No. 20-39

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

REPLY BRIEF FOR THE PETITIONERS

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This Court's review is required to resolve two issues of exceptional importance to the fair conduct of international arbitration seated in the United States: the due process rights of non-signatories to have independent judicial review of arbitral jurisdiction before confirmation of an award affecting their rights and the due process and public policy requirements of the New York Convention, which prevent the recognition and enforcement of an international arbitration

award by a panel unfairly composed of a super-majority appointed by one side to the dispute.

To avoid review of these important questions, Respondents' consolidated opposition brief conflates the issues raised by the non-signatory Petitioners and the distinct issues posed by the signatory to the arbitral agreement, AVIC USA, in its separate petition for a writ of certiorari (No. 20-40). The separate legal rights of the non-signatory Petitioners are critical to the questions presented in their Petition. Respondents' arguments about what the *signatories* contractually agreed with respect to arbitral panel selection and arbitral jurisdiction have no application to the *non-signatory* Petitioners. Tellingly, Respondents' opposition takes as given that the non-signatories are alter-egos of AVIC USA — even short-handing Petitioners as the "AVIC Alter Egos" — notwithstanding that they never consented to arbitrate and that no court has ever determined arbitrability of the claims against them — core issues in dispute.

For similar reasons, Respondents' claims that these questions are "fact-bound" or waived fall flat. Petitioners never agreed to the arbitration process and have consistently pressed for judicial review of the arbitral panel's jurisdiction and protested the arbitral panel's lopsided composition at every opportunity. As to Petitioners, resolution of these important legal questions does not hinge on fact-bound determinations.

As demonstrated in the Petition, the Fifth Circuit's decision establishes a fundamental conflict with the established norms of international arbitration and the requirements of due process, warranting this Court's review.

I. Petitioners Are Non-Signatories to the Arbitral Agreement and Were Entitled to Judicial Review of Arbitral Jurisdiction Before the Arbitration, or at Least, Before the Confirmation of the Award

Petitioners have established that review is warranted to address the important question of *when* courts should conduct the required independent judicial review of arbitrability. This case is an ideal vehicle for resolving that important question. Specifically, Petitioners demonstrated that 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, or at a minimum, before confirmation of an arbitration award that purports to make findings against them. *See* Pet. 15-26.

Respondents concede that Petitioners, "as non-signatories, are entitled to independent court review of the arbitrators' power over them." Opp'n 20. And Respondents further concede that Petitioners have not yet obtained that independent review. *Id.* But Respondents ignore the crux of the Petition — namely, that the non-signatories face an award that has been

confirmed against AVIC USA and also makes adverse findings against them, despite never having received the independent judicial review of arbitrability to which they were entitled. The lower courts' deferral of this exercise of jurisdiction over non-signatories who never agreed to arbitrate is prejudicial because Respondents have asserted that adjudications on appeal as to AVIC USA would be "law of the case" and preclude re-litigation by the non-signatories on the same grounds. ROA.34224 (claiming "if the award is confirmed over the objections of AVIC USA, those rulings will be law of the case as to the same grounds asserted by other Respondents"); ROA.34226 (arguing "[o]nce the court has decided these issues, they will be decided once and for all"). The non-signatory Petitioners disagree with Respondents' "law of the case" argument, but it underscores that the failure to conduct the necessary independent review before confirming the award prejudices Petitioners. *See* 9 U.S.C. § 13; Pet. 23.

This implicates the important question of the timing of judicial arbitrability review. The Court's elucidation of this important timing question is broadly applicable to any matter in which a non-signatory to an arbitration agreement did not agree to arbitrate and seeks judicial review *before* arbitrability, or at least before an award is confirmed.

In describing the arbitral process, Respondents fail to acknowledge that the non-signatories repeatedly objected to and did not participate in the arbitration, and that no court has ever made an independent determination of arbitrability of the claims against them. *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."). Respondents seek to obscure the fact that the non-signatories were tried *in absentia* before any determination of arbitrability.[1]

A. The Arbitral Award Should Not Have Been Confirmed Without Judicial Review of the Panel's Exercise of Jurisdiction over the Non-Signatories

Respondents argue that determination of arbitrability over the non-signatories was irrelevant and immaterial because the signatory, AVIC USA, "was independently liable." Opp'n 19. That argument over-

[1] Respondents also improperly conflate the signatory, AVIC USA, with the non-signatories by misleadingly referring to AVIC USA as "AVIC" (*see, e.g.,* Opp'n 9-10) and the non-signatories as the "AVIC Alter Egos" even though no award has ever been confirmed against them.

looks the fundamental premise underlying the Petition, which is that the arbitral award purported to bind *both* AVIC USA *and* the non-signatory Petitioners. Pet. 20-22.

To begin, Respondents mischaracterize the arbitrators' conclusions by contending "[t]he arbitrators found AVIC USA *directly* liable under the Soaring Wind Agreement, regardless of the AVIC Alter Egos' liability, and then held the AVIC Alter Egos jointly and severally liable under alter ego principles." Opp'n 20. What Respondents describe as a finding of "direct liability" was in truth a finding of *indirect* liability based on the purported breach of the Agreement by non-signatory AVIC IRE, which never agreed to arbitration and over which the arbitrators had no jurisdiction. The panel then attributed AVIC IRE's actions to AVIC USA on an alter-ego theory. Pet. App. 142a-143a, ¶ 66. Based on this alter-ego finding—itself founded on the exercise of jurisdiction over a non-signatory—AVIC USA was deemed liable. *Id.* The arbitral panel's findings of wrongdoing by alter-ego liability of the *non-signatories* were then confirmed against AVIC USA.

The award against AVIC USA, and the District Court's confirmation and judgment, thus rest upon a fundamental violation of this Court's precedent re-

quiring independent judicial review of arbitral jurisdiction. Pet. 15-16.[2]

B. Petitioners' Challenge Is Not "Academic" — They Face a Confirmed Award That Finds Them Jointly and Severally Liable, Which Respondents Threaten to Enforce Against Them

Respondents dismiss the Petition as "academic" because, they contend, the award and judgment stand against AVIC USA regardless of whether the non-signatories "are separately subject to any judgment." Opp'n 19. But this argument proves Petitioners' point. The arbitral award is predicated on adverse alter ego and liability findings *against the non-signatories* without the requisite judicial finding of jurisdiction over the non-signatory Petitioners.

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[2] Respondents also wrongly assert that AVIC IRE's liability was "not premised in any way on an improper 'adverse inference.'" Opp'n 20, 23. The panel drew an adverse inference that AVIC IRE competed against SWE because AVIC IRE, as a non-signatory who objected to and did not appear in the arbitration, refused to produce documents in the litigation. Pet. App. 161a-162a, ¶ 128. That adverse finding, wrongly treating AVIC IRE as a party to the arbitration, was imputed to AVIC USA, and formed the basis of its holding against AVIC USA and other non-signatories on an alter-ego theory.

Respondents contradict their own prior assertion that the confirmed AVIC USA award will be "law of the case" by now claiming that Petitioners "will indeed get [the] review" to which they are entitled. Opp'n 20. As the award is predicated on non-signatory liability, the question of whether the claims against the non-signatories were arbitrable should have been decided first. Respondents suggest they will attempt to enforce the confirmed award against the non-signatory Petitioners as soon as "the district court enters an appropriate judgment" — consistent with their previous suggestions that the confirmed award is "law of the case" not subject to further challenge. Opp'n 20; Pet. 23. As the Petition established, if Respondents' views are accepted, this would preclude the non-signatory Petitioners from independently challenging the award, leaving them with limited defenses to enforcement of the award against them. These issues are anything but "academic." This matter implicates important questions regarding the timing of judicial arbitrability review. If not resolved, Petitioners will suffer the manifest prejudice of effectively being denied the independent review of arbitrability that all parties agree they are due before the award that makes findings against them is fully and finally confirmed as to AVIC USA.[3]

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[3] Respondents also incorrectly imply (Opp'n 17-18 & n.5) that jurisdiction exists over Petitioners under Section 202 of the

II. Petitioners Established the Decision Below Is Contrary to the Due Process and Public Policy Requirements Underpinning the New York Convention

Petitioners established that the decision of the courts below is contrary to the due process and public policy requirements underpinning the New York Convention, leaving the United States out-of-step with other Treaty signatories and the international arbitration community. Petitioners also established that 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. The confirmation of an arbitral award by a panel with a super-majority of arbitrators appointed by one side — particularly with the egregious and uncontested evidence of an intent to manipulate the appointment process to stack the

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New York Convention, because the arbitration bore "some * * * reasonable relation with one or more foreign states." Section 202 does not establish jurisdiction over Petitioners, who are not parties to the arbitration agreement and are not alter-egos of the signatory. *Cf. ChampionsWorld, LLC v. U.S. Soccer Fed'n, Inc.*, 890 F. Supp. 2d 912, 927 (N.D. Ill. 2012) (considering only whether foreign non-signatory's connection to the dispute allowed the plaintiff to bring the arbitration against *signatories* pursuant to Section 202).

votes and pre-determine the outcome (*see* Pet. 38-40) — 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. *See* Pet. 26-41.

Respondents incorrectly ignore Article (V)(1)(b) of the New York Convention, which contemplates a "uniform international standard of procedural fairness and equality." Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION 2157 (2d ed. 2014);[4] *see also* Pet. 29-30. As Petitioners established, Article V(1)(b) is widely recognized to prevent the recognition and enforcement of an arbitral award "based on procedures that deny the parties equality of treatment or an opportunity to be heard." Born, *supra*, at 2158. Other scholars have noted that the parties "should receive equal treatment throughout the entire arbitration process, including during constitution of the tribunal." *See* Charles Nairac, *Due Process Considerations in the Constitution of Arbitral Tribunals*, INTERNATIONAL

[4] Despite Respondents' attempts to dismiss scholarship on international arbitration as "the views of certain academics," this Court has turned to established authorities, such as Gary Born's treatises on international arbitration, to contextualize and inform its understanding of international arbitration and the New York Convention. *See, e.g., GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1646 (2020) (relying on the same Born treatise cited by Petitioners).

ARBITRATION AND THE RULE OF LAW 119, 123-24, 124 n.15 (Andrea Menaker ed., 2017). Respondents do not, and cannot, deny that this uniform international due process standard is applicable under Article V(1)(b) of the New York Convention.

Respondents' arguments under Article V(2)(b) fare no better. Petitioners established that denying equality of treatment to parties in arbitration violates fundamental norms of due process and United States public policy. *See* Pet. 26-40. The public policy defense applies to the nation's "most basic notions of morality and justice." *PDV Sweeny, Inc. v. Conocophillips Co.*, 670 F. App'x 23, 24 (2d Cir. 2016). The opportunity to be heard is fundamental to a fair adjudication.[5]

Moreover, as Petitioners established, Congress sought "to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974); *see* Pet. 28, 33-36, 37-38. Therefore, despite Respondents' urging,

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[5] *See, e.g.*, *Kerry v. Din*, 576 U.S. 86, 91 (2015) (noting origins of due process in the Magna Carta in 1215 and incorporation into Anglo-American legal tradition). Due process stands in contrast to the rejected public policy in Respondents' cited case. *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987) (declining to find public policy for general safety concerns involving the operation of dangerous machinery while under the influence of drugs).

this Court should consider the acts of other Treaty signatories and decline to interpret the New York Convention "in a manner contrary to every other nation to have addressed this issue." *See Vimar Seguros y Reaseguros S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995); *see also Abbott v. Abbott*, 560 U.S. 1, 16, 18 (2020) (looking to opinions of "sister signatories" and scholars' views of "emerging international consensus").

Contrary to Respondents' suggestion that adhering to the due process and public policy requirements of the New York Convention would improperly displace domestic law (Opp'n 26), the question presented here is *not* analogous to this Court's recent decision in *GE Energy*, 140 S. Ct. at 1644, which found the Convention was silent on the application of estoppel principles for a non-signatory. By contrast, the New York Convention is not silent on due process and public policy requirements — Articles V(1)(b) and V(2)(b) expressly provide for the non-recognition and non-enforcement of awards where contrary to due process or U.S. public policy.

In addition, Respondents' arguments (Opp'n 29, 34) that "petitioners" are bound by the "bespoke" contractual language of the SWE Agreement misleadingly fails to differentiate between AVIC USA and the non-signatory Petitioners. Petitioners *never* signed the SWE Agreement and *never* agreed to its arbitra-

tor-selection method. None of the cases cited by Respondents stand for the proposition that *non-signatories* can be bound by an award issued by a blatantly stacked panel engineered by the opposing party. In Respondents' cases involving "lopsided" panels (Opp'n 27-28), each party was a signatory to the underlying contract, while in two of those cases, one side failed to even nominate an arbitrator. *See UBS Fin. Servs., Inc. v. Padussis*, 842 F.3d 336, 337-38 (11th Cir. 2016) (party failed to indicate preferences before deadline to director of body selecting arbitrator panel); *Kentucky River Mills v. Jackson*, 206 F.2d 111, 117 (6th Cir. 1953) (party failed to nominate arbitrator); *Kushlin v. Bialer*, 301 N.Y.S.2d 181 (N.Y. App. Div. 1969) (involving three signatories to three-person partnership agreement).

Respondents wrongly contend that Petitioners waived their due process and public policy arguments by failing to make them at the district court level. Opp'n 25, 28. This is patently false. These arguments were prominent in the Non-Signatories' motions to vacate the arbitral award (ROA.31831-44, ROA31643) and also included in AVIC USA's motion to vacate (ROA.31683-84, ROA.31688, ROA.31691-94). Respondents obviously knew these due process and public policy arguments had been raised because Respondents addressed them in their oppositions to the motions to vacate of AVIC USA and the Non-Signatories. ROA.34387, ROA.34455-63. Despite this, the district court overlooked or disregarded these arguments

in confirming the award against AVIC USA, but this does not write the arguments out of the briefing or waive them. There is no support for Respondents' assertion of waiver by either AVIC USA or the Non-Signatories, whom Respondents misleadingly conflate as "Petitioners" to make their waiver argument.

* * *

For the foregoing reasons, and for the reasons stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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