

No. 24-981

IN THE
Supreme Court of the United States

STRUCTURED ASSET SALES, LLC,

Petitioner,

v.

EDWARD CHRISTOPHER SHEERAN,
PKA ED SHEERAN, *et al.*,

Respondents.

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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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Second Circuit, in finding the 1909 Copyright Act “clear” on its face and holding that copyright protection extended only to the four corners of the two “complete copies” of the “best edition” of a musical work “then published” (which “complete copies” the 1909 Copyright Act expressly required be deposited with the Copyright Office), correctly applied its own independent judgment in interpreting the plain language of a statute, consistent with the “guidance of this Court” in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

2. Whether this Court should grant certiorari to “settle” the already “settled” scope of copyright for musical works under the 1909 Copyright Act, where the 1909 Copyright Act is “clear” on its face that copyright protection for musical works extended only to the four corners of the “complete” copies of the musical works deposited with the Copyright Office, where every court of appeals that has considered the question—the Second, Sixth and Ninth Circuits—has reached the same conclusion based on the plain language of the statute, where this Court already denied a prior petition for certiorari seeking review of the same question, and where the instant Petition only speculates as to the supposed “importance” of the Second Circuit’s nonexistent error.

PARTIES TO THE PROCEEDING

Respondents (defendants-appellees below) are Edward Christopher Sheeran, Sony/ATV Music Publishing LLC n/k/a Sony Music Publishing (US) LLC (“SATV”); Atlantic Recording Corporation d/b/a Atlantic Records (“Atlantic”); Bucks Music Group Ltd. (“Bucks”); BDi Music Ltd. (“BDi”); David Platz Music (USA) Inc. (“DPMI”); The Royalty Network, Inc. (“TRNI”); Amy Wadge; and Jake Gosling (collectively, “Respondents”).

Petitioner (plaintiff-appellant below) is Structured Asset Sales, LLC (“Petitioner”).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29(6):

1. SATV identifies its parent corporation(s) and any publicly held company that owns 10% or more of its stock as follows: SATV is a wholly-owned, indirect subsidiary of Sony Group Corporation, a publicly traded company organized under the laws of Japan.

2. Atlantic identifies its parent corporation(s) and any publicly held company that owns 10% or more of its stock as follows: Atlantic is a wholly-owned, indirect subsidiary of Warner Music Group Corp. (“WMG”), a Delaware corporation; WMG is a publicly traded company with more than 10% of its stock owned by AI Entertainment Holdings LLC and certain affiliates, which are not publicly traded companies.

3. Bucks identifies its parent corporation(s) and any publicly held company that owns 10% or more of its stock as follows: a private individual owns 100% of the stock of Bucks; no public company owns any portion of Bucks.

4. BDi identifies its parent corporation(s) and any publicly held company that owns 10% or more of its stock as follows: Bucks and a private individual (distinct from the one alluded to in paragraph 3 above) each own more than 10% of the stock of BDi; a private individual owns 100% of the stock of Bucks; no public company owns any portion of BDi or Bucks.

5. DPMI identifies its parent corporation(s) and any publicly held company that owns 10% or more of its stock as follows: Bucks owns 100% of the stock of DPMI; a private individual owns 100% of the stock of Bucks; no public company owns any portion of DPMI or Bucks.

6. TRNI states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

v

RELATED PROCEEDINGS

Kathryn Townsend Griffin, et al. v. Edward Christopher Sheeran, et al., No. 17-cv-5221, U.S. District Court of the Southern District of New York. Judgment entered May 5, 2023.

Structured Asset Sales, LLC v. Edward Christopher Sheeran, et al., No. 20-cv-4329, U.S. District Court of the Southern District of New York. Stay entered March 30, 2021.

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INTRODUCTION

In an effort to persuade this Court to revisit the Second Circuit’s affirmance of the District Court’s decision below, Petitioner Structured Asset Sales, LLC falsely contends the Second Circuit disregarded this Court’s decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). Petitioner manufactures this falsity by claiming the Second Circuit erroneously deferred to the Copyright Office’s purported unilateral determination that copyright protection for a musical composition under the 1909 Copyright Act extended only to matter expressed in the written sheet music deposit copies.

The Second Circuit did not defer to any supposed unilateral determination by the Copyright Office—and there was no such “unilateral determination by the Copyright Office.” Instead, the Second Circuit relied on the unequivocal language of the 1909 Copyright Act—which the Second Circuit found to be “clear” and which was enacted in response to and following this Court’s decision in *White-Smith Music Publishing Company v. Apollo Company*, 209 U.S. 1 (1908). The Second Circuit upheld and applied unambiguous statutory law and existing authority of this Court.

Specifically, the 1909 Copyright Act required deposit copies of musical compositions to be in written form and, for published compositions such as the allegedly infringed composition at issue in this case, the 1909 Copyright Act required the “complete” deposit copies to correspond to the “best edition” of the work “then published.” Because the distribution of phonorecords or sound recordings did **not** constitute publication under the 1909 Copyright

Act, the only way a musical work could be published was in written form, which necessarily limited copyright protection to what was reflected in the “best edition” of the “complete” written (sheet music) copies “then published” and deposited with the Copyright Office.

That the Copyright Office Compendium was also consistent with both statutory law and legal precedent in no way supports Petitioner’s false assertion that the Second Circuit purportedly deferred to the Copyright Office without making its own independent determination, in violation of *Loper Bright*. The Second Circuit did no such thing. The decision below does not conflict with the precedents of this Court in any way. Nor does it present an “important federal question” that should be “settled” by this Court given that every circuit which has considered the question (the Second, Sixth and Ninth Circuits) has reached the same conclusion based on the plain language of the statute, and given that this Court has already denied a prior petition for certiorari seeking review of the same question (a petition which Petitioner supported by filing an *amicus* brief).

STATEMENT OF THE CASE

A. Statutory Background

1. In 1908, this Court, applying the Copyright Act then in effect, assessed whether reproductions of piano rolls (rolls of paper with holes punched into them which could be utilized in conjunction with pianos or other reading systems to reproduce sound) infringed an author’s exclusive rights under copyright in musical compositions. *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1,

11-12 (1908). Answering that question in the negative, this Court held that a “copy” of a musical composition required “**a written or printed record of it in intelligible notation,**” and that piano rolls, therefore, were not “copies” and could not infringe a musical composition copyright. *Id.* at 17, 18 (emphasis added).

Following *White-Smith*, Congress enacted the Copyright Act of 1909 (as amended, the “1909 Act”), which, without affording copyright protection to mechanical reproductions of musical compositions themselves (such as reproductions embodied in piano rolls or later in sound recordings) or defining such reproductions as “copies,” created a compulsory licensing regime and granted copyright owners the right to be paid a mechanical reproduction fee and the right to enjoin unauthorized mechanical reproductions of their compositions. 17 U.S.C. § 1(e) (1971).¹

However, as noted, the 1909 Act did **not** grant copyright protection to mechanical reproductions themselves or classify them as “copies” of compositions, nor did it change the requirement that, to claim copyright for a musical composition, “the work had to be reduced to sheet music or other manuscript form.” 1 *Nimmer on Copyright* § 2.05[A][1][a] (2025); *see also* Harry G. Henn, Copyright Office Study No. 5, *The Compulsory*

1. Congress amended the 1909 Act over time, sometimes changing section numbers (*e.g.*, the 1947 codification changed Section 9 to Section 10). Unless otherwise noted, all references to the 1909 Act correspond to the Act in effect in 1973, and the dates in parentheses that sometimes follow citations to sections of the 1909 Act correspond to the date of the most recent amendment to such section prior to 1973.

License Provisions Of The U.S. Copyright Law (1956) at 19 (“While the copyright law since 1909 has protected ... musical compositions against recording and mechanical reproduction, [the 1909 Act] has not changed the ruling in [*White-Smith*] that recordings were not ‘copies’ of the musical composition or ‘writings’ of an author within the scope of the existing copyright statute.”); Alfred M. Shafter, *Musical Copyright* (1932) at 27 (under the 1909 Act, “music must appear on music paper, or ruled paper, so that it may be read. Without this visible manifestation, the music cannot be granted protection ... the present statute insists on a form that is ‘intelligible.’”).

Rather, as stated in the House Report on the Copyright Act of 1909, 60th Congress, 2d Session, Report No. 2222 (February 1909) (the “1909 House Report”): “[I]t is not the intention of the committee to extend the right of copyright to the mechanical reproductions themselves, but only to give the composer or copyright proprietor the control, in accordance with the provisions of the bill, of the manufacture and use of such devices.”² See also *Capitol Recs., Inc. v. Mercury Recs. Corp.*, 221 F.2d 657, 660 (2d Cir. 1955) (Section 1(e) of the 1909 Act prescribed that “one who had copyrighted a musical composition by publishing **written** copies thereof with the copyright notice had the exclusive right to make records thereof,” but “[n]othing in the Act indicates an intention that the record shall be the ‘copyrighted work.’”) (emphasis added; footnote omitted); *Skidmore as Tr. For The Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051, 1061-64 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 453

2. A copy of the 1909 House Report is available at: <https://tinyurl.com/4ped2a6w>.

(2020), *reh'g denied*, 141 S. Ct. 946 (2020) (“Although the 1909 Act extended copyright protection against infringement beyond the mere reproduction of the sheet music, Congress did not provide that copyrighted works could be anything other than sheet music”).

The 1909 House Report further explained that the use of the word “writings” in Section 4 of the 1909 Act was “not intended ... to change in any way the construction which the courts have given to it,” and this Court had interpreted the term “writings” to be limited to “the ideas in the mind of the author [which] are given **visible** expression.” *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (emphasis added).³

2. In contrast to the Copyright Act of 1976 (as amended, the “Current Act”) which provides for immediate copyright protection upon fixation into a tangible medium (17 U.S.C. § 102(a)), securing copyright protection under the 1909 Act required adherence to specific formalities. For published musical works, such as the allegedly infringed work at issue in this case, the 1909 Act required publication in visibly perceptible format with notice of copyright. In particular, Section 10 of the

3. Congress later recognized that the term “writings” had a broader meaning under the Constitution than under the 1909 Act as originally enacted. See *Goldstein v. California*, 412 U.S. 546, 567-68 (1973), *reh'g denied*, 414 U.S. 883 (1973) (explaining that, prior to the passage of the 1971 sound recording amendment which extended copyright protection to sound recordings, Congress “recognized that recordings qualified as ‘writings’ within the meaning of the Constitution, but had not previously been protected under the federal copyright statute,” *i.e.*, the 1909 Act) (citations omitted).

1909 Act provided that “[a]ny person entitled thereto by this title may **secure copyright** for his work by publication thereof with the notice of copyright required by this title” 17 U.S.C. § 10 (emphasis added). In turn, Section 20 of the 1909 Act provided that the “notice of copyright shall be applied, in the case of ... a musical work either upon its title page or the first page of music” 17 U.S.C. § 20 (1971). Of course, phonorecords, which were held not to be “copies” in *White-Smith*, do not include a “title page” or any “page[s] of music.” See *Neal v. Thomas Organ Co.*, 325 F.2d 978, 983 (9th Cir. 1963), *abrogated on other grounds by Lone Ranger Television, Inc. v. Program Radio Corp.*, 740 F.2d 718 (9th Cir. 1984); see also 1909 House Report (at discussion of Sections 18 and 19 of 1909 Act, as originally enacted).

Following publication of the written version of the musical work with proper notice, to obtain a copyright registration, an author of a musical work needed to deposit “two complete copies” of the “best edition” of the work as published. This was **not** some Copyright Office issued “administrative instruction,” as Petitioner pretends. Pet. 33. It was an **express requirement** of the 1909 Act: “After copyright has been secured by publication of the work with the notice of copyright as provided in section 10 of this title, there shall be promptly deposited in the Copyright Office ... two **complete copies** of the **best edition thereof then published**” 17 U.S.C. § 13 (1956). A copyright owner’s failure to deposit “the copies called for by section 13” could result in the copyright becoming “void.” 17 U.S.C. § 14 (1947).

Notwithstanding Petitioner’s suggestion to the contrary, the 1909 Act expressly required the deposited

“complete copies” of published musical compositions to correspond to “the work as published.” 17 U.S.C. § 13 (1956) (itemizing certain narrow classes of works for which the Register of Copyrights could, due to “their size, weight, fragility, or monetary value,” authorize the deposit of “photographs” or “identifying reproductions in lieu of copies,” but **excluding** class “e” musical compositions from that abbreviated list and requiring the deposit of musical compositions (and various other works) to correspond to “the work as published”); *see also* *Led Zeppelin*, 952 F.3d at 1062-63 (citing *Register’s Report on the General Revision of the U.S. Copyright Law* (1961) (“the act of 1909 inaugurated the present system: copyright is now secured by publication of the work with the copyright notice, and registration is made later when copies of the work **as published** are deposited”)) (emphasis added).

That authors could “secure copyright” by “publication” under the 1909 Act (provided properly compliant copyright notices were imprinted on the title page or first page of music) was significant because, prior to the effective date of the Current Act (January 1, 1978), the **only way** an author of a musical composition could “publish” the composition with notice was through sheet music or in another written, printed format: “The distribution before January 1, 1978, of a phonorecord shall **not** for any purpose constitute a publication of any musical work, dramatic work, or literary work embodied therein.” 17 U.S.C. § 303(b) (1997) (emphasis added); *see also* *Rosette v. Rainbo Rec. Mfg. Corp.*, 546 F.2d 461, 463 (2d Cir. 1976); *ABKCO Music, Inc. v. Laverne*, 217 F.3d 684, 690 (9th Cir. 2000), *cert. denied*, 531 U.S. 1051 (2000) (explaining that the 1997 enactment of Section 303(b) was not merely prospective but reflected “a statement of what [the 1909

Act] has meant all along”) (citation & internal brackets & quotation omitted).

3. As noted, Congress amended the 1909 Act in 1971 to extend copyright protection to sound recordings under class “n,” prohibiting only actual duplication of the sound recording. 17 U.S.C. § 5 (1971). Phonorecords could then serve as deposit copies for sound recordings **but not for any other class of work** (and hence not for purposes of protecting the underlying musical composition, which still required the deposit of written music). *See* 17 U.S.C. § 26 (1971) (“For the purposes of this section [*i.e.*, Section 26] and sections 10, 11, 13, 14, 21, 101, 106, 109, 209, 215, **but not for any other purpose**, a reproduction of a work described in subsection 5(n) [*i.e.*, “Sound recordings”] shall be considered to be **a copy thereof ...**”) (emphasis added). Accordingly, Petitioner’s assertion that “sound recordings were not accepted as deposit copies in connection with musical compositions” due to “administrative fiat” is a pure fiction that ignores the plain language of the statute. Pet. 24 n.9. The express text of the 1909 Act forbids the deposit of sound recordings for the registration of musical compositions.

Congress did not permit phonorecords to serve as deposit copies for compositions until the effective date of the Current Act (January 1, 1978), and the Current Act continues to distinguish between “copies” and “phonorecords.” *See* 17 U.S.C. § 408(b)(2) (permitting the deposit of “copies or phonorecords”); 17 U.S.C. § 101 (defining “copies” as “material objects, other than phonorecords” and defining “phonorecords” as “material objects in which sounds ... are fixed”).

4. In 1959, the Copyright Office promulgated regulations (the “1959 Regulations”)—consistent with the plain language of the 1909 Act and established legal precedent, including both *White-Smith* and *Burrow-Giles*—providing that “[a] phonograph record or other sound recording is **not** considered a ‘copy’ of the compositions recorded on it, and is **not** acceptable for copyright registration.” 37 C.F.R. § 202.8(b) (1959) (emphasis added). Of note, and also inconsistent with Petitioner’s attempt to invoke *Loper Bright*, Congress expressly provided in the 1909 Act that “the Register of Copyrights shall be authorized to make rules and regulations for the registration of claims to copyright as provided by this title.” 17 U.S.C. § 207 (1947).

In 1967, the Copyright Office published the *Compendium Of U.S. Copyright Office Practices* (1st ed. 1967) (the “1967 Compendium”), which explained that “[w]hen a sound recording is deposited [for a musical composition], the Office will reject the claim but point out to the applicant the possibility of writing out the composition in manuscript form and then making registration on the basis of the manuscript.” § 2.6.2.II.

As Petitioner emphasizes, albeit ignoring that it derives from and is consistent with both the statutory text of the 1909 Act and this Court’s decisions in *White-Smith* and *Burrow-Giles*, the 1967 Compendium further explained that copyright “protection extends only to the material actually deposited.” *Id.* § 2.6.1.II.a.

Congress amended the 1909 Act three times after promulgation of the 1959 Regulations and twice after publication of the 1967 Compendium (PL 87-646 (Sept.

7, 1962); PL 92-140 (Oct. 15, 1971); PL 93-573 (Dec. 31, 1974)), thus confirming that Congress viewed the Copyright Office’s regulations and guidance as being entirely consistent with its express intent as embodied in the plain statutory text of the 1909 Act. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change”) (citation & quotation omitted).

B. Facts And Procedural History

1. This case concerns the scope of copyright for the musical composition “Let’s Get It On” (“LGO”), co-authored by Ed Townsend and registered with the U.S. Copyright Office in July 1973 under Registration No. EP 314589 (the “EP” signifies that LGO had been registered under class “e,” musical compositions, as a published work). A569-575.⁴ As required by Section 13 of the 1909 Act (17 U.S.C. § 13 (1956)), “two complete copies of the best edition [of LGO] then published” (sheet music) were deposited with the Copyright Office—which, in accordance with Section 20 of the 1909 Act (17 U.S.C. § 20 (1971)), included a copyright notice on “the first page of music” (the “Deposit Copy”). *Id.* The Copyright Application identified February 14, 1973, as “the date when copies of this particular version [the deposited sheet music] of [LGO] were first placed on sale, sold or publicly distributed.” A569.

Petitioner is not an author nor even a legal owner of the LGO copyright. Instead, it acquired an 11.11%

4. Citations to A___ refer to the Appendix filed with the Court of Appeals.

beneficial interest in LGO from Townsend’s son, entitling it to receive royalties only. Pet. 5.

In 2018, Petitioner sued, alleging that the musical composition “Thinking Out Loud” (“TOL”) infringed LGO’s registered copyright. A1721 ¶ 1. Petitioner’s Third Amended Complaint (“Complaint”) alleged that TOL copied “various elements” from LGO, including the “harmonies,” “drums,” “bass line” and “tempo.” A32 ¶ 5. However, the Deposit Copy does not notate drums, a bass line or tempo. A840-845; A1733-36 ¶¶ 22-23. Rather, Petitioner contends that such elements appear **only** in a Marvin Gaye sound recording of LGO (the “Gaye Recording”), one of many different recordings of LGO. Pet. App. 72a.⁵

2. In April 2021, Respondents moved to exclude the reports of Petitioner’s musicologists because, *inter alia*, their reports improperly compared TOL to the Gaye Recording and relied on elements not expressed in the Deposit Copy (*e.g.*, an “implied” bass line). A1382-1413. Respondents separately sought summary judgment on grounds not germane to the Petition. *Id.*

On September 9, 2021, the District Court issued several *in limine* rulings. As relevant here, the District Court held that the Deposit Copy “defines precisely what [is] the subject of copyright,” and that “the scope of copyright is limited by the deposit copy.” Pet. App. 71a

5. A prior case brought by Townsend’s actual heirs (his sister, daughter and the estate of his ex-wife) was tried before a jury in April and May of 2023, and the jury returned a verdict finding that Ed Sheeran and Amy Wadge independently created TOL and did not copy LGO.

(citations, quotations & brackets omitted). The District Court further held that “the field of protected elements” is **not** “enlarged on the theory that they are consistent, and harmonize with the work as articulated in the Deposit Copy, and are implied by the way the articulated elements are expressed” because “[i]f what is implied is not in the Deposit Copy, it does not have the protection of copyright.” *Id.*⁶

Because it afforded Petitioner’s experts an opportunity to correct their defective reports, the District Court denied Respondents’ summary judgment motion “without prejudice to renewal.” A1245. After Petitioner submitted revised expert reports, Respondents renewed their motion for summary judgment, which the District Court denied on September 29, 2022. Subsequently, in response to Respondents’ motion for reconsideration, and upon granting the motion for reconsideration, the District Court granted summary judgment dismissing the complaint on May 16, 2023. Pet. App. 36a-50a. Petitioner timely appealed from the resulting judgment to the Court of Appeals for the Second Circuit and challenged, *inter alia*, the District Court’s Deposit Copy ruling. Pet. App. 5a.

On November 1, 2024, the Second Circuit affirmed the judgment and held “the scope of a copyright in a

6. The Court also held “[t]here is no genuine question that there is no notation or specification of a bass line in the Deposit Copy,” which “is apparent from a visual inspection, and is beyond dispute,” and thus rejected Petitioner’s attempt to “imply” a bass-line into the Deposit Copy. Pet. App. 72a-73a. While not barring use of the Gaye Recording at trial, the District Court also held that “the Gaye sound recording is inadmissible in any way which might confuse the jury into thinking it represents what is protected by copyright.” Pet. App. 72a.

musical work registered under the Copyright Act of 1909 [] is limited to the elements found in the copy of the work deposited with the Copyright Office,” that “[t]he scope of copyright protection for *Let’s Get It On* under the 1909 Act is limited to the four corners of the Deposit Copy,” and that elements of the Gaye Recording “that do not appear in the Deposit Copy are thus not protected by the registration.” Pet. App. 14a, 19a.

Upon its independent, *de novo* review of the plain language of the 1909 Act, the Second Circuit recognized that (a) published works “could be protected by affixing a copyright notice” on a published copy, (b) “a copyright notice cannot be affixed to sound,” (c) “distributing a sound recording ... did not constitute ‘publication’ under the [1909] Act,” and (d) “a musical composition was ‘published’ only if the sheet music were published.” Pet. App. 15a-16a (citations omitted); *accord supra* at 5-8. And because composers, “to secure an enforceable copyright of a [published] musical work,” needed to file “with the Copyright Office ‘two **complete copies** of the **best edition** thereof **then published**,’” the Second Circuit concluded “[t]he **statute** [] makes **clear** that its enforceable protection for musical works is limited to the contents of the ‘**complete copy**’ of the work filed with the Copyright Office at the time of registration.” Pet. App. 16a-17a (quoting 17 U.S.C. § 13; emphasis added). Otherwise, the Court reasoned, “extending protection beyond the ‘complete copy’ would negate the plain meaning of ‘complete.’” Pet. App. 17a (cleaned up).

To support its independent interpretation of the 1909 Act, the Second Circuit emphasized that while the 1909 Act required the deposit of “complete” copies for

musical works, it “required less than a ‘complete copy’ for [certain] works other than musical compositions,” confirming that “Congress’s inclusion of ‘complete’ to describe musical—but not other—works was deliberate.” Pet. App. 17a (citations omitted); *accord supra* at 6-7 (citing 17 U.S.C. § 13 (1956) (deposits of published musical works must correspond to “complete copies” of “the work as published”)).

Further supporting its conclusion that the statute was “clear” (Pet. App. 16a-17a), the Second Circuit explained its reading “complies with the principle of fair notice that led to public registration of copyrights in the first place,” and that “[e]ven before the 1909 Act, [this] Court recognized that an important reason for requiring a deposit copy was to allow others ‘to ascertain precisely what was the subject of copyright.’” Pet. App. 17a (quoting *Merrell v. Tice*, 104 U.S. 557, 561 (1881)).

Upon concluding its thorough, independent examination of the plain language of the 1909 Act—and after finding the statute “clear” on its face—the Second Circuit cited the 1967 Compendium to note that “longstanding practices of the Copyright Office promote” the aforementioned “interest in predictability and fair notice.” Pet. App. 18a. In other words, the Copyright Office’s practices are consistent with the statutory requirements; the Copyright Office did not create the requirements, it implemented the requirements embodied in the statutory text.

The Second Circuit then addressed, and dispensed with, the arguments raised by Petitioner. First, the Court rejected as incompatible with the plain language of the 1909 Act Petitioner’s argument “that a plaintiff must

show ‘access and substantial similarity to the work,’ not to the deposit copy of the work.” Pet. App. 19a. As the Court held, “a musical ‘work’ registered under the 1909 Act **is** the ‘complete copy’ filed with the Copyright Office.” *Id.* (emphasis in original). Second, the Court rejected Petitioner’s “common law” copyright argument, citing well-established law that the “securing of a statutory copyright, either by general publication with a proper notice or by registration of the work, ended the common-law protection.” *Id.* (citation omitted). Finally, the Court rejected Petitioner’s grasping invocation of the Berne Convention, finding the Convention of “no moment” to Petitioner’s claim “seeking to enforce a domestic copyright.” *Id.* at 20a.

On November 15, 2024, Petitioner moved for panel rehearing or, in the alternative, for rehearing *en banc*. On December 6, 2024, the Second Circuit denied the motion. Pet. App. 1a-2a.

ARGUMENT

I. The Petition Does Not Allege A Circuit Split, And This Court Already Denied A Distinct Petition For Certiorari Regarding The Scope Of Copyright Protection Afforded Musical Works Under The 1909 Act

Although the Petition suggests supposed “confusion [] has arisen in recent years over the proper interpretation” of the 1909 Act (Pet. 13), there is neither confusion nor any disagreement among any of the circuits to have considered this precise issue. The Petition does not, because it cannot, allege a circuit split, as every circuit to consider the

question—the Second, Sixth and Ninth—has concluded, consistent with the plain language of the 1909 Act and decisional authority, that the scope of copyright protection afforded musical works under the 1909 Act is limited to the written “complete copies” of music deposited with the Copyright Office. Pet. App. 13a-21a; *Led Zeppelin*, 952 F.3d at 1060-64; *Parker v. Hinton*, No. 22-5348, 2023 WL 370910, at *4 (6th Cir. Jan. 24, 2023).

Following the Ninth Circuit’s ruling in *Led Zeppelin*, this Court also denied a petition for certiorari (and petition for rehearing) regarding the scope of copyright protection afforded musical works under the 1909 Act. *See* 141 S. Ct. 453 (2020), *reh’g denied*, 141 S. Ct. 946 (2020). Notably, Petitioner filed an amicus brief in support of that failed petition. *See* Brief of The Pullman Group, LLC and Structured Asset Sales, LLC as Amicus Curiae in *Skidmore, as Trustee for the Randy Craig Wolfe Trust v. Led Zeppelin*, No. 20-142.

II. The Decision Below Does Not Conflict With A Prior Decision Of This Court, And The Petition Is Based On The False Premise That The Second Circuit “Deferred” To An Administrative Interpretation

Petitioner predicates its Petition on the premise that the Second Circuit “failed to fulfill its obligation to decide” what the 1909 Act “says and does not say about the role or lack of a role of the [] ‘deposit copy’ in defining and limiting the scope of copyright protection,” and that the Second Circuit “instead deferred to the statutory interpretation of administrators,” thus “conflict[ing] with” *Loper Bright v. Raimondo*, 603 U.S. 369 (2024). Pet. 4, 10 (emphasis omitted). That assertion is pretextual and false.

The question which Petitioner purports to present is not actually presented by this case but has been fabricated in effort to attract this Court's attention.

Contrary to Petitioner's assertion, the Second Circuit engaged in an independent analysis of the 1909 Act and expressly decided what the 1909 Act "says and does not say" on the subject of the deposit copy, ruling "[t]he **statute** [] makes **clear** that its enforceable protection for musical works is limited to the contents of the 'complete copy' of the work filed with the Copyright Office at the time of registration" because "[e]xtending its protection beyond the 'complete copy' would negate the plain meaning of 'complete.'" Pet. App. 16a-17a (emphasis added).

The Second Circuit did not apply, nor even reference, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *reh'g denied*, 468 U.S. 1227 (1984), nor did it defer to the Copyright Office's interpretation or even imply that it was doing so. On the contrary, the basis for the Second Circuit's decision was the "clear" statutory language of the 1909 Act which the Second Circuit analyzed itself. Further, under *Chevron*, courts could only defer to administrative interpretations when the statute at issue was "silent or ambiguous with respect to the specific issue." *Chevron*, 467 U.S. at 843. Here, however, the Second Circuit specifically ruled the statute was "clear" on its face, confirming it did not apply *Chevron* deference and did not abdicate its obligation to interpret the statute itself. Pet. App. 16a-17a.

Although the Ninth Circuit's decision in *Led Zeppelin* has already visited this Court in a *certiorari* petition that was previously denied, Petitioner also misrepresents the

basis for the Ninth Circuit decision, claiming the Ninth Circuit “deferred to the *Compendium*” in deciding *Led Zeppelin*. Pet. 4. That, too, is false. Like the Second Circuit, the Ninth Circuit ruled “[t]he text [of the 1909 Act] is **clear**,” and that “for unpublished works, the author must deposit one *complete copy* of such work.” *Led Zeppelin*, 952 F.3d at 1062 (bolded emphasis added; italicized emphasis in original).⁷ To support its ruling, the Ninth Circuit cited a case from the Court of Appeals for the First Circuit and a 1961 Report by the Register of Copyrights. *Led Zeppelin*, 952 F.3d at 1062-63. It then cited *Merrell v. Tice* to explain that “one objective of the deposit [copy requirement] was to permit inspection by other authors ‘to ascertain precisely what was the subject of copyright.’” *Id.* at 1063. Only after citing these authorities did the Ninth Circuit cite the 1967 Compendium to explain “the Copyright Office’s practice regarding applications to register unpublished musical compositions.” *Id.* Again, the 1967 Compendium did not provide the basis for the Court’s determination in *Led Zeppelin* but instead was consistent with the plain statutory text of the 1909 Act and the decisions of this Court and, hence, confirmatory of what the statute itself required, as relied on by the Ninth Circuit.

In short, neither the Second Circuit below nor the Ninth Circuit in *Led Zeppelin* “deferred” to the 1967 Compendium; each Court independently interpreted the 1909 Act and ruled—correctly—as to its express, unambiguous meaning. That the Copyright Office

7. Here, LGO was a published work, requiring the deposit of two complete copies of the best edition of the work then published. 17 U.S.C. § 13 (1956).

interpreted the 1909 Act in like manner for decades does not mean the Second Circuit or Ninth Circuit “deferred” to an administrative interpretation; it simply means the Copyright Office likewise adhered to the plain language of the 1909 Act. It is only Petitioner that pretends the statutory text is either unclear or nonexistent, that the Copyright Office has issued regulations that have no statutory basis, and that the Second Circuit erroneously deferred to the Copyright Office’s interpretation. Petitioner does so by necessity to create a false basis for its Petition. The Second Circuit’s decision clearly and unequivocally rebuts Petitioner’s baseless assertion.

Reduced to its essence and reality, Petitioner disagrees with what is mandated by the plain language of the 1909 Act and with Ninth Circuit, the Sixth Circuit and the Second Circuit in their reading of what each of these Courts has found to be clear statutory language. But not only is Petitioner’s argument wrong (because the circuit courts read and applied the law correctly), Petitioner’s argument provides no basis for granting certiorari (which is why Petitioner pretends the Second Circuit violated this Court’s *Loper Bright* decision). *See* Supreme Court Rule 10(a).

Moreover, Petitioner does not contend and cannot establish that the decision below “directly conflicts” with *Loper Bright*. Nothing in the Second Circuit decision even remotely implicates *Loper Bright* because the decision is specifically founded on the Second Circuit’s own reading of the statutory text of the 1909 Act, which the Court found to be clear. Petitioner’s secondary (and equally meritless) basis for seeking certiorari—that the Court should decide “an important question of federal law that has not been,

but should be, settled by this Court” (Pet. 10 (emphasis omitted))—confirms the decision below does **not** conflict with a prior decision of this Court.

While Petitioner argues that the Second Circuit supposedly improperly “relied upon the Compendium’s legal opinion,” or, “[a]t the absolute minimum,” “turned to the Compendium’s pronouncement of the law to shore up its analysis” (Pet. 21), there was nothing at all “improper” about the Second Circuit **considering** the 1967 Compendium. Petitioner is plain wrong when it argues the 1967 Compendium “should not enter into the analysis at all.” *Id.* (emphasis omitted). The Second Circuit did not need to sequester itself from the Copyright Office’s interpretation and pretend it did not exist. Rather, as the Court made clear in *Loper Bright*, while “courts must exercise independent judgment in determining the meaning of statutory provisions,” “[i]n exercising such judgment ... courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes.” *Loper Bright*, 603 U.S. at 394; *accord id.* at 399 (“exercising independent judgment is consistent with the ‘respect’ historically given to Executive Branch interpretations”) (citations omitted). Further, the “interpretations” of administrative agencies, both before and after *Loper Bright*, “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Id.* at 394 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

Likewise, courts always have been permitted to “accord[] due respect to Executive Branch interpretations of federal statutes,” and this Court has long recognized that “the contemporaneous construction of those who were called upon to act under the law, and were appointed to

carry its provisions into effect, is entitled to very great respect.” *Loper Bright*, 603 U.S. at 385-86 (citations & quotations omitted); *see also id.* at 386 (“the longstanding practice of the government—like any other interpretive aid—can inform a court’s determination of what the law is”) (cleaned up; citations & internal quotations omitted); *accord Bondi v. VanDerStok*, 145 S. Ct. 857, 873-74 (2025). This is especially true where, as here, Congress has delegated rulemaking authority. *See* 17 U.S.C. § 207 (1947) (“the Register of Copyrights shall be authorized to make rules and regulations for the registration of claims to copyright as provided by this title.”); *Loper Bright*, 603 U.S. at 394-95.⁸

The decision below does not conflict with *Loper Bright* or any other decision of this Court, and the Second Circuit did not “defer” to the Copyright Office. The Petition should be denied.⁹

III. The Petition Does Not Raise An Important, “Unsettled” Question Of Federal Law

To support its claim of “importance,” Petitioner makes two baseless arguments.

8. It is baseless for Petitioner to assert that the Copyright Office, in promulgating 37 C.F.R. § 202.8(b) (1959), improperly “interpret[ed]” the 1909 Act and “create[d] law.” Pet. 22. For published musical works, the 1909 Act already required the publication and deposit of written matter, corresponding to “complete copies” of the “best edition” of the musical work “as published.” 17 U.S.C. § 13 (1956).

9. Petitioner also waived its right to argue the issue it now raises by failing to argue in the District Court that the Copyright Office exceeded its authority in promulgating the 1967 Compendium.

First, Petitioner contends that “[p]roper application of the Supreme Court’s decisions ... is self-evidently a matter of exceptional importance.” Pet. 26. But, as demonstrated above, the Court below did **not** improperly apply this Court’s precedents.

Second, Petitioner speculates—without elaboration, much less record evidence—that the scope of protection afforded musical compositions under the 1909 Act is a matter “of exceptional importance to creators of musical compositions.” Pet. 34. Of course, matters raised by litigation are always important to the litigants and often, too, to those who occupy like positions in industry or society. But that does not mean the litigation implicates a question of exceptional, national importance.

Nor is there any pressing need for this Court to “settle” the scope of copyright protection afforded musical works under the 1909 Act when that question has an overwhelmingly obvious answer that has been decided in identical manner by every court to consider the question. For over a century, as evidenced by consistent case law and even by copyright treatises, there has been nothing “unsettled” about the scope of copyright protection for musical works being limited to what is literally expressed in the “complete copies” of the “best edition” of the written sheet music deposited with the Copyright Office, as required by the plain language of the 1909 Act.

Compounding matters, Petitioner’s claim of “importance” rests on its rank conjecture that authors of musical works ignored the express requirements of the 1909 Act and failed to deposit “complete copies” of the “best edition” of their musical works. There is no

basis for such a blanket assertion and, indeed, copyright protection for musical works has operated effectively since the passage of the 1909 Act and since the effective date of the Current Act.

Petitioner, who had nothing to do with the 1973 creation of LGO or its 1973 registration with the Copyright Office, speculates that Townsend himself failed to deposit a “complete copy” of his work, and that the Gaye Recording “reflect[ed] the best evidence of the true breadth of” his composition. Pet. 25. Petitioner proceeds unencumbered by knowledge and feels at liberty to make pronouncements about events it was not a party to and knows nothing about. Petitioner has no knowledge of what Townsend intended or believed with respect to LGO, beyond the undisputed fact that he chose to register the specific sheet music he registered (and as Petitioner was not present nor in existence when the Gaye Recording was created, it also has no knowledge whether Townsend or Gaye authored any of the elements which Petitioner claims appear in the Gaye Recording but not in the written Deposit Copy). Indeed, the Gaye Recording is but one of many recorded versions of the LGO composition. If Townsend created the alleged elements in the Gaye Recording and believed them to be important and entitled to copyright protection, he could have, and likely would have, included—indeed, he was **required** to include—all such elements in the “complete copies” of the “best edition” of the published sheet music deposited with the Copyright Office. Townsend did not do so.¹⁰

10. Citing photographs of the commercially released single of the Gaye Recording bearing a (p) copyright notice of 1973 (Pet. App. 92a-93a), Petitioner asserts that the Gaye Recording had been

It is also fundamentally false for Petitioner to assert that the Ninth Circuit has “recognized a scope of protection for works broader than that reflected in an incomplete deposit copy.” Pet. 34 (citing *Three Boys Music v. Bolton*, 212 F.3d 477, 486-87 (9th Cir. 2000)). In *Three Boys*, which predates *Led Zeppelin* by some twenty years, the Ninth Circuit addressed whether “minor” “inaccuracies” in a deposit copy could **invalidate** the copyright, **not** whether the scope of copyright could extend beyond matter expressed in a deposit copy. *Three Boys*, 212 F.3d at 486-87.

Regardless, for nearly 70 years (from 1909 until 1978), Congress could have, but did not, alter the publication and deposit copy requirements for musical compositions. That Congress clearly understood and intended for the 1909 Act to require the deposit of “complete copies” of the “best edition” of **written** music is evidenced by its adopting, for the first time in the Current Act, a provision allowing for phonorecords to serve as deposit copies for registration of both sound recordings and musical compositions. *See*

registered with the Copyright Office as of June 15, 1973, before Townsend registered the sheet music in July 1973. The copyright registration of a sound recording only protected that sound recording, not the musical composition embodied on the recording, and it is, thus, irrelevant to the compositional copyright. The sound recording copyright also provides no information regarding when the sheet music was published. Moreover, Petitioner has no interest in the sound recording copyright. It is also instructive that Townsend never sought to register the sound recording to reflect the musical composition at any time after the effective date of the 1976 Copyright Act, which permits sound recordings to be registered to cover the musical composition embodied in the recording.

17 U.S.C. § 408(b). Yet, as noted above, this change was prospective only, as Section 303(b) of the Current Act makes clear that the distribution of a phonorecord prior to the effective date of the Current Act (January 1, 1978) did not, for any purpose, constitute a publication of the underlying musical work embodied in the recording. Instead, under the 1909 Act, only the distribution of written music constituted publication of the musical work (and under the 1909 Act, publication is what secured copyright protection and triggered the requirement of depositing two complete copies of the best edition of the work then published). Thus, the work then published could only be in written form because a phonorecord did not publish the musical work, and the deposit copy necessarily corresponded to the published written music for which copyright had been secured.

IV. The Second Circuit's Decision Is Correct

Dissatisfied with the Second Circuit's conclusion that the 1909 Act is "clear" on its face in that the "complete copies" of the "best edition" of "as published" musical works (or the one "complete copy" of unpublished musical works) deposited with the Copyright Office needed to be in written format and that the written deposit copy defined the metes and bounds of copyright, Petitioner makes the irrelevant assertion that the 1909 Act does not literally state, word-for-word, "that sheet music (handwritten or otherwise) is the only type of material that can be submitted as a deposit copy for a musical composition." Pet. 27.

However, as the Second, Sixth and Ninth Circuits have recognized, the plain language—or in the words of

the Second and Ninth Circuits, the “clear” language—of the 1909 Act inescapably mandates such conclusion.

Petitioner’s assertion ignores a series of incontrovertible principles: (i) published musical works “secure[d] copyright” upon publication (17 U.S.C. § 10); (ii) the distribution of a phonorecord prior to January 1, 1978 did not publish the musical composition embodied in the recording; (iii) musical works could **only** be published in written format (17 U.S.C. § 303(b) (1997); *Rosette*, 546 F.2d at 463; *ABKCO Music*, 217 F.3d at 691; *accord supra* at 7-8); (iv) the required copyright notice could not be affixed to sound (17 U.S.C. § 20 (1971); *Neal*, 325 F.2d at 983); and, (v) “complete copies” of the “best edition” of the musical work “then published” needed to be deposited with the Copyright Office (17 U.S.C. § 13 (1956)). These principles establish that copyright protection for musical works under the 1909 Act necessarily extended **only** to the “four corners of the Deposit Copy.” Pet. App. 13a-21a; *accord Parker*, 2023 WL 370910, at *4; *Led Zeppelin*, 952 F.3d at 1060-64; *see also Unistrut Corp. v. Power*, 280 F.2d 18, 23 (1st Cir. 1960), *infra* at 29.

Forced to admit that, for musical works, the 1909 Act required the deposit of “complete copies” of the “best edition” of the work “as published,” Petitioner incongruously argues that protection for musical works somehow still extended beyond the “complete,” “best edition” deposit copy because the 1909 Act permitted the deposit of “identifying material” for **other** types of works. Pet. 30-31. That argument is self-defeating because it requires disregard for the plain language of the 1909 Act, which did not permit “identifying material” for musical compositions. And though it may not have been ideal to

permit “identifying material” for unwieldy objects such as large sculptures or motion pictures, the limited exceptions itemized in the 1909 Act reflect practical reality; the exceptions did not, however, undermine the purpose of the deposit requirement, nor did they override the express mandate of the 1909 Act with respect to musical works.

Further, although the Second Circuit clearly engaged in its own independent assessment of the 1909 Act—and again, the Court found that the statutory text was “clear”—it was, again, fully justified in considering the interpretation proffered by the Copyright Office in the 1967 Compendium as consistent. *See supra* at 16-21. And because Congress twice amended the 1909 Act **after** publication of the 1967 Compendium without change to the publication and deposit requirements for musical compositions (PL 92-140 (Oct. 15, 1971); PL 93-573 (Dec. 31, 1974)), Congress is understood to have expressed its agreement with the Copyright Office interpretation—*i.e.*, that copyright protection for musical works under the 1909 Act extended only to the written material deposited. *See Forest Grove Sch. Dist.*, 557 U.S. at 239-40; *accord Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

In proposing a contrary rule—copyright protection not for what is expressed in a deposit copy but for anything an expert might imply at any point in the future—Petitioner also seeks to gut a central purpose of the deposit requirement: to clarify “precisely what [is] the subject of copyright.” *Merrell*, 104 U.S. at 561. The self-serving free-for-all Petitioner posits would foment vast uncertainty and encourage rampant speculation, decades after the fact (and, in many cases, such as this one, long after the death of the composer in question), regarding the composer’s

supposed intentions, the scope of the composer’s work and what represents the “best edition” of the composer’s work, notwithstanding the express mandate in the 1909 Act that the deposit copy needed to correspond to the “best edition” of the work “then published.” It would expand copyright infringement litigation to encompass elements appearing nowhere in deposited sheet music under the 1909 Act, nor in deposited recordings under the 1976 Act, so long as an expert is willing to suggest that such elements can be implied. There is no basis in the statute, much less logic, for such an unworkable rule.

Conflating “access” with the scope of copyright, Petitioner next argues that songwriters today do not “consult the deposit copies on file with the Copyright Office,” implying Sheeran copied from the Gaye Recording. Pet. 31. The Second Circuit correctly rejected that contention because, while copying can be proved by access to a distinct work that incorporates elements of the copyrighted work, that does not somehow expand the scope of protection for the copyrighted work in question. Pet. App. 19a; *see also Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1372 (2d Cir. 1993); *Lipton v. Nature Co.*, 71 F.3d 464, 471 (2d Cir. 1995). Moreover, whether today’s songwriters consult Copyright Office records is irrelevant, as Congress enacted the statutory regime in question in 1909.¹¹

Petitioner falsely claims that “all of the authority on which the District Court relied can be traced back” to

11. Petitioner’s arguments concerning “common law” copyright and the Berne Convention lack even a colorable basis and were swiftly rejected by the Second Circuit. Pet. App. 19a-20a; *see also supra* at 15.

the 1967 Compendium, only to immediately backtrack, admitting that the very first decisional authority the District Court cited was this Court's decision in *Merrell v. Tice*, a case decided some 86 years before publication of the 1967 Compendium (and, of course, the Second Circuit also relied on the clear text of the 1909 Act). Pet. 15.

In a similar vein, Petitioner falsely claims “the only authority” cited by the courts “on the question ... of whether the deposit copy defines and limits the scope of copyright” for musical works “is the Compendium,” and that “no court had rendered a legal opinion as to whether the scope of copyright protection was defined and limited by what was submitted as a deposit copy, until the Ninth Circuit’s *en banc* decision in [*Led Zeppelin*].” Pet. 16, 34 (emphasis omitted). In fact, both the Second and Ninth Circuits cited *Merrell v. Tice* to support their rulings. The Ninth Circuit also cited *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1161-62 (1st Cir. 1994), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), which itself cited an earlier First Circuit opinion in which the First Circuit barred a claimant under the 1909 Act from claiming ownership over elements not included in the deposit copy of its literary work, confirming—consistent with the decision below, *Parker* and *Led Zeppelin*—that the scope of protection under the 1909 Act for musical compositions is defined and limited by what is contained in the best edition of the complete copies deposited with the Copyright Office. *See* 36 F.3d at 1163 n.27 (citing *Unistrut*, 280 F.2d at 23 (“insufficient proof of infringement” where “there was no proof” that copied material “was contained” in the “edition” “deposited with the Copyright Office”)).

At bottom, Petitioner cannot overcome the “clear” language of the 1909 Act. The Second Circuit correctly—and independently—interpreted the 1909 Act, and there is no need for this Court to “settle” a question that is not unsettled, but which is consistent with the plain language of the 1909 Act and which has been answered in identical fashion by the Second, Sixth and Ninth Circuits.¹²

12. Arguing it was “severely prejudiced”—which is not a basis for certiorari—Petitioner cites a “cascade” of supposed “errors” that flowed from the Deposit Copy ruling. Pet. 11-12. Although utterly irrelevant for purposes of assessing certiorari, there were no “errors” committed. First, Petitioner contends the judges below, whom it describes as “layperson[s],” improperly failed to apprehend “a fully-annotated bass line” in the Deposit Copy. In fact, Petitioner’s expert, John Covach, “conceded that the Deposit Copy ‘does **not** include a notated bass part,’” and, instead, sought to imply one. Pet. App. 22a (emphasis added). Second, Petitioner complains that “[t]o prevent the jury from any [] confusion” regarding the scope of LGO’s copyright (Pet. App. 73a), the District Court directed its experts to “remove” any reference to elements that appeared only in the Gaye Recording and, third, that the District Court denied Covach “the opportunity” to “opine” how professional musicians would play the Deposit Copy. Pet. 12. The Second Circuit reviewed those rulings for an abuse of discretion, finding “no reason to disturb the district court’s decision to exclude Covach’s testimony as ‘non-helpful’” and that it correctly “cabined the admissible evidence to the scope of the registration—the Deposit Copy.” Pet. App. 21a-23a (citations omitted). Fourth, Petitioner falsely contends “the lower courts erroneously imputed a bright-line requirement as to how many elements are required for ‘numerosity’ in the context of a selection-and-arrangement claim.” Pet. 12. However, neither the District Court nor the Second Circuit applied a “bright-line” rule—the District Court expressly refused to adopt one (Pet. App. 45a), and the Second Circuit nowhere spoke of one. Pet. App. 29a-31a.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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