No. 23-660

In the Supreme Court of the United States

GRUPO UNIDOS POR EL CANAL, S.A., SACYR, S.A., WEBUILD, S.P.A., JAN DE NUL, N.V.,

Petitioners,

v.

AUTORIDAD DEL CANAL DE PANAMÁ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under the Federal Arbitration Act, a court may vacate an arbitral award "where there was evident partiality * * * in the arbitrators." 9 U.S.C. § 10(a). In the district court, Petitioners moved to vacate the awards issued after a years-long arbitration between Petitioners and Respondent, arguing that the arbitrators' nondisclosure of certain facts about their service as arbitrators in various unrelated matters evinced "evident partiality." The district court denied vacatur, and the Eleventh Circuit affirmed.

The question presented is whether the Eleventh Circuit correctly concluded that Petitioners failed to demonstrate "evident partiality" on the facts of this case.

RULE 29.6 STATEMENT

Respondent, the Autoridad del Canal de Panamá (the "ACP"), is an autonomous juridical entity created under Title XIV of the National Constitution of the Republic of Panamá, responsible for the administration of the Panama Canal. The ACP has no parent corporation and no publicly held company owns 10% or more of the ACP.

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INTRODUCTION

Consistent with Congress's strong "federal policy favoring arbitration," *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (citation omitted), a federal court may vacate an arbitration award "only in very unusual circumstances." *Oxford Health Plans LLC* v. *Sutter*, 569 U.S. 564, 568 (2013) (citation omitted). That black-letter rule is necessary to prevent arbitration from becoming "merely a prelude to a more cumbersome and time-consuming judicial review process." *Id.* at 568-569 (citation omitted). This case arises out of a concerted effort by Petitioners to avoid that rule—and thereby avoid the consequences of an unfavorable arbitral decision—through a meritless collateral attack on the neutrality of the three eminent and world-renowned arbitrators who unanimously ruled against them.

The arbitration giving rise to this case lasted over half a decade and cost the parties some $140 million. When the arbitrators ruled against Petitioners and in favor of Respondent Autoridad del Canal de Panamá (the "ACP"), Petitioners embarked on a transparent, after-the-fact effort to manufacture objections to the arbitrators. Petitioners challenged all three arbitrators' impartiality based on a smorgasbord of theories. But far from presenting "very unusual circumstances" raising serious concerns about partiality, *Oxford Health*, 569 U.S. at 568 (citation omitted), Petitioners based their claims on routine professional contacts that are ubiquitous in the specialized international arbitration community—indeed, so ubiquitous that the arbitrators had similar professional contacts with *Petitioners*' own counsel and law firms. Unsurprisingly,

the district court rejected the invitation to follow Petitioners' "conspiratorial web," Pet. App. 36a, and the Eleventh Circuit later unanimously rejected Petitioners' arguments, which found no support in any precedent. Petitioners now seek one last shot at relitigating their fact-specific and legally unsupported theories.

This Court should deny the petition. None of the Court's traditional criteria for certiorari are satisfied. The Eleventh Circuit correctly and unanimously held, on the detailed record developed here, that Petitioners did not come close to satisfying their burden to set aside an arbitral award on the basis of "evident partiality" under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10(a)(2). The petition alleges a split of authority regarding the legal standard for "evident partiality." But any difference in the formulation articulated by the various circuits is largely academic: All circuits apply a fact-intensive inquiry, under which a party need not show actual bias, but cannot prevail through speculative or unsupported suggestions of partiality. Tellingly, Petitioners muster no case reaching a different outcome on materially analogous facts.

More importantly, to the extent there is *any* practical difference in the standards across circuits, the Eleventh Circuit already applied what Petitioners themselves characterize as the correct and more vacatur-friendly test—so Petitioners must lose under the legal standard applied by any circuit. This case would, therefore, be a wholly unsuitable vehicle for the Court to address the "evident partiality" standard. At bottom, Petitioners disagree with how the Eleventh Circuit applied the law to the particular facts here. That

is a classic request for fact-bound error correction, and unworthy of further review.

STATEMENT

I. Legal Background

Enacted "in response to a perception that courts were unduly hostile to arbitration," *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1621 (2018), the FAA sets forth an "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). Particularly since the United States' accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention), and "the implementation of th[at] Convention" through amendments to the FAA, that pro-arbitration policy "applies with special force in the field of international commerce." *Ibid.*[1]

Consistent with its "pro-arbitration purposes," the FAA "compels judicial enforcement of a wide range of written arbitration agreements," *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 111, 115 (2001), and permits courts to vacate an arbitral decision "only in very unusual circumstances," *Oxford Health*, 569 U.S. at

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[1] "The New York Convention is a multilateral treaty that addresses international arbitration." *GE Energy Power Conversion France SAS* v. *Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1644 (2020). Courts have held that where (as here) an international arbitration was seated in the United States, the grounds for vacatur of a Convention-governed arbitral award are those set out in Chapter 1 of the FAA, specifically 9 U.S.C. § 10. See, *e.g.*, *Corporación AIC, SA* v. *Hidroeléctrica Santa Rita S.A.*, 66 F.4th 876, 880 (11th Cir. 2023) (en banc).

568 (citation omitted). It enumerates only four narrow grounds for vacatur, see 9 U.S.C. § 10(a), such as "where the award was procured by corruption, fraud, or undue means," *id.* § 10(a)(1), or (relevant to Petitioners' claims) "where there was evident partiality or corruption in the arbitrators," *id.* § 10(a)(2). The strictly "limited judicial review" available under these provisions is necessary to "maintain[] arbitration's essential virtue of resolving disputes straightaway," and to prevent arbitration from "becom[ing] merely a prelude to a more cumbersome and time-consuming judicial review process." *Oxford Health*, 569 U.S. at 568-569 (internal quotation marks omitted).

This Court applied the "evident partiality" standard in *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968). There, an arbitrator failed to disclose "repeated and significant" direct business dealings with a party, "involving fees of about $12,000" paid by the party to the arbitrator "over a period of four or five years," and even including "the rendering of services on the very projects involved" in the arbitration. *Id.* at 146. Although there was no proof the arbitrator was "actually guilty of fraud or bias," this Court found vacatur warranted. *Id.* at 147-148. Justice Black delivered the opinion of the Court, which explained that it was enough that the arbitrator "might reasonably be thought biased against one litigant and favorable to another" on the facts presented. *Id.* at 150. Justice White, in a concurrence joined by Justice Marshall, wrote separately to explain the limits of the Court's holding. He emphasized that arbitrators "are men of affairs, not apart from but of the marketplace," and often selected as effective and

knowledgeable commercial adjudicators for precisely that reason. *Id.* at 150 (White, J., concurring). Thus, "arbitrators are not automatically disqualified" even by an undisclosed "business relationship with the parties," if "the relationship is trivial." *Ibid.* Three Justices dissented. Thus, "the vote of either Justice White or Justice Marshall was necessary to the formation of a majority voting for reversal," and Justice White's concurrence has "therefore been given particular weight" by courts interpreting *Commonwealth Coatings*. *Schmitz* v. *Zilveti*, 20 F.3d 1043, 1045 (9th Cir. 1994).

Hewing to *Commonwealth Coatings*, courts agree that parties asserting evident partiality need not prove *actual* bias. Yet, equally consistent with both *Commonwealth Coatings* and the FAA's text—which allows vacatur only where partiality is "evident"[2]—courts refuse to vacate on the basis of remote or speculative theories of potential bias. Rather, the facts must, at minimum, create a "reasonable" impression of partiality. See, *e.g.*, *Gianelli Money Purchase Plan & Tr.* v. *ADM Inv. Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir.) (award may be vacated absent "actual conflict," if arbitrator "fails to disclose[] information which would lead a reasonable person to believe that a potential conflict exists"), cert. denied, 525 U.S. 1016 (1998); *Scandinavian Reinsurance Co.* v. *St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 72 (2d Cir. 2012) ("[p]roof of actual bias is not required"; however, evident partiality "will be found where a reasonable person would

[2] Cf. *Evident*, *Merriam-Webster Dictionary* (2024), http://tinyurl.com/3swa4j32 (last visited Feb. 20, 2024) (defining "evident" as "clear to the vision or understanding").

have to conclude that an arbitrator was partial") (citation omitted); *In re Sussex*, 781 F.3d 1065, 1073-1075 (9th Cir.) (vacatur may be warranted absent "actual bias" if facts give rise to "reasonable impression of partiality"; however, claims based on "attenuated" connections are insufficient), cert. denied, 577 U.S. 827 (2015).

II. Factual and Procedural Background

1. This case involves the "Panama 1 Arbitration" (Pet. 10), one of several arbitrations concerning disputes arising out of the design and construction of the expansion of the Panama Canal. See Pet. App. 3a-4a. The underlying contract required resolving disputes through arbitration by a three-person tribunal, seated in Miami, under the rules of the International Chamber of Commerce. *Id.* at 4a. Pursuant to those rules, each party nominated one arbitrator for confirmation by the ICC's International Court of Arbitration ("ICC Court"), and adopted a mutually agreed-upon procedure for selecting a tribunal president. *Ibid.*

The tribunal selected through this process was composed of highly experienced, well-respected international arbitrators with extensive track records in resolving international construction disputes. The ACP nominated, and the ICC Court confirmed, Dr. Robert Gaitskell, "an engineer and a lawyer who specializes in construction cases," Pet. App. 4a, who has served as arbitrator in over 100 arbitrations worldwide, and "comes recommended as one of the most sought-after and experienced construction arbitrators by Chambers and Partners, Legal 500, and Who's Who Legal," Dist. Ct. Dkt. 57-92 ¶ 23. Petitioners nominated, and the

ICC Court confirmed, Mr. Claus von Wobeser, "a lawyer and the former president of the Mexican chapter of the ICC," Pet. App. 4a, who has participated in over 200 arbitrations, Dist. Ct. Dkt. 57-92 ¶ 23. The party-agreed procedure for selecting a president led to the nomination of Mr. Pierre-Yves Gunter, "a lawyer who heads the international arbitration group at a Swiss firm," Pet. App. 4a, has participated in over 220 arbitrations, has been a Member of the Board of Directors of the Singapore International Arbitration Centre and Co-Chair of the International Arbitration Committee of the ABA, and is especially recommended for expertise in construction matters, Dist. Ct. Dkt. 57-92 ¶ 23.

The arbitrators submitted statements of acceptance that included relevant disclosures and affirmed their impartiality.[3] Gaitskell noted his status as a co-arbitrator in an associated arbitration over the Canal, and disclosed that he was an arbitrator in 22 pending arbitrations—eight as sole arbitrator or chair and fourteen as co-arbitrator. Pet. App. 5a. Von Wobeser noted that "he was appointed by Panama" in another international arbitration, and acknowledged more broadly that because counsel for both sides were "important law firms active in international arbitration," he had "professional relationships with both law

[3] Notwithstanding Petitioners' repeated characterization of Gaitskell as the ACP's "wing arbitrator" (Pet. 3, 12, 13, 25, 28, 35), the arbitrators here—pursuant to party agreement—took an oath of impartiality, "requir[ing] that they not be advocates for the parties but rather independent, fair, and impartial." Craig R. Tractenberg, *Nuts and Bolts of International Arbitration*, 38 Franchise L.J. 451, 458 & n.38 (2019).

firms." *Ibid.* (internal quotation marks and alterations omitted). He disclosed that he was sole arbitrator or chair in one other pending arbitration, co-arbitrator in seven, and counsel in six. *Ibid.* Gunter disclosed that he was involved in 20 pending arbitrations—eight as sole arbitrator or chair, seven as co-arbitrator, and five as counsel. *Id.* at 6a. At that time, Petitioners raised no questions about the arbitrators' involvement in the other arbitrations referenced in their submissions. *Ibid.*

The arbitration lasted over five years, with proceedings that included "over 3,500 pages of pleadings; 78 fact witnesses; 63 expert witnesses; over 3,500 exhibits; a 20-day merits hearing; and around 1,290 pages of post-hearing briefs." Pet. App. 6a. The parties collectively incurred over $140 million in costs, including more than $77 million in legal fees. Dist. Ct. Dkt. 57-1 ¶ 246. In September 2020, the tribunal issued a unanimous Partial Award addressing liability and the main damages issues. Pet. App. 6a. The tribunal dismissed most of Petitioners' claims, but awarded them about $26.8 million on others. *Ibid.* Meanwhile, the tribunal ordered Petitioners to pay the ACP $265,299,500, resulting in a net amount of about $238 million owed to the ACP. *Ibid.* In a February 2021 Final Award, the tribunal awarded the ACP more than $33 million in costs. Dist. Ct. Dkt. 57-1 ¶ 239; cf. Pet. App. 9a.

2. Disappointed, Petitioners began casting about for some basis to avoid their loss. In the wake of the Partial Award, Petitioners quickly settled on a vacatur strategy: fish for any contacts among the arbitrators or with counsel, or between an arbitrator and a party,

and concoct a theory of bias.[4] Because "evident partiality" is one of the few bases for vacatur under the FAA, this kind of fishing expedition is a not-uncommon strategy for arbitral losers seeking to renege on their agreement to arbitrate, and avoid the consequences of an adverse award, by mounting an after-the-fact challenge. Cf. *Positive Software Sols., Inc.* v. *New Century Mortg. Corp.*, 476 F.3d 278, 285 (5th Cir.) (en banc) (noting "incentive to conduct intensive, after-the-fact investigations to discover the most trivial of relationships"), cert. denied, 551 U.S. 1114 (2007).

To that end, Petitioners made broad and vague demands for additional disclosures including, among other things, about the arbitrators' (or other members of their respective law firms') co-service in related or unrelated, pending or closed, arbitrations, or involvement in other pending or closed arbitrations in which counsel for either side (including Petitioners' own counsel) played a role. See Pet. App. 6a-7a; Dist. Ct. Dkts. 55-24, 55-25, 55-26. Given that all three tribunal members were highly experienced and respected arbitrators with overlapping expertise, and both parties to the arbitration were represented by "important law firms active in international arbitration," Pet. App. 5a (citation omitted), Petitioners doubtless hoped these sweeping demands would yield some results—though they had shown no interest in these subjects

[4] This was not the first time Petitioners sought—unsuccessfully—to vacate an arbitral award in a dispute with the ACP arising out of the same contract. See Pet. App. 26a-27a & n.1.

(and submitted no such requests) prior to losing the arbitration, cf. *id.* at 6a-7a.

Although the demands went well beyond what is customary or contemplated by the ICC rules, the arbitrators voluntarily responded. Pet. App. 7a. Among other things, Gunter voluntarily noted that, in an unrelated matter involving different parties and different law firms, he was the president of a tribunal in which Gaitskell was a co-arbitrator; he also noted that he was an arbitrator in several unrelated matters in which parties were represented by law firms that represented *Petitioners* in the Panama 1 Arbitration. See Dist. Ct. Dkt. 55-35.

Von Wobeser voluntarily noted his involvement in various unrelated current or past matters where law firms that represented Petitioners or the ACP in the Panama 1 Arbitration also were involved. Those included an unrelated case in which Von Wobeser was sitting as a co-arbitrator alongside one of the attorneys (Chilean lawyer Andrés Jana) who played a role representing the ACP in the Panama 1 Arbitration in relation to certain civil law matters. See Dist. Ct. Dkt. 55-37.

Gaitskell voluntarily noted, among other things, the unrelated matter in which he and Gunter were co-arbitrators, as well as the fact that he had been appointed arbitrator in multiple unrelated matters by one of the law firms (White & Case) that represented Petitioners in the Panama 1 Arbitration. See Dist. Ct. Dkt. 55-36. Gaitskell also noted that he was acting as arbitrator in two ongoing unrelated arbitrations in which White & Case was counsel (including one in which White & Case nominated him), and was acting

as arbitrator in an unrelated matter in which one of the attorneys representing the ACP in the Panama 1 Arbitration (Manus McMullan) represented a party. *Ibid.* Finally, Gaitskell observed that he had, years ago, sat on tribunals in unrelated cases with one of the attorneys (Richard Preston) who represented Petitioners in the Panama 1 Arbitration, as well as with one of the attorneys (James Loftis) who represented the ACP in the Panama 1 Arbitration. *Ibid.*

Apparently dissatisfied with these initial results, Petitioners expanded the scope of their information demands. See Pet. App. 7a. In the interest of cooperation, the arbitrators continued to voluntarily respond, identifying a few other points of contact with both the ACP's and Petitioners' law firms in unrelated matters. See Dist. Ct. Dkts. 55-41, 55-45, 55-46, 55-47, 55-48.

Petitioners then filed requests with the ICC Court (the parties' contractually agreed forum for determining challenges to the arbitrators) to remove all three tribunal members for supposed bias, including Petitioners' own party-nominated arbitrator, von Wobeser. Pet. App. 8a. Petitioners advanced numerous theories, including some (but not all) of the theories they later pursued in the Eleventh Circuit. *Ibid*. After weeks of proceedings and multiple rounds of briefing, the ICC Court found that there was no conflict warranting disqualification, reasoning that the record did not raise "reasonable doubt" about the arbitrators' impartiality. Dist. Ct. Dkt. 55-62 at 7-8; see Pet. App. 8a-9a; contra Pet. 32 (suggesting "back-end" vacatur through judicial review is a party's "only remedy" to enforce arbitrator disclosure obligations).

3. Petitioners then turned to federal district court, where they moved to vacate the Partial and Final Awards. They again relied on a hodgepodge of theories about potential sources of bias. See Pet. App. 33a-34a, 38a-41a, 42a n.3. After receiving several thousand pages of briefing, expert reports, declarations, and factual exhibits, the district court rejected all of Petitioners' arguments. See Pet. App. 10a. The court explained that "[a]n arbitration award may be vacated due to evident partiality" either where there is an "actual conflict" or where "the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists." Pet. App. 33a (quoting *Univ. Commons-Urbana, Ltd.* v. *Universal Constructors Inc.*, 304 F.3d 1331, 1339 (11th Cir. 2002)). In the district court's view, "[n]o reasonable person would follow [Petitioners] down th[e] conspiratorial web" they had constructed from "unfounded train[s] of speculation" regarding attenuated professional contacts. Pet. App. 36a.

Undeterred, Petitioners turned to the Eleventh Circuit. There, they abandoned several of their prior arguments, settling on four theories of "evident partiality." Cf. Pet. App. 8a. As to Gunter, Petitioners asserted "evident partiality" because Gaitskell provided one of two votes to appoint him tribunal president in an unrelated arbitration involving different parties and different law firms. Petitioners' theory of bias from this relationship rested on a complicated series of completely speculative inferences. They began by suggesting that a reasonable person could think that Gaitskell's support for Gunter's appointment in

the unrelated matter would make Gunter feel "grateful," and thus inclined to side with Gaitskell in *different* cases (such as the Panama 1 Arbitration). Pet. C.A. Br. 29. That gratitude, they further hypothesized, could lead Gunter to favor (or be perceived as favoring) the *ACP* itself in the Panama 1 Arbitration because the ACP had nominated Gaitskell in that arbitration. Gaitskell, in turn, could be perceived as biased in the ACP's favor because Gaitskell might view the ACP as a "source[] of future work." Pet. C.A. Reply 5-6; see Pet. App. 13a.

As to von Wobeser—whom Petitioners themselves had nominated as arbitrator—Petitioners argued that his service as a co-arbitrator with Jana in an unrelated matter had the "potential" to "affect" von Wobeser's "perceptions" of Jana in unspecified ways. Pet. C.A. Br. 34; see Pet. App. 13a-14a. Finally, Petitioners argued that Gaitskell's service as a co-arbitrator alongside Loftis in a prior unrelated matter, and Gaitskell's service as an arbitrator in a different unrelated matter in which McMullan was counsel for a party, warranted vacatur. Pet. App. 17a-18a.

The Eleventh Circuit unanimously rejected these arguments, concluding that Petitioners "presented nothing that comes *near*" justifying vacatur. Pet. App. 3a (emphasis added). It explained that, under circuit precedent, "[a]rbitrators must 'disclose to the parties any dealing that might create an impression of possible bias,'" and evident partiality can exist either where there is an "actual conflict" or where an "arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a poten-

tial conflict exists." *Id.* at 14a-15a (quoting *Univ. Commons*, 304 F.3d at 1338-1339). Consistent with this Court's admonition that the FAA allows vacatur only in extraordinary circumstances, however, the Eleventh Circuit also emphasized that the "alleged partiality must be direct, definite and capable of demonstration rather than remote, uncertain and speculative." *Id.* at 15a (internal quotation marks omitted) (quoting *Gianelli*, 146 F.3d at 1312).

In a detailed and record-intensive analysis, the Eleventh Circuit explained why Petitioners' arguments were speculative and illogical. As for Gunter's co-service alongside Gaitskell, the court explained that the "record is barren" of any indication that Gunter "was in any way influenced in the Panama I Arbitration because he was selected to serve in another arbitration proceeding." Pet. App. 15a-16a. The record instead showed that Gunter was selected in both matters for his "extensive experience"—not as some kind of favor that would make him feel indebted to Gaitskell. Nor was there any evidence to support Petitioners' speculation that serving alongside Gaitskell in an unrelated matter would plausibly bias him (or lead a reasonable person to perceive bias) in favor of the ACP. *Ibid.*

As to von Wobeser's service as an arbitrator alongside Jana, and Gaitskell's service alongside Loftis, in unrelated matters, the court explained that these contacts—without anything further in the record to support a reasonable possibility of bias—did "not suggest evident partiality," but merely the kind of professional familiarity that routinely occurs due to "confluent ar-

eas of expertise." *Id.* at 17a-18a (quoting *Univ. Commons*, 304 F.3d at 1340). Finally, the court was "hard pressed" to see how Gaitskell's service as an arbitrator in an unrelated case where one of the ACP's lawyers represented a party would cast doubt on Gaitskell's impartiality; standing alone, "[r]epeated appearances establish only familiarity, and familiarity 'does not indicate bias.'" *Id.* at 18a (quoting *Univ. Commons*, 304 F.3d at 1340).

Ultimately, ruling for Petitioners would effectively require holding "that mere indications of professional familiarity are reasonably indicative of possible bias"—a particularly implausible conclusion in the context of "the small international arbitration community," whose "elite members" routinely "cross paths in their work." Pet. App. 14a, 19a. Indeed, the Eleventh Circuit highlighted expert testimony that there were only a few dozen arbitrators worldwide who would be attractive candidates for a proceeding such as the Panama 1 Arbitration. *Id.* at 19a. The fact that Petitioners identified past professional contacts and familiarity between arbitrators and counsel within this small and specialized community was both unsurprising and, standing alone, provided no reasonable indication of possible bias. *Ibid.* Petitioners did not seek panel or en banc rehearing.

REASONS FOR DENYING THE PETITION

I. This Case Does Not Implicate Any Disagreement Among Circuit Courts.

In an effort to make this case appear worthy of review, Petitioners focus on a marginal difference in wording between (1) circuits (led by the Second) which

will vacate an arbitral decision for evident partiality only where "a reasonable person would have to conclude that an arbitrator was partial," *Morelite Constr. Corp.* v. *N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984); see also Pet. 18-21 (discussing decisions from the First, Third, Fourth, Fifth, and Sixth Circuits), and (2) circuits (led by the Ninth) which contemplate vacatur where there is a "reasonable impression of partiality," *Schmitz*, 20 F.3d at 1047 (Ninth Circuit); accord *Lifecare Int'l, Inc.* v. *CD Med., Inc.*, 68 F.3d 429, 433 (11th Cir. 1995) (same; citing *Schmitz*).

Petitioners posit that the latter formulation of the evident-partiality standard is correct under *Commonwealth Coatings*, and more favorable to parties (like them) who seek vacatur. See Pet. 2, 23-24. Petitioners cast this slight wording difference as an "entrenched" and "important" split. *Id.* at 16-17. But any difference between circuits on how to articulate the evident-partiality standard is academic and unworthy of this Court's review. Nor, in any event, is it even implicated by this case.

1. To begin, Petitioners dramatically overstate the nature, extent, and importance of any divergence between circuits. There is little daylight between the marginally different formulations of the evident-partiality standard Petitioners identify, as a textual or practical matter. And Petitioners make no effort to show these different formulations have generated conflicting outcomes on similar facts. Consistent with *Commonwealth Coatings*, neither formulation demands proof of actual bias, and both exclude specula-

tive or attenuated theories through an objective reasonableness standard. Compare, *e.g.*, *Morelite*, 748 F.2d at 84 (Second Circuit) (vacatur warranted if "a reasonable person would have to conclude that an arbitrator was partial"), and *Thomas Kinkade Co.* v. *White*, 711 F.3d 719, 723-724 (6th Cir. 2013) (same), with *In re Sussex*, 781 F.3d at 1074-1075 (Ninth Circuit) (vacatur warranted if facts give rise to a "reasonable impression of partiality"), and *Commonwealth Coatings*, 393 U.S. at 150 (vacatur warranted where arbitrator "might reasonably be thought biased"). Whatever difference remains is largely a matter of tone or emphasis.

Tellingly, Petitioners' account of this supposedly "important" "split" consists entirely of cataloguing marginal differences in how circuit courts articulate the general legal standard, but does not identify any decisions in which circuits reached clearly inconsistent results on analogous facts. The absence of any identifiable pattern of outcome-determinative divergence is fatal to Petitioners' claim that the difference in formulation warrants this Court's review. It is also unsurprising, given the context-intensive nature of the evident-partiality inquiry. In this area, courts "employ[] a case-by-case approach in preference to dogmatic rigidity," focusing closely on the facts and circumstances of each case to determine the materiality of the allegedly biasing circumstances. *Lucent Techs. Inc.* v. *Tatung Co.*, 379 F.3d 24, 28 (2d Cir. 2004) (citation omitted); accord *Gianelli*, 146 F.3d at 1313 (evident-partiality cases "ordinarily require[] a fact-intensive inquiry"). Thus, outcomes are driven primarily by the

fact-specific evidence available, rather than any theoretical gap between differing high-level formulations. This may explain the Court's repeated denial of past petitions seeking resolution of the question and "split" Petitioners identify. See, *e.g.*, *Seldin* v. *Est. of Silverman*, 141 S. Ct. 2622 (2021) (No. 20-895); *Monster Energy Co.* v. *City Beverages LLC*, 141 S. Ct. 164 (2020) (No. 19-1333); *Positive Software Sols., Inc.* v. *New Century Mortg. Corp.*, 551 U.S. 1114 (2007) (No. 06-1352); *Int'l Bank of Com.-Brownsville* v. *Int'l Energy Dev. Corp.*, 528 U.S. 1137 (2000) (No. 99-880).

Moreover, despite Petitioners' alarmist rhetoric over the Second Circuit's (and some other courts') occasional use of the word "plurality" in connection with Justice Black's opinion, Pet. 18, there is no heady principle of "vertical *stare decisis*"—much less "the rule of law in this country," *id.* at 31—lurking behind the circuits' ways of summarizing and elaborating on what "evident partiality" requires. The Second Circuit's point was simply that, insofar as language in Justice White's concurrence could not be "reconcile[d]" with certain aspects of Justice Black's opinion, the latter language should be interpreted as dicta. *Morelite*, 748 F.2d at 83 & n.3. That proposition is hardly novel—much less a threat to the "rule of law." See, *e.g.*, *McKoy* v. *North Carolina*, 494 U.S. 433, 462 n.3 (1990) (Scalia, J., dissenting) ("[W]here [a separately concurring] Justice is * * * needed for the majority * * * the opinion [of the Court] is *not* a majority opinion except to the extent that it accords with his views," and such a concurrence "can assuredly narrow what the majority opinion holds * * * ."). To be sure, the Ninth Circuit has taken the more irenic view that all the language in

both opinions *can* be reconciled. *Schmitz*, 20 F.3d at 1045-1047. But the task of sorting dicta from holding remains an appropriate role for judicial inquiry—as it does *whenever* lower courts interpret this Court's decisions. The circuits agree that Justice White's concurrence is important to that task. *Id.* at 1045 (Ninth Circuit agreeing that Justice White's concurrence deserves "particular weight"). And, as discussed, the circuits have ultimately settled on the same broad approach to analyzing evident-partiality claims.

2. But there is an even more fundamental problem with Petitioners' effort to cast this case as somehow involving a circuit split. Even if there were a material difference between circumstances where a "reasonable person would have to conclude that an arbitrator was partial" and those that give rise to a "reasonable impression of partiality," this case does not implicate it. The Eleventh Circuit employs the latter formulation. See *Univ. Commons*, 304 F.3d at 1339. By Petitioners' own characterization, that "reasonable impression of partiality" formulation is *more favorable* to parties seeking vacatur than the alternative formulation adopted by other circuits. See Pet. 2. Thus, even if this Court granted review and adopted the alternative formulation employed by the Second Circuit (and others), Petitioners would still lose—indeed, *a fortiori*. Cf. *UBS Fin. Servs., Inc.* v. *Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 997 F.3d 15, 19 (1st Cir. 2021) (summarizing circuits' respective views on "the meaning of 'evident partiality,'" and characterizing as more vacatur-friendly the Ninth and Eleventh Circuits' position "that a reasonable appear-

ance of bias is sufficient to demonstrate evident partiality"); Restatement of the Law, The U.S. Law of Int'l Com. & Inv.-State Arb. § 4.18 cmt. b (Am. L. Inst. 2023) (hereinafter Restatement) (similar).

Recognizing this fatal problem, Petitioners strain to conjure a "three-way split," with the Eleventh Circuit in the "middle," between the Ninth Circuit and the rest. Pet. 2. In that way, they presumably hope to show that granting certiorari and deciding the question presented actually could affect the outcome here. But Petitioners concede, as they must, that Eleventh Circuit precedent articulates the very same standards as the Ninth. *Id.* at 22 (conceding that the Eleventh Circuit "purports" to apply the Ninth Circuit's "reasonable impression of partiality" standard) (capitalization omitted); see, *e.g.*, *Lifecare*, 68 F.3d at 433 (quoting *Schmitz*, 20 F.3d at 1046).

As the panel emphasized here, in language drawn from Justice Black's opinion in *Commonwealth Coatings*, Eleventh Circuit precedent requires arbitrators to "disclose to the parties any dealing that might create an impression of possible bias," Pet. App. 14a (quoting *Univ. Commons*, 304 F.3d at 1338), or, in slightly different words, "disclose those facts that create a reasonable impression of partiality," *Univ. Commons*, 304 F.3d at 1339 (internal quotation marks omitted). Petitioners themselves endorse this exact understanding of *Commonwealth Coatings*' scope. *E.g.*, Pet. 23-25. In other words, the Eleventh Circuit not only applies the same standards as the Ninth; it applies (and articulated again in this very case) the exact understanding of *Commonwealth Coatings*' scope that Petitioners evidently most prefer—and that

Petitioners presumably urge this Court to grant certiorari to adopt.

Faced with this awkward reality, Petitioners strain to show that the Eleventh Circuit says one thing but does another—*i.e.*, somehow applies a different and stricter standard "in [p]ractice." Pet. 22. Primarily, they point to the Eleventh Circuit's statement that the alleged partiality must be "direct, definite and capable of demonstration rather than remote, uncertain and speculative." Pet. App. 15a (quoting *Gianelli*, 146 F.3d at 1312). Petitioners raised no quarrel with this sensible requirement below. See Pet. C.A. Reply 4, 22. And Petitioners nowhere try to defend the dubious proposition that the FAA could require courts to vacate arbitral awards based on "remote, uncertain and speculative" theories of bias that are "[in]direct, [in]definite and [in]capable of demonstration." Nonetheless, Petitioners now recast this cautionary language as standing for an "effective[]" (Pet. 23) abrogation of the "reasonable impression of partiality" standard. *E.g.*, *Univ. Commons*, 304 F.3d at 1339. They even suggest that the Eleventh Circuit requires a showing of "[a]ctual [b]ias." Pet. 22, 25-26.

But far from "effectively" transforming the Eleventh Circuit's "reasonable impression test," Pet. 23, the quoted language is simply common sense. It flows directly from the requirement to show facts giving rise to a *reasonable* (or, to use the statutory term, "evident") impression of partiality, as opposed to one based on unwarranted and unsubstantiated speculation. In any event, the Ninth Circuit employs practically identical cautionary language. See *In re Sussex*, 781 F.3d

at 1075 ("contingent, attenuated, and merely potential" sources of bias are insufficient to provide "grounds to vacate an award for evident partiality"). That is fatal to Petitioners' spurious effort to manufacture a "three-way split." Pet. 2.

Petitioners also point to the Eleventh Circuit's statement in a different case that a "mere appearance" of bias or partiality is insufficient to justify vacatur. Pet. 23 (quoting *Lifecare*, 68 F.3d at 433). But that language (neither referenced nor quoted in the opinion below) is just another way of saying that a party must show facts giving rise to a *reasonable*, as opposed to speculative or attenuated, impression of partiality. And, notwithstanding Petitioners' suggestion to the contrary, the Eleventh Circuit consistently and expressly has held, including here, that a party need not show actual bias; it is enough to show that a "reasonable person" would "believe" that a "potential conflict" exists. Pet. App. 15a (citation omitted). However, because the alleged partiality must be "direct, definite, and capable of demonstration," a "*mere* appearance of bias" is insufficient, *Lifecare*, 68 F.3d at 433-434 (emphasis added).

What a challenger must show, in other words, is not just a "mere" appearance, *Lifecare*, 68 F.3d at 433, but a "*reasonable* appearance," of bias. *Sunkist Soft Drinks, Inc.* v. *Sunkist Growers, Inc.*, 10 F.3d 753, 758-759 (11th Cir. 1993) (emphasis added), cert. denied *sub nom. Sunkist Growers, Inc.* v. *Del Monte Corp.*, 513 U.S. 869 (1994), abrogated on other grounds by *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624 (2009). Thus, for example, the Eleventh Circuit will not "infer par-

tiality" simply "because * * * the arbitrator's judgment" appears unfairly slanted to the losing party. *Fowler* v. *Ritz-Carlton Hotel Co.*, 579 Fed. Appx. 693, 697 (11th Cir. 2014) (per curiam). Again, the Ninth Circuit has employed virtually identical language in describing the limits of the evident-partiality standard. *Emps. Ins. of Wausau* v. *Nat'l Union Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481, 1489 (9th Cir. 1991) ("more than a mere appearance of bias" is required to satisfy "reasonable impression of partiality" standard) (citation omitted). Petitioners cannot summon a nonexistent conflict between the Ninth and Eleventh Circuits by cherry-picking cautionary language. And thus, this petition is a uniquely unsuitable vehicle for the Court to address the question presented, because Petitioners already lost in a court applying what they themselves characterize as the more favorable (to them) legal standard.

Ultimately, the real basis for Petitioners' attempt to recast Eleventh Circuit precedent is the bare fact that they lost below. Pet. 23. But the fact that Petitioners lost under their own preferred standard—in a unanimous decision that found this to be an easy case, see Pet. App. 3a—is not a basis for certiorari. On the contrary, it simply illustrates the weakness of Petitioners' claims, and how decidedly *unworthy* of review this case is.

3. Petitioners identify no decision from another appellate court that conflicts in *outcome* with the Eleventh Circuit's decision here—*i.e.*, any case that found evident partiality on relevantly similar facts. Petitioners passingly cite *University Commons-Urbana, Ltd.* v. *Universal Constructors Inc.*, 304 F.3d 1331 (11th

Cir. 2002). See Pet. 27-28. But the panel here distinguished *University Commons*, which involved an arbitrator's service as *co-counsel* alongside party counsel in another matter, a much stronger potential for bias than Petitioners' flimsy allegations here. Pet. App. 16a-17a. Anyway, intra-circuit conflicts are not a basis for certiorari, but rather en banc rehearing—which Petitioners did not seek.

Petitioners suggest tension between the Eleventh Circuit's rejection of their Gaitskell/Gunter theory and a handful of other cases. Pet. 28-29. But any tension evaporates upon examination. *Burlington Northern Railroad* v. *TUCO Inc.*, 960 S.W.2d 629 (Tex. 1997), involved a referral to serve as counsel by a *non-neutral* co-arbitrator's law firm—a critical fact that distinguishes this case (in which all arbitrators affirmed their impartiality and independence), and upon which the *Burlington Northern* court laid primary emphasis. *Id.* at 630, 639. Nor can Petitioners seek support in the D.C. Circuit's reference, in dicta, to the possibility that receipt of an "unusually lucrative fee" or an "unusually prestigious appointment" might foster partiality. *Tatneft* v. *Ukraine*, 21 F.4th 829, 839 (D.C. Cir. 2021), cert. denied, 143 S. Ct. 290 (2022). The record here shows that Gunter's appointment as chair in an unrelated arbitration involved no "unusual[]" compensation or prestige, *ibid.*; on the contrary, such appointments were routine for Gunter. Pet. App. 6a, 16a.[5]

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[5] Petitioners also suggest potential tension between the Eleventh Circuit's rejection of their Jana/von Wobeser theory and a 23-year-old non-binding district court decision. Pet. 27 (citing

II. The Eleventh Circuit's Unanimous Decision Is Correct.

Given the unavoidable reality that this case implicates no circuit disagreement, Petitioners focus on arguing that the Eleventh Circuit was wrong on the facts. Pet. 23-31. Again, Petitioners' desire for fact-bound correction of an alleged error is not a basis for certiorari. But regardless, the Eleventh Circuit's decision was correct.

1. Arbitrators "will nearly always, of necessity, have numerous contacts within their field of expertise." *In re Sussex*, 781 F.3d at 1074 (citation omitted). Accordingly, courts reject theories of bias premised on "attenuated" or "insubstantial" contacts or relationships. *Ibid.* (citation omitted). That is consistent with *Commonwealth Coatings*, in which Justice Black approved vacatur where an arbitrator "might *reasonably* be thought biased," 393 U.S. at 150 (emphasis added), and Justice White wrote separately to emphasize that arbitrators are "men of affairs" who cannot "be held to the standards of judicial decorum of Article III judges," and "cannot be expected to provide the parties with [their] complete and unexpurgated business biograph[ies]," *id.* at 150-151 (White, J., concurring); cf. Pet. 2 (conceding that Justice White's remarks are "fully consistent" with Justice Black's opinion). Consistent with that universally accepted understanding,

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Valrose Maui, Inc. v. *Maclyn Morris, Inc.*, 105 F. Supp. 2d 1118, 1124 (D. Haw. 2000)). Setting aside that this Court does not grant review to resolve tensions between circuit and district court decisions, see Sup. Ct. R. 10, that case involved the undisclosed appointment of an arbitrator, by a party's counsel, as mediator in another dispute—not mere co-service as arbitrators.

the Eleventh Circuit properly rejected Petitioners' theories of bias resting on professional contacts that are routine in the small international arbitration community. Pet. App. 14a, 19a.

The FAA's text—a topic on which Petitioners are tellingly silent—precludes vacatur based on attenuated theories of partiality like those here. The FAA sets a high bar by referring to "*evident* partiality." 9 U.S.C. § 10(a)(2) (emphasis added). "On its face, 'evident partiality' conveys a stern standard. Partiality means bias, while 'evident' is defined as 'clear to the vision or understanding' and is synonymous with manifest, obvious, and apparent." *Positive Software*, 476 F.3d at 281 (quoting *Webster's Ninth New Collegiate Dictionary* 430 (1985)). At minimum, the FAA's text—"with which [courts] always begin," *ibid.*—requires rejecting theories of partiality that are not "direct, definite and capable of demonstration rather than remote, uncertain and speculative." Pet. App. 15a (citation omitted); cf. *Hall Street St. Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 586 (2008) (observing that § 10's text, including "evident partiality," refers only to "egregious" and "extreme" circumstances); contra Pet. 16, 23, 25.

Thus, under the FAA's text, *Commonwealth Coatings*, and the great weight of circuit precedent, the Eleventh Circuit was correct when it unanimously explained that Petitioners "presented nothing that *comes near* the high threshold required for vacatur." Pet. App. 3a (emphasis added). As the panel cogently summarized: "To rule for Grupo Unidos, [one] would need to hold, in essence, that mere indications of pro-

fessional familiarity are reasonably indicative of possible bias"—a proposition that has never been, and cannot be, the law. *Id.* at 14a.

2. Petitioners' theories of evident partiality simply do not hold water. "Nothing in the record" supported any hint of bias stemming from the routine professional contacts between von Wobeser and Jana (the latter of whom, contra Pet. 13, 26, was not the ACP's "lead" lawyer),[6] or Gaitskell and Loftis. Pet. App. 17a-18a. Co-arbitrators have no motive to "curry favor" with one another, contra Pet. 28 (citation omitted); their only duty is "to hear the case and apply the law in a fair, reasonable, and impartial manner." Pet. App. 17a.

Petitioners posit that arbitral co-service has the "potential" to "affect" individuals' "perceptions" of one another in a different context, and provide an "opportunity" to communicate and gain "insight" into one another's personalities. Pet. 27. Notably absent from this psychological theorizing is any reference to *bias*, as opposed to mere "professional familiarity." Pet. App. 14a. Professional interactions that have the "potential" to indeterminately "affect" how members of a specialized bar may "perce[ive]" each other, Pet. 27, are ubiquitous in any small professional community (such as international construction arbitration), and

[6] Jana served predominantly as civil law counsel for the ACP, and cross-examined just two witnesses at the hearing. Jana was neither the ACP's lead lawyer for the arbitration nor lead advocate. Petitioners cannot make their claims seem more credible in this Court by seriously misstating the record.

simply do not give rise to a reasonable—or any—impression of partiality.

Indeed, the record establishes numerous similarly routine contacts between the Panama 1 arbitrators and the counsel or law firms that represented *Petitioners* below. See, *e.g.*, Dist. Ct. Dkt. 67-1 ¶¶ 61-70. For example, in an unrelated matter, Gaitskell previously served as co-arbitrator alongside Richard Preston, who represented Petitioners in, among other things, the Panama 1 Arbitration. Dist. Ct. Dkt. 55-36 ¶ 4. Presumably that, too, had the "potential" to "affect" Gaitskell's "perceptions" of Petitioners' counsel, Pet. 27, thus (by Petitioners' logic) rendering him partial *in Petitioners' favor*.

Petitioners protest that these professional contacts would be "unthinkable in the judicial context." Pet. 27. But importing the "standards of judicial decorum of Article III judges" wholesale into the arbitration context is inconsistent with the viability of the private arbitration system. *Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring). Petitioners also ignore the numerous interactions between the Panama 1 arbitrators and Petitioners' own counsel—contacts that would not occur with Article III judges but did not trigger Petitioners' scruples until after they lost the arbitration and needed an excuse to challenge the outcome. See generally Dist. Ct. Dkt. 67-1 ¶¶ 61-70. Simply put, no "reasonable person" familiar with the nature of the "small international arbitration community" and the factual record here would "suspect" that von Wobeser and Gaitskell were partial to the ACP simply because they worked alongside other

members of that small community in unrelated matters. Pet. App. 17a, 19a.

The same goes for Petitioners' theory that Gaitskell exhibited "evident partiality" because he served as an arbitrator in an unrelated matter where one of the ACP's lawyers (McMullan) appeared as counsel for a party. No reasonable person would view a counsel's prior appearance before the same adjudicator in an unrelated matter, without more, as giving rise to doubts about the adjudicator's neutrality. Pet. App. 18a.[7] Petitioners hypothesize that repeat appearances are concerning in the arbitration context because parties' lawyers "may" be involved in "select[ing]" arbitrators. Pet. 30. But by Gaitskell's recollection, it was his co-arbitrators, not the parties or McMullan, who appointed him. Dist. Ct. Dkt. 55-45 ¶ 6. And Petitioners' own law firm White & Case nominated Gaitskell in another arbitration that was pending during the Panama 1 Arbitration, Dist. Ct. Dkt. 55-36 ¶ 4—laying to rest any notion that Gaitskell would be partial to any side whose counsel might have played a role in nominating him in unrelated arbitrations.

Finally, Petitioners' "cross-appointment" theory is similarly unavailing. The record shows that both Gaitskell and Gunter, who were sworn to neutrality, had *zero* pecuniary incentive to vote for the ACP. See Dist. Ct. Dkt. 57-92 ¶ 185; contra Pet. 29-30. In spite of this, Petitioners posit a chain of fanciful hypotheses:

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[7] Petitioners emphasize that the ICC Court found that this contact should have been disclosed. Pet. 30. But the ICC also found the nondisclosure too trivial to raise a question about Gaitskell's independence or impartiality. Pet. App. 9a.

first, that Gaitskell would have an "incentiv[e] to please ACP" in hopes that the ACP might grant him hypothetical "future appointments," and second, that Gunter might in turn corrupt his ethics by bowing to Gaitskell's presumed preferences because he would feel "indebted," if only "subconsciously," to Gaitskell for playing a role in nominating him as chair in an unrelated arbitration. Pet. 28.

Every link in this elaborate hypothetical chain runs into a brick wall of contrary record evidence. Gaitskell is a renowned international arbitrator who has served as arbitrator in over 100 arbitrations worldwide. Dist. Ct. Dkt. 57-92 ¶ 23. Far from being dependent on the ACP for future work, Gaitskell was serving as an arbitrator in numerous other unrelated matters at the time. Pet. App. 5a. Notably, that included another then-pending arbitration in which *Petitioners'* law firm selected Gaitskell. Dist. Ct. Dkt. 55-36 ¶ 4. For his part, Gunter has acted as arbitrator or counsel in over 220 arbitrations, including acting as sole arbitrator/chair in eight pending arbitrations at the time of his nomination in the Panama 1 Arbitration. Pet. App. 6a, 16a. He had no need to "curry favor" with Gaitskell, Pet. 28 (citation omitted), and thereby tarnish his reputation and violate his oath of neutrality, to maintain a busy ongoing arbitration docket. And contrary to Petitioners' unsupported assertion that Gaitskell assisted Gunter in securing an especially "lucrative" chair appointment, Pet. 28, the record shows that chair appointments are generally viewed as *less*, not more, "lucrative" than service as a co-arbitrator or party counsel. Dist. Ct. Dkt. 57-92

¶¶ 180-182. Petitioners' attempt to conjure a "financial conflict" on this record is baseless. Cf. Pet. 30.

3. Presumably realizing the weakness of their theories, Petitioners waste considerable effort arguing that *Commonwealth Coatings* "rejected [an] actual bias standard," and suggesting that the Eleventh Circuit "effectively" strayed from that holding here. Pet. 24-25. But, as Petitioners ultimately are forced to concede, *id.* at 25, the Eleventh Circuit explicitly recognized that Petitioners were not required to demonstrate actual bias. See Pet. App. 14a-15a. The problem the Eleventh Circuit identified was not (only) that Petitioners failed to prove actual bias; it was that the record evidence would not cause a "reasonable person" to even "suspect" (*i.e.*, have a reasonable impression of) bias. *Id.* at 16a.

Here, the point of the Eleventh Circuit's emphasis on the "many sound and impartial reasons" for Gunter's selection was not that Petitioners had to prove actual bias. Pet. App. 16a. The point was that no "reasonable person" aware of all the "record evidence," including Gunter's standing in the international arbitration community, would "suspect" bias simply because Gaitskell supported Gunter's appointment as chair in an unrelated matter. *Ibid.* Similarly, the court's analysis of von Wobeser's contacts with Jana, and Gaitskell's contacts with Loftis, focused on whether a "reasonable person" would "suspect" improper influence. *Id.* at 17a. And the court's rejection of Petitioners' theory regarding McMullan's past appearance as party counsel before Gaitskell in an unrelated matter fo-

cused on whether such facts "indicate" (*i.e.*, give a reasonable impression of) "bias," not whether they prove actual bias. *Id.* at 18a (citation omitted).

III. Petitioners Exaggerate the Importance of the Question, and This Case Would Be a Particularly Poor Vehicle for Addressing It.

Petitioners exaggerate the importance of their question presented—*i.e.*, which of two marginally different verbal formulations of the evident-partiality standard courts should apply—and this case is an exceptionally bad vehicle for addressing it.[8]

1. Petitioners first suggest this Court should grant review to address broad questions about "vertical *stare decisis*" and "clarify" that lower courts cannot "strip a decision * * * of its legal force by interpreting a concurrence to be in conflict with a majority opinion." Pet. 31. But this case plainly does not implicate any such rarefied issues. As it has for decades, the Eleventh Circuit applied the same standards as the Ninth Circuit—which by Petitioners' own characterization has

[8] In addition to the first question Petitioners frame for review, they posit a second: "[w]hether an arbitrator's failure to disclose relationships with a party's counsel or a party-appointed arbitrator constitutes evident partiality." Pet. i. But Petitioners allege no divergence between circuits on that question, independently of the above-described issue regarding the interpretation of *Commonwealth Coatings*. In any event, the question is not susceptible to a blanket "yes" or "no" answer. As courts uniformly agree (and consistent with *Commonwealth Coatings*), whether a particular nondisclosure involving relationships with counsel or another arbitrator evinces evident partiality depends on the nature of the relationship and the facts of a particular case.

interpreted *Commonwealth Coatings* "correctly." *Id.* at 2. It even quoted and applied Petitioners' *own preferred language* from Justice Black's opinion (compare Pet. 24, with Pet. App. 14a), and never even referenced Justice White's concurrence.

The real target of Petitioners' ire is the Second Circuit's stated view, in a 1984 opinion cited nowhere in the decision below, that "much of Justice Black's opinion must be read as dicta" because it could not be "reconcile[d]" with Justice White's concurrence. *Morelite*, 748 F.2d at 83 & n.3. But, properly understood, that was simply an ordinary exercise in striving to separate dicta from holding. In any event, *this* case—in which the Eleventh Circuit heavily and exclusively relied on Justice Black's opinion (not Justice White's), and articulated the precise word-for-word understanding of *Commonwealth Coatings*' scope that Petitioners themselves endorse—would be a uniquely poor vehicle to review a *different* circuit's characterization of Justice Black's opinion in a 40-year-old decision that had no bearing on the Eleventh Circuit's reasoning here.

2. Petitioners extol the importance of arbitral impartiality, warning that "[c]onfidence in the arbitral system would quickly wane if appearances of bias went unchecked." Pet. 32. Yet confidence in arbitration has demonstrably *not* waned in the years since some circuits (albeit not the Eleventh) have adopted a formulation of the evident-partiality standard with which Petitioners disagree. See Gary Born & Wendy Miles, *Global Trends in International Arbitration* (June 1, 2007), http://tinyurl.com/yc88s7mx (citing statistics showing "steadily increasing caseloads at

leading arbitral institutions" since 1980). As for supposed "growing concern" over "failure to disclose the types of relationships at issue here," Pet. 33-34, that would come as news to the authors of the recently released Restatement of the U.S. Law of International Commercial and Investor-State Arbitration. In fact, the Restatement endorses what it characterizes as the "more exacting" (*i.e.*, less-vacatur-friendly) formulation of the evident-partiality standard adopted by the Second and other circuits—reasoning that stern vacatur standards are needed to strike the proper "balance between preserving the integrity of the arbitral process and parties' general expectations that arbitrators have specialized knowledge as a consequence of their remaining engaged in professional relationships and maintaining professional affiliations." Restatement § 4.18 cmt. b.

Indeed, it is Petitioners' proposed approach (not the status quo) that would undermine confidence in the arbitral system—an approach under which, apparently, courts would welcome challenges to arbitral awards based on "[in]direct" and "[in]definite" theories of partiality that are "[in]capable of demonstration." Pet. 23, 25 (quoting, and criticizing, Pet. App. 15a). That would invite litigants "to conduct intensive, after-the-fact investigations to discover the most trivial of relationships, most of which they likely would not have objected to if disclosure had been made," *Positive Software*, 476 F.3d at 285—*i.e.*, to follow precisely the playbook Petitioners used here. And it would cause a proliferation of "cumbersome and time-consuming judicial review," *Oxford Health Plans*, 569 U.S. at 568-569 (citation omitted), as parties litigated speculative

theories about arbitrators' attenuated business contacts.

The effects of Petitioners' proposed approach would be particularly deleterious in the "small international arbitration community." Pet. App. 19a. Parties to complex and high-stakes proceedings like the Panama 1 Arbitration demand arbitrators who possess the experience and expertise both to understand and resolve the difficult technical issues in dispute and also to efficiently manage the arbitral process. See Dist. Ct. Dkt. 57-92 ¶ 21; *Nationwide Mut. Ins. Co.* v. *Home Ins. Co.*, 429 F.3d 640, 646 (6th Cir. 2005). The pool of arbitrators qualified for such large, international construction disputes is exceptionally small. Pet. App. 19a. Their "specialized knowledge" arises precisely *because* they "remain[] engaged in professional relationships and maintain[] professional affiliations" in that field. Restatement § 4.18 cmt. b.

As the Eleventh Circuit cogently perceived, selecting such experienced specialists as arbitrators would be dangerous, if not impossible, if the inevitable result would be after-the-fact litigation in which the losing party picks through the arbitrators' biographies in search of any attenuated professional contacts that might be viewed as having "the potential to affect" an arbitrator's "perceptions of" any party or any lawyer for that party, Pet. 27, and citing such contacts as a basis to throw out the results of years-long and hugely expensive arbitrations.

3. Finally, Petitioners implausibly recommend this case as an "ideal vehicle" because it involves "three sets of non-disclosures." Pet. 34-35. But a party's

stated intent to raise numerous fact-specific arguments calling on this Court to wade through a case's voluminous record is typically a good reason to *deny* certiorari. Petitioners nowhere explain how their desire for repeated, fact-bound error correction would assist this Court in resolving any questions about the proper interpretation of *Commonwealth Coatings* (much less the FAA's text), and their arguments only further reveal their petition as a request for fact-bound reversal of a decision they disagree with.[9]

[9] Petitioners suggest this Court could, alternatively, consider their petition together with (or hold their petition pending disposition of) *Occidental Exploration & Production Co.* v. *Andes Petroleum Ecuador Ltd.*, No. 23-506. Pet. 35 n.2. There is no sound reason to do so. The parties in *Occidental* recently asked this Court to defer the petition's distribution, because they are "working on an agreement to settle the case and anticipate filing a motion to dismiss under Rule 46 if the settlement is finalized." Joint Mot. to Defer Consideration, *Occidental*, No. 23-506 (Feb. 13, 2024). Even if that case were not almost moot, the *Occidental* petition asserts that the Second Circuit has misinterpreted *Commonwealth Coatings*, and that this Court should instead adopt the Eleventh Circuit's framing in place of the Second Circuit's ostensibly less-vacatur-friendly standard. See Pet. 11, 23, 25, *Occidental*, No. 23-506. So, if this Court were to grant certiorari in *Occidental* and rule for petitioner there, the Eleventh Circuit's legal standard would be vindicated—implicating no change in the law governing this case, and providing no basis to disturb the judgment here.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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