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 PANAMA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

Carolyn B. Lamm
WHITE & CASE LLP
701 Thirteenth St., N.W.
Washington, DC 20005

Luke Sobota
THREE CROWNS (US) LLP
3000 K St., N.W.
Suite 101
Washington, DC 20007

Noel J. Francisco
Counsel of Record
Krista Perry Heckmann
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939
njfrancisco@jonesday.com

Counsel for Petitioners

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 3

I. THE CIRCUITS ARE IN OPEN CONFLICT. 3

II. THIS IS AN IDEAL VEHICLE TO RESOLVE THIS DISPUTE. 6

III. THE ELEVENTH CIRCUIT WAS WRONG. 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Burlington N. R.R. Co. v. TUCO Inc.,
960 S.W.2d 629 (Tex. 1997) 3, 8

Commonwealth Coatings Corp. v. Continental Casualty Co.,
393 U.S. 145 (1968) 1, 3, 6, 9, 10, 11

Dep't of Com. v. New York,
139 S. Ct. 2551 (2019) 10

Gianelli Money Purchase Plan & Trust v. ADM Inv. Servs., Inc.,
146 F.3d 1309 (11th Cir. 1998) 4

In re Grand Jury Subpoena, Judith Miller,
438 F.3d 1141 (D.C. Cir. 2006) 6

McKoy v. North Carolina,
494 U.S. 433 (1990) 6

Monster Energy Co. v. City Beverages, LLC,
940 F.3d 1130 (9th Cir. 2019) 8

Morelite Construction Corp. v. New York City District Council Carpenters Benefit Funds,
748 F.2d 79 (2d Cir. 1984)...................................... 5

Schmitz v. Zilveti,
20 F.3d 1043 (9th Cir. 1994) 4, 8

TABLE OF AUTHORITIES
(continued)

Page(s)

UBS Fin. Servs. Inc. v. Asociación de Empleados del Estado Libre Asociado de Puerto Rico,
419 F. Supp. 3d 266 (D. Mass. 2019) 3

UBS Fin. Servs., Inc. v. Asociacion De Empleados Del Estado Libre Asociado De Puerto Rico,
997 F.3d 15 (1st Cir. 2021) 4

Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.,
304 F.3d 1331 (11th Cir. 2002) 7

Valrose Maui, Inc. v. Maclyn Morris, Inc.,
105 F. Supp. 2d 1118 (D. Haw. 2000) 7, 8

Vasquez v. Hillery,
474 U.S. 254 (1986) 6

STATUTES

Federal Arbitration Act 1, 4, 10

OTHER AUTHORITIES

Lee Korland, *What an Arbitrator Should Investigate and Disclose: Proposing A New Test for Evident Partiality Under the Federal Arbitration Act*,
53 Case W. Res. L. Rev. 815 (2003) 4

TABLE OF AUTHORITIES
(continued)

Page(s)

Braydon Roberts, *An Evident Contradiction: How Some Evident Partiality Standards Do Not Facilitate Impartial Arbitration*, 43 J. Corp. L. 681 (2018) 3

INTRODUCTION

Respondent attempts to diminish but cannot dispute that the lower courts are in open conflict over the meaning of the FAA's evident partiality standard. That split is widely acknowledged by courts and commentators. It is deep-seated, with (a) at least five circuits following the Second Circuit standard requiring vacatur only if a court *would have* to conclude an arbitrator was partial, (b) the Ninth Circuit requiring only a *reasonable impression of possible bias*, and (c) the Eleventh Circuit falling in-between, parroting the Ninth Circuit's standard but applying the Second's. Pet. 17-23. This alone warrants review. Arbitration is the cornerstone of international commercial dispute resolution. And the circuit courts are in open conflict over the most fundamental aspect of that international arbitral regime: the right to disclosure of potential conflicts so that a party can make an informed decision to consent, or not, to the arbitrators deciding the case.

This conflict also implicates this Court's authority to issue decisions that bind the country on questions of federal law. The reason the circuits have divided is because the Second Circuit and others have concluded that this Court's opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968)— joined by six justices—was, in fact, a plurality opinion, because they (erroneously) found a conflict between the majority opinion and Justice White's concurrence. That lower-court second-guessing of the facial validity of this Court's binding pronouncements, if allowed to stand, risks undermining the stability of the vertical authority upon which our judiciary rests.

There is therefore no doubt that this case warrants plenary review. Each of Respondent's efforts to show otherwise fails. First, it argues that the circuit conflict is mere wordplay. Nonsense. Courts do not openly acknowledge conflicts where it does not matter. The fact that they have done so here, repeatedly, shows the importance of this recurring issue.

Second, Respondent asserts the conflict does not matter here, because the outcome would be the same under either standard. Not so. The Eleventh Circuit's own prior decisions show how the Ninth Circuit's standard, properly applied, requires a different result. Regardless, given the fact-intensive nature of these disputes, it is critical that courts apply the right—and same—legal rule. Otherwise, there is no hope that courts will treat like cases alike, one of the central promises of the Rule of Law.

Third, Respondent argues that the court below was correct. Wrong again, and also irrelevant. Here, the Eleventh Circuit sanctioned one party's four-time wing arbitrator secretly helping to award the arbitral president a lucrative appointment in the middle of this case—without even the president disclosing it. And another arbitrator secretly served alongside Respondent's lawyer as co-arbitrators during these proceedings. Both dealings obviously should have been disclosed. Neither was. But regardless, courts across this country should decide that issue under the same legal standard; the outcome should not turn on whether the appeal is heard in New York City, San Francisco, or Miami.

In short, the circuits are in disarray, the decision below is wrong, and this is an ideal vehicle to address

the important and recurring questions presented. This Court should grant certiorari.

ARGUMENT

I. THE CIRCUITS ARE IN OPEN CONFLICT.

1. As the Petition explains, the circuit courts, state courts, and commentators all acknowledge the conflict over when an arbitrator's failure to disclose constitutes evident partiality. Pet. 17; *see also, e.g.*, *UBS Fin. Servs. Inc. v. Asociación de Empleados del Estado Libre Asociado de Puerto Rico*, 419 F. Supp. 3d 266, 272 (D. Mass. 2019) ("[T]he Circuits are still split . . . ."); *Burlington N. R.R. Co. v. TUCO Inc.*, 960 S.W.2d 629, 633-34 (Tex. 1997) (federal and state courts are "divided"); Braydon Roberts, *An Evident Contradiction: How Some Evident Partiality Standards Do Not Facilitate Impartial Arbitration*, 43 J. Corp. L. 681, 683 (2018) ("struggle" over "whether to apply the majority or concurrence" in *Commonwealth Coatings* has "resulted in multiple interpretations"). Indeed, Respondent itself cites authorities acknowledging the split. BIO 19-20.

2. This disagreement is not just wordplay; it matters. Courts do not typically acknowledge illusory conflicts. They highlight material disagreements when they are in need of guidance. That is why so many courts have repeatedly acknowledged this conflict.

And here, the substance of the tests and the cases applying them show why the distinction matters. The "reasonable impression of partiality" standard "is much broader" than the "would have to conclude" standard, "as circumstances can convey an *impression* of partiality without necessarily dictating a *conclusion* of partiality." *Burlington*, 960 S.W.2d at 633-34

(cleaned up). One commentator has thus highlighted "hundreds of decisions relating to evident partiality and undisclosed conflicts of interest, often along similar fact patterns, that have generated a myriad of differing results." Lee Korland, *What an Arbitrator Should Investigate and Disclose: Proposing A New Test for Evident Partiality Under the Federal Arbitration Act*, 53 Case W. Res. L. Rev. 815, 817, 828 (2003).

For example, in *Schmitz v. Zilveti*, the Ninth Circuit vacated an award where an arbitrator failed to disclose that his law firm had previously represented the parent company of a party to the arbitration. 20 F.3d 1043, 1044 (9th Cir. 1994). The court found a reasonable impression of partiality even though the arbitrator did not have actual knowledge of his law firm's connection: "If the parties are to be judges of the arbitrators' partiality, duties to investigate and disclose conflicts must be enforced, even if later a court finds that no actual bias was present." *Id.* at 1048-49.

In contrast, the First Circuit declined to vacate an award where an arbitrator failed to disclose his employer had provided legal services to one of the parties to the arbitration alongside other professional relationships. *UBS Fin. Servs., Inc. v. Asociacion De Empleados Del Estado Libre Asociado De Puerto Rico*, 997 F.3d 15, 18 (1st Cir. 2021). After expressly rejecting the Ninth Circuit's standard and adopting the Second's, the First Circuit concluded that "a reasonable person would not 'have to conclude' that [the arbitrator] was partial" based on his employer's connections to one party. *Id.* at 20. *See also Gianelli Money Purchase Plan & Trust v. ADM Inv. Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998) (observing that *Schmitz* "conflicts with the law of this Circuit").

3. It is particularly important to resolve this conflict because it goes to the heart of this Court's authority in the judicial hierarchy. The disagreement between the circuits is largely based on several circuit courts—including the Eleventh Circuit—erroneously interpreting *Commonwealth Coatings'* binding majority opinion as a nonbinding plurality. Pet. 18-24 (noting circuit conflict on this issue as well). Respondent's suggestion that these courts are merely sorting dicta from holding is wrong. The Second Circuit in *Morelite Construction Corp. v. New York City District Council Carpenters Benefit Funds*, 748 F.2d 79 (2d Cir. 1984), for example, expressly concluded that "[b]ecause the two opinions are impossible to reconcile" it "must *narrow the holding* to that subscribed to by both Justices White and Black," and thus set its own standard "on a relatively clean slate." *Id.* at 83 n.3, 84 (emphasis added). Other courts have followed suit. Pet. 18-24.

That method of interpretation is wrong. If individual Justices do not agree with some portion of the majority opinion, there is a well-established convention for signaling that disagreement: "concurring in the judgment" or "concurring in part." But when a Justice "concurs" with the Court's opinion in full—*i.e.,* joins it—lower courts are required to treat it for what it is: *the Court's* opinion. They do not have license to parse the concurrence to ferret out perceived conflicts with the Court's reasoning. After all, the Justices themselves are best positioned to assess whether their separate opinions warrant full or partial joinder with the majority; allowing lower courts to second-guess that judgment is a recipe for judicial chaos. In all events, this is an ideal vehicle for the

Court to clarify not only the precedential value of *Commonwealth Coatings* but also the relevance of a Justice's concurrence in the majority opinion.[1]

II. THIS IS AN IDEAL VEHICLE TO RESOLVE THIS DISPUTE.

This case is a clean vehicle—nothing prevents this Court from reaching and resolving the questions presented. Indeed, Respondent does not identify any actual impediment to review. The multiple non-disclosures at issue were admitted subsequently by the arbitrators, raised and passed upon below, and are now squarely presented for review. There is no factual dispute. This case thus presents a prime opportunity for this Court to resolve the split and provide clarity to courts, parties, and arbitrators alike on an important and recurring issue.[2]

---

[1] Respondent cites a Justice Scalia dissent arguing that a concurrence can narrow the majority. BIO 18. A concurrence in that same case, however, disagreed: "the meaning of a majority opinion is to be found within the opinion itself; the gloss that an individual Justice chooses to place upon it is not authoritative." *McKoy v. North Carolina*, 494 U.S. 433, 448 n.3 (1990) (Blackmun, J., concurring); *see also Vasquez v. Hillery*, 474 U.S. 254, 261 n. 4 (1986) (describing the *Marks* rule as "inapplicable" to an opinion "to which five Justices expressly subscribed"); *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1148 (D.C. Cir. 2006) ("[The] opinion is not a plurality opinion of four justices joined by a separate Justice . . . to create a majority, it is the opinion of the majority of the Court. As such it is authoritative precedent. It says what it says."). If anything, this disagreement is a further reason for granting certiorari.

[2] Respondent notes the Court has previously denied petitions raising similar questions presented. BIO 17. But those all were poor vehicles. Some involved disputes as to whether the alleged conflicts were known to the parties in advance; others

Respondent also asserts that the questions presented do not matter because the Eleventh Circuit already applied Petitioners' preferred standard. BIO 19-24. That assertion is wrong and irrelevant.

It is wrong because the opinion below effectively raised the bar for vacatur to a standard akin to the Second Circuit's. Pet. 23-31. That legal error is obvious in light of the fact that the Eleventh Circuit has previously reached the opposite conclusion on similar facts. *See Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331 (11th Cir. 2002). There, the court held that "a reasonable person might envision a potential conflict if an arbitrator, *concurrently with the arbitration*, partakes in a proceeding in which counsel for one of the parties to the arbitration is also participating." *Id.* at 1340. That is exactly what happened here when one of the arbitrators worked alongside Respondent's lawyer as co-arbitrators in the middle of the arbitration. That the two served as undisclosed co-arbitrators rather than co-counsel is a distinction without a difference.

Moreover, had this dispute arisen in the Ninth Circuit, Petitioners would have clearly been entitled to vacatur. *See, e.g.*, *Valrose Maui, Inc. v. Maclyn Morris, Inc.,* 105 F. Supp. 2d 1118, 1124 (D. Haw. 2000) (finding evident partiality where arbitrator failed to disclose ex parte communication with a party's

---

involved highly-specific facts, like an arbitrator's interest in the arbitral organization. This case, in contrast, involves a common fact pattern. Pet. 35 n.2. Regardless, the recurring nature of the issue and the lower courts' repeated acknowledgement of the conflict make clear that the time has come for this Court to address the issue.

attorney and appointment as a mediator in an unrelated matter); *Burlington*, 960 S.W.2d at 630 (finding evident partiality where neutral arbitrator failed to disclose that he accepted, during the arbitration proceedings, a referral from the law firm of a non-neutral co-arbitrator);[3] *cf. Schmitz*, 20 F.3d at 1044; *Monster Energy Co. v. City Beverages, LLC*, 940 F.3d 1130, 1132 (9th Cir. 2019).

Regardless, any dispute over the appropriate characterization of the Eleventh Circuit's rule is no barrier to this Court's review of the broader disagreement between the circuits. This case directly implicates the standard for determining when an arbitrator's failure to disclose constitutes evident partiality. The fact-specific nature of the evident partiality inquiry makes it critically important that courts apply a uniform legal standard. And the fact pattern here, far from undermining the case for certiorari (BIO 35-36), is an ideal vehicle for the Court to explain both what the standard is and how it applies. *See* Pet. 34-35 & n.2.

---

[3] Respondent fails to distinguish these cases. BIO 24 & n.5. The arbitral co-service between Respondent's attorneys and the arbitrators here may not have directly involved appointment of an arbitrator to another matter, but Gaitskell's vote to award Gunter a lucrative appointment in another matter did. *Valrose*, 105 F. Supp. at 1124. Nor does the self-proclaimed neutrality of Respondent's four-time wing arbitrator change the fact that he had an incentive to favor the party that repeatedly hired him. Business referrals between a party's arbitrator and another arbitrator should be disclosed even when reasonable people "could debate whether the referral was likely to affect [the neutral arbitrator's] impartiality," which is at least the case here. *Burlington*, 960 S.W.2d at 639.

III. THE ELEVENTH CIRCUIT WAS WRONG.

Although not critical to the issue of whether to grant certiorari, the Eleventh Circuit was also clearly wrong. As the Petition explains, the decision below effectively required actual bias in conflict with this Court's decision in *Commonwealth Coatings*. Pet. 23-31.

Contrary to Respondent's characterization, each of the undisclosed connections here goes far beyond mere familiarity. While parties might *want* their arbitrators to focus solely on their duty "to hear the case and apply the law in a fair, reasonable, and impartial manner," BIO 27, that is not the only *incentive* possessed by arbitrators who must secure future employment from the lawyers and co-arbitrators with whom they work. That is why those connections must be disclosed—so *the parties* can make any necessary trade-off between neutrality and "experience and expertise," BIO 35.[4]

For example, shortly before closing arguments, Gaitskell—an arbitrator Respondent has appointed at least four times—helped award the tribunal president (Gunter) an appointment likely worth hundreds of thousands of dollars in the middle of the arbitration proceedings. It not at all "fanciful" to point out that both Gunter and Gaitskell have an incentive to please those who help them secure (well) paid work as arbitrators. That Gunter and Gaitskell also have other sources of employment in no way undercuts this incentive. BIO 30. As this Court has explained, it is not "at all relevant" that the "payments received were

---

[4] Respondent erroneously suggests there was a shortage of qualified arbitrators. BIO 15. In fact, scores were available. *See* Dist.Ct.Dkt. 66 ¶ 17.

a very small part of (the arbitrator's) income." *Commonwealth Coatings*, 393 U.S. at 148. Instead, in the judicial context, even "the slightest pecuniary interest" means "a decision should be set aside." *Id.* (cleaned up). In the arbitral context—where arbitrators lack the structural checks on judicial authority but parties choose their decision-makers—such interest must be "disclose[d]." *Id.* at 149.

Respondent asserts that Gaitskell took an oath of neutrality, but if that were sufficient the FAA's evident partiality standard would be rendered dead letter. BIO 7 n.5, 29-30. Respondent has appointed him as its chosen arbitrator no less than *four times*. And in response, Gaitskell has consistently ruled in Respondent's favor. Judges are "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) (cleaned up).

Additionally, one of Respondent's lead lawyers served as a co-jurist alongside Petitioner's arbitrator during the closing arguments and deliberations of this arbitration. When one side's lawyer has real-time, undisclosed, ex parte access to the decision-makers in a case, a reasonable person obviously could perceive the potential for bias. It is no different than if Respondent's counsel here served as a judge alongside members of the panel below and everyone knew but Petitioner. Respondent suggests that co-arbitrators have no motive to curry favor with one another, BIO 27, but that is simply false. Arbitrators and counsel can be a source of future work for one another and thus have every incentive to work cooperatively. As importantly, arbitral co-service gives one side unbalanced access to and a relationship with

supposedly neutral decision-makers. These connections must be disclosed.[5]

* * *

At the end of the day, Respondent's argument is a demand for arbitral affirmance no matter what. But the consequences of Petitioners' position is not an increase in vacated awards; it is an increase in arbitrators' disclosures. And that is the whole point: in a system of dispute resolution based on consent, the parties, not the arbitrators, are entitled to make an informed decision. If arbitrators disclose their potential conflicts, then parties can make—and must live with—their voluntary choices. But as the Court said in *Commonwealth Coatings*, there is "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." 393 U.S. at 149. Here, Petitioners were deprived of that choice by the arbitrators' multiple failures to disclose obvious potential conflicts. The Court should grant this case to resolve an open circuit conflict over when arbitrators' mandatory disclosure obligations are triggered.

---

[5] That the arbitrators also failed to disclose some connections with Petitioners' counsel is irrelevant. BIO 28-30. None of these were discussed by either the district court or the Eleventh Circuit. Indeed, some were in fact immediately *disclosed.* Dist.Ct.Dkt. 67-1 ¶¶ 63(1), 65(1); 55-20, 55-21, 55-35. Regardless, none involved (a) an arbitrator repeatedly appointed by Petitioners helping award the arbitral president a lucrative contract in the middle of the case or (b) Petitioners' lawyer serving as co-arbitrators with the arbitrators here *during* the arbitral proceedings. If anything, ACP's arguments only confirm that the arbitrators did indeed fail to make complete disclosures.

CONCLUSION

This Court should grant the petition.

March 5, 2023

Respectfully submitted,

Noel J. Francisco
Counsel of Record
Krista Perry Heckmann
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939
njfrancisco@jonesday.com

Carolyn B. Lamm
WHITE & CASE LLP
701 Thirteenth St., N.W.
Washington, DC 20005

Luke Sobota
THREE CROWNS (US) LLP
3000 K St. N.W.
Suite 101
Washington, DC 20007

Counsel for Petitioners