No. 23-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What is the standard for determining whether an arbitrator's failure to disclose constitutes evident partiality justifying vacatur of the arbitral award under the Federal Arbitration Act, 9 U.S.C. § 10(a)(2)?

2. Whether an arbitrator's failure to disclose relationships with a party's counsel or a party-appointed arbitrator constitutes evident partiality.

CORPORATE DISCLOSURE STATEMENT

Petitioner Grupo Unidos por el Canal, S.A. is a corporation formed under and governed by the laws of the Republic of Panama. Grupo Unidos por el Canal, S.A. has no parent corporation, and is not publicly held. Grupo Unidos por el Canal, S.A. was incorporated by Sacyr, S.A., Impregilo S.p.A. (now Webuild S.p.A.), and Jan de Nul N.V. (the other three Petitioners, who together own 99% of Grupo Unidos por el Canal, S.A.'s stocks) and Constructora Urbana, S.A.

Petitioner Sacyr, S.A. (SCYR) is a publicly held corporation formed under and governed by the laws of the Kingdom of Spain. Sacyr, S.A. has no parent corporation. Disa Corporación Petrolífera owns more than 10% of Sacyr, S.A.'s shares. Disa Corporación is not publicly held, and no publicly held corporation owns 10% or more of its stock.

Petitioner Webuild S.p.A. (IMPJY) is a company formed under and governed by the laws of the Italian Republic and listed on the stock exchange market. Webuild S.p.A. is subject to the management and coordination of Salini Costruttori S.p.A., which owns 100% of Salini S.p.A.'s share capital; Salini S.p.A. owns 39.62% of Webuild S.p.A.'s ordinary share capital. Three Italian banks, CDP Equity S.p.A., Intesa Sanpaolo S.p.A., and Unicredit S.p.A. own, respectively, 16.45%, 4.63%, and 4.93% of Webuild S.P.A.'s share capital.

Petitioner Jan De Nul N.V. is a privately held corporation formed under and governed by the laws of the Kingdom of Belgium, and its parent company is Sofidra, S.A, a privately held corporation formed

under and governed by the laws of the Grand Duchy of Luxembourg. No publicly held corporation owns 10% or more of Jan De Nul, N.V.'s or Sofidra, S.A.'s stock.

PARTIES TO THE PROCEEDING

Petitioners, who were the Plaintiffs-Appellants in the Eleventh Circuit, are Grupo Unidos por el Canal, S.A., Sacyr, S.A., Webuild, S.p.A., and Jan de Nul, N.V.

Respondent, who was the Defendant-Appellee in the Eleventh Circuit, is Autoridad del Canal de Panama.

RELATED PROCEEDINGS

Grupo Unidos por el Canal, S.A., et al. v. Autoridad del Canal de Panama, No. 1:20-cv-24867, U.S. District Court for the Southern District of Florida. Judgment entered November 18, 2021 and amended December 9, 2021.

Grupo Unidos por el Canal, S.A., et al. v. Autoridad del Canal de Panama, No. 21-14408, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered August 18, 2023.

Grupo Unidos por el Canal, S.A., et al. v. Autoridad del Canal de Panama, No. 23A369, Supreme Court of the United States. Application granted by Justice Thomas extending the time to file until December 16, 2023 on October 24, 2023.

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PETITION FOR WRIT OF CERTIORARI

Informed consent is the cornerstone of arbitration. By selecting arbitration, parties give up most of their rights to challenge the merits of an arbitral decision as well as many other protections routinely afforded to litigants in federal court. But this system works only if parties are able to consent *meaningfully*. That, in turn, requires arbitrators to disclose any potential conflicts of interest. Only then can parties make an informed decision to trade off the rights ordinarily incident to judicial processes for the benefits of arbitration. And that fundamental safeguard is enshrined in the Federal Arbitration Act ("FAA"), which provides that one of the few bases for vacating an arbitral award is "where there was evident partiality . . . in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2).

That is precisely what this Court held over fifty years ago in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). Interpreting the "broad statutory language" of the FAA, the Court enforced the "simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." *Id.* at 149–50. Indeed, even though there was no evidence of actual bias in that case, the Court emphasized that the "appearance of bias" created by the arbitrator's failure to disclose a business relationship with a party required vacatur. *Id.* In the words of Justice White, 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 (White, J.,

concurring). The Court thus explained that it could "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.

Notwithstanding *Commonwealth Coatings*'s clear holding, the lower courts are deeply divided over the standard for determining whether an arbitrator's failure to disclose evinces partiality. The majority of circuits have erroneously interpreted Justice White's concurrence—in which he not only expressly joined the majority but added remarks fully consistent with it—as transforming the *Commonwealth Coatings* majority opinion into a nonbinding plurality opinion. *See infra* pp. 15–19. And this error has spawned a three-way split amongst the circuits. Six circuits will find evident partiality only if a reasonable person would *have to* conclude that an arbitrator was partial to one party to the arbitration. *E.g.*, *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984); *see also infra* pp. 16–19. The Ninth Circuit, in contrast, correctly treats this Court's decision in *Commonwealth Coatings* as binding and finds "'evident partiality' [to be] present when undisclosed facts show 'a reasonable impression of partiality.'" *Schmitz v. Zilveti*, 20 F.3d 1043, 1046 (9th Cir. 1994). And in the middle, the Eleventh Circuit at times recites a standard akin to the Ninth Circuit, but in practice follows an approach similar to the majority rule. *See infra* pp. 20–21. In sum, "the circuits are split on what constitutes 'evident partiality.'" Merrick T. Rossein & Jennifer Hope, *Disclosure and Disqualification Standards for Neutral*

Arbitrators, 81 St. John's L. Rev. 203, 212 (2007); *see also Ploetz ex rel. Ploetz, 1985 Tr. v. Morgan Stanley Smith Barney LLC*, 894 F.3d 894, 898 (8th Cir. 2018) (noting "uncertainty over the proper interpretation of the term 'evident partiality' that followed the *Commonwealth Coatings* decision").

This is an ideal vehicle to resolve the circuit split because, applying the correct standard as set forth in *Commonwealth Coatings* to this case, it is clear that the arbitrators' nondisclosures require vacatur. A reasonable person would surely see the potential for bias in the arbitrators' failure to disclose that Respondent's four-time wing arbitrator awarded the tribunal president a lucrative appointment in the middle of the arbitration, that Respondent's lawyers secretly served as co-arbitrators alongside the arbitrators here both before and during the arbitral proceedings, and that another of Respondent's lawyers appeared again before one of the arbitrators in another case. Moreover, impartiality is especially important in international cases like this one, where arbitration ensures that parties from different countries have their disputes resolved in a neutral forum. Petitioners' only recourse is vacatur.

This Court should grant certiorari.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 78 F.4th 1252 and is reproduced at Pet.App. 1a–23a. The District Court's amended order is not reported but is available at 2021 WL 5834296 and is reproduced at Pet.App. 24a–52a. (The District Court's initial order was substantively identical, but was amended to

correct certain references to Respondent's name, *see* Pet.App. 24a.)

JURISDICTION

The Eleventh Circuit entered judgment on August 18, 2023. On October 24, 2023, Justice Thomas extended the time to file a petition for certiorari until December 16, 2023. This petition was timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

Chapter 1 of the FAA provides:

> "[T]he United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . . where there was evident partiality or corruption in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2).

Chapter 2 of the FAA provides:

> "Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207.

Article V of the New York Convention provides:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against

whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

…

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

…

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

…

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

STATEMENT OF THE CASE

A. Legal Background

1. Arbitration awards "are not self-enforcing and are only given legal effect through court orders and judgments enforcing them." 3 Martin Domke, Domke on Commercial Arbitration § 42:1 (3d ed. 2022). The prevailing party in an arbitration often goes to court seeking a judgment which recognizes and enforces (*i.e.*, confirms) the award. The losing party may oppose any attempted confirmation of the award and may also move to vacate the award in the jurisdiction where the arbitration was seated.

In the United States, the FAA provides the framework for judicial review and enforcement of arbitral awards.

Chapter 1 of the FAA generally governs the treatment of awards issued by arbitral tribunals seated in the United States. Chapter 1 provides for vacatur of such awards where, for example, "the award was procured by corruption, fraud, or undue means," "the arbitrators exceeded their powers," or the arbitrators were guilty of "misbehavior by which the rights of any party have been prejudiced." 9 U.S.C. § 10(a). Key here, Section 10 also calls for vacatur when an arbitrator is tainted by "evident partiality." *Id.* § 10(a)(2).

Chapter 2 of the FAA governs the recognition and enforcement of international arbitration awards that are subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). *See Corporación AIC, SA v. Hidroeléctrica Santa Rita S.A.*, 66 F.4th 876, 880, 884 & n.5 (11th Cir. 2023) (en banc); 9 U.S.C. §§ 201, 207.

Vacatur by the courts of the jurisdiction where the arbitration took place is also a basis to deny confirmation. *See* New York Convention, Art. V(1)(e).

An award may fall under both Chapter 1 and 2 of the FAA if, as in the case here, the arbitration was seated in the United States but involved international parties. *See* 9 U.S.C. § 208. In such circumstances, courts have held that vacatur of the award is governed by Chapter 1, Section 10 of the FAA. *See, e.g.*, *Hidroeléctrica*, 66 F.4th at 886–87, 890.

2. This Court addressed Section 10 in *Commonwealth Coatings*, 393 U.S. at 145. Specifically, the Court addressed when an arbitrator's "evident partiality" requires vacatur. *See id.* at 147. There, the arbitrator failed to disclose that he had prior business dealings with one of the parties, who 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.* at 146. But as the Court explained, there was no evidence that the arbitrator "was actually guilty of fraud or bias in deciding th[e] case" and the Court had "no reason, apart from the undisclosed business relationship, to suspect him of any improper motives." *Id.* at 147; *see also id.* at 151 n.* (White, J., concurring).

Even so, in an opinion authored by Justice Black, joined by five other Justices, and reported as "the opinion of the Court," the Court called for vacatur. *Id.* at 145–50. The Court held that the "broad statutory language" of the FAA, including specifically the "evident partiality" standard, requires arbitrators to avoid not only actual bias but "even the appearance of bias." *Id.* Thus the undisclosed business relationship

alone was enough to show a "manifest violation of the strict morality and fairness Congress would have expected" and to require that the award be vacated. *Id.* at 147–48. The Court emphasized that it could "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 further reasoned that arbitration rules and judicial ethics canons alike "rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Id.* at 150. Indeed, "we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review." *Id.* at 149.

Justice White authored a concurrence, joined by Justice Marshall. He expressly stated that he was "glad to join my Brother Black's opinion" but wrote separately to make some "additional remarks." *Id.* at 150 (White, J., concurring). Justice White explained that unlike judges, "arbitrators 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.* Nevertheless, he 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. Indeed,

because the consent of the parties—the very cornerstone of arbitration—is only meaningful when it is informed, arbitrators should "err on the side of disclosure." *Id.* at 151–52. Justice White agreed with the majority that the appearance of bias required vacatur despite the arbitrator being in fact "entirely fair and impartial." *Id.* at 151 n.*

3. Despite the unambiguous vote line-up of *Commonwealth Coatings* and Justice White's own words, "most courts have concluded that Justice White did not in fact join" Justice Black's opinion. *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 252 n.10 (3d Cir. 2013); *see also, e.g.*, *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1200 (11th Cir. 1982) (per curiam) (describing Justice Black's opinion as a "plurality opinion"); *Morelite*, 748 F.2d at 82–83 & n.3 (concluding Justice Black's opinion was written only "for a plurality" because Justice Black's and Justice White's opinions are "impossible to reconcile"). Worse still, many courts have ignored *Commonwealth Coatings* altogether and defined for themselves the meaning of evident partiality "on a relatively clean slate." *Id.* at 83; *see also Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983) (asserting that *Commonwealth Coatings* "provides little guidance because of the inability of a majority of Justices to agree on anything but the result"). Most courts have thus disregarded the Court's clear holding and instead formulated their own standards for assessing evident partiality. *See infra* pp. 15–21.

B. Factual Background

1. A Man, A Plan, A Canal, Panama!

In 2009, the Panamanian governmental agency tasked with the operation and management of the Panama Canal (Autoridad del Canal de Panama or "ACP") awarded Petitioners a multi-billion dollar contract for the design and construction of a new set of locks to expand the Panama Canal. Pet.App. 3a, 25a–26a.

As part of that contract, the parties agreed to arbitrate any disputes. In particular, the parties agreed that disputes would be resolved through arbitration in Miami, Florida under the Rules of Arbitration of the International Chamber of Commerce ("ICC Rules"), Pet.App. 4a, and that any arbitration "shall be governed by the United States Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*." Dist.Ct.Dkt. 55-8 at Sub-Clauses 20.6(e), (f); Dist.Ct.Dkt. 55-9 at Sub-Clause 9.2(e), (f). The parties thus specifically contracted for an arbitration conducted by impartial arbitrators. *See* ICC Rules Art. 11; 9 U.S.C. § 10(a)(2).

Complications and construction delays spawned multiple arbitrations between the parties. Pet.App. 3a. This case concerns the "Panama 1 Arbitration" in which Petitioners brought several contractual claims against ACP in 2015 in connection with the use of a particular source of basalt rock as the concrete aggregate. Pet.App. 3a–4a, 25a–27a.

2. Panama 1 Arbitration

Pursuant to the ICC Rules, ACP nominated Dr. Robert Gaitskell as its party-appointed arbitrator and Petitioners nominated Mr. Claus von Wobeser as

theirs. Pet.App. 4a. The parties agreed on a procedure for selecting the tribunal president, which resulted in the nomination of Mr. Pierre-Yves Gunter. *Id.*

Each arbitrator submitted a "statement of acceptance, availability, impartiality and independence," as required under the ICC Rules. Pet.App. 4a; *see also* ICC Rules Art. 11(2) ("The prospective arbitrator shall disclose . . . any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality"). The disclosure form instructed that the arbitrator should take into account "whether there exists any past or present relationship, direct or indirect, between you and any of the parties, their related entities or their lawyers or other representatives, whether financial, professional or of any other kind" and required any disclosure be "complete and specific," including dates, financial arrangements, and details of individuals. *E.g.*, Dist.Ct.Dkt. 55-12.

Gaitskell disclosed that "[a]s the parties [were] aware, [he was] already a co-arbitrator in [an] associated case" over the canal disputes. Pet.App. 5a. Von Wobeser disclosed that he had previously been appointed by Panama in a concluded arbitration and, in an abundance of caution, that both parties' counsel "are important law firms active in international arbitration and therefore [he had] and ha[s] professional relationship[s] with both law firms." Pet.App. 5a. Gunter affirmed that he had nothing to disclose. *Id.*

By April 2016, all three arbitrators were confirmed and the arbitration commenced. Pet.App. 4a. Although the duty to disclose continues throughout the course of the arbitration, ICC Rules Art. 11(3), the arbitrators made no additional disclosures addressing the relationships challenged here.

Following the completion of the proceedings, the arbitral tribunal issued a Partial Award in September 2020 addressing liability and the main damages determination, and a Final Award in February 2021 addressing the remaining issues. Pet.App. 6a, 9a. The tribunal held overwhelmingly against Petitioners for all but a few minor claims, awarding ACP approximately $285 million in damages and costs—which Petitioners have since paid in full. *Id.*

3. The Arbitrators' Failures to Disclose

A review of the tribunal's reasoning in the Awards raised doubts in Petitioners' minds as to the arbitrators' impartiality. *See* Dist.Ct.Dkt. 55-3 ¶ 28. Consequently, Petitioners conducted their own research and asked the arbitrators to confirm that their disclosures were complete—a process that ultimately revealed that all three of the arbitrators had failed to disclose material relationships. *Id.* ¶¶ 28–43. In particular, Petitioners learned the following:

a. Just two months before closing arguments in Panama 1, ACP's wing arbitrator (Gaitskell)—whom ACP has nominated as an arbitrator in a total of four arbitrations arising from the expansion project—helped appoint the tribunal president (Gunter) as arbitral president in a separate arbitration. *See* Pet.App. 7a, 13a. An arbitrator can earn hundreds of

thousands of dollars from this sort of appointment. Thus, ACP's four-time wing arbitrator helped award the tribunal president a lucrative contract in the middle of the arbitration. Neither Gaitskell nor Gunter disclosed this to Petitioners when it occurred.

b. In addition, two of ACP's lawyers in the arbitration served as co-arbitrators alongside two of the arbitrators here both before and during the arbitration proceedings. *See* Pet.App. 8a, 15a–17a. During the closing arguments and deliberations of Panama 1, ACP's lead lawyer—Mr. Jana—was working alongside von Wobeser as co-arbitrator in another matter. *See id.* And shortly before the arbitrations between the parties commenced, another of ACP's lawyers—Mr. Loftis—served as a co-arbitrator with Gaitskell. *See id.* In other words, two of ACP's lawyers, including its lead lawyer, served as co-jurists with two members of the arbitral panel. ACP knew it. ACP's lawyers knew it. And the two arbitrators knew it. But because neither arbitrator disclosed this relationship, Petitioners alone remained in the dark.

c. Finally, beginning in 2016, Gaitskell presided over another arbitration in which ACP's lawyer, Mr. McMullan, appeared as counsel. *See* Pet.App. 9a, 18a. Such relationships too must be disclosed because, unlike in the judicial context, a lawyer's *appearance* before an arbitrator often means that lawyer had a hand in *appointing* that arbitrator and thus providing him with a financial benefit. *Cf.* Pet.App. 40a. But no one had disclosed this relationship to Petitioners either.

4. The ICC Challenge

Petitioners challenged all three arbitrators before the ICC Court, seeking their removal under the ICC Rules due to the failure to disclose important relationships that bring their neutrality into question. Pet.App. 8a. The ICC Court agreed that a number of the relationships at issue should have been disclosed. *Id.* In particular, because an arbitrator should disclose professional relationships with counsel to one of the parties, the ICC Court concluded that Gaitskell should have disclosed his arbitration where McMullan appeared as counsel and von Wobeser should have disclosed his arbitration where Jana was his co-arbitrator. *Id.* at 9a. The ICC Court also assumed without deciding that the Gunter-Gaitskell cross-appointment should have been disclosed. Dist.Ct.Dkt. 55-62. Nevertheless, seemingly applying an actual bias standard, the ICC refused to remove the arbitrators. *See* Pet.App. 8a; Dist.Ct.Dkt. 55-62 at 8 ("The mere theoretical opportunity to discuss the matter without the third arbitrator . . . cannot qualify as a reasonable doubt as to Mr Gunter's independence or impartiality."); *id* at 10 ("Regardless of whether or not Mr von Wobeser should have specifically disclosed his role as arbitrator together with Mr Jana, the Court does not consider that role to be such that it calls into question Mr von Wobeser's continued independence or impartiality.").

C. Procedural Background

Petitioners timely moved to vacate both the Partial Award and the Final Award in the Southern District of Florida. Pet.App. 8a–9a. The District Court had jurisdiction pursuant to 28 U.S.C. § 1330(a) (because

this is a "nonjury civil action against a foreign state" and ACP waived its immunity by agreeing to and actually participating in arbitration) and 28 U.S.C. § 1331 (because the case falls under the New York Convention, 9 U.S.C. § 203).

The District Court consolidated the two cases and directed the parties to file consolidated motions. Pet.App. 10a. Petitioners argued that the arbitrators' nondisclosures evinced partiality and thus required vacatur. Pet.App. 9a–10a. ACP opposed vacatur and also sought to confirm the Awards. Pet.App. 10a, 29a. The District Court denied Petitioners' motion to vacate and confirmed the Awards. Pet.App. 10a, 50a.

Petitioners appealed, arguing that the evident partiality of the arbitrators—evidenced by their failure to disclose key relationships with counsel and with one another—required vacatur under both the New York Convention and 9 U.S.C. § 10(a)(2). *See* CA11.Dkt. 23.

While the appeal was pending, the Eleventh Circuit changed its law governing vacatur. Pet.App. 2a–3a, 10a–11a. Previously, the Eleventh Circuit was the only circuit to hold that Article V of the New York Convention supplies the grounds for vacatur of international arbitral awards rendered by tribunals seated in the United States. Pet.App. 10a–11a; Restatement (Third) of Int'l Commercial & Inv'r-State Arb, Am. Law Inst., Proposed Final Draft (2019) § 4.9 cmt. a, note a. But in *Hidroeléctrica*, 66 F.4th at 880, the en banc Eleventh Circuit overruled its precedent and now agrees that Chapter 1 of the FAA provides the proper grounds for vacatur of such awards. Pet.App. 2a–3a, 10a–11a. At the court's request,

Petitioners filed a supplemental brief explaining that they had already established that vacatur was warranted under 9 U.S.C. § 10(a)(2). CA11.Dkt. 68. ACP agreed that no remand was needed. CA11.Dkt. 67.

The Eleventh Circuit affirmed. The court first acknowledged that arbitrators must "disclose information liberally," only to later require that evident partiality be "strictly construed." Pet.App. 14a, 15a. And although the court recited that evident partiality is established when "the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists," it also required that the "partiality must be 'direct, definite and capable of demonstration.'" Pet.App. 15a. The court ultimately rejected Petitioners' arguments because, in its view, the record did not indicate the arbitrators actually "evinced bias" or were "improperly influenced" because of their connections to ACP's lawyers and to one another. Pet.App. 15a–19a.

This petition follows.

REASONS FOR GRANTING THE WRIT

The Courts of Appeals have divided over the test for establishing evident partiality under the FAA. In so doing, they have issued decisions that openly conflict with this Court's decision in *Commonwealth Coatings* and that unduly weaken the evident-partiality standard, threatening the neutrality and integrity of arbitration. This is an ideal vehicle to resolve this important circuit split because *Commonwealth Coatings*, properly applied, mandates vacatur in this case. Certiorari should thus be granted.

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED.

The majority of courts have disregarded the clear holding of *Commonwealth Coatings* and, in so doing, have created an entrenched circuit split over the test for determining when an arbitrator's failure to disclose constitutes evident partiality.

This split is widely acknowledged by courts and commentators alike. *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) ("The circuits have not reached a consensus on the meaning of 'evident partiality.'"); *Montez v. Prudential Sec., Inc.*, 260 F.3d 980, 983 (8th Cir. 2001) ("The absence of a consensus on the meaning of 'evident partiality' is evidenced by the approaches adopted by the different circuits."); *Kinn v. Alaska Sales & Serv., Inc.*, 144 P.3d 474, 485 (Alaska 2006) (noting that "[f]ederal courts, and state courts interpreting similar provisions have articulated different versions of [the evident partiality] standard"); Edward C. Dawson, *Speak Now or Hold Your Peace: Prearbitration Express Waivers of Evident-Partiality Challenges*, 63 Am. U. L. Rev. 307, 324 (2013) (describing "longstanding, wide-ranging, and intractable judicial division over evident-partiality doctrine."); 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) (noting "a myriad of inconsistent judicial rulings" and "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").

Especially because this split arises from "uncertainty among the courts of appeals about the holding of *Commonwealth Coatings*," *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157, 159 (8th Cir. 1995), only this Court can provide a definitive answer and restore much-needed uniformity.

A. Six Circuits Ask Whether a Reasonable Person Would Have to Find Partiality.

Most Courts of Appeals have rejected *Commonwealth Coatings* by misconstruing the majority opinion as somehow non-binding. *See infra* pp. 8, 15–21; *see also Merit,* 714 F.2d at 682; *Republic of Argentina v. AWG Grp. Ltd.*, 894 F.3d 327, 334 n.2 (D.C. Cir. 2018). And instead of applying this Court's appearance of bias standard, six circuits ask whether a reasonable person would *have* to conclude that an arbitrator was partial to one side.

1. The Second Circuit was the first circuit to adopt this erroneous standard. *Morelite*, 748 F.2d at 82–84 & n.3. The court erroneously concluded that Justice White's concurrence is "impossible to reconcile" with Justice Black's "plurality" opinion and thus "narrow[s]" the holding of *Commonwealth Coatings*. *Id.* at 83 n.3. Even then, rather than apply the concurrence directly, the Second Circuit declared itself free to craft the "evident partiality" standard "on a relatively clean slate." *Id.* at 83. And in the Second Circuit's view, the "appearance of bias" standard set the bar "too low." *Id.* at 83–84. As a result, the Second Circuit has settled on a standard that cannot be squared with the either the majority or the concurrence of *Commonwealth Coatings*: that evident partiality only exists when "a reasonable person would

have to conclude that an arbitrator was partial to one party to the arbitration." *Id.* at 84. Recently, the court applied that standard to conclude that an arbitral award could not be vacated despite the arbitrator's failure to disclose that he had been simultaneously serving alongside a party's counsel as a co-arbitrator in another matter. *See Andres Petroleum Ecuador Ltd. v. Occidental Expl. & Prod. Co.* , No. 21-3039, 2023 WL 4004686 (2d. Cir. June 15, 2023), *cert petition filed* Nov. 9, 2023 (No. 23-506).

2. The Sixth Circuit "agree[s] with the Second Circuit in *Morelite* . . . that in view of Justice White's concurrence in *Commonwealth Coatings*, the plurality's appearance of bias discussion should be considered dicta." *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 n.19 (6th Cir. 1989); *see also Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 644 n.5 (6th Cir. 2005) ("[A] majority of the Court did not endorse the 'appearance of bias' standard set forth in the plurality opinion."). The court also adopted the Second Circuit's test: that evident partiality exists when "a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration." *Apperson*, 879 F.2d at 1358 (quotations omitted).

3. The Fourth Circuit has similarly relied on Justice White's concurrence to hold that "a mere appearance of bias is insufficient to demonstrate evident partiality." *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993). Instead, the court looks to factors such as the extent and character of the interest, the directness of the relationship, the connection to the arbitration, and the proximity in time to determine whether "a reasonable

person would have to conclude that an arbitrator was partial to the other party to the arbitration." *Id.*; *see also ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 500 (4th Cir. 1999); *Three S Delaware, Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 530 (4th Cir. 2007).

4. Also accepting the erroneous premise that Justice Black's opinion is a "plurality opinion," *UBS Fin. Servs.*, 997 F.3d at 22, the First Circuit holds that evident partiality exists when "a reasonable person would have to conclude that an arbitrator was partial to one party to an arbitration." *JCI Commc'ns, Inc. v. Int'l Bhd. of Elec. Workers*, 324 F.3d 42, 51 (1st Cir. 2003). The court thus imposes a higher standard than "the appearance of possible bias." *Id.*

5. The Third Circuit has likewise held that "Justice White's concurrence is the narrowest grounds for judgment, which means that it is the holding of the Court." *Freeman*, 709 F.3d at 252; *see also id.* (observing that "the plurality's"—that is, Justice Black's—"discussion of appearances is nonbinding"). This misapplication of the *Marks* rule allowed the court to require the "stronger showing" that "a reasonable person would have to conclude that [the arbitrator] was partial to one side." *Id.* at 253. The court requires that "[t]he conclusion of bias must be ineluctable." *Id.*

6. For its part, the Fifth Circuit initially recognized *Commonwealth Coatings* as binding and rejected the Second Circuit's attempt to deviate from it. *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 436 F.3d 495 (5th Cir. 2006). But the en banc court later vacated that opinion and reached 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, which called out the majority for "evading the law of the Supreme Court," *id.* at 288 (Reavley, J., dissenting), the en banc Fifth Circuit concluded that Justice White's joinder was "magnanimous but significantly qualified," leaving the opinion of the Court just a "plurality opinion," *id.* at 281–82. The Fifth Circuit accordingly endorsed its own heightened standard and explicitly rejected the Ninth Circuit's adherence to the *Commonwealth Coatings* majority. *Id.* at 282–83. The Fifth Circuit subsequently endorsed the Second Circuit's approach. *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").[1]

B. The Ninth Circuit Asks Whether the Undisclosed Facts Show a Reasonable Impression of Partiality.

In contrast, the Ninth Circuit correctly identified that Justice Black's opinion for the Court "is not a plurality opinion" and has binding force. *Schmitz*, 20 F.3d at 1045. As the court explained, "[g]iven Justice White's express adherence to the majority opinion in

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[1] The Eighth Circuit has expressly declined to take a position on the holding of *Commonwealth Coatings* or the appropriate standard for evident partiality. *See Olson*, 51 F.3d at 159 (concluding it "need not sort out" the "uncertainty" over the "holding of *Commonwealth Coatings*" to decide the case); *Ploetz*, 894 F.3d at 898 (acknowledging that the Eighth Circuit's "own case law reflects 'uncertainty' over the proper interpretation of the term 'evident partiality' that followed the *Commonwealth Coatings* decision").

Commonwealth Coatings," it is "clear that the majority opinion, including its 'appearance of bias' language, received at least five votes." *Id.* at 1047.

Interpreting the majority opinion, the Ninth Circuit held that "the best expression of the *Commonwealth Coatings* court's holding" is that "'evident partiality' is present when undisclosed facts show 'a reasonable impression of partiality.'" *Id.* at 1046. This standard remains good law in the Ninth Circuit. *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) (applying "'reasonable impression of partiality' standard"); *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1105–06 (9th Cir. 2007) (same).

Several state supreme courts have also adhered to this approach. *See, e.g.*, *Burlington N. R.R. Co. v. TUCO Inc.*, 960 S.W.2d 629, 633–37 (Tex. 1997); *Narayan v. Ass'n of Apartment Owners of Kapalua Bay Condo.*, 398 P.3d 664, 676 & n.14 (Haw. 2017); *but see Dowd v. First Omaha Sec. Corp.*, 495 N.W.2d 36, 43 (Neb. 1993).

C. The Eleventh Circuit Purports to Assess a Reasonable Impression of Partiality, But in Practice Requires Actual Bias.

At times, the Eleventh Circuit has articulated a standard similar to the one followed by the Ninth Circuit, but the court's practice has now converged with the Second Circuit's.

In *University Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331 (11th Cir. 2002), the

Eleventh Circuit 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." *Id.* at 1339 (internal quotation omitted). Applying that standard, 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 (emphasis in original).

However, the Eleventh Circuit has also applied a gloss to this standard, requiring that the alleged partiality be "direct, definite and capable of demonstration." *Gianelli Money Purchase Plan & Trust v. ADM Inv. Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998). It interprets this language to mean that "the mere appearance of bias or partiality is not enough to set aside an arbitration award." *Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 433 (11th Cir. 1995).

This language—which the Eleventh Circuit applies "strictly," Pet.App. 15a—effectively converts the reasonable impression test into something resembling the Second Circuit's approach, as illustrated by the panel's decision in this case. As a result, the Eleventh Circuit's test is significantly more stringent than the Ninth Circuit's and more closely resembles the test followed by the Second Circuit and others.

II. THE ELEVENTH CIRCUIT'S DECISION IS WRONG.

Commonwealth Coatings is clear that an arbitral award should be vacated when an arbitrator fails to

disclose information that creates a reasonable impression of partiality. The Eleventh Circuit erred by effectively raising the bar to require actual bias. Applying the correct standard, the undisclosed relationships at issue here plainly evince partiality.

1. *Commonwealth Coatings* is binding precedent. *Contra Middlesex*, 675 F.2d at 1200 (referring to a "plurality opinion"). Because the majority opinion is unambiguously an opinion of the Court, joined by six Justices, there is no need for application of the *Marks* rule. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When 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[.]") (cleaned up) (emphasis added); *see also* Richard Re, *Beyond the* Marks *Rule*, 132 Harv. L. Rev. 1942, 1944, 2001–04 (2019). The *Commonwealth Coatings* majority opinion is therefore binding on lower courts. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). And *Commonwealth Coatings* squarely holds that arbitrators must "disclose to the parties any dealings that might create an impression of possible bias." 393 U.S. at 149. Actual bias is not required. *Id.* at 147.

Even looking to the concurrence does not change the analysis. Justice White simply observed that arbitration has unique attributes—unlike judicial processes, parties are the "architects of their own arbitration process" and so may consent to arbitrators with some connections to the business world. *Id.* at 150, 151 (White, J., concurring). But that is perfectly consistent with the requirement that arbitrators

disclose all non-trivial relationships. Parties cannot meaningfully consent without that knowledge. *Id.* at 151 (disclosure allows parties to either "reject the arbitrator or accept him *with knowledge* of the relationship") (emphasis added). It is therefore not at all surprising that Justice White joined the majority opinion in full, requiring vacatur despite specifically emphasizing that the case involved no actual bias. *Id.* at 150, 151 n.* Thus, both the majority *and* the concurrence rejected the actual bias standard.

2. Instead of faithfully applying *Commonwealth Coatings*, the Eleventh Circuit effectively required the actual bias standard that this Court rejected. To be sure, the court dutifully recited its precedent holding that a movant may prove evident partiality by showing that "the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists." Pet.App. 14a. But the court's analysis transformed that standard into something far more stringent.

To begin, the court applied a "presumption against vacatur," "strictly construed" the meaning of evident partiality, and required any partiality be "direct, definite and capable of demonstration." Pet.App. 15a. Then, in analyzing the undisclosed relationships, the court excused each failure to disclose by asserting a lack of actual bias. For example, the court rejected Petitioners' challenge to the failure to disclose the lucrative, mid-arbitration appointment that ACP's four-time wing arbitrator Gaitskell helped award to Gunter, the tribunal president, because there was no "indication that Gunter evinced bias or that he was in any way influenced in the Panama 1 Arbitration because he was selected to serve in another arbitration

proceeding." Pet.App. 15a–16a. And although *Commonwealth Coatings* plainly does not require corrupt motive, the court went on to posit that "there were many sound and impartial reasons" for the appointments, including Gunter's extensive experience. Pet.App. 16a.

The court also rejected Petitioners' challenge to the arbitrators' failure to disclose that they sat as co-arbitrators with ACP's lawyers both before and during the proceedings, because it concluded that a reasonable person would not suspect that there was "improper[] influence[]" and because the arbitrators affirmed that they would remain impartial and independent. Pet.App. 17a; *see also id.* at 18a (again emphasizing the arbitrator's experience). Finally, the court rejected the challenge to a lawyer's repeat appearance in front of an arbitrator because "familiarity does not indicate bias." Pet.App. 18a. As this analysis makes clear, the Eleventh Circuit erroneously required much more than the appearance of bias found sufficient in *Commonwealth Coatings*.

3. Under a proper application of *Commonwealth Coatings* and the FAA, the arbitrators' failure to disclose the numerous relationships at issue here creates a reasonable impression of possible bias.

a. ACP's lawyers, including its lead lawyer in this case, secretly served as co-arbitrators with two of the arbitrators in this case both before and during these arbitral proceedings. It is not hard to understand why a party would perceive possible bias when a purportedly neutral decisionmaker collaborates with opposing counsel as decision-makers in another case and declines to disclose it. When an arbitrator sits

with counsel as a co-arbitrator in another matter, they develop a relationship as professional peers serving as neutral decision-makers. That obviously has the potential to affect their relationship and perceptions of one another when, in a different proceeding, one appears as an arbitrator and the other as an advocate. Moreover, co-service inevitably creates an opportunity for *ex parte* communication and real-time, behind-the-scenes insight into the arbitrator's views and decision-making process.

Indeed, such an arrangement would be unthinkable in the judicial context. Imagine a situation in which one attorney serves as a co-jurist with a judicial panel member on one day; appears before that jurist as an advocate on the next; and everyone knows about it except her opposing counsel. To quote *Commonwealth Coatings,* there can be no doubt that such a relationship "might create an impression of possible bias." 393 U.S. at 149.

At the very least, this relationship should have been disclosed so that "the parties [were] free to reject the arbitrator or accept him with knowledge of the relationship." *Id.*at 151 (White, J., concurring). *Cf. Valrose Maui, Inc. v. Maclyn Morris, Inc.*, 105 F. Supp. 2d 1118, 1124 (D. Haw. 2000) (vacating award due to evident partiality where arbitrator failed to disclose *ex parte* communication with a party's attorney and appointment as a mediator in an unrelated matter); International Bar Association, Guidelines on Conflicts of Interest in International Arbitration, Part II ¶ 6 (2014) (recommending disclosure of prior service in other tribunals with one of the counsel in the current proceedings if it "may create a perceived imbalance within the tribunal"). As the Eleventh Circuit itself

has held, evident partiality arises where an arbitrator fails to disclose that "concurrently with the arbitration, [he is] partak[ing] in a proceeding in which counsel for one of the parties is also participating." *Univ. Commons*, 304 F.3d at 1340 (emphasis omitted). After all, actions in one matter "could be seen as a way to curry favor" in the other. *Id.* at 1341. Whether the arbitrator and counsel act as co-counsel or as co-arbitrators, the failure to disclose a colleague relationship with opposing counsel raises questions as to the arbitrator's neutrality. The Eleventh Circuit erred by concluding otherwise here.

b. The same is true of ACP's four-time wing arbitrator, Gaitskell, helping to award the arbitral president, Gunter, a lucrative appointment in the middle of this case. In plain terms, when an arbitrator is appointed to be a president of another tribunal, that president may earn hundreds of thousands of dollars for his service. The president is undoubtedly indebted to the co-arbitrator, which could manifest in the president (consciously or subconsciously) siding with the co-arbitrator and disrupting the three-way deliberative process among the arbitrators.

Here, ACP's repeat wing arbitrator—who himself is incentivized to please ACP in order to obtain future appointments, *see* Hans Smit, *The Pernicious Institution of the Party-Appointed Arbitrator*, 33 Columb. FDI Persp. 1, 1 (2010) ("[A]n arbitrator's personal incentive is to secure reemployment by providing his or her party with a favorable outcome.")—provided the dispositive vote to grant such a benefit to the tribunal president. This is just one step removed from ACP itself providing the tribunal president with such a benefit. At the very

least, it creates an impression of bias. *See Burlington*, 960 S.W.2d at 630 (finding evident partiality where neutral arbitrator failed to disclose that he accepted, during the course of the arbitration proceedings, a referral from the law firm of a non-neutral co-arbitrator); *Tatneft v. Ukraine*, 21 F.4th 829, 839 (D.C. Cir. 2021) (explaining that "an unusually lucrative fee or an unusually prestigious appointment" would be a "reason to doubt [the arbitrator's] impartiality," thus requiring disclosure, but upholding the award only because Ukraine failed to identify any such facts).

The Eleventh Circuit was wrong to focus on the potentially innocent reason for the cross-appointment and the lack of actual bias. Party confidence in the impartiality of the arbitrators is essential to the integrity of arbitration, especially on the international plane, where arbitration is often selected because it ensures a neutral forum for parties from different countries to resolve their disputes. The law is clear that "the slightest pecuniary interest" on behalf of a judge justifies setting aside her decision, even if the judge is not "likely to [be] influence[d]" by the financial incentive. *Commonwealth Coatings*, 393 U.S. at 148 (quoting *Tumey v. Ohio*, 273 U.S. 510 (1927)); *see also Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 870, 886 (2009) (holding that the defendant's campaign contributions to a judge's election created a "serious risk" of bias because it "offer[ed] a possible temptation to the average . . . judge to . . . lead him not to hold the balance [between the parties] nice, clear, and true") (citation omitted); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 61 (1972) (relying on the "incentive" rather than "special prejudic[e] in [a] particular case" or the eventual availability of an "impartial

adjudication"). The same principle applies to arbitrators who fail to disclose such financial incentives—indeed, it applies with greater force. *See Commonwealth Coatings*, 393 U.S. at 148–49. More importantly, it was for the parties, not the arbitrators, to make any tradeoff between expertise and financial conflicts. Petitioners, however, were deprived of that choice by the arbitrators' failure to disclose this obviously troubling relationship.

c. Finally, ACP's lawyer's repeat appearance before one of the arbitrators in another case likewise should have been disclosed. After all, each arbitrator agreed to disclose "any past or present relationship, direct or indirect, between you and any of the parties . . . or their lawyers . . . , whether financial, professional or of any other kind." *E.g.*, Dist.Ct.Dkt. 55-12. This broad obligation—which the ICC Court agreed required disclosure, Pet.App. 9a—reflects the fact that, unlike in domestic litigation in courts, parties to arbitration play a key role in selecting the arbitrators who will decide their cases (and thereby generate income for those arbitrators). Thus, appearances before arbitrators in other cases indicate that a party's attorney may have played a role in their selection. And because international commercial arbitrations are generally confidential, disclosure is the only reliable way for parties to assess how often opposing counsel have appeared before and thus potentially played a role in appointing certain arbitrators.

d. These undisclosed relationships—all of which create an impression of bias in favor of ACP, the prevailing party—are particularly troubling when viewed altogether. Although Section 10(a)(2) allows

for vacatur when even a single arbitrator evinces partiality, here there are serious doubts about all three members of the tribunal.

4. Because the awards should have been vacated, it was also wrong to confirm them. The FAA and the New York Convention make clear that vacatur itself is a basis to refuse confirmation. 9 U.S.C. § 207 (adopting the Convention's grounds for refusing confirmation); N.Y. Convention Art. V(1)(e) (providing that confirmation may be refused where the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made"); *see also* CA11.Dkt. 68 at 17–18. Moreover, evident partiality calls for refusal of confirmation under several other provisions of the New York Convention. *See id.*; CA11.Dkt. 23, 39.

III. THE QUESTIONS PRESENTED MERIT THE COURT'S ATTENTION.

The Questions Presented are profoundly important.

1. It matters immensely for the operation of the rule of law in this country that this Court's decisions are followed by the lower courts. That most circuits openly disregard *Commonwealth Coatings* in order to restrict the meaning of "evident partiality" is thus reason enough to grant certiorari. The Court should take this opportunity to clarify that each Justice determines the effect of his or her vote by joining (or not joining) an opinion—vertical *stare decisis* does not permit lower courts to strip a decision of this Court of its legal force by interpreting a concurrence to be in conflict with a majority opinion that it explicitly joined.

2. In addition, in order to protect arbitration as a viable option, courts must ensure that parties get the

impartiality and disclosure they bargain for. Federal policy is "emphatic[ally] . . . in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). Arbitration lacks many of the safeguards that protect litigants in domestic court systems, such as appointment of judges after a rigorous vetting process, guaranteed judicial salaries and tenures, substantive appellate review, and adherence to *stare decisis*. Confidence in the arbitral system would quickly wane if appearances of bias went unchecked. And that is precisely why arbitrator disclosure requirements are necessary and must be strictly enforced. They are central to the integrity of a system of voluntary dispute resolution that is otherwise largely insulated from judicial review.

Indeed, disclosure is critical to ensuring the informed consent on which the entire arbitral process depends. "How arbitrators disclose potential situations of conflict to the parties is the 'cornerstone' of the entire system of arbitration. 'It is therefore of fundamental importance for the legitimacy of the entire system.'" Tom Jones, *Mourre calls for universal standard of disclosure*, GLOBAL ARBITRATION REVIEW (Feb. 20, 2023). By contracting for arbitration pursuant to the ICC Rules and the FAA, the parties here specifically agreed to arbitrate on the condition that their arbitrators would be impartial and disclose any circumstances that might create an impression of bias so the parties could decide how to proceed. Vacatur at the back-end is the only remedy that allows parties like Petitioners to enforce their front-end right to agree—or not—to an arbitral proceeding that will bind them.

Disclosure is also necessary to ensure the neutrality of the decisionmakers, which is particularly important in the context of international arbitration. Parties from different countries typically do not want to litigate a dispute in their adversary's home court; they seek neutrality by agreeing to arbitration in a neutral venue (here, parties from Europe and Panama chose the United States). *Polimaster Ltd. v. RAE Sys.*, 623 F.3d 832, 842 (9th Cir. 2010) ("[I]nternational arbitration is often preferred as a method to obtain a neutral decision maker, and to 'obviate[] the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.'") (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974)); *see also* Jan Paulsson, *International Arbitration Is Not Arbitration*, 2 Stockholm Int'l Arb. Rev. 1, 2 (2008); Dist.Ct.Dkt. 66 ¶ 16. It is therefore particularly important that this Court protect parties' ability to select neutral arbitrators in the international context.

3. There is, moreover, growing concern in the arbitral community over the potential conflicts inherent in the failure to disclose the types of relationships at issue here. As one stakeholder put it, "the most pressing concern today is the issue of conflicts of interest," including those that might arise when arbitration practitioners fail to disclose that they "repeatedly wear several hats simultaneously as arbitrator, counsel, and expert" and "appoint each other." Nassib Ziadé, *Do We Need a Permanent Investment Court?*, GLOBAL ARBITRATION REVIEW (Feb. 13, 2019) (emphasis added); *see also* Expert Report of Professor Chiara Giorgetti,

Dist.Ct.Dkt. 55-1 at 21–24 (addressing the "increasingly criticized practice" of "reciprocal or repeat appointments and of 'double hatting'"). This case presents a prime opportunity for this Court to address the need for disclosure when arbitrators serve in multiple different capacities and develop relationships with counsel in a for-profit system of dispute resolution. As *Commonwealth Coatings* held, the "simple" solution is to "require[] that arbitrators disclose" those relationships so the parties may make an informed decision on whether to proceed. 393 U.S. at 149.

4. The questions presented arise frequently and require clarity. The scope of required disclosures has the potential to affect every single arbitration governed by the FAA. And the realities of international commercial arbitration are such that arbitrators will often have relationships with counsel and with one another. Arbitrators need clarity on what they are required to disclose. Jones, *Mourre calls for universal standard of disclosure*, GLOBAL ARBITRATION REVIEW (arguing that the legitimacy of arbitration requires "not only that disclosures are made but also that there is clarity as to what should be disclosed"). Clear rules *ex ante* will reduce the need for judicial intervention *ex post*.

IV. THIS CASE IS AN IDEAL VEHICLE.

This case is an ideal vehicle for this Court to resolve the circuit split and reaffirm that *Commonwealth Coatings* sets out the standard for determining when an arbitrator's failure to disclose evinces partiality. It squarely presents the applicability of the evident partiality standard in the

context of three sets of non-disclosures—an arbitrator's service as a co-arbitrator with opposing counsel; a party's wing arbitrator helping award the arbitral president a lucrative appointment; and opposing counsel's repeat appearance before an arbitrator in another proceeding. This case thus gives the Court the opportunity to provide guidance to the lower courts both by articulating the legal standard and applying it to a diverse set of undisputed facts.[2]

CONCLUSION

This Court should grant the petition.

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[2] Petitioners note that there is overlap between this petition and the petition filed in *Occidental Exploration and Production Co. v. Andres Petroleum Ecuador Ltd.*, No. 23-506, to which the Court recently requested a response. Both present the question of the meaning of the FAA's evident partiality standard and its application to an arbitrator's service as co-arbitrator with a party's opposing counsel. As noted, this case also presents two additional undisclosed conflicts. At a minimum, if the Court grants the petition in only one of the two cases, the other should be held.