No. ______

In the

Supreme Court of the United States

BONNIE TOWNSEND, EXECUTRIX OF THE ESTATE OF LINDA ELAM,

Petitioner,

v.

BLC LEXINGTON SNF, LLC D/B/A BROOKDALE RICHMOND PLACE SNF, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Arbitration Act (FAA), provides statutory criteria for affirming an arbitration award, FAA 9 U.S.C. § 9, and for vacating an arbitration award, FAA 9 U.S.C. § 10. The FAA, 9 U.S.C. § 10, provides for the vacating of an arbitration award where there is "evident partiality or corruption in the arbitrators."

This Court set forth a standard requiring an affirmative duty on an arbitrator to disclose any appearance of bias in *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145 (1968). Since *Commonwealth Coatings*, there has been considerable confusion among the circuits regarding the case's holding, leading to a circuit split. Some circuits, including the Sixth Circuit from which this Petition arises, have imposed a much higher standard under 9 U.S.C. § 10 to vacate an arbitration award, requiring that "the challenging party must show that 'a reasonable person would have to conclude that an arbitrator was partial' to the other party to the arbitration" and "the party asserting evident partiality must establish specific facts that indicate improper motives on the part of the arbitrator." *Id. Uhl v. Komatsu Forklift Co., Ltd.*, 512 F.3d 294, 306 (6th Cir. 2008).

The questions presented are:

1. Is the Sixth Circuit Opinion incorrectly applying U.S. Supreme Court precedent to vacate arbitration awards by requiring specific conduct in the particular case meriting disqualification, an issue on which there is a circuit split, or is the standard one of "appearance of bias" as this Court has previously

held?

2. Did the Sixth Circuit incorrectly impose a heightened burden on Petitioner to vacate the arbitration award, and does application of this Court's *Commonwealth Coatings* standard, or even the Sixth Circuit's much higher standard, merit reversal due to the arbitrator's prior relationship with the Respondents and his prior undisclosed history of quid pro quo/bribery misconduct?

PARTIES TO THE PROCEEDING

Petitioner (Defendant-Appellant below) is Bonnie Townsend, Executrix of the Estate of Linda Elam.

Respondents (Plaintiffs-Appellees below) are BLC Lexington SNF, LLC d/b/a Brookdale Richmond Place SNF; Brookdale Senior Living Communities, Inc.; Brookdale Senior Living Inc.; and American Retirement Corporation.

CORPORATE DISCLOSURE STATEMENT

Petitioner is the executrix of an estate for a deceased nursing home resident which has no parent corporation, and there is no publicly held company that owns 10% of the Petitioner's stock.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Sup. Ct. Rule 14.1(b)(iii):

- Opinion Affirming, U.S. Court of Appeals for the Sixth Circuit, *BLC Lexington SNF, LLC v. Townsend*, 171 F.4th 788, No. 25-5675 (6th. Cir. 2026), rendered March 26, 2026, *reh. denied* April 27, 2026, Doc. 35-2, App. A.
- Eastern District of Kentucky Order entered June 27, 2025 affirming arbitration award and denying Petitioner's Motion to Alter, Amend, or Vacate Arbitration Award, *BLC Lexington SNF v. Townsend*, 5:21-cv-223-KKC, 2022 WL 23038738, RE 71, App. B.
- Eastern District of Kentucky modified Order compelling arbitration entered September 28, 2022, 5:21-cv-223-KKC, 2025 WL 2181407, RE 19, App. C.
- Order entered April 27, 2026 denying Petition for Rehearing, U.S. Court of Appeals for the Sixth Circuit, Doc. 37-1, App. D.
- Kentucky Court of Appeals Opinion Affirming in state court companion case, *BLC Lexington SNF, LLC v. Townsend*, 719 S.W.3d 48 (Ky. App. 2025), *disc, review denied*. App. H.

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PETITION FOR WRIT OF CERTIORARI

The Opinion Affirming by the U.S. Court of Appeals for the Sixth Circuit below conflicts with the United States Supreme Court's precedent in *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145 (1968), and there is a circuit split in the interpretation of *Commonwealth Coatings*' "simple requirement that arbitrators disclose to the parties any dealings **that might create an impression of possible bias**." *Id.* at 149 (emphasis added); *see also Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994) (adhering to this requirement).

Under Sup. Ct. R. 10, there are compelling reasons for review. In this era of increased use of arbitration, it is of paramount importance to ensure that any enforcement of arbitration agreements occurs only with arbitrators who are impartial, appropriate, do not have improper motives, do not have a history of serious misconduct, do not have an appearance of bias, and who disclose all such potential issues prior to being selected.

This case has already resulted in a published Kentucky state court appellate opinion in Petitioner Townsend's favor on a different issue related to Respondents' continued attempts to force arbitration of all claims. *BLC Lexington SNF, LLC v. Towsend*, 719 S.W.3d 48 (Ky. App. 2025), *disc. review denied*, prior to the Sixth Circuit's Opinion in Respondents' favor on the portion of the case that was ordered by the federal court to be arbitrated.

The Sixth Circuit panel decision below only cursorily addresses the arbitrator's history of substantial misconduct and quid pro quo/bribery and glosses over the significance of these facts. The panel then notes that in the Sixth Circuit, "[t]o establish evident partiality, the challenging party must show that a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration,"[1] and that "not every nondisclosure violates the FAA."[2]

The Sixth Circuit held Townsend to a standard requiring her to "'show that a reasonable person would have to conclude that' the arbitrator was partial to [nursing home] BLC Lexington. . . . To meet that burden, Townsend needed to point to 'specific facts that indicate improper motives on the part of the arbitrator.'"[3] The Court then concludes in three short sentences:

> Townsend failed to satisfy her burden. The arbitrator's three-decade-old public censure over improper campaign contributions does not show that he was partial to BLC Lexington. The mere failure to disclose the censure thus does not, on its own, warrant vacating the arbitration award. *See ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 500 (4th Cir. 1999).

Id. at 10. Thus, the Opinion basically requires the Petitioner to show that the arbitrator engaged in quid pro quo/bribery in *this* case, and it held that the fact that he had engaged in it previously in his judicial

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[1] (Doc. 35-2, App. A, at 9 (citation omitted))

[2] *Id.* (citation omitted).

[3] *Id.* at 9-10.

capacity was insufficient as a matter of law, which cannot be, and should not be, the law. The Sixth Circuit's Opinion below does not even cite or address *Commonwealth Coatings*, this Court's seminal case on this issue, which was cited numerous times and analyzed in Petitioner Townsend's appellate briefs below. Further, the Opinion does not address the significance of the details of the serious misconduct at issue.

This Court has recently issued a series of opinions regarding enforcement of arbitration. *See, e.g., Epic Systems Corp. v. Lewis*, 584 U.S. 497 (2018) (reversing regarding arbitration); *Kindred Nursing Centers Ltd. Partnership v. Clark*, 581 U.S. 246 (2017) (reversing the Kentucky Supreme Court regarding arbitration); *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011) (reversing regarding arbitration).

The United States' appellate courts have also recently issued a series of opinions regarding alleged corruption. *See, e.g., Percoco v. U.S.*, 598 U.S. 398 (2023) (noting private citizen who is an agent of the government has a fiduciary duty to government and public it serves); *Skilling v. U.S.*, 561 U.S. 358 (2010) (reviewing conviction under honest-services statute for bribery and kickback); *U.S. v. Blagojevich*, 794 F.3d 729 (7th Cir. 2015) (reviewing conviction for attempted extortion from campaign contributors, corrupt solicitation of funds, wire fraud), *cert denied*, 577 U.S. 1234 (2016).

This is the rare case that combines both topics of arbitration enforcement and past serious misconduct in the form of corruption, but there is a dearth of case law addressing the specific issue in this case regarding what was discovered to be a history of prior misconduct and corruption by the arbitrator. The Sixth Circuit, as part of a circuit split, is improperly applying the U.S. Supreme Court's *Commonwealth Coatings* standard to require a higher standard, meriting review by this Court, especially under the facts herein. The facts and issues in this case are an ideal vehicle for this Court to resolve important issues and the circuit split on the subject matter of this appeal.

This appears to be a matter of first impression where an arbitrator had previously been found to have engaged in the corrupt practices at issue herein, which the arbitrator did not disclose to Petitioner (Defendant/Appellant below),[4] after which the district court affirmed the arbitrator's award and denied Petitioner's requested relief to vacate this arbitration. In Respondents' (Plaintiffs/Appellees below) Response Brief in the Sixth Circuit, they were unable to cite a single case in the United States where an arbitrator's award was upheld where there was a similar undisclosed history of such serious misconduct by an arbitrator.

The Sixth Circuit Opinion would allow persons with histories of a relationship with a party and serious misconduct to serve as arbitrators while concealing their backgrounds, and allow their awards to remain undisturbed and nearly exempt from review

[4] Respondents conceded that they did not know either. (Respondent's Sixth Circuit Resp. Br., Doc. 25 at 14 (Pg. 27), n.9) ("Counsel for [Respondent] Plaintiffs had no prior knowledge"); (RE 64, Page ID# 1990) ("To be clear, counsel for Brookdale had no knowledge").

despite their failure to disclose their prior serious misconduct. This Court should not condone such a course of action and it should grant review in order to resolve the circuit split which has arisen from this Court's decision in *Commonwealth Coatings*.

This Court should review this case and reverse the Sixth Circuit decision below.

OPINIONS BELOW

The Sixth Circuit's Opinion Affirming rendered March 26, 2026 is reported at 171 F.4th 788 (6th Cir. 2026), and reproduced at App. A (Doc. 35-2). The Eastern District of Kentucky's Order entered June 27, 2025 affirming arbitration award and denying Petitioner's Motion to Alter, Amend, or Vacate Arbitration Award is reported at No. 5:21-cv-223-KKC, 2025 WL 2181407, and reproduced at App. B (RE 71). The Eastern District of Kentucky's modified Order compelling arbitration entered September 28, 2022 is reported at 5:21-cv-223-KKC, 2025 WL 2181407, and reproduced at App. C (RE 19). The Sixth Circuit's Order denying Petitioner's Petition for Rehearing entered on April 27, 2026 is reproduced at App. D. The Kentucky Court of Appeals' published Opinion Affirming in the state court companion case is reported at *BLC Lexington SNF, LLC v. Townsend*, 719 S.W.3d 48 (Ky. App. 2025), *disc, review denied*, and reproduced at App. H.

JURISDICTION

The Sixth Circuit rendered its published Opinion Affirming on March 26, 2026. App. A. The Sixth Circuit denied Petitioner's Petition for Rehearing by Order entered April 27, 2026. App. D.

This Court has jurisdiction under 28 U.S.C. § 1254(1). The basis for jurisdiction in the federal district court asserted by Respondents was the allegation of jurisdiction on the basis of diversity and federal statute, citing 28 U.S.C. §1332(a)(1) and 9 U.S.C. §4.[5]

STATUTORY PROVISIONS INVOLVED

The applicable statutes are FAA 9 U.S.C. §§ 9 and 10, reproduced at App. I.

STATEMENT OF THE CASE

A. Legal Framework

"The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Congress required that "courts must place arbitration agreements on an equal footing with other contracts." *Id.* (citation omitted). The purpose of the FAA and placing arbitration agreements on equal footing was to "ensure that private arbitration agreements are enforced according to their terms." *Id.* at 347, n.6 (citation omitted). As a result, discretion is allowed in designing arbitration agreements and its terms regarding the arbitrators who will arbitrate. *Id.* at 344-45.

However, in order to ensure fair and impartial arbitrators, Congress included a fail-safe provision under FAA 9 U.S.C. § 10, as follows:

> **9 U.S. Code § 10 - Same; vacation; grounds; rehearing**
>
> (a) In any of the following cases the United States court in and for the

[5] (RE 1, Page ID# 3).

district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was

> made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

App. I.

The federal district court in the instant case declined to vacate the arbitrator's award under FAA 9 U.S.C § 10, and instead affirmed the arbitration award under FAA 9 U.S.C § 9. App. B. The district court rejected Petitioner's argument that the arbitrator's prior misconduct satisfies the bases for vacating the award under FAA 9 U.S.C § 10, even though only one of its provisions must be present in order for the award to be vacated.

In *Commonwealth Coatings Corp.*, 393 U.S. 145, even though one arbitrator of a three-arbitrator panel in a dispute was not alleged to have been guilty of fraud or bias in the case, where neither he nor a party disclosed to the other party that financial relations had existed between the party and arbitrator in prior years, the other party was entitled to have the award set aside. Although the lower courts refused to set aside the arbitrator's award, this Court reversed. In *Commonwealth Coatings*, this Court imposed an affirmative obligation on arbitrators to disclose information important to whether they can serve as an arbitrator and a majority of the Supreme Court adhered to an "appearance of bias" standard.

The Opinion of the Court authored by Justice Black[6] noted that the FAA's "provisions show a desire of Congress to provide not merely for any arbitration but for an impartial one." *Id.* at 147. It noted that "**we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges**" given their wide ability to decide the law and the facts. *Id.* at 149 (emphasis added). It concluded, "[w]e can perceive no way in which the effectiveness of the arbitration process will be hampered by **the simple requirement that arbitrators disclose to the parties any dealings that <u>might create an impression of possible bias</u>**." *Id.* (emphasis added). In reversing, the Opinion further noted:

> [A]ny tribunal permitted by law to try cases and controversies not only must be unbiased **but also must avoid even the appearance of bias**. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.

Id. at 150.

The concurring opinion authored by Justice White noted:

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[6] In addition to the Opinion of the Court by Justice Black which appears to have had four votes, there was a concurring opinion authored by Justice White which was joined by Justice Marshall, and therefore six justices voted to reverse.

> The arbitration process functions best . . . **by establishing an atmosphere of frankness at the outset, through disclosure by the arbitrator** of any financial transactions which he has had or is negotiating with either of the parties. . . .[7] And **it is far better that the relationship be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration** . . . .

Id. at 151 (White, J., concurring) (emphasis added). Of note, the footnote in this part of the concurring Opinion notes that the Opinion of the Court is "the majority opinion." *Id.* at 151, n.*. Under either the Opinion of the Court or the concurrence, the Petitioner has argued that the award in this case must be vacated.

Just as in this case, this Court noted as follows:

> An arbitration was held, but **the facts concerning the close business connections between the third arbitrator and the prime contractor were unknown to petitioner and**

[7] "In fact, the District Court found—on the basis of the record and petitioner's admissions—that the arbitrator in this case was entirely fair and impartial. I do not read the majority opinion as questioning this finding in any way." *Id.* at n.*.

> **were never revealed to it by this arbitrator, by the prime contractor, or by anyone else until after an award had been made. Petitioner challenged the award on this ground, among others** . . .

Id. at 146.

Additionally, in *Commonwealth Coatings*, the U.S. Supreme Court reversed even though there was no claim that the arbitrator's actual conduct in the arbitration before the three-arbitrator panel which had reached a unanimous decision was improper, except for the undisclosed prior relation, yet it was still vacated. The Opinion specifically states, "[i]t is true that petitioner does not charge before us that the third arbitrator was actually guilty of fraud or bias in deciding this case, and we have no reason, apart from the undisclosed business relationship, to suspect him of any improper motives." *Id.* at 147.

Petitioner here additionally uncovered that the Respondents had used the same arbitrator to arbitrate at least one prior past case for the Respondents but there was no disclosure of his prior work for Respondents in addition to the failure to disclose the arbitrator's past corruption in his judicial capacity. The Petitioner **also** alleged in great detail numerous reasons the arbitration and the arbitrator's conduct were fundamentally flawed, supporting the vacating of the award on those separate independent grounds, *see* (RE 38, 54), which Petitioner argued was a stronger case for vacating the award than in *Commonwealth Coatings*.

In addition to not meaningfully addressing the significance of the past agreed-upon misconduct by the arbitrator, the panel decision relies upon a Sixth Circuit test on which there is a circuit split.

> The U.S. Supreme Court last considered the meaning of evident partiality in *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145 (1968), almost five [now almost six] decades ago. . . . The law in the circuits since *Commonwealth Coatings* is split. . . . Thus, the time is ripe for further Supreme Court clarification.

Katz, Gordon P. and Han, Taylor, Disclosures key to avoiding "evident partiality" challenges, at 1, 3 (Aug. 31, 2017).[8]

In *Schmitz v. Zilveti*, 20 F.3d 1043, 1045 (9th Cir. 1994), the Ninth Circuit vacated an arbitrator's award, finding "*Commonwealth Coatings* is not a plurality opinion, however. Justice White said he joined in the 'majority opinion' but wrote to make 'additional remarks.'" It held, "[g]iven Justice White's express adherence to the majority opinion in *Commonwealth Coatings*, **it is clear that the majority opinion, including its 'appearance of bias' language, received at least five votes**." *Id.* at 1047 (emphasis added). "The *Commonwealth Coatings* court reversed precisely because" of "an

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[8] *Available at* https://www.hklaw.com/files/Uploads/Documents/Articles/08312017_DisclosuresKeyToAvoid.pdf (last checked July 24, 2026); *see also* Katz, Gordon P. and Han, Taylor, Disclosures key to avoiding "evident partiality" challenges, *Massachusetts Lawyers Weekly* (Aug. 31, 2017).

'appearance of bias.'" *Id.*

However, in contrast to the U.S. Supreme Court and Ninth Circuit's holding utilizing an "appearance of bias" standard, the Sixth Circuit has been requiring a higher burden "greater than an appearance of bias." *Thomas Kinkade Co. v. White*, 711 F.3d 719, 724 (6th Cir. 2013) (emphasis added).

The Petitioner respectfully submits that this Court should grant review of this case and resolve the circuit split and provide guidance to lower courts regarding the "appearance of bias" standard delineated in *Commonwealth Coatings*.

B. Factual Background and Proceedings Below.

Linda Elam ("Elam") was placed into the care of Respondent Brookside Richmond Place (Plaintiffs-Appellees), a nursing home in Lexington, Fayette County, Kentucky from June 15, 2020 through July 8, 2020.[9] After Elam suffered many injuries at Respondents' facility, she was transferred to University of Kentucky Hospital, where she died shortly thereafter on July 13, 2020.[10] Her sister Bonnie Townsend ("Townsend") filed an initiating Complaint and Amended Complaint in Fayette Circuit Court, a Kentucky state court, styled *Bonnie Townsend, Executrix of the Estate of Linda Elam v. BLC Lexington SNF, LLC d/b/a Brookdale*

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[9] Petitioner's Complaint filed in State Court Action (RE 1-2); Petitioner Plaintiff's First Amended Complaint filed in State Court Action (RE 14-1; 16-1).

[10] Petitioner Plaintiff's Initial Rule 26 Expert Witness Disclosures (RE 38-8).

Richmond Place SNF, et al., Civil Action Number 21-CI-01993, alleging global neglect by Respondents for many reasons, which resulted in injuries to and the wrongful death of Elam.

Respondents (who were Defendants in the state action), filed a complaint in the Eastern District of Kentucky, styled *BLC Lexington SNF, LLC v. Bonnie Townsend, Executrix of the Estate of Linda Elam*, 5:21-cv-00223-KKC, seeking to compel arbitration pursuant to the agreement signed by Petitioner (Plaintiff in the state action) regarding Elam's nursing home residency.[11]

The district court eventually denied the Motion to Compel Arbitration as to the wrongful death claim, but granted it in all other respects regarding the Respondents.[12] It denied Petitioner's Motion to Reconsider compelling arbitration based on current Kentucky precedent, and it also denied Petitioner's request to vacate the arbitration award.[13] The Sixth Circuit affirmed.[14]

The arbitration of a portion of this case was held at the office of Respondents' counsel from April 22, 2024, to April 29, 2024. Prior to the arbitration, despite Petitioner's request for discovery of substantial, important and relevant information from

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[11] (RE 1).

[12] (RE 19).

[13] (RE 71, App. B).

[14] (RE 15; RE 19 modified Order, App. C; RE 71 final Order, App. B; RE 72 Judgment).

the Respondents,[15] the arbitrator refused to compel it, denying the Petitioner nearly all of the discovery sought, and the arbitration commenced without the benefit of substantial discovery to which Petitioner should have been entitled.[16] The arbitrator then refused to release the arbitration award to the parties until he had received full payment of his fee of $66,192.50.[17] This was paid, and the Petitioner then received the arbitration award which largely rubber stamped the Respondents' submitted proposed arbitration award.[18] The arbitration award found against the Petitioner on every single substantial issue and awarded judgment in favor of the Respondents on every issue. On one of the most important issues, it imposed a "certainty" burden on Petitioner instead of preponderance of the evidence.[19]

After Petitioner received the arbitration award, which Petitioner concluded was wholly inconsistent with the facts and law, Petitioner discovered for the first time and obtained a copy of what is now known

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[15] (RE 1-1, at Page ID# 10) (requiring application of Kentucky Rules of Evidence and Civil Procedure in the arbitration; in Kentucky "the relevancy requirement [of KY CR 26.02(1)] is so broad that we can hardly think of any inquiry that would be excluded." *Newsome v. Lowe*, 699 S.W.2d 748, 751 (Ky. App. 1985).

[16] (Arbitrator's order on discovery, RE 41-4); Petitioner's Reply regarding motion to vacate, RE 54, Page ID# 1029-1031); (Petitioner's motion to compel discovery in arbitration, (RE 56-1), Petitioner's supplemental filing in support, (RE 56-2), and second supplemental, (RE 56-3)).

[17] (RE 38-6).

[18] (RE 38-6; RE 46-1; RE 41-3).

[19] (RE 46-1, App. E, at Page ID# 839-840).

to be a Public Censure of Thomas E. McDonald, III, the arbitrator in this case, for his past serious misconduct, which he never disclosed to the parties.

The Public Censure of the arbitrator was for a *quid pro quo* bribery scheme while he was serving as a district judge where he would appoint attorneys to serve as *guardian ad litem* in cases in his court if they donated funds to the his judicial campaign. The Kentucky Judicial Retirement and Removal Commission ("JRRC") found that the arbitrator had violated KY SCR 4.020(1)(b)(i) (guilty of misconduct in office) and his conduct further violated multiple canons of judicial conduct.[20] The JRCC publicly censured McDonald and he was required to withdraw from his judicial campaign and return the funds. None of these facts were disclosed to the Petitioner.

The Kentucky Judicial Retirement and Removal Commission ("JRRC") found:

> ORDER OF PUBLIC CENSURE
> Pursuant to [Kentucky]
> SCR 4.020(1)(b))
>
> Thomas E. McDonald, III is district judge of the Thirteenth Judicial District, Jefferson County. Judge McDonald **agreed to accept without formal proof the disposition made in this Order.**
>
> The Commission determined, after an *investigation* and an informal hearing, that Judge McDonald

[20] *Id.*

> personally solicited campaign contributions from attorneys in private practice in Jefferson County. **The Commission further determined that Judge McDonald solicited contributions from certain attorneys in connection with their appointment as guardian ad litem in juvenile cases in his court.**
>
> The above actions of Judge McDonald amounted to misconduct in office in violation of SCR 4.020(1)(b)(i). His actions further violated the following Canons of the Code of Judicial Conduct, Supreme Court Rule 4.300 . . . .[21]

The Kentucky JRRC found that he solicited contributions from "**certain** attorneys **in connection with** their appointment" to government-funded fee-paying cases,[22] which is corrupt conduct in his judicial capacity for what appears to be quid pro quo/bribery, and potentially establishes the elements for serious criminal conduct.

The JRRC specifically found that McDonald's actions as a judge amounted to misconduct "in violation of SCR 4.020(1)(b)(i)" (guilty of misconduct in office), *id.*, and "(h)is actions further violated" numerous specific canons of judicial conduct, including violation of Canons of the Code of Judicial

[21] *In Re the Matter of: Thomas E. McDonald, III*, Order of Public Censure, September 7, 1990. (RE 58-1, App. G, Page ID# 1955) (emphasis added).

[22] *Id.* (emphasis added).

Conduct, Canons 1, 2, 3, **and** 7:

(1) the integrity and independence of the judiciary (Canon 1);

(2) the avoidance of impropriety and the appearance of impropriety in all of his activities (Canon 2);

(3) performing the duties of his office with ***impartiality*** and diligence (including not making unnecessary appointments only on the basis of merit, avoiding nepotism and favoritism, and not approving compensation of appointees beyond the fair value rendered) (Canon 3); and

(4) refraining from political activity inappropriate to his judicial office (Canon 7).[23]

As part of his agreed-upon discipline, he agreed to discipline including withdrawing from a judicial campaign and returning contributions. The JRRC further found that "[u]pon consideration of his agreement to accept this disposition without formal proof, the Commission *finds* and it is hereby ORDERED and ADJUDGED that for the foregoing violations, Judge Thomas E. McDonald, III should be and hereby **is PUBLICLY CENSURED.**"[24]

After receiving the arbitration award, the Petitioner also learned that the arbitrator had arbitrated at least one prior case for Respondents.

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[23] *Id.* at Page ID# 1955-1957.

[24] *Id.*

Thus Respondents were repeat users of his arbitration services, which was also undisclosed.

Petitioner moved in the district court to alter, amend, or vacate the arbitration award based on this Court's Opinion in *Commonwealth Coatings* that an "appearance of bias" is sufficient to vacate the arbitration award. The Eastern District of Kentucky, and then the Sixth Circuit on appeal, instead imposed a heightened standard that required Petitioner to "'show that a reasonable person would have to conclude that' the arbitrator was partial to [nursing home] BLC Lexington. . . . To meet that burden, Townsend needed to point to 'specific facts that indicate improper motives on the part of the arbitrator,'"[25] and they declined to vacate the arbitration award under the authority granted in FAA 9 U.S.C. § 10.

The district court and Sixth Circuit did not find these reasons to be sufficient to vacate the arbitration award under FAA 9 U.S.C. § 10. The district court and the Sixth Circuit applied the Sixth Circuit's heightened standard for arbitrator impropriety, regarding which there is a circuit split and significant confusion among the circuits, and it declined to vacate the arbitration where this arbitrator has a history of relationship with Respondents and of quid pro quo/bribery in his judicial capacity, which were undisclosed to Petitioner. The district court and the Sixth Circuit also incorrectly held that the record did

[25] (Doc. 35-2, App. A, at 9-10); (RE 71, App. B). Obviously, steps such as deposing the arbitrator would be drastic.

not indicate a "certainty" standard was used.[26]

REASONS FOR GRANTING THE PETITION

The circuit split regarding a decades-old precedent demonstrates the need for a clarification of what "evident partiality or corruption in the arbitrators" means in order to vacate an arbitration award under 9 U.S.C. § 10.

The U.S. circuit courts have reached their own conclusions as to the meaning of *Commonwealth Coatings* without any additional guidance, and as a result this Court should step in and finally determine the meaning of Justice Black's opinion in light of Justice White's concurrence. The passage of the FAA was meant to further the United States' approval of arbitration despite years of judicial non-enforcement and the judiciary's attitude of disapproval. With the FAA, arbitration agreements were placed on the same footing as other contracts but if this circuit split remains, there will be an evident disparity between qualification of arbitrators in different circuits.

Based on the current landscape, arbitrators may refuse to arbitrate proceedings in those circuits in which they are held to different standards. All courts need to follow the same standard in deciding whether an arbitrator has shown evident partiality or corruption, or it will disincentivize parties from incorporating an arbitration agreement in one jurisdiction, creating conflicting use of arbitration and its varying standards for arbitrators in different parts of the country.

This Court has previously reviewed Kentucky

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[26] *Id.*

precedent concerning the interpretation of arbitration agreements signed by Attorneys in Fact[27] and should once again review this arbitration issue as the Sixth Circuit is misinterpreting the *Commonwealth Coatings* holding, causing a circuit split.

The decision below is the ideal situation where this Court should review and clarify what it means for an arbitrator to be disqualified for "evident partiality or corruption."

I. Is the Sixth Circuit Opinion incorrectly applying U.S. Supreme Court precedent to vacate arbitration awards by requiring specific conduct in the particular case meriting disqualification, an issue on which there is a circuit split, or is the standard one of "appearance of bias" as this Court has previously held?

The provisions of FAA 9 U.S.C. § 10 demonstrate that it was Congress' intent to have an impartial arbitrator and for the courts to have the authority to vacate an award if, for example, there is "evident partiality or corruption in the arbitrators." *Id.* This Court recognized Congress' intent in *Commonwealth Coatings*, 393 U.S. at 149, finding that the courts "should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review." *Id.*

However, even though *Commonwealth*

[27] *See Clark*, 581 U.S. 246 (reversing Kentucky Supreme Court's clear statement rule in arbitration cases).

Coatings is the seminal case on this issue from this Court, it has resulted in a federal circuit split with different applications of this important issue in modern ligation, and the application of this Court's holding merits review by this Court.

In *Commonwealth Coatings*, the Supreme Court vacated the arbitration award for merely an appearance of bias by the arbitrator. 393 U.S. at 146-47. Similar to the present case, the issues with the arbitrator in *Commonwealth Coatings* "were unknown to petitioner and were never revealed to it by this arbitrator, by the prime contractor, or by anyone else until after an award had been made." *Id.* at 146. The petitioners in *Commonwealth Coatings* never alleged that the arbitrator was "actually guilty of fraud or bias in deciding th[e] case," but this Court held that any "intimation" of a relationship must be revealed, and because such past relationships had not been disclosed, the award was required to be vacated. *Id.* at 147-150. This Court also held, "[w]e can perceive no way in which the effectiveness of the arbitration process will be hampered by **the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias**." *Id.* at 149 (emphasis added).

This Court therefore clearly held that arbitrators have an affirmative duty to disclose any issues that could be perceived as creating "an impression of possible bias," so that parties can thereafter decide for themselves whether they wish to proceed with a particular arbitrator.

It is this Court's prerogative, not the lower courts', to decide whether a controlling authority no longer achieves a uniform interpretation of similar statutory language. *Id.* "[A] precedent of this Court must be followed by the lower courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982); *see also Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989) (overruling *Wilko v. Swan*, 346 U.S. 427 (1953), in order to promote uniformity among the courts regarding the FAA and to correct erroneous interpretations of statutes to promote congressional policy).

Commonwealth Coatings directly controlled Petitioner's case, but the Sixth Circuit erroneously failed to apply this Court's precedent, as other circuits have also done in other cases. Under this Court's precedent, the Sixth Circuit was required to evaluate whether there was an "appearance of bias" by the arbitrator, and not to apply a heightened standard requiring "specific facts that indicate improper motives on the part of the arbitrator." *Thomas Kinkade Co.*, 711 F.3d at 723-24.

Congress had no intention of giving arbitrators unlimited authority in arbitration proceedings, which is why it included a provision granting federal courts authority to vacate arbitration awards. 9 U.S.C. § 10. This Court held in *Commonwealth Coatings*, 393 U.S. at 150, that an arbitrator not only must be unbiased but also must avoid even the appearance of bias. The Opinion was very clear in its imposition of an affirmative duty on arbitrators to disclose any appearance of bias. However, there is a circuit split in the holding of *Commonwealth Coatings* and Justice

White's concurrence, and some circuits, including the Sixth Circuit from which this petition arises, impose a more stringent burden on parties seeking to vacate an arbitration award that appears to controvert the purpose of this Court's holding.

In *Commonwealth Coatings*, Justice White wrote a concurring opinion, joined by Justice Marshall, to explain that although arbitrators are not automatically disqualified if the relationship between the arbitrator and a party is trivial, it is still required that the arbitrator disclose those relationships so that the parties may decide whether to proceed with the arbitrator. *Id.* at 150-52 (White, J., concurring). "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 (emphasis added).

The concurring opinion notes that "[i]t is far better that the relationship be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration." *Id.* at 151. Some circuits have followed *Commonwealth Coatings* while others, including the Sixth Circuit, have required a higher burden than what the Court intended.

It is Petitioner's position that the Sixth Circuit, and other circuits, have disregarded *Commonwealth Coatings* by raising the bar for vacating an arbitration award to a higher standard than what *Commonwealth Coatings* calls for.

In contrast to this Court's "appearance of bias" standard, the Fifth Circuit, for example, has concluded that the standard is a "stern standard." *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 281 (5th Cir. 2007). It has held that partiality must be "direct, definite, and capable of demonstration rather than remote, uncertain, or speculative." *Cooper v. WestEnd Capital Management, L.L.C.*, 832 F.3d 534, 545 (5th Cir. 2016) (citation omitted).

Such a heightened standard completely disregards this Court's holding and directives in *Commonwealth Coatings*. The Fifth Circuit has held that "[p]artiality means bias, while 'evident' is defined as 'clear to the vision to understanding' and is synonymous with manifest, obvious, and apparent." *Positive Software*, 476 F.3d at 281 (citations omitted). The Fifth Circuit describes confusion regarding how to interpret this Court's *Commonwealth Coatings* decision as a result of the four-vote majority with the concurrence of Justice White which was joined by Justice Marshall. The Fifth Circuit has read the concurrence as support for "ample but not unrealistic disclosure, and . . . a cautious approach to vacatur for nondisclosure." *Id.* at 282. However, there is no indication by Justice White's concurrence that a "stern standard" or "a cautious approach to vacatur" is the appropriate measure. *See Commonwealth Coatings*, 393 U.S. at 150-52 (White, J., Concurring).

In *Positive Software*, 476 F.3d at 284-85, the Fifth Circuit held under the facts of that case, as follows:

Finally, even if Justice White's "joinder"

> is not read as a limitation on Justice Black's opinion in *Commonwealth Coatings*, and the controlling opinion emphatically requires arbitrators to "disclose to the parties any dealings that might create an impression of possible bias," 393 U.S. at 149, 89 S.Ct. at 339, we cannot find the standard breached in this case. The facts of *Commonwealth Coatings* are easily distinguishable.

The Fifth Circuit explicitly noted that *Commonwealth Coatings* is subject to multiple interpretations, stating, for example, that "[a]nother compelling reading of the opinions is also possible, however."'

The Second Circuit has acknowledged that "[t]he Supreme Court, in *Commonwealth Coatings* . . . attempted to resolve the issue, but the result of that decision appears to be ongoing uncertainty" and that "[e]xactly what constitutes 'evident partiality' [under FAA 9 U.S.C. § 10] by an arbitrator is a troublesome question." *Morelite Const. Corp. v. New York City Dist. Council Carpenters*, 748 F.2d 79, 82 (2nd Cir. 1984). The Second Circuit concluded that the *Commonwealth Coatings* standard of "mere appearance of bias" was too low but "proof of actual bias" was too high, *id.* at 83-84, at it held that evident partiality will be found "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration," *id.* at 84.

Similarly, the Eleventh Circuit interpreted *Commonwealth Coatings* as requiring a "reasonable impression of partiality." *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1201 (11th Cir. 1982).

The Ninth Circuit, however, instead found that the "appearance of bias" language in the majority opinion in *Commonwealth Coatings* gained a majority of votes, including Justice White. *Schmitz v. Zilveti*, 20 F.3d 1043, 1047 (9th Cir. 1994). The multiple standards from the differing U.S. circuit courts have caused confusion and uncertainty, demonstrating the need for this Court's clarification.

The Ninth Circuit has appropriately followed its obligation to adhere to the holding of *Commonwealth Coatings*, and has not diverted from this Court's "appearance of bias" language because "it is clear that the majority opinion, including its 'appearance of bias' language, received at least five votes." *Schmitz v. Zilveti*, 20 F.3d, 1043, 1047 (9th Cir. 1994).

In *Schmitz*, the Ninth Circuit noted as follows:

> How to apply *Commonwealth Coatings* in a nondisclosure case is an issue of first impression in the Ninth Circuit. Other courts facing the same issue have held that "evident partiality" is present when undisclosed facts show "a reasonable impression of partiality." *Levine*, 675 F.2d [1197] at 1201 [11th Cir. 1982]; s*ee Sanko S.S. Co. v. Cook Indus., Inc.*, 495 F.2d 1260, 1263–64 (2d Cir.1973).

In *Schmitz*, the Court held that "[t]he *Commonwealth Coatings* court reversed precisely because the arbitrator's business relationship with one of the parties reasonably created an 'appearance of bias.'" *Id.* at 1047. The Court concluded that the U.S. Supreme Court did not articulate a "succinct standard," *id.*, and it also held as follows:

> In a nondisclosure case, the integrity of the process by which arbitrators are chosen is at issue. Showing a "reasonable impression of partiality" is sufficient in a nondisclosure case because the policy of section 10(a)(2) instructs that the parties should choose their arbitrators intelligently. *Commonwealth Coatings*, 393 U.S. at 151, 89 S.Ct. at 340 (White, J., concurring). The parties can choose their arbitrators intelligently only when facts showing potential partiality are disclosed. Whether the arbitrators' decision itself is faulty is not necessarily relevant. But in an actual bias determination, the integrity of the arbitrators' decision is directly at issue. That a reasonable impression of partiality is present does not mean the arbitration award was the product of impropriety.

Id. at 1407.

The arbitrator in the present case had a previous relationship with Respondents and has been involved in serious misconduct that involved what appears to be quid pro quo/bribery, all of which brings his partiality, bias, and fairness into question. These facts should have been sufficient to have required disclosure by the arbitrator of his past history of serious misconduct and relationship with the Respondents, and it should require the vacating of the arbitration award under either the appearance of bias standard or the heightened standard employed by multiple circuits, including the Sixth Circuit.

In this case, the Sixth Circuit affirmed the federal district court and erroneously declined to vacate the arbitrator's award, relying on *Uhl v. Komatsu Forklift Co., Ltd.*, 512 F.3d 294, 306 (6th Cir. 2008), to define the evident partiality standard as requiring the following: "We have held that "the challenging party must show that 'a reasonable person would have to conclude that an arbitrator was partial' to the other party to the arbitration." *Id.* at 306 (citations omitted).

The Sixth Circuit has thus also rejected this Court's standard delineated in *Commonwealth Coatings* and instead adopted a much higher burden on parties seeking to vacate an arbitration award. *Id.* at 306.

In *Uhl*, the Sixth Circuit decided that "[i]t is not enough to demonstrate 'an amorphous institutional predisposition toward the other side,' because that would simply be the appearance-of-bias standard that we have previously rejected." *Id.* at 306-07 (citations omitted). The Sixth Circuit requires "**the party asserting evident partiality must establish specific facts that indicate improper motives on the part of the arbitrator**." *Id.* at 306 (citations omitted) (emphasis added). The Sixth Circuit has concluded that applying the "the appearance-of-bias standard" "would make it impossible, in some circumstances, to find a qualified arbitrator at all." *Id.* at 307-08.

The Sixth Circuit's failure to follow this Court's holding in *Commonwealth Coatings* instead imposes a significantly higher burden on Petitioner, and the Sixth Circuit's Opinion Affirming in this case has thus far allowed an arbitration award to stand even where the arbitrator did not disclose a previous relationship with the Respondents and that he had been previously engaged in quid pro quo/bribery in his judicial capacity, which is an undeniably significant history of misconduct for an arbitrator.

The circuit split should be reviewed and the application of the appearance of bias standard for arbitrators should be clarified by this Court. The application of the correct *Commonwealth Coatings* standard, or even the heightened Sixth Circuit standard, to the facts of this case, merits reversal and vacating of the arbitration award.

II. Did the Sixth Circuit incorrectly impose a heightened burden on Petitioner to vacate the arbitration award, and does application of this Court's *Commonwealth Coatings* standard, or even the Sixth Circuit's much higher standard, merit reversal due to the arbitrator's prior relationship with the Respondents and his prior undisclosed history of quid pro quo/bribery misconduct?

The failure of the arbitrator to disclose his prior relationship with the Respondents and his prior misconduct is indefensible, requiring the vacating of the arbitration award.

The arbitrator has previously engaged in serious misconduct which has in other cases justified criminal prosecution or disbarment, and the FAA's provisions for a court vacating an arbitration award have clearly been met. *See* 9 U.S.C. § 10. The arbitrator, Thomas Edward McDonald, III, failed to disclose his past corruption in his judicial capacity as well as previous arbitration proceedings where Respondents herein were a party.

"This Court's precedents have recognized the vital state interest in safeguarding public confidence in the fairness and integrity of the nation's elected judges." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 433 (2015) (citations and quotation marks omitted). If Kentucky does not have confidence in this arbitrator's fairness as a judge, then the courts should not allow him to arbitrate cases to resolution without, at least, providing full disclosure of his history of serious misconduct.

In proceedings brought under the Judicial Conduct Code, the Kentucky Supreme Court has historically very rarely removed a judge from office. Although there were no public proceedings by the Kentucky Bar Association regarding this arbitrator's prior conduct at issue, similar conduct in other cases has repeatedly resulted in prosecutions as well as disbarment by the Kentucky Supreme Court.

In *Wake v. Kentucky Bar Ass'n*, 860 S.W.2d 295 (Ky. 1993), where the (Lexington) Fayette County Attorney prosecutor gave pay raises to employees and the funds were channeled back to his campaign, he was convicted of federal mail fraud, misappropriation of funds, and conspiracy, the Supreme Court held his "criminal conduct" "violates SCR 3.130(8.3)" as "[h]is convictions are of such a nature as to put in grave issue his moral fitness to continue the practice of law," *id.*, and he was disbarred.

Furthermore, in *Huffman v. Kentucky Bar Ass'n*, 422 S.W.3d 230 (Ky. 2013), where a district judge "assured a criminal defendant favorable treatment" in exchange for drugs, he was convicted of "the federal felony offense of knowingly and willfully attempting to affect commerce by extortion," and the Supreme Court noted that it "has repeatedly, especially recently, held elected officials to a higher standard and punished them accordingly for their betrayal of the public trust," holding that "[p]ermanent disbarment is the appropriate sanction." *Id.* at 231-34. The Kentucky Supreme Court noted, "'we have disbarred attorneys who have committed financial misconduct even when they have made efforts to rehabilitate themselves and even when they had committed merely a single offense.' Permanent disbarment is the near-routine sanction for gross financial misconduct." *Id.* at 232.

Accordingly, the prior violations of the arbitrator herein, without disclosure, raise a reasonable inference of or at least the appearance of the existence of bias, prejudice, partiality, favoritism for dishonest conduct, corruption, or the absence of impartiality with a history of disregarding ethical and decision-making codes and rules in pursuit of financial and political benefit. A reasonable party such as Petitioner would not have used this arbitrator if advised of the serious prior misconduct and his prior relationship with the Respondents, but these matters remained undisclosed.

These facts and this issue demonstrate at least the appearance of bias or impropriety, and they are also direct, definite, and established by specific facts as well as agreed-upon discipline for serious misconduct. To the extent Respondents argue that the law should not require such a disclosure by an arbitrator, a point with which Petitioner disagrees, then the law certainly *should* require such a disclosure for evaluation by the parties when they consider hiring a potential arbitrator. Additionally, the prior corruption at issue here should not have to be shown to have occurred in this particular case. Instead, the past history of misconduct and corruption should be sufficient to vacate the arbitration.

Kentucky has recently repeatedly affirmed that elected officials are held to higher standards and are punished for their betrayal of the public trust. *Huffman*, 422 S.W.3d at 233 ("This Court has repeatedly, especially recently, held elected officials to a higher standard and punished them accordingly for their betrayal of the public trust."). Removal of judges for misconduct in Kentucky is quite rare but appears to have occurred more often recently, *see id.* at 233, n.10, and it has been noted that "[a]n even-handed, unbiased and impartial judiciary is one of the pillars upon which our system of government rests," *McDonald v. Ethics Committee of the Kentucky Judiciary*, 3 S.W.3d 740, 745 (Ky. 1999) (citation omitted).

The Kentucky Supreme Court has even overturned elections where it has found that a candidate has participated in bribery and other misconduct because "the [candidate cannot] be adjudged to have been fairly nominated." *Ellis v. Meeks*, 957 S.W.2d 213, 217 (Ky. 1997).

In *United States v. Goldy*, 164 F.4th 493 (6th

Cir. 2026), a former Kentucky Commonwealth Attorney prosecutor's conviction for quid pro quo bribery was upheld by the Sixth Circuit, yet the same Court did not take the past misconduct of the arbitrator herein as seriously when affirming the denial of Petitioner's motion to vacate the arbitration award. App. A.

"Talmudic sages believed that judges who accepted bribes would be punishable by eventually losing all knowledge of the divine law." *U.S. v. Sun-Diamond Growers of California*, 526 U.S. 398, 400 (1999). "Bribery in this setting has long been taken seriously." *U.S v. Terry*, 707 F.3d 607, 612 (6th Cir. 2013) (finding the state court judge accepted bribes for his reelection campaign, the court refers to Herodotus, *The Histories* 5:25 (A.D. Godley trans., Harvard Univ. Press 1920) "describing how, in ancient Persia, a judge who accepted a bribe was flayed alive and his successor was forced to sit on a chair made from the predecessor's skin").

In recent years, this Court has taken a strong stance against corruption by public officials. In differentiating between bribes and gratuities, this Court has noted that "because bribery can corrupt the official act, Congress treats bribery as a far more serious offense than gratuities." *Snyder v. United States*, 603 U.S. 1, 8 (2024). The arbitrator in the present case has in the past taken acts "for private gain, not for the public good," *id.* at 6, and offered fee-paying appointments for campaign donations, making him untrustworthy in the eyes of the judiciary, and by extension, he is untrustworthy to be an arbitrator without full disclosure of his past.

The courts should be highly suspect of this arbitrator's misconduct due to the threat toward the integrity of the judiciary. "The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *McCutcheon v. Federal Election Com'n*, 572 U.S. 185, 192 (2014) (citation omitted).

This Court has declared that "**a judge who accepts bribes** from a criminal defendant to fix that defendant's case **is 'biased'** in the most basic sense of that word." *Bracy v. Gramley*, 520 U.S. 899, 905 (1997) (emphasis added). The judge in *Bracy* had started his corrupt acts when he was an attorney and continued in accepting bribes as a judge. *Id.* at 906-07. This potential issue lends support to the need for full disclosure of past misdeeds to ensure that corrupt acts are not still occurring in other proceedings, or that a party can "intelligently" choose not to move forward with an arbitrator with such a past. The arbitrator herein appointing individuals in return for campaign donations for his reelection campaign is a prime illustration of this need for disclosure.

Where an arbitrator could not even be impartial and free from quid pro quo/bribery when he was a judge, the Petitioner herein should not have to rely upon his being free from favor and acting appropriately as an arbitrator without disclosure of his prior misconduct.

Furthermore, the fact that the Respondents had previously used this same arbitrator in arbitration proceedings makes Respondents repeat users of his arbitration services, which was also not disclosed to Petitioner. *See Spence v. BLC Lexington SNF, LLC,* et al., 5:19-cv-00045-GFVT, Agreed Order of Dismissal [D.E. 13] (E.D. Ky. July 29, 2021) (same nursing home chain, same specific nursing home, same initial counsel for nursing home, and same arbitrator).[28]

This is Petitioner's only case since the executrix Petitioner brought the case on behalf of her sister after the nursing home Respondents wrongfully injured her and caused her death, and, unlike Respondents, counsel for Petitioner has never mediated or arbitrated with the arbitrator Thomas E. McDonald, III in any other case.

While not binding, it is important to note that even the American Arbitration Association ("AAA") has a specific rule governing what an arbitrator should do when arbitrators work with the same party more than once. The AAA states in its Rule and Mediation Procedures that arbitrators

> shall disclose to the AAA **any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias** or any financial or personal interest in the result of the arbitration or **any past or present relationship with the parties or their representatives**.

COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R-18(A) (AM. ARB. ASS'N 2022) (emphasis added);[29] *see also Commonwealth Coatings*, 393 U.S.

[28] (RE 69-3)).

[29] *Available at* https://www.adr.org/media/ueonklrv/2026_commercial-

at 149 (noting "[w]hile not controlling in this case, § 18 of the Rules of the American Arbitration Association, in effect at the time of this arbitration, is highly significant" and citing similar provisions in the AAA Rules § 18 in effect at the time regarding required disclosure by arbitrators).

Worse still, the arbitrator in this case improperly applied a "certainty" standard to the Petitioner's burden of proof on critical issues, specifically stating that "**[t]he Arbitrator cannot be certain** that Ms. Elam had developed the precise wounds shown in the photographs taken by the hospital staff at UK Medical Center on July 9, 2020 during her residency at Brookdale Richmond Place."[30]

There was no legal basis for the arbitrator to require in this civil tort case that the Petitioner meet a certainty standard on any issue. The arbitrator even noted that on July 6, 2020 at the Plaintiffs' facility, "Ms. Elam's weekly skin integrity review also identified three open wounds on her buttocks with multiple areas of slough, redness, and yellow tissues,"[31] but when she had multiple severe pressure ulcers identified upon her admission to UK Hospital three days later on July 9, 2020 he held that he "**cannot be certain**" that the wounds developed at the nursing home facility. (Emphasis added). This is the wrong legal standard, as it is well-established that "[i]n civil actions, proof by a preponderance of the

arbitration-rules-mediation-procedures.pdf (last checked July 24, 2026).

[30] (RE 46-1, at Page ID# 839-840) (emphasis added), App. E.

[31] *Id.* at Page ID# 826.

evidence normally 'determines the rights of the parties.' *Aetna Ins. Co. v. Johnson,* 74 Ky. (11 Bush) 587, 593 (1874)." *Woods v. Commonwealth*, 142 S.W.3d 24, 43 (Ky. 2004). This has been the law in Kentucky for at least 150 years, and where the principle is disregarded, reversal is required. *Aetna*, 74 Ky. (11 Bush) at 593, 595.

The Petitioner did not have the opportunity to weigh the arbitrator's undisclosed past relationship with the Respondents or his history of serious misconduct. Had Petitioner been advised of the prior relationship and the arbitrator's misconduct in his judicial capacity, Petitioner would not have used him and would have exercised her right to "intelligently" choose an arbitrator without such a history. *See Schmitz v. Zilveti*, 20 F.3d at 1047.

Under either the "appearance of bias" standard of the U.S. Supreme Court in *Commonwealth Coatings*, or the heightened standard of the Sixth Circuit that a party "must establish specific facts that indicate improper motives on the part of the arbitrator," the arbitration in this case must be vacated. "We should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges" given their wide ability to decide the law and the facts. *Commonwealth Coatings*, 393 U.S. at 149.

The unique facts of this case, the proceedings below, and the circuit split on an issue of profound importance in modern litigation, merit review and reversal by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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