No. 20-_____

IN THE

Supreme Court of the United States

PETROBRAS AMERICA INCORPORATED, PETROBRAS VENEZUELA INVESTMENTS & SERVICES, B.V., AND PETRÓLEO BRASILEIRO S.A.-PETROBRAS,
Petitioners,

v.

VANTAGE DEEPWATER COMPANY, VANTAGE DEEPWATER DRILLING, INCORPORATED,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Panama Convention and the New York Convention authorize the courts of Contracting States to refuse enforcement of an arbitral award where enforcement would violate domestic public policy. There is confusion among the circuits about how United States courts should treat determinations of the arbitrators on issues that bear on this defense.

Should United States courts review *de novo* an arbitrator's conclusions on issues of law or mixed questions of law and fact bearing on the ultimate question of whether United States public policy should prevent enforcement of an arbitral award?

PARTIES TO THE PROCEEDINGS

The case caption contains the names of all parties who were parties in the court of appeals.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings that are directly related to this case.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners Petróleo Brasileiro S.A.-Petrobras, Petrobras America Inc. and Petrobras Venezuela Investments & Services, B.V. state that:

1. Petróleo Brasileiro S.A.-Petrobras is a publicly traded company organized under the laws of Brazil. Petróleo Brasileiro S.A.-Petrobras has no parent company and no publicly-held corporation owns 10% or more of its shares. The Brazilian Federal Government owns 50.26% of the ordinary shares of Petróleo Brasileiro S.A.-Petrobras.

2. Petrobras America Inc. is an indirectly controlled subsidiary of Petróleo Brasileiro S.A.-Petrobras. Petróleo Brasileiro S.A.-Petrobras has no parent company and no publicly held corporation owns 10% or more of its shares. The Brazilian Federal Government owns 50.26% of the ordinary shares of Petróleo Brasileiro S.A.-Petrobras.

3. Petrobras Venezuela Investments & Services, B.V. is an indirectly controlled subsidiary of Petróleo Brasileiro S.A.-Petrobras. Petróleo Brasileiro S.A.-Petrobras has no parent company and no publicly held corporation owns 10% or more of its shares. The Brazilian Federal Government owns 50.26% of the ordinary shares of Petróleo Brasileiro S.A.-Petrobras.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Petrobras America Inc. ("PAI"), Petrobras Venezuela Investments & Services, B.V. ("PVIS") and Petróleo Brasileiro S.A.-Petrobras ("Petrobras-Brazil," and collectively with PAI and PVIS, "Petrobras") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

INTRODUCTION

This case presents the recurring and important question of how United States courts tasked with adjudicating whether enforcement of an arbitral award would contravene United States public policy under Article V of the Panama Convention (and the cognate provision of the New York Convention) should treat determinations of arbitrators on issues that bear on this public-policy defense.

There is confusion and conflict among the circuits about how this public-policy review should be conducted when an arbitrator's conclusions on issues of law or mixed questions of law and fact bear on whether enforcement of the award would violate United States public policy. Some circuits have correctly concluded that, while deferring to an arbitrator's factual findings, courts must independently review an arbitrator's legal determinations or determinations of mixed law and fact on issues determinative of the party's public-policy defense. Other circuits, by contrast, have skirted their obligation to decide the compatibility of the award with public policy by deferring entirely to all arbitral determinations that bear on the public-policy defense.

The Court should grant this petition to resolve the confusion and conflict and to ensure that United States courts do not put the weight of the United States behind arbitral awards that violate public policy.

OPINIONS BELOW

The opinion of the district court (App., *infra*, 30a-59a) is not reported but is available at 2019 WL 2161037. The Fifth Circuit's opinion (App., *infra*, 1a-27a) is reported at 966 F.3d 361. The Fifth Circuit's order denying rehearing and en banc review (App., *infra*, 309a-310a) is not reported.

JURISDICTION

The Fifth Circuit entered judgment on July 16, 2020. App., *infra*, 28a-29a. Petitioners filed timely petitions for rehearing and rehearing en banc, which were denied on August 28, 2020. App., *infra*, 309a-310a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

9 U.S.C. § 301 provides:

> The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter.

Article V(2)(b) of the Inter-American Convention on International Commercial Arbitration, *opened for signature* Jan. 30, 1975, 104 U.S.T. 448 (1990), 1438 U.N.T.S. 245, *reprinted following* 9 U.S.C. § 301, also known as the Panama Convention, provides:

> The recognition and execution of an arbitral decision may also be refused if the competent authority of the State in which the recognition and execution is requested finds . . . (b) That the recognition or execution of the decision

> would be contrary to the public policy ("ordre public") of that State.

9 U.S.C. § 201 provides:

> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

Article V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, *reprinted in* 9 U.S.C. § 201 (historical and statutory notes), also known as the New York Convention, provides:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that . . . (b) The recognition or enforcement of the award would be contrary to the public policy of that country.[1]

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[1] The arbitral award in this case is subject to both the Panama Convention and the New York Convention. Because the majority of the parties to the arbitration agreement are citizens of signatories to the Panama Convention (United States and Brazil), the Panama Convention applies to this case under 9 U.S.C. § 305. Although the texts of the Panama and New York Conventions are not entirely identical, the text of Article V(2)(b) of both conventions is substantially identical, and case law construing the New York Convention's Article V is applicable to proceedings under Article V of the Panama Convention; cases under both are therefore cited herein. *See, e.g.*, *PDV Sweeny,*

STATEMENT OF THE CASE

In the opinion below, the Fifth Circuit affirmed enforcement of an international arbitration award for $615.62 million in lost profits under a contract that was indisputably procured by bribery of foreign public officials (the "Award"). The court of appeals elided the public-policy issue by deferring to the Award's conclusion that Petrobras "ratified" the parties' corrupt contract based on the arbitrators' factual finding that Petrobras had notice of *allegations* that the contract had been procured by bribery and nonetheless continued to perform thereunder. But that factual finding of knowledge of bribery *allegations* is not legally sufficient to constitute ratification, which requires a finding of *actual* knowledge of bribery. Accordingly, the Award's "ratification by mere suspicion" theory was legally insufficient to overcome the public-policy impediment to enforcement of a contract procured by bribery. The lower courts should not have deferred to the Award on this issue.

Article V of the Panama Convention explicitly empowers national courts—here, the courts of the United States—to refuse to confirm arbitral awards

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Inc. v. ConocoPhillips Co., No. 14-CV-5183 (AJN), 2015 WL 5144023, at *4 (S.D.N.Y. Sept. 1, 2015) (analyzing petitioners' public-policy arguments under Article V(2)(b) of the Panama Convention, and observing that the fact that the Panama Convention applied was "not particularly consequential, as the [Panama] Convention is substantively identical to the New York Convention and applies concomitantly in this case"), *amended*, No. 14-CV-5183 (AJN), 2015 WL 9413880 (S.D.N.Y. Dec. 21, 2015), *aff'd*, 670 F. App'x 23 (2d Cir. 2016).

incompatible with their domestic public policy. Panama Convention, Art. V(2)(b). This Court's precedents unequivocally provide that whether enforcement of an international (or a domestic) arbitral award would contravene public policy is for the courts, not arbitrators, to decide. *See W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983). This ensures that a United States court does not place its imprimatur on a private arbitral award that offends fundamental United States public policy, just as the court would not enforce a contract that contravenes public policy.

In this case, the court of appeals acknowledged its duty to adjudicate Petrobras's public-policy defense under Article V of the Panama Convention. However, the court of appeals held that it was *precluded* from independently evaluating the arbitrators' ratification conclusion, a mixed question of law and fact.

The court of appeals' complete deference to the arbitrators conflicts with the approach to public-policy review taken by four other circuits, which have engaged in searching independent review of arbitrators' legal determinations and conclusions on mixed questions of law and fact bearing on the public-policy question, while deferring only to the arbitrators' factual findings. By contrast, the Fifth Circuit here, joining at least two other circuits, took a narrow approach to the public-policy inquiry and held that total deference is warranted where the arbitral tribunal has evaluated issues informing the public-policy

defense. Under this view, the already narrow public-policy exception to a United States court's otherwise deferential approach to arbitral decision-making is foreclosed entirely if the issue implicating public policy was considered—however erroneously or briefly—by the arbitral tribunal. If this view were accepted, it would prevent courts from exercising their crucial function in ensuring that the judiciary does not lend its imprimatur and the coercive power of a court judgment to an arbitral award whose enforcement contravenes United States public policy, just because the dispute was heard by arbitrators rather than by a judge.

The Court should resolve the circuit split on this issue. This Court's guidance is needed to clarify the extent of United States courts' authority to conduct *de novo* public-policy review—something the courts of appeals, even within the same circuit, have struggled with in evaluating defenses under Article V(2)(b). This is an indisputably important question as more and more parties agree to arbitrate disputes implicating United States public policy. This is especially so where, as here and in many similar cases, the public-policy concern is the bribery of public officials. Indeed, if the ruling below is permitted to stand, it would establish the dangerous precedent that a United States court will enforce a contract *indisputably* obtained through bribery of foreign public officials in violation of well-established United States public policy.

A. Background

Although the United States' pro-arbitration policy is well recognized, it is equally well established that United States courts must vigorously enforce the narrow but fundamental safeguards specified in Article V of the Panama Convention for refusing recognition of arbitral awards, including when recognition would run afoul of other United States public policies. *See* Panama Convention Art. V(2)(b). The Panama Convention acknowledges the right and obligation of the courts of each Contracting State to "refuse[]" to lend the judiciary's sanction and the State's coercive authority to an arbitral award if doing so would be "contrary to the public policy" of "the State in which the recognition and execution are requested." *Id*.

As this Court has made clear, courts, not arbitrators, must decide whether enforcement of an award would contravene public policy. *See, e.g.*, *W.R. Grace*, 461 U.S. at 766 ("[T]he question of public policy is *ultimately one for resolution by the courts*." (emphasis added)). Indeed, the United States' policy promoting arbitration relies on the understanding that "[h]aving permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate [public-policy] interest . . . has been addressed." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985). This ensures that a United States court does not give effect to a private arbitral award that offends fundamental United States public policy and

foundational notions of justice, thereby safeguarding both the rights of the parties to the arbitration and the continuing legitimacy of arbitration as an alternative dispute-resolution mechanism.

The judiciary's refusal to enforce such an arbitral award is rooted in the fundamental common-law notion "that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act." *United Paperworkers Int'l Union v. Misco Inc.*, 484 U.S. 29, 42 (1987). This doctrine is "further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements." *Id.*

B. Facts and Procedural History

In 2009, Vantage engaged in a complex bribery scheme to procure a ten-year, $1.8 billion Agreement for the Provision of Drilling Services (the "Contract"), which provided Petrobras with offshore drilling services using the *Titanium Explorer* deepwater drillship. As the court of appeals recounted in the opinion below, "[i]n exchange for help procuring [the Contract], Vantage's largest shareholder and board member [Hsin-Chi Su ("Su")] . . . agreed to pay approximately $30 million in bribes, distributed as kickbacks" to Brazilian political party officials, former Petrobras employees and Vantage's agent, Hamylton Pinheiro Padilha, Jr. App., *infra*, 2a. The bribery scheme also implicated key Vantage executives and directors at the highest levels, including its

then-Chief Executive Officer and President. *Id.* at 2a-3a.

Suspicions that the Contract may have been procured through bribery, including of Brazilian government officials, first emerged in August 2013, when a Brazilian magazine published conclusory *allegations* (later recanted) that a Vantage shareholder had paid a political lobbyist to procure a drilling contract with Petrobras. App., *infra*, 3a. Vantage declined to investigate the article's allegations. Petrobras, however, promptly conducted an internal investigation. *See id.* Although the investigatory report determined that certain Petrobras employees had not complied with internal Petrobras contracting rules, the report could not "'prove the veracity'" of the bribery allegations with respect to Vantage. *Id.* at 3a-4a. Petrobras nonetheless continued to investigate the allegations. In late July 2015, a breakthrough occurred when Padilha signed a plea agreement with Brazilian prosecutors and shortly thereafter confessed under oath to paying bribes to obtain the Contract. *Id.* at 2a, 5a. Now knowing that the bribery allegations were true, Petrobras promptly terminated the Contract. *Id.* at 4a-5a.

Vantage then commenced the arbitration, claiming that Petrobras's termination of the Contract was a breach that entitled Vantage to recover "over $450 million" in damages. App., *infra*, 5a. The primary issue in the arbitration was whether the Contract was procured through bribery and corruption. *Id.* Petrobras contended that Vantage could not prove the Contract's validity, a key element of its breach

claim, because the contract was obtained through bribery. *Id.*

Following a merits hearing, two of the arbitrators, over the dissent of the third,[2] issued the Award in Vantage's favor. Although the Award acknowledged that the Contract was procured by bribery, the Award expressly declined to decide whether Vantage was responsible for that bribery. App., *infra*, 190a-192a. The Award accomplished this sidestep by finding that in any event, Petrobras ratified the Contract through contractual performance and amendments after the August 2013 article that put Petrobras on notice of bribery *allegations*. Notably, the tribunal did not find—and cited no evidence to support a finding—that the acts claimed to have constituted a ratification of the Contract by Petrobras were performed at a time when Petrobras had actual knowledge that the Contract had been obtained by bribery. *Id.* at 190a-191a, 219a, 235a, 238a-241a.

The tribunal awarded Vantage damages of $622.02 million plus interest. App., *infra*, 271a-272a. Of this, $615.62 million was "benefit of the bargain" damages for lost profits, and the rest covered invoices for services rendered before termination. *Id.*

Vantage filed a petition to confirm the Award (the "Petition"). App., *infra*, 7a. Petrobras opposed confirmation based on Article V(2)(b) of the Panama

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[2] We refer to the two-arbitrator majority hereinafter as the tribunal or the arbitrators.

Convention because enforcement would allow Vantage to reap the benefits of a contract it obtained through bribery, including of foreign public officials, in violation of United States public policy. *Id.* at 13a.[3]

The district court granted Vantage's Petition and confirmed the Award. In deciding Petrobras's public-policy defense, the court deferred to the tribunal's ratification decision, even though the public-policy question under Article V(2)(b) is one uniquely within the province of the courts that must be reviewed *de novo*. App., *infra*, 55a-57a.[4] The district court thus declined to independently examine whether the tribunal's factual finding that Petrobras was aware of bribery *allegations* amounted to legal ratification sufficient to overcome the public-policy defense. Instead, it assumed the correctness of the tribunal's ratification conclusion, characterizing the question before it as "whether enforcing a contract alleged to have been procured through bribery—*and subse-*

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[3] Petrobras opposed confirmation only of the portion of the Award awarding Vantage $615.62 million in lost profits, which would require Petrobras to pay Vantage on a prospective basis amounts Vantage supposedly "would have received" if Petrobras had not terminated the Contract that was invalidly obtained by bribery—*i.e.*, the gain to Vantage from the bribery. App., *infra*, 243a.

[4] Along with its opposition to confirmation, Petrobras filed a motion to vacate the entire Award under FAA Sections 10(a)(2), 10(a)(3) and 10(a)(4), which the district court denied. App., *infra*, 7a, 33a.

quently ratified by the non-bribing party—would violate public policy." *Id.* at 56a (emphasis added). Finding it would not, the district court confirmed the Award.

The court of appeals affirmed. It acknowledged the overwhelming evidence that the Contract was procured by bribery, App., *infra*, 2a-3a, and that the "underlying conduct [in the case], bribery, does violate public policy," *id.* at 16a. Nevertheless, the court of appeals determined that "[t]here was no public policy bar to confirmation," *id.* at 18a, because it believed it was required to defer to the tribunal's "finding" that Petrobras had "ratified" the bribery-induced Contract. *Id.* at 16a-17a. As the court of appeals explained:

> The arbitrators found Petrobras ratified the [Contract]. When we defer to that finding, the legal conclusion follows that the [Contract], and the arbitration award, did not violate public policy.

Id.

The court of appeals thus deferred not only to the tribunal's factual finding that Petrobras continued to perform under the Contract after the August 2013 article put it on notice of bribery *allegations*, but also to the tribunal's legal conclusion that continued performance by Petrobras under these circumstances was sufficient to constitute ratification necessary to overcome the acknowledged public-policy impediment to enforcing the Award. It did not address Petrobras's position that as a matter of law ratifica-

tion may be found—and the public-policy stain removed—only when the party continues to perform with actual knowledge that bribery had induced the Contract, which the arbitrators did not and could not find in this case.

In arguing against this result, Petrobras relied on prior Fifth Circuit authority in *Gulf Coast Industrial Workers Union v. Exxon Co., USA*, 991 F.2d 244 (5th Cir. 1993), in which the court independently reviewed an arbitrator's conclusion *de novo* before affirming vacatur of an arbitral award on public-policy grounds. App., *infra*, 14a-15a. The court of appeals acknowledged this precedent, but declined to conduct such *de novo* review here. Instead, the court of appeals relied on a Second Circuit decision holding that "a reviewing court should not reconsider an arbitrator's findings" with respect to public-policy defenses related to the award's substance. *Id.* at 15a-16a.

Thus, rather than considering *de novo* the legal import of the facts the tribunal found, the court of appeals simply deferred to the arbitrators' ratification determination—an issue directly implicating Petrobras's public-policy defense. App., *infra*, 16a-17a.

The court of appeals denied Petrobras's petition for rehearing and rehearing en banc. App., *infra*, 309a-310a.

REASONS FOR GRANTING THE WRIT

The decision below implicates a conflict among the courts of appeals on an important and recurring question concerning adjudication of the public-policy defense to enforcement of arbitral awards: whether that defense under the Panama and New York Conventions requires United States courts to exercise their independent judgment in assessing arbitrators' legal determinations and conclusions on mixed questions of law and fact determinative of the public-policy concern at issue. In the decision below, the court of appeals broke with the decisions of at least four other circuits (and its own precedent) conducting *de novo* review to assess public-policy-based grounds for denial of enforcement. Instead, following decisions of the Second and Seventh Circuits, the court below simply deferred to the arbitral tribunal's legally incorrect determination that the contract had been ratified and the public-policy stain had therefore been removed. This Court should take this opportunity to resolve the confusion in the circuits about whether such legal determinations that are determinative of a public-policy defense should be subject to *de novo* review, and to confirm the importance of such *de novo* public-policy review.

I. There is confusion and conflict among the courts of appeals about how courts should treat determinations of arbitrators on issues that bear on the public-policy defense

Though this Court's precedents assign to courts the determination whether enforcement of an award would contravene United States public policy, there is disagreement among the courts of appeals concerning how courts are to conduct challenges pursuant to Article V(2)(b) of the Panama Convention (or Article V(2)(b) of the substantially identical New York Convention) where the arbitral tribunal has evaluated issues related to the public-policy concern in question.[5]

[5] Cases involving public-policy challenges to arbitral awards as (a) a defense to recognition under the Panama Convention and Chapter 3 of the FAA or under the New York Convention and Chapter 2 of the FAA, (b) a ground for vacatur under Chapter 1 of the FAA or (c) a ground for vacatur of awards brought under the Railway Labor Act, 45 U.S.C. § 153 First (q) (the "RLA"), involve the same issues. Petrobras has therefore cited cases under each of these statutes to illustrate the circuits' differing treatment of the public-policy defense.

A. The Sixth, Eighth, Eleventh and D.C. Circuits recognize that *de novo* review of an arbitral tribunal's findings of law and mixed questions of law and fact is necessary to give effect to the Article V(2)(b) public-policy defense

Decisions of the Sixth, Eighth, Eleventh and D.C. Circuits have recognized that courts must independently evaluate an arbitral tribunal's findings of law and mixed questions of law and fact in assessing public-policy defenses to enforcement involving issues addressed by the arbitrators in such findings.

The decision below splits from decisions of the D.C. Circuit where reviewing courts evaluating the public-policy defense to recognition engage in searching independent review of arbitrators' legal conclusions and mixed questions of law and fact. In *Enron Nigeria Power Holding, Ltd. v. Federal Republic of Nigeria*, 844 F.3d 281 (D.C. Cir. 2016), Nigeria contended that enforcement of an arbitral award of damages under a contract that it claimed resulted from "false representations regarding Enron's financial strength" would violate the public policy against fraud in contracting. *Id.* at 290. The court of appeals did not reflexively defer to the arbitrators' rejection of Nigeria's fraudulent-inducement defense to liability in considering the public-policy challenge. Instead, the court conducted a *de novo* review notwithstanding the overlapping issues: "[I]f enforcement of the Award . . . violates a public policy of the United States, as Nigeria contends, then the district court was 'obligated to refrain from enforcing

it.'" *Id.* at 288. The D.C. Circuit ultimately found no public-policy violation in enforcing the award, based on its independent review of the record, because Nigeria failed "to connect th[e Enron] fraud to" the relevant issues. *Id.* at 289-90.

Likewise in *National Railroad Passenger Corp. v. Fraternal Order of Police, Lodge 189 Labor Committee*, 855 F.3d 335 (D.C. Cir. 2017), Amtrak moved to vacate an arbitral award of reinstatement on grounds that the arbitrator's determination that the Amtrak Inspector General was bound to afford investigated employees the procedural protections provided in Rule 50 of the employee's collective bargaining agreement violated public policy. *Id.* at 338. Although the question of whether Rule 50 applied to the Inspector General was squarely before the arbitrator, the D.C. Circuit affirmed vacatur based on its independent assessment that constraining the investigative powers of Inspectors General by requiring them to adhere to Rule 50 resulted in an award that "violate[d] law or public policy." *Id.* at 340 (citation omitted).

The Eighth Circuit has also endorsed courts' *de novo* evaluation of tribunals' conclusions that involve the application of legal principles related to a party's public-policy defense. *See Entergy Operations, Inc. v. United Gov't Sec. Officers of Am.*, 856 F.3d 561, 564 (8th Cir. 2017) ("We accept the facts as found by the arbitrator, but we review his legal conclusions de novo to determine whether the award violates public policy."); *Iowa Elec. Light & Power Co. v. Local Union 204*, 834 F.2d 1424, 1427 (8th Cir.

1987) ("Once the public policy question is raised, we must answer it by taking the facts as found by the arbitrator, but reviewing his conclusions de novo.").

Applying this approach in *Iowa Electric Light & Power*, the court affirmed vacatur on public-policy grounds of an award reinstating a nuclear power plant employee (Schott) who violated federally mandated safety regulations where the arbitrator concluded, based on his factual finding, that though Schott's violation was deliberate, he was not aware of the gravity of his actions. 834 F.2d at 1426-27. While deferring to the arbitrator's findings of fact, the Eighth Circuit conducted a close examination of the record and concluded that Schott's violation was "serious" and "knowing" and that accordingly "strong public policy would be violated by judicial enforcement of an arbitrator's award requiring the reinstatement of an employee who acted as Schott did under the circumstances of this case." *Id.* at 1427, 1429-30.

The Eleventh Circuit adopted the same approach in *Delta Air Lines, Inc. v. Air Line Pilots Association International*, 861 F.2d 665 (11th Cir. 1988). Delta sought to set aside on public-policy grounds an award to reinstate a pilot who had flown his plane while drunk. The arbitrators found that while the pilot's conduct amounted to a dischargeable offense, based on their consideration of the facts, discharge was not warranted. *Id.* at 668. Notwithstanding the overlapping issues, the Eleventh Circuit conducted a *de novo* review of the public-policy issues, explain-

ing that while its function in reviewing an arbitration award was limited, under this Court's precedent the court should not affirm if doing so would "enforce an agreement contrary to [an explicit, well-defined and dominant] public policy." *Id.* at 670. While the Eleventh Circuit deferred to the arbitrators' factual findings, it independently assessed whether, under those facts, the award of reinstatement and the arbitrators' underlying finding that there was no just cause for the pilot's discharge offended public policy protecting the populace from pilots' flying while intoxicated. *Id.* at 674. Finding that they did, the Eleventh Circuit affirmed vacatur on public-policy grounds. *Id.*

More recently, in *Inversiones y Procesadora Tropical INPROTSA, S.A.* ("*INPROTSA*") *v. Del Monte International GMBH*, 921 F.3d 1291 (11th Cir. 2019), the Eleventh Circuit reviewed *de novo* whether enforcing an award giving effect to a contract allegedly induced by a fraudulent representation would violate public policy. *Id.* at 1294-95. Even though this fraud defense had been presented to the arbitrators, the court did not merely defer to the arbitrators' rejection of the defense, but instead itself reviewed the record to determine whether the arbitrators' factual findings were legally sufficient to establish that there was no public-policy impediment to enforcing the award enforcing the contract. *Id.* at 1306 (holding that because INPROTSA knew about litigation finding that Del Monte had attempted to mislead certain growers at the time it contracted with Del Monte, "enforcing the Award in this case does not offend public policy at all").

The Sixth Circuit took a similar tack in *MidMichigan Regional Medical Center-Clare v. Professional Employees Division of Local 79*, 183 F.3d 497 (6th Cir. 1999). The arbitral award in *MidMichigan* required a hospital to reinstate a nurse who was terminated following an incident that the arbitrator determined, based on his factual findings, "constituted an act of negligence" and amounted to a "Group I" violation under the parties' contract and the hospital's work rules, pursuant to which the employee was subject to suspension only. *Id.* at 504-05. The hospital disputed the arbitrator's characterization of the nurse's conduct as a "Group I" violation and contended that an award based on an interpretation of the hospital's rules requiring the hospital to reinstate a nurse who the arbitrator found to have acted negligently violated public policy. *Id.* While acknowledging that it was bound to defer to the arbitrator's factual findings in assessing the hospital's public-policy challenge to the award, the Sixth Circuit emphasized that "courts will not enforce a contract that they *independently* determine to be contrary to public policy." *Id.* at 504 (emphasis added). Thus, the court of appeals reviewed *de novo* whether the nurse's act of negligence was properly classified as a "Group I" violation. *Id.* at 505. Concluding that "Group I" violations encompassed infractions based on "simple negligence," the Sixth Circuit found that reinstatement of the nurse did not violate public policy and denied vacatur of the award. *Id.*

The approach to public-policy review taken by the Sixth, Eighth, Eleventh and D.C. Circuits in

these decisions thus conflicts with the narrow approach embraced by the Fifth Circuit in the decision below. Adding to this confusion, the Fifth Circuit's present endorsement of such limited public-policy review conflicts with its prior decision in *Gulf Coast Industrial Workers Union v. Exxon Co., U.S.A.*, 991 F.2d 244 (5th Cir. 1993), where the Fifth Circuit reviewed the arbitrator's conclusions *de novo* in conducting its public-policy inquiry. In *Gulf Coast*, the court affirmed vacatur of an arbitral award reinstating a terminated employee based on the court's independent determination that reinstatement would violate public policy. *See* 991 F.2d at 255. In the arbitration, "[a] single issue was submitted to the arbitrator: 'Was [] Woods [who had been fired after testing positive for illegal substances in violation of his employer's drug-use policy] discharged for just cause and, if not, *what is the proper remedy*?'" *Id.* at 247 (emphasis added). The arbitrator considered the facts and found that discharge was not warranted, and that reinstatement without backpay and without restriction to a less safety-sensitive position was appropriate. *Id.* at 247-48. Exxon challenged the award arguing that reinstatement violated public policy.

Although the public-policy inquiry overlapped with the sole issue before and decided by the arbitrator—whether reinstatement was an appropriate remedy—the court nevertheless ruled that because Exxon's challenge to the award was based on public policy, the court "enjoy[ed] *more latitude in reviewing the arbitrator's decision*," and decided the public-policy challenge "by 'taking the facts as found by the

arbitrator, *but reviewing his conclusions de novo*.'" *Id.* at 249 (emphasis added) (citation omitted). As the Fifth Circuit explained, under this Court's precedent, "*courts* are the ultimate arbiters of public policy in the arbitration context." *Id.* at 254-55 (emphasis added); *see also id.* at 254 (opining that a construction of public-policy review whereby an arbitrator's "determination [bearing on the public-policy issue at stake] would be unreviewable" and which "would have the practical effect of . . . abdicating the public policy question entirely to arbitrators" would be inconsistent with such precedent). The Fifth Circuit therefore conducted a *de novo* inquiry by considering the facts the arbitrator had found in assessing the question of reinstatement and the arbitrator's ultimate decision to "sustain[] the grievance and direct[] Exxon to reinstate Woods to his previous job." *Id.* at 247-49.

Upon such *de novo* review, the Fifth Circuit panel affirmed vacatur of the award, finding that the facts did not support reinstatement based on public-policy concerns:

> [I]t offends public policy for Woods, an employee who occupies a safety-sensitive position, to retain his job upon testing positive for cocaine while on the job and after having breached his company's drug abuse policy on two occasions…

Id. at 250.

B. The panel below and other circuits take a restrictive view that requires courts to defer wholesale to arbitral determinations on issues informing the public-policy concern

By contrast, the Fifth Circuit panel below and several other circuits have refused to engage in *de novo* review to assess whether enforcement of an arbitral award would be contrary to public policy where underlying issues had already been considered by the arbitrators. In place of independent review, these courts defer wholesale to the arbitral tribunal's determinations on those intertwined issues. Notably, these courts fail to explain how they can meaningfully comply with the requirement that courts independently consider public-policy defenses to enforcement if they must also defer to a tribunal's resolution of legal issues relevant to these defenses.

In *Europcar Italia S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310 (2d Cir. 1998), the Second Circuit declined to independently evaluate whether enforcing an award based on an allegedly forged agreement would be contrary to public policy. *Id.* at 315-16. Rather, the Second Circuit opined that to the extent Maiellano raised the issue of the forged agreement to the arbitrators, Maiellano's public-policy defense based on the alleged forgery was tantamount to an improper attempt to "relitigate the matter" and noted that "even if the arbitrators erroneously determined that the [allegedly forged] agreement was valid," that would not support refusing enforcement

on public-policy grounds. *Id.* Thus, without any independent consideration of whether the arbitral record supported the arbitrator's conclusion that the agreement was valid, the Second Circuit affirmed the district court's rejection of Maiellano's public-policy defense. *Id.* at 316.

A divided panel of the Seventh Circuit adopted a similar approach in *Baxter International Inc. v. Abbott Laboratories*, 315 F.3d 829 (7th Cir. 2003), by refusing to consider whether an arbitral award violated the Sherman Act in violation of United States public policy where related issues were before the arbitral tribunal. *Id.* at 832-33. In so doing, the majority explained: "The arbitral tribunal in this case 'took cognizance of the antitrust claims and actually decided them.' Ensuring this is as far as our review legitimately goes." *Id.* at 832. Under the Seventh Circuit's view of the public-policy defense, as long as an arbitral tribunal considered issues related to an Article V public-policy defense, a court is precluded from any further review to address the public interests at stake. *Id.*; *see also id.* at 833 ("All that matters today is that the arbitrators have concluded that the antitrust laws . . . do not diminish Abbott's contractual rights—and that decision is conclusive between these parties.").

The *Baxter* dissent disagreed with the majority's approach to public-policy review, recognizing that reflexive deferral to the arbitral tribunal's determinations in this context amounts to an abdication of "the traditional function of judicial review properly assigned only to [courts]," which requires reviewing

courts to "examine the effect of the outcome commanded by the arbitral award." *Id.* at 836. To accept the majority's approach, the dissent observed, would stretch courts' deference to arbitral tribunals to a point that would "den[y United States courts'] prerogative to refuse to enforce awards that command unlawful conduct." *Id.* Echoing this Court's recognition in *Misco* of the public interest that is safeguarded by public-policy review, *see Misco*, 484 U.S. at 42, the dissent emphasized the critical role courts play in exercising independent judicial review:

> When public rights are at stake, there is good reason to be more reluctant to defer totally to the arbitrators, since they are acting as delegates of the private parties, not of the consuming public. Too deferential an attitude by the courts when the rights of the consuming public are at stake can severely undermine the foundations of our economy.

Baxter, 315 F.3d at 838.

As this review of the case law shows, there is disagreement among the courts of appeals concerning the review that is required in order to discharge a court's duty to meaningfully consider a public-policy defense to enforcement of an arbitral award. The Sixth, Eighth, Eleventh and D.C. Circuits have held that *de novo* review of an arbitrator's legal determinations or determinations of mixed questions of law and fact is required when determinative of a party's public-policy defense. Before the decision below, the Fifth Circuit had applied a similar approach. By

contrast, the decision below, and decisions of the Second and Seventh Circuits, render the public-policy defense essentially nugatory by deferring entirely to arbitral tribunals, even where such deference requires lending the court's imprimatur to an arbitral award that violates public policy. The Court should take this opportunity to resolve this confusion and conflict and to confirm the importance of searching independent *de novo* public-policy review.

Resolution of this issue is especially important in light of the widespread use of arbitration for dispute resolution in the cross-border context where issues implicating public policy—particularly issues of bribery and corruption—are increasingly being presented to arbitrators. This case presents an ideal vehicle for the Court to articulate the appropriate standard for reviewing such public-policy challenges. It also offers the Court a chance to clarify what should be a straightforward principle, but one on which the courts of appeals are divided: While an arbitrator's factual findings must be deferred to, independent review of an arbitrator's legal determinations or determinations of mixed law and fact on issues determinative of a party's public-policy defense is required in adjudicating that defense pursuant to Article V(2)(b).

II. If the court below had applied the correct standard, it would have declined to enforce the Award

Had the court of appeals properly conducted a *de novo* inquiry in adjudicating Petrobras's public-policy defense instead of simply deferring to the tribunal's legally incorrect ratification determination, it could not have let the Award stand.

The court of appeals correctly recognized that this Court assigns the assessment of public policy to judges. App., *infra*, 14a-15a; *see W.R. Grace*, 461 U.S. at 766 ("[T]he question of public policy is ultimately one for resolution by the *courts*." (emphasis added)); *United Food & Com. Workers Union AFL-CIO v. Pilgrim's Pride Corp.*, 193 F.3d 328, 332 (5th Cir. 1999) (explaining that the unequivocal delegation of public-policy review to the courts recognizes that "an exception to th[e] general deference to arbitration exists for awards that clearly violate 'well-defined and dominant' public policy" (citing *W.R. Grace*, 461 U.S. at 766)). So, too, did the court of appeals correctly recognize that the underlying conduct at issue in this case—bribery of public officials to procure the contract—violates United States public policy. App., *infra*, 16a; *see also, e.g.*, *England v. Sys. Mgmt. Am. Corp.*, 38 F. App'x 567, 572 (Fed. Cir. 2002) ("The case law uniformly states that public policy considerations, in particular concern for the integrity of the Government procurement process, preclude the enforcement of contracts tainted by bribery, kickbacks or conflicts of interest." (citation omitted)). There is plainly no dispute that, as

Vantage has conceded, United States public policy would bar enforcement of the tribunal's award of $615 million in lost profits to Vantage—which would reward Vantage for a contract indisputably obtained through bribery of foreign public officials—absent ratification.[6]

But the court of appeals erred in ruling that in evaluating the public-policy question it was bound to defer to the arbitrators' conclusion that the indisputably bribery-induced contract had been ratified, thus removing the public-policy taint. App., *infra*, 16a-17a ("The arbitrators found Petrobras ratified the [Contract]. When we defer to that finding, the legal

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[6] The Fifth Circuit erroneously suggested that the "district court relied on the arbitrators' findings [] that Petrobras had not proved Vantage was guilty of bribery." App., *infra*, 13a. This is inaccurate. The factual finding cited by the district court appears in the section of the Award evaluating Petrobras's counterclaims, App., *infra*, 56a (citing *id.* at 228a-229a), not the sections that address the validity of the Contract, *see id.* at 190a. The bribery is not in dispute. As the Fifth Circuit recounted, through its largest shareholder and board member (Su), Vantage agreed to pay approximately $30 million in bribes distributed as kickbacks to Brazilian political party officials, former Petrobras employees and Vantage's agent (Padilha) as a commission for procuring the Contract. App., *infra*, 2a. Indeed, "Vantage told United States regulators in 2017 that it had discovered some evidence that its then-CEO Bragg and then-board member John O'Leary were at least willfully blind to Padilha and Su's bribery" and in 2018 "[t]he [United States] Justice Department stated that multiple Petrobras individuals had received bribes to assist Vantage in winning the drilling contract with Petrobras." *Id.* at 3a.

conclusion follows that the [Contract], and the arbitration award, did not violate public policy.").

What constitutes "ratification," however, is not a purely factual question whose determination by the arbitrators would be subject to deference under this Court's precedents. Rather, it is a mixed question of fact and law, and the legal conclusion is subject to *de novo* judicial review. Relying on the August 2013 magazine article reporting allegations of bribery, and Petrobras's October 2013 audit report investigating those allegations, the tribunal found that Petrobras was aware of bribery *allegations* in 2014 when the parties' contract was novated. App., *infra*, 190a-191a. Based on those factual findings alone, the tribunal concluded that Petrobras ratified the contract. *Id.* at 191a.

In the proceedings below, Petrobras did not challenge the tribunal's factual findings that Petrobras was aware of bribery *allegations* in 2013 and 2014. Nor does Petrobras now dispute that the court of appeals was required to defer to those factual findings. The court of appeals, however, should not have deferred to the arbitrators' legal determination that those facts constitute ratification sufficient to overcome the stain of corruption. *See, e.g.*, *Gulf Coast*, 991 F.2d at 249 ("When [public-policy] violations are alleged . . . reviewing courts resolve the issue by 'taking the facts as found by the arbitrator, *but reviewing his conclusions de novo*.'" (emphasis added) (citation omitted)). The court of appeals erred in failing to independently evaluate whether, as a matter of law, ratification could be found without actual

knowledge of the bribery. Had it conducted the required independent evaluation, the court of appeals should have concluded that the tribunal's factual findings were legally insufficient to establish ratification by Petrobras.

This is because the public-policy concerns with respect to an award enforcing a contract obtained through bribery cannot be "cured," and the contract become enforceable, based on the mere awareness of bribery *allegations*. *See, e.g.*, *City of Findlay v. Pertz*, 66 F. 427, 439 (6th Cir. 1895) ("The city could not be held estopped by ratification until after *full discovery of the fraud. A mere suspicion was not enough to put it to an election*." (emphasis added)); *Tex. First Nat'l Bank v. Ng*, 167 S.W.3d 842, 860, 863-64 (Tex. App. 2005) (finding "evidence . . . legally insufficient to sustain the [jury's] ratification finding" where the alleged ratifying party "suspected" fraudulent conduct but there was "no evidence in the record that full knowledge was possessed at the time of the alleged ratifications"), *opinion supplemented on overruling of reh'g* (June 2, 2005).

Rather, actual knowledge is required. *See, e.g.*, *R&L Inv. Prop., L.L.C. v. Hamm*, 715 F.3d 145, 149 & n.2 (5th Cir. 2013) (explaining that "[r]atification is the adoption or confirmation by a person *with knowledge of all material facts*," and finding that plaintiff did "*not dispute that it knew* about the [defendants'] misrepresentation before signing the [agreement]" and ratifying the contract (emphasis added) (citation omitted)); *Commonwealth Mortg. Corp. v. First Nationwide Bank*, 873 F.2d 859, 865-

66 (5th Cir. 1989) (holding that jury properly rejected defendant's ratification defense where "the record [did] not conclusively show that at the time it allegedly ratified the contract" defendant was aware of plaintiff's fraud, explaining that "[t]he key element which must be proved to establish ratification of the fraudulent conduct is that the ratifying party had full knowledge of the fraudulent acts at the time he ratified these acts" (citation omitted)); *Kennedy v. Bender*, 135 S.W. 524, 525 (Tex. 1911) ("[A]cts done in affirmance of the contract can amount to a waiver of the fraud only where they are done with *full knowledge of the fraud and of all material facts*." (emphasis added) (citation omitted)); *see also Williams Elecs. Games, Inc. v. Garrity*, 366 F.3d 569, 573-74 (7th Cir. 2004) (remanding for new trial because the jury "*may* have based its findings of ratification" on erroneous instructions that defendant "should have known" of bribery (emphasis in original)). Thus, any finding short of Petrobras's *actual knowledge* of bribery is insufficient to overcome the public-policy bar on enforcing a contract obtained through bribery.

Because the arbitrators did not find that Petrobras had "*knowledge of all material facts*," as opposed to awareness of mere *allegations*, the arbitrators' factual findings are not legally sufficient to support the arbitrators' ratification conclusion. As such, the tribunal's determination of ratification cannot overcome the public-policy impediment to enforcing contracts procured by bribery.

The court of appeals thus failed to discharge its duty to meaningfully consider public-policy challenges under Article V(2)(b) by construing the judicial responsibilities assigned to it to be so limited where the tribunal decided in the first instance an issue that informed the court's public-policy review. The court of appeals' failure to conduct this analysis resulted in the enforcement of an award that violates public policy. The Court should grant review to resolve the circuit conflict regarding the scope of public-policy review where there are overlapping issues and, on the merits, hold that courts may not defer to arbitrators' legal conclusions on issues related to or overlapping with the public-policy question.

III. The question presented is an important and recurring one that warrants the Court's review

This case presents an ideal vehicle for the Court to resolve the conflicting approaches in the circuits by articulating the appropriate standard for review of the public-policy question and offers the Court a chance to clarify a standard of review about which there should be no confusion.

This is the rare case in which the lower courts agreed that the objection to confirmation of the Award does implicate an explicit, well-defined and dominant public policy of the United States. The underlying contract in this case was indisputably procured by bribery. As the court of appeals recounted, "[i]n exchange for help procuring drilling-services contracts, Vantage's largest shareholder and board member Nobu Su . . . agreed to pay approximately

$30 million in bribes, distributed as kickbacks" to former Petrobras employees, Brazilian party officials and others as commission for procuring a $1.8 billion drilling services agreement. App., *infra*, 2a. There is also no question that, as the court of appeals acknowledged, "the underlying conduct here, bribery, does violate public policy." *Id.* at 16a. Demonstrating that a genuine national public policy is implicated by an international arbitral award poses a high bar, but has already been established here.

This case is thus the optimal vehicle for resolution of the question presented, since not only was this question fully briefed by the parties in the proceedings below and effectively passed on by the court of appeals, but resolution of the question presented in this case would also have been dispositive of the issue of confirmation. Had the court of appeals discharged its duty to conduct meaningful, *de novo* review of Petrobras's public-policy defense, which would of necessity have included review of the arbitral tribunal's ratification conclusion, the Award would have been declared unenforceable as contrary to fundamental United States public policy.

How courts should deal with this issue is all the more important because issues of public policy, and particularly issues of bribery and corruption, are now commonly presented in international arbitration, which has become the favored dispute-resolution mechanism in international transactions. Decades ago, this Court recognized that "[a]s international trade has expanded in recent decades, so too has the use of international arbitration to resolve

disputes arising in the course of that trade." *Mitsubishi Motors Corp.*, 473 U.S. at 638. Indeed, "[i]n recent years, international arbitration has been fast becoming the venue of choice for transnational corruption cases," a trend that "can largely be attributed to the increase in international transactions and trade, which consequently have increased the number of *illicit* cross-border acts and practices." Günther Horvath & Katherine Khan, *Addressing Corruption in Commercial Arbitration: How Do Arbitral Tribunals Evaluate and Adjudicate Contractual Relationships Tainted by Corruption*, 15 German Arb. J. 127, 129 (2017). "Corruption is today one of the greatest challenges facing international commerce," and "arbitrators in both commercial and investment treaty arbitration proceedings are today adjudicating corruption issues with increasing frequency." Emmanuel Gaillard, *The Emergence of Transnational Responses to Corruption in International Arbitration*, 35 Arb. Int'l 1, 1-2 (2019).

As a result, United States courts are increasingly reviewing on public-policy grounds arbitral awards in transnational corruption cases where recognition would run afoul of the clear United States public policy against bribery and corruption. In just the past few years, United States courts have repeatedly been asked to recognize arbitral awards in disputes involving allegations of bribery and corruption.[7] Recent public reports have, furthermore, disclosed the

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[7] *See, e.g.*, *Metropolitan Municipality of Lima v. Rutas de Lima S.A.C.*, No. 1:20-cv-02155, ECF No. 1-1 (D.D.C. Aug. 7, 2020)

existence of numerous recent arbitral disputes involving allegations of bribery and corruption, where the parties may in the future seek to resist enforcement in the United States on public-policy grounds.[8] The question, therefore, whether United States

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(seeking vacatur in the United States of $66 million arbitral award on the grounds that the underlying contract with a Brazilian company was procured by bribery); *id.*, ECF No. 10 (D.D.C. Dec. 23, 2020) (seeking to enforce award in the United States); *Process and Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, No. 18-cv-594 (CRC), 2020 WL 7122896 (D.D.C. Dec. 4, 2020) (denying motion to dismiss engineering firm's action seeking enforcement in the United States of $10 billion arbitral award against Nigeria related to contract allegedly procured by bribery), *appeal filed* (Dec. 31, 2020).

[8] *See, e.g.*, Cosmo Sanderson, *Subpoena in Bribery Probe Upheld Despite BIT Claim*, Global Arb. Rev. (Apr. 23, 2020), https://globalarbitrationreview.com/bribery-and-corruption/subpoena-in-bribery-probe-upheld-despite-bit-claim ($300 million arbitration brought by Australian engineering company against Ecuador purportedly relating to contracts with Ecuador's national oil company that were procured by bribery); Sebastian Perry, *Eni Brings ICSID Case over Nigeria Corruption Claims*, Global Arb. Rev. (Oct. 8, 2020), https://globalarbitrationreview.com/bribery-and-corruption/eni-brings-icsid-case-over-nigeria-corruption-claims (arbitration brought by Italian energy company against Nigeria, where Nigeria claims that the underlying contract was procured by bribery); Jin Young-tae & Kim Hyo-jin, *Korean Prosecutors Drop Charges against Elliott over Samsung Merger*, Pulse (June 30, 2020), https://pulsenews.co.kr/view.php?year=2020&no=667611 ($669 million arbitration brought by United States hedge fund in 2018 surrounding failed merger, which was reportedly "part of a major corruption scandal that led to the impeachment" of Korea's former President and the arrest of a Samsung executive).

courts must exercise their independent judgment in deciding if such awards would violate explicit United States public-policy, or whether they should instead simply defer to the tribunal's evaluations of issues that inform the public-policy defense, is of significant importance. The Court should issue firm, clear guidance as to how United States courts should address this critical question.

The New York and Panama Conventions provide fundamental safeguards for refusing recognition of arbitral awards that violate United States public policy. The enforcement of these fundamental safeguards by the courts is essential to ensure that the weight of the United States judiciary is not placed behind an arbitral award that offends United States public policy, thereby safeguarding the public's interest in the continuing legitimacy of arbitration as a dispute-resolution mechanism. *See* Gary B. Born, *International Commercial Arbitration* § 26.05(C)(9)(a) (3d ed. 2020) ("These various public policy exceptions in different [international arbitration conventions] provide escape devices designed to protect the fundamental, mandatory policies of national legal regimes."); Christopher S. Gibson, *Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law*, 113 Penn St. L. Rev. 1227, 1234 (2009) (considering "the concept of public policy in arbitration as not only reflecting principles fundamental to the dispute-resolution method itself, but also as an 'interface of exchange' with a larger civilization outside of arbitra-

tion," which "operates through the public policy defense to recognition and enforcement of international arbitration awards"). The fact that an arbitral tribunal has considered issues related to the public-policy concern should not deprive a court of this final gatekeeping function.

Indeed, as United States courts are increasingly being asked to enforce arbitral awards involving actors in foreign countries where bribery and corruption are pervasive,[9] United States courts should not be relegated to rubber-stamping arbitral awards implicating these issues. Rather, United States courts must be permitted to conduct meaningful public-policy review in order to protect the public interests at stake. Congress has been unequivocal on this point: "As the world's leader in the promotion of democratic values, the *United States has a unique obligation* to confront the many challenges," including "[p]ublic corruption," to "these cherished values." S. Exec. Doc. No. 106-15, at 11 (2000) (emphasis added).

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[9] Several of the countries involved in the recently filed enforcement proceedings and recently commenced arbitrations noted *supra* fall into this category. As examples, Nigeria scored a 26 out of 100 on Transparency International's 2019 Corruption Perception Index survey and is ranked 146 out of 180 countries surveyed, and Ecuador scored a 38 and is ranked 93. *See Corruption Perceptions Index*, Transparency Int'l, https://www.transparency.org/en/cpi/2019/index/nzl (last visited Jan. 22, 2021).

Through the enactment of the Foreign Corrupt Practices Act, Congress criminalized bribery of foreign officials—as occurred here—in recognition of the fact that such illicit conduct not only affects the parties involved, but also undermines societal interests and "is counter to the moral expectations and values of the American public." H.R. Rep. No. 95-640, at 4 (1977); *see also* S. Exec. Doc. No. 106-15, at 11, 21 (2000) ("Corruption is antithetical to successful democracy" and "destructive of morality and public decency. It undermines and weakens the strong social values that are necessary for a true and modern democratic system to function."); President William J. Clinton's Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, 2 Pub. Papers 2011 (Nov. 10, 1998) ("We have long believed bribery is inconsistent with democratic values, such as good governance and the rule of law."). The Foreign Corrupt Practices Act underscores that bribery of public officials is "fundamentally destructive in a free market society," Deputy Attorney General Rod Rosenstein, Remarks at the 34th Int'l Conf. on the Foreign Corrupt Practices Act, at 1 (Nov. 29, 2017) (citation omitted), and threatens the "efficient functioning of our capital markets," S. Rep. No. 95-114, at 3 (1977).

Allowing the court of appeals' decision and approach to stand would thus not only substantially and inappropriately curtail United States courts' discharge of their duty to conduct meaningful public-policy review, but would also establish the dangerous precedent that a United States court may lend its imprimatur to an arbitral award granting lost

profits on a contract obtained through the bribery of public officials. This Court should not permit such a dangerous precedent to go unreviewed.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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