No. 23-506

IN THE

Supreme Court of the United States

OCCIDENTAL EXPLORATION AND PRODUCTION COMPANY,

Petitioner,

v.

ANDES PETROLEUM ECUADOR LIMITED,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner made no showing that its party-nominated arbitrator exhibited "evident partiality" and that vacatur under 9 U.S.C. § 10(a)(2) was therefore not warranted.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, counsel for Respondent Andes Petroleum Ecuador Limited ("Andes" or "Respondent") states as follows:

1. Andes is owned 100% by Andes Petroleum Company Limited ("APC").

2. APC is owned 55% by CNPC International Ltd. ("CNPCI") and 45% by Sinopec Overseas Oil & Gas Limited ("SOOGL").

3. CNPCI is owned 100% by China National Oil and Gas Exploration and Development Corporation ("CNODC"), and CNODC is owned 100% by China National Petroleum Corporation ("CNPC"). CNPC is wholly owned by the State-owned Assets Supervision and Administration Commission of the State Council of the People's Republic of China ("SASAC"). SOOGL is owned 100% by Sinopec International Petroleum Exploration and Production Corporation ("SIPC"), and SIPC is owned: (i) 30% by China Petroleum Corporation ("Sinopec Group"); (ii) 40% by China Chengtong Kechuang Investment Co. Ltd., which is owned 100% by China Chengtong Holdings Group Co. Ltd.; and (iii) 30% by China Reform Yuanbo Investment (Beijing) Co., Ltd., which is owned 100% by China Reform Holdings Co. Ltd. (China). Sinopec Group, China Chengtong Holdings Group Co., Ltd., and China Reform Holdings Co., Ltd. are wholly owned by the SASAC.

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INTRODUCTION

This case does not warrant review. Petitioner Occidental Exploration and Production Company ("OEPC" or "Petitioner") asks this Court to clarify the meaning of "evident partiality" in 9 U.S.C. § 10(a)(2), which authorizes vacatur of an arbitration award "where there was evident partiality." This Court has previously denied petitions presenting this general question at least *fifteen* times.[1] There is no reason to treat this petition differently. What constitutes "evident partiality" is an inherently factbound issue, and every circuit to address the issue analyzes the materiality of the alleged

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[1] *See Seldin* v. *Est. of Silverman*, 141 S. Ct. 2622 (2021) (mem.); *Monster Energy Co.* v. *City Beverages LLC*, 141 S. Ct. 164 (2020) (mem.); *Managed Care Ins. Consultants, Inc.* v. *United Healthcare Ins. Co.*, 138 S. Ct. 1168 (2018) (mem.); *Mendel* v. *Morgan Keegan & Co.*, 138 S. Ct. 1166 (2018) (mem.); *Turnberry/MGM Grand Towers, LLC* v. *Sussex*, 136 S. Ct. 156, (2015) (mem.); *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.); *Int'l Bank of Commerce-Brownsville* v. *Int'l Energy Dev. Corp.*, 528 U.S. 1137 (2000) (mem.); *ANR Coal Co.* v. *Cogentrix of N.C., Inc.*, 528 U.S. 877 (1999) (mem.).

relationship that allegedly gave rise to arbitrator bias. Whatever differences may exist in terminology are academic. Moreover, even assuming the question implicates a substantive split, this case is a poor vehicle because the question presented is not outcome-determinative: Petitioner would have lost in any circuit, because it provided "no evidence" that the arbitrator was partial or had a "material relationship" with an interested party from which "a reasonable person could reasonably infer . . . the possibility of bias." Pet. App. 4–5. Lastly, the Second Circuit's analytical framework is correct. The petition should be denied.

* * *

Petitioner argues that courts have split over the meaning of "evident partiality" in 9 U.S.C. § 10(a)(2), as this Court construed that term in *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968). According to Petitioner, while the Ninth and Eleventh Circuits hold that an arbitration award may be vacated under § 10(a)(2) so long as there is an "appearance of bias," *see* Pet. 23–25, the First, Second, Third, Fourth, Fifth, and Sixth Circuits apply a more stringent standard, *see* Pet. 20–23.

Petitioner is incorrect. The Ninth and Eleventh Circuits agree with the decision below that a mere "appearance of bias" is not "evident partiality." As the Eleventh Circuit puts it, "the mere appearance of bias or partiality is not enough to set aside an arbitration award." *Lifecare Int'l, Inc.* v. *CD Med., Inc.*,

68 F.3d 429, 433 (11th Cir. 1995). And "[u]nlike the standard for judges," the Ninth Circuit reasoned, "parties must demonstrate more than a mere appearance of bias to disqualify an arbitrator." *Employers Ins. of Wausau* v. *Nat'l Union Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481, 1489 (9th Cir. 1991). Therefore, every circuit agrees that a mere "appearance of bias" is not the standard.

Courts also agree that "the 'evident partiality' question necessarily entails a fact intensive inquiry," *Lifecare Int'l*, 68 F.3d at 435, focused on analyzing the materiality of the alleged relationship at issue, *see* Pet. App. 5. It may be true that the circuit courts, when deciding whether to vacate an arbitration award under § 10(a)(2), have used different words to articulate the standard, but there is no substantive difference in the analysis, which, in every circuit, tracks the reasoning and core holding in *Commonwealth Coatings*: nondisclosure of a material relationship warrants vacatur, whereas nondisclosure of a trivial or nonmaterial relationship does not.

Given the factbound nature of what constitutes "evident partiality," it is unsurprising that the alleged circuit conflict is overblown. And given the facts—namely Petitioner's failure to show that the arbitrator had a "material relationship" with a party from which "a reasonable person could reasonably infer . . . the possibility of bias," Pet. App. 5—it is also unsurprising that the outcome would have been the same whether Petitioner had moved to vacate in the Second Circuit (as it did here) or the Eleventh

Circuit. For instance, the Eleventh Circuit provides that "the alleged partiality must be 'direct, definite and capable of demonstration rather than remote, uncertain and speculative." *Lifecare Int'l*, 68 F.3d at 433. Here, because Petitioner has "no evidence" that the arbitrator was partial, its mere speculation does not suffice. Pet. App. 4. And because the decision below applied an analytical framework that focuses on the materiality of the alleged relationship that allegedly gives rise to bias—the same general framework applied by every other circuit—there is no merit to the assertion, *see* Pet. 26–33, that the decision below is contrary to *Commonwealth Coatings*.

The petition should be denied.

STATEMENT OF THE CASE

A. Legal Background.

Under 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" thereof. *Hall St. Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 582 (2008) (quoting 9 U.S.C. § 9). The grounds listed in § 10 of the FAA are the "exclusive" grounds on which an award may be vacated. *Id.* at 584. Nothing less than "egregious departures from the parties' agreed-upon arbitration" or "extreme arbitral conduct" warrants vacatur. *Id.* at 586. 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). The

present petition concerns only the "evident partiality" limb of this subsection.

In *Commonwealth Coatings*, this Court addressed circumstances in which an arbitrator's undisclosed relationships rise to the level of "evident partiality." That case involved an undisclosed, "repeated and significant" business relationship between an arbitrator and the respondent in the arbitration. 393 U.S. at 146 (referring to the respondent's "patronage" of the arbitrator's services as an engineering consultant over four or five years). In that case, "neither th[e] arbitrator nor the [respondent in the arbitration] gave to petitioner even an intimation of the close financial relations that had existed between them for a period of years." *Id*. at 147–48. In an opinion by Justice Black and a concurrence by Justice White (joined by Justice Marshall), six justices agreed that vacatur was warranted because of the arbitrator's failure to disclose his "close financial relations" to a party in the arbitration. *Id*.

Justice Black's opinion and Justice White's concurrence are fully consistent in holding that an arbitrator's failure to disclose a material or nontrivial relationship with one of the parties to an arbitration may constitute grounds to vacate an arbitration award for "evident partiality." *See id*. (holding that failure to disclose a "significant" "business relationship" and "close financial relations that had existed . . . for a period of years" warranted vacatur); *id*. at 150–52 (White, J., concurring) (noting that failure to disclose a "trivial" relationship is not grounds for vacatur, but "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"); *Applied Indus. Materials Corp.* v. *Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 139 (2d Cir. 2007) (holding that failure to disclose a "business relationship" involving "not a trivial amount" warranted vacatur (citing the Black opinion and the White concurrence)); *Lucent Techs. Inc.* v. *Tatung Co.*, 379 F.3d 24, 28 (2d Cir. 2004) ("In *Commonwealth Coatings*, the Supreme Court held that an arbitrator's failure to disclose a material relationship with one of the parties can constitute 'evident partiality' requiring vacatur of the award." (citing the Black opinion)).

The present petition, however, is premised upon the notion that there exists an "entrenched circuit split" among the circuit courts: it contends that the Ninth and Eleventh Circuits adopt an "appearance of bias" standard, which "requir[es] recusal when an arbitrator 'might reasonably be thought biased.'" Pet. 17. The petition further claims that the Second Circuit (and several other circuits) employ a different test, under which evident partiality exists "when 'a reasonable person would *have* to conclude that [the] arbitrator was partial.'" *Id.* (alteration in original). In reality, the circuit courts' formulations of the "evident partiality" standard, while differently expressed, do not represent a genuine "split." Equally, the tests, as applied, do not give rise to different outcomes in practice, and certainly would not lead to a different outcome in the present case.

B. Factual Background.

Andes initiated the underlying international arbitration (the "Andes/OEPC Arbitration") in July 2017, seeking recovery of monies owed to it by OEPC pursuant to a contractual commitment to share monies resulting from another international arbitration that OEPC had earlier prosecuted against the Republic of Ecuador. C.A. App. JA35 ¶ 35.

Pursuant to the parties' agreements, each party nominated one arbitrator to the three-person arbitration tribunal. *Id.* JA587–88, JA601. OEPC nominated Robert Smit ("Smit"). *Id.* JA578 ¶ 15, JA601. Prior to his appointment, Smit disclosed to OEPC's lawyers that he had a professional connection with one of Andes' lawyers, Laurence Shore ("Shore"). *Id.* JA519–20. Smit confirmed that he had "recent[ly]" been "appointed by . . . Larry [Shore]" as an arbitrator in a separate, ongoing case in which Shore was lead counsel, and that he knew Shore "from arbitration conferences." *Id.* 519. In a later disclosure to both parties during the arbitration, Smit reiterated that he had "been appointed by a party represented by [Herbert Smith Freehills New York LLP, counsel to Andes] . . . in a pending, unrelated investment treaty arbitration . . . ." *Id.* JA535. OEPC did not withdraw its nomination of Smit. *Id.* JA578–79 ¶ 17, JA609–10. Smit and the Andes-nominated arbitrator jointly appointed a third arbitrator as chair of the tribunal.

In January 2018, six months after Andes commenced the Andes/OEPC Arbitration against OEPC,

Smit was confirmed as a party-nominated arbitrator in a separate, unrelated arbitration (the "Construction Arbitration"). *Id.* JA581 ¶ 28(a). None of the parties involved in the Construction Arbitration were related to Andes or OEPC, and the legal issues raised in the two arbitrations were distinct. *Id.* JA580 ¶ 23.

Unlike in the Andes/OEPC Arbitration, the president (*i.e.*, chairperson) of the Construction Arbitration panel was not selected by Smit and the other party-nominated arbitrator. *Id.* JA581–82 ¶ 28. Rather, the president was chosen by the parties from a list of candidates prepared by the Secretariat of the International Court of Arbitration ("ICC") for the International Chamber of Commerce. That list included Shore and seven other individuals. *Id.* JA582 ¶ 28(c). The parties ranked the candidates on the list, and Shore received the highest combined ranking. *Id.* JA582 ¶ 28(d). Through this process, Shore was appointed president of the Construction Arbitration panel on April 25, 2018. *Id.* JA 582 ¶ 28(e). Smit did not appoint—and had no role in appointing—Shore. *Id.* JA582 ¶ 29. Prior to Shore's appointment, Smit and Shore had no contact in connection with the Construction Arbitration. *Id.*

Smit's and Shore's appointments to the Construction Arbitration were a matter of public record. In June 2018, the identities of all three members of that panel, including Smit and Shore, were published on various public websites. *Id.* JA583 ¶¶ 31, 33, JA760, JA768–69.

There was no familial or financial relationship between Shore and Smit. There was further no basis to suggest that Smit's and Shore's contacts in connection with the Construction Arbitration were anything other than entirely proper and solely concerned with the Construction Arbitration. During the course of the Construction Arbitration, the panel only convened in person once for an evidentiary hearing on October 14-18, 2019. *Id.* JA584 ¶ 35. All other panel meetings were telephonic or by video. *Id.* It is undisputed that Smit and Shore never communicated outside the presence of, at minimum, the third member of the panel, *id.* JA584–85 ¶ 38, or that Smit and Shore never discussed the Andes/OEPC Arbitration. *Id.* JA585 ¶ 39. The panel in the Construction Arbitration rendered its final award on August 13, 2020. *Id.* JA584 ¶ 36.

In March 2021, after full briefing and a merits hearing, the tribunal in the Andes/OEPC Arbitration rendered a unanimous final award (the "Final Award") in favor of Andes. *Id.* JA65–66 ¶ 160, JA66–67 ¶ 164, JA83 ¶¶ 190–91.

C. The District Court Proceedings.

Before the district court, Andes filed a petition to confirm the Final Award in the Andes/OEPC Arbitration in May 2021. OEPC opposed Andes' petition and cross-moved to vacate the Final Award, alleging, among other grounds for vacatur, evident partiality. Pet. App. 10, 16.

OEPC's claim of evident partiality was based on its allegations of Smit's "intentional concealment" of his service with Shore in the Construction Arbitration. Dist.Ct.Dkt. 29 at 1, 3, 4, 7, 14, 23–25. OEPC argued that Smit's alleged intentional concealment constituted an "objective fact inconsistent with impartiality" from which OEPC claimed that "evident partiality can and should be *inferred*." *Id.* at 25 (emphasis added).

On November 15, 2021, the district court issued an opinion and order confirming the Final Award and denying OEPC's motion to vacate. Pet. App. 10–20.

With respect to the alleged nondisclosure, the district court recognized that "'with the exercise of due diligence,' [OEPC] could have discovered their relationships because in June 2018, at least one publicly-available website had published Smit's and Shore's appointments to the [Construction Arbitration] panel." *Id.* 16. The district court noted that, while courts may find a material relationship warranting an inference of evident partiality if arbitrators have "undisclosed pecuniary interests or close familial relationships," the fact of concurrent service as arbitrators in a separate proceeding, without more, does not constitute "evidence that they were predisposed to favor one party over another in either arbitration." *Id.* 16–17 (quoting *Scandinavian Reinsurance Co.* v. *Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 74 (2d Cir. 2012)). Finding that OEPC "base[d] its argument of partiality on only concurrent service on two panels and merely speculate[d]

about the opportunity to engage in misconduct," the district court denied OEPC's motion to vacate the Final Award on grounds of evident partiality. *Id.* 17.

D. The Second Circuit Proceedings.

The court of appeals affirmed in relevant part on the issue of evident partiality. *Id.* 4–5.

The Second Circuit concluded that "OEPC provides no evidence that Smit was partial." *Id.* 4. The court noted that "aside from Smit's and Shore's concurrent service, OEPC does not allege a 'material relationship' such as a 'family connection or ongoing business arrangement with a party or its law firm—circumstances in which a reasonable person could reasonably infer a connection between the undisclosed outside relationship and the possibility of bias for or against a particular arbitrating party." *Id.* 5 (quoting *Scandinavian Reinsurance*, 668 F.3d at 74).

The Second Circuit also agreed with the district court that the information on the Construction Arbitration was a matter of public record, noting that although "[n]either Smit nor Shore disclosed their appointment [in the Construction Arbitration]," the fact of their respective appointments "was listed publicly online." *Id.* 3.

REASONS FOR DENYING THE PETITION

The question presented by the petition does not warrant this Court's review. First, the circuit courts that have addressed this issue have applied this Court's holding in *Commonwealth Coatings* consistently, requiring an assessment of the materiality of the alleged arbitrator relationship. Petitioner's claim of a purported circuit split as to the formulation of the standard for vacatur for "evident partiality" is academic and vastly exaggerated. Second, even if this Court were to find that a meaningful circuit split exists regarding the application of the "evident partiality" standard, this case is a poor vehicle for resolving that split. Third, the Second Circuit correctly applied *Commonwealth Coatings* and denied Petitioner's motion to vacate the Final Award.

I. PETITIONER'S CLAIM OF AN "ENTRENCHED CIRCUIT SPLIT" IS EXAGGERATED AND MISLEADING.

Petitioner contends that there is an "entrenched circuit split" that stems from an "egregious disregard of this Court's precedent" regarding the standard for vacating an arbitration award for "evident partiality" under *Commonwealth Coatings*. Pet. 4, 19–20. Petitioner asserts that the First, Second, Third, Fourth, Fifth, and Sixth Circuits employ a "more stringent test" than the Ninth and Eleventh Circuits, whereas the latter "continue to abide" by

the "appearance of bias" standard referenced in *Commonwealth Coatings*. Pet. 11, 20. Petitioner is mistaken. The purported differences in how circuit courts have articulated the tests are academic and result in a distinction without a difference. All of the circuit courts have recognized and steadfastly implemented this Court's core holding in *Commonwealth Coatings*, *i.e.*, that an arbitrator's nondisclosure of a *material* relationship may warrant vacatur, notwithstanding differences in the words each circuit uses to formulate the legal standard.

The Second Circuit has held that an arbitration award may be vacated for evident partiality "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Morelite Const. Corp. (Div. of Morelite Elec. Serv.)* v. *N.Y. City Dist. Council Carpenters Ben. Funds*, 748 F.2d 79, 84 (2d Cir. 1984). Interpreting the plain language of 9 U.S.C. § 10(a)(2), the Second Circuit concluded that if "an undisclosed matter is not suggestive of bias, vacatur based upon that nondisclosure cannot be warranted under an evident-partiality theory," since the statute permits vacatur where "it is 'evident' that an arbitrator was 'partial[]' to one of the litigating parties." *Scandinavian Reinsurance*, 668 F.3d at 73.

The First, Third, Fourth, Fifth, and Sixth Circuits have endorsed a similar formulation of the legal standard, requiring that a reasonable person would "have to conclude" that the arbitrator was partial to one party. *See JCI Commc'ns, Inc.* v. *I.B.E.W., Local 103*, 324 F.3d 42, 51 (1st Cir. 2003); *Freeman* v.

Pittsburgh Glass Works, LLC, 709 F.3d 240, 252–53 (3d Cir. 2013); *Three S Del., Inc.* v. *DataQuick Info. Sys., Inc.*, 492 F.3d 520, 530 (4th Cir. 2007); *Positive Software Sols., Inc.* v. *New Century Mortg. Corp.*, 476 F.3d 278, 280–83 (5th Cir. 2007); *Uhl* v. *Komatsu Forklift Co.*, 512 F.3d 294, 306–07 (6th Cir. 2008). Like the Second Circuit, the Third Circuit and Fifth Circuit have looked to the plain meaning of the words "evident partiality," concluding that "the statute requires more than a vague appearance of bias," *Freeman*, 709 F.3d at 253, and that the word "evident" conveys a "stern standard" that "seems to require upholding arbitral awards unless bias was clearly evident in the decisionmakers." *Positive Software*, 476 F.3d at 281.

The Ninth Circuit's approach (the basis for the asserted "split") does not meaningfully diverge from these decisions. In *Schmitz* v. *Zilveti*, the Ninth Circuit, after acknowledging that "the majority [in *Commonwealth Coatings*] did not articulate a succinct standard," held that the "evident partiality" standard differed from the strict standards applicable to judges, because "arbitrators will nearly always, of necessity, have numerous contacts within their field of expertise . . . [and] have many more potential conflicts of interest than judges." 20 F.3d 1043, 1046 (9th Cir.1994); *see also Commonwealth Coatings*, 393 U.S. at 148 (noting that "arbitrators cannot sever all their ties with the business world"). It held that, in a case involving alleged nondisclosure by an arbitrator of "facts showing a potential conflict of interest," vacatur under 9 U.S.C. 10(a)(2)

would be warranted if the nondisclosure of such facts gave rise to a "reasonable impression of partiality." *Schmitz*, 20 F.3d at 1045–46.

The Eleventh Circuit (the other court of appeals which the petition claims, gives rise to split) has held that to constitute "evident partiality" there must be alleged partiality that is "direct, definite and capable of demonstration rather than remote, uncertain and speculative." *Univ. Commons-Urbana, Ltd.* v. *Universal Constructors Inc.*, 304 F.3d 1331, 1339 (11th Cir. 2002). Within that framework, the Eleventh Circuit has stated that vacatur is permitted where facts that an arbitrator has not disclosed create a "reasonable impression of partiality." *Id.*

Petitioner's analysis of the purported circuit split is superficial. Noting that the Second Circuit adopts a different formulation of the legal standard as compared to the Ninth Circuit ("would have to conclude" versus "reasonable impression of partiality"), Petitioner ends its analysis, concluding that the Second Circuit "betrayed that fundamental principle" of vertical *stare decisis*. Pet. 27. However, the Second Circuit has in fact adopted the essential reasoning and core holding of Justice Black's opinion, *i.e.*, that vacatur is permitted where an arbitrator fails to disclose a material relationship. *See* 393 U.S. at 147–48 (holding that failure to disclose a "significant" "business relationship" warranted vacatur); *id.* at 150–52 (White, J., concurring) ("[I]t 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.").

In fact, courts on both sides of Petitioner's purported circuit split have faithfully followed this Court's holding in *Commonwealth Coatings* by placing a materiality analysis at the center of their assessment of claims of evident partiality:

a. Petitioner states that the First Circuit in *UBS Fin. Servs., Inc.* v. *Asociacion De Empleados Del Estado Libre Asociado De Puerto Rico* "acknowledged the 'circuit split'" and "implicitly rejected" the formulation adopted by the Ninth and Eleventh Circuits. 997 F.3d 15, 19 (1st Cir. 2021); Pet. 21. However, Petitioner's analysis ignores the court's assessment of the materiality of the alleged relationship. The First Circuit in *UBS* expressly relied upon a four-factor test intended to assess the materiality and "personal interest, pecuniary or otherwise," among other factors, of the arbitrator in the relationship at issue.[2] *Id.* at 20–21. The court concluded that there was no evidence of a material relationship, noting that the allegations were "too attenuated and too marginal," "[in]sufficiently direct or substantial," and that "[i]t strain[ed] credulity to argue that th[e] attenuated connection [was] more than trivial." *Id.* at 21. The First Circuit cites and relies upon the Black opinion. *Id.* at 22.

[2] The First Circuit relied on the test as articulated in *Scandinavian Reinsurance*, 668 F.3d at 74.

b. Petitioner claims that the Second Circuit in *Morelite* adopted a "far more stringent standard" than the "appearance of bias" standard established in *Commonwealth Coatings*, Pet. 20, and that the Second Circuit rejected both the Black opinion and the White concurrence, *id.* 3. However, the Second Circuit has held that "an arbitrator's failure to disclose a material relationship with one of the parties," without more, warrants vacatur, expressly relying upon the Black opinion. *Lucent Techs.*, 379 F.3d at 28 (citing *Commonwealth Coatings*, 393 U.S. at 147–48).[3] In *Morelite*, the court granted vacatur due to the materiality of the undisclosed "father-son" relationship at issue in that case, which was "such that reasonable people would have to believe it provides strong evidence of partiality by the arbitrator." *Morelite*, 748 F.2d at 84–85. The Second Circuit's decision in the present case likewise turned on its application of the materiality rule from *Commonwealth Coatings*, since it held that Petitioner's failure to allege a "material relationship" between Smit and Shore, "such as a 'family connection or ongoing business arrangement with a party or its law firm,'" was fatal to its motion to vacate. Pet. App. 5. Petitioner's argument that the Second Circuit has refused to implement either the Black opinion or the

[3] The Second Circuit has repeatedly cited both the Black opinion and the White concurrence in its description of the legal standard for "evident partiality." *See*, *e.g.*, *Certain Underwriting Members of Lloyds of London* v. *Fla., Dep't of Fin. Servs.*, 892 F.3d 501, 507, 510 (2d Cir. 2018) (citing the Black opinion and White concurrence); *Scandinavian Reinsurance*, 668 F.3d at 73, 78 (same).

White concurrence is therefore directly contradicted by the Second Circuit's consistent application of this Court's materiality rule from *Commonwealth Coatings*.

c. Petitioner notes that the Third Circuit "expressly endorsed" the Second Circuit's reasoning in *Morelite*. Pet. 21–22 (citing *Freeman*, 709 F.3d at 252–53). However, Petitioner again limits its analysis to differences in the words used to formulate the legal standard rather than the reasoning in *Freeman*. In fact, the Third Circuit in *Freeman* assessed the materiality of the alleged arbitrator relationships based upon both the public nature of the information and the limited scope of the alleged "professional relationship." 709 F.3d at 255–56. Regarding allegations that an arbitrator received $4,500 in campaign contributions from a minority owner of a party to the arbitration, the Third Circuit held that the donation could not give rise to an inference of evident partiality because it was a matter of public record. *See id.* at 255. Regarding an allegation that an arbitrator co-taught a seminar with an attorney for a party to the arbitration, the Third Circuit held that a mere "professional relationship," without more, was insufficient to give rise to an inference of evident partiality. *Id.* at 255–56.

d. Petitioner makes similar claims regarding the Fourth Circuit's decisions in *Three S Delaware* and in *Peoples Security Life Insurance* v. *Monumental Life Insurance*, 991 F.2d 141, 146 (4th Cir. 1993). Pet. 22. However, Petitioner's analysis again ends abruptly at the words used to formulate the legal

standard. In fact, the Fourth Circuit in *Three S Delaware* employs a four-factor test to assess the materiality of arbitrator relationships, including the "personal interest, pecuniary or otherwise, of the arbitrator in the proceedings." 492 F.3d at 530. The Fourth Circuit has also assessed whether any alleged arbitrator bias is "direct, definite, and capable of demonstration" or merely "uncertain and speculative." *Peoples*, 991 F.2d at 146. In *Three S Delaware*, the Fourth Circuit held that the party seeking vacatur failed to offer any evidence "to show that the arbitrator had an improper relationship with DataQuick." 492 F.3d at 530. In the absence of a material relationship, the court rejected vacatur. *See id.*

e. Petitioner claims that the Fifth Circuit's en banc decision in *Positive Software* "provides an especially remarkable illustration of the split." Pet. 22. However, Petitioner ignores that the en banc Fifth Circuit held that the result in the case would be the same, and vacatur would be denied, regardless of which formulation of the standard was adopted. *See Positive Software*, 476 F.3d at 284–85. In reaching this result, the Fifth Circuit expressly applied the materiality analysis required by the Black opinion, noting specifically that the "'repeated and significant' business relationship" at issue in *Commonwealth Coatings* was easily distinguishable from the "the tangential, limited, and stale contacts" between the arbitrator and an attorney at issue in *Positive Software*, which involved the arbitrator's and an attorney's overlapping representation of a common

client years earlier in litigation involving different parties, where there was no underlying financial or familial relationship between the arbitrator and the attorney. *Id.* at 280, 285. Petitioner's analysis fails to mention the Fifth Circuit's application of the materiality rule from *Commonwealth Coatings*.

f. Finally, Petitioner claims that the Sixth Circuit "rel[ies] on Justice White's concurrence rather than the majority opinion in *Commonwealth Coatings*" and has, together with other circuit courts, "rejected the standard for evident partiality established in *Commonwealth Coatings*" in favor of the Second Circuit's standard in *Morelite*. Pet. 23. However, the Sixth Circuit's analysis in *Uhl* is fact-intensive and properly focused on analyzing the materiality of the alleged relationships at issue in that case. The court held that the fact that an arbitrator and an attorney for a party served as "co-counsel on two cases and that on six other cases [the arbitrator] represented the plaintiff while [the party's attorney] represented the intervening plaintiff" was insufficient, on the facts presented, to warrant vacatur. *Uhl*, 512 F.3d at 307. Moreover, the Sixth Circuit does not reject the Black opinion; it reads the Black opinion together with the "nuanced view" in the White concurrence that "not every nondisclosure violates the FAA." *Cf. id.* at 306. This position may add "nuance" to the Black opinion, but it is plainly not a "reject[ion]" of the materiality rule of *Commonwealth Coatings*.

While the Ninth and Eleventh Circuits employ a different formulation of the legal standard, both

substantively apply the same materiality rule required by *Commonwealth Coatings*:

a. Petitioner claims that the Ninth Circuit has continued to apply a "reasonable impression of partiality" standard, contrary to the circuit courts noted above, because it "squarely rejected the 'misunderstanding of Justice White's concurrence in *Commonwealth Coatings*' as the controlling opinion." Pet. 24. However, the Ninth Circuit's approach is fully consistent with *Commonwealth Coatings* because it requires assessing the materiality of the alleged conflict. For example, in *Schmitz*, vacatur was warranted by the arbitrator's failure to inquire into his firm's representation of the parent entity of a party to the arbitration—a material financial relationship. 20 F.3d at 1049. Likewise, in *Monster Energy Co.* v. *City Beverages, LLC*, the arbitrator's failure to disclose his ownership interest in JAMS/ Endispute LLC ("JAMS"), an alternative dispute resolution provider, was a sufficiently material nondisclosure to warrant vacatur. 940 F.3d 1130, 1135–36 (9th Cir. 2019). Petitioner emphasizes the words used in the Ninth Circuit's formulation of the legal standard at the expense of any substantive discussion of the court's materiality analysis.

b. Relatedly, Petitioner claims that "the Eleventh Circuit has not embraced *Morelite*'s higher showing that a reasonable person would have to conclude that the arbitrator was partial." Pet. 25 (emphasis omitted). Petitioner overlooks that the Eleventh Circuit requires that, to warrant vacatur, a purported conflict must be material—a requirement that

comes directly from *Commonwealth Coatings*. Indeed, Petitioner cannot deny that the Eleventh Circuit has cited the same indicia of what amounts to a material relationship as the Third Circuit, Fourth Circuit, and other circuit courts have relied upon, namely, that any alleged partiality "must be 'direct, definite and capable of demonstration rather than remote, uncertain and speculative.'" *Grupo Unidos por el Canal, S.A.* v. *Autoridad del Canal de Panama*, 78 F.4th 1252, 1263 (11th Cir. 2023) (citation omitted).

In sum, Petitioner is wrong to assert that the Ninth and Eleventh Circuits are the only circuit courts that "correctly apply" *Commonwealth Coatings*, and equally wrong to claim that the Second Circuit's approach "flouts this Court's binding precedent." Pet. 4, 23. In reality, the circuit courts consistently and uniformly apply the materiality rule of *Commonwealth Coatings*. *See supra* pp. 11–21.

The circuit courts also agree on other essential elements of the legal standard. For example, the Ninth and Eleventh Circuits agree with the other circuits that nondisclosure alone does not require vacatur, since "trivial" business dealings or conflicts need not be disclosed.[4] The Ninth and Eleventh

[4] *See Positive Software*, 476 F.3d at 282 (en banc) (noting the different formulations of the legal standard in different circuits and concluding that "[w]hile these courts' interpretations of *Commonwealth Coatings* may differ in particulars, they all agree that nondisclosure alone does not require vacatur of an arbitral award for evident partiality"); *Scandinavian Reinsurance*, 668 F.3d at 72 (holding that "nondisclosure does

Circuits—like the Second Circuit—also recognize that the phrase "evident partiality" "means more than a mere appearance of bias."[5] In addition, courts in the Ninth and Eleventh Circuits, like other circuit courts, have held that "[t]he alleged partiality must be direct, definite and capable of demonstration rather than remote, uncertain and speculative."[6]

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not by itself constitute evident partiality," since "[t]he question is [rather] whether the facts that were not disclosed suggest a material conflict of interest"); *Cronin* v. *Advanced Fresh Concepts Franchise Corp.*, 2022 WL 2063476, at *4 (C.D. Cal. May 25, 2022) ("[V]acatur is appropriate only if the undisclosed facts amount to a real, non-trivial conflict." (citing *New Regency Prods., Inc.* v. *Nippon Herald Films, Inc.,* 501 F.3d 1101, 1110 (9th Cir. 2007)); *see also Lozano* v. *Md. Cas. Co.*, 850 F.2d 1470, 147l (11th Cir. 1999) (per curiam) (holding that "where trivial, disclosure is not required" (citing *Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring)).

[5] *See, e.g.*, *Employers Ins. of Wausau*, 933 F.2d at 1489 (holding that a party "must demonstrate more than a mere appearance of bias to disqualify an arbitrator"); *Lifecare Int'l*, 68 F.3d at 433 ("[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); *Balan* v. *Tesla Motors Inc.*, 2019 WL 1411223, at *2 (N.D. Cal. Mar. 28, 2019) ("[E]vident partiality means more than the mere appearance of bias." (citing *Florasynth, Inc.* v. *Pickholz*, 750 F.2d 171, 173 (2d Cir. 1984), *Lagstein* v. *Certain Underwriters at Lloyd's*, 607 F.3d 634, 645–46 (9th Cir. 2010), and *Scandinavian Reinsurance*, 668 F.3d at 74)).

[6] *Aviles* v. *Charles Schwab* & *Co.*, 435 F. App'x 824, 828 (11th Cir. 2011) (per curiam); *Lifecare Int'l*, 68 F.3d at 433 (same); *Lagstein*, 607 F.3d at 646 (dismissing motion to vacate where moving party "failed to show any connection" between the parties to the arbitration and the challenged arbitrator "that would give rise to a reasonable impression of partiality

II. IN ALL EVENTS, THIS CASE IS A POOR VEHICLE FOR RESOLVING ANY PURPORTED CIRCUIT SPLIT.

Petitioner claims that this Court should grant review to resolve a purported circuit split regarding the definition of "evident partiality." Pet. 35–36. However, Petitioner has not, and cannot demonstrate, that the Ninth or Eleventh Circuits would have reached a different result.

Notably, Petitioner has failed to identify any cases involving nondisclosure in which an award vacated by the Ninth or Eleventh Circuits would not also have been vacated in the Second Circuit (or in any other court of appeals). There are only five instances in which, interpreting *Commonwealth Coatings*, the Ninth or Eleventh Circuit has vacated or affirmed the vacatur of an arbitration award on grounds of evident partiality (or remanded for further discovery on the issue of evident partiality). Each of these five cases involved undisputed evidence of a significant business relationship or financial interest on the part of the arbitrator, and so each case would

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toward [appellant]"); *Cronin*, 2022 WL 2063476, at *6 (dismissing motion to vacate "based merely on concurrent service on the same AAA Commercial Panel" because "[v]acatur of an arbitration award for evident partiality is appropriate where the possibility of bias is direct, definite, and capable of demonstration rather than remote, uncertain and speculative" (citation omitted)).

have plainly yielded the same result in the Second Circuit.[7]

Indeed, Second Circuit law is clear that failure to disclose or investigate nontrivial financial or business dealings meets the Second Circuit's standard for vacatur, even where there is no evidence that the arbitrator had actual knowledge of the relevant relationship. *See Applied Indus.*, 492 F.3d at 139 (vacating award where there was an undisclosed "business relationship" involving $275,000 in revenue, which was "not a trivial amount").

Petitioner unsurprisingly fails to identify a single case in which the court's use of one "evident partiality" standard over another would have impacted the outcome in any respect, and it would not change the outcome here. Even under the formulation of the legal standard employed by the Ninth and Eleventh

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[7] *See Monster Energy*, 940 F.3d at 1136 (failure to disclose financial interest that was "hardly trivial"); *New Regency*, 501 F.3d at 1107 (failure to disclose new employment as a "high-level executive" during pendency of the arbitration (citing *Commonwealth Coatings*, 393 U.S. at 151–52 (White, J., concurring)); *Schmitz*, 20 F.3d at 1044 (failure to investigate or disclose that arbitrator's law firm had represented parent company of a party to the arbitration "in at least nineteen cases during a period of 35 years"); *Middlesex Mut. Ins. Co.* v. *Levine*, 675 F.2d 1197, 1202 (11th Cir. 1982) (failure to disclose "'repeated' and 'significant' business dealings"); *Univ. Commons-Urbana*, 304 F.3d at 1340 (failure to disclose service as co-counsel in state court with attorneys for a party to the arbitration during pendency of arbitration (citing, *inter alia*, *Sanko S.S. Co.* v. *Cook Indus., Inc.*, 495 F.2d 1260, 1263 (2d Cir. 1973)).

Circuits, Petitioner's argument for vacatur would not prevail. First, Petitioner has not alleged (nor could it) that Smit's service with Shore on the Construction Arbitration panel gave Smit "any financial or personal interest in the outcome" of the arbitration between Andes and OEPC. *See Lagstein*, 607 F.3d at 646. Second, their concurrent service, without more, does not constitute a relationship, such as a familial or business relationship, that "would lead a reasonable person to believe that a potential conflict exists." *Univ. Commons-Urbana*, 304 F.3d at 1339.

Indeed, the Eleventh Circuit in *University Commons-Urbana* unequivocally held that the arbitrator's interactions with counsel for one of the parties to the arbitration, without more, "do *not* establish a potential conflict," which forecloses OEPC's argument here, since OEPC has alleged nothing more. *Id*. at 1342 (emphasis added).

Further refinement of the standard is neither necessary nor useful because circuit courts generally address the question of "evident partiality" on a "case-by-case" basis as part of a "fact-intensive" inquiry.[8] As set forth above, this Court has

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[8] *See*, *e.g.*, *Lucent Techs.,* 379 F.3d at 28 ("This court has . . . viewed the teachings of *Commonwealth Coatings* pragmatically, employing a case-by-case approach in preference to dogmatic rigidity.") (internal marks omitted); *Univ. Commons-Urbana,* 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

consistently declined to review petitions alleging a purported circuit split regarding the legal standard articulated by *Commonwealth Coatings* because the purported split is academic: notwithstanding the somewhat differing labels that the circuit courts affix to their analyses, there is broad consensus on what constitutes "evident partiality" under specific factual scenarios. *See supra* pp. 11–21.

Thus, even without more, OEPC's petition should be denied.

Even if there was an actual, valid circuit split, this case is a poor vehicle to resolve the split. Even assuming the Ninth Circuit's "appearance of bias" standard indicated a more stringent standard of review than is applicable in other circuits, the facts of this petition are ill-suited to clarifying the burden of a party seeking to establish evident partiality (under any formulation of the legal standard) because Petitioner's motion to vacate the Final Award would not have been decided any differently. The factual record contains no evidence whatsoever of bias, or of any undisclosed, material financial or business relationship between Smit and Shore, much less any undisclosed financial or business relationship between Smit and one of the parties that would have required disclosure. The totality of Petitioner's case is premised on the speculative notion that Smit's concurrent service in the Construction Arbitration with Shore "gave Shore a behind-the-scenes look" at Smit's

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settings of each particular case." (alterations in original; internal marks omitted)).

"decision-making process" and opportunities for ex parte discussions. Pet. 2, 15. The petition fails to identify any prior precedent in any circuit (or indeed any district court) in which vacatur was granted in comparable circumstances.

Nor do the opinions in *Commonwealth Coatings* (the Black opinion and the White concurrence) suggest vacatur would be appropriate here. On the contrary, as this Court made clear in *Commonwealth Coatings*, vacatur of an arbitration award under the "evident partiality" standard is necessarily linked, at a minimum, to the possibility of bias on the part of the arbitrator. *See* 393 U.S. at 150. This Court held that Congress enacted the FAA to provide for "impartial" arbitration; 9 U.S.C. § 10(a)(2) is therefore intended to permit vacatur where one or more arbitrators "might reasonably be thought biased *against one litigant and favorable to another*." *Id.* at 150 (emphasis added).

No possibility of arbitrator bias has been found here. As the Second Circuit held, "OEPC provide[d] no evidence that Smit was partial," and OEPC's challenge was based upon mere "speculation." Pet. App. 4–5. Indeed, "aside from Smit's and Shore's concurrent service, Petitioner does not allege a 'material relationship' such as a 'family connection or ongoing business arrangement with a party or its law firm—circumstances in which a reasonable person could reasonably infer a connection between the undisclosed outside relationship and *the possibility of bias for or against a particular arbitrating party*.'" *Id.* 5 (quoting *Scandinavian Reinsurance*, 668 F.3d

at 74) (emphasis added). In other words, the Second Circuit concluded that there was insufficient evidence to allege even the *possibility* of a material relationship or bias, which clearly warranted dismissal of Petitioner's claim of evident partiality under any of the formulations of the legal standard adopted by the circuit courts, including in the Ninth and Eleventh Circuits.

In its petition, OEPC does not and cannot identify any "business relationship" or familial relationship between Smit and Shore that could lead to an inference of possible arbitrator bias. *See Commonwealth Coatings*, 393 U.S. at 147. Indeed, OEPC's petition does not allege *potential bias* on the part of Smit at all. Instead, it merely alleges that Smit's and Shore's purported "collaboration" in the Construction Arbitration "provided Andes' counsel with real-time, behind-the-scenes access to the arbitrator's views about specific contract-law issues, amenability to particular strategies, and procedures preferences."[9] Pet. 2, 35. Petitioner fails to cite a single case for the proposition that an arbitration award may be vacated where there is not even a claim of bias on the part of the arbitrator. Petitioner is in effect proposing a strict liability rule whereby the fact of nondisclosure, without more, triggers vacatur. This proposed rule is foreclosed by contrary holdings

[9] OEPC's claim that the specific contract law issues raised in the Construction Arbitration were somehow relevant to the Andes/OEPC Arbitration is pure speculation; there were no similar contract law issues present in the two arbitrations. C.A. App. JA580 ¶ 23.

from circuit courts on both sides of the purported circuit split. *See supra* pp. 20–21 n.4.[10]

Finally, regardless of whether arbitrator Smit's nondisclosure of the Construction Arbitration evinces evident partiality (which it does not), his service alongside Shore was public for years prior to the issuance of the Final Award, so OEPC waived its right to object. In the Second Circuit, it is well-established that an arbitration award should not be vacated based upon an alleged "undisclosed" relationship "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.'"

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[10] OEPC's reliance on *Commonwealth Coatings* and *University Commons-Urbana* is misplaced, as these cases are readily distinguishable. OEPC relies on these cases for its conclusory assertion that Smit's alleged "blatant" and "flagrant[]" violation of his disclosure obligations under the parties' agreements and the AAA Rules "would more than suffice to show an impermissible appearance of bias" and "readily suffices to establish that an arbitrator 'might reasonably be thought biased.'" Pet. 16, 35 (citing *Commonwealth Coatings*, 393 U.S. at 150 and *Univ. Commons-Urbana*, 304 F.3d at 1341). However, *Commonwealth Coatings* involved "repeated and significant" "patronage" by a party to the arbitration of the business services of one of the arbitrators. 393 U.S. at 146. Relatedly, *University Commons-Urbana* involved allegations that, *inter alia*, one of the arbitrators, "while the arbitration was ongoing, represented a co-defendant" in the arbitration in a state court case as co-counsel with a lawyer for University Commons-Urbana. 304 F.3d at 1340. By contrast, OEPC does not allege any business relationship or other pecuniary, familial, or social interest of Smit in the outcome of the underlying arbitration here (nor could it).

Certain Underwriting Members of Lloyds of London v. *Fla., Dep't of Fin. Servs.*, 892 F.3d 501, 506 (2d Cir. 2018) (quoting *Lucent Techs.*, 379 F.3d at 28); *see also In re Andros Compania Maritima, S.A. (Marc Rich & Co., A.G.)*, 579 F.2d 691, 702 (2d Cir. 1978) (same). The result would be the same in the Ninth Circuit. *See*, *e.g.*, *Fidelity Fed. Bank* v. *Durga Ma Corp.*, 386 F.3d 1306, 1313 (9th Cir. 2004); *Lagstein*, 607 F.3d at 646; *Cronin* v. *Advanced Fresh Concepts Franchise Corp.*, 2022 WL 2063476, at *4 (C.D. Cal. May 25, 2022) ("By admitting that this information was publicly available, Plaintiff and her counsel likely had 'at least constructive notice' that Mr. Nigolian was on the AAA Commercial Panel before the arbitration took place.").

Petitioner does not even attempt to challenge the Second Circuit's finding that it could have discovered Smit's and Shore's appointments in the Construction Arbitration, nor can it deny that the information was posted as a matter of public record on the ICC's website for nearly three years before the issuance of the Final Award, as well as being publicly available in the arbitration database Jus Mundi. *See supra* p. 8. In fact, OEPC could have learned of the appointments "by the most basic method of contemporary 'due diligence': a Google search." *Ameriprise Fin. Servs., Inc.* v. *Brady*, 325 F. Supp. 3d 219, 226 (D. Mass. 2018).

III. THE SECOND CIRCUIT'S DECISION CORRECTLY APPLIED *COMMONWEALTH COATINGS*.

The Second Circuit's summary order declining to vacate the Final Award for evident partiality is entirely consistent with this Court's interpretation of the FAA, as set forth in *Commonwealth Coatings*.

OEPC's petition argues that Second Circuit's *Morelite* decision is not faithful to the *Commonwealth Coatings* majority. Pet 3. In fact, *Morelite* adopted the holdings in *Commonwealth Coatings* "subscribed to by *both Justices White and Black*." *Morelite*, 748 F.2d at 83 n.3 (emphasis added). Petitioner's critique of *Morelite* is thus misplaced.[11]

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[11] Petitioner claims that the Second Circuit "declared itself free to consider the very question *Commonwealth Coatings* decided 'on a relatively clean slate' . . . ." Pet. 3. However, the Second Circuit never "declared itself free" to disregard *Commonwealth Coatings* or the fundamental rule of vertical *stare decisis* and instead expressly stated it "must narrow the holding to that subscribed to by both Justices White and Black." *Morelite*, 748 F.2d at 83.n.3. Petitioner also claims falsely that the Second Circuit considered the issue an "unresolved" question and considered *Commonwealth Coatings* "unsuccessful." Pet. 10. However, the Second Circuit never claimed the question was "unresolved" or deemed "the holding . . . subscribed to by both Justices White and Black," "unsuccessful." The Second Circuit's acknowledgement—together with many other circuit courts—that *Commonwealth Coatings* left "troublesome question[s]" for resolution does not constitute a "radical departure from this Court's binding precedent," as alleged by Petitioner, Pet. 36, since the "regular task" of the lower federal courts "involves interpreting [this Court's]

Petitioner's assertion that the Second Circuit's formulation "effectively demands the showing of actual bias that the *Commonwealth Coatings* dissenters would have required" also is plainly incorrect. Pet. 11. The Second Circuit has been clear in holding that "[u]nder the 'evident partiality' standard, the bar the movant must clear is somewhat lower than actual partiality." *United States* v. *Int'l Bhd. of Teamsters*, 170 F.3d 136, 147 (2d Cir. 1999).

For example, in *Applied Industrial*, the Second Circuit affirmed the vacatur of an arbitration award where the arbitrator was "aware that a nontrivial conflict of interest might exist," but failed to disclose that fact. 492 F.3d at 138–39. Notably, the court held the arbitrator's failure to disclose a potentially nontrivial conflict was sufficient for vacatur, even though there was no proof of the arbitrator's knowledge of the underlying relationship, much less proof of "actual bias." *Id.*; *see also Scandinavian Reinsurance*, 668 F.3d at 72 (holding that "[p]roof of actual bias is not required" because "[a] conclusion of partiality can be inferred 'from objective facts inconsistent with impartiality'" (citations omitted)); *Morelite*, 748 F.2d at 84 ("[W]e cannot countenance the promulgation of a standard for partiality as insurmountable as 'proof of actual bias'—as the literal words of Section 10 might suggest.").

Petitioner's claim that the "Second Circuit's approach thus effectively leaves parties to arbitration

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opinions . . . ." *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 167 n.4 (1987) (Scalia, J., concurring).

agreements with no means to enforce contractual disclosure obligations" is incorrect for the same reason. *See Applied Indus.*, 492 F.3d at 138 (noting that "the arbitrator was under an ongoing obligation to disclose conflicts and had previously assured the parties that he intended to comply with that obligation" and vacating arbitration award for nondisclosure).

Thus, the Second Circuit's formulation of the applicable legal standard is consistent with *Commonwealth Coatings*. By contrast, Petitioner's expansive interpretation of the Black opinion would effectively impose a strict liability standard that would permit an inference of partiality (and authorize vacatur) for any nondisclosure by an arbitrator, even regarding nonmaterial relationships. This interpretation would render meaningless the statutory requirement that partiality be "evident." *See Freeman*, 709 F.3d at 253 ("The word 'evident' suggests that the statute requires more than a vague appearance of bias. Rather, the arbitrator's bias must be sufficiently obvious that a reasonable person would easily recognize it. By contrast, the judicial standard requires recusal if a judge's 'impartiality might reasonably be questioned.' 28 U.S.C. § 455(a). This language suggests that the judicial inquiry focuses on appearances—'not on whether the judge actually harbored subjective bias.'").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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