No. ____

In the

Supreme Court of the United States

DORSEY RON MCCALL,

Petitioner,

v.

APTIM CORPORATION,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

ROBERT B. ELLIS
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
(312) 862-2000

ERIN E. MURPHY
Counsel of Record
MICHAEL D. LIEBERMAN
LAUREN N. BEEBE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
erin.murphy@kirkland.com

Counsel for Petitioner

October 22, 2018

QUESTIONS PRESENTED

This case arises out of an extraordinary course of forum shopping that resulted in an extraordinary incursion on the state courts. Petitioner was sued by his former employer in state court over a contract dispute. When that litigation did not proceed to its liking, the employer reversed course and sought to compel arbitration of the same claims on which it had sued. The state court denied the motion, concluding that the employer waived its right to arbitrate by suing, and that its belated effort to escape the consequences of that choice was blatant forum shopping. Undeterred, the employer turned to the *federal* courts and persuaded a district court to overlook its waiver, compel arbitration, and enjoin the very state-court proceedings the employer had initiated. The Fifth Circuit affirmed, concluding that even if the employer waived its right to arbitrate, the court would not enforce that waiver because petitioner did not prove that he was prejudiced by being sued in state court. And it affirmed the district court's refusal to abstain from deciding the very same arbitration issue that the state court had just resolved. The first of those rulings is the product of an acknowledged circuit split that this Court previously granted certiorari to resolve, and the second creates a new one.

The questions presented are:

1. Must a party opposing arbitration on the ground of waiver by litigation conduct prove that it was prejudiced by the other party's waiver?

2. Should a federal court abstain from resolving a request to compel arbitration when a state court has already ruled on that request?

PARTIES TO THE PROCEEDING

Defendant-appellant below, who is the petitioner in this Court, is Dorsey Ron McCall.

Plaintiff-appellee below, who is the respondent in this Court, is Aptim Corporation.

CORPORATE DISCLOSURE STATEMENT

Petitioner Dorsey Ron McCall is an individual.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner Dorsey Ron McCall is embroiled in a dispute with his former employer about an alleged breach of a noncompete agreement. When the dispute arose, the employer could have invoked the agreement's arbitration clause, but instead chose to file a lawsuit against McCall in Louisiana state court, seeking damages and injunctive relief. After things started to go south in court, however, the employer (now acting through a third party to which it purportedly assigned its rights in the noncompete agreement) changed its mind, filed a demand for arbitration, and moved to voluntarily dismiss its lawsuit. The court denied the motion and stayed the arbitration, ruling that the employer waived its right to arbitrate by initiating and pursuing litigation, and that its belated efforts to get out of court amounted to blatant forum shopping.

Having been chastised for forum shopping, the employer decided to shop its case to yet another forum, this time turning to a federal district court and asking it to compel the very same arbitration the state court had just stayed. At that point, the appropriate course of action should have been clear. The state court had already concluded that the employer waived the right to arbitrate when it decided to sue McCall for damages. Second-guessing that decision not only would facilitate the employer's blatant forum shopping, but would produce exactly the kind of interference with ongoing state-court proceedings that constitutionally grounded abstention principles are designed to prevent. Nonetheless, the district court forged ahead and, after considering the very same

arguments that the state court had just rejected, effectively overruled the state court's waiver decision, ordered the parties to arbitrate, and, adding insult to injury, enjoined the state-court proceedings that the employer itself had initiated.

By affirming that decision, the Fifth Circuit exacerbated one split and created another. First, the Fifth Circuit's waiver ruling deepens a longstanding circuit split over when courts should hold a party to its waiver through litigation conduct of the right to arbitrate. While some circuits will refuse to compel arbitration whenever the party seeking it has waived its right to arbitrate, other circuits, like the Fifth Circuit in the decision below, refuse to enforce such a waiver unless the party opposing arbitration proves that it was prejudiced by that waiver—*e.g.*, that it was forced to reveal its merits strategies or to produce documents that would be non-discoverable in arbitration. State courts, which apply the Federal Arbitration Act more frequently than federal courts, also are divided on this question. This Court has granted certiorari to resolve exactly this question before, only to dismiss the case when the parties settled, leaving the lower courts intractably divided. This case presents an ideal vehicle to resolve this longstanding, widely acknowledged, and highly consequential split of authority, as the Fifth Circuit assumed without deciding that the right to arbitrate had been waived and expressly rested its decision on the prejudice prong of its rule alone.

The Fifth Circuit also created a circuit split by affirming the district court's refusal to abstain from reconsidering the same arbitration issue that the state

court had just resolved. Three other circuits have addressed circumstances where, as here, the party on the losing end of a state court's arbitration ruling eschews state appellate avenues and instead asks a federal court to intervene. All three circuits, recognizing the affront to federalism that would result from overruling a decision by a co-equal state court, declined to exercise jurisdiction pursuant to the abstention principles set forth in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). The Fifth Circuit, however, took up jurisdiction over the same issue the state court had already resolved and then effectively reversed the coordinate state court.

That decision cannot be reconciled with the decisions of three other circuits, is deeply offensive to the sovereignty of state courts, and should not be permitted to stand. Indeed, the decision stands as an open invitation for forum shopping, both between litigation and arbitration and between state and federal courts. The Fifth Circuit's waiver rule leaves parties free to shift to arbitration should they become displeased with litigation, and its abstention rule leaves parties free to shift to federal court should they become displeased with state court. The Federal Arbitration Act may create a strong federal policy in favor of arbitration, but it certainly does not do so at the expense of the independence of state courts. The Court should grant certiorari to resolve the divisions of authority on which the decision below rests and bring much-needed clarity to this area.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 888 F.3d 129 and reproduced at App.1-35. The district court's order is available at 2017 WL 4156630 and reproduced at App.38-53.

JURISDICTION

The Fifth Circuit issued its opinion on April 17, 2018. On May 31, 2018, the Fifth Circuit denied a petition for rehearing en banc. On August 17, 2018, Justice Alito extended the time for filing this petition to September 28, 2018. On September 14, 2018, Justice Alito extended the time for filing this petition to October 26, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner Dorsey Ron McCall is a former employee of The Shaw Group, Inc. App.2. After his employment contract with Shaw ended, McCall eventually became the CEO of Allied Power Management, LLC, which is a competitor of Shaw's. App.2. Shaw claimed that McCall, by taking the job with Allied, violated a noncompete agreement in his employment contract. App.2. That noncompete agreement includes an arbitration clause, which provides that any disputes between the parties shall be resolved through arbitration. App.2. The arbitration clause preserves Shaw's right to seek "interim measures or injunctive relief" (but not damages) from a judicial authority without waiving its

right to compel arbitration, but does not otherwise contemplate litigation. ROA.250-251.[1]

Despite having a contractual right to assert its claims against McCall in arbitration, Shaw elected to file a lawsuit in Louisiana state court. App.2. And Shaw did not confine itself to seeking "interim measures or injunctive relief," ROA.250, but rather requested both injunctive relief and damages. App.2; *see* ROA.310-22. Although Shaw's state-court petition quoted the parties' agreements extensively, it did not reference the arbitration clause or arbitration, much less purport to reserve Shaw's right to arbitrate.

The state court conducted a two-day hearing on Shaw's request for a temporary restraining order. The parties ultimately agreed to a protective order that would control until the court ruled on Shaw's request for a preliminary injunction. The protective order allowed McCall to continue working for Allied, but prohibited him from soliciting Shaw's employees. App.2 n.2; *see* ROA.420-21. Shaw dropped its request for a temporary restraining order and agreed to stop threatening legal action against Allied's employees. App.2 n.2. The parties also agreed to expedited discovery. App.2 n.2.

With the most pressing issues resolved by agreement, Shaw and McCall began litigating the case in state court. In accordance with the expedited discovery agreement, Shaw issued deposition notices and propounded requests for production; McCall and Allied did the same and also prepared responses to

[1] Citations to "ROA.__" refer to the electronic record in the Fifth Circuit.

Shaw's requests. *See* ROA.714-15. Throughout the "substantial litigation … in the State Court Action," ROA.1120, Shaw did not mention the arbitration clause or reserve a right to arbitrate the claims that it was actively litigating against McCall.

While the state-court litigation was ongoing, Shaw purportedly assigned to respondent Aptim Corporation "all of [its] rights and interests in and to the Executive Employment Agreement and Nonsolicitation and Noncompete Agreement of Dorsey Ron McCall." ROA.127; *see* App.2. Though McCall disputes its validity, the assignment specifically contemplated that Aptim would continue to pursue the state-court litigation that Shaw initiated, as Shaw agreed to "promptly transition the pending Injunction and Damages proceeding in the 19th Judicial District Court [of Louisiana] to [Aptim] for handling and prosecution." ROA.128. Consistent with the assignment, Aptim and Shaw moved to substitute Aptim into the state-court action. App.2. McCall opposed the motion, requesting limited discovery to clarify the scope of the assignment and the meaning of certain terms in the motion. App.2. The state court postponed the preliminary injunction hearing to allow for discovery on the assignment. ROA.1489.

At that point, Shaw and Aptim decided that they no longer wanted to litigate in state court. They proceeded to execute an orchestrated four-filing plan in the hopes of extricating themselves from the very state-court proceeding that Shaw had initiated and Aptim had just sought to join. First, they jointly filed a notice of withdrawal of motions, purporting to withdraw their motion for substitution. App.2.

Second, Shaw filed an amended complaint, which was identical to the original complaint except that it removed the claim for damages. App.3. Third, Shaw filed a motion to dismiss that same amended complaint—*i.e.,* the complaint it filed just moments earlier—asking the court to dismiss its remaining claims for injunctive relief with prejudice. App.3. Fourth, still on the same day, Aptim filed a demand for arbitration, asserting the same claims and seeking the same injunction and damages that Shaw had been seeking in state court, but for the first time invoking the arbitration provision in the noncompete agreement. App.2-3.

Because these actions made clear that Shaw and Aptim were forum shopping and trying to resurrect the right to arbitration that they waived by filing and pursuing a damages lawsuit in state court, McCall opposed the motion to dismiss and moved to stay the arbitration. App.3. Before the trial court could rule on either motion, Shaw filed an application for a writ of mandamus with the Louisiana Court of Appeal, asking the court to direct the trial court to grant its motion to dismiss. *See* ROA.598.

While those motions were pending in the state trial and appellate courts, Aptim—apparently not confident about the rulings to come—turned to the *federal* courts and filed a petition to compel arbitration in the Eastern District of Louisiana. App.3. Aptim asked the court to order McCall into arbitration and to stay the ongoing state-court proceedings—*i.e.*, to stay the very proceedings Aptim had just sought to join, which its assignor had initiated, and where its own

motions and writ application remained pending. App.3.

At this point, the identical question was pending in parallel proceedings in state and federal courts—*i.e.*, both courts had been asked to decide whether Aptim and Shaw waived their arbitration rights. The state court acted first. After the state appellate court directed the trial court to promptly rule on Shaw's motion to dismiss, the trial court denied the motion to dismiss and then, a few days later, held a hearing on McCall's motion to stay the arbitration. App.3. After the hearing, the court ruled that Shaw and Aptim waived their right to arbitrate by initiating the state-court damages action. App.3. The court expressly found that Shaw and Aptim "engaged in a pattern of forum shopping" and that Aptim violated the protective order by filing the arbitration demand. ROA.594. It accordingly entered an order staying the arbitration. App.3. The court also joined Aptim as a party-litigant, retroactive to the date of the assignment, in accordance with state law. App.3.

Aptim again sought relief in the state appellate courts, applying for a supervisory writ and a stay pending the disposition of the writ application. ROA.197. The Louisiana Court of Appeal denied all requested relief. ROA.579. The parties continued to litigate in state court, filing numerous pleadings and motions, participating in multiple hearings, and briefing *six* separate writ applications to the state appellate court. ROA.196-97.

Back in federal court, McCall opposed Aptim's petition to compel arbitration, explaining that the state court already decided the dispositive question—

i.e., it ruled that Shaw waived its right to arbitrate when it filed and litigated its state-court lawsuit for injunctive relief and damages, and that this waiver was imputable to Aptim since Aptim is Shaw's alleged assignee. McCall argued that Aptim's federal lawsuit was merely an effort "to avoid decisions in the state court proceeding in which it initially elected to file suit," and that Aptim had "engaged in blatant forum shopping by filing this suit in federal court." ROA.190. McCall accordingly asked the district court to abstain under *Colorado River* or, alternatively, to defer to the state court's correct decision on waiver. ROA.200-06.

The district court granted Aptim's motion in its entirety. App.3-4. Even though the state court had already decided the exact question pending before it, the federal court declined to abstain and exercised jurisdiction. App.3. And notwithstanding the state court's contrary ruling on the exact same question, the federal court concluded that Aptim had not waived its right to arbitrate. App.3-4. Ignoring the state court's conclusion that Shaw's conduct was imputable to Aptim as a matter of state law, the federal court concluded that Aptim did not waive its right to arbitrate because Shaw, not Aptim, initiated the state-court proceedings, and held that Shaw's conduct was *not* imputable to Aptim. App.50-51. Then, notwithstanding the Anti-Injunction Act, the court enjoined the state-court proceedings, reasoning that this case fell within the Act's "relitigation exception." *See* App.51-52.

Finally, even though it had just held that *Shaw*'s waiver could not be imputed to *Aptim*, the court granted *Aptim*'s request to broaden the injunction to

encompass state-court litigation among McCall, *Allied*, and *Shaw*—the latter two of which were not even parties to the federal lawsuit. App.51-52. The court thus entered a final judgment ordering that "Aptim, McCall and all persons and entities in privity with them, shall submit to arbitration all claims arising under or necessitating interpretation of [the] Employment Agreement." ROA.1345.

The Fifth Circuit granted a stay pending appeal, but then affirmed on the merits. In an opinion written by Judge Smith, which was joined in full by Judge Reavley and in part by Judge Owen, the court held that the district court did not abuse its discretion by declining to abstain under *Colorado River*. The court acknowledged "three out-of-circuit decisions in which the state court ruled [on an arbitration issue] first and the appellate court found abstention proper." App.12-15 (citing *Preferred Care of Delaware, Inc. v. VanArsdale*, 676 F. App'x 388 (6th Cir. 2017); *D.A. Osguthorpe Family Partnership v. ASC Utah*, *Inc.*, 705 F.3d 1223 (10th Cir. 2013); *Vulcan Chemical Technologies, Inc. v. Barker*, 297 F.3d 332 (4th Cir. 2002)). But it rejected the argument that "the state court's issuance of a ruling should be a primary focus of the abstention inquiry," App.12, and maintained that each of the three conflicting cases was distinguishable, App.13-15.

The court then addressed the waiver question. Under Fifth Circuit precedent, to demonstrate that party has waived its right to arbitrate, the opposing party must prove not only that the waiving party "substantially invoke[d] the judicial process," but also that its litigation conduct "cause[d] detriment or

prejudice to the other party." App.15-16. The court agreed with McCall that Shaw's state-court complaint "raising a claim for damages is enough for substantial invocation." App.16. But it declined to decide whether Shaw's pre-assignment invocation of the judicial process was imputable to Aptim, its purported assignee, even though it is well established that assignors "can assign only the rights they possess." *Quality Infusion Care, Inc. v. Health Care Serv. Corp.*, 628 F.3d 725, 729 (5th Cir. 2010); *see* App.17-18. The court found the imputation question unnecessary to decide because, in its view, McCall did not demonstrate that it was prejudiced by Shaw's invocation of the judicial process. App.19. And because the Fifth Circuit will not enforce a waiver absent a finding of prejudice, that ruling was sufficient to resolve the case. *See* App.18 ("This inquiry is simplified by the absence of prejudice, thus obviating the need to interpret the assignment agreement and determine imputation.").

The court then turned to the Anti-Injunction Act. The court acknowledged that the Anti-Injunction Act generally prohibits federal courts from enjoining state-court proceedings and that, if a "state court takes an action the federal court or a party to the action finds incorrect, the proper course is typically the state appellate court." App.20. It nonetheless upheld the injunction under the Act's "relitigation exception," an exception "designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court." App.21 (quoting *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988)). Even though the waiver issue had not been "previously presented to

and decided by the federal court"—quite the opposite, it was previously presented to and decided by *the state court*—the Fifth Circuit held that the injunction was permissible because the state-court ruling was not a final judgment, whereas the federal court's second-in-time order compelling arbitration was, or would be, a final judgment. App.19-25.

Judge Owen concurred in part and dissented in part. She would have "reverse[d] the district court's judgment to the extent that it purports to enjoin the state-court litigation as to [Shaw]." App.26. She also "address[ed] statements in Supreme Court opinions that, at least facially, lend support to McCall's contention that the federal district court was powerless under the Anti-Injunction Act." App.26.

REASONS FOR GRANTING THE PETITION

This case puts into sharp relief the need for clear rules to check the considerable potential for forum shopping that the federal and state courts' concurrent jurisdiction over arbitration issues can create. Dorsey Ron McCall was sued by his former employer in state court—only to have the employer reverse course by purportedly assigning its claims to Aptim and trying to move to what it hoped would be a more favorable arbitration forum. When the state court saw that for the blatant forum shopping that it was, and reached the rather obvious conclusion that Shaw and Aptim waived their right to arbitrate this dispute by *suing* McCall, Aptim persuaded a federal court to step in, reverse the state court's waiver ruling, and enjoin the very state-court litigation that Shaw had initiated. That remarkable result is the product of two

fundamentally flawed conclusions, each of which implicates a circuit split.

First, the decision below stems from a longstanding circuit split over the correct standard for determining when to enforce a waiver of the right to arbitrate by engaging in litigation conduct. The Fifth Circuit did not deny that initiating a lawsuit to litigate claims covered by an arbitration agreement generally suffices to constitute waiver. But it refused to enforce that waiver because it concluded that McCall suffered no prejudice from being forced to defend himself against state court litigation before Shaw and Aptim decided that they would rather arbitrate. In reaching that conclusion, the Fifth Circuit applied circuit precedent holding that the party resisting arbitration must prove not just waiver, but prejudice. While that rule has been embraced by several circuits, other circuits have held that "[a] finding of prejudice is not necessary in order to conclude that a right to compel arbitration has been waived." *Khan v. Parsons Glob. Servs., Ltd.*, 521 F.3d 421, 425 (D.C. Cir. 2008). State courts, which apply the FAA more frequently than federal courts, are also divided on this question.

This Court previously granted certiorari to resolve this long-acknowledged circuit split, only to dismiss the writ when the parties settled. This case presents an excellent vehicle to revisit this important issue and provide much-needed guidance to the lower courts. In the decision below, the Fifth Circuit treated the purported absence of prejudice as dispositive to the waiver question; the question is thus cleanly and squarely presented here. The question, moreover, is of critical importance. The differing standards applied

by state and federal courts produce untenable disuniformity along multiple dimensions. Not only is there disagreement among federal courts and among state courts; there is also disagreement between state courts and the federal circuits in which they are located. As a result, whether courts will enforce a waiver of the right to arbitrate depends on whether arbitration is sought in federal court or across the street in state court, creating an obvious potential for forum shopping. And that problem is particularly acute in the context of a plaintiff who wants to try litigation first, but reserve the possibility of shifting to arbitration if the court proves unfavorable. Certiorari is warranted to resolve this widely acknowledged and highly consequential split of authority.

Certiorari is also warranted because the Fifth Circuit never should have considered the waiver question in the first place and created a circuit split by refusing to abstain from doing so. "Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings." *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964). That rule is effectuated by, among other things, this Court's decision in *Colorado River*, which instructs federal courts to abstain when parallel state-court litigation has substantially progressed and federal-court action could lead to piecemeal litigation, conflicting results, and tension between state and federal courts. In the typical *Colorado River* case, the state and federal cases are moving on parallel tracks, and one party argues that the federal court should yield because the state court is a little bit further along. What makes this case both distinct and capable of categorical

resolution is that the state court was not just a little bit further along in resolving the arbitration issue in this case—it had *already decided* that issue.

Faced with those same circumstances, the Fourth, Sixth, and Tenth Circuits have all required or upheld *Colorado River* abstention. That makes perfect sense: Abstention is quite obviously warranted when a state court has already resolved the sole issue pending before the federal court, and the state court loser is asking the federal court to reconsider the decision of a coordinate state court. Indeed, the balance of the *Colorado River* factors is not even close in such a case, as the state-federal tensions that abstention is designed to prevent are inevitable when a federal court takes up jurisdiction for the express and exclusive purpose of overriding an already-issued state-court decision.

The Fifth Circuit, undeterred, broke sharply from those three circuits, approved the district court's decision to effectively overrule the state court, and for good measure affirmed an extraordinary *injunction* of the very same state-court litigation that Shaw had initiated and Aptim had sought to join. By taking up jurisdiction for the express purpose of overriding a state-court decision, the decision below conflicts with decisions from three other circuits and violates "several traditionally valued tenets of wise judicial administration." *Vulcan*, 297 F.3d at 343. And by enabling a state-court plaintiff to enlist a federal court in its belated effort to undo the consequences of its decision to sue in state court, the decision below creates a roadmap for unabashed forum shopping twice over. The Court should grant certiorari to

resolve the splits of authority on which that misguided decision rests.

I. The Fifth Circuit's Waiver Ruling Deepens A Circuit Split And Is Wrong.

According to the decision below, even assuming that any right Aptim may have had to arbitrate the claims underlying this case was waived when Shaw sued McCall on those claims in state court, the courts are not bound to enforce that waiver unless McCall can prove that he was prejudiced by Shaw's decision to sue him. That legal rule, which was dispositive in this appeal, is the subject of a division of authority among both federal and state courts. While some circuits and state courts will not enforce a waiver by litigation conduct unless the non-moving party proves prejudice, in others, waiver alone is enough. This split is acknowledged, longstanding, and consequential. In fact, this Court previously granted certiorari to resolve this exact question, only to dismiss the writ after the parties settled. *See Stok & Assocs., P.A. v. Citibank, N.A.*, 562 U.S. 1215 (2011) (granting cert); *Stok & Assocs., P.A. v. Citibank, N.A.*, 563 U.S. 1029 (2011) (dismissing writ "pursuant to Rule 46.1"). This case is an ideal vehicle to resolve this longstanding split.

1. "[I]n ordinary contract law, a waiver" of a contractual right "normally is effective without proof of consideration or detrimental reliance." *Cabinetree of Wisc., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995). Consistent with that rule, the Seventh Circuit has long held that a party opposing a motion to compel arbitration on waiver grounds "need not show that it would be prejudiced if the stay were granted and arbitration ensued." *Id.* at 390. Instead,

all that matters is whether the party seeking to compel arbitration has waived its right to do so; if so, then that waiver must be enforced. While the Seventh Circuit has acknowledged that other circuits have rejected that rule, *id.*; *see also infra* pp.18-20, it nonetheless has continued to "not require a showing of prejudice to find waiver," *Kawasaki Heavy Indus., Ltd. v. Bombardier Recreational Prods., Inc.*, 660 F.3d 988, 994 (7th Cir. 2011). As it has explained, the rule that "a court may find waiver even if that decision did not prejudice the non-defaulting party" is correct because it "treat[s] a waiver of the right to arbitrate the same as … the waiver of any other contract right." *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prod. Co.*, 969 F.2d 585, 590 (7th Cir. 1992).

The D.C. Circuit similarly "has never included prejudice as a separate and independent element of the showing necessary to demonstrate waiver of the right to arbitration." *Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 777 (D.C. Cir. 1987). While prejudice may be relevant to determining whether a waiver through litigation conduct has occurred, "[a] finding of prejudice is not necessary in order to conclude that a right to compel arbitration has been waived." *Khan*, 521 F.3d at 425. Instead, a party seeking to compel arbitration "who has not invoked the right to arbitrate on the record at the first available opportunity … has presumptively forfeited that right," regardless of whether that delay has prejudiced the other party. *Zuckerman Spaeder, LLP v. Auffenberg*, 646 F.3d 919, 922 (D.C. Cir. 2011); *see id.* at 924 ("By this opinion we alert the bar in this Circuit that failure to invoke arbitration at the first

available opportunity will presumptively extinguish a client's ability later to opt for arbitration.").

2. In direct and acknowledged conflict with the Seventh and D.C. Circuits, several other circuits will not enforce a party's waiver of its right to arbitration by litigation conduct unless the non-moving party demonstrates that it was prejudiced by that waiver. While these circuits offer somewhat varying formulations of their tests, each applies a disjunctive standard under which a waiver will be enforced only if: (1) the moving party engaged in litigation conduct inconsistent with an intent to arbitrate; *and* (2) the party resisting arbitration demonstrates prejudice.

In the Second Circuit, for example, "waiver of the right to compel arbitration due to participation in litigation may be found only when prejudice to the other party is demonstrated." *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 105 (2d Cir. 2002). In the Third Circuit, "[i]n order to obtain a finding that arbitration is waived, a party seeking to avoid arbitration must demonstrate prejudice." *Wood v. Prudential Ins. Co. of Am.*, 207 F.3d 674, 680 (3d Cir. 2000). The rule is the same in the Fourth Circuit. Even if "the party seeking arbitration has invoked the litigation machinery to some degree, the dispositive question is whether the party objecting to arbitration has suffered actual prejudice." *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 249 (4th Cir. 2001) (emphasis omitted). The Fifth Circuit, as seen in the decision below, also follows the rule that "the party opposing arbitration must demonstrate prejudice before we will find a waiver of the right to arbitrate." *In re Mirant Corp.*, 613 F.3d 584, 591 (5th Cir. 2010).

The Ninth Circuit is in accord: "More is required than action inconsistent with an arbitration provision; prejudice to the party opposing arbitration must also be shown." *Martin v. Yasuda*, 829 F.3d 1118, 1126 (9th Cir. 2016). And the Eleventh Circuit also requires prejudice in all cases: "In order to demonstrate waiver, [defendant] must also establish that [plaintiff's] participation in litigation … caused [defendant] to suffer prejudice." *Citibank, N.A. v. Stok & Assocs., P.A.*, 387 F. App'x 921, 924 (11th Cir. 2010), *cert. granted sub nom. Stok & Assocs., P.A. v. Citibank, N.A.*, 562 U.S. 1215, *writ dismissed*; 563 U.S. 1029. The First, Sixth, and Eighth Circuits likewise require a showing of prejudice. *See In re Citigroup, Inc.*, 376 F.3d 23, 26 (1st Cir. 2004) ("We have emphasized that, to succeed on a claim of waiver, plaintiffs must show prejudice."); *Shy v. Navistar Int'l Corp.*, 781 F.3d 820, 828 (6th Cir. 2015) ("Both inconsistency and actual prejudice are required."); *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085, 1093 (8th Cir. 2007) ("Even where a party has acted inconsistently with its right to arbitrate, it has not waived that right unless its actions prejudice the other party.").

As for the Tenth Circuit, most Tenth Circuit opinions treat prejudice as just one of multiple factors that courts may consider in assessing waiver, not a prerequisite to enforcing a waiver through litigation conduct. *See Peterson v. Shearson/Am. Express, Inc.*, 849 F.2d 464, 467-68 (10th Cir. 1988) (listing factors); *BOSC, Inc. v. Bd. of Cty. Comm'rs*, 853 F.3d 1165, 1174-75 (10th Cir. 2017) (assessing six "*Peterson* factors"). Some Tenth Circuit opinions, however, suggest that prejudice is *required*. *See Adams v. Merrill Lynch, Pierce, Fenner & Smith*, 888 F.2d 696,

701 (10th Cir. 1989). The Tenth Circuit has acknowledged, but has not yet resolved, this tension in its case law. *See BOSC*, 853 F.3d at 1174 n.3.

3. State courts—who are "most frequently called upon to apply the [FAA]," *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 17 (2012)—are divided on this question as well. Because state courts are coordinate, not inferior, to the federal courts of appeals on matters of federal law, they are free to adopt their own interpretations of federal law absent binding guidance from this Court. *See Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("Neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation."); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1231 n.495 (1986).

Predictably given the absence of guidance from this Court, state courts are divided on whether the party arguing waiver must prove prejudice. *Compare Parsons v. Halliburton Energy Servs., Inc.*, 785 S.E.2d 844, 853 (W. Va. 2016) ("There is no requirement that the party asserting waiver show prejudice or detrimental reliance."), *and Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So.2d 707, 710-11 (Fla. 2005) ("[T]here is no requirement for proof of prejudice in order for there to be an effective waiver of the right to arbitrate."), *with Perry Homes v. Cull*, 258 S.W.3d 580, 602 (Tex. 2008) ("[P]rejudice is a required element of waiver of the right to arbitrate cases subject to the FAA."), *and St. Agnes Med. Ctr. v. PacifiCare of Cal.*, 82 P.3d 727, 737 (Cal. 2003) ("The

presence or absence of prejudice from the litigation of the dispute is the determinative issue under federal law.").

Making matters worse, some state courts have chosen a different side of the split from the federal circuit in which they are located, creating obvious incentives for forum shopping. In Florida, for example, prejudice is a prerequisite in federal court, *see Stok & Assocs.,* 387 F. App'x at 924, but not in state court, *see Raymond James*, 896 So.2d at 710-11. The opposite dynamic exists in Illinois, where prejudice is not required in federal courts, *see Cabinetree*, 50 F.3d at 390, but is required in state courts, which have expressly "decline[d] to follow *Cabinetree*," *LAS, Inc. v. Mini-Tankers, USA, Inc.*, 796 N.E.2d 633, 638 (Ill. App. 2003). And as this case all too clearly demonstrates, parties typically can move to compel arbitration in either state or federal court (or, at least according to the Fifth Circuit, both), making these state-federal inconsistencies especially problematic.

4. These divisions are widely acknowledged. The courts of appeals have discussed the split for many years. *See, e.g.*, *Kawasaki*, 660 F.3d at 994 ("Some circuits require a showing that the non-waiving party was prejudiced …. [W]e do not."); *Erdman Co. v. Phx. Land & Acquisition, LLC*, 650 F.3d 1115, 1118 (8th Cir. 2011) ("There is a circuit split over whether the party asserting waiver must show prejudice."). Commentators likewise have taken note. *See, e.g.*, Thomas J. Lilly, Jr., *Participation in Litigation As A Waiver of the Contractual Right to Arbitrate*, 92 Neb. L. Rev. 86, 89 (2013) ("The most fundamental split in the circuits … concerns whether some prejudice to the

party resisting arbitration is a necessary element of such a waiver."); Paul Bennett IV, *"Waiving" Goodbye to Arbitration*, 69 Wash. & Lee L. Rev. 1609, 1635 (2012) ("[A] circuit split has formed regarding the following question: Must a party resisting arbitration (nonmovant) show prejudice in order to prove that the party demanding arbitration (movant) waived its right to arbitrate by engaging in pretrial conduct?").

Indeed, this Court previously recognized the circuit split and the importance of resolving it by granting certiorari in *Stok & Assocs.*, 562 U.S. 1215. The question presented in that case, just like here, was whether "a party [should] be required to demonstrate prejudice after the opposing party waived its contractual right to arbitrate by participating in litigation." Pet. for Certiorari at i, *Stok & Assocs.*, No. 10-514 (U.S. Oct. 14, 2010). This Court ultimately dismissed the writ after the parties settled, leaving the question unanswered and the state and federal courts in need of guidance.

This case is an ideal vehicle to definitively answer that question. In the decision below, the Fifth Circuit applied a disjunctive test under which it would find waiver only if Aptim *both* "substantially invoke[d] the judicial process" (*i.e.*, waived its right to arbitrate) *and* "thereby cause[d] detriment or prejudice" to McCall. App.15. It then proceeded to reserve judgment on the first part of that disjunctive test, instead resolving the appeal on the ground that McCall did not prove he was prejudiced by the litigation conduct that preceded the two motions to compel arbitration. In particular, the court acknowledged that the filing of a damages lawsuit generally "constitutes substantial invocation

of the judicial process," App.16, but it saw no need to determine whether Shaw's conduct in filing that lawsuit was imputable to Aptim because "the absence of prejudice" obviated "the need to … determine imputation." App.18. Because the decision below treats the purported absence of prejudice as dispositive to the waiver question, this petition cleanly presents the question of whether a party opposing arbitration on the ground of waiver must prove that it has suffered prejudice.

This case is also aptly illustrates the problems with importing a distinct prejudice requirement into the waiver-by-litigation-conduct analysis. While the prejudice requirement that some courts have adopted may be animated by a desire to craft a waiver rule that does not require a defendant to forgo even obvious threshold litigation steps in order to preserve its right to arbitrate, the far more sensible way to deal with that concern is through the analysis of what kind of litigation conduct suffices to constitute waiver. A distinct prejudice requirement, by contrast, inevitably encourages blatant forum shopping, as it enables parties to sue first but resort to arbitration later should they develop buyers' remorse about their first choice of forum. And the potential for forum shopping is even more acute in the arbitration context because of the concurrent jurisdiction of state and federal courts over arbitration issues. As this case vividly illustrates, under the Fifth Circuit's rule, a plaintiff dissatisfied with the state-court forum he selected not only can shift gears and arbitrate, but can enlist a federal court to aid him in doing so.

The Fifth Circuit's rule thus not only encourages forum shopping, but has the potential to disrupt—indeed, in this case clearly *did* disrupt—the federal-state balance. This Court should grant certiorari to resolve the open and acknowledged division of authority over whether that rule is the right one and to establish a uniform standard for enforcing waivers by litigation conduct.

II. The Fifth Circuit's Abstention Ruling Creates A Circuit Split And Is Wrong.

This Court should also grant certiorari to resolve the circuit split that the decision below creates over when abstention is warranted in the arbitration context. Three other circuits have confronted cases indistinguishable from this one, with a party who received an unfavorable arbitration-related ruling in state court turning to a federal court for a second bite at the apple. The Fourth, Sixth, and Tenth Circuits—each recognizing the affront to federalism that would result from overruling a decision by a co-equal state court—declined to exercise jurisdiction. In the decision below, however, the Fifth Circuit not only took up jurisdiction over the same issue the state court had already resolved, but also effectively reversed the state court (and, for good measure, enjoined its proceedings). That decision is an outlier among the federal courts of appeals, is deeply offensive to the sovereignty of state courts, and should be reversed.

1. One of the Framers' primary concerns when crafting a system of dual state and federal courts was that those courts would "fight each other for control of a particular case." *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 286 (1970). To

address that concern, and to preserve the dignity of the States as dual sovereigns, Congress and the courts created and refined several doctrines to ensure that "state and federal courts would not interfere with or try to restrain each other's proceedings." *Donovan*, 377 U.S. at 412. Because our dual system "could not function if state and federal courts were free to fight each other for control of a particular case," *Atl. Coast Line*, 398 U.S. at 286, it has long been settled law that state-court proceedings "should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately [the Supreme] Court." *Chick Kam Choo*, 486 U.S. at 146.

That constitutionally grounded principle is today reflected in myriad doctrines designed to minimize friction between federal and state courts. One of those doctrines, of course, is preclusion. *See* 28 U.S.C. §1738. But while res judicata "largely obviates the risk of conflicting *final dispositions on the merits*, a significant risk of conflict attends interlocutory rulings that are not ordinarily entitled to preclusive effect." *Tyrer v. City of S. Beloit*, 456 F.3d 744, 756 (7th Cir. 2006) (emphasis added). Such conflicting interlocutory rulings, just as much as final judgments, have the potential to cast doubt on the "legitimacy of the court system in the eyes of the public," to deny "fairness to the individual litigants," and to produce the state-federal friction the Framers sought to avoid. *Lumen Const., Inc. v. Brant Constr. Co.*, 780 F.2d 691, 694 (7th Cir. 1985).

Accordingly, this Court has recognized that even absent a final judgment entitled to preclusive effect,

"[c]omity or abstention doctrines may … permit or require the federal court to stay or dismiss the federal action in favor of the state-court litigation." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 292 (2005). One of those doctrines is set forth in *Colorado River*, which instructs federal courts to decline to exercise jurisdiction when a parallel state-court case involving the same issue has substantially progressed, and where federal-court intervention could lead to piecemeal litigation and conflicting results. 424 U.S. at 817-20. By declining to adjudicate questions that are the subject of parallel state-court proceedings, federal courts not only accord due respect to coordinate state courts, but also prevent "duplicative litigation" that "wastes judicial time and resources and increases transaction costs." 17A Moore's Federal Practice—Civil §122.90 (2017). And declining jurisdiction under *Colorado River* is particularly appropriate when the federal litigation is "vexatious or reactive," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17 n.20 (1983), such as when one party undertakes "a strategy to obtain a second opinion on the same issue from the district court." *Vulcan*, 297 F.3d at 343.

2. The Fourth Circuit applied those principles to a situation like this one in *Vulcan*. There, after an agreed-upon arbitrator issued an award, the parties filed competing actions in state and federal court to confirm and to vacate that award. *Id.* at 335. The state court acted first, entering a judgment confirming the award and denying a cross-motion to vacate it. *Id.* Notwithstanding the first-in-time state-court ruling, the federal court exercised jurisdiction and "vacated the very award that had been confirmed by the

California court." *Id.* The Fourth Circuit reversed, holding that the district court was bound to abstain under *Colorado River*: "By failing to abstain and thereby relieve the unseemly tension between federal and state courts, we conclude that the district court abused its discretion." *Id.* at 343. The deciding factor was the "extraordinary" fact that Vulcan was asking "a federal court to vacate an arbitration award that a California state court had confirmed in an earlier judgment after considering the same evidence and arguments." *Id.* at 341. Those circumstances "call[ed] loudly for the application of *Colorado River* abstention." *Id.* at 343. Allowing a party who voluntarily litigated in a state forum "to obtain a second opinion on the same issue" in a federal forum "would undermine several traditionally valued tenets of wise judicial administration" and trample on the "respect … given by both state and federal governments to the courts of the other." *Id.*

The Sixth Circuit arrived at the same conclusion in *VanArsdale*, 676 F. App'x 388. There, the defendant in a wrongful-death action defended in state court by invoking an arbitration clause, and also filed a petition to compel arbitration in federal court. *Id.* at 391. The state court acted first, holding the arbitration agreement unenforceable. *Id.* The federal court then declined to exercise jurisdiction pursuant to *Colorado River*, and the Sixth Circuit affirmed. As the court explained, "without abstaining, the district court would necessarily have to litigate the same issue resolved by the state trial court, … thereby duplicating judicial effort and potentially rendering conflicting results." *Id.* at 395.

The Tenth Circuit's decision in *Osguthorpe*, 705 F.3d 1223, is in accord. There, a state court denied Osguthorpe's motion to compel arbitration, finding that it waived any right to arbitrate by filing suit and litigating in state court for several years. *Id.* at 1228-29. Osguthorpe then "turned to the federal courts for relief," asking a district court to compel the very same arbitration that the state court refused to compel. *Id.* at 1229. The district court declined and the Tenth Circuit affirmed, emphasizing the impropriety of Osguthorpe's asking "the federal courts for relief only after receiving an unfavorable state-court ruling on arbitrability." *Id.* at 1235. Instead of allowing Osguthorpe another bite at the apple, the court invoked *Colorado River* and declined to address the waiver question. *Id.* at 1235-36.

As these decisions reflect, while the *Colorado River* analysis may ordinarily be case-specific, the analysis is quite different when the state court is not just a little further along, but has *already decided* the only issue that the federal court is asked to resolve. There is no surer way to cause "tension and controversy between the federal and state forums" than to issue a ruling in direct conflict with an already-issued order of a coordinate state court. *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 569 (1983). Indeed, in that context, the evils *Colorado River* was designed to prevent—wasted resources, conflicting decisions, and state-federal tension—are inevitable. Thus, where, as here, a state court has already resolved the *sole* issue the federal court is asked to answer, *Colorado River* abstention is invariably the proper course.

3. Breaking sharply with its sister circuits, the Fifth Circuit refused to follow that course here, instead approving the district court's decision to effectively override the already-issued ruling of a co-equal state court. Making matters worse, the court then affirmed the district court's decision to *enjoin* the state litigation, concluding that the Anti-Injunction Act's "relitigation exception"—an exception that allows federal courts to protect *their own* first-in-time judgments from being relitigated in state court by a dissatisfied party, *see Chick Kam Choo*, 486 U.S. at 147—allows federal courts to enjoin a state court from enforcing its own first-in-time decision (at the behest of a dissatisfied state-court litigant, no less).

Ignoring the forest for the trees, the Fifth Circuit ascribed no particular importance to the fact that the state court already decided the *only* issue that the federal court was asked to answer. Indeed, the court's only acknowledgment of that critical fact came in its puzzling comment that abstention was unwarranted because the distinct doctrine of res judicata did not apply: "[T]he state court's ruling is not decisive regarding abstention because the state court's interlocutory ruling regarding arbitration is not entitled to full faith and credit under the Full Faith and Credit Act." App.10-11. Not only is that a non-sequitur, it also does not distinguish the other cases: The state-court rulings in all three cases were not entitled to res judicata effect either: In *Vulcan*, the state-court ruling was "the subject of appeal," 297 F.3d at 343, making it non-final under the relevant state's law; in *VanArsdale*, "no final judgment ha[d] issued in state court," 676 F. App'x at 392; and in *Osguthorpe*, trial was "imminent" and no final judgment had

issued, 705 F.3d at 1229. Indeed, if the state-court decisions in those cases had been entitled to res judicata, then the abstention question never would have arisen.

The Fifth Circuit's other efforts to distinguish those decisions are equally unavailing. As for *Vulcan*, the Fifth Circuit posited that the Fourth Circuit declined to exercised jurisdiction simply because that was how *Colorado River*'s "typical six-factor analysis" shook out. App.13. That reading of *Vulcan* is untenable. The *Vulcan* court made crystal clear that the prior state-court ruling was decisive. Indeed, the opinion's very first sentence describes the case as turning solely on that fact: "We are presented with the question of whether this action should have proceeded to hearing and judgment in the face of an earlier state court judgment that involved the same parties and issues." 297 F.3d at 334-35. And the court specifically emphasized that a "factor-by-factor analysis does not fully convey the synergistic effect of all the circumstances"; its decision was instead driven by the need to "relieve the unseemly tension" resulting from the fact that the "state court had entered judgment on the exact issue to be considered by the federal court." *Id.* at 343-44.[2]

---

[2] The Fifth Circuit also commented that the moving party's "motive for filing in federal court was critical" to the *Vulcan* court's decision. App.13; *see Vulcan*, 297 F.3d at 343 ("[Vulcan] undertook a strategy to obtain a second opinion."). But that only underscores the conflict between the decisions, as Aptim acted with the exact same motive here, urging the district court to forge ahead even after the state court ruled. ROA.1489.

The Fifth Circuit brushed aside *VanArsdale* in the same way, claiming that the Sixth Circuit "did not base its ruling solely on the fact that the state court issued an order finding the arbitration clause invalid under state law before the federal court ruled." App.14. Once again, however, that vastly understates the importance of the prior state-court ruling. While the Sixth Circuit certainly went through the *Colorado River* factors, it made clear that the prior state-court ruling made the outcome a *fait accompli*: "[W]ith a judgment as to the enforceability of the [arbitration] agreement already entered in state court, five of the latter six factors under [*Colorado River*] weigh in favor of abstention in this case." 676 F. App'x at 393. *VanArsdale* thus plainly stands for the proposition—rejected by the Fifth Circuit—that declining to exercise jurisdiction under *Colorado River* is warranted when one party asks a federal court for "resolution of the very same issue" the state court has already decided. *Id.* at 395.

With respect to *Osguthorpe*, the Fifth Circuit emphasized that the underlying state-court litigation proceeded for several years before Osguthorpe sought to compel arbitration. App.14. But the fact that Osguthorpe waited so long to seek arbitration was the reason why the state court found that Osguthorpe waived its right to arbitration, not the reason why the federal court declined to consider the question of waiver anew. In other words, Osguthorpe's delay may have been dispositive with respect to the state court's waiver ruling, but what was decisive for the federal court's *Colorado River* ruling was that Osguthorpe "came to the federal courts for relief only after receiving an unfavorable state-court ruling on

arbitrability." 705 F.3d at 1235. Under those circumstances, the Tenth Circuit declined to exercise jurisdiction and held that the case "should live out the rest of its days in the place where it began: the Utah state courts." *Id.* at 1236.

In short, the decision below is irreconcilable with decisions from the Fourth, Sixth, and Tenth Circuits. By taking up jurisdiction for the express purpose of overriding an already-issued state-court decision, the decision below conflicts with decisions from three other circuits and "several traditionally valued tenets of wise judicial administration." *Vulcan*, 297 F.3d at 343.

4. The decision below sets a dangerous precedent that effectively allows a dissatisfied party to "seek appellate review of a state decision in the Federal District Court." *Atl. Coast Line*, 398 U.S. at 293. When a party moves to compel arbitration in state court, the order denying the motion conclusively resolves the arbitration issue. The moving party can then seek relief from the state appellate courts—depending on the state, in an interlocutory appeal, a writ petition, or on appeal from the final judgment that results from litigation on the merits—and then, ultimately, from this Court. *See id.* at 296 ("If the union was adversely affected by the state court's decision, it was free to seek vindiction of its federal right in the Florida appellate courts and ultimately, if necessary, in this Court.").

The decision below blesses an alternate path—one that short-circuits the state appellate process and is guaranteed to create "tension and controversy between the federal and state forums." *San Carlos*

Apache Tribe, 463 U.S. at 569. In particular, the decision below allows the party whose motion to compel arbitration was denied in state court to circumvent the state appellate process and instead file the exact same motion in federal court, seeking the exact same relief the state court just denied. This gambit is not prohibited by res judicata because a state-court ruling denying arbitration is technically not a "final judgment on the merits," as the merits remain to be litigated. *Rivet v. Regions Bank of La.*, 522 U.S. 470, 476 (1998). Thus, absent the application of some other doctrine, a party can guarantee itself two bites at the apple: It can first ask the state court to compel arbitration, and if the state court refuses, it can go across the street and file the same motion in federal court. That sort of "strategic gamesmanship … has no place in a dual system of federal and state courts." *Tyrer*, 456 F.3d at 756.

The Fifth Circuit also compounded the problem by concluding that the Anti-Injunction Act sanctions this intrusion into the workings of the state courts. The point of the Anti-Injunction Act's "relitigation exception" is to *prevent* parties who have litigated an issue in one court from "fight[ing] the battle over on another day and field." *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118, 144 (1941) (Reed, J., dissenting). To that end, the doctrine creates a narrow exception to the Anti-Injunction Act that "permit[s] a federal court to prevent state litigation of an issue that previously was presented to and decided *by the federal court*." *Chick Kam Choo*, 486 U.S. at 147 (emphasis added). But that exception has *never* been applied to permit a federal court to enjoin state-court litigation in order to overrule a state court on an question that *the state*

court decided first (in part because abstention principles should prevent a federal court from ever being in that position in the first place). The notion that federal courts may not only exercise jurisdiction for the express purpose of second-guessing rulings in state-court proceedings, but then enjoin those state-court proceedings to boot, turns the Anti-Injunction Act on its head.

Rather than distort that critical statutory safeguard of the federal-state balance beyond recognition, the Fifth Circuit should have followed its sister circuits' lead and declined to exercise jurisdiction. Dissatisfied with the rulings of a state court (and apparently dissatisfied with the state's appellate system as well), Aptim did precisely what a state-court litigant is not supposed to do: It asked a federal court to overrule the state court. Indeed, the only issue Aptim asked the federal court to decide in this case—whether to compel arbitration—was precisely the issue that the state court had just resolved. The only appropriate response for the district court was to decline to exercise jurisdiction, thereby according due respect to the considered judgment of a coordinate state court and preventing Aptim from re-litigating in federal court an issue that it had already litigated and lost. This Court should grant certiorari to ensure that the concurrent jurisdiction of state and federal courts over arbitration petitions does not become an instrument for federal intrusion into the workings of state courts.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

ROBERT B. ELLIS
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
(312) 862-2000

ERIN E. MURPHY
Counsel of Record
MICHAEL D. LIEBERMAN
LAUREN N. BEEBE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
erin.murphy@kirkland.com

Counsel for Petitioner

October 22, 2018