No.

In the Supreme Court of the United States

AVIC INTERNATIONAL HOLDING CORPORATION; AVIC INTERNATIONAL RENEWABLE ENERGY CORPORATION; AVIATION INDUSTRY CORPORATION OF CHINA; CHINA AVIATION INDUSTRY GENERAL AIRCRAFT COMPANY LIMITED

v.

SOARING WIND ENERGY, L.L.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Petitioners are foreign corporations that did not sign the arbitration agreement signed by an affiliated entity, did not consent to arbitration, and objected to and did not participate in the arbitration. Before the arbitration, the district court refused to consider the non-signatories' challenge to the arbitration panel's jurisdiction, and after the arbitration, the courts below confirmed the arbitral award without reviewing the threshold question of arbitrability.

The question presented is: Whether the district court must independently review a non-signatory's challenge to an arbitral panel's jurisdiction before the arbitration, and at a minimum, before confirmation of the arbitral award.

2. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, known as the New York Convention, requires courts to deny the enforcement and recognition of foreign arbitral awards contrary to U.S. public policy or obtained without due process, and requires equal treatment in the process of constituting an arbitral panel. The Federal Arbitration Act, 9 U.S.C. §§ 201-208, the New York Convention's implementing statute, permits those defenses in judicial proceedings to confirm or vacate foreign arbitral awards.

The question presented is: Whether the due process and public policy defenses under the New York Convention prevent the recognition and enforcement of international arbitration awards where one

side of the dispute appointed a super-majority of the members of the arbitral panel?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner AVIC Renewable Energy Corporation ("AVIC IRE") is a subsidiary of Petitioner AVIC International Holding Corporation ("AVIC IHC"). AVIC IHC is a subsidiary of Petitioner Aviation Industry Corporation of China ("AVIC"), a state-owned enterprise of the People's Republic of China. Petitioner China Aviation Industry General Aircraft Company Limited ("CAIGA") is also a subsidiary of AVIC. No publicly traded company owns more than 10% of the shares of stock of any of these companies.

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JURISDICTION

The judgment of the court of appeals was entered on January 7, 2020. A petition for rehearing was denied on February 4, 2020 (Pet. App. 85a-86a). On March 19, 2020, the Court issued an order providing for a 150-day extension due to the COVID-19 pandemic. The Court extended the time within which to file a petition for a writ of certiorari up to and including July 6, 2020. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. Section 201 of Chapter 2 of Title 9 of the United States Code, which implements the New York Convention,[1] states:

> 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.

2. Section 207 of Chapter 2 of Title 9 of the United States Code states:

> Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

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[1] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 [the "New York Convention" or the "Convention"]. The New York Convention is implemented by Chapter 2 of the Federal Arbitration Act ("FAA"). *See* 9 U.S.C. §§ 201-208.

3. Article V of the New York Convention states:

> (1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
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> * * *
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.
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> * * *
>
> (2) 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.

STATEMENT

A. Respondents and AVIC USA were 50-50 owners in Soaring Wind Energy, LLC ("Soaring Wind"), a venture to market wind energy equipment and materials and to develop wind farms.[2] The Limited Liability Company Agreement of Soaring Wind Energy, LLC ("SWE Agreement") governed the venture, and among other things, established the agreement of the members of Soaring Wind to arbitrate disputes among them. A dispute among the members arose when Respondents accused Petitioners (among other non-signatories to the SWE Agreement) of violating the SWE Agreement's exclusivity provision by competing against Soaring Wind. Respondents initiated an arbitration with the American Arbitration Association ("AAA"), naming AVIC USA, Petitioners, and other non-signatories under various theories of liability, including the assertion that Petitioners were alter egos of AVIC USA.

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[2] The five Respondents are Tang Energy Group, Ltd. ("Tang"), The Nolan Group, Inc., Keith P. Young, Jr. (now deceased and represented by Mary M. Young, individually and as the independent executrix of the Estate of Keith P. Young), Mitchell W. Carter, and Jan Family Interests, Ltd. ROA.29803-04.

Petitioners objected to the arbitration on jurisdictional, and other grounds, and filed lengthy Objections and a Notice of Non-Participation asserting that they were not obligated and declined to appear in the arbitration. Before the arbitration, Ascendant Renewable Energy Corporation ("Ascendant"), another non-signatory named in the arbitration, filed suit against Respondents asserting that the arbitral panel lacked jurisdiction over the non-signatories because Respondents failed to obtain a court order compelling non-signatories to arbitrate. Pet. App. 38a-44a.

On August 4, 2015, the district court granted Ascendant's motion for summary judgment and denied as moot Ascendant's motion to stay all actions related to the arbitration. Pet. App. 38a-44a. The district court admonished Respondents that the "threshold issue" of whether a non-signatory is bound to arbitrate "is for a court, not an arbitrator, to determine in the first instance." *Id.* at 42a. The district court observed, "[when] the very existence of any agreement [to arbitrate] is disputed, it is for the courts to decide at the outset whether an agreement was reached." *Id.* (quoting *Will-Drill Res., Inc. v. Samson Res. Co*, 352 F.3d 211, 218-19 (5th Cir. 2003) (brackets in original)). But, the district court noted that, rather than taking up arbitrability at that juncture, it would evaluate arbitrability later without

deference to the arbitral panel's rulings. Pet. App. 42a.

Recognizing that the *Ascendant* decision might result in an arbitral award that would be overturned later for lack of jurisdiction, Respondents filed an "emergency" motion to abate so they could attempt to obtain a court ruling on arbitrability. ROA.30950-55; *Ascendant Renewable Energy Corp. v. Tang Energy Grp., Ltd.*, No. 14-CV-3314-K, 2015 WL 4713240 (N.D. Tex. Aug. 4, 2015). Respondents conceded in that motion that they could not prove any breach of the SWE Agreement without asserting jurisdiction over and liability of the non-signatories. ROA.30951. The panel denied Respondents' motion to abate and pushed forward with the arbitration.

B. AVIC USA and the non-signatories also objected to the process for selection of the arbitral panel initiated by Respondents. Rather than following the typical process of allowing each side to pick an equal number of arbitrators with the presiding arbitrator selected by the AAA or with equal input from each side, the panel accepted Respondents' interpretation of the SWE Agreement to allow each *participant* to select an arbitrator. Pet. App. 28a-37a, 57a-62a. As a result, even though Respondents and AVIC USA were 50-50 owners in Soaring Wind, the five aligned Respondents were *each* permitted to select an arbitrator,

while AVIC USA and another aligned party were permitted to choose only two arbitrators. *Id.* at 57a-58a. Respondents appointed the first five arbitrators and communicated their "thoughts" on the eighth and ninth arbitrators *ex parte* to those five arbitrators. Neither AVIC USA nor the aligned party engaged in any *ex parte* communications regarding arbitrator selection.[3]

C. In August 2015, the arbitral panel conducted a five-day hearing, concluding by a 6-3 vote that it had jurisdiction over the non-signatories (including Petitioners), and that the claims against them were arbitrable because the majority determined the non-signatories were alter egos of AVIC USA. Pet. App. 120a, 164a-170a. Based on its assertion of jurisdiction over the non-signatories, and notwithstanding the district court's *Ascendant* decision to the contrary, the panel heard evidence as to both AVIC USA and the non-signatories, trying the non-signatories *in absentia*.

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[3] Before the arbitration, AVIC USA filed an action to void the lopsided arbitral panel, or to reconstitute it with equal input from the two sides. Pet. App. 28a-37a. The district court dismissed the action for lack of subject matter jurisdiction, holding that AVIC USA's remedy was to raise that challenge after arbitration. The Fifth Circuit affirmed that dismissal. *Id.* at 37a.

On December 21, 2015, the panel issued a final award in favor of Respondents. Relying on an alter ego theory, the panel found the non-signatories were "affiliates" of the signatory, AVIC USA, and that a non-signatory, AVIC IRE, breached the exclusivity provision of the SWE Agreement by competing against Soaring Wind. The panel not only imputed AVIC IRE's breach to AVIC USA, it also imputed AVIC USA's breach to the other non-signatories under an alter ego theory, finding AVIC USA and the non-signatories jointly and severally liable for $62.9 million in damages. Pet. App. 119a-180a.

Three of the nine arbitrators dissented from the entire award, including the majority's decisions to: (a) proceed without an independent court determination of jurisdiction over the objecting non-signatories, (b) exercise jurisdiction over the non-signatories, (c) admit evidence and make adverse inferences and findings against the non-signatories, and (d) find joint and several liability of AVIC USA and the non-signatories. Pet. App. 165a-180a.

D. Respondents filed a motion with the district court to confirm the award as to both AVIC USA and the non-signatories (other than Ascendant). AVIC USA and the non-signatories filed oppositions to the

motion to confirm, as well as motions to vacate the award. Pet. App. 48a-81a, 82a-84a.

On August 9, 2018, the district court severed the non-signatories from AVIC USA, assigned a new case number, and stayed and administratively closed the Non-Signatories' new case. Pet. App. 45a-47a. The same day, the district court granted Respondents' motion to confirm the award against AVIC USA and entered judgment against AVIC USA. *Id.* at 81a.

The district court found AVIC USA's challenge to the lopsided arbitral panel unreviewable under the FAA, holding that "such 'procedural questions' are presumed to be for an arbitrator to decide" and are "binding." The court refused to recognize that due process and fairness in selection of an arbitral panel are grounds to invalidate an arbitral award under the New York Convention. The court also found AVIC USA could not challenge the award based on the arbitral panel's improper assertion of jurisdiction over the non-signatories and rejected AVIC USA's arguments that the panel erred by using an alter-ego theory to impute liability to AVIC USA based on the conduct of one non-signatory, AVIC IRE. Because it had already severed the non-signatories from the case, the court gave no consideration to their arbitrability arguments.

E. Petitioners and AVIC USA appealed. Pet. App. 1a-25a. On January 7, 2020, the Fifth Circuit Court of Appeals affirmed confirmation of the award against AVIC USA.[4] *Id.* at 26a-27a.

The Fifth Circuit's decision relied on the fact that AVIC USA was a signatory to the SWE Agreement, and therefore purportedly agreed to the imbalanced panel and arbitral process, even if it was unfair. Pet. App. 15a-17a. The Fifth Circuit characterized the non-signatories' arbitrability arguments as "irrelevant" because AVIC USA agreed to the terms of the SWE Agreement. *Id.* at 16a.

The Fifth Circuit did not address whether the non-signatories were entitled to independent judicial review of the panel's jurisdiction before confirmation of an award that was predicated on the purported conduct of one non-signatory and that imposed joint and several liability on AVIC USA and all the non-signatories. The Fifth Circuit also rejected Petitioners' due process objections as a "notion" that would "require this court to invalidate any award not issued by an evenly appointed panel." Pet. App. 20a.

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[4] Non-signatories Ascendant and AVIC T.E.D. were dismissed from the action before the Fifth Circuit decision.

F. Petitioners and AVIC USA filed a joint petition for rehearing en banc, which was denied on February 4, 2020. Pet. App. 85a-87a. This petition now follows.

REASONS FOR GRANTING THE PETITION

This case presents two issues of importance that merit the Court's review. Petitioners embrace the federal courts' deference to arbitration. That deference, however, is predicated on the availability of safeguards in the arbitral process essential to the fairness of arbitration. It is impossible to strip away those safeguards and yet maintain the deference to arbitration — lest the proceedings degenerate into a fundamentally unfair and unreviewable morass that undermines respect for and confidence in the institution of arbitration as a fair and effective alternative to the courts.

Here, the arbitrators' award and the lower courts' unquestioning deferential confirmation of that award purport to bind the Petitioners, although they never agreed to arbitrate. Notwithstanding the district court's pre-arbitration holding in *Ascendant* recognizing that only a court can determine arbitrators' jurisdiction over non-signatories, here the arbitration charged ahead. This placed the non-signatories in the untenable position of either participating in an arbitration to which they never consented or risking adverse results by not participating in the proceedings deciding their fate.

Compounding the harm to Petitioners was Respondents' "stacked deck" arbitral panel in which Respondents appointed the first five arbitrators while the other side (represented by AVIC USA and another party) picked only two arbitrators. That already-skewed panel then selected the eighth and ninth arbitrators, based on Respondents' *ex parte* recommendations. Respondents thus appointed directly or indirectly a super-majority of the panel. There has never been a reported and judicially sanctioned arbitration in U.S. jurisprudence or international arbitration permitting one side, over objection, to appoint more arbitrators than the other side, much less a super-majority of a panel.

Notwithstanding Respondents' request to first seek judicial review of the panel's jurisdiction over the non-signatories, the panel pressed forward with the arbitration and, by a 6 to 3 vote, found jurisdiction over the non-signatories, drew adverse inferences against them based on their non-participation in the arbitration, and issued an award imposing joint-and-several liability on them and AVIC USA.

Demonstrating the pernicious influence of the "stacked deck" panel, the six arbitrators in the super-majority were all appointed directly or indirectly by Respondents. The remaining three arbitrators dissented entirely, declining to join in even one factual

finding or legal conclusion. They dissented even from the majority's decision to exercise jurisdiction over the non-signatories. Pet. App. 180a.

This Court's review is warranted to: (1) determine that independent judicial review of an arbitral panel's jurisdiction over non-signatories must take place before arbitration, or at least, before the arbitral award is confirmed—an issue of great importance and not yet resolved; and (2) resolve the conflict between the Fifth Circuit and the international arbitration community regarding whether the public policy and due process defenses under the New York Convention prevent the recognition and enforcement of an international arbitration award issued by a lopsided arbitral panel where one side appointed a super-majority of the panel members.

I. This Court Should Grant Review to Establish Non-Signatories Are Entitled to Judicial Review of Arbitrability Before Arbitration, or at Minimum, Before Confirmation of an Award that Purports to Bind Them.

A. Meaningful Independent Judicial Review of Arbitral Jurisdiction Is Secured Only If It Occurs Pre-Arbitration, or at Least Before Confirmation of an Arbitral Award

It is well established that a non-signatory which disputes that it is subject to an arbitration agreement is entitled to independent judicial review of the threshold jurisdictional question of "arbitrability." *AT&T Techs., Inc. v. Comm'ns Workers*, 475 U.S. 643, 648-49 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."). This fundamental principle "flow[s] inexorably from the fact that arbitration is simply a matter of contract." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 546-47 (1964) ("Under our decisions, whether or not the company was bound to arbitrate . . . is a matter to be determined by the Court on the basis of the con-

tract entered into by the parties."). The right to meaningful judicial review of arbitral jurisdiction is the lynchpin of our voluntary and contractual arbitration system. *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) ("Arbitration is strictly a matter of consent") (internal quotation marks omitted).

Although the right to judicial review of arbitrability is firmly established, this Court has not addressed the important question of *when* courts should conduct the required judicial review — and whether a party is entitled to such review before the arbitration, at the confirmation or vacatur stage, or whether a court may punt that determination until post-confirmation enforcement proceedings, when important defenses to a confirmed award are no longer available.

This Court should grant review to establish that when presented with an arbitrability challenge, courts should determine whether jurisdiction exists over non-signatories before the arbitration begins. Judicial review is intended to preserve arbitration's contractual foundation by ensuring that parties have a legitimate opportunity to litigate arbitrability and to obtain a court's independent review of those issues before they can be compelled to arbitrate. Pre-arbitration review effectuates the requirement that parties consent to arbitration. *See Oil, Chem., & Atomic*

Workers Int'l Union (AFL-CIO) v. Conoco, 241 F.3d 1299 (10th Cir. 2001).

Without pre-arbitration review non-signatories are forced to choose between two unacceptably harmful options: (1) arbitrate against their will, without ever having agreed to do so; or (2) decline to participate in the arbitration and risk that the arbitrators will wrongly assert jurisdiction over and make adverse findings against them. This is an untenable Hobson's choice. Delay of review of arbitrability impugns the fundamental premise that arbitration requires consent because it is a matter of contract, and is fundamentally unfair to non-signatories which did not consent to arbitrate. *First Options*, 514 U.S. at 946-47.

Conoco illustrates the importance of pre-arbitration review when requested by the parties. Conoco asked the district court to determine arbitrability before the arbitration. 241 F.3d at 1303-05. The district court ordered the parties to arbitration but attempted to defer its arbitrability ruling. *Id.* The Tenth Circuit vacated the district court's order, reasoning that "[t]he possibility that the district court might revisit the arbitrability question at the conclusion of the arbitration proceedings is not an adequate substitute for a pre-arbitration ruling." *Id.* at 1305. The court con-

cluded Conoco was "entitled to a ruling on arbitrability before it is compelled to submit to arbitration." *Id.* The Tenth Circuit's reasoning was grounded in this Court's decisions that "an arbitration should not proceed until a court has resolved the threshold question of whether the dispute is arbitrable." *Id.* at 1304 (quoting *John Wiley & Sons*, 376 U.S. at 547 ("[A] compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.")).[5]

At a minimum, however, a court should not *confirm* an arbitration award based on findings against non-signatories without first performing the required independent review. If the court fails to do so, the party challenging arbitrability is effectively deprived of independent judicial review because a final

[5] Conversely, courts agree that where parties *elect* to preserve the issue for post-arbitration proceedings, the determination need not necessarily precede the arbitration. *See*, *e.g.*, *Nat'l Ass'n of Broad. Emps. & Technicians v. Am. Broadcasting Co., Inc.*, 140 F.3d 459, 462 (2d Cir. 1998) ("*NABET*") (where parties did not seek pre-arbitration review, finding "no reason why arbitrability *must* be decided by a court before an arbitration award can be made" if parties desire alternate order of proceedings) (emphasis added); *see also Conoco*, 241 F.3d at 1305 n.2 (distinguishing *NABET's* deferral of arbitrability ruling because, in that case, "neither party requested a determination of arbitrability before the arbitration commenced").

confirmed award that includes findings against it is an enforceable judgment that can no longer be contested on the merits. If a court does not review arbitrability even at the confirmation stage, a non-signatory's only remaining remedy is to protest enforcement of the confirmed award against it, not to challenge the award itself.

A party challenging a confirmed award has limited defenses at the enforcement stage, where it may be precluded from contesting the legal, factual, and jurisdictional underpinnings of the confirmed award. As a practical matter, therefore, deferral of arbitrability review is denial of the jurisdictional challenge. Moreover, deferral of the arbitrability decision is a tremendous waste of legal and judicial resources, undermining a core purpose of arbitration—it makes no sense for a court to wait until *enforcement* of an award to review the threshold issue of arbitrability, particularly after parties endured the arbitration and the confirmation process.

This Court should accordingly hold that a court should independently review a challenge to an arbitration panel's jurisdiction over non-signatories before the arbitration or, at minimum, before confirming the arbitral award.

B. The Fifth Circuit Erred by Failing to Review Jurisdiction Over Petitioners Before Confirming the Arbitral Award that Purports to Bind Them

The courts below erred in refusing to review arbitral jurisdiction over Petitioners before arbitration and by again failing to address the issue at the confirmation stage. Before arbitration, the district court recognized, in theory, that arbitrability is a question reserved for the court and the arbitral panel's non-binding opinion on that jurisdictional question is owed no deference. The district court nonetheless declined to stay the arbitration as to the non-signatories.[6] Pet. App. 38a-44a.

Thereafter, the panel asserted jurisdiction over and made adverse decisions *in absentia* against Petitioners, which the panel deemed to be alter egos of

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[6] Respondents fully appreciated the impact of the *Ascendant* ruling on their efforts to ensnare the non-signatories in arbitration, and immediately asked the panel to abate the proceeding so they could obtain the district court's independent review of the arbitrators' jurisdiction over the non-signatories *before* the arbitration, lest they conduct the arbitration only to have a court later find their dispute with the non-signatories was not arbitrable. The panel denied the emergency motion and the arbitration proceeded.

AVIC USA. The panel did not find any direct breach by AVIC USA. Rather, the panel's finding of a breach depended on its exercise of jurisdiction over non-signatories, its finding that a non-signatory, Petitioner AVIC IRE, breached an exclusivity provision, and its conclusion that the actions of AVIC IRE should be imputed to AVIC USA. In doing so, the panel scrambled the evidence with no effort to separate or to make distinct findings as between AVIC USA and the non-signatories. The panel then went further and imputed AVIC USA's liability to the other non-signatories, holding the non-signatories jointly and severally liable with AVIC USA in the award. Pet. App. 169a.

Even after the panel issued its award against the non-signatories, the courts below refused to review jurisdiction over Petitioners before *confirming* the award. At the confirmation stage, Petitioners sought to vacate the award, reiterating their arbitrability challenge as non-signatories. Notwithstanding its holding in *Ascendant*, the district court severed Petitioners from AVIC USA and relegated their motions to vacate to a separate case that the court immediately closed administratively. The district court then confirmed the panel's findings against AVIC USA without recognizing that the findings and award were inextricably intertwined with the panel's exercise of

jurisdiction over and findings against all the non-signatories. Pet. App. 48a-81a, 82a-84a. This tremendous leap allowed the district court to neatly confirm the award against AVIC USA without ever reaching the predicate issue of whether the panel ever had jurisdiction over the non-signatories — a finding essential to the panel's award.

The Fifth Circuit likewise affirmed without review of the arbitral panel's jurisdiction over the non-signatories, applying a narrow and "very deferential" standard. Pet. App. 1a-25a. In doing so, the Fifth Circuit deprived Petitioners of the independent judicial review to which they were entitled before the award was confirmed and became enforceable as a judgment. Thus neither the district court nor the Fifth Circuit has ever answered the threshold question of whether the arbitrators had jurisdiction over the Non-Signatory Petitioners.

The courts below erred in failing to independently review jurisdiction over Petitioners when asked to vacate the award and before confirmation of it. Having twice been denied judicial review of the threshold jurisdictional question, the Petitioners now face a confirmed award containing findings against them, including joint and several liability, even though they never agreed to arbitrate.

The district court's severance of the non-signatories before confirmation of the award against AVIC USA purported to defer the jurisdictional review. But the legal and practical effect of the courts' repeated failures to independently review arbitrability is *de facto* confirmation of the award *against the non-signatory Petitioners* because the party holding a confirmed award can attempt to enforce it as a judgment or otherwise rely on those findings as preclusive. *See* 9 U.S.C. § 13.

The district court's attempt to "sever" the non-signatories and postpone the arbitrability determination ignores the interdependence of the findings against AVIC USA and the non-signatories. The court's confirmation of the award as to AVIC USA allows the arbitrators' unreviewed jurisdictional and liability findings against the non-signatories to stand, regardless of whether the court ever revisits the non-signatories' arbitrability challenge in the severed action. The egg cannot be unscrambled.

Now that the award has been confirmed against AVIC USA, Petitioners will have limited defenses to enforcement. Respondents have already asserted that the confirmed award against AVIC USA is the "law of the case" and argue that it precludes Petitioners from contesting the validity of the award. ROA.34224; *see* ROA.34226 (Movants Combined Reply Br. on Mot. for

Rescheduling Order Governing Briefing of Movants' Mot. to Confirm and Resp'ts' Mots. To Vacate and Mot. To Dismiss at 2, 4, *Soaring Wind Energy, LLC v. Catic USA, Inc.*, No. 15-cv-04033 (N.D. Tex. Apr. 25, 2016), ECF No. 260) ("Once the Court has decided these issues, they will be decided once and for all.").[7] At a subsequent enforcement stage, Petitioners may challenge their responsibility for the judgment as alleged alter egos, but will have no opportunity to revisit the arbitral panel's confirmed award against AVIC USA.

By punting the core issue of arbitrability while confirming the award against AVIC USA, the courts below provided no effective judicial review — essentially reducing any eventual judicial review to a rubber stamp of arbitrators' unauthorized jurisdictional and liability findings. Allowing continued uncertainty as to when a district court must review the question of arbitrability leaves the arbitral process riddled with holes, lacking fundamental fairness, and a source of prejudice to parties who never agreed to arbitrate.

This Court should definitively resolve the question regarding when judicial review of arbitrability

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[7] Petitioners do not agree with Respondents' theory of purported claim preclusion, particularly where the confirmed award and resulting judgment were procured without a court review of arbitrability for the non-signatories.

must occur for non-signatories. Otherwise, under the Fifth Circuit's approach, non-signatory parties will effectively be compelled to arbitrate and deprived of any meaningful due process — *i.e.*, an opportunity to challenge the arbitrators' assertion of jurisdiction over and findings against them at any time before an award is confirmed.

C. This Case Provides an Ideal Opportunity to Confirm that Parties Are Entitled to Independent Judicial Review of Arbitrability Before Arbitration, and at Minimum Before Confirmation

This case illustrates the danger in denying review of arbitrability before a confirmed award may be enforced. Petitioners objected to arbitrability at every stage, including before and after the arbitration, and through a motion to vacate the award. Despite its assurances in *Ascendant* that arbitrability would be addressed by *de novo* review, the district court confirmed the award against AVIC USA without ever reaching the underlying question of arbitrability as to the non-signatories, who were tried *in abstentia* with AVIC USA.

Petitioners are now left without meaningful independent judicial review. Petitioners now risk en-

forcement of the confirmed award, which includes adverse findings and imposes joint and several liability against them, without ever receiving their day in court as to the threshold question of the panel's jurisdiction. This important question is squarely presented for review.

II. This Court Should Grant Review to Vindicate the Public Policy and Due Process Rights Guaranteed by the New York Convention to a Fair and Equitably Constituted Arbitral Panel

The due process limits on the constitution of an arbitral panel under the New York Convention is an issue of fundamental importance to the role of American courts in the system of international arbitration. Here, the courts below confirmed the arbitral award by a panel blatantly stacked in favor of one side, resulting in a super-majority that voted as a block. Respondents directly or indirectly appointed six out of nine arbitrators, and these six arbitrators voted in unison on every issue, including the ultimate award, over the dissenting three arbitrators.

The decision of the courts below is contrary to the due process and public policy requirements underpinning the New York Convention. *See* New York Convention arts. V(1)(b), V(2)(b). These defenses are designed to protect fundamental due process that is

central to the fairness of arbitral proceedings and widely recognized and enforced by the international community.

The Fifth Circuit's affirmance of the arbitral award here establishes an interpretation of the New York Convention contrary to international arbitration practice and law. Other signatory nations and international law scholars have interpreted the New York Convention's due process and public policy defenses to ensure just results by requiring equality of treatment in the constitution of an arbitral tribunal. Departure from these principles puts the Fifth Circuit, and thus the United States, at odds with the international consensus on the fair constitution of arbitral panels, undermines the Convention's purpose in unifying the standards for recognizing and enforcing arbitral awards in signatory countries, and violates these essential due process norms.

A. The Fifth Circuit's Decision Splits from International Law by Confirming the Award Notwithstanding a Clear Violation of the New York Convention's Requirement of Equality of Treatment

1. The New York Convention requires equality of treatment in the constitution of arbitral panels

The New York Convention is "a multilateral treaty that addresses international arbitration" and "contains recognition and enforcement obligations related to arbitral awards for contracting states and for parties seeking the enforcement of arbitral awards." *GE Energy Power Conversion France SAS Corp. v. Outokumpu Stainless USA,* LLC, 140 S. Ct. 1637, 1644 (2020). The United States adopted the Convention and incorporated it into Chapter 2 of the FAA, *see* 9 U.S.C. §§ 201-208, to "encourage the recognition and enforcement of commercial arbitration agreements in international contracts and . . . unify the standards by which agreements to arbitrate are observed . . . in the signatory countries." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). Although the Convention provides for summary enforcement of an international award in countries party to the convention, it establishes seven grounds for challenge of such

awards, incorporated into the FAA at Section 207. *See* 9 U.S.C. § 207.

The Convention provides that a court may refuse to recognize and enforce an international arbitral award that violates standards of due process or public policy. New York Convention art. V(1)(b); *id.* art. V(2)(b). Article V(1)(b) is widely recognized to prevent recognition of an arbitral award "based on procedures that deny the parties *equality of treatment* or an opportunity to be heard." Gary Born, *International Commercial Arbitration* 2158 (2d ed. 2014) (emphasis added). "Properly interpreted, the mandatory procedural standards applicable under Article V(1)(b) are not based on national laws or public policies, but instead impose a uniform international standard of procedural fairness and equality." *Id.* at 2157.

The parties "should receive *equal treatment* throughout the entire arbitration process, including *during constitution of the tribunal*," and the "arbitrator selection method chosen by the parties or the procedural rules to which they refer must ensure a level playing field." Charles Nairac, *Due Process Considerations in the Constitution of Arbitral Tribunals*, International Arbitration and the Rule of Law 119, 123-24, 124 n.15 (Andrea Menaker ed., 2017) (emphasis added). Accordingly, the parties' contractually agreed method "can be set aside either by the institution or a

national court at the seat of the arbitration" if it "creates a significant imbalance between the parties in the constitution process." *Id.* at 124 n.15.

International treatises and the courts of signatory nations extol the requirement of equality of treatment of the parties through the arbitration process, especially in the constitution of the tribunal. In the influential case *Sociétés BKMI et Siemens v. Société Dutco* ("*Dutco*"), the French Court of Cassation refused to enforce an award resulting from a three-member tribunal in which the International Chamber of Commerce ("ICC") required two respondents with diverging interests to jointly nominate an arbitrator. *See Judgment of 7 January 1992, Sociétés BKMI et Siemens v. Société Dutco*, 10 ASA Bull. 295, 295-97 (1992) (French Cour de cassation civ. 1e). In *Dutco*, the French Court of Cassation found the arbitrator nomination process unfairly favored the claimant and deprived the respondents of their right to equal treatment. *Id.* It found that equal treatment of the parties was so fundamental to public policy, that it could be waived only after a dispute had arisen, and therefore operated to invalidate the arbitral award — even though the panel was constituted in compliance with the arbitration agreement and ICC arbitration rules. *Id.*; *see also* Nairac, *supra*, at 125.

Dutco is the seminal authority in international arbitration declaring the now-established rule that the process of constituting the arbitral panel "should not favour one party over another." *See* Nairac, *supra*, at 126. *Dutco* reflects the principle that while all parties "should have the same rights with regard to the appointment of the arbitrators," they should not necessarily "all have a right to appoint 'their' arbitrator." *See Fouchard, Gaillard, Goldman on International Commercial Arbitration* 469-70 (Emmanuel Gaillard & John Savage eds., 1999). "[T]he parties' discretion as to their choice of arbitration is not without its limits." *Id.* As a reaction to *Dutco*, "most leading institutional rules have adopted provisions dealing with appointment of arbitrators in multi-party cases." Born, *supra*, at 2610.

This principle of equal treatment seeks to prevent the unfairness of the situation here, where there are nominally more than two disputants to an arbitration but only two sides to the dispute. In a multi-party case, "[s]imply providing each party with one selection would lead to an imbalance when there are distinct claimant and respondent groups of differing numbers." Jeffrey Maurice Waincymer, Procedure and Evidence in International Arbitration 510 (2012). Moreover, this imbalance would be "particularly prob-

lematic if parties on the majority side were able to appoint some or all parochial arbitrators as this might guarantee a favourable outcome." *Id.* at 510-11. The constitution of the panel must not so favor one side that a favorable outcome for that side is all but guaranteed.

Even where the arbitration agreement putatively permits an imbalanced panel, such mechanisms in an arbitration agreement should be set aside where "their terms are problematic from a substantive equality perspective." *Id.* at 511. For example, Article 8 of the 2014 London Court of International Arbitration ("LCIA") Rules implements these principles by mandating that each "side" of a multi-party arbitration appoint arbitrators, or alternatively that the LCIA appoint all members of the arbitral panel where there are three or more parties and the disputing parties do not collectively represent two "sides."[8] Contrary to the Fifth Circuit, these equality of treatment principles apply even if the parties' agreement provides for a different, but unbalanced appointment process. At minimum, the arbitration agreement here

[8] London Court of International Arbitration art. 8 (2014), https://www.lcia.org//Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article%208.

should have been construed to avoid conflict with these bedrock principles.

2. The Fifth Circuit's departure from these internationally recognized principles of equality of treatment undermines the United States' obligations under the New York Convention.

The Fifth Circuit ignored the principle of equality of treatment in upholding the panel's award where the constitution of the panel was grossly imbalanced with Respondents directly or indirectly appointing six out of the nine arbitrators. The Fifth Circuit brushed aside this equality concern, explaining that it would not "discard the plain text" of the arbitration agreement "out of so-called fairness." Pet. App. 19a. But that is exactly what the principle of equality of treatment requires: to set aside as unfair arbitral awards handed down by a grossly imbalanced panel. At the very least, the courts should have interpreted the arbitral agreement to avoid this clear conflict with the New York Convention's requirements, rather than disregarding the principle of equality entirely.

This divergence from the fundamental equality norm is contrary to Congress' purposes in implementing the New York Convention, including "to unify the

standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk*, 417 U.S. at 520 n.15. In implementing the New York Convention through the FAA, Congress sought to give "domestic effect to international obligations" under the Convention. *See Medellin v. Texas*, 552 U.S. 491, 522 (2008) (noting the Convention as an example of a treaty given domestic effect). The House Committee on the Judiciary, in recommending the passage of the bill amending the FAA to implement the New York Convention, noted that implementing the New York Convention would "serve the best interests of Americans doing business abroad by encouraging them to submit their commercial disputes to impartial arbitration for awards which can be enforced in both U.S. and foreign courts." H.R. Rep. No. 91-1181, at 3602 (1970) ("House Report").

A variety of public and private actors supported the Convention's implementation, including the American Bar Association, the Inter-American Commercial Arbitration Commission, the International Chamber of Commerce, the Department of State, and the Department of Justice. *Id.* In deviating from international practice, the United States risks undermining the interests of Americans doing business abroad by throwing into question whether arbitral

awards will be subject to uniform recognition and enforcement standards in U.S. and foreign courts. *See Scherk*, 417 U.S. at 520 n.15.

Courts "should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements," so that the United States is "able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors." *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995) (interpreting the Hague Rules [Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading, 51 Stat. 233 (1924)]). In interpreting other treaties to which the United States is a party, this Court has declined to interpret them "in a manner contrary to every other nation to have addressed this issue." *Vimar Seguros y Reaseguros*, 515 U.S. at 537.

This Court has repeatedly recognized the importance of interpretation of international treaties in a manner consistent with other signatory nations. *See Medellin*, 552 U.S. at 517 ("So too here the lack of any basis for supposing that any other country would treat ICJ judgments as directly enforceable as a matter of their domestic law strongly suggests that the treaty should not be so viewed in our courts."); *Abbott v. Abbott*, 560 U.S. 1, 16 (2010) (noting that in inter-

preting any treaty, "[t]he 'opinions of our sister signatories' . . . are 'entitled to considerable weight'"). This includes looking to scholars' views of "an emerging international consensus." *Abbott*, 560 U.S. at 18. This Court should grant review to ensure that the United States does not stand alone among nations in failing to recognize the principle of equality of treatment in the constitution of arbitral panels.

B. The Principle of Equality of Treatment, Established under the Convention to Guard Against an Unjust Arbitral Process, Is Important and Should Be Enforced to Maintain Harmony with International Arbitration Practice

Enforcement of the principle of equality of treatment under the Convention is an issue of substantial national importance worthy of this Court's review. Declining to give the Article V(1)(b) and Article V(2)(b) defenses their full effect leaves arbitration vulnerable to manipulation and gamesmanship in the arbitrator selection process. A party seeking an unfair advantage in arbitration need only split itself into a number of entities—a Hydra with each head appointing an arbitrator—to assure a favorable outcome for its side. Parties may now view the United States as a forum for gamesmanship that allows their opponents to engage in forum shopping to "stack the deck" in

their favor.

Besides violating fundamental norms of due process and United States' public policy, the ability of one side to engineer a favorable outcome through the panel constitution process erodes parties' faith that arbitration will provide a fair and effective alternative to court proceedings. A lack of fairness in the arbitrator selection process prevents the arbitration from being an effective substitute for a judicial forum because it inherently lacks neutrality. *McMullen v. Meijer, Inc.*, 355 F.3d 485, 494 n.7 (6th Cir. 2004) ("When the process used to select the arbitrator is fundamentally unfair . . . the arbitral forum is not an effective substitute for a judicial forum, and there is no need to present separate evidence of bias or corruption in the particular arbitrator selected."); *see also Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968) ("[W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.").

In implementing the Convention, Congress believed it would "serve the best interests of Americans doing business abroad" and encourage them to submit commercial disputes to arbitration. House Report at

3602. The due process and public policy defenses under the Convention are meant to guard against arbitral procedures that undermine the foundations of international arbitration practice and to provide a baseline of fairness and due process. Condoning gamesmanship in arbitrator selection is fundamentally unfair because the resulting arbitral panel lacks neutrality, depriving the parties of an effective substitute for the judicial forum and discouraging the use of international arbitration to resolve commercial disputes.

C. The Fifth Circuit Court of Appeals Erred in Affirming the Arbitral Award Handed Down by a Severely Lopsided Panel

The Fifth Circuit erred in finding the arbitral panel was "fairly constituted" and in sanctioning the parties' unequal treatment in the arbitrator selection process. The Fifth Circuit improperly focused on the number of participants, wrongly assuming that unequal treatment would not directly affect the outcome: "This case involves two sides, but, more importantly, it features seven members; suppose Eris had tossed the Apple of Discord into a Soaring Wind conference room, prompting a free-for-all among the parties — the arbiter selection process would have remained the same." Pet. App. 18a. Here, Respondents positioned themselves as one claimant group at the outset. Tang filed the arbitration demand "in its own capacity and

on behalf of Wind Energy LLC and its other members, the Nolan Group, Inc., Keith P. Young, Mitchell W. Carter, and Jan Family Interests Ltd." ROA.29633. In the demand, Tang prayed for relief "in its own name and on behalf of Soaring Wind Energy, LLC and the other similarly situated members[.]" ROA.29644. This alliance to act as one even before arbitrator selection, formed two distinct claimant and respondent groups. As a result, Respondents directly or indirectly appointed a super-majority of the nine-member panel. Respondents' arbitrators voted as a block, as intended, capturing the proverbial Apple of Discord.

Allowing each participant in the arbitration to appoint its own arbitrator, while facially affording the "same" treatment to each participant, in fact denied AVIC USA and Petitioners equal treatment in arbitrator selection, in contravention of international arbitration practice and due process. It is fundamentally unfair for one side to appoint a super-majority of the arbitrators, as to all but guarantee a favorable outcome. *See* Waincymer, *supra*, at 510-11; *Commonwealth Coatings*, 393 U.S. at 149; *McMullen*, 355 F.3d at 494. It is especially unfair where the party seeking to benefit from an egregiously imbalanced tribunal initiated and framed the dispute as consisting of only two sides in the arbitration demand. *See* ROA.29633,

ROA.29644 (demanding arbitration on behalf of all Respondents and appointing a single arbitrator).

Illustrative of the direct relationship between equal treatment during the constitution of the panel and due process and the need for independent court review, is the unmistakable evidence here of Respondents' intentional gaming of the appointment process to guarantee a favorable outcome — precisely the situation that the New York Convention and the international arbitration community say must be avoided. Counsel for Tang circulated an Agreement regarding Division of Proceeds agreeing to pay "the legal fees for those members of SWE who appoint an arbitrator *with Tang's approval*." ROA.30978-80 (emphasis added). Tang's counsel also circulated a spreadsheet to the Respondents assessing the likelihood of favorable rulings from potential arbitrators. ROA.29715-18 ("stupid, unpredictable, but likes me;" "Loves Texas. Endorsed me as candidate;" "Not that bright. Likes Carlos [Tang's counsel's law partner] . . . would probably go along.").

The courts below were also incorrect that the imbalanced panel constitution was simply the outcome of the contractual process for panel selection, and therefore permissible. The district court and the Fifth Circuit erred in interpreting the contract by disregarding the well-established principles of law that

would invalidate a decision permitting such an unfair arbitral selection process or the resulting award. *See* Waincymer, *supra*, at 510-11. The courts below should have interpreted the contract to avoid a glaring conflict with the internationally recognized norm of equality and fairness in arbitral selection. When viewed in that light, the skewed arbitral selection process violated the arbitration agreement and the resulting award should be set aside.

D. This Case Is the Ideal Vehicle to Confirm the Application of the Principle of Equality of Treatment to the Constitution of an Arbitral Panel

Objections to the panel constitution were raised at every stage by Petitioners and AVIC USA. The prejudice resulting from the constitution of the lopsided panel is readily apparent: the stacked deck panel voted in a block in asserting jurisdiction over non-signatories and in issuing its award against both AVIC USA and the Petitioners. This case squarely presents this issue of fundamental importance to the fairness of arbitral proceedings and to confidence in and respect for the institution of arbitration.

III. Review of This Case Would Complement the Court's Review in *Henry Schein*

On June 15, 2020, the Court granted a petition for writ of certiorari in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, as to "[w]hether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator." 935 F.3d 274 (5th Cir. 2019), *cert. granted*, No. 16-41674.

The resolution of *Henry Schein* will require this Court to determine *who* decides arbitrability—the court or the arbitrator—depending on the scope of the parties' agreement. The first question presented here requires this Court to resolve *when* a court must determine arbitrability—whether independent court review of arbitral jurisdiction must come before the arbitration, before confirmation, or whether, as the courts mistakenly held below, that issue may be deferred to enforcement. Review of the first question presented would provide guidance that complements the resolution in *Henry Schein*, and it would be ideal for the Court to consider these closely related issues in tandem.

The Court accordingly should grant the petition for a writ of certiorari. Even if this Court chooses not

to undertake review of this important question immediately, this Court should hold this petition in abeyance to be considered in light of the outcome in *Henry Schein*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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