

No. 26-143

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**

REPLY BRIEF FOR PETITIONER

D. TODD VARELLAS

Counsel of Record

SANDRA M. VARELLAS

VARELLAS &

VARELLAS PLLC

360 E. Vine St., Ste. 320

Lexington, KY 40507

(859) 252-4473

tvarellas@varellaslaw.com

Counsel for Petitioner

September 15, 2026

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
I. Respondents’ fact-specific arguments do not support denial of the Petition.	1
II. Respondents’ legal arguments further demonstrate the need for review by this Court....	7
CONCLUSION.....	14

TABLE OF AUTHORITIES

Cases

<i>Commonwealth Coatings Corp. v. Cont'l Cas. Co.</i> , 393 U.S. 145 (1968).....	1, 7, 9, 11, 12, 14
<i>EHM Productions, Inc. v. Starline Tours of Hollywood, Inc.</i> , 1 F.4th 1164 (9th Cir. 2021)	9
<i>Lagstein v. Certain Underwriters at Lloyd's, London</i> , 607 F.3d 634 (9th Cir. 2010).....	8
<i>Morelite Construction Corp. v. New York City Dist. Council</i> , 748 F.2d 79, 84 (2d Cir.1984)	9
<i>Nationwide Mut. Ins. Co. v. Home Ins. Co.</i> , 429 F.3d 640, 645 (6th Cir. 2005).....	9
<i>Positive Software Sols., Inc. v. New Century Mortg. Corp.</i> , 476 F.3d 278 (5th Cir. 2007).....	10
<i>Vaden v. Discover Bank</i> , 556 U.S. 49 (2009).....	2

Other Authorities

FED. R. CIV. P. 60.....	3
-------------------------	---

REPLY BRIEF

I. **Respondents' fact-specific arguments do not support denial of the Petition.**

Respondents' Brief in Opposition ("Opposition") provides additional justification for the grant of the Petition, as it demonstrates that the Sixth Circuit is applying a different standard than this Court's standard delineated in *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145 (1968).

This case is similar to *Commonwealth Coatings*, where

the facts concerning the close business connections between the third arbitrator and the prime contractor 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. Petitioner challenged the award on this ground . . .

Id. at 146 (emphasis added). Similarly, in this case, as the issue was a nondisclosure by the arbitrator of a matter of paramount importance, it was not until after the arbitration when the Petitioner discovered the arbitrator's undisclosed history.

As noted in the Petition at 4, n.4, Respondents' current counsel conceded that they did not know about it either. Respondents have never disclosed whether Respondents' prior counsel, who was their counsel at the commencement of the arbitration and later

withdrew,¹ in fact knew about the arbitrator's history, and Respondents have not disclosed the degree of their relationship with the arbitrator. In the federal district court, the Petitioner had also requested "[t]hat [Respondents] and their representatives, including both law firms which have represented [Respondents] in this case, provide information regarding any other 'relationship or transaction' with the arbitrator which has not been disclosed."² The district court's Order did not require the disclosure.³

Interestingly, as a matter of jurisdiction, this case is only in federal court because after Petitioner filed her initiating lawsuit in state court against Respondents **and** against its nursing home administrator Becky Stocker, who was **not** diverse,⁴ Respondents did not remove this case but instead filed a separate lawsuit against Petitioner in federal court in which they dropped the non-diverse administrator as a party⁵ to manipulate federal diversity and seek to avoid a "look through" of the federal lawsuit to compel arbitration. *See, e.g. Vaden v. Discover Bank*, 556 U.S. 49 (2009). The district court in this case rejected the look through of the lawsuit and kept the case.⁶

Respondents' Opposition claims that Petitioner's discovery and filing regarding the

¹ (RE 31) (Notice of Withdrawal); (RE 38) (Joint Status Report regarding commencement of arbitration).

² (RE 69, Page ID# 2138).

³ (RE 71).

⁴ (RE 1-2) (state court Complaint).

⁵ (RE 1, Page ID# 1).

⁶ (RE 15, Page ID# 295).

arbitrator's misconduct was somehow untimely, but this is a **nondisclosure** case. Petitioner filed her motion to vacate the arbitration under FAA 9 U.S.C. § 10 less than three months after receiving the arbitrator's decision,⁷ and thereafter filed her supplemental filing in support of her motion to vacate,⁸ and reply thereto,⁹ regarding the arbitrator's history as soon as it was discovered.

Newly discovered evidence permits a supplemental filing and even permits the reopening of a final judgment had one been entered. *See, e.g.*, Fed. R. Civ. P. 60(b)-(c). Furthermore, Respondents' motion to confirm the award had not even yet been filed, and it was not filed until June 6, 2025,¹⁰ over 11 months after the arbitration opinion on June 24, 2024. Petitioner was permitted to oppose such a motion to confirm the arbitration award. In fact, the issue of the arbitrator's misconduct was brought before the district court and fully briefed by April 10, 2025,¹¹ nearly two months before Respondents even filed their motion to confirm the arbitration award,¹² all of which were before the district court entered its final Order and Judgment addressing the arbitrator's history of misconduct.

Respondents' Opposition at 8 argues that the public censure of the arbitrator "is publicly available

⁷ (RE 38).

⁸ (RE 58).

⁹ (RE 69).

¹⁰ (RE 70).

¹¹ (RE 69).

¹² (RE 70).

online and through other resources regularly utilized by legal practitioners,” but this is misleading. Notably, Respondents stated in the district court that the Public Censure was “readily available by a quick internet search,”¹³ and they stated before the Sixth Circuit that it was “quickly identifiable,”¹⁴ but they have now changed their characterization of the availability of it.

Petitioner’s online searches, online court records searches, and searches of news publications did not yield any available record of the misconduct at issue that Petitioner was able to locate, and it took months of calls, communications and records requests before Petitioner finally uncovered and received—after the filing of the initial briefs regarding Petitioner’s then-pending motion to vacate—the Public Censure of the arbitrator at issue. It was previously unknown to the Petitioner and undisclosed by the arbitrator at any time.

Any argument by Respondents that they were able to in hindsight find sources describing the arbitrator’s history at issue falls flat. As Petitioner also set forth in the federal district court below, online searches by Petitioner for the misconduct at issue returned nothing at all on the issue.¹⁵ In fact, a Google internet search engine search for Thomas Edward McDonald III reveals that the public censure is not located on the first 10 pages of Google search engine

¹³ (RE 64, Page ID# 1988).

¹⁴ (Doc. 25, at 27).

¹⁵ (RE 69, Page ID# 2131-2133; RE 69-2; RE 69-6 to 69-10).

results.¹⁶ Respondents' current counsel concedes that they did not know about it either. And as also stated before the district court, when Petitioner sent requests to the Kentucky Bar Association, the KBA did not produce any misconduct order, and it was only after later receiving a response from the Kentucky Judicial Conduct Commission that Petitioner was finally able to make the discovery of the misconduct at issue.¹⁷

Respondents' Opposition at 5 states that Petitioner proposed the arbitrator at issue, implying that this should waive all issues regarding whether he could properly serve as arbitrator without disclosing his prior serious judicial misconduct to the parties. However, Petitioner did not know about the arbitrator's history at issue. Without the disclosure by the arbitrator of his improper judicial conduct and censure, Petitioner was not informed about and could not waive issues regarding his appropriateness to serve as the arbitrator for this case. Additionally, the parties spent the majority of a year disagreeing over an arbitrator, and the arbitrator at issue was at least the fifth proposed arbitrator in this case, as described in email chains ending on June 20, 2023¹⁸ and December 16, 2022.¹⁹

Interestingly, Respondents' counsel states that they were not counsel when the arbitrator was selected, but no affirmative claims regarding its prior

¹⁶ (RE 69-2).

¹⁷ (RE 69, Page ID# 2131).

¹⁸ (RE 69-4).

¹⁹ (RE 69-5).

counsel's knowledge about this arbitrator have ever been made in Respondents' filings on this issue.

Respondents' Opposition at 6 states that the arbitrator ruled in Petitioner's favor on some pre-arbitration matters. However, a review of the arbitrator's discovery Order at issue demonstrates that the arbitrator compelled very little of the discovery sought by Petitioner in the entire case.²⁰ Additionally, the arbitrator's ruling regarding an errata sheet was a motion filed by Respondents which was largely unimportant and a waste of everyone's time.²¹ Furthermore, regarding the pre-arbitration motions *in limine*, many were largely uncontested, and the arbitrator ruled against Respondents on very little that was significant or not crystal clear under the law.²² Most importantly, the arbitrator ruled against Petitioner and in Respondents' favor on every legal claim in his final award.²³

Respondents' Opposition at 19 argues that "the arbitrator expressly applied the preponderance-of-the-evidence standard," *id.* at 19, but this is incorrect. On a critical issue in the case regarding unstageable pressure ulcers, the arbitrator explicitly stated he was holding the Petitioner's level of proof to a level of certainty, stating that Petitioner had not met her burden because "[t]he Arbitrator cannot be certain."²⁴

²⁰ (RE 41-4).

²¹ (RE 50, Page ID# 2503-2506).

²² (RE 50, Page ID# 2507-2509).

²³ Compare Pet. App. E with Pet. App. F.

²⁴ Pet. App. 77 (Pet. App. E).

Respondents' Opposition at 9 argues that "[i]t was and is undisputed that the arbitrator remained qualified as a neutral, as evidenced by his continued service as a Kentucky judge for many years following the public censure." However, simply because it appears no criminal case was pursued at the time regarding the arbitrator's admitted misconduct and he continued to serve as a judge (although was barred from seeking an appeals judgeship), albeit with a public censure describing facts, evidence, and admitted serious misconduct, this has no bearing on whether the arbitrator was qualified to serve as an arbitrator without disclosure to the parties of the issue. This is especially true in this case, as Respondents argued to the Sixth Circuit that "[a] court's review of arbitral awards is very narrow" and one of "the narrowest" that there is,²⁵ and this Court has held 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. *Commonwealth Coatings*, 393 U.S. at 149 (emphasis added).

II. Respondents' legal arguments further demonstrate the need for review by this Court.

Respondents' legal arguments further support review.

Respondents' Opposition at 13 argues that "[w]hatever differences may exist in how the circuits have phrased the 'evident partiality' standard, none is

²⁵ (Doc. 25, at 51).

implicated here: on the facts of this case, the award would stand under any of those formulations.” Petitioner submits that the Sixth Circuit has applied an improperly stated rule of law as part of a circuit split. And that under the standard of this Court or of any of the circuits or the judges within the circuits, that this Court should review the case and vacate the arbitration.

Respondents’ Opposition at 16 cites *Lagstein v. Certain Underwriters at Lloyd’s, London*, 607 F.3d 634 (9th Cir. 2010), in support of their claim that a nondisclosure must be of facts indicating bias against one litigant and in favor of another. In that case, the arbitrator had previously had a judicial conduct complaint regarding his handling of peremptory strikes as a judge. *Id.* at 639. The FBI investigated him on “unspecified charges” and entered into a non-prosecution agreement. *Id.* The judicial conduct complaint “eventually was dropped.” *Id.* Unlike in the present case, (1) there was no final finding that the judge had violated multiple canons governing the judiciary, (2) there was no agreement by the judge to the facts supporting and findings of such violations, and (3) there was no discussion whatsoever of a prior quid pro quo/bribery scheme.

Furthermore, unlike in the present case, in *Lagstein*, “[a]ll three arbitrators . . . discharged their disclosure obligations by providing information concerning their relationships with the parties, their attorneys, and those attorneys’ law firms.” *Id.* at 646. In the present case, there was **no disclosure of anything on any issue at all** by the arbitrator.

After *Lagstein*, in 2021, the Ninth Circuit again held that a party “correctly points out that an ‘arbitrator’s failure to disclose to the parties any dealings that might create an impression of possible bias is sufficient to support vacatur.’ *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1105 (9th Cir. 2007).” *EHM Productions, Inc. v. Starline Tours of Hollywood, Inc.*, 1 F.4th 1164, 1173 (9th Cir. 2021). The cases cited by the party in that case involved an “arbitrator’s failure to disclose a *specific* relationship or business dealing that could create the impression of bias.” *Id.* Here, the specific dealing is the prior quid pro quo/bribery scheme, which renders the arbitrator in this case unfit to serve in this case, or in any case, without disclosure of his prior serious misconduct.

Regarding the circuit split, the Sixth Circuit has noted that it has “accepted *Morelite*’s²⁶ rejection, as dicta, of the appearance of bias standard espoused in the plurality opinion in *Commonwealth Coatings*.” *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 645 (6th Cir. 2005) (citation omitted).

But in *Commonwealth Coatings*, 393 U.S. at 149, the Opinion of the Court by Justice Black noted that under the FAA there is “**the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.**” (Emphasis added.) The Opinion also stated that “any tribunal permitted by law to try cases and controversies not only must be

²⁶ *Morelite Construction Corp. v. New York City Dist. Council*, 748 F.2d 79, 84 (2d Cir.1984).

unbiased **but also must avoid even the appearance of bias.**” *Id.* at 150 (emphasis added). The concurring Opinion by Justice White stated that it “join[s] my Brother Black’s opinion in this case,” but that it makes “additional remarks.” *Id.* at 150 (White, J., concurring).

In *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278 (5th Cir. 2007) (en banc), cited in Respondent’s Opposition at 14, n.47, the Fifth Circuit “reconsidered this case en banc in order to determine whether an arbitration award must be vacated for ‘evident partiality,’ 9 U.S.C. § 10(a)(2),” and it also adopted a heightened approach which Petitioner submits is inconsistent with *Commonwealth Coatings*.

In fact, it is apparent that even within the circuits, circuit judges are divided. The dissenting Opinion, joined by four other circuit judges, stated as follows:

In 1968 the Supreme Court held that an arbitral award could not stand where the arbitrator had failed to disclose a past relationship that might give the impression of possible partiality. *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968). The Court has never changed that holding; it is the law that rules us today. But the majority of this court disapprove of that law because they prefer to protect arbitrators and their awards when they fail to disclose

prior relationships with parties or counsel. They therefore change the law for this case and, to make it appear as if their transgression does not matter, trivialize their report of the past relationship. I dissent because this court may not overrule a decision of the Supreme Court.

Id. at 286 (Reavley, Judge, dissenting).

Regarding the divergent treatment of *Commonwealth Coatings*, the dissent notes:

The judicial disfavor of *Commonwealth Coatings*, while receiving surprisingly little treatment, has not gone unnoticed by commentators. One observed that “[f]ederal courts have floundered in the wake of *Commonwealth Coatings*” treating Justice White’s concurrence as authoritative and standing for a different holding

Id. at 288 (Reavley, Judge, dissenting).

The dissent of five circuit judges also stated that the same burden that has been imposed on Petitioner in this case is nearly insurmountable, in an era of increased use of arbitration:

Nor should we miss the need to promote the impartiality of arbitrators in this time when that is the favored method of dispute resolution. Influence can so easily corrupt the decision-making process even when it is not recognized by

the magistrate or arbitrator himself. And to prove bias or improper influence is rarely possible. . . . [T]he Justices made clear in *Commonwealth Coatings*, it is the protection and reassurance of the party that matters most.

Id. at 289 (Reavley, Judge, dissenting).

Given the considerable confusion even within the circuits surrounding *Commonwealth Coatings*, its holding should be clarified by this Court.

Respondents do not cite any authority in the United States that condones the history of serious misconduct of the arbitrator in this case from disclosing this significant past. This arbitrator's history is highly irregular, arising from facts and findings which were agreed to by the arbitrator, and not mere allegations of past impropriety. Despite this, Respondents' Opposition argues that the arbitrator had no duty at all to disclose the history of serious misconduct or even to disclose the full extent of his relationship with Respondents, which has never been provided.

In fact, if the arbitrator were a mere witness or party in a criminal or civil case, there is an argument that his prior misconduct and Public Censure would have been required to be disclosed by the prosecution to a criminal defendant for its use against him as a witness or that it would potentially be able to be used to impeach or to discredit his testimony, statements, or claims, since there is admitted underlying conduct which appears to involve moral turpitude and

dishonesty of substantial degree.²⁷ Furthermore, if this arbitrator were seeking regular employment, many employers, including those in the legal field, may choose not to hire him due to his background. If he were employed without disclosure of this background and it was later learned by the employer, many employers may also choose to terminate his employment as a result.

It appears that no matter how serious the past offense of an arbitrator, for example if it had resulted in prosecution or imprisonment, it would not be sufficient under Respondents' argument to vacate an arbitrator's decision after such a past was undisclosed, unless the conduct and punishment was as a result of this particular case. This cannot and should not be the law.

This Court need not necessarily rule that this arbitrator is disqualified from serving as an arbitrator in all cases, but merely that his nondisclosure in this case requires that this arbitration be vacated. To hold otherwise would allow persons with histories of serious misconduct—even involving highly dishonest conduct—or relationships with a party to conceal their backgrounds, serve as arbitrators, and for their awards to remain undisturbed and nearly completely exempt from review, as Respondents urge in this case. This Court should not condone such a course of action.

The misconduct of the arbitrator, which was admitted by him, is extraordinary. This Court should

²⁷ See (RE 58, at Page ID# 1947, n.10, for a string cite of cases which support this legal and evidentiary basis).

accept review, clarify *Commonwealth Coatings'* “simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias,” 393 U.S. at 149, resolve the diverging opinions in the lower courts, and reverse.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

D. TODD VARELLAS

Counsel of Record

SANDRA M. VARELLAS

VARELLAS &

VARELLAS PLLC

360 E. Vine St., Ste. 320

Lexington, KY 40507

(859) 252-4473

tvarellas@varellaslaw.com

Counsel for Petitioner

September 15, 2026