned to know of and disclose potential conflicts of interest, to the parties, who now must expend considerable time and resources investigating arbitrators' backgrounds exhaustively. *Cf. Holtz v. J.J.B. Hilliard W.L. Lyons, Inc.*, 185 F.3d 732, 743 (7th Cir. 1999) ("[D]uties should rest upon the least-cost avoider."). Moreover, many of the facts regarding Ms. Marston's undisclosed conflicts were uncovered only through the use of discovery tools that are unavailable during the arbitrator-selection process.

2. The district court acknowledged that what it dubbed "the 'actual knowledge' approach" had the "virtue" of "fostering (more) arbitrator disclosure on the front-end." App. 42a. But the court preferred "the 'should have known' approach" because "limiting waiver to situations involving 'actual knowledge'

would encourage willful blindness" and because it "best reflects federal policy favoring the finality of arbitration awards." *Id.* Neither of those rationales for imposing an investigative burden on arbitrating parties is persuasive.

First, limiting waiver to situations where parties know of but fail to object to potential conflicts of interest does not encourage parties to be "willful[ly] blind[]." To ensure that parties know of potential conflicts, an arbitrator need only disclose those circumstances to parties. When a party receives an effective disclosure of the source of potential bias, there is no question that it must either object or be held to have waived any claim for vacatur based on that potential conflict. If anything, the lower courts' approach encourages *arbitrators* to be willfully blind to conflicts of interest, for if the parties are unable to discover and object to those conflicts, any challenge to the award based on them will have been waived.

Second, the policy favoring finality cannot justify the investigative burden imposed by the lower courts. In the analogous context of reopening a district court judgment under Federal Rule of Civil Procedure 60(b), this Court has given "little weight to [an] appeal to the virtues of finality" because "[t]hat policy consideration, standing alone, is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality." *Gonzales v. Crosby*, 545 U.S. 524, 529 (2005). Here, too, the "whole purpose" of FAA § 10 is "to make an exception to [the] finality" of arbitration awards. *Id.* Appeals to finality are therefore "unpersuasive" and entitled to "little weight" in the interpretation of § 10. *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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