No. 13-959

IN THE
Supreme Court of the United States

LAURENCE STONE,
Petitioner,

v.

BEAR, STEARNS & CO., INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly ruled that petitioner failed to establish that one of the three arbitrators hearing his case exhibited "evident partiality" against him.

2. Whether the court of appeals correctly ruled that petitioner waived his right to challenge the arbitration award on the ground of evident partiality because he failed to raise that challenge until after the adverse award was issued, even though the facts underlying that challenge were reasonably available to him before the arbitration took place.

CORPORATE DISCLOSURE STATEMENT

Respondents are direct or indirect wholly owned subsidiaries of JPMorgan Chase & Co. JPMorgan Chase & Co. is a publicly held company. It has no parent corporation, and no publicly held company owns 10% or more of its shares.

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STATEMENT

A. Factual Background

1. Petitioner Laurence Stone invested a total of $9 million from 2005 to 2007 in a fund managed by one of the respondents. Amidst the global financial crisis, that fund depreciated in value. Stone blamed respondents for his losses, claiming in essence that they fraudulently induced him into investing in the fund. Pet. App. 7a.

Stone initiated arbitration proceedings in April 2008 by filing a statement of claim with the Financial Industry Regulatory Authority (FINRA). Pet. App. 7a. He sought roughly $7.6 million in damages. *Id.* Under the FINRA rules then in effect, the arbitration

was to be conducted by a three-member panel composed of one "non-public" arbitrator and two "public" arbitrators. *Id.* 8a. "Non-public" arbitrators must have significant experience in the securities industry, *see* FINRA Rule 12100(p), whereas "public" arbitrators may not have significant ties to that industry, *see* FINRA Rule 12100(u); C.A. App. 453-454 (discussing 2004 amendments to predecessor rule); Pet. App. 8a.

FINRA randomly generated three lists of potential arbitrators: a list of eight non-public arbitrators, a list of eight public arbitrators, and a second list of eight public arbitrators from the chairperson roster. Pet. App. 8a. FINRA forwarded the lists to the parties, accompanied by an arbitrator disclosure report for each of the 24 potential arbitrators, providing "employment history and other background information … , including education, prior awards, and conflict disclosures." *Id.* The parties thereafter ranked the prospective arbitrators according to their preferences. *Id.*

Stone "had absolutely nothing to do with the selection of the arbitrators in his case." Pet. App. 8a; *see* C.A. App. 680 (Stone "didn't think about … if it was important who was on the panel" at any time before award was rendered). He relied instead on his "attorneys to conduct due diligence on the arbitration panel candidates." Pet. App. 9a; *see* C.A. App. 683, 607-608. Stone's attorney team conducted "Internet searches," "reviewed selected copies of … publicly available FINRA arbitration awards," and reviewed the arbitrator disclosure reports provided by FINRA. *Id.* 607.

In September 2008, based on the parties' rankings and the arbitrators' availability, FINRA assigned Gordon Wase (chairperson and public arbitrator), Jerrilyn Marston (public arbitrator), and Dale Pope (non-public

arbitrator) to Stone's case. *See* C.A. App. 464, 469. Neither Stone nor his attorneys raised any objection to the composition of the panel. *See id.* 687.

2. Upon the assignment of the three-member panel in September 2008, the pre-hearing process commenced, with merits hearings eventually scheduled over an eight-month span between September 2010 and May 2011. *See* Pet. App. 52a. "The arbitration did not go well for Stone." *Id.* 5a. Just weeks before the beginning of the merits hearings, the panel, on respondents' motion, unanimously sanctioned Stone $15,000 for discovery violations. *Id.*; *see id.* 49a. Although Stone viewed that sanction as "[g]rossly unfair," he discerned no partiality among the arbitrators and raised no objection to the panel. C.A. App. 686-687; *see id.* 693.

On the day of the first merits hearing, Stone decided, after almost three years of protracted arbitration, to withdraw one of his claims with prejudice. *See* Pet. App. 49a. Respondents again moved for sanctions—this time, for Stone's "'eleventh hour' withdrawal" of his claim—but the panel denied that motion. *Id.*

The merits hearing then began, and the panel ultimately heard a total of 11 days of testimony. *See* Pet. App. 52a. In July 2011, after considering the pleadings and the testimony and evidence presented by the parties, the panel issued its unanimous decision denying Stone's claims in their entirety. *Id.* 50a; *see id.* 14a. The panel also denied the requests of both Stone and respondents for legal fees and costs. *Id.* 50a.

Neither Stone nor his attorneys objected to the panel composition before the award was rendered, and none of the arbitrators exhibited any conduct during the arbitration suggesting a lack of fairness or impartiality. *See* C.A. App. 693, 687-688; Pet. App. 14a, 44a-45a.

3. Stone was "angry" about the outcome of the arbitration, C.A. App. 688, and his "disenchantment was extreme because [he] … lost," *id.* 693. He therefore started "digging for dirt on each of the three arbitrators." Pet. App. 9a.

Stone "began scouring the internet for anything that might suggest one arbitrator or another was biased against him." Pet. App. 43a. He spent approximately 20 hours doing research on the three arbitrators. *Id.* He initially discovered what he considered "possibly pertinent" information regarding Chairperson Wase: that Wase was "on the Philadelphia Trust and Probate Commission with … someone else from JP Morgan." C.A. App. 689. Stone's attorneys told him, however, that that information was immaterial. *Id.* 690. Moving on, Stone found "[n]othing of significance" on Arbitrator Pope. *Id.* He eventually settled on Arbitrator Marston. *See id.* 690-693.

In his search, Stone found nothing in Arbitrator Marston's professional background casting doubt on her fairness or impartiality.[1] Instead, based on information that was publicly available on the Internet but that he had not learned earlier, Stone developed the theory that Arbitrator Marston, an attorney and a lecturer at the University of Pennsylvania Wharton School and Law School, was biased because of connections that her husband Dr. Richard Marston, a profes-

[1] At the time of Stone's arbitration, Arbitrator Marston had had a career as an arbitrator that spanned 16 years and included more than 40 arbitrations, in none of which she had ever been accused of misconduct or bias. Stone's attorneys had already researched Arbitrator Marston's publicly available awards before the arbitration proceedings and had found no cause for concern. *See* C.A. App. 607-608.

sor of finance at the Wharton School, had to the securities industry. Pet. App. 6a; *see* C.A. App. 692-694.[2]

B. District Court Proceedings

1. Stone filed a petition to vacate the arbitration award on the ground that Arbitrator Marston's "undisclosed conflicts of interest arising from her spouse's work for the securities industry demonstrated 'evident partiality.'" Pet. 11. Ultimately, Stone's nondisclosure claim focused on the arbitrator disclosure report that FINRA had provided to the parties on Arbitrator Marston. That report stated that Arbitrator Marston had a "Family Member" who has a "relationship with" the "University of Pennsylvania," but did not provide further details on that point. C.A. App. 471; *see* Pet. App. 5a.

The parties engaged in discovery, which revealed that Arbitrator Marston had conscientiously adhered to her obligation under FINRA rules to disclose any potential conflicts. Arbitrator Marston had disclosed to FINRA, when she applied to become an arbitrator in 1996, that her husband was a professor of finance at Wharton and that he spoke regularly to a wide array of interests in the securities industry. *See* Pet. App. 10a-11a; C.A. App. 485. For unexplained reasons, however, FINRA did not transmit that information to Stone's

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[2] As Stone described it, his attorneys "were quite surprised to learn" of the connection between Arbitrator Marston and Dr. Marston. C.A. App. 694; *see also id.* 608. But Stone's arbitration attorneys stated that they had "reviewed [Arbitrator] Marston's Arbitrator Disclosure Report" and conducted "Internet searches regarding [Arbitrator] Marston." *Id.* 607. Arbitrator Marston and her husband, Dr. Marston, are the first two search results returned on a simple Google search of the terms "Marston and Penn." *Id.* 717-718; *see id.* 682.

legal team. Pet. App. 11a. In 2005, Arbitrator Marston tried to amend her disclosure to read "Family Member is faculty member, Wharton School, University of Pennsylvania, and gives seminars to financial consultants and investors," but again, for reasons unknown, FINRA never amended the disclosure report it provided to parties to reflect that information. *Id.*

Discovery also revealed that Dr. Marston's connection to the securities industry had, at most, a tenuous relation to this case, and that the Marstons were not even aware of certain facts that Stone claimed should have disqualified Arbitrator Marston from serving as a public arbitrator. As an illustrative example of the type of ties on which Stone relied, Stone emphasized that Dr. Marston had conducted a training program for J.P. Morgan personnel. But Dr. Marston's work was for "the old JP Morgan," before it merged with The Chase Manhattan Corp., C.A. App. 560, and ended "in the late 1990s"—more than a decade before the arbitration in this case—when the company "fired [him]," *id.* 512.

Stone also focused on a paid keynote speech that Dr. Marston gave in 2009, at what Stone calls the "J.P. Morgan Asset Management Conference." Pet. 9. But that speech, "about how investors should be reacting to the financial crisis," was given at the University of Chicago Graduate School of Business and was organized and paid for by a third-party vendor—not J.P. Morgan, which was only one of a "list of firms" sponsoring the talk. C.A. App. 557. Moreover, Arbitrator Marston doubted she was even aware that her husband had given that speech. *Id.* 512-513.

Finally, Stone pointed to the fact that Dr. Marston served on the board of W.P. Carey International, a subsidiary of W.P. Carey & Co., a real estate investment

trust, and on the board of Carey Asset Management, which reviews and approves Carey's real estate investments. Stone contended that Arbitrator Marston should have been disqualified from serving as a public arbitrator because Carey Asset Management owns Carey Financial LLC, a registered broker-dealer. But neither Arbitrator Marston nor Dr. Marston was aware at the time of Stone's arbitration of the relationship between Carey Asset Management and Carey Financial. C.A. App. 512, 559.

2. The district court denied Stone's petition to vacate the award.

As the district court explained, Stone's evident-partiality claim was premised on the allegation that Arbitrator Marston "fail[ed] to disclose her husband's relationship with the securities industry in general, and J.P. Morgan in particular," thereby allegedly "'creat[ing] an impression of partiality.'" Pet. App. 10a. But the court concluded that Stone's argument was "factually flawed" because Arbitrator Marston "*did disclose* her husband's affiliation with the securities industry to FINRA." *Id.* As the district court detailed, in her 1996 application to become an arbitrator, Arbitrator Marston explained her husband's position at Wharton and his speaking engagements on securities matters, but no one from FINRA ever "followed-up with Marston about her husband's activities." *Id.* 11a; *see* C.A. App. 505. And it was "FINRA," not Arbitrator Marston, that "translated Marston's relatively detailed disclosure about her husband into 'Family Member has a relationship with [the] University of Pennsylvania.'" *Id.* (alteration in original).

Moreover, not only did Arbitrator Marston disclose her husband's affiliations to FINRA, but she also

"made a specific effort to discover any potential conflicts once she learned FINRA had assigned her to Stone's case." Pet. App. 12a; *see* C.A. App. 512. Having detected no conflicts and having already disclosed her husband's professional activities to FINRA early on, Arbitrator Marston saw no need to re-disclose old issues during the course of Stone's arbitration itself. *See* Pet. App. 12a.

As the court reasoned, "'failure to disclose,' in and of itself, is *not* a basis for vacating an arbitration award. Instead, Marston's alleged non-disclosure of her husband's business dealings has relevance in the vacatur context only to the extent that the non-disclosure reveals evident partiality against Stone." Pet. App. 25a. Yet Arbitrator Marston, in fact, "*did* disclose her husband's affiliation with the securities industry" to FINRA. *Id.* 6a. "This," the court concluded, "is not the conduct of someone with a hidden agenda." *Id.* 25a.

The district court further found that "Dr. Marston's relationship with J.P. Morgan is much too tenuous … to conclude that Marston was evidently partial against Stone." Pet. App. 26a. The training course for J.P. Morgan personnel ended in the late 1990s, "many years before Stone's arbitration began." *Id.* As for the keynote speech in 2009, the court found that "nothing in the record suggests that this was anything more than a one-time deal," and, in any event, it was "a third-party vendor" that "arranged his appearance." *Id.* "And even more importantly," the court credited Arbitrator Marston's testimony that she "'doubt[ed]' she knew that J.P. Morgan sponsored th[at] event." *Id.* 27a. Arbitrator Marston's lack of knowledge, the court concluded, "undercuts any inference of bias" because, of course, "unknown facts … cannot … enter into an arbitrator's thought process." *Id.*

That same reasoning applied to Dr. Marston's involvement with W.P. Carey. As the district court found, "[a]lthough Dr. Marston sat on the board of [an] entity that controlled a broker-dealer, neither he nor arbitrator Marston knew of it until *after* the arbitration, when Stone filed this suit." Pet. App. 27a.

Finally, the court alternatively held that Stone waived any evident-partiality challenge by failing to raise it during the arbitration proceedings. *See* Pet. App. 38a. As the court explained, Stone's challenge "stem[s] from the allegedly non-disclosed information about Dr. Marston that Stone discovered in his belated, post-award investigation." *Id.* 42a-43a. "By his own admission, Stone could have done this research earlier in the process but did not. Instead, Stone waited until he lost and then almost immediately began scouring the internet for anything that might suggest one arbitrator or another was biased against him." *Id.* 43a. Under these circumstances, the court concluded, a finding of waiver was appropriate. *See id.* 44a-45a. "Anything less," the court stated, "would allow, if not encourage, sore losers to do exactly what Stone did in this case: run a post-award background check on each and every arbitrator, not because he perceived any bias during the arbitration, but simply as a tactical response to losing." *Id.*

C. Third Circuit Proceedings

The court of appeals affirmed in an unpublished, summary decision.

In its brief recitation of the facts, the court of appeals made clear that it agreed with the factual findings set forth in the district court's "thoughtful and thorough opinion." Pet. App. 2a. In view of those findings, the court concluded that, even if the legal "concepts of 'evident partiality' and 'waiver' could be further ex-

plored, … this case does not provide the factual setting in which to do so." *Id.* 3a. "[T]he facts here," the court concluded, "do not present a close case as to either issue." *Id.* And, the court stressed, "there is nothing egregious about the award that was unanimously agreed upon by the arbitrators." *Id.*

ARGUMENT

Neither question presented by the petition warrants this Court's review. Stone first contends that the courts of appeals are divided on the standard for vacating an arbitration award on the ground that an arbitrator exhibited "evident partiality." It is true that the courts of appeals have adopted slightly differing formulations of the applicable standard, but it is far from clear that those variations have led to any difference in practice. Stone fails to point to a single case—including his own—in which the court's articulation of the standard would have made a difference in the outcome. And in the last fifteen years, this Court has denied at least eleven petitions for certiorari—including two last year—that implicate the first question presented here.[3]

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[3] *See PAC Pac. Group Int'l, Inc.* v. *NGC Network Asia, L.L.C.*, 134 S. Ct. 265 (2013) (mem.); *Michael Motors Co.* v. *Dealer Computer Servs., Inc.*, 133 S. Ct. 945 (2013) (mem.); *Certain Underwriters at Lloyd's, London* v. *Lagstein*, 131 S. Ct. 832 (2010) (mem.); *Positive Software Solutions, Inc.* v. *New Century Mortg. Corp.*, 551 U.S. 1114 (2007) (mem.); *RDC Golf of Florida I, Inc.* v. *Apostolicas*, 549 U.S. 1253 (2007) (mem.); *Thomas* v. *Hassler*, 549 U.S. 1210 (2007) (mem.); *AFC Coal Props., Inc.* v. *Delta Mine Holding Co.*, 537 U.S. 817 (2002) (mem.); *Brown* v. *Wheat First Sec., Inc.*, 534 U.S. 1067 (2001) (mem.); *Umana* v. *Swidler & Berlin, Chartered*, 533 U.S. 952 (2001) (mem.); *International Bank of Commerce-Brownsville* v. *International Energy Dev. Corp.*, 528 U.S. 1137 (2000) (mem.); *ANR Coal Co.* v. *Cogentrix of N.C., Inc.*, 528 U.S. 877 (1999) (mem.).

There is no reason for the Court to change course and grant review on that issue, especially in this case, which has highly atypical facts that do not present the Court with a suitable vehicle for resolving any purported divergence in the lower courts.

Nor does the issue of waiver warrant certiorari. First, because Stone's evident-partiality challenge fails under any standard, disposition of the waiver question in this case would make no difference in the result. Second, there is again no consequential split among the courts of appeals on this question. The courts of appeals consistently find that waiver is appropriate where, as here, the disappointed party knew or should have known of the purportedly disqualifying conflict during the arbitration proceedings but does not present its challenge until after the proceedings end and the arbitral panel issues its award. Stone contends that there is a clear split between courts of appeals adopting an "actual knowledge" standard and courts adopting a "constructive knowledge" standard, but that is not so. The Second and Fourth Circuits will find waiver even absent actual knowledge, and the Sixth and Eleventh Circuits have never ruled on a case like this one, where the facts forming the basis of the evident-partiality challenge were reasonably available to the challenging party before the arbitration took place.

The petition should therefore be denied.

I. STONE'S "EVIDENT PARTIALITY" CHALLENGE DOES NOT WARRANT REVIEW

"Under the terms of § 9[of the Federal Arbitration Act (FAA)], a court 'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected 'as prescribed' in §§ 10 and 11." *Hall St. Assocs., L.L.C.* v. *Mat-*

tel, Inc., 552 U.S. 576, 582 (2008). "Section 10 lists grounds for vacating an award," *id.*; those grounds are "exclusive," *id.* at 584, and they are limited to "egregious departures from the parties' agreed-upon arbitration" and "extreme arbitral conduct," *id.* at 586; *see also Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010) (petitioner seeking to vacate an arbitration award must clear a "high hurdle"). As relevant here, § 10 provides that a court may 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 Court addressed the meaning of "evident partiality" in *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968). The opinion by Justice Black stated that that phrase denotes "the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." *Id.* at 149. According to that opinion, Congress did not mean to authorize litigants to submit their cases to arbitrators "that might reasonably be thought biased against one litigant and favorable to another." *Id.* at 150.

Justice White, writing for himself and Justice Marshall—whose votes were necessary to make up a majority of the Court—was "glad to join" Justice Black's opinion, but wrote to make "additional remarks," emphasizing that "[t]he Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges." 393 U.S. at 150 (White, J., concurring). Justice White stressed that arbitrators are not "automatically disqualified by a business relationship with the parties before them … if [the parties] are unaware of the facts but the relationship is trivial." *Id.* In his view, the FAA imposes only reasonable disclosure obligations on arbitrators, and they "cannot be expected to provide

the parties with [their] complete and unexpurgated business biograph[ies]." *Id.* at 151. "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." *Id.* at 152. Justice White concluded that "it [was] 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.*

As Stone observes, some lower courts have debated whether Justice Black's opinion actually reflects the opinion of the Court, or whether Justice White's opinion sets forth a narrower rule that controls the standard for evident-partiality challenges under § 10. But, as noted, this Court has consistently declined to review that question; it has denied multiple petitions for certiorari addressed to the purported split in authority concerning the "evident partiality" standard. *See supra* pp. 10-11 & n.3. That is because the split is a superficial one: notwithstanding the somewhat differing labels that the courts of appeals affix to their analysis, there is broad consensus on what constitutes "evident partiality." All the courts of appeals agree, moreover, that the question of "evident partiality" is a highly fact-intensive one, which suggests that further refinement of the standard is neither necessary nor particularly useful.

This petition should be denied as well. The Third Circuit's unpublished order did not even take a side on the split that Stone identifies. The court of appeals concluded that, even if "the concept[] of 'evident partiality' … could be further explored by our Court, … this case does not provide the factual setting in which to do so." Pet. App. 3a. It follows *a fortiori* that this is an inappropriate vehicle for this Court's review. In-

deed, Stone conspicuously fails to identify a single case—including his own—where the court's selection of one "evident partiality" standard over another would determine the outcome. In addition, the idiosyncratic facts of this case—where the arbitrator *did* disclose the challenged affiliations, but the arbitration organization failed to provide them to the parties—make it a particularly poor vehicle for articulating a standard to be applied in all evident-partiality challenges.

A. Stone's Description Of The Split In Authority Is Exaggerated

According to Stone, this Court should grant review to resolve a purported split on the definition of "evident partiality"—between courts adopting an "actual bias" standard, which requires a showing that "a reasonable person would have to conclude that an arbitrator was partial to one party in the arbitration," Pet. 16, and courts adopting a "reasonable impression of partiality" standard, which requires a showing of a "reasonable appearance of bias," *id.* 21. But there is no Manichean distinction between a so-called "actual bias" standard, on the one hand, and a "reasonable impression of partiality" standard, on the other. To the contrary, the courts of appeals are in general agreement on what does, and what does not, constitute "evident partiality" under the FAA.

Courts on both sides of the purported split "agree that nondisclosure alone does not require vacatur."[4]

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[4] *Positive Software Solutions, Inc.* v. *New Century Mortg. Corp.*, 476 F.3d 278, 282 (5th Cir. 2007) (en banc) (citing cases); *see New Regency Prods., Inc.* v. *Nippon Herald Films, Inc.*, 501 F.3d 1101, 1110 (9th Cir. 2007) ("vacatur is only appropriate if the conflict left undisclosed was real and not trivial") (internal citation and quotation marks omitted); *see also Lozano* v. *Maryland Cas. Co.*,

Courts also consistently recognize that the phrase "evident partiality" "means more than a mere appearance of bias."[5] Courts likewise are consistent in recognizing that "[t]he alleged partiality must be direct, definite and capable of demonstration rather than remote, uncertain or speculative."[6] And, finally, courts have made clear that "proof of actual bias" is not required.[7] This

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850 F.2d 1470, 1471(11th Cir. 1999) (per curiam) ("where trivial, disclosure is not required" (citing *Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring)).

[5] *Florasynth, Inc.* v. *Pickholz*, 750 F.2d 171, 173 (2d Cir. 1984); *see Lifecare Int'l, Inc.* v. *CD Med., Inc.*, 68 F.3d 429, 433 (11th Cir. 1995) ("[T]he mere appearance of bias or partiality is not enough to set aside an arbitration award."), *as modified*, 85 F.3d 519 (11th Cir. 1996); *Plumbers & Pipe Fitters Local Union No. 442* v. *Ford Constr. Co.*, 7 F. App'x 558, 559 (9th Cir. 2001) (explaining, in collective bargaining case, that "evident partiality" requires a "reasonable basis to think that the arbitrator might be biased in [appellee's] favor").

[6] *Peoples Sec. Life Ins. Co.* v. *Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993) (internal quotation marks omitted); *see Freeman* v. *Pittsburgh Glass Works, LLC*, 709 F.3d 240, 253 (3d Cir. 2013) ("'alleged partiality must be direct, definite, and capable of demonstration'"); *Aviles* v. *Charles Schwab & Co.*, 435 F. App'x 824, 828 (11th Cir. 2011) (per curiam) (party challenging award "must show that the alleged partiality is 'direct, definite and capable of demonstration rather than remote, uncertain and speculative'"); *Lifecare Int'l, Inc.*, 68 F.3d 429 at 433 (same); *Lagstein* v. *Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 646 (9th Cir. 2010) (relying on decision from Eighth Circuit, and rejecting evident-partiality challenge in nondisclosure case where plaintiff "failed to show any connection" between the parties and the challenged arbitrator "that would give rise to a reasonable impression of partiality toward [appellant]").

[7] *Consolidation Coal Co.* v. *Local 1643, United Mine Workers of Am.*, 48 F.3d 125, 129 (4th Cir. 1995) (internal quotation marks omitted); *see Morelite Constr. Corp.* v. *New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) ("[W]e

broad consensus provides lower courts with sufficient guidance to apply the FAA in a consistent fashion. Whatever divergent results there may be from case to case turn not on the standard the court articulates, but rather the particular facts of the case. *See infra* pp. 19, 21-22 & n.10.

Stone contends that the Ninth and Eleventh Circuits read *Commonwealth Coatings* correctly, and that only their articulation of a "reasonable impression of partiality" standard faithfully implements the FAA. But his description of the Ninth and Eleventh Circuits' case law overstates those courts' purported deviation from the majority rule.

Stone points to *New Regency Productions, Inc.* v. *Nippon Herald Films, Inc.*, 501 F.3d 1101 (9th Cir. 2007), for the authoritative articulation of the Ninth Circuit's "reasonable impression of partiality" standard. *See* Pet. 20. But in that decision, the court of appeals had no difficulty relying on decisions from other courts of appeals that purportedly adopt a different standard to hold that "vacatur is only appropriate if the conflict left undisclosed was real and not trivial." 510 F.3d at 1110 (internal citation and quotation marks omitted). Citing decisions from the Fourth and Fifth Circuits, which allegedly inhabit the other side of the split, the Ninth Circuit concurred that, "[u]nderstandably, courts have rejected claims of evident partiality based on long past, attenuated, or insubstantial connections between a party and an arbitrator." *Id.* There is in practice no difference between

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cannot countenance the promulgation of a standard for partiality as insurmountable as 'proof of actual bias[.]'"); *Fidelity Fed. Bank, FSB* v. *Durga Ma Corp.*, 386 F.3d 1306, 1312 (9th Cir. 2004) ("a showing of actual bias is not required").

that standard and the one used by the Second, Third, Fourth, Fifth, and Sixth Circuits, which likewise require the alleged partiality to be "direct, definite and capable of demonstration rather than remote, uncertain or speculative." *Peoples Sec. Life Ins. Co.* v. *Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993) (internal quotation marks omitted); *see Freeman*, 709 F.3d at 253; *Scandinavian Reinsurance Co.* v. *St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 72-73 (2d Cir. 2012); *Householder Group* v. *Caughran*, 354 F. App'x 848, 852 (5th Cir. 2009) (per curiam); *Uhl* v. *Komatsu Forklift Co.*, 512 F.3d 294, 306-307 (6th Cir. 2008).

The same holds true for the Eleventh Circuit. Stone contends that 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.'" Pet. 21. But the Eleventh Circuit's case law actually makes clear that the "evident partiality" standard is a demanding one "to be strictly construed, as it must be if the federal policy favoring arbitration is to be given full effect." *Gianelli Money Purchase Plan & Trust* v. *ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998) (citation omitted). Thus, in *Lifecare International, Inc.* v. *CD Medical, Inc.*, 68 F.3d 429 (11th Cir. 1995), *as modified*, 85 F.3d 519 (11th Cir. 1996), the court stated that it adheres to a "reasonable impression of partiality" standard, but also stressed "that the alleged partiality must be direct, definite and capable of demonstration rather than remote, uncertain and speculative," and that "the mere appearance of bias or partiality is not enough to set aside an arbitration award." *Id.* at 433 (internal quotation marks omitted). In so holding, the court cited liberally to precedent from the Second, Fourth, and Ninth

Circuits—courts that, according to Stone, are on opposing sides of the purported split. *See id.*

In *University Commons-Urbana, Ltd.* v. *Universal Constructors Inc.*, 304 F.3d 1331 (11th Cir. 2002)—the case Stone relies on for his description of the split, *see* Pet. 21—the court of appeals explicitly relied on its earlier decision in *Lifecare*, and stated that an arbitration award may be subject to challenge "*only* when either (1) an actual conflict exists or (2) the arbitrator "kn[ew] of, but fail[ed] to disclose, information which would lead a reasonable person to believe that a potential conflict exists." 304 F.3d at 1339 (internal quotation marks omitted; emphasis added). The Eleventh Circuit did not rule in that case that an arbitral award *must* be vacated under those circumstances; rather, it explained that vacatur is inappropriate *unless*, at a minimum, such facts are shown. The Eleventh Circuit did not invalidate the award in that case, but merely held that the district court had improperly terminated discovery. *See id.* at 1340-1342.[8] In sum, there is no consequential difference between the "reasonable impression of partiality standard" the Eleventh Circuit has applied and the standard used elsewhere.

In fact, while courts of appeals use a variety of formulations to articulate the "evident partiality" standard, they have no difficulty applying *Commonwealth Coatings*. Following Justice White's caution that "[t]he judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality," 393 U.S. at 151

[8] On remand, the district court confirmed the award, finding, among other things, that the alleged potential conflict had only a tenuous connection to the case. *See University Commons-Urbana, Ltd.* v. *Universal Constructors, Inc.*, 301 F. Supp. 2d 1297, 1301 (N.D. Ala. 2004).

(White, J., concurring), courts have taken a flexible, fact-intensive approach to determining whether a party has demonstrated evident partiality. As the Fifth Circuit has explained, "[t]he 'reasonable impression of bias' standard is thus interpreted practically rather than with the utmost rigor." *Positive Software Solutions, Inc.* v. *New Century Mortg. Corp.*, 476 F.3d 278, 283 (5th Cir. 2007) (en banc); *see, e.g.*, *Lucent Techs. Inc.* v. *Tatung Co.*, 379 F.3d 24, 28 (2d Cir. 2004) ("This court has … viewed the teachings of *Commonwealth Coatings* pragmatically, employing a case-by-case approach in preference to dogmatic rigidity." (internal quotation marks omitted)); *University Commons-Urbana, Ltd.*, 304 F.3d at 1345 ("[T]he 'evident partiality' question necessarily entails a fact intensive inquiry [as t]his is one area of the law which is highly dependent on the unique factual settings of each particular case." (alterations in original; internal quotation marks omitted)); *see also Scandinavian Reinsurance Co.*, 668 F.3d at 74 & n.18 (listing "variety of factors for use in guiding a district court in the application of the evident-partiality test," all of which are "useful" but not "mandatory, exclusive or dispositive").[9]

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[9] Stone omits the First, Seventh, Eighth, Tenth, and D.C. Circuits from his description of the purported split, noting only that the Eighth Circuit has remarked on the split but never taken a side. *See* Pet. 22. These courts evidently have not seen the need to settle on one formulation of the standard, and have instead taken a practical, case-by-case approach to the question. *See, e.g.*, *Merit Ins. Co.* v. *Leatherby Ins. Co.*, 714 F.2d 673, 680, 682 (7th Cir. 1983) (acknowledging "suggestion" in prior decision that "'appearance of bias' is a proper standard," but declining to specifically endorse that standard and emphasizing instead that "the standard is an objective one, but less exacting than the one governing judges"); *Olson* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157, 159 (8th Cir. 1995) (discussing different interpretations of

Given the courts of appeals' coalescence around the basic principles that animate "evident partiality" review, Stone fails to present a compelling reason why this Court's intervention is required. Indeed, this case would not be a suitable vehicle for resolution of any disagreement because the standard for evident partiality would not have made any difference here. The court of appeals found that this was not "a close case." Pet. App. 3a. And the district court concluded that "Dr. Marston's relationship with J.P. Morgan is much too tenuous … to conclude that [Arbitrator] Marston was evidently partial against Stone." *Id.* 26a. Even under the law of the Ninth and Eleventh Circuits as Stone sees it, his claim would have failed: None of Dr. Marston's connections with the securities industry suggests that Arbitrator Marston "had any financial or personal interest in the outcome of the arbitration," *Lagstein* v. *Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 646 (9th Cir. 2010) (internal quotation marks omitted), and none of those dealings "would lead a reasonable person to believe that a potential conflict exists," *Uni-*

Commonwealth Coatings but deciding that "[w]e need not sort out this uncertainty to decide [appellant's] case"); *see also JCI Commc'ns, Inc.* v. *International Bhd. of Elec. Workers*, 324 F.3d 42, 51 (1st Cir. 2003) (relying on cases from courts of appeals comprising both sides of the purported split in discussing the "evident partiality" standard); *Ormsbee Dev. Co.* v. *Grace*, 668 F.2d 1140, 1147-1148, 1150-1151 (10th Cir. 1982) (discussing both opinions in *Commonwealth Coatings* but not articulating a standard for evident partiality, and requiring "the evidence of bias or interest of an arbitrator [to] be direct, definite and capable of demonstration rather than remote, uncertain, or speculative"); *Al-Harbi* v. *Citibank, N.A.*, 85 F.3d 680, 683 (D.C. Cir. 1996) (finding that "the burden on a claimant for vacation of an arbitration award due to 'evident partiality' is heavy," and claimant in that case failed to "establish specific facts that indicate improper motives on the part of [the] arbitrator" (internal quotation marks omitted)).

versity Commons-Urbana, Ltd., 304 F.3d at 1339 (internal quotation marks omitted). Indeed, the district court cited case law from both sides of the purported split, *see* Pet. App. 27a (citing *University Commons-Urbana, Ltd.*, 304 F.3d at 1341), and used a variety of formulations—some reflecting what Stone refers to as an "actual bias" standard, others reflecting what he calls an "appearance of bias" standard—in assessing the issue of evident partiality, *see, e.g.*, *id.* 28a ("a reasonable person could very well believe"); *id.* ("or so a reasonable person might believe"). There is no indication that the standard mattered here.

Indeed, Stone has not pointed to a single case where the court's adoption of one standard over another determined the outcome. The most likely candidate for that argument would be the Fifth Circuit's closely divided en banc decision in *Positive Software*, where the majority adopted what Stone refers to as the "actual bias" standard. But in that case, the majority then found that the asserted connection between the arbitrator and one party's counsel was "trivial," 476 F.3d at 283—that is, that it would not satisfy even the "appearance of bias" test, *see id.* at 285: "They were two of thirty-four lawyers, and from two of seven firms, that represented" a third party in prior litigation unrelated to the arbitration, "which ended at least seven years before the … arbitration," *id.* at 284. Drawing on case law from both sides of the alleged split, the court explained that "[n]o case we have discovered in research or briefs has come close to vacating an arbitration award for nondisclosure of such a slender connection between the arbitrator and a party's counsel. In fact, courts have refused vacatur where the undisclosed connections are much stronger." *Id.* The outcome in *Positive Software* reinforces that what matters in evident-partiality chal-

lenges is not so much the legal standard as the facts of the case. The facts here would warrant rejection of such a challenge under any standard.[10]

B. This Idiosyncratic Case Is An Unsuitable Vehicle For Resolving Any Disagreement On The Legal Standard

The unique circumstances of this case also make it a singularly poor vehicle for articulating a standard for "evident partiality" that would govern all arbitration cases under the FAA. The issue of evident partiality arises most frequently in two fact patterns: where the arbitrator announces his potentially disqualifying conflicts during the arbitration but the arbitration nonetheless proceeds to decision, and one party later attacks that decision in federal-court proceedings (so-called "actual bias" cases); and where the arbitrator, though aware of a conflict that might be disqualifying under rules of the arbitral panel, nonetheless fails to reveal it (so-called "nondisclosure" cases). *See Freeman*, 709 F.3d at 254 (explaining distinction); *Nationwide Mut. Ins. Co.* v. *Home Ins. Co.*, 429 F.3d 640, 644-645 (6th Cir. 2005) (same). This case does not fall into either of

[10] Ultimately, the real disagreement between the dissenting judges and the majority in *Positive Software* concerned the "trivial[ity]" *vel non* of the connections between the arbitrator and party counsel. According to the dissenting judges, that relationship was far from trivial, *see* 476 F.3d at 289-290, "and certainly would have prevented [appellee] from resting its case with" the arbitrator, *id.* at 290. Thus, even if the dissenting judges had agreed with the majority on the formulation of the "evident partiality" standard, they would have vacated the arbitration award—further evidence that the standard matters less than the court's highly fact-bound view of the nature of the relationship between an arbitrator and a party.

those fact patterns; instead, the facts here are *sui generis* and ill-suited for review.

Arbitrator Marston disclosed to FINRA—twice—information about her husband's connections to the securities industry and welcomed further questions from FINRA on that subject. Pet. App. 25a-26a; *see id.* 11a-12a. It was FINRA's failure to disclose those details to Stone that gave rise to the evident-partiality challenge at issue. This case therefore does not present the Court with a suitable vehicle for deciding whether an arbitrator exhibits "evident partiality" when she fails to disclose potential conflicts of which she was aware. That, quite simply, is not what happened in this case.[11]

Courts that have found evident partiality in non-disclosure cases have concluded that "[a] reasonable person would have to conclude that an arbitrator who failed to disclose under such circumstances"—*i.e.*, where she "knows of a material relationship with a party and fails to disclose it"—"was partial to one side." *Applied Indus. Materials Corp.* v. *Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007). No such inference is warranted where, as here, the arbitrator did in fact disclose the challenged relationship: As the district court aptly observed, Arbitrator Marston's disclosures to FINRA are "not the conduct of someone with a hidden agenda." Pet. App. 25a. Courts

[11] Moreover, despite making "a specific effort to discover any potential conflicts once she learned FINRA had assigned her to Stone's case," Pet. App. 12a, Arbitrator Marston was unaware of the other purported source of her conflict until Stone filed this suit: the fact that Carey Asset Management, where her husband served as a board member, owned a broker-dealer, *id.* 13a, 27a. Indeed, her husband was *also* unaware of that fact. *Id.* There was, accordingly, no way that Arbitrator Marston could have disclosed that information.

have rejected evident-partiality challenges in such circumstances because vacating an arbitration award "where the arbitrator has disclosed potential conflicts of interest to the [arbitration association] but the [association] thereafter did not forward the information to a party … would serve no public purpose." *Lucent Techs. Inc.*, 379 F.3d at 27 (internal quotation marks omitted); *see id.* at 28-29.

In addition, this case may be atypical of arbitration cases more generally—and thus a poor vehicle for resolving questions about the "evident partiality" standard—because it does not involve an arbitrator who was experienced in the relevant industry. As the Court recognized in *Commonwealth Coatings*, parties often select arbitrators precisely because of their deep knowledge of the industry: "It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function." 393 U.S. at 150 (White, J., concurring); *see also Scott* v. *Prudential Sec., Inc.*, 141 F.3d 1007, 1016 (11th Cir. 1998) ("[A]n arbitrator's experience in an industry, far from requiring a finding of partiality, is one of the factors that can make arbitration a superior means of resolving disputes."). The principal challenge in articulating an "evident partiality" standard is to allow the parties to select arbitrators who may well have firsthand knowledge of the issues while also ensuring that those arbitrators do not have such close connections to the parties that they would be considered partial to one side. *See Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring) ("[A]rbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. I see

no reason automatically to disqualify the best informed and most capable potential arbitrators.").

This case, however, is not conducive to exploring the expertise-impartiality tradeoff inherent in that kind of arbitration case, because Marston was meant to be a public arbitrator—*i.e.*, one not affiliated with the securities industry. If the Court were inclined to revisit *Commonwealth Coatings* and further elucidate the meaning of "evident partiality," it ought to do so in a case where it can explore the particular partiality concerns implicated by industry-affiliated arbitrators.

II. THE ISSUE OF STONE'S WAIVER DOES NOT WARRANT REVIEW

The second question presented also does not warrant this Court's review. As an initial matter, the question of waiver is not independently worthy of certiorari in this case because, whether or not Stone waived his right to pursue his evident-partiality challenge, that challenge fails on the merits under any standard. *See supra* pp. 20-21. In any event, Stone's depiction of a split among the courts of appeals on the issue of waiver is exaggerated. The absence of a current, consequential split in authority on this question obviates the need for this Court's review.

According to Stone, the First, Eighth, and Ninth Circuits have held "that a party waives its objections to an arbitrator's undisclosed conflicts unless it investigates the arbitrator's background during the investigation." Pet. 30. In conflict with those courts of appeals, Stone says, the Second, Fourth, Sixth, and Eleventh Circuits "have concluded that a party waives its evident-partiality challenge only when that party has actu-

al knowledge of the facts that form the basis of the challenge but fails to object during the arbitration." *Id.* 28.

As to the Second and Fourth Circuits, that description is wrong. Those courts have articulated a standard that requires less than actual knowledge. *See Lucent Techs. Inc.*, 379 F.3d at 28 (Second Circuit has "declined to vacate awards because of undisclosed relationships where the complaining party should have known of the relationship, *or could have learned of the relationship* just as easily before or during the arbitration rather than after it lost its case" (emphasis added; internal citation and quotation marks omitted)); *Remmey* v. *PaineWebber, Inc.*, 32 F.3d 143, 148 (4th Cir. 1994) (refusing to sustain impartiality challenge where disclosure information "*was at [challenger's] disposal* before the arbitration began and nothing prevented [challenger] from using it before participating in the arbitration" (emphasis added)).

Stone also overreads the Eleventh Circuit's decision in *Middlesex Mutual Insurance Co.* v. *Levine*, 675 F.2d 1197 (11th Cir. 1982) (per curiam). There, the court held that, on the facts of that case, where adverse information about an arbitrator was not known to the individuals conducting the arbitration but was known to persons working for their corporate affiliates, "[t]he law does not require that [the arbitrating party] check its vast corporate files in each separate division to ascertain whether an arbitrator has violated his duty of disclosure." *Id.* at 1203. That situation bears little resemblance to this case, where Stone was able to discover information about Arbitrator Marston with a few hours' research on the Internet but failed to conduct that (or any) research before the arbitration took place. Were the Eleventh Circuit presented with a case like this one,

it might well find its decision in *Middlesex* (which is more than three decades old) to be distinguishable.

As for the Sixth Circuit, that court has not addressed the issue in 25 years. *See Apperson* v. *Fleet Carrier Corp.*, 879 F.2d 1344 (6th Cir. 1989). Although the court in *Apperson* employed an actual-knowledge standard, it was not dispositive to the case. There, the court concluded that the challenging party had waived its objection to one arbitrator because it *did have* actual knowledge of the facts that formed the basis of the challenge and to another because it failed to allege any facts regarding its knowledge so as to defeat summary judgment; the court was not presented with a case where the challenging party did not actually know, but reasonably could have known, those facts. *See id.* at 1359. If the question were put to the Sixth Circuit today, it might well adopt a standard that looks to what the challenging party reasonably could have known. The courts of appeals that have considered the issue since *Apperson* have adopted such a standard, and whereas *Apperson* relied on a First Circuit case for its articulation of the "actual knowledge" standard, the First Circuit has since concluded that a party waives a challenge when it fails to "inquire about the backgrounds of the [arbitrators] either before or during the hearing." *JCI Commc'ns, Inc.* v. *International Bhd. of Elec. Workers*, 324 F.3d 42, 52 (1st Cir. 2003) (cited at Pet. 30).

As the courts of appeals have regularly observed, a waiver standard that looks to whether the information forming the basis of the challenge was reasonably available to the challenging party best respects the policy of the FAA to treat arbitration awards as final and binding, subject only to very narrow exceptions. *See, e.g.*, *Fidelity Fed. Bank, FSB* v. *Durga Ma Corp.*, 386 F.3d 1306, 1313 (9th Cir. 2004) ("Holding that the waiver doc-

trine applies where a party to an arbitration has constructive knowledge of a potential conflict but fails to timely object is the better approach in light of our policy favoring the finality of arbitration awards."). An actual-knowledge standard, by contrast, would discourage parties from conducting due diligence on the arbitrators' backgrounds until after the hearing was finished, and would encourage disappointed parties to scour for facts that might form the basis for challenges after they had lost at the hearing. *See* Pet. App. 44a-45a. As this case shows, such challenges may require extended procedures, including discovery, to resolve. Such drawn-out challenges are hardly consistent with the overarching purpose of the FAA: to provide an efficient and timely method of dispute resolution. *See AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1749 (2011).

Finally, there is no inconsistency between the waiver standard applied by the majority of the courts of appeals and this Court's decision in *Commonwealth Coatings*. Stone contends that, in reversing the First Circuit, this Court repudiated the appellee's argument that "if appellant desired knowledge as to the existence of such past relationships it was incumbent upon him to inquire." Pet. 32 (quoting 382 F.2d 1010, 1011 (1st Cir. 1967) (per curiam)). That is wrong; neither Justice Black's opinion nor Justice White's opinion said anything about the duty of the parties to the arbitration. Rather, Justice Black simply articulated a general "requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." 393 U.S. at 149. Imposing such a requirement on arbitrators was not in any way tantamount to licensing arbitration parties' abdication of their duty to inquire.

Here, Stone undertook that inquiry—but only after the arbitration decision made it worth his while. *See*

Commonwealth Coatings, 393 U.S. at 151 (White, J., concurring) (fearing that "a suspicious or disgruntled party [might] seize on [an arbitrator's nondisclosure] as a pretext for invalidating the award"). The lower courts' waiver analysis reflects a straightforward application of the weight of authority, which finds waiver when the facts forming the basis of the purportedly disqualifying conflict were reasonably available to the challenging party before or during the hearing. "In determining what a plaintiff should have known, we ask what facts a reasonably diligent plaintiff would have considered." *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1223 (2013). The lower courts were not required to speculate about that question in this case, because Stone discovered the purportedly disqualifying information through straightforward Internet research that easily could have been conducted before the arbitration proceedings. The holding that Stone waived his evident-partiality challenge—which was, in any event, meritless—is correct, consistent with the overwhelming weight of authority, and inappropriate for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2014