No. 21-1028

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

BRIEF IN OPPOSITION

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INTRODUCTION

The alleged grounds for review by this Court are simply inaccurate. The likelihood that this Court's decision in *Morgan v. Sundance*, No. 21-328 (docketed Sept 1, 2021) might suggest a different possible outcome in this case is, at best, hypothetical and remote. The parties in *Morgan* have not submitted or argued the questions Petitioner speculates might be of import to this case and, therefore, it is unlikely that the Court would—if not certain the Court would not—choose to address these questions in the context of the *Morgan* case. The *Morgan* case bears relation to this case only because it also involves a claim of waiver of arbitration by one party through its litigation conduct ("litigation conduct waiver"). This link by itself is insufficient to warrant holding this petition pending the Court's disposition of *Morgan*.

In addition, there is no circuit split on the standard of review issue raised by Petitioner, certainly not a "clear" split as Plaintiff argues. Tellingly, not a single case cited by Petitioner as highlighting the purported circuit split mentions a disagreement among the circuits on the appropriate standard of review. Nor does Petitioner offer any secondary authority suggesting there is such a split. The differences in the cases are explained by the disparate factual and procedural contexts addressed by each case, not by a disagreement on the appropriate standard of review.

This case involves a situation not presented by any of the other cases cited by Petitioner in which the district court, on an extant record developed in arbitration, made a legal error in concluding that Respondent suffered no prejudice from Petitioner's litigation conduct because the litigation activity was primarily procedural in nature, a holding which is not

consistent with the applicable legal standard for prejudice. Furthermore, the district court did not disagree with the detailed findings of two arbitrators on the subject of prejudice and made no other findings to support its no-prejudice conclusion.

As a result, in addition to stating that it owed no deference to the district court's unsupported conclusion as it did, the Fifth Circuit could also have simply stated that the conclusion was clearly erroneous because the entire evidence left the court with the definite and firm conviction that the district court had made a mistake. In effect, this is what the court did. Consequently, this case would be a poor case for reevaluating the standard of review.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

The facts of the parties' underlying dispute have minimal relevance to the issues presented by the Petition, except to the extent that these facts inform the long procedural history of this case and Petitioner's prejudicial pursuit of U.S. court litigation, to the exclusion of arbitration, for many years. Nevertheless, Petitioner includes a factual background section in the Petition, as it has frequently done in other briefing, in order to leave the false impression that this case involves a miscarriage of justice in which Petitioner has been denied a forum for claims that are largely undisputed. Nothing could be further from the truth.

Respondent has steadfastly denied that it ever promised to pay Petitioner a "commission" or a "finder's fee" in connection with Respondent's purchase of oil and gas assets located in Pakistan from BP plc, which is the gravamen of Petitioner's claims. Pet.4-5. There is no written agreement signed by Respondent

that reflects an agreement to pay such a commission or finder's fee, as the Petition inaccurately suggests. Pet.5. The parties' later written agreement for Petitioner to provide certain specific consulting services to Respondent makes no mention of a commission or finder's fee and only references services provided by Petitioner in the past in the most general terms for purposes of clarifying that Petitioner did not release any claim as to prior work by virtue of signing the written agreement to provide other services. ROA.1404-1407.[1] This written agreement contains an arbitration clause providing for arbitration of certain disputes in Houston, Texas, but Respondent has always disputed that this clause covers Petitioner's claims of an oral agreement to compensate Petitioner for pre-closing services. ROA.1406. Furthermore, this clause does not cover all disputes arising from the parties' entire relationship but only those "arising out of this Agreement or its interpretation." *Id.*

Because Petitioner spent years pursuing a jury trial in U.S. courts instead of bringing its claims in an appropriate forum from the beginning, such as the courts of Hong Kong, Respondent, a Hong Kong-based corporation, has been forced to contest Petitioner's efforts to hale it improperly to a far-away venue with little connection to the parties' dispute aside from being Petitioner's home court. As a result of the procedural posture of the case, Petitioner has been able to restate its disputed allegations many times as though they are fact, but they remain allegations only and no final resolution of the disputed claims has occurred.

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[1] As does Petitioner, Respondent uses "ROA" to refer to the Record on Appeal in the Fifth Circuit.

B. Procedural Background

The important aspects of this case's procedural history are not disputed. But not all of these aspects are included in Petitioner's recitation of the history. The legal process that has culminated in the petition to this Court began when Petitioner, in July 2013, sued Respondent in Texas state court, demanded a jury, and paid a jury fee. ROA.1411-16. Outside of expressly disclaiming the intention to arbitrate its claims, it is difficult to think of an act that more clearly demonstrates an unequivocal intention to pursue claims in court rather than arbitration. More than that, though, Petitioner cited the agreement containing the arbitration clause that it later attempted to enforce in its state court petition, but made no mention of its arbitration provision. ROA.1414. Instead, Petitioner thereafter argued that the arbitration clause amounted to a "forum selection clause" through which Respondent had consented to jurisdiction in Texas for its state court action seeking a jury trial. ROA.1421-22.

Respondent removed the lawsuit to federal court and filed a motion to dismiss on personal jurisdiction grounds. While this motion was pending, after first suggesting it would await the district court's ruling on the motion, Petitioner filed an arbitration demand with the American Arbitration Association. In June 2014, the arbitrator, Gary V. McGowan, entered an award dismissing Petitioner's claims on well-reasoned grounds of litigation conduct waiver (the "McGowan Award"). ROA.1023-28.

Petitioner *never* challenged the McGowan Award through a timely motion to vacate under the FAA or otherwise. Nor did it initiate another arbitration at that time. Instead, Petitioner awaited the district

court's decision on Respondent's pending motion to dismiss its lawsuit for lack of personal jurisdiction. After the district court ruled in Respondent's favor and dismissed the lawsuit, Petitioner appealed to the Fifth Circuit in August 2014. The appeal challenged both the propriety of Respondent's removal of Petitioner's state court lawsuit to federal court and the dismissal on personal jurisdiction grounds.

Petitioner knew full well that prevailing on neither of these issues was important to whether it could bring its claims in arbitration but was only important to an attempt to bring claims in court instead of arbitration. In its briefing to the Fifth Circuit, the parties cited cases that stand for the proposition that a court has jurisdiction to compel arbitration pursuant to an agreement that designates the location of the court as the situs of the arbitration even if the court lacks jurisdiction over the parties for other purposes. ROA.2521-23. As an initial matter, Petitioner did not need a court to compel arbitration because, as the claimant, it had the power to initiate an arbitration independently. But even setting this aside, Petitioner clearly understood that it did not need the Fifth Circuit to rule that the Texas courts had jurisdiction over Respondent to obtain a Texas court's assistance in compelling arbitration pursuant to the parties' arbitration agreement, if necessary.

In March 2016, after extensive briefing and argument and a successful rehearing petition by Respondent on the issue of personal jurisdiction, the Fifth Circuit ruled in Respondent's favor, holding that Petitioner's state court lawsuit was properly removed to federal court and that the district court correctly concluded that the Texas courts lacked jurisdiction over Respondent. *Int'l Energy Ventures Mgmt., L.L.C. v. United*

Energy Grp., Ltd., 818 F.3d 193, 213 (5th Cir. 2016). Only *after* the Fifth Circuit denied Petitioner's subsequent rehearing petition did Petitioner return again to arbitration by initiating a second arbitration proceeding and filing another lawsuit in Texas state court asking the court to compel arbitration—actions that, if not barred by Petitioner's failure to challenge the McGowan Award, could have been taken at any time after the McGowan Award.[2]

Respondent removed the second lawsuit, like the first one, to federal court. By the time of removal, however, the parties had already submitted extensive briefing to the new arbitrator on arbitrability and waiver issues, and the district court stayed the lawsuit pending a ruling by the arbitrator. On December 8, 2017, a second arbitrator, Platt W. Davis III, issued an award, again dismissing Petitioner's claims on grounds of litigation conduct waiver (the "Davis Award"). ROA.1010-15. In addition to the litigation conduct cited in the McGowan Award, Arbitrator Davis incorporated into his analysis all of the facts concerning Petitioner's appeal of the dismissal of the first lawsuit and the extensive and unnecessary time and expense incurred by Respondent from having to defend against this appeal. ROA.1013-14.

In contrast to Petitioner's failure to move to vacate the McGowan Award, this time Petitioner filed a motion to vacate the Davis Award under the FAA, asserting that the arbitrator had exceeded his powers by ruling on the question of litigation conduct waiver.

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[2] The fact that Petitioner initiated this second arbitration after *losing* its appeal on removal and personal jurisdiction is further evidence Petitioner did not believe the appeal was necessary to pursuing claims in arbitration, but rather related to its desire to pursue its claims instead in court.

The motion to vacate was fully briefed by early June 2018. Nearly two years later, in March 2020, the district court issued a five page "Opinion on Arbitration," vacating not only the Davis Award, but also the McGowan Award, which it had not even been asked to vacate, and granting Petitioner's motion to compel arbitration. ROA.2655-59; *see also* Pet'r.App.25-31. Respondent appealed to the Fifth Circuit while Petitioner initiated its third arbitration on the same claims.

On May 28, 2021, the Fifth Circuit issued the ruling that Petitioner challenges now. *Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 999 F.3d 257 (5th Cir. 2021). The court noted that prejudice, under the prevailing standard in the Fifth Circuit, is established through evidence of "delay, expense, ***or*** damage to [its] legal position" from an opposing party's pursuit of litigation. *Id*. at 267 (emphasis added and citations omitted). After this, the court summarized the incontrovertible evidence in the record of the delay and expense to Respondent that could only have been related to a desire by Petitioner to pursue claims in court instead of arbitration. *Id*. at 267-68 (noting, among other things, that more than two-and-a-half years passed between the conclusion of Petitioner's filing of the first arbitration and initiation of the second, during which time Respondent incurred "significant attorney['s] fees" and submitted "substantial briefing" to protect its litigation position). The court then stated that it owed no deference to the district court's bare conclusion, unsupported by any findings, that Respondent suffered no cognizable prejudice from Petitioner's litigation conduct. *Id*. at 268.

Respondent also argued to both the district court and the court of appeals that Petitioner's right to arbitrate a second time was waived by Petitioner's

failure to timely move to vacate the McGowan Award. The Fifth Circuit determined that this argument might have merit but did not need to be addressed in view of the court's independent conclusion that the district court committed reversible error by concluding that Respondent did not suffer prejudice from Petitioner's litigation conduct. *Id*. at 265 n.3.

Petitioner asked for rehearing en banc, but its petition was denied because no member of the court requested that the court be polled. Pet'r.App.23-24.

REASONS THE PETITION SHOULD BE DENIED

This Court's resolution of *Morgan v. Sundance* should have no impact on the outcome in this case and there is no circuit split—much less a "clear" one—on the standard of review issue raised by the petition. Furthermore, because of the unique record of this case and the fact that the court of appeals' decision, as set forth below, is easily reconciled to this Court's statement of the clear error standard, this case is a poor case for analyzing and providing guidance for how the clear error standard should be applied in other cases.

I. *Morgan v. Sundance* has no bearing on this case.

Petitioner leads with argument that the Court should hold its petition pending the outcome of the recently argued *Morgan v. Sundance*, No. 21-328. In doing so, Petitioner dramatically overstates the potential relevance of *Morgan* to this case. Although both cases involve litigation conduct waiver, the similarities largely end there.

Morgan brought claims in court against Sundance that Sundance argued, after some period of litigation, were subject to arbitration. Morgan argued that

Sundance waived the right to arbitrate through its litigation conduct. The court of appeals determined otherwise, applying the prejudice requirement used by a majority of courts in this context and concluding that Morgan had not been prejudiced by Sundance's delay in moving to compel arbitration.

Morgan has now argued to this court that, under the provisions of the FAA and the traditional understanding of the doctrine of waiver, a party claiming that another party waived its arbitration right should not have to prove prejudice at all. Waiver, instead, should be wholly dependent on the conduct of the party alleged to have waived the right.

Obviously, if Morgan prevails, the outcome of this case remains the same. This Court's decision would simply provide another reason that Petitioner was correctly held by the Fifth Circuit to have waived its arbitration right, as Petitioner concedes. Pet'r.Br.9.

And Petitioner is incorrect that an adverse result for Morgan could or would compel this Court to grant its petition, vacate the Fifth Circuit's judgment, and remand this case in light of *Morgan*. Petitioner's argument explicitly depends on a series of "ifs": *if* Morgan's argument is rejected; and *if* the Court then proceeds to opine on the extent or amount of prejudice a party must demonstrate to establish waiver; and *if* the Court holds that a district court's findings about prejudice must be reviewed deferentially; and *if* the Court holds that the absence of relevant fact findings compels a court of appeals to remand to the district court for further findings regardless of the state of the record before it; *then* the *Morgan* decision *may* be relevant to whether the prejudice demonstrated by Respondent in this case meets that standard. Pet.9, 11.

Not only is this argument incredibly attenuated and speculative, there is serious reason to doubt that this Court would or should address the prejudice-*standard* questions suggested by Petitioner in *Morgan*.

First, *Morgan* only addresses whether *any* prejudice requirement applies in assessing litigation conduct waiver and does not raise any question concerning the *standard* by which the lower courts applied the prejudice requirement in her case. Accordingly, this Court has no reason in *Morgan* to provide guidance to the lower courts about proper application of the prejudice requirement, as *Morgan* only presents the binary issue of whether a prejudice requirement should have been applied at all. The question of whether the prejudice requirement was properly applied was not preserved by Morgan.

Second, because Morgan did not raise the issue, and the parties did not brief or argue it, *Morgan* is not a good vehicle for the Court to opine about the types or extent of prejudice that should be required in the litigation conduct waiver context. Nor has evidence of a need for Supreme Court guidance on alternative prejudice *standards* been presented in either case. Petitioner is simply grasping at straws in a last ditch effort to keep its claims alive in a U.S. forum where they never should have been brought in the first place.

II. There is no circuit split.

As a circuit split on an important issue of law is one of the most common reasons this Court accepts cases for review, it is telling that not a single case cited by Petitioner as illustrating the purported circuit split references any disagreement among the circuits con-

cerning how Rule 52's clear error standard should be applied.[3]

In fact, the cases cited by Petitioner do not reflect a clear circuit split but merely foreseeable differences in how the clear error standard is applied in the very different factual and procedural settings presented by the cases. Even Petitioner acknowledges this Court's precedent holding that, in cases involving insufficient fact findings, remand to the district court for further findings is not required where "the record permits only one resolution of the factual issue." Pet.13 (citing *Pullman-Standard, Div. of Pullman v. Swint*, 456 U.S. 273, 292 (1982)). The cases cited by Petitioner as reflecting improper application of Rule 52, purportedly on one side of a circuit split, may be more accurately understood as applying this rule rather than asserting power of an appellate court to make fact findings in a manner prohibited by Rule 52. Most importantly, this is certainly true with respect to the Fifth Circuit's ruling in this case.

Supermercados Econo, Inc. v. Integrated Assurance Co., 375 F.3d 1 (1st Cir. 2004), is the case that Petitioner argues best illustrates how the clear error standard should be applied. Pet.17. *Supermercados* involved a bench trial in which the district court rejected one of the plaintiff's claims without indicating any basis, *legal or factual*, for the decision. *Id.* at 7. To review the district court's decision, therefore, would require the court of appeals to "infer the conclusions of law as well as the factual basis of those conclusions."

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[3] Indeed, in view of this Court's important role in resolving circuit splits, it is notable that Petitioner does not lead its petition with its argument that there is a "clear circuit split" concerning proper application of the clear error standard if such a split exists.

Id. at 7-8. The record in the case rendered it "utterly impracticable" for the court of appeals to address these issues "when neither the conclusions of law which guided the district court ruling, nor the findings of fact essential to a principled decision under the applicable law, are discernable from its decision." *Id*. Plainly, the court of appeals believed more than one outcome was conceivable.

Petitioner argues that *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395 (D.C. Cir. 1988) "illustrates a more rigorous approach" to application of Rule 52. Pet.17. *Berger* involved a bench trial in which the district court simply adopted nearly verbatim the plaintiffs' proposed findings of fact, including typographical errors, but deleted record citations. *Id*. at 1404. While the court of appeals rejected that this warranted making de novo fact findings, the court nevertheless undertook the "Herculean task" of evaluating the correctness of these fact findings on the basis of a detailed review of the evidence in the record. *Id*. at 1408. The existence of detailed fact findings (albeit adopted verbatim from the plaintiffs' proposal) renders *Berger* very different from cases in which Petitioner claims the clear error standard was misapplied. Those cases, in contrast, involve instances where the appellate courts found the district courts' fact findings to be insufficient or nonexistent. Nevertheless, the court of appeals in *Berger* did not conclude that remand was required, but held that the district court erred in various respects based on a careful comparison of the court's findings and the record. *See id*. at 1407 n.3, 1408.

The other cases cited favorably by Petitioner apply the clear error standard in very different contexts that are not truly in conflict with decisions of other circuits.

In *Crittendon v. Chappell*, 804 F.3d 998, 1006 (9th Cir. 2015), the panel majority in a habeas case simply rejected the dissent's argument that the district court's fact findings should be reviewed de novo because they were not based on testimony elicited in the district court but rather from a "cold record." The majority pointed to the express language of Rule 52(a)(6) that findings of fact "based on oral *or other evidence*" must not be set aside except for clear error. *Id.* (emphasis in original). No other case cited by Petitioner holds to the contrary.

Duffie v. Deere & Co., 111 F.3d 70, 74 (8th Cir.1997) is an ERISA disability case in which a panel of the Eighth Circuit reversed the district court's finding of no disability as clearly erroneous and remanded to the district court, evidently because it was not clear that the record permitted only one resolution of the factual issues. Again, other cases cited by Petitioner are not in conflict with this outcome.

Indeed, it is simply not true that any of the cases Petitioner cites "eschew[s] Rule 52's clear error review" by determining that fact issues may be decided by the court of appeals de novo. Pet.14.

In *Mobil Shipping v. Transp. Co. v. Wonsild Liquid Carriers Ltd*., 190 F.3d 64, 68 (2d Cir. 1999) a panel of the Second Circuit noted that prior panel decisions in the circuit had deferred to district court findings on the question of vessel seaworthiness but had applied slightly different degrees of deference. The *Mobil Shipping* panel concluded, however, that the district court's finding was correct regardless of whether the traditional clear error standard or the slightly less deferential standard it felt had been applied in some other cases was applied in that case. *Id*.

G.G. Marck & Assocs. v. Peng, 309 F.App'x. 928 (6th Cir. 2009), involves the Sixth Circuit's review of a district court's award of sanctions, an award that was required to be supported by "'clear and convincing' evidence." *Id*. at 936. The district court failed to make any specific findings of fact related to the sanctions award. *Id*. at 935-36. Examining the record, the court held that the evidence could not meet the "clear and convincing" threshold for the sanctions award. *Id*. at 937-38. In effect, it held that the record permitted only one resolution of this issue. *See Pullman Standard*, 456 U.S. at 292. (holding that insufficient fact findings do not require remand to the district court for further findings under Rule 52 where "the record permits only one resolution of the factual issue").

Tejada v. Dugger, 941 F.2d 1551, 1555 (11th Cir. 1991) is a habeas case in which the appellant claimed the district court failed to make fact findings on important issues when denying his habeas petition. Affirming the district court, the Eleventh Circuit held that, "[b]ecause the record on appeal in the instant case provide[d] a complete understanding of the issues," no remand for additional fact findings was required. *Id*. This statement similarly can be explained as based on the conclusion that the record permitted only one resolution. Fact findings are meant to facilitate an appellate court's review of legal conclusions, but where the record evidence only supports only one legal conclusion, remand is not required simply to have the district court set out those findings. This conclusion is not in conflict with this Court's precedents or decisions of other circuits cited by Petitioner.

Critically, the instant case does not create an exception to the clear error standard, but stands only for the unremarkable proposition that a court cannot give

deference to fact findings when there are none. *Int'l Energy Ventures Mgmt*., 999 F.3d at 268 (holding that "clear error review assumes there are 'factual findings underlying' a district court's determination" but "here there the district court's analysis contains no factfinding"). The court of appeals did not conclude it owed no deference to the district court's fact findings, but that it owed no deference to the district court's bare (and inaccurate) assertion that litigation activities that are procedural in nature cannot result in prejudice, when the applicable legal standard for prejudice is whether the party suffered "delay, expense, ***or*** damage to [its] legal position" because of the litigation activities. *Id*. at 267 (citing *Nicholas v. KBR, Inc*., 565 F3d 904, 907 (5th Cir. 2009) (emphasis added)). This was a legal error on the part of the district court, which the Fifth Circuit appropriately reviewed de novo.

What remains is the question whether the Fifth Circuit was required to remand this case to the district court to make fact findings. Again, the answer is no if "the record permits only one resolution of the factual issue." *Pullman Standard*, 456 U.S. at 292. In this case, two arbitrators, as noted by the panel, had previously set out the record evidence of serious delay and expense suffered by Respondent from Petitioner's litigation activities. *Int'l Energy Ventures Mgmt*., 999 F.3d at 267-68. These facts were not disputed.[4]

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[4] Though the district court in this case did not set out the arbitrators' fact findings in detail in its opinion, its opinion arguably adopts or accepts those findings. Certainly, the district court does not contest the findings. It simply concluded, erroneously, that they were not relevant because they reflected litigation conduct on "jurisdictional grounds" that "never [came] close to addressing core [*i.e*., merits] issues." Pet'r.App.30.

The district court did not take issue with this evidence, but rather came to a different conclusion about its import, apparently based on the legally erroneous assumption that the activities were not worthy of consideration due to their largely procedural nature. Pet.App.30 (holding "[t]he bulk of the litigation's activity arose from dismissals and appeals on jurisdictional grounds, never coming close to addressing the core issues. In other words, this case has mostly been a game of cat-and-mouse. Litigation of this sort does not waive arbitration."). The Fifth Circuit explained in detail why Petitioner's arguments for considering these facts to be irrelevant were legally flawed. *Int'l Energy Ventures Mgmt.*, 999 F.3d at 268-69. Therefore, this was a classic case of the record permitting only one resolution, not a departure from the accepted standard of review.

In sum, the cases cited by Petitioner are all different and involve decisions about proper application of the Rule 52 standard that are context specific. No two decisions cited by Petitioner are clearly in conflict and the Fifth Circuit's ruling in this case is fully supported by this Court's precedent.

III. This case is a poor vehicle for clarifying any uncertainties about the clear error standard.

There is no debate that appellate deference to a district court's fact findings is at an end where "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). This standard, on its own terms, requires the reviewing court to consider the "entire evidence." Furthermore, as noted above, a reviewing court need not remand a case in which there were inadequate fact

findings by the district court if the record permits only one resolution of the factual issue.

Because both of these points are true about the Fifth Circuit's conclusions concerning the district court's opinion in this case, even if there were some difference in how the different circuits have applied the clear error standard of review, this case is a poor one for the Court to take up any such purported discrepancy. Such a review should await a case in which there is a clear conflict in how different circuits have applied the clear error standard in similar factual or procedural contexts.

CONCLUSION

For the reasons stated above, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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