No. ______

In the
Supreme Court of the United States

OCCIDENTAL EXPLORATION AND PRODUCTION COMPANY,

Petitioner,

v.

ANDES PETROLEUM ECUADOR LIMITED,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Arbitration Act authorizes vacatur of an award if the arbitrator shows "evident partiality." 9 U.S.C. §10(a)(2). In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), this Court authoritatively interpreted that provision to mean arbitrators "not only must be unbiased but also must avoid even the appearance of bias." *Id.* at 150. The Court accordingly vacated an award where an arbitrator failed to disclose a relationship with a party, concluding that the arbitrator "might reasonably be thought biased" based on the failure to disclose alone. *Id.* at 147, 150.

Since then, the Second Circuit has inexplicably concluded that *Commonwealth Coatings* is not binding precedent. Instead, it has declared the opinion of the Court—joined by six Justices—to be a mere plurality opinion, expressly discarded its standard, and adopted what was essentially the position of the dissenters: Evident partiality exists only if a reasonable person "would have to conclude" that the arbitrator was in fact partial. *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 82-84 (2d Cir. 1984). Remarkably, five other circuits have followed the Second Circuit's lead, while two continue to correctly adhere to this Court's opinion.

The question presented is:

Whether an arbitrator's failure to disclose a relationship evinces evident partiality if it shows the arbitrator "might reasonably be thought biased," as *Commonwealth Coatings* held, or instead only if a reasonable person "would have to conclude" that the arbitrator was actually biased.

PARTIES TO THE PROCEEDING

Petitioner is Occidental Exploration and Production Company.

Respondent is Andes Petroleum Ecuador Limited.

CORPORATE DISCLOSURE STATEMENT

Occidental Exploration and Production Company is an indirect subsidiary of Occidental Petroleum Corporation, which indirectly owns 100% of Occidental Exploration and Production Company's stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings in the U.S. Court of Appeals for the Second Circuit and the U.S. District Court for the Southern District of New York:

- *Andes Petroleum Ecuador Ltd. v. Occidental Exploration and Production Company*, No. 21-3039 (2d Cir.), judgment entered on June 15, 2023; petition for rehearing or rehearing en banc denied on August 11, 2023.
- *Andes Petroleum Ecuador Ltd. v. Occidental Exploration and Production Company*, No. 1:21-cv-03930 (S.D.N.Y.), judgment entered on December 2, 2021; judgment affirmed in part and vacated in part on August 18, 2023.

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The Federal Arbitration Act ("FAA") balances the strong interest in conclusive arbitration proceedings with the equally strong interest in ensuring that those proceedings comport with the parties' agreement and basic principles of fairness. The "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), depends on maintaining that balance, as parties will not agree to arbitrate absent assurances that they will get the kind of tribunal and procedures for which they bargained.

In keeping with those principles, this Court has interpreted the FAA's provision allowing vacatur for "evident partiality," 9 U.S.C. §10(a)(2), as requiring that arbitrators "not only must be unbiased but also must avoid even the appearance of bias," which arises when an arbitrator "might reasonably be thought biased against one litigant and favorable to another." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968). The Court applied that standard to hold that an award had to be vacated when an arbitrator failed to disclose a relationship with a party. *Id.* at 149. As it explained, "[w]e can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." *Id.* The opinion for the Court was accompanied by a concurrence from Justice White, joined by Justice Marshall, who confirmed that he was "glad to join" the "majority opinion" in full, but wrote to underscore that vacatur may not be appropriate "if both parties are

informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial." *Id.* at 150 (White, J., concurring).

That should have made this an easy case. The $392 million arbitration award at issue arises out of an arbitrator's egregious and decidedly non-"trivial" violation of disclosure obligations mandated by the arbitration agreement itself. Petitioner Occidental Exploration and Production Company ("OEPC") and respondent Andes Petroleum Ecuador Limited ("Andes") partnered in a project to develop hydrocarbon resources in Ecuador. As is common in international ventures, the parties did not leave dispute resolution to the Ecuadorian courts. Valuing a forum with both the appearance and reality of independence and impartiality, the parties chose arbitration subject to strict, ongoing disclosure requirements to root out any undisclosed relationships and so any appearance of partiality.

In blatant and direct violation of those disclosure obligations, one of the arbitrators concealed for more than two years that he was simultaneously working with Andes' lead counsel as a co-arbitrator in a concurrent matter—a collaboration that provided Andes' counsel with real-time, behind-the-scenes access to the arbitrator's views about specific contract-law issues, amenability to particular strategies, and procedural preferences. Neither the arbitrator nor Andes ever disclosed that relationship, even though the parties' agreement imposed detailed, extensive, and ongoing disclosure requirements on both.

The Second Circuit nevertheless found no evident partiality, but only by ignoring this Court's

precedent—quite literally. According to the Second Circuit, *Commonwealth Coatings* is not a binding decision of this Court. In its view, that opinion—though designated the opinion of the Court, explicitly joined by six Justices, and recognized as the majority opinion by Justice White himself and the dissenters—conflicts with Justice White's concurrence, and so represents the views of only "a plurality of four [J]ustices." *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 82 (2d Cir. 1984). More inexplicable still, the Second Circuit somehow deemed itself bound by *neither* the opinion of the Court *nor* the purportedly conflicting concurring opinion of Justice White. It instead declared itself free to consider the very question *Commonwealth Coatings* decided "on a relatively clean slate"—and proceeded to explicitly reject the "appearance of bias" standard *Commonwealth Coatings* adopted as "too low," and instead demand proof that "a reasonable person would *have* to conclude that an arbitrator was partial." *Id.* at 83-84 (emphasis added).

That deliberate disregard of a binding majority opinion of this Court, based solely on a (mis)perceived conflict between that opinion and an accompanying concurrence that explicitly joined it, is an astonishing departure from the fundamental rule of vertical *stare decisis*. Unfortunately, that egregious error is not limited to the Second Circuit; it has become the prevailing view among the federal courts of appeals, with five other circuits adopting the Second Circuit's precedent-defying approach, while two others follow this Court's binding precedent.

That entrenched circuit split, and the egregious disregard of this Court's precedent from which it stems, readily warrants this Court's attention. Instead of respecting the balance set by the FAA and this Court—insulating arbitration awards from judicial review on the merits but requiring impartial and independent arbitrators in accordance with parties' agreement—the Second Circuit's rule sets the standard for showing arbitrator partiality so high as to reduce that safeguard to a nullity and render bargained-for disclosure obligations largely irrelevant. The Second Circuit's approach thus effectively leaves parties to arbitration agreements with no means to enforce contractual disclosure obligations, flouting the basic principle that courts must "enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted." *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1621 (2018). That vitiates the core premise of arbitration, openly flouts this Court's binding precedent, and has serious implications for all who rely on arbitration to fairly and efficiently resolve their disputes. This Court should grant certiorari.

OPINIONS BELOW

The Second Circuit's decision below is not reported but is available at 2023 WL 4004686 and reproduced at App.1-8. The district court's order and opinion is not reported but is available at 2021 WL 5303860 and reproduced at App.10-20.

JURISDICTION

The Second Circuit issued its decision on June 15, 2023, and denied a timely petition for rehearing on August 11, 2023. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The relevant provision of the FAA, 9 U.S.C. §10(a), is reproduced at App.21.

STATEMENT OF THE CASE

A. Legal Background

1. The FAA defines the legal framework for judicial review and enforcement of arbitration awards, which reflects the "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors*, 473 U.S. at 631. Among other things, the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. §2, and it authorizes courts to compel arbitration in accord with the terms of the parties' agreement, *id.* §4, including the method of appointing arbitrators provided by their agreement, *id.* §5.

The FAA also sets the terms for federal judicial enforcement of arbitration awards. A party "may apply to the court … for an order confirming the award," and the court "must grant such an order unless the award is vacated, modified, or corrected" as prescribed under the FAA. *Id.* §9. Sections 10 and 11 in turn set out the "exclusive grounds" on which a court may vacate or modify an arbitration award, *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 583

(2008)—that is, the basic limits the FAA places on arbitration proceedings to ensure that any resulting award warrants enforcement. In particular, the FAA provides that a court may vacate an award where:

> (1) "the award was procured by corruption, fraud, or undue means";
>
> (2) "there was evident partiality or corruption in the arbitrators";
>
> (3) "the arbitrators were guilty of misconduct"; or
>
> (4) "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award … was not made."

9 U.S.C. §10(a).[1]

2. This case involves the second ground for vacatur under §10 of the FAA: when an arbitrator is tainted by "evident partiality." 9 U.S.C. §10(a)(2). This Court has addressed that provision only once, 55 years ago in *Commonwealth Coatings*—a decision that should have resolved this case.

Like this case, *Commonwealth Coatings* involved an arbitrator's failure to disclose a relationship with an opposing party that called his neutrality into question. Commonwealth Coatings was a subcontractor who sued to recover money it claimed

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[1] Because this arbitration involved a non-American party, it is also governed by the New York Convention. *See* 9 U.S.C. §202; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517. But when an award is vacated under 9 U.S.C. §10, it is unenforceable under the Convention too. *See* 9 U.S.C. §207; New York Convention art. V(1)(e).

its prime contractor owed it. 393 U.S. at 146. The dispute was referred to arbitration in accordance with the parties' agreement, and a panel of three arbitrators was appointed. As it turned out, one of those arbitrators had prior business dealings with the prime contractor, who had been "[o]ne of his regular customers" and had paid him "fees of about $12,000 over a period of four or five years" for his services as a consultant—including on projects involved in the arbitration. *Id.* Those prior dealings "were unknown to [Commonwealth Coatings] and were never revealed to it by th[e] arbitrator, by the prime contractor, or by anyone else until after an award had been made." *Id.*

Once Commonwealth Coatings learned of that conflict, it petitioned to vacate the award. The district court denied the petition, and the court of appeals affirmed. *Id.* This Court granted certiorari and reversed. *Id.* at 146-50. In an opinion authored by Justice Black, joined by five other Justices, and unambiguously reported as "the opinion of the Court," the Court framed the question presented as whether "elementary requirements of impartiality taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through arbitration." *Id.* at 145. It concluded that by allowing courts to vacate awards for "evident partiality," the FAA provides "not merely for any arbitration but for an impartial one." *Id.* at 147. That standard, the Court held, requires avoiding not only actual bias but "even the appearance of bias"—and so required vacating the award at hand because the arbitrator's failure to disclose his prior relationship with the prime contractor called his partiality into serious question. *Id.* at 147-50.

The Court recognized that there was no evidence the arbitrator "was *actually* guilty of fraud or bias in deciding this case," and it had "no reason, apart from the undisclosed business relationship, to suspect him of any improper motives." *Id.* at 147 (emphasis added). But the fact that "neither th[e] arbitrator nor the prime contractor gave [Commonwealth Coatings] even an intimation" of their relationship was enough to show a "manifest violation of the strict morality and fairness Congress would have expected." *Id.* at 147-48. Under "the broad statutory language that governs arbitration proceedings," and the "evident partiality" standard in particular, the Court concluded that the resulting appearance of bias was enough to require vacatur even absent evidence of actual bias. *Id.* at 148. That holding, the Court underscored, would impose no meaningful burden on arbitration proceedings, as "[w]e can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." *Id.* at 149.

The Court closed by noting that both existing arbitration rules and canons of judicial ethics "rest on the premise" that a neutral arbiter "not only must be unbiased but also must avoid even the appearance of bias." *Id.* at 150. The Court accordingly concluded that Congress has not authorized binding arbitration by arbitrators who "might reasonably be thought biased against one litigant and favorable to another." *Id.*

Justice White filed a concurring opinion, joined by Justice Marshall. In the first line of that opinion,

Justice White stated explicitly that he was "glad to join" Justice Black's opinion for the Court, which he later referred to as "the majority opinion"; he simply wished to add some "additional remarks." *Id.* at 150, 151 n.* (White, J., concurring). In particular, Justice White noted that arbitrators are not "held to the standards of judicial decorum of Article III judges," and are not "automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance," or if "the relationship is trivial." *Id.* at 150. But like the opinion of the Court that he joined, Justice White emphasized that arbitration "is best served by establishing an atmosphere of frankness at the outset, through disclosure by the arbitrator," so that "the parties are free to reject the arbitrator or accept him with knowledge of the relationship." *Id.* at 151. After all, parties "are the architects of their own arbitration process," and so are entitled to know all the relevant facts when determining whether an arbitrator is acceptable. *Id.* Accordingly, while Justice White noted that some "undisclosed relationships" may be "too insubstantial to warrant vacating an award," he agreed with the "majority opinion" that the appearance of bias in the case at hand required vacating the award even though the arbitrator was in fact "entirely fair and impartial." *Id.* at 151-52 & n.*.

Justice Fortas, joined by Justices Harlan and Stewart, dissented. The dissenters repeatedly expressed their disagreement with "the Court" and "the Court's ruling," without ever suggesting that it was only a plurality opinion or adverting to Justice White's concurring opinion. In the dissenters' view, a party seeking to vacate an arbitration award for

evident partiality must show *actual* bias, not just an appearance of bias. *Id.* at 152-55 (Fortas, J., dissenting). Because Commonwealth Coatings did not claim "actual partiality, unfairness, bias, or fraud," the dissenters would have confirmed the award.

3. One might think that in a system with clear rules of vertical *stare decisis*, the majority opinion of this Court in *Commonwealth Coatings* would suffice to conclusively settle the standard for assessing evident partiality under the FAA, especially in the context of failures to disclose. The Second Circuit, however, thinks otherwise, and its mistaken view has spread to other circuits.

Sixteen years after *Commonwealth Coatings*, the Second Circuit announced in *Morelite* that it still considered the issue of "what constitutes 'evident partiality' by an arbitrator" to be an unresolved and "troublesome question." 748 F.2d at 82. The court acknowledged that this Court "attempted to resolve the issue" in *Commonwealth Coatings*, but it deemed that attempt unsuccessful—on the theory that Justice Black's opinion for the Court was really written only "for a plurality of four [J]ustices." *Id.* The Second Circuit admitted (with considerable understatement) that it "might be thought that Justice Black's opinion represents the views of six members of the Court, for Justice White wrote that he was 'glad to *join* my Brother Black's opinion.'" *Id.* at 83 n.3 (quoting *Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring)). But in the Second Circuit's view, Justice Black's and Justice White's opinions were "impossible to reconcile"—and so it concluded that Justice White (despite explicitly joining the majority opinion, which

was unambiguously reported as the opinion of the Court) had in fact only "concurred in the result," meaning that "much of Justice Black's opinion must be read as dicta." *Id.* at 82-83 & n.3.

Having converted the binding opinion of the Court in *Commonwealth Coatings* into a mere plurality view, the Second Circuit took another unusual step: Instead of at least deeming itself bound by Justice White's concurrence, it declared itself free to revisit the question "on a relatively clean slate"—and proceeded to explicitly reject the "appearance of bias" standard that *Commonwealth Coatings* adopted. *Id.* at 83-84. In the Second Circuit's view, the FAA demands a showing that "a reasonable person would *have* to conclude that an arbitrator was partial to one party." *Id.* (emphasis added). In other words, it effectively demands the showing of actual bias that the *Commonwealth Coatings* dissenters would have required.

Morelite has proven remarkably influential, presumably because New York is a hub of arbitration activity. Five other federal courts of appeals—the First, Third, Fourth, Fifth, and Sixth Circuits—have since followed its lead, disregarding the "appearance of bias" standard set by this Court in *Commonwealth Coatings* in favor of the higher standard set by the Second Circuit in *Morelite*. *See infra* pp.21-23. The Ninth and Eleventh Circuits, by contrast, have resisted the Second Circuit's innovation and continue to abide by *Commonwealth Coatings*. *See infra* pp.23-25.

B. Factual Background

1. OEPC is a U.S.-based hydrocarbon exploration company. In 1999, OEPC entered into an agreement with an Ecuadorian state-owned oil company to carry out hydrocarbon development in the Ecuadorian Amazon region. App.11. OEPC subsequently signed agreements with a Bermudan company whose interest in the project was later acquired by Andes, a wholly owned subsidiary of Chinese state-run oil companies. C.A.App.23, 30-31. Under the parties' agreements, OEPC and Andes would conduct joint operations in the area, with OEPC retaining a 60% economic interest and Andes taking a 40% economic interest. App.11. The parties additionally agreed that if Ecuador terminated the agreement and OEPC took legal action against Ecuador, OEPC and Andes would split costs and any monetary award 60%-40%. App.11.

Ecuador subsequently terminated the agreement, expropriating all interests in the area, and OEPC and its parent company Occidental Petroleum Corporation commenced arbitration against Ecuador before the International Centre for the Settlement of Investment Disputes ("ICSID") seeking to recover the full value of the expropriated property. App.11-12. The ICSID tribunal initially sided with OEPC in full, *see* Dist.Ct.Dkt.3-1 at ¶28, but on appeal, the annulment committee scaled back the award. It found that OEPC could not recover damages for Andes' 40% interest, and thus reduced OEPC's award "from 100% to 60%," while making clear that Andes remained free to seek relief from Ecuador for its 40% interest. *Id.* ¶¶31-32. Andes, however, declined to do so. Instead, Andes demanded that OEPC hand over 40% of the Ecuador

recovery, even though that recovery had already been reduced by 40% precisely to exclude Andes' 40% interest. *Id.* ¶34. That dispute led to the arbitration at issue here.

2. In crafting their dispute resolution procedures, the parties valued impartiality and independence above all else—indeed, their agreement to arbitrate stemmed in significant part from OEPC's concerns that the Ecuadorian courts would not provide an adequately impartial forum. The parties' arbitration agreement reflected this focus on impartiality, setting forth numerous rules to ensure transparency and arbitral independence.

Under the agreement, each party would appoint one arbitrator, and those two arbitrators would then appoint a third. App.12. Unsurprisingly, the parties' agreement explicitly mandated that the arbitrators would at all times be "wholly independent and impartial." App.2. The parties reinforced that requirement by incorporating the American Arbitration Association ("AAA") rules, which require arbitrators, parties, and parties' counsel to disclose "any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence," App.2-3, including "any past or present relationship with the parties or their representatives," AAA, *Commercial Arbitration Rules and Mediation Procedures*, Rule R-17(a).

The applicable arbitrator disclosure form expansively described the relationships that must be disclosed, including "any past or present relationship with the parties, their counsel, or potential witnesses, direct or indirect, whether financial, professional,

social or of any other kind." Dist.Ct.Dkt.30-4 at 1. That disclosure obligation remained ongoing throughout the arbitration. App.3. In fact, the parties' agreement required the arbitrators to execute an oath acknowledging that the disclosure obligation was "a continuing obligation throughout [their] service," that "any additional direct or indirect contact [that] arise[s] during the course of the arbitration … must … be disclosed," and that "[a]ny doubts should be resolved in favor of disclosure." Dist.Ct.Dkt.30-4 at 1.

3. After conducting thorough diligence on several candidates, OEPC appointed Robert Smit to the arbitration panel. App.12; *see* C.A.App.183 ¶19. During the interview process, Smit disclosed that he had a "professional connection" to one of Andes' counsel, Laurence Shore, whose firm had appointed him as an arbitrator in "an unrelated *prior* arbitration." App.3 (emphasis added). OEPC took a particular interest in that disclosure and followed up by asking Smit whether he had any other relationship with Shore. Smit responded that the prior matter was "the only [arbitration] I've ever done involving [Shore]." C.A.App.519. Once appointed, Smit executed the arbitrator's oath, and, recognizing his obligations, he continually—albeit it turned out incompletely—updated his disclosures, even as to relatively trivial matters. *See, e.g.*, Dist.Ct.Dkt.31-2 at 40 (disclosing service as arbitrator in an unrelated arbitration in which one attorney representing Andes appeared as counsel).

In March 2021, the panel ruled for Andes. App.13. The panel did not deny that the earlier tribunal had

compensated OEPC for only its 60% interest, or that Andes remained free to pursue its own 40% interest from Ecuador. Nevertheless, it concluded that Andes was entitled to 40% of OEPC's reduced recovery—$392 million, plus tens of millions more in prejudgment interest.

4. Shortly after the panel issued that counterintuitive award, OEPC discovered some startling information: Throughout the arbitration proceedings, Smit and Andes had been concealing an ongoing relationship between Smit and Shore. Beginning in April 2018—mere months after the panel was constituted—and all the way through mid-2020, Smit and Shore served together as co-arbitrators on a separate, undisclosed matter. App.12; Dist.Ct.Dkt.38 at ¶36. That arbitration was conducted confidentially, so beyond the fact that it too involved a contract dispute in the energy sector, its details remain largely unknown to OEPC. Dist.Ct.Dkt.38 at ¶¶22-23 & n.1. But this much is clear: For nearly the entirety of the merits proceedings here, Smit and Shore secretly maintained a close, direct relationship as coequals in a confidential arbitration that gave Shore a behind-the-scenes look at Smit's decision-making process, inside information on his views about contract doctrines, and ample opportunity for ex parte communication, collegial discussions, and collaborative decision-making. And while Smit, Shore, and Andes were duty-bound to disclose that entanglement to OEPC, none did.

C. Procedural Background

Andes filed a petition in the U.S. District Court for the Southern District of New York to confirm the

award; OEPC opposed and moved to vacate on several grounds, including evident partiality. App.10. The case was initially assigned to Judge Woods; three weeks later, it was reassigned to Judge Broderick; three months after that, to Judge Cote; and two months after that, to Judge Hellerstein. The shuffle ended there: A mere two weeks after being assigned the matter, and without hearing argument, Judge Hellerstein confirmed the award and entered judgment for Andes for over $550 million, including costs and prejudgment interest. App.4.

OEPC appealed, and the Second Circuit affirmed in relevant part. The court recognized that the parties' agreement and the applicable AAA rules "required all arbitrators to be 'wholly independent and impartial,'" that "[t]he AAA Rules and the arbitrator oath required by the parties' agreements mandated disclosure of 'any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence,'" and that "[t]hese disclosure obligations continued throughout the arbitration." App.2-3. But despite Smit's blatant violation of those obligations—which would more than suffice to show an impermissible appearance of bias under *Commonwealth Coatings*—the Second Circuit concluded that OEPC had not shown evident partiality under the higher *Morelite* standard, because it had not demonstrated that "a reasonable person, considering all the circumstances, would *have* to

conclude that [Smit] was partial." App.4 (emphasis in original).[2]

REASONS FOR GRANTING THE PETITION

This case requires this Court's review. There is an open and acknowledged circuit split on the question presented, the majority of the circuits addressing it have inexplicably downgraded an opinion of this Court to a plurality opinion, the Second Circuit's approach is plainly wrong, and the issue is exceptionally important. This Court should grant certiorari.

As multiple courts and commentators have recognized, the circuits are sharply and intractably divided over the standard for evident partiality under the FAA. That circuit split should be foreclosed by this Court's decision in *Commonwealth Coatings*, which held that the standard is an "appearance of bias," requiring recusal when an arbitrator "might reasonably be thought biased." 393 U.S. at 150. But the Second Circuit has arrogated to itself the power to convert *Commonwealth Coatings* into a "plurality [opinion] of four [J]ustices," because two Justices who expressly joined the Court's opinion also joined a concurring opinion that it found difficult to reconcile with the majority's—a.k.a. the Court's—opinion. In the Second Circuit's view, evident partiality exists only when "a reasonable person would *have* to conclude that [the] arbitrator was partial." *Morelite*, 748 F.2d at 82-84 (emphasis added); *see* App.4-5. Remarkably, five other circuits have adopted the

[2] The Second Circuit did vacate the district court's prejudgment interest award, directing it to "adequately explain its calculation" on remand. App.7.

Second Circuit's standard, while only two faithfully read the U.S. Reports and abide by the Court's opinion in *Commonwealth Coatings*. Only this Court can resolve that open and entrenched conflict over whether one of its own opinions remains binding. And only this Court can remind lower courts that the obligation to follow this Court's precedents until this Court reconsiders them, *see Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989), precludes lower courts from reading opinions for the Court out of existence by deeming them mere plurality opinions.

The Second Circuit's approach is blatantly wrong. Lower courts have no license to disregard the U.S. Reports, the express statement of Justice White that he joined the "majority opinion," or the dissenters' complaints about "the Court" and "the Court's ruling," based on their own perception that statements in a concurring opinion—not a concurrence in the judgment—contradict the majority opinion that Justices White and Marshall were "glad to join," *Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring). In any event, there is no contradiction between the Court's opinion and Justice White's concurrence (which presumably explains why he and Justice Marshall joined both). And even if there were, that certainly would not justify the Second Circuit's decision to adopt a rule that conflicts with *both*.

The question presented is especially important. The strong federal policy in favor of arbitration depends on the ability of parties to get the tribunal they bargained for, especially in international arbitration proceedings, where impartiality and

independence are essential. That interest cannot tolerate a circuit split on an issue as basic as the standard for determining whether a violation of unambiguous disclosure obligations evinces impermissible partiality. Nor can it tolerate an evident-partiality standard so weak as to leave parties with no remedy at all when an arbitrator violates explicitly bargained-for disclosure obligations, contrary to the bedrock rule that courts must "enforce arbitration agreements according to their terms." *Epic*, 138 S.Ct. at 1621. The Second Circuit's remarkable disregard of this Court's binding precedent in adopting its novel standard, moreover, is itself a matter of grave importance that warrants this Court's intervention. This Court should grant the petition and reverse.

I. There Is An Acknowledged And Entrenched Circuit Split On The Question Presented.

Despite the clear command of this Court's decision in *Commonwealth Coatings*, there is an acknowledged and entrenched circuit split over the standard for determining whether a failure to disclose constitutes evident partiality under the FAA. *See, e.g.*, *UBS Fin. Servs., Inc. v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 997 F.3d 15, 19 (1st Cir. 2021) (explaining that "[t]he circuits have not reached a consensus" on the issue and describing the "circuit split"); *Ploetz v. Morgan Stanley Smith Barney LLC*, 894 F.3d 894, 898 (8th Cir. 2018) (reiterating the "absence of a consensus" on the issue); *Montez v. Prudential Sec., Inc.*, 260 F.3d 980, 983 (8th Cir. 2001) (describing the different "approaches adopted by the different circuits"); *see also* Edward C. Dawson, *Speak*

Now or Hold Your Peace: Prearbitration Express Waivers of Evident-Partiality Challenges, 63 Am. U. L. Rev. 307, 321 (2013) ("The federal circuits have an acknowledged split over … whether evident partiality requires a mere appearance of bias or a more robust reasonableness standard."); Merrick T. Rossein & Jennifer Hope, *Disclosure and Disqualification Standards for Neutral Arbitrators*, 81 St. John's L. Rev. 203, 212 (2007) ("[T]he circuits are split on what constitutes 'evident partiality[.]'"); Peter B. "Bo" Rutledge & Sawyer M. Bradford*, Supreme Court's Fractured Ruling on Enforcing Arbitral Awards Impacts Circuit Courts*, Law.com (Oct. 25, 2022), https://tinyurl.com/s885ne3m (recognizing the "deep circuit split").

1. The decision below reflects the majority (and incorrect) side of that split, which rejects *Commonwealth Coatings*' "appearance of bias" standard—under which an award should be vacated if the arbitrator "might reasonably be thought biased," 393 U.S. at 150—in favor of a more stringent test that requires proof that "a reasonable person, considering all the circumstances, would *have* to conclude that an arbitrator was partial to one side." App.4. In adopting that far more stringent standard in *Morelite*, the Second Circuit recognized that it requires "something more" than the "appearance of bias" standard adopted in *Commonwealth Coatings*, which the Second Circuit believed set the bar "too low." 748 F.2d at 83-84. The Second Circuit justified that explicit departure from this Court's binding precedent by positing that Justice White failed to realize that his concurring opinion was "impossible to reconcile" with Justice Black's opinion for the Court, hence rendering the latter only the

nonbinding views of "a plurality of four [J]ustices." *Id.* at 82-83 & n.3.

Five other circuits—the First, Third, Fourth, Fifth, and Sixth—have followed the Second Circuit's mistaken lead.

a. The First Circuit first adopted the *Morelite* approach in *JCI Communications, Inc. v. International Brotherhood of Electrical Workers, Local 103*, 324 F.3d 42 (1st Cir. 2003). Citing *Morelite* and cases from the Fourth and Sixth Circuits, the court stated without further analysis that evident partiality requires "more than just the appearance of possible bias" and instead demands that "a reasonable person would have to conclude that an arbitrator was partial." *Id.* at 51. More recently, the First Circuit has acknowledged the "circuit split" and reaffirmed that it has "sided with the circuits" that have followed *Morelite* and "implicitly rejected" the contrary approach of other circuits. *UBS Fin. Servs.*, 997 F.3d at 19.

b. The Third Circuit has been equally explicit, agreeing with the courts that have "followed the Second Circuit's lead" and "reaffirm[ing]" that evident partiality requires that "a reasonable person would have to conclude that [the arbitrator] was partial." *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 252-53 (3d Cir. 2013). The Third Circuit has also expressly endorsed the Second Circuit's mistaken reasoning, agreeing that Justice Black's opinion for the Court was "nonbinding" as a "plurality opinion" in which "only three other [J]ustices joined," dismissing Justice White's explicit statement that he was "glad to join" the majority, and concluding that Justice White's

concurrence was actually "the holding of the Court" as "the narrowest grounds for judgment." *Freeman*, 709 F.3d at 251-52 & n.10.

c. The Fourth Circuit likewise holds that, "[t]o establish partiality," one must show that "a reasonable person would have to conclude that an arbitrator was partial." *Three S Delaware, Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 530 (4th Cir. 2007) (quoting *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 500 (4th Cir. 1999)); *see also, e.g., Peoples Sec. Life Ins. v. Monumental Life Ins.*, 991 F.2d 141, 146 (4th Cir. 1993) (declaring it "well established that a mere appearance of bias is insufficient to demonstrate evident partiality," and block-quoting Justice White's concurrence in *Commonwealth Coatings* without even citing the majority opinion).

d. The Fifth Circuit, for its part, provides an especially remarkable illustration of the split and the need for this Court's guidance. In a panel opinion, the Fifth Circuit initially recognized *Commonwealth Coatings* as binding and rejected the Second Circuit's attempt to deviate from it—only to have a majority of the full court vacate that opinion, take the case en banc, and reach the opposite result. *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 476 F.3d 278 (5th Cir. 2007) (en banc). Over a five-judge dissent, the en banc Fifth Circuit concluded that Justice White merely "purported to be 'glad to join' Justice Black's opinion," and that in reality his joinder was "magnanimous but significantly qualified," leaving the opinion of the Court just a "plurality opinion" after all. *Id.* at 281-82. The en banc court accordingly endorsed the Second Circuit's approach and explicitly

rejected the Ninth Circuit's contrary view. *Id.* at 282-83; *see, e.g.*, *Cooper v. WestEnd Cap. Mgmt., L.L.C.*, 832 F.3d 534, 545 (5th Cir. 2016) (evident partiality requires showing that "a reasonable person would have to conclude that the arbitrator was partial").

e. Finally, the Sixth Circuit has also followed *Morelite*, relying on Justice White's concurrence rather than the majority opinion in *Commonwealth Coatings* to hold that evident partiality requires showing that "a reasonable person would have to conclude that an arbitrator was partial." *Uhl v. Komatsu Forklift Co.*, 512 F.3d 294, 306 (6th Cir. 2008); *see Nationwide Mut. Ins. v. Home Ins.*, 429 F.3d 640, 645 (6th Cir. 2005) (explaining that the Sixth Circuit has "accepted *Morelite*'s rejection, as dicta, of the appearance of bias standard espoused in the plurality opinion [of] *Commonwealth Coatings*"); *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989) ("agree[ing] with the *Morelite* court's analysis"). In sum, five other circuits have rejected the standard for evident partiality established in *Commonwealth Coatings* in favor of *Morelite*'s more demanding "would have to conclude" standard.[3]

2. Not every court has followed the Second Circuit's mistaken lead. The Ninth and Eleventh Circuits and a number of state high courts continue to correctly apply the standard adopted by *Commonwealth Coatings*, creating an open and acknowledged split.

[3] The Nebraska Supreme Court likewise has "adopt[ed] the standard enunciated in *Morelite*." *Dowd v. First Omaha Sec. Corp.*, 495 N.W.2d 36, 43 (Neb. 1993).

a. The Ninth Circuit examined in detail application of the evident partiality standard and *Commonwealth Coatings* to disclosure failures in *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994). It squarely rejected the "misunderstanding of Justice White's concurrence in *Commonwealth Coatings*" as the controlling opinion, explaining that Justice Black's opinion for the Court "is not a plurality opinion" and has binding force. *Id.* at 1045. "Given Justice White's express adherence to the majority opinion in *Commonwealth Coatings*," the court explained, "it is clear that the majority opinion, including its 'appearance of bias' language, received at least five votes." *Id.* at 1047. And the "most succinct expression" of that "appearance of bias" standard in nondisclosure cases, the court held, is that "'evident partiality' is present when undisclosed facts show 'a reasonable impression of partiality.'" *Id.* at 1046. The Ninth Circuit therefore (correctly) recognized that it was bound to abide by this Court's precedent.

The Ninth Circuit has continued to abide by *Commonwealth Coatings* ever since. *See, e.g.*, *EHM Prods., Inc. v. Starline Tours of Hollywood, Inc.*, 1 F.4th 1164, 1173 (9th Cir. 2021) (requiring disclosure of "any dealings that might create an impression of possible bias"); *In re Sussex*, 781 F.3d 1065, 1073-74 (9th Cir. 2015) ("*Commonwealth Coatings* created a 'reasonable impression of partiality' standard[.]"); *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1105-06 (9th Cir. 2007) ("reasonable impression of partiality"); *see also, e.g.*, *Positive Software*, 476 F.3d at 283 (describing Ninth Circuit's approach).

b. The Eleventh Circuit likewise has followed *Commonwealth Coatings* and its "simple requirement that arbitrators disclose to the parties any dealing that might create an impression of possible bias." *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1338 (11th Cir. 2002) (quoting *Commonwealth Coatings*, 393 U.S. at 149). Like the Ninth Circuit, the Eleventh Circuit has described the standard as whether the undisclosed facts create a "reasonable impression of partiality," which it has equated to "information which would lead a reasonable person to believe that a potential conflict exists." *Univ. Commons*, 304 F.3d at 1339. And like the Ninth Circuit, the Eleventh Circuit has not embraced *Morelite*'s higher showing that a reasonable person would *have* to conclude that the arbitrator was partial. *See, e.g.*, *UBS Fin. Servs.*, 997 F.3d at 19 (contrasting *Morelite* with the Ninth and Eleventh Circuits' approach).

c. Several state supreme courts also have correctly adhered to *Commonwealth Coatings* and rejected *Morelite* while acknowledging the conflict. *See, e.g.*, *Narayan v. Ass'n of Apartment Owners of Kapalua Bay Condo.*, 398 P.3d 664, 676 & n.14 (Haw. 2017) (noting the "split of opinion"); *Burlington N. R.R. Co. v. TUCO Inc.*, 960 S.W.2d 629, 633-37 (Tex. 1997) (describing the difference between the Second and Ninth Circuit's approaches, canvassing decisions on both sides, and following the latter).

In short, there is a clear and entrenched circuit split on the question presented that has repeatedly been acknowledged by courts and commentators. Particularly given that it stems from disagreement

over whether one of this Court's decisions is binding, that conflict cries out for this Court's review.

II. The Second Circuit's Approach Is Egregiously Wrong.

The Second Circuit's deliberate departure from *Commonwealth Coatings* is extraordinarily mistaken. Its conscious disregard of a majority opinion of this Court, based on a perceived conflict between that opinion and a two-Justice concurring opinion that expressly "joined" the Court's opinion, violates the basic principle of vertical *stare decisis* and sets an exceptionally dangerous precedent. And the rule it adopted to displace *Commonwealth Coatings* renders even bargained-for disclosure obligations virtually meaningless.

1. The Constitution vests the federal judicial power in "one supreme Court"—this Court—and "such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, §1. The hierarchy is unmistakable: On matters of federal law, this Court is supreme, and the lower courts are constitutionally bound to follow its decisions. "It is this Court's responsibility to say what a federal statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *James v. City of Boise*, 577 U.S. 306, 307 (2016) (per curiam) (brackets omitted) (quoting *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 21 (2012)). When this Court renders a decision, its ruling "is the controlling interpretation of federal law" and must be faithfully applied by other courts no matter what they may think of it. *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97 (1993). In short, "vertical

stare decisis is absolute," and the lower courts "have a constitutional obligation to follow a precedent of this Court unless and until it is overruled by this Court." *Ramos v. Louisiana*, 140 S.Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring); *see also Shearson/Am. Express*, 490 U.S. at 484.

The Second Circuit betrayed that fundamental principle. Justice Black's opinion for the Court in *Commonwealth Coatings* is just that—an opinion for the Court, explicitly joined by six Justices—and it carries all the binding force that designation implies. That is why this Court's official reports state that "Mr. Justice Black delivered the opinion of the Court," and label that opinion as such on every page. 393 U.S. at 145, available at https://tinyurl.com/3x5b469k (format-preserving version). It is why Justice White himself recognized it as "the majority opinion," *id.* at 151 n.* (White, J., concurring), and why the dissenters dissented from "the Court's ruling." The Second Circuit was no more free to ignore the official reports of this Court than to ignore the Statutes at Large. There is simply no justification for its decision to demote this Court's opinion to a "plurality of four [J]ustices," disregard its binding holdings as mere "dicta," and reconsider the issue "on a relatively clean slate." *Morelite*, 748 F.2d at 82-83.

The Second Circuit attempted to justify depriving Justice Black of his majority by calling his opinion for the Court "impossible to reconcile" with Justice White's concurrence. *Id.* at 83 n.3. But that was a decision for Justice White, not the Second Circuit, to make—and Justice White plainly thought otherwise, as he declared himself "glad to join" Justice Black's

opinion and wrote an opinion "concurring" with the majority rather than concurring only in the judgment. *Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring). That explicit joinder leaves no room for the claim that Justice Black's opinion was anything other than a binding decision by a six-Justice majority.

The Second Circuit appears to have relied on a wholly erroneous version of the *Marks* rule, under which "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977); *see Positive Software*, 476 F.3d at 282 (relying on *Marks* to disregard Justice Black's opinion for the Court); *Freeman*, 709 F.3d at 251-52 (same). But *Marks* has no application where, as here, a majority of the Justices *do* join a single opinion for the Court. *Marks* thus comes nowhere near empowering a lower court to deprive an opinion of the Court of its binding force by identifying perceived inconsistencies in a concurring opinion of a Justice who joined the majority.

The dangerous consequences of the Second Circuit's approach are all too easy to see. Allowing lower courts to decide for themselves whether an opinion of this Court is sufficiently consistent with each concurrence to remain binding would largely destroy the controlling force of any majority opinion accompanied by a concurrence, effectively leaving to lower courts "the prerogative of overruling [this

Court's] decisions." *Shearson/Am. Express*, 490 U.S. at 484. Moreover, treating concurrences as controlling contravenes the basic principle that "[t]he reasoning of this Court with respect to the disposition of [a] case is set forth in [the majority] opinion and none other." *Gill v. Whitford*, 138 S.Ct. 1916, 1931 (2018). Both the stakes and the potential for lower court mischief are high. More than a third of this Court's opinions over the two most recent Terms were accompanied by concurring opinions, and in more than half of those cases, the concurring opinions were written or joined by Justices whose votes were necessary to make a majority.

2. In all events, there is no conflict between the *Commonwealth Coatings* majority opinion and Justice White's concurrence (which presumably explains why Justice White and Justice Marshall had no difficulty joining both). The majority held that arbitrators "not only must be unbiased but also must avoid even the appearance of bias," and so an award can be vacated if an arbitrator "might reasonably be thought biased against one litigant and favorable to another." *Commonwealth Coatings*, 393 U.S. at 150. To that end, the majority emphasized the obligation to disclose "any dealings that might create an impression of possible bias." *Id.* at 149. Justice White's concurrence took no issue with any of that; he simply observed that vacatur may not be warranted "if both parties *are* informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial." *Id.* at 150 (White, J., concurring) (emphasis added). That is entirely consonant with the majority's approach, as a *disclosed* relationship does not carry the same inherent bias concerns as a concealed one,

and a "trivial" relationship is so minor that it cannot give rise to any appearance of bias.

The Second Circuit posited that the majority "appeared to impose upon arbitrators the same lofty ethical standards required of Article III judges," while Justice White "made clear the Court was not holding that arbitrators' and judges' ethical [duties] are coextensive." *Morelite*, 748 F.2d at 82. But that reflects a fundamental misunderstanding of the majority opinion. To be sure, the majority drew on analogies to the canons of judicial ethics and the "elementary requirements of impartiality taken for granted in every judicial proceeding" to conclude that arbitrators "must avoid even the appearance of bias." 393 U.S. at 145, 148-50. But as Justice White pointed out, none of that means that arbitrators "are to be held to the standards of judicial decorum of Article III judges," as the FAA generally "consign[s] to the parties, who are the architects of their own arbitration process," decisions about what kinds of arbitrator-party relationships they are willing to tolerate. *Id.* at 150-51 (White, J., concurring). That is particularly true in commercial arbitration, where parties often agree *ex ante* to trade the kind of complete impartiality expected of judges for practical expertise and familiarity with industry standards. No one would want a judge in a dispute about diamonds to own a diamond store, but parties arbitrating under a contract for the sale of diamonds might well choose a panel of diamond merchants who must disclose any relationships with the parties. There is no conflict in embracing the appearance-of-impartiality standard while acknowledging that parties can *agree* to tolerate

relationships that may not pass muster in the judicial context.

3. Even if *Marks* analysis were applicable, it still would not justify the Second Circuit's decision to reconsider the question anew and announce an evident partiality standard that contravenes *both* the majority opinion *and* Justice White's concurrence. The Second Circuit openly acknowledged that it was adopting a standard different from the one chosen by the *Commonwealth Coatings* majority, declaring that it considered the "appearance of bias" standard to be "too low." *Morelite*, 748 F.2d at 83-84. But while it justified that departure by reference to Justice White's concurrence, *id.* at 82-83, it did not try to devise some other standard from that concurrence. The Second Circuit instead concluded that the inconsistency it perceived between the concurrence Justice White wrote and the majority opinion he joined freed it to operate "on a relatively clean slate," *id.* at 82-83, and proceed as if there were *no* controlling opinion of this Court. *But see Marks*, 430 U.S. at 193.

The result is a rule that conflicts not only with the *Commonwealth Coatings* majority opinion, but even with Justice White's concurrence. Nothing in that concurrence suggests that the standard for evident partiality should be limited to the extreme circumstance where a reasonable person "would *have* to conclude that [the] arbitrator was partial." App.4. On the contrary, Justice White recognized that the failure to disclose a relationship that is more than "trivial" can warrant a finding of evident partiality even if it is undisputed that the arbitrator "was entirely fair and impartial." 393 U.S. at 150-51 & n.*

(White, J., concurring). Indeed, he could not have concurred even in the judgment if he did not share that view, as he accepted the district court's finding that the arbitrator at issue *was* "entirely fair and impartial." *Id.* at 151 n.*. And while Justice White noted that some undisclosed relationships may be "too insubstantial to warrant vacating an award," *id.* at 152, his opinion provides no basis for embracing the *dissenting* Justices' view that *every* undisclosed relationship falls into that category, no matter how egregious the disclosure violation, unless it is beyond reasonable dispute that it rendered the arbitrator partial.

4. The Second Circuit's rule is also flatly inconsistent with the FAA's overriding mandate to "enforce arbitration agreements according to their terms." *Epic*, 138 S.Ct. at 1621. Under *Commonwealth Coatings*, bargained-for disclosure obligations matter: When an arbitrator fails to make a material disclosure required by the parties' contract, he "might reasonably be thought biased" and the award can be challenged on that basis. *Commonwealth Coatings*, 393 U.S. at 150. Under *Morelite*, however, bargained-for disclosure obligations are practically meaningless (as this case illustrates), since a court can always decide later that a reasonable person would not "have to conclude" the breach of those bargained-for obligations reflects partiality. That cannot be squared with the foundational principle that arbitration is "a matter of contract between the parties," whose contractual arrangements must be respected. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

In sum, the Second Circuit's conscious rejection of this Court's binding precedent cannot be reconciled with the fundamental and absolute principle of vertical *stare decisis*. Its decision to disregard a controlling opinion by this Court based on a perceived conflict between that opinion and an accompanying concurrence is exceedingly dangerous. Worse still, it is not even right on its own terms, as the perceived conflict is entirely of the Second Circuit's making. Even if there were any conflict, moreover, that would hardly empower the Second Circuit to adopt a novel rule that conflicts with both decisions and most closely mirrors the dissent. This Court should not allow that egregious misstep to continue to deprive parties of the impartial arbitrators for which they bargained.

III. The Question Presented Is Exceptionally Important.

The FAA's "first" and "foundational" principle is that "arbitration is strictly a matter of consent." *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407, 1415 (2019). The evident-partiality provision enforces that principle by reflecting Congress' recognition that parties bargain "not merely for any arbitration but for an impartial one." *Commonwealth Coatings*, 393 U.S. at 147. To be sure, "parties are free to choose for themselves to what lengths they will go in quest of impartiality," as there may be contexts in which tolerating some degree of entanglement is the best way to get the "most capable potential arbitrators … with deep industry connections." *Certain Underwriting Members of Lloyds of London v. Fla., Dep't of Fin. Servs.*, 892 F.3d 501, 507-08 (2d Cir. 2018). But when, as here, parties go out of their way

to impose the most stringent of disclosure requirements—and then express particular concerns about the precise relationship at issue, *see supra* p.14—the "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi Motors*, 473 U.S. at 631, depends on providing some recourse when an arbitrator egregiously violates those obligations. After all, parties will not agree to arbitrate in the first place if they cannot even be confident that they will get the actuality and appearance of impartiality for which they bargained, as well as the "rigorous[]" enforcement of their agreement that the FAA requires. *Epic*, 138 S. Ct. at 1620.

Recourse for disclosure violations is particularly critical in international commerce, where both the federal policy favoring arbitration and the need for impartiality "appl[y] with special force." *Mitsubishi Motors*, 473 U.S. at 631. Arbitration is regularly invoked to "avoid the uncertainty, expense, and potential hostility of a foreign nation's local courts," *Baker Hughes Servs. Int'l, LLC v. Joshi Techs. Int'l, Inc.*, 73 F.4th 1139, 1142 (10th Cir. 2023). Those strong federal interests are not served by an evident-partiality standard that excuses the breach of express contractual disclosure obligations on the ground that it is still possible to conclude that the arbitrator might be unbiased. Nor are they served by uncertainty about the applicable standard. Yet as things currently stand, the law in New York and Miami—the top two international arbitration venues in the country—differs. *See* Alexander Lugo, *Miami's Rise as 'Global Metropolis' Challenges New York as International Arbitration Hub*, Daily Bus. Rev. (Mar. 31, 2023), https://tinyurl.com/rbv6ks7y; *cf. Moses H. Cone Mem'l*

Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (recognizing Congress' efforts to create a uniform "body of federal substantive law of arbitrability").

This case vividly illustrates the stark practical difference between the divergent standards the circuits have embraced. The arbitrator here flagrantly violated his disclosure obligations under the parties' agreement, failing to inform OEPC of an ongoing collaboration with Andes' lead counsel as co-arbitrators in a simultaneous arbitration that involved many of the same legal doctrines and gave Andes unique insight into his views about specific contract-law issues and his amenability to particular strategies. He did so, moreover, even after OEPC expressed interest in his relationship with Andes' counsel, and even as he disclosed much less material issues, thereby creating the false impression that he was abiding by his ongoing disclosure obligations.

That readily suffices to establish that an arbitrator "might reasonably be thought biased." *Commonwealth Coatings*, 393 U.S. at 150; *see, e.g.*, *Univ. Commons*, 304 F.3d at 1341 ("[S]erving as the decision-maker in one action in which a colleague in another action represents a party clearly poses the possibility of bias[.]"). Indeed, the nondisclosure here was arguably more egregious than the nondisclosure in *Commonwealth Coatings* itself. It also, by any measure, violated the disclosure obligations that bound this arbitrator under the parties' arbitration agreement. Yet under the Second Circuit's demanding standard, even that was not enough to show that a reasonable person "would *have* to conclude" that the arbitrator was partial. App.4-5. That outcome acutely

demonstrates the real-world impact of the Second Circuit's standard and the compelling reasons to reject it.[4]

Finally, the Second Circuit's radical departure from this Court's binding precedent is itself of significant importance. If a circuit court can write a decision of this Court out of the U.S. Reports based solely on a perceived conflict between that opinion and a concurrence that explicitly joined it, the absolute rule of vertical *stare decisis* is in serious peril, and future concurrences will require careful thought. Those consequences cannot be squared with the strict hierarchy of our judicial system, or with this Court's centuries-old practice of delivering its binding decisions in a single opinion of the Court. The Second Circuit's disregard of those basic principles confirms the need for review.

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[4] The Second Circuit also relied on its own precedent holding that an arbitrator's concurrent service with a co-arbitrator on another arbitration panel does not show partiality. App.5. But there is a world of difference between simultaneously serving with a *co-arbitrator* on another arbitration panel, and (as here) simultaneously serving with *a party's lead counsel* on another panel. *See Univ. Commons*, 304 F.3d at 1341. It is one thing to learn a panel of judges sat together the previous day; it would be quite another to learn that opposing counsel sat with the judges the previous day.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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