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

SUPPLEMENTAL BRIEF OF PETITIONER

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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.

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INTRODUCTION

In its Petition, International asked the Court to hold this case for *Morgan v. Sundance* and then grant, vacate, and remand for reconsideration based on that opinion. On Monday, this Court decided *Sundance*. Under this Court's Rule 15.8, Petitioner respectfully submits this supplemental brief to explain why the *Sundance* opinion requires the petition to be granted, the decision below vacated, and the case remanded to the Fifth Circuit.

Under *Sundance*, the litigation-conduct waiver test for arbitrations now rests on the parties' *intent*. A party waives arbitration where it "knowingly relinquish[es]" its right. In stark contrast, the Fifth Circuit decided this case consistent with its long-standing precedent, which focused on "substantial invocation" of litigation and a finding of prejudice. Those two standards are incompatible. Indeed, the Fifth Circuit itself dismissed this Court's standard "out of hand" when presented the question many decades ago. Because an "intervening factor" has now arisen that "has a legal bearing upon the decision," *Elmbrook School District v. Doe*, 134 S. Ct. 2283 (2014), this Court should GVR this case to permit the Fifth Circuit to apply this Court's newly announced waiver test, or to craft another appropriate test under *Sundance.*

SUPPLEMENTAL ARGUMENT

I. *Morgan v. Sundance* calls for a GVR.

In *Sundance*, this Court held that the federal rule of litigation waiver of arbitration—to the extent that federal law controls—"does not include a prejudice requirement" because "the text of the FAA makes clear that courts are not to create arbitration-specific procedural rules like the one we address here." *Morgan v. Sundance, Inc.*, 596 U.S. ___, slip op. at 7 (2022). The Court made this decision assuming, without deciding, that litigation-conduct waiver under the Federal Arbitration Act is a matter of federal law. *Id.* at 4. Following this conclusion, the Court remanded to the Eighth Circuit with the following guidance:

> Did Sundance, as the rest of the Eighth Circuit's test asks, knowingly relinquish the right to arbitrate by acting inconsistently with that right? . . . On remand, the Court of Appeals may resolve that question, *or* (as indicated above) *determine that a different procedural framework* (such as forfeiture) is appropriate.

Id. at 7 (emphasis added). The Court's remand gave the Eighth Circuit two choices after stripping away an arbitration-specific standard: either (1) apply the "knowingly relinquish" test or (2) decide anew what other standard should apply to answer whether litigation conduct cedes the right to arbitration.

Either way, this Court must remand here too. If the Fifth Circuit were to agree that federal law

controls, then it must employ a new standard it did not apply below and has never applied to arbitrations. *Sundance* holds that waiver "is the intentional relinquishment or abandonment of a known right." *Id.* at 5 (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). The Fifth Circuit did not apply that test or anything close. Instead, the Fifth Circuit asked, as a matter of federal law, whether International "substantially invoke[d] the judicial process" before then asking whether such invocation prejudiced United. Op. at 11. Indeed, the Fifth Circuit case this Court cited in *Sundance* itself "dismiss[ed] out of hand" the suggestion that litigation-conduct waiver is "an intentional release, relinquishment, or surrender of a right." *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 497 n.4 (5th Cir. 1986). *See also Nicholas v. KBR, Inc.*, 565 F.3d 904, 907 (5th Cir. 2009) ("Waiver will be found when the party seeking arbitration substantially invokes the judicial process. . . .").

Thus, this Court's now-controlling "intentional relinquishment" standard is incompatible with the Fifth Circuit's now-outdated "substantial invocation" standard—as the Fifth Circuit's own case law demonstrates, intentional relinquishment makes waiver "a question of fact based largely on intent." *Id.*; *see also United States v. Arviso-Mata*, 442 F.3d 382, 384 (5th Cir. 2006) (explaining that a party did not waive or intentionally relinquish a right when "[t]here is no evidence . . . that he consciously chose to forego it"). Even if the Fifth Circuit sticks with a federal standard of waiver, it must apply a new general waiver standard, which it did not

do because it judicially created the entire standard specifically for FAA cases.

However, if the Fifth Circuit selects this Court's other option and crafts a different procedural framework, a remand is just as necessary. The parties based their briefing on decades-old circuit precedent that this Court overturned. As this Court recognized, circuit courts are now left with a potential blank slate. *See Sundance*, slip op. at 4. While courts have traditionally viewed litigation conduct as a waiver question in FAA cases, they might now frame the question as one of "forfeiture, estoppel, laches, or procedural timeliness." *Id.* State law may also control, rather than federal law. *Id.* These are issues that International and United should have the opportunity to brief, and that opportunity might best exist after a GVR.

Beyond these considerations, the equities should prompt a GVR for the Fifth Circuit to answer a question under a new standard that has never been applied in the arbitration context. The Fifth Circuit employed its now-obsolete litigation-conduct-waiver standard for over thirty-five years. *See Miller Brewing*, 781 F.2d at 496–97. As this Court recognized, other courts have followed judicially crafted standards requiring showings of prejudice for even longer. *See Sundance*, slip op. at 4 n.1 (citing *Carolina Throwing Co. v. S & E Novelty Corp.*, 442 F.2d 329, 331 (4th Cir. 1971); *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (2d Cir. 1968)). With these decades of case law backing up countless business decisions, no one in these circuits thought that filing a complaint would waive the right to

arbitration, without more. And no one even had a reason to brief some other theory to any court or arbitrator. Now, after decades of settled law, the substantive arbitration-waiver question is one of first impression in the Fifth Circuit. Allowing the current decision to stand based on abrogated law would be an injustice to the parties and the judicial system. A GVR is the only way to maintain fairness for all parties.

CONCLUSION

This Court should grant, vacate and remand this case for reconsideration by the Fifth Circuit, in light of this Court's decision in *Morgan v. Sundance, Inc.*, 596 U.S. ___ (2022). In the alternative, as explained in the Petition, this Court should grant the Petition for Writ of Certiorari to decide the second issue presented.

Respectfully submitted,

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