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

REPLY BRIEF

THOMAS C. WRIGHT
Counsel of Record
RAFFI MELKONIAN
MICHAEL ADAMS-HURTA
BRADLEY C. WILLIAMS
JONATHAN W. LEHRMANN
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

April 29, 2022

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

INTRODUCTION

United's brief in opposition misses the forest for the trees. United claims *Morgan v. Sundance* would only become relevant here in the most attenuated circumstances, but the *Morgan* oral arguments showed precisely how relevant that case is—several forks of the decision tree in that case would demand a GVR here. As for the circuit split identified in the Petition, United does nothing but wave away the gap in the cases, acting as if the law in this case is unambiguously plain in this Court and around the country. This argument too is wrong. The circuits are in direct disagreement about how factual findings may be reviewed.

That uncertainty around *Morgan* and the prejudice rule in arbitration should prompt this Court to hold this case for *Morgan* and ultimately issue a GVR. But the dispute on the merits of the procedural issue also calls for plenary review. As a careful review shows, both issues presented here are important and are ripe for further review.

REPLY ARGUMENTS

I. *Morgan v. Sundance* likely will materially affect the outcome of this appeal.

United apparently believes that *Morgan v. Sundance*—a case argued at the merits in this Court and considering the main issue of substance in this case—"has no bearing here." This makes no sense at even the threshold. The Court was asked to speak on the

viability of the prejudice standard for arbitration waivers, and of course anything it says will have bearing here. Rhetoric aside, even United concedes there are scenarios where *Morgan* would be decisive here. BIO at 9. United downplays the likelihood of this scenario, but it fails to describe any risk this Court assumes by holding the Petition until the outcome of *Morgan*.

In any event, United's insistence that the effects of *Morgan* on this case are too speculative to justify holding the Petition is just wrong. Far from requiring an unlikely perfect storm, oral argument suggested several possible results in *Morgan* that present a "reasonable probability" that the court of appeals would change directions. *Tyler v. Cain*, 533 U.S. 656, 666 n. 6 (2001). The only "if" that determines whether or not *Morgan* will affect the outcome of this case is "if" the Court agrees with Sundance that prejudice must be shown *or* states an entirely new standard if it agrees with the Petitioner Morgan. Not a "series of ifs," but a singular one. The direct issue in *Morgan* has a direct effect on this Petition.

For example, if the Court agrees with the *Morgan* respondent that the party arguing litigation conduct waiver must show it has been prejudiced by the litigation conduct (as nearly all Circuit courts to address this issue have held), the Court will necessarily announce *some* standard for how a party shows prejudice. Sundance called on the Court to do exactly that at oral argument:

> [O]ne benefit of making this a federal question is that, through appellate review . . . this Court could provide some guidance to make sure that the system is working.

Morgan v. Sundance, No. 21-328, Tr. of Oral Arg. at 67:23–68:3 (Mar. 21, 2022).

Announcing a new standard is quite likely to change the outcome below, because courts of appeals have varied widely on prejudice. At oral argument in *Morgan*, Justice Sotomayor acknowledged this fact, explaining that:

> I'm troubled by the fact that the Circuits define prejudice in different ways . . . [T]here is wide variety in defining prejudice.

Id. at 25:3–19.

That "wide variety" emerged even during argument. For example, Sundance counsel Paul Clement at one point analogized the prejudice requirement to the prejudice analyses done in Rule 15 motions to amend and Rule 24 motions to intervene. *Id.* at 48:5–10. Yet the Fifth Circuit here certainly did not allow the district court the type of discretion it would have in an appeal of a Rule 15 amendment decision. If the Court makes this analogy itself, that provides a basis for remand.

Alternatively, Mr. Clement also made the point that "the line most courts have drawn [between sufficient prejudice to waive arbitration and not] . . . is whether there's been substantial discovery." *Id.* at

61:6–9. If this Court draws that line, it would also be grounds for remand here, because the Fifth Circuit cast aside the fact that discovery was stayed and found prejudice on its own "regardless of the amount of discovery." *Int'l Energy Venture Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 999 F.3d 257, 269 (5th Cir. 2021).

Meanwhile, Justice Barrett suggested that the waiver question might not be based in Section 3 of the FAA, as was frequently suggested in *Morgan*, but in Section 4's definition of "default" as a "failure, neglect or refusal of another to arbitrate." *Id.* at 63:10–15. *See also* 9 U.S.C. § 4. If that is the answer, it remains unclear whether such a standard requires prejudice at all, or if it requires prejudice in the same way as current precedent. *See id.* at 63:15–64:3. A decision situating waiver by litigation conduct in Section 4 would thus also call for a remand for the Fifth Circuit to consider whatever new standard this Court announced. And then Justice Breyer suggested that maybe "how much prejudice" is weighed with "other relevant circumstances" by the trial judge. *Id.* 66:7–13. This would be yet another enunciation of a prejudice standard calling for remand.

Regardless of the lines drawn by this Court in *Morgan v. Sundance*, the result of that line-drawing in a specific case is a matter of remand. As Justice Kavanaugh suggested: "we set forth a standard of Section 3 [of the FAA], and you can figure out exactly what happened in this case on remand." *Id.* at 62:21–24. If

this Court remands on those grounds in *Morgan*, it should GVR here, too.

Even if this Court agrees with Petitioner in *Morgan* that prejudice is not required, that may still call for a remand in this Court because it would mean that courts must analyze waiver under state law rather than the federal standard that the Fifth Circuit did here. As counsel for Petitioner argued:

> The mistake that those courts have made, even though they—they didn't rely on that—that AAA rule language, was that they analyzed the question under federal law exclusively instead of first looking at whether there had been a waiver under generally applicable contract principles of state law.

Id. at 13:12–18. Justice Kagan later echoed Petitioner's concern. *See id.* at 55:12–16 ("[W]hy wouldn't we look to state law in the same way we look to state law with respect to many other questions about the enforcement or validity of particular contractual provisions?"). And as Justice Breyer pointed out, a state-law standard may require all sorts of other analyses, such as questions of "laches, in default, forfeiture, waiver, estoppel, and there are probably about six or seven others, which are primarily contract or not entirely, but—state law questions." *Id.* at 14:8–13.

Even in *Morgan*, therefore, Petitioner argued for a "remand for the Eighth Circuit to apply the correct generally applicable contract test in the first instance." *Id.* at 13:22–25; *see id.* at 31:6–12 (arguing for a

remand "to be decided under state law"). So even if Petitioner *wins* in *Morgan* such that prejudice is not necessarily required as a matter of federal law, a remand likely would be appropriate here, too. The state law analysis may be entirely different and lead to an entirely different result (and only after a choice-of-law analysis is made first).

In other words, there are several potential standards and burdens that the Court may consider regarding how litigation waiver—and specifically, the issue of prejudice—is decided. This Court is aware of the current lack of clarity regarding the standard for showing prejudice and is at least considering enunciating a new standard or set of considerations for answering that question. The Court should hold this Petition while it considers this issue in *Morgan*.

II. Alternatively, the Rule 52(a) circuit split is ripe for this Court's review in this case.

United claims that there is no circuit split to resolve because, despite the text of the opinions, all the courts on both side of the split identified in the Petition faithfully applied the clear error standard. This argument inserts words into circuit court opinions that are not there. Some courts apply Rule 52 correctly. Some, like the Fifth Circuit here, do not. As for United's vehicle argument, that too is less than it seems. This case crisply presents the question and does so in a context where it is likely to be dispositive. That the Fifth Circuit did not *say* it was creating a circuit split is

immaterial. United should not be able to rewrite the opinions to avoid a circuit split.

A. The Second, Fifth, Sixth, and Eleventh Circuits truly created unwarranted exceptions to the clear-error standard.

United does not dispute that the First, Eighth, Ninth, and D.C. Circuits have strictly followed Rule 52(a)'s clear-error standard, even when a party or dissenting judge suggested otherwise. *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). United instead suggests that these opinions are unremarkable and thus cannot create part of a split for this Court to address. Those opinions *should* be unremarkable, because they follow Rule 59(a)'s direction without any difficulty at all. But they are notable in their steadfast refusal to do otherwise, in contrast to other courts of appeals.

Instead, United insists that the other side of the split is illusory, and that the Second, Fifth, Sixth, and Eleventh Circuits all properly applied clear error review. BIO at 13. United seems to think that these circuits silently applied the clear-error standard or perhaps held that the record permitted only one resolution of the issue. *See Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982). But if these courts truly were

doing as such, they would have said so. They did not. The text of the opinions shows these courts conducted their own review in the face of supposedly insufficient trial-court findings.

The Second Circuit: "Judge Martin's failure to make factual findings regarding the latent defect defense does not require a remand. Although Federal Rule of Civil Procedure 52(a) obligates a district court to 'find the facts specifically and state separately its conclusions of law thereon,' . . . ***we may review the district court's decision*** 'if we are able to discern enough solid facts from the record to permit us to render a decision.'" *Mobil Shipping & Transp. Co. v. Wonsild Liquid Carriers Ltd.*, 190 F.3d 64, 69 (2d Cir. 1999) (quoting *Davis v. N.Y.C. Hous. Auth.*, 166 F.3d 432, 436 (2d Cir. 1999)). United does not dispute the Second Circuit's adoption of this unique Rule 59(a) stance—instead, United cited to that court's clear-error analysis on another issue (not the latent-defect defense). *See* BIO at 13 (citing *Mobil Shipping*'s analysis on the "seaworthiness" issue).

Next, the Sixth Circuit followed its longstanding precedent that "although it could 'vacate the judgment of the District Court and remand the case for sufficient findings of fact under Rule 52(a) . . . in order to avoid further extension of this protracted litigation' it would 'dispose of the appeal on the merits despite the insufficiency of the findings of fact.'" *G.G. Marck & Assoc., Inc. v. Peng*, 309 F. App'x 928, 936 (6th Cir. 2009) (quoting *B.F. Goodrich Co. v. Rubber Latex Prods., Inc.*, 400 F.2d 401, 403 (6th Cir. 1968)) (alteration in original).

United inaccurately claims that *G.G. Marck* held that the evidence of sanctions "*could not*" meet the governing clear-and-convincing standard, and thus the Sixth Circuit effectively found that the record only permitted one result (BIO at 14), but nowhere does the opinion say that. Rather, the opinion merely states that the panel—on its own review—held that the evidence "*does not*" amount to clear-and-convincing evidence. *G.G. Marck*, 309 F. App'x at 937 (emphasis added).

Then, the Eleventh Circuit conducted its own de novo review as well, stating that "[b]ecause the record on appeal in the instant case provides a complete understanding of the issues, we now address Tejada's claims for habeas relief that the district court failed to discuss." *Tejada v. Dugger*, 941 F.2d 1551, 1555 (11th Cir. 1991). United does not cite to anywhere in this opinion or otherwise explain how this is not a statement of the Eleventh Circuit's decision to conduct de novo review—that is, its own review where it "reach[es] its own conclusions based on such an inquiry"—despite Rule 52(a)'s mandates. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (discussing de novo review).

And finally, of course, there is the Fifth Circuit, as exemplified by this case. Here, the Fifth Circuit went out of its way to state that the district court's holding is one that it would "typically review for clear error" before then citing its precedent for "reviewing a[] . . . determination de novo" and insisting that "[w]e owe no deference to such conclusory assertions" that it believed the district court had made. *Int'l Energy Venture*

Mgmt., 999 F.3d at 268. This could not be any more obvious: the Fifth Circuit felt it was justified to apply an exception to Rule 52(a)'s clear-error standard. If it—even in the alternative—believed that its holding was the only permissible result on the record, or even that the district court's "conclusory assertion" was clear error, it would have said so. But the Fifth Circuit did not say that its conclusion was the only permissible result in the record, and neither did the Second, Sixth, or Eleventh Circuits. They each conducted their *own* review, and came to their *own* conclusions de novo. That creates a clean split with the First, Eighth, Ninth, and D.C. Circuits for this Court to review.

B. This petition is a good vehicle to resolve this split, and the record does not support United's arguments otherwise.

Finally, Respondent is wrong to suggest that this case is a "poor vehicle" to resolve inconsistencies between circuit courts on the clear-error standard. *Contra* BIO at 16–17. Again, the Fifth Circuit panel *could* have held that it was "left with the definite and firm conviction that a mistake ha[d] been committed," *see Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985), or that "the record permits only one resolution of the factual issue." *See Pullman-Standard v. Swint*, 456 U.S. 273, 291. But it didn't.

This Court has not hesitated to step in when reviewing courts misapplying the "deferential" clear-error standard. *See June Med. Servs. L.L.C. v. Russo*,

140 S. Ct. 2103, 2124 (2020). United's emphasis on paths the Fifth Circuit panel could have, but did not, choose aims at a straw man.

Although the Fifth Circuit panel did not explicitly state that it contributed to a circuit split or abandoned the clear-error standard, its decision does not make this case any less worthy of certiorari. Rule 52(a)'s clear-error standard for setting aside factual findings applies to *any* factual findings made by district courts, not just those in the realm of litigation conduct waiver. *See* FED. R. CIV. P. 52(a)(6). Appellate courts who decidedly take their thumb off the scale and assess factual findings anew—regardless of the subject matter—undercut the deference mandated to a district court's ability to judge the credibility of the evidence. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 565 (1985) (holding an appellate court "may not reverse [a district court] even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently"). United's request for the Court to wait for a case with a similar factual or procedural context is, at best, a distinction without a difference.

Fundamentally, this case may also present a deeper question, as well: what should courts of appeals do with district judges that do not follow the procedural rules to their satisfaction? This greater policy problem may have weighed on the Fifth Circuit's decision, because the particular district judge presiding is one who the Fifth Circuit does not seem to trust. *See Pulse Network, L.L.C. v. Visa, Inc.*, ___ F.4th ___, 2022 WL 1010686, at *11 n.28 (5th Cir. Apr. 5, 2022)

(collecting cases). But the remedy for such distrust is not to rewrite the rules to conduct de novo review. Our rules provide for other remedies, such as a simple remand with instructions to make proper findings—or as the Fifth Circuit has done before with this judge in exceptional circumstances (which do not exist here), reassigning the case to a different judge entirely upon remand. *See Pulse Network*, 2022 WL 1010686, at *10 (citing 28 U.S.C. § 2106). But when it comes to sufficient factual findings and subsequent review, this Court should clarify that Rule 52(a) provides only two paths: clear-error review or a remand.

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
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: April 29, 2022