No. 21-_____

In The
Supreme Court of the United States

INTERNATIONAL ENERGY VENTURES MANAGEMENT, L.L.C.,

Petitioner,

v.

UNITED ENERGY GROUP, LTD.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

THOMAS C. WRIGHT
Counsel of Record
RAFFI MELKONIAN
MICHAEL ADAMS-HURTA
BRADLEY C. WILLIAMS
JONATHAN W. LEHRMANN
EMILY C. FREEMAN
WRIGHT CLOSE & BARGER, LLP
One Riverway, Suite 2200
Houston, Texas 77056
(713) 572-4321
wright@wrightclosebarger.com
Counsel for Petitioner

MICHAEL D. SYDOW
THE SYDOW FIRM
5020 Montrose Blvd., Suite 450
Houston, Texas 77006
(713) 622-9700

January 18, 2022

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

The district court in this case found, as a factual matter, that Respondent did not suffer prejudice from Petitioner's failure to immediately press its right to arbitration. The court of appeals reversed. But instead of finding the district court committed clear error (the standard of review for factual findings) it simply announced that the district court's factual findings were due no deference, and that Respondent had suffered prejudice. The questions presented are:

1. This Court is currently considering *Morgan v. Sundance*, No. 21-328, on the merits. That case squarely presents whether prejudice is part of the test for litigation conduct waiver in the context of an arbitration clause. Should the Court hold this petition pending the disposition of *Morgan*, and then grant, vacate, and remand in light of the standards for prejudice announced in that case?

2. Must a reviewing court strictly adhere to Federal Rule of Civil Procedure 52(a)'s requirement that a district court's fact-findings "must not be set aside unless clearly erroneous," as the First, Eighth, Ninth, and D.C. Circuits have held, or may the appellate court engage in its own review with less deference (or "no" deference, as the court below held) when the court of appeals decides the fact-findings are insufficient, as the Second, Fifth, Sixth, and Eleventh Circuits have concluded?

CORPORATE DISCLOSURE STATEMENT

Petitioner International Energy Ventures Management, L.L.C. is not publicly traded, and no publicly held company owns 10% or more of Petitioner's stock or equity.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States District Court for the Southern District of Texas and the United States Court of Appeals for the Fifth Circuit.

- *International Energy Ventures Management, L.L.C. v. United Energy Group, Ltd.*, Case No. 20-20221 (Fifth Circuit).
- *International Energy Ventures Management, L.L.C. v. United Energy Group, Ltd.*, Case No. 14-20552 (Fifth Circuit).
- *International Energy Ventures Management, L.L.C. v. United Energy Group, Ltd.*, Case No. 4:17-cv-2262 (Southern District of Texas).

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES & RULES

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

International Energy Ventures Management, L.L.C. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion is published at *International Energy Ventures Management, L.L.C. v. United Energy Group, Limited*, 999 F.3d 257 (5th Cir. 2021), and is available at Pet. App. 1-22. The district court's opinion is not published. It is available at Pet. App. 25-31.

JURISDICTION

The court of appeals entered judgment on January 15, 2021, and the court of appeals denied rehearing on October 18, 2021. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

9 U.S.C. § 2: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof,

or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. § 3: "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

FED. R. CIV. P. 52(a)(1)(6): "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."

INTRODUCTION

Respondent, United Energy Group, signed a contract admitting it owed money to International. The text of the agreement is unambiguous: United "acknowledges that [International] did provide valuable services" and "further acknowledges that payment for such services has not been paid" by United.

Yet, at every turn, International's efforts to get a resolution on the merits have been blocked. After years of seeking arbitration, the Fifth Circuit held that International waived its arbitration right because United suffered prejudice when International waited until a few months after it sued to seek arbitration.

If that issue sounds familiar to the Court, there is good reason. This Court recently granted certiorari in a case presenting the issue whether prejudice is part of the test for waiver of arbitration, *Morgan v. Sundance*. Because that case is directly relevant here, this Court should hold this Petition until it resolves *Morgan* and then grant, vacate, and remand this case in deference to the *Morgan* opinion.

Alternatively, the Court should grant plenary review. The issue presented here is narrow but important. May a court of appeals refuse to apply the well-established "clear-error" standard to a district court's fact findings it deems to be insufficient or conclusory? Citing a single case reviewing an administrative agency's determinations, the Fifth Circuit said "yes," deepening a broad split among the courts of appeals. It reasoned that the district court had not really made fact-findings but then declined to remand so the district court could make such findings. The Second, Sixth, and Eleventh Circuits have created similar exceptions to the "clear-error" rule. The correct—indeed, only—answer under the plain language of Rule 52(a) and this Court's decisions, however, is "no." That was the answer of First, Eighth, Ninth, and D.C. Circuits

when they considered a departure from clearly-erroneous review due to insufficient fact-findings.

Giving district courts deference on fact-findings is a central structural feature of the federal court system, even when the court of appeals thinks the fact-findings are weak. Almost forty years ago, this Court reminded the circuits that "appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). This Court should intervene to resolve the split in this crucial arbitration context.

STATEMENT OF THE CASE

A. Factual Background.

The dispute in this case arises out of BP's (the former British Petroleum) sale of certain oil and gas assets for $775 million. International had more experience in those assets than any other consulting firm in the world. Because of its deep knowledge and connections, United promised International would receive a commission on that sale if it was successful. That commission was estimated to be worth $26 million. ROA.696.[1]

But after the deal closed—despite thanking International for its "invaluable service and advice," ROA.39, United refused to pay. Nor did it provide any

[1] International uses "ROA" to refer to the Record on Appeal in the Fifth Circuit.

explanation for its refusal. Arguably, it failed to pay because it believed it was beyond International's ability to enforce.

In March 2012, United asked International to undertake some additional consulting work on the BP assets. ROA.42. Although reluctant, International ultimately agreed to do so subject to certain conditions, including that: (a) United acknowledge in writing that it owed International for the past finder's fee and consulting work; and (b) United agree to arbitrate any further dispute with International over the finder's fee and consulting agreement. ROA.42-43.

The consulting agreement acknowledged that United "retained" International as a "consultant to assist in the purchase" of the assets, and that International should have been paid but "were not paid" for their services. ROA.711. The agreement also "acknowledge[d]" that International "did provide valuable services" on the asset purchase and that "payment for such services has not been paid by United." ROA.711. In addition, the new consulting agreement included an arbitration agreement covering all disputes arising from it.

B. Procedural History.

In July 2013, International sued United in Texas state court. United removed to federal court, and then moved to dismiss for lack of personal jurisdiction. Pet. App. 27. The district court stayed all discovery pending the ruling on United's jurisdictional motion

to dismiss. In November 2013—less than two months after United removed the case and four months after filing suit—International moved to compel arbitration. International also told United at the parties' initial Rule 26(f) conference before the federal district court that it intended to move to compel arbitration. ROA.795.

The district court dismissed International's case for lack of personal jurisdiction. International appealed the dismissal—subject to its right to arbitrate. *See*, *e.g.*, ROA.1544.[2]

The Fifth Circuit ultimately held that personal jurisdiction existed over United for the limited purpose of compelling arbitration, but that there was no broader personal jurisdiction. *See International Energy Ventures Management*, *L.L.C. v. United Energy Group, Ltd.*, 818 F.3d 193, 212 (5th Cir. 2016).

Based on that holding, International filed this suit to compel arbitration, under the Texas savings statute, and a motion to compel arbitration. ROA.768. United again removed to federal court. ROA.6. International also commenced arbitration proceedings. In December 2017, Arbitrator Platt Davis granted United's motion to dismiss, holding that: (a) the parties' arbitration agreement covered this dispute, but (b) International had (allegedly) waived its right to arbitrate. Pet. App. 28.

Upon International's motion, the district court vacated Davis's judgment. The district court held that

---

[2] International's first arbitration was dismissed by the arbitrator. The district court properly held this result was not binding. Pet. App. 28-29.

the issue of waiver was for the court and not the arbitrator to decide, and that as a factual matter United had not been prejudiced by International's limited litigation conduct. Pet. App. 29-30. This was because, the court explained, the litigation here was procedural: That is, the parties had been engaged in a "game of cat-and-mouse" about jurisdiction, which is not the kind of conduct that normally waives arbitration. Pet. App. 30. Indeed, the only prejudice that United argued was the delay from litigation and participation in limited procedural proceedings, along with the apparent cost in doing so (although United presented no evidence of those costs). ROA.2462. The district court therefore granted International's motion to compel arbitration. Pet. App. 30-31.

While the long-awaited arbitration was pending, the Fifth Circuit reversed. *Int'l Energy Venture Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 999 F.3d 257, 260 (5th Cir. 2021). Rather than holding that the district court committed "clear error"—the normal legal standard for overturning a fact-finding—the Panel held that it "owe[s] no deference" to the district court's supposedly "conclusory assertions." *Id.* at 268. In so holding, the court of appeals cited *University of Texas, M.D. Anderson Cancer Center v. U.S. Department of Health & Human Services*, 985 F.3d 472, 475-76 (5th Cir. 2021). In that case, the Fifth Circuit had refused to offer an administrative agency any deference because of the Department of Health and Human Services' "steadfast insistence in the administrative record" that it was not making a judgment. *Id.* The Fifth Circuit then held, apparently on its own review, that United—

who admits it owes money it has been withholding for eight years—had suffered prejudice because of the litigation delay. *Int'l Energy Venture Mgmt.*, 999 F.3d at 268-69.

REASONS FOR GRANTING THE PETITION

The Court should hold the matter pending its disposition of *Morgan v. Sundance*, No. 21-328. That case squarely presents the question whether prejudice is an "essential element of proving waiver of the right to arbitrate"—and if so, implicitly what the standard for that prejudice should be. If this Court agrees with the *Morgan* respondent that prejudice is part of the traditional test for waiver of arbitration and is a factual issue entrusted to the district court for review, then the judgment here should be granted, vacated, and remanded under *Morgan*.

If the Court does not resolve the question presented in *Morgan* so that a GVR would be warranted, it should grant this petition for plenary review to resolve a wide circuit split about the breadth of Federal Rule of Civil Procedure 52(a)'s requirement for clear-error review of fact-findings. Appellate courts may not set aside a district court's findings of fact unless those findings are clearly erroneous. Under this Court's decision in *Pullman-Standard v. Swint*, an appellate court must generally remand for further fact-finding when the district court fails to make adequate findings. Yet the Fifth Circuit staked out a position previously taken by the Second, Sixth, and Eleventh Circuits to

allow a less deferential or de novo review of factual findings when the prior findings are "insufficient" for some reason, unlike many circuits who take a strict approach to Rule 52(a)'s plain language. This Court should resolve this ripe split by reaffirming the foundational principle that appellate courts must review factual findings for nothing less than clear error. While that point is important in all scenarios, it is especially important when waiver of arbitration is at stake. All doubts should be resolved in favor of arbitration—including doubts about the district court's factual findings.

I. The Court should hold this Petition pending *Morgan v. Sundance.*

This Court recently granted certiorari in *Morgan v. Sundance*, No. 21-328. The question directly presented in that case is whether prejudice is properly part of the test for litigation conduct waiver in arbitration at all. To be sure, if this Court holds that prejudice is not part of the test for waiver of arbitration, then there is nothing left to debate in this case either. In that sense, *Morgan* may well be dispositive of this petition. That alone counsels holding this Petition until *Morgan* is decided.

But if the Court holds that prejudice *can* be part of the waiver analysis (as it should), then it has more work to do. It must decide, for example, whether the prejudice required is "modest" (as the Eighth Circuit found in *Morgan* itself), or more substantial. *See*, *e.g.*, *Rota-McLarty v. Santander Consumer USA*, 700 F.3d

690, 702 (4th Cir. 2012) ("The dispositive determination is whether the opposing party has suffered actual prejudice.").

Once it places itself in one of the prejudice "camps" (in the words of the *Morgan* petition), the Court must then sketch out the proper test for finding prejudice. And it should, in the course of doing all of that, decide whether a district court's decisions on prejudice are due deference or whether, as the Fifth Circuit held in this case, they can be ignored as inadequate and new findings made essentially de novo.

Thus, *Morgan* may have significant consequences for this case. Indeed, depending on the Court's holding, it may then be appropriate to grant, vacate, and remand (GVR) this case for reconsideration in light of *Morgan*. Under the "prevailing standard," *Elmbrook School District v. Doe*, 134 S. Ct. 2283 (2014), a GVR should be granted "where an intervening factor has arisen that has a legal bearing upon the decision." *Lawrence v. Chater*, 516 U.S. 163, 168-69 (1996) (per curiam); *see also Youngblood v. West Virginia*, 547 U.S. 867, 875 (2006) (Kennedy, J., dissenting) (explaining that "issuing a GVR order in light of some new development" is "traditional practice").

The standard for issuing a GVR is not as demanding as the standard for a traditional grant of certiorari. A GVR order is warranted whenever, "in light of 'intervening developments,' " "there [i]s a 'reasonable probability' that the court of appeals would reject a legal premise on which it relied and which may affect the

outcome of the litigation." *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) (*quoting Lawrence*, 516 U.S. at 167); *see also Wellons v. Hall*, 558 U.S. 220, 225 (2010) (per curiam). This is so because a GVR "conserves the scarce resources of this Court," "assists the court below by flagging a particular issue that it does not appear to have fully considered," and "assists this Court by procuring the benefit of the lower court's insight before we rule on the merits." *Lawrence*, 516 U.S. at 167.

If this Court holds in *Morgan* that prejudice remains part of waiver and that a district court's findings about prejudice must be reviewed deferentially, then a GVR would be appropriate to allow the Fifth Circuit to have the benefit of the *Morgan* opinion.

II. Alternatively, this Court should grant plenary review to resolve a clear circuit split on Rule 52(a)'s clear-error standard.

Rule 52(a)'s standard for appellate review is unambiguous: "Findings of fact, whether based on oral or other evidence, *must not be set aside unless clearly erroneous*." FED. R. CIV. P. 52(a)(6) (emphasis added). The clearly-erroneous language has been an enduring standard set by Rule 52. *See*, *e.g.*, *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

Despite its plain language, courts have long struggled to apply the Rule faithfully. For example, up until the mid-1980s, many circuit courts believed there was no reason to defer to the trial court's findings—even when sufficiently stated—if the findings did not rest on

an evaluation of a witness's credibility. *See* 9 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2587 (3d ed., Apr. 2021 Update) (discussing history of findings from documentary evidence). In 1985, a rule amendment made clear that those circuits went too far, and the clear-error rule applied *whether or not* the findings were "based on oral or other evidence." FED. R. CIV. P. 52, note to 1985 amnd. That same year, this Court reminded the lower courts that "appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 123 (1969)).

Nevertheless, the courts of appeals again created exceptions to the newly clarified rule. Just seven years ago, this Court rejected the notion that there is an exception to clear-error review when circuit courts review factual findings that were "underlying" a legal conclusion. *See Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 321-22, 324-28 (2015). As this Court said in *Teva*, exceptions "undermine the legitimacy of the district courts . . . , multiply appeals . . . , and needlessly reallocate judicial authority." *Id.*, *citing* Advisory Committee's 1985 Note on subd. (a) of FED. R. CIV. P. 52.

Undeterred, some circuit courts have created another exception: When the district court fails to make sufficient findings under Rule 52(a)(1), some courts of appeals engage in their own de novo review simply out of an apparent desire for efficiency or because the

record contains only documentary evidence. This conflicts with the other circuits that steadfastly follow this Court's 1985 reminder that their job is not to conduct de novo review. This deepening split is ripe for this Court's review.

A. The Second, Fifth, Sixth, and Eleventh Circuits circumvent the clear-error standard, in conflict with the First, Eighth, Ninth, and D.C. Circuits.

If the district court fails to make proper findings of fact or if the findings of fact are inadequate, then the "usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings." *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982).

The one alternative approach recognized by this Court is when "the record permits only one resolution of the factual issue." *Id.* at 292. And some courts will further affirm, even without sufficient findings, if the record supports the district court's judgment. *See e.g.*, *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001). These approaches are not exceptions to the rule itself but simply an extension of Rule 52's clear-error standard of review, as they only allow reversal when the circuit court "is left with the definite and firm conviction that a mistake has been committed." *Anderson*, 470 U.S. at 573. In other words, when the clear-error standard is met.

But the Second, Fifth, Sixth, and Eleventh Circuits have created their own exceptions to the general rule. Out of an apparent concern for judicial economy, these Circuits sometimes eschew Rule 52's clear-error review and decide fact issues de novo. *See Mobil Shipping & Transp. Co. v. Wonsild Liquid Carriers Ltd.*, 190 F.3d 64, 69 (2d Cir. 1999); *Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 999 F.3d 257, 268 (5th Cir. 2021); *G.G. Marck & Assocs., Inc. v. Peng*, 309 F. App'x 928, 936 (6th Cir. 2009); *Tejada v. Dugger*, 941 F.2d 1551, 1555 (11th Cir. 1991).

This conflicts with the First, Eighth, Ninth, and D.C. Circuits that follow this Court's prior guidance to its logical conclusion and insist that they must either remand to the district court or undertake the "herculean" task of a difficult clear-error review even in the face of insufficient findings. *See Supermercados Econo, Inc. v. Integrand Assurance Co.*, 375 F.3d 1, 3 (1st Cir. 2004); *Duffie v. Deere & Co.*, 111 F.3d 70, 74 (8th Cir. 1997); *Crittenden v. Chappell*, 804 F.3d 998, 1006-07 & n.4 (9th Cir. 2015); *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1407-08 (D.C. Cir. 1988).

In this case, the Fifth Circuit panel neither remanded for further fact-finding nor found that the record permitted only one outcome. Instead, it directly rejected clear-error review and found that United had suffered prejudice because of International's litigation conduct. *Int'l Energy Venture Mgmt.*, 999 F.3d at 268-69. This holding illuminates a fault line in an acknowledged and troublesome circuit split. The Fifth Circuit

has also previously held that a remand for findings is unnecessary if, as in this case, "the evidence is documentary and the appellate court can pass upon the facts as well as the trial court, or if all facts relied upon to support the judgment are in the record and are undisputed." *Jenkens & Gilchrist v. Groia & Co.*, 542 F.3d 114, 118 (5th Cir. 2008).

The Second Circuit has held similarly, making factual determinations, rather than remanding to the district court, if it is "able to discern enough solid facts from the record to permit [it] to render a decision." *Mobil Shipping & Transp. Co.* 190 F.3d at 69 (quoting *Davis v. NYC Hous. Auth.*, 166 F.3d 432, 436 (2d Cir. 1991)). Thus, even in a case where the trial court failed to make a relevant factual finding because it simply "did not address" the issue, the Second Circuit has held that it may still conduct its own review where "the relevant evidence is documentary and undisputed." *Id.* at 67, 69.

The Sixth and Eleventh Circuits have not broken with Rule 52 as cleanly, but their decisions have the same effect. The Sixth Circuit has not emphasized whether the record contained only documentary evidence, for example, but it has held that it may "dispose of the appeal on its merits despite the insufficiency of the findings of fact" simply "to avoid further extension of . . . protracted litigation." *G.G. Marck*, 309 F. App'x at 936. Meanwhile, the Eleventh Circuit has simply decided issues on its own, saying that remand is unnecessary when "a complete understanding of the issues is possible in the absence of separate findings and if

there is a sufficient basis for the appellate court's consideration of the merits of the case." *E.g.*, *Tejada*, 941 F.2d at 1555.

These cases conflict with the approaches of the First, Eighth, Ninth, and D.C. Circuits, which all refuse to conduct their own review in the face of insufficient findings. *See Supermercados Econo, Inc.*, 375 F.3d at 3 (1st Cir. 2004); *Duffie*, 111 F.3d at 74 (8th Cir. 1997); *Crittenden*, 804 F.3d at 1006-07 & n.4 (9th Cir. 2015); *Berger*, 843 F.2d at 1407-08 (D.C. Cir. 1988). And even more circuits state in general terms that they "*must* remand" to the district court when insufficient or nonexistent findings prevent clear-error review, or that remand is *necessary* or *required* in such circumstances. *See e.g.*, *PharMethod, Inc. v. Caserta*, 382 F. App'x 214, 218 (3d Cir. 2010); *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 414 (4th Cir. 1999); *Sellers v. United States*, 902 F.2d 598, 601 (7th Cir. 1990); *In re Young*, 91 F.3d 1367, 1375 (10th Cir. 1996); *Golden Blount, Inc. v. Robert H. Peterson Co.*, 365 F.3d 1054, 1061 (Fed. Cir. 2004).

The circuits that strictly adhere to the principle that only the district court may make fact-findings choose one of two paths when the findings of fact are wanting. Generally, they follow the "usual rule" endorsed by this Court that the case be remanded for further findings. *See Pullman-Standard*, 456 U.S. at 291. In rare circumstances, they may still attempt a clear-error review, although the task is arduous without proper findings of fact.

Supermercados Enoco provides the best illustration of the usual rule. There, the district court dismissed the plaintiff's claims against the defendant that it should have been included as a payee in a payment of certain insurance claims. 375 F.3d at 3. On appeal, the plaintiff complained that the district court failed to make appropriate findings as to that claim. *Id.* While the district court made some findings of fact, the First Circuit could not discern the district court's basis for rejecting the loss-payee claim. *Id.* The defendant nevertheless insisted that "appellate tribunals should not stand unduly on ceremony, but should fill in the blanks in the district court's account when the record and the circumstances permit this to be done without short-changing the parties." *Id.* In response, the First Circuit noted that its own function was simply to review legal conclusions de novo and factual findings for clear error, but in this instance such review was "utterly impracticable." *Id.* at 4. Accordingly, the First Circuit remanded to the district court "for further findings of fact and conclusions of law as required by Rule 52(a)" without expressing an opinion on the merits. *Id.* at 5. What the First Circuit refused to do is ignore Rule 52's requirements.

Berger illustrates a yet more rigorous approach to the question. There, the appellants specifically asked the court of appeals to perform its own review (either de novo "or something approaching it") because the trial court's order did not constitute appropriate "findings." 843 F.2d at 1407. The D.C. Circuit refused, explaining that de novo review is "wholly inconsistent

with the function of an appellate court." *Id.* The court further noted that de novo review would also be "contrary to the plain meaning of Rule 52(a), which requires courts to set aside factual findings only if they are 'clearly erroneous.' " *Id.*

The D.C. Circuit has held firm to its views in *Berger*. For example, in 2001 the en banc D.C. Circuit refused to apply any standard of review less demanding than clear error, even after it disqualified the district judge. *See United States v. Microsoft Corp.*, 253 F.3d 34, 117-18 (D.C. Cir. 2001) (en banc) (per curiam) ("As the rules are written, district court fact[-]findings receive either full deference under the clearly erroneous standard or they must be vacated. There is no *de novo* appellate review of fact[-]findings and no intermediate level between *de novo* and clear error, not even for findings the court of appeals may find sub-par."). The difference between *Berger* and other cases is simply that the court then chose, for whatever reason, to "undertake with great reluctance what in this case has proven a Herculean task"—to maintain a "clearly erroneous" standard of review despite insufficient findings. *Berger*, 843 F.2d at 1408.

The longstanding split ought to be resolved by this Court because there is no question this case would be resolved differently in different circuits. The Second, Fifth, Sixth, and Eleventh Circuits have created an apparent exception to Rule 52(a)'s clear-error rule: When the district court fails to make proper fact-findings, no deference is owed and the court of appeals may come to its own conclusions. The remaining

circuits, however, especially the First, Eighth, Ninth, and D.C. Circuits, refuse to review the district court under any standard *but* clear error—even when confronted with such weak findings.

B. The question presented is important and recurring.

This case presents a straightforward opportunity for this Court to reaffirm its longstanding tenet that district courts, not appellate courts, are the best judges of the facts. The decisions by the Second, Fifth, Sixth, and Eleventh Circuits to eschew the clear-error standard at times defies the basic principles of appellate review.

That is of special importance in the context of arbitration. This Court has spared no effort to emphasize that Congress has commanded the courts to adopt a "liberal federal policy favoring arbitration agreements. . . ." *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (collecting cases). Thus, the Court has rejected efforts to prohibit class action waivers in consumer contracts, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), confirmed that such waivers are valid, *American Express v. Italian Colors Restaurant*, 570 U.S. 228 (2013), and instructed courts that questions of arbitrability are only for arbitrators, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019). On top of all that, the Court has recently granted review of the rule prohibiting California Private Attorneys General Act waivers in individual

arbitration agreements. *See Viking River Cruises Inc. v. Moriana*, No. 20-1573. All those decisions are in service of the broader point that courts must "rigorously enforce" arbitration agreements according to their terms. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). To intervene in all of those cases, and yet allow International's and United's negotiated arbitration agreement to be thwarted here defies the thrust of this Court's jurisprudence.

Moreover, hundreds of bench trials occur in federal court every year, with countless other judicial decisions like injunctions or arbitration orders that require Rule 52's application. And as a years-long pandemic forces courts and litigators to rethink trial strategies and efficiencies, bench trials are becoming even more common. *See* Jeffrey E. Gross, *What COVID-19-Era Litigation May Foretell for Remote Bench Trials*, AM. BAR ASS'N (Apr. 1, 2021), https://perma.cc/QZL3-QRLL.

With the growth of bench trials and cases being decided by individual district judges before trial, clarifying the standard of review when trial judges make insufficient fact-findings is critical. The "orderly appellate review safeguards" are important both for parties' due-process rights and the "rights of public justice." *United States v. Loud Hawk*, 474 U.S. 302, 313 (1986). Allowing courts of appeals to manipulate Rule 52's standard of review whenever they can claim that

findings are "insufficient" would gravely endanger these rights.[3]

Given the importance of appellate standards of review, this Court unsurprisingly routinely intervenes to resolve splits in the lower courts on this issue. For example, as recently as 2020, this Court clarified that the appellate-review standards were deferential in multiple other areas of law, such as certain determinations under the Antiterrorism and Effective Death Penalty Act and the Hague Convention. *See Shinn v. Kayer*, 141 S. Ct. 517, 523-24 (2020); *Monasky v. Taglieri*, 140 S. Ct. 719, 730-31 (2020); *see also McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159, 1166-67 (2017); *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991).

In the 1980s, when federal courts of appeals had taken various approaches on how to treat Rule 52's clear-error standard and some circuits virtually disregarded the rule, this Court intervened. Although their deviations are more subtle now, the courts of appeals have again diverged from the iron rule of clear-error

[3] Allowing courts of appeals flexibility in applying standards of review poses special dangers when a district court judge might be disfavored. Even a putatively weaker judge can make correct fact-findings. It is perhaps no coincidence here that the district judge in question has been openly criticized by the Fifth Circuit. *See*, *e.g.*, Oral Argument, *Pulse Network v. Visa*, No. 18-20669 (5th Cir. Jan. 5, 2022), *available at* https://www.ca5.uscourts.gov/OralArgRecordings/18/18-20669_1-5-2022.mp3 (court member suggesting that litigants in this judge's court often seek reassignment as a remedy on appeal).

review for factual findings. This Court should intervene.

C. The Fifth Circuit erred here while further muddying the otherwise clear standards of Rule 52(a).

This Court once made abundantly clear the scope of an appellate court's authority in reviewing a lower court's findings of fact. Fact-finding is the fundamental responsibility of district courts, not appellate courts. *See Pullman-Standard*, 456 U.S. at 291. Under Federal Rule of Civil Procedure 52(a)(6), an appellate court may not set aside a district court's factual findings unless they are clearly erroneous.

The clearly-erroneous standard does not entitle an appellate court to reverse the finding of the trier of fact "simply because it is convinced that it would have decided the case differently." *Anderson*, 470 U.S. at 573. It also does not "exclude certain categories of factual findings from the *obligation* of a court of appeals to accept a district court's findings." *Pullman-Standard*, 456 U.S. at 287 (emphasis added). The clear-error standard is inflexible, not allowing for broader review simply "because the factual findings at issue may determine the outcome of the case." *Maine v. Taylor*, 477 U.S. 131, 145 (1986). Instead, the appellate court must defer to the lower court's findings and reverse *only* if left with the definite and firm conviction that a

mistake was committed.[4] *U.S. Gypsum Co.*, 333 U.S. at 395.

When applying the clearly-erroneous standard, appellate courts must also "constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp.*, 395 U.S. at 123. The reviewing court may not review the lower court's findings, even if it is convinced it would have weighed the evidence differently if it were sitting as the trier of fact. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). This Court has repeatedly emphasized these principles and continues to do so today. *See Glossip v. Gross*, 576 U.S. 863, 881 (2015) ("[W]e review the District Court's factual findings under the deferential 'clear error' standard."); *June Med. Servs., L.L.C. v. Russo*, 140 S. Ct. 2103, 2121 (2020) (rejecting the argument that the Court should not defer to the trial court's factual findings because they were "conjectural").

Rule 52(a)(6) promotes stability and judicial economy by recognizing that the trial court, not the appellate court, should find the facts. To permit courts of appeals to share more actively in the fact-finding function undermines the legitimacy of the district courts in the eyes of litigants, multiplies appeals by encouraging appellate retrial of factual issues, and needlessly reallocates judicial authority. And although appellate

[4] "To be clearly erroneous, a decision must strike [an appellate court] as more than just maybe or probably wrong; it must . . . strike [it] as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988).

courts may view their own intervention as efficiently deciding cases and controversy, Rule 52(a)(6) preserves judicial resources by deferring to the single judge who is closest to the parties and witnesses, rather than having panels of numerous judges at different levels decide discrete fact issues in the first instance.

In this case, the district court acted properly when it found that United had not been prejudiced by International's limited litigation conduct. The district court found that the litigation merely arose from "dismissals and appeals on jurisdictional grounds, never coming close to addressing the core issue." Pet. App. 30. It analogized the parties' conduct as primarily being "a game of cat-and-mouse." *Id.* Accordingly, it was reasonable—and, more specifically, *not clearly erroneous*, to find that United failed to show prejudice by International's minimal litigation efforts.

In reversing the district court's judgment, the Fifth Circuit acknowledged the correct standard of review. It agreed correctly that the Court would "typically" review the district court's fact-findings for clear error. *Int'l Energy Venture Mgmt.*, 999 F.3d at 268. Yet it never determined whether the district court's prejudice determination was clear error. Instead, the appellate court dismantled decades of precedent and applied a novel "no deference" standard of review to the district court's factual findings. *Id.*

What's more, the Fifth Circuit then made its own findings and placed itself in the district court's position. It found de novo that International's initial

pursuit of litigation caused United to suffer delay, expense, and damage to its legal position. *Id.* at 268-69. Rather than reviewing the district court's various factual findings, the Fifth Circuit summarily dismissed its findings as "conclusory assertions." *Id.* Finally, the Fifth Circuit declined to remand for further findings as Petitioner suggested in its motion for rehearing. This is facially improper under the plain language of Rule 52, and this approach—followed by the Second, Sixth, and Eleventh Circuits—should be reversed and corrected by this Court.

III. The petition is an ideal vehicle.

This case is an ideal vehicle for this Court to resolve the important issue presented. Simply put, although the issue is important and recurring, it is rarely stated so crisply. Many courts of appeals simply ignore the standard of review—the Eleventh Circuit in *Tejada v. Dugger*, for example, failed to mention any standard of review or indicate whether it gave any deference to the district court's judgment. *See generally* 941 F.2d 1551. But the Fifth Circuit panel here specifically held that it refused to defer to the district court's factual findings—that it owed the district court "no deference." The court may as well have said "We are not going to follow Rule 52." That bald holding is strikingly rare enough to call out for this Court's rebuke. This may be one of the only cases this Court ever sees that

presents this issue *without* a significant vehicle problem that presents this question.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari. In the alternative, this Court should hold this Petition for *Morgan*, and once that case is decided, grant, vacate, and remand this case for reconsideration by the Fifth Circuit.

Respectfully submitted,

THOMAS C. WRIGHT
Counsel of Record
RAFFI MELKONIAN
MICHAEL ADAMS-HURTA
BRADLEY C. WILLIAMS
JONATHAN W. LEHRMANN
EMILY C. FREEMAN
WRIGHT CLOSE & BARGER, LLP
One Riverway, Suite 2200
Houston, Texas 77056
(713) 572-4321
wright@wrightclosebarger.com

MICHAEL D. SYDOW
THE SYDOW FIRM
5020 Montrose Blvd., Suite 450
Houston, Texas 77006
(713) 622-9700

Counsel for Petitioner

Dated: January 18, 2022