No. 09-____

IN THE

Supreme Court of the United States

ZURICH AMERICAN INSURANCE CO., *et al.*,

Petitioners,

v.

PIONEER NATURAL RESOURCES USA, INC. AND PIONEER NATURAL RESOURCES COMPANY,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a case removed under the Convention on the Recognition and Enforcement of Arbitral Awards, 9 U.S.C. § 205, whether an order denying a motion to compel arbitration and remanding to state court is appealable under the Federal Arbitration Act's express right of interlocutory appeal from such denials, 9 U.S.C. § 16(a)(1)(C), notwithstanding 28 U.S.C. § 1447(d).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners, who were appellants below, are Syndicate 457 (a Lloyd's underwriting syndicate); Syndicate 33 (a Lloyd's underwriting syndicate); Syndicate 2020 (a Lloyd's underwriting syndicate); Syndicate 1225 (a Lloyd's underwriting syndicate); Syndicate 5000 (a Lloyd's underwriting syndicate); Syndicate 1036 (a Lloyd's underwriting syndicate); Syndicate 1209 (a Lloyd's underwriting syndicate); Syndicate 510 (a Lloyd's underwriting syndicate); Syndicate 2987 (a Lloyd's underwriting syndicate); Navigators Insurance Company; Aspen Insurance UK Limited; Houston Casualty Company; Commonwealth Insurance Company; Gard Marine & Energy Ltd.; Zurich American Insurance Company; Mutual Marine Office, Inc. on behalf of N.Y. Marine & General Ins. Co.; Arch Insurance Company; Liberty Mutual Insurance Company; American Offshore Insurance Syndicate; XL Specialty Insurance Company (through XL Marine & Offshore Energy).

The Respondents, who were appellees below, are Pioneer Natural Resources USA, Inc. and Pioneer Natural Resources Company.

The parent company of Syndicate 457 (a Lloyd's underwriting syndicate) is Munich Re and no other publicly held company owns 10% or more of its stock.

The parent companies of Syndicate 33 (a Lloyd's underwriting syndicate) are Hiscox Dedicated Corporate Member Limited, and Hiscox Group, and no other publicly held company owns more than 10% of its stock.

The parent company of Syndicate 2020 (a Lloyd's underwriting syndicate) is Catlin Group Ltd., and no other publicly held entity owns more than 10% of its stock.

The parent companies of Syndicate 1225 (a Lloyd's underwriting syndicate) are AEGIS Insurance Services Inc and Associated Electric & Gas Insurance Services Ltd. (AEGIS), and no other publicly held company owns 10% or more of its stock.

The parent company of Syndicate 5000 (a Lloyd's underwriting syndicate) is The Travelers Company, Inc., and no other publicly held company owns 10% or more of its stock.

The parents company of Syndicate 1036 (a Lloyd's underwriting syndicate) are QBE Underwriting Limited and QBE Insurance Group, and no other publicly held company owns 10% or more of its stock.

The parent companies of Syndicate 1209 (a Lloyd's underwriting syndicate) are Dornach Limited (lead underwriter) and XL Market Group Limited and no other publicly held company owns 10% or more of its stock.

The parent companies of Syndicate 510 (a Lloyd's underwriting syndicate) are Kiln Group Limited, Tokio Marine Nichido Fire Insurance Co. Ltd., and Tokio Marine Holdings, Inc., and no other publicly held company owns 10% or more of its stock.

The parent companies of Syndicate 2987 (a Lloyd's underwriting syndicate) are Brit UW Ltd., Brit Underwriting Holdings Ltd., Brit Overseas Holdings S.a.r.l., Brit Group Holdings B.V., and Brit Insurance Holdings, N.V., and no other publicly held company owns 10% or more of its stock.

The parent company of Navigators Insurance Company is The Navigators Group, Inc., and no other publicly held company owns 10% or more of its stock.

The parent companies of Aspen Insurance UK Limited are Aspen (UK) Holdings Limited and Aspen Insurance Holdings Limited, and no other publicly held company owns 10% or more of its stock.

The parent companies of Houston Casualty Company are Illium Inc. and HCC Insurance Holdings, Inc., and no other publicly held company owns 10% or more of its stock.

The parent company of Commonwealth Insurance Company is Northbridge Financial Corporation, and no other publicly held company owns 10% or more of its stock.

The parent company of Gard Marine & Energy Ltd. is Gard P&I (Bermuda) Ltd., and no other publicly held company owns 10% or more of its stock.

The parent companies of Zurich American Insurance Company are Zurich Holding Company of America, Inc., Zurich Insurance Company Ltd., and Zurich Financial Services Ltd., and no other publicly held company owns 10% or more of its stock.

The parent company of both Mutual Marine Office, Inc. and New York Marine and General Insurance Company is NYMAGIC, INC., and no other publicly held company owns 10% or more of their stock.

The parent companies of Arch Insurance Company are Arch Insurance Group and Arch Capital Group Ltd., and no other publicly held company owns 10% or more of its stock.

The parent company of Liberty Mutual Insurance Company is Liberty Mutual Holding Company, Inc., and no other publicly held company owns 10% or more of its stock.

American Offshore Insurance Syndicate has no parent corporation and no publicly held company owns 10% or more of its stock.

The parent companies of XL Specialty Insurance Company are Intercargo Corporation and XL Capital, Ltd., and no other publicly held company owns 10% or more of its stock.

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PIONEER NATURAL RESOURCES USA, INC. AND PIONEER NATURAL RESOURCES COMPANY,

Respondents.

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

Petitioners Zurich American Insurance Co. *et al*. (collectively, the "Underwriters") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The judgment of Fifth Circuit, issued without an opinion, is reproduced at page 1a of the Appendix to this petition ("App."). The unpublished opinion of the District Court is reproduced at App. 24a.

JURISDICTION

The judgment of the Fifth Circuit was entered on December 17, 2009. App. 1a. That court denied a timely filed petition for rehearing en banc on

January 27, 2010. App. 39a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the relevant statutes is set forth at App. 41a.

INTRODUCTION

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") is an international treaty designed "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced." *Scherk* v. *Alberto-Culver Co*., 417 U.S. 506, 520 n.15 (1974). To ensure that our nation meets these treaty obligations under a uniform body of federal law, and to protect the strong federal policy favoring arbitration, Congress provided a broad and absolute right of removal to federal court for any claim that "relates to" an arbitration agreement covered by the Convention, and an interlocutory right to appeal any order denying a motion to compel arbitration under the Convention. *See* 9 U.S.C. §§ 16(a)(1)(C), 205.

In this case, however, the lower courts thwarted Congress's scheme in a manner that conflicts with decisions of this Court and other circuits. The District Court held that the case was properly removed under the Convention, but subsequently denied the mandatory federal forum on the ground that state law purportedly nullified any right to arbitration. The Fifth Circuit then refused to recognize the clear statutory appeal right of that decision denying arbitration, simply because that decision was issued simultaneously with—rather

than before—a remand decision purportedly non-appealable under 28 U.S.C. § 1447(d).

As a dissenting judge has lamented, the Fifth Circuit precedent relied upon by Respondents, by allowing this result, creates a "Catch-22 problem [that] cries out for immediate remedy from the Supreme Court." *Dahiya* v. *Talmidge Int'l, Ltd*., 371 F.3d 207, 214 n.3 (5th Cir. 2004) (DeMoss, J., dissenting). Since that time, the need for this Court's review has only increased. Recently, the Court held in *Arthur Andersen LLP* v. *Carlisle*, 129 S. Ct. 1896, 1900-01 (2009), that an order refusing arbitration based on the purported absence of an arbitration agreement is appealable as of right, regardless of the merits of that issue. And the Court held in *Osborn* v. *Haley*, 549 U.S. 225, 240-44 (2007), that any conflict between a specialized removal scheme and the general prohibition on appealing remand orders in 28 U.S.C. § 1447(d) is resolved in favor of the more specific statute establishing conclusive removal jurisdiction that federal courts cannot revise.

The Fifth Circuit's law conflicts with these decisions. And it further conflicts with the holdings of other circuits that recognize a right to appeal decisions rejecting arbitration, regardless of whether those appealable decisions implicate remand issues. The result has been a denial of both the mandatory federal forum for Convention arbitration issues, and the mandatory right to federal appellate review, relegating these critical federal issues to disuniform state court review. This Court's review is warranted given these conflicts and the national and international importance of ensuring a uniform body

of federal law that upholds the United States' treaty obligations under the Convention.

Alternatively, and at a minimum, the Court should remand this case to the Fifth Circuit for it to explain its reasoning. The Fifth Circuit was the first and only lower court that could opine on the question of appellate jurisdiction in this case, yet it failed to do so. This Court should at the very least require the Fifth Circuit to explain its decision to override important federal rights.

STATEMENT OF THE CASE

1. The Underlying Dispute.

Pioneer owned and operated offshore oil and gas platforms and other facilities in the Gulf of Mexico. In 2005, Hurricane Rita passed over one of Pioneer's platforms, causing it to collapse. This action arose out of disputes over insurance claims filed by Pioneer related to that platform. App. 3-4a.[1]

Pioneer asserted claims under an Energy Package Policy (the "Package Policy"). App. 4a. Each of the Underwriters provided coverage under that policy. App. 6a. Section One of the policy covers physical damage to the platform. App. 25a. Section Two covers control of the well, and other costs. App. 25a. Section Three provides excess liability coverage. App. 6a, 25a. The Underwriters include citizens or subjects of one or more foreign nations. App. 16a.

Section Three's excess coverage is above the limits of an existing policy (the "AEGIS Policy") issued to Pioneer by Associated Electric & Gas Insurance

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[1] Citations to portions of the district court record not included in the Appendix are cited by the district court docket number, (*e.g.*, "Dkt. 1").

Services Ltd. App. 6a. Rather than existing as stand-alone coverage, Section Three's excess coverage "follow[s] the terms and conditions" of the underlying AEGIS Policy. App. 7a. The AEGIS Policy, in turn, provides that any controversy or dispute arising out of or relating to the policy "shall be settled by binding arbitration" subject to specified procedures, and that these "shall be the sole and exclusive procedures for the resolution of any such controversy or dispute." App. 33a; Dkt. 1, Ex. D, at 14.

Section Three of the Package Policy contains various specific exceptions to provisions of the AEGIS Policy, but none of those exceptions alters the incorporated mandatory arbitration provision. Dkt. 1, Ex. C, at 67. Nor would it have made sense for Section Three to have eliminated the arbitration requirement, since that section provided only excess coverage under the same terms as the AEGIS Policy, and the AEGIS Policy requires (and is currently undergoing) arbitration to resolve any disputes. App. 7a.[2]

2. Removal Under The Convention.

The United States is a signatory to the Convention (also called the New York Convention), which covers all commercial arbitration agreements except those that are both (1) entirely between citizens of the United States and (2) do not involve foreign property,

[2] Separate from this provision, the General Insuring Conditions of the Package Policy also contained a permissive arbitration provision "[i]n the event it is mutually agreed by [Pioneer] and the Underwriters to arbitrate any dispute under this Policy." App. 31a. Nothing in this general provision, however, purports to alter the mandatory arbitration provision incorporated into Section Three.

envisage performance or enforcement abroad, or have some other reasonable relation with a foreign country. 9 U.S.C. § 202.

To carry out the United States' international obligations under the Convention and to ensure a uniform federal interpretation of it, Congress provided that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States," 9 U.S.C. § 203, and created original federal jurisdiction over all such actions or proceedings, without regard to the amount in controversy. *Id*. In addition, in 9 U.S.C. § 205 ("Section 205"), Congress broadly provided defendants with an absolute right of removal to federal court—exercisable at any time before trial—whenever "the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention." 9 U.S.C. § 205.

Thus, to be removable under Section 205, a case need only "relate to" an arbitration agreement falling under the Convention, which includes commercial agreements involving at least one non-U.S. party that provide for arbitration in a signatory nation. *Sedco, Inc.* v. *Petroleos Mexicanos Mexican Nat. Oil Co*., 767 F.2d 1140, 1144 (5th Cir. 1985). If these minimal conditions are satisfied, Section 205 provides an absolute right of removal to federal court.

3. Proceedings In The District Court.

On August 8, 2007, Pioneer filed suit against the Underwriters under the Package Policy in Louisiana state court, claiming damages of over $50 million. App. 25a. On February 8, 2008, Pioneer filed an

amended petition in state court that specifically sought recovery under Section Three's excess coverage. App. 26a.[3]

Because this case "relates to" an arbitration agreement covered by the Convention, the Underwriters removed the case to the Middle District of Louisiana on April 18, 2008, pursuant to the plain terms of Section 205. Dkt. 1. The Underwriters then filed a motion to stay the litigation pending arbitration. Dkt. 3. Pioneer filed a competing motion to remand the case to state court. Dkt. 5. The District Court referred the motions to the magistrate judge to make an initial report and recommendation.

The parties did not dispute that the underlying AEGIS Policy incorporated into Section Three provides for mandatory arbitration. Nor did Pioneer credibly argue that the dispute in no way "relates to" a commercial arbitration agreement covered by the Convention. Indeed, Pioneer and AEGIS were then, and are now, engaging in mandatory arbitration in the U.S. of disputes under the AEGIS Policy, relating to many of the same coverage issues that are the subject of this case involving the excess insurers. App. 7a. Instead, Pioneer moved for remand asserting that, as a matter of contract interpretation, the "following form" provision in Section Three did not incorporate the AEGIS Policy's mandatory arbitration provision into the Package Policy, and therefore that its dispute with the Underwriters was not subject to mandatory arbitration. Dkt. 5.

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[3] Recently, Pioneer has made a demand for $188,100,000. *See* Offer of Judgment, *Pioneer Nat. Resources USA, Inc.* v. *Zurich Am. Ins. Co., et al*., No. 558,017 (La. Dist. Ct., filed Apr. 22, 2010).

On January 6, 2009, the magistrate judge issued a Report and Recommendations rejecting Pioneer's contentions that there was no removal jurisdiction under Section 205. App. 3a. She recommended denial of Pioneer's motion to remand, expressly finding that "*the litigation relates to an arbitration agreement that falls under [the Convention], and therefore the matter was properly removed pursuant to 9 U.S.C. § 205*." *Id*. at 19a (emphasis added).

The magistrate judge emphasized that Section 205 removal jurisdiction is determined from the petition for removal itself, and that *Beiser* v. *Weyler*, 284 F.3d 665, 672 n.7 (5th Cir. 2002), required the court to keep[] the jurisdictional and merits inquiries separate." App. 10a. Moreover, she noted "the importance of a [party's] right to appeal a decision on a motion to stay or compel arbitration" App. 11a. "Conscious of these issues," the magistrate judge was "cautious not to delve into the merits and focuse[d] on whether the allegations made in the amended petition or notice of removal are sufficient to establish jurisdiction." *Id*.

Applying these principles to the parties' pending motions, the magistrate judge found that questions involving whether the parties will eventually be compelled to arbitration based on the interpretation the policies were "inapplicable" to the motion to remand. *Id*. Pioneer's arguments about the intent of the parties to incorporate that provision into the Package Policy were "not the issue before the Court on the motion to remand," App. 14a, but instead were "merits-based inquiries, separate from the Court's determination of whether it has jurisdiction to decide the case either way." *Id*.

The magistrate judge first found the Underwriters' allegations sufficient on their face to establish that the arbitration agreement incorporated under Section 3 of the Package Policy falls under the Convention under 9 U.S.C. § 202, because it involved non-U.S. parties and provided for arbitration in a convention signatory. App. 16a. Accordingly, the judge found that removal was proper because the claims for coverage under Section Three "relate to" a Convention arbitration agreement under the "extremely loose" requirements of 9 U.S.C. § 205—regardless of whether such claims would eventually be stayed or compelled to arbitration following a determination of the merits of Pioneer's contractual arguments. App. 17a. The judge also determined that supplemental jurisdiction existed over Pioneer's claims for coverage under Section Two of the Package Policy, regardless of whether those claims might also support removal on their own *Id.*

Over Pioneer's objections, the District Court approved the magistrate judge's Report and Recommendations in its entirety on February 10, 2009, and "adopt[ed] it as the court's opinion herein." App. 22a. The court accordingly denied Pioneer's motion for remand, *id*., adopting the magistrate judge's determination that "the litigation relates to an arbitration agreement that falls under [the Convention], and therefore the matter was properly removed pursuant to 9 U.S.C. § 205." App. 19a, 22a.

That determination by the District Court that this case satisfies every requirement of Section 205 should have been the end of the jurisdictional inquiry. The court, however, misunderstood its subsequent role. After the court determined that removal had been proper, the Underwriters filed a

motion to compel arbitration of all claims pursuant to 9 U.S.C. § 206 or, in the alternative, to stay litigation of some claims pending arbitration of the claims under Section Three of the Package Policy. Dkt. 74. Pioneer opposed, and filed a second motion to remand, this time seeking remand only of its claims for coverage under Section Two. Dkt. 81.

On October 7, 2009, the District Court simultaneously ruled on both the Underwriters' motion to compel arbitration, and Pioneer's motion for partial remand, holding that state law precluded the Underwriters' reliance on the mandatory arbitration provision. The court held that "the federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties; instead ordinary contract principles determine who is bound." App. 31a. (citations omitted). The court then parsed the insurance policies, concluding that the mandatory arbitration provision in the AEGIS Policy conflicted with the permissive arbitration provision in the general insuring conditions of the Package Policy. Under state law, the court held that the resulting ambiguity must be construed in favor of the insured, and that "no valid agreement exists between the parties to submit the disputes to arbitration." App. 36a.

Having concluded as a matter of contract interpretation that that "the Package Policy does not present a valid agreement to arbitrate," the court remanded the entire case, purportedly for lack of subject matter jurisdiction. In its view, "[b]ecause the Convention only applies to valid commercial arbitration agreements in international contracts the court also concludes that the Convention is not applicable to the dispute before the court and federal question

jurisdiction is, therefore, absent." App. 37a. Under governing Fifth Circuit law, this determination also resulted in a denial of the Underwriters' motion to compel arbitration or stay litigation, because "any order remanding [a matter to state court] for lack of subject matter jurisdiction necessarily denies all other pending motions." *Dahiya*, 371 F.3d at 210. *Accord Carlson* v. *Arrowhead Concrete Works, Inc*., 445 F.3d 1046, 1052 (8th Cir. 2006).

4. Proceedings in the Court of Appeals.

On October 8, 2009, the Underwriters filed a timely notice of appeal to the Fifth Circuit from the District Court's order. Dkt. 101. Pioneer filed a motion to dismiss the appeal for lack of jurisdiction, relying principally on two Fifth Circuit cases for the view that after a district court denies arbitration under the Convention and remands a case to state court for lack of subject matter jurisdiction, 28 U.S.C. § 1447(d) ("Section 1447(d)") bars a federal appellate court from reviewing the arbitration ruling. Appellees' Mot. to Dismiss, at 3-8 (citing *Dahiya*, 371 F.3d 207, and *Certain Underwriters at Lloyd's, London* v. *Warrantech Corp*., 461 F.3d 568 (5th Cir. 2006)).

The Underwriters opposed the motion, contending that appellate jurisdiction existed under 9 U.S.C. § 16(a)(1) ("Section 16(a)(1)"), which provides that "[a]n appeal may be taken from * * * an order * * * denying an application under section 206 of this title [*i.e.*, the Convention] to compel arbitration." 9 U.S.C. § 16(a)(1)(C). The Underwriters also explained that Section 1447(d) does not abrogate the express appeal right provided under Section 16(a)(1). Appellants' Opp. to Motion to Dismiss, at 8-9.

On December 17, 2009, the Fifth Circuit granted the motion to dismiss the appeal in a summary order. Even though this was the first opportunity for any court to rule on the question of appellate jurisdiction in this case, the Fifth Circuit granted the motion without any further briefing or argument, without any opinion, and without any explanation of its reasoning or citation of authority. App. 1a. On January 27, 2010, the Fifth Circuit denied the Underwriters' timely petition for rehearing en banc, again without any explanation or opinion. App. 39a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S AND OTHER CIRCUITS' PRECEDENTS.

A. Under This Court's Precedents, Section 16(a)(1) Confers A Mandatory Right To Appeal Decisions Denying Arbitration.

The language of 9 U.S.C. § 16(a)(1)(C) could not be more clearly applicable to this case: "[a]n appeal may be taken from * * * an order * * * denying an application under section 206 of this title to compel arbitration." The Underwriters filed an application to compel arbitration under 9 U.S.C. § 206, which pertains specifically to agreements governed by the Convention. *See* Dkt. 74. The District Court denied that request because, in the Court's view, the asserted arbitration agreement did not apply to the parties' dispute. Accordingly, Section 16(a)(1) unequivocally provides a right of immediate appellate review, regardless of the merits of the District Court's ruling.

1. This result is compelled not only by the plain terms of that statute, but also by the Court's recent

decision in *Arthur Andersen*, which established a "categorical, bright-line approach" to jurisdiction under Section 16(a)(1). *Conrad* v. *Phone Dirs. Co.*, 585 F.3d 1376, 1383 (10th Cir. 2009). There, the petitioners had moved for a stay of litigation pending arbitration. As in this case, the district court denied the request because, after examining the relevant agreements, it believed that the asserted arbitration agreement did not apply to the dispute. The party seeking arbitration appealed under Section 16(a)(1).[4] The court of appeals dismissed the appeal for want of jurisdiction, based on its view that there was no agreement by the parties to arbitrate.

This Court reversed, holding that under Section 16(a)(1)'s "clear and unambiguous" terms, "any litigant who asks for a stay [pending arbitration] is entitled to an immediate appeal from denial of that motion—regardless of whether the litigant is in fact eligible for a stay." *Arthur Andersen*, 129 S. Ct. at 1900. The court of appeals had jurisdiction simply because the petitioner had requested arbitration, regardless of whether that request was right or wrong. A court of appeals may not "look through" the pleadings to determine appealability under Section 16(a)(1). Rather, jurisdiction over the appeal is determined merely by "focusing upon the category of order appealed from." *Id*. (citation omitted). This straightforward determination is "immeasurably more simple and less factbound than the threshold determination * * * whether the litigant was a party

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[4] *Arthur Andersen* involved the appeal of an order denying a stay of litigation pending arbitration, which is appealable under Section 16(a)(1)(A). There is no relevant difference between Section 16(a)(1)(A) and Section 16(a)(1)(C), which covers orders denying motions to compel arbitration under the Convention.

to the contract." *Id*. at 1901. That latter question is reserved until "after the court has accepted jurisdiction over the case." *Id*.

Under *Arthur Andersen*, the Fifth Circuit should have looked only to the fact that the District Court had rejected the Underwriters' application to compel arbitration in order to conclude that it had appellate jurisdiction under Section 16(a)(1). Instead, the court engaged in a different inquiry. It dismissed the appeal based on Pioneer's invocation of Fifth Circuit precedent which, according to Pioneer, bars appellate jurisdiction under Section 1447(d) whenever an otherwise appealable denial of arbitration results in a remand. *See Dahiya*, 371 F.3d at 210 ("We lack jurisdiction under § 16 because the denials of Appellants' motions to stay and to compel arbitration accompanied a remand for lack of subject matter jurisdiction."). That was wrong. Under *Arthur Andersen*, the order denying arbitration was expressly appealable under Section 16(a)(1) notwithstanding the District Court's conclusion that the parties had not agreed to arbitrate. Whether the District Court was right or wrong about that issue is a question on the merits, not of jurisdiction.

2. The import of *Arthur Andersen* is not undermined by any purported conflict between the command of Section 16(a)(1) that "an appeal may be taken" from an order denying arbitration, and the language of Section 1447(d) providing that "an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." As the Court made clear in *Osborn* v. *Haley*, *supra*, any such conflict must be resolved in favor of a specialized removal scheme established by Congress, which in this case mandates a non-discre-

tionary federal forum for all claims that "relate to" arbitration agreements governed by the Convention.

In *Osborn*, the Court held that Section 1447(d) did not bar an appeal of a remand order issued in contravention of a specialized removal scheme. In the scheme at issue there (the Westfall Act), removal is authorized whenever the Attorney General certifies that a defendant federal employee was acting within the scope of official duties. In *Osborn*, the case had been removed upon such a certification, but the district court remanded on the ground that the certification had been improper. This Court held that it had jurisdiction to consider an appeal of that remand order, notwithstanding Section 1447(d).

The Court held that Congress gave district courts no authority to return cases to state courts on the ground that certification was unwarranted; the certification itself determines removal jurisdiction. 549 U.S. at 241-42. If a district court later concludes that the certification decision was incorrect, it may override that decision for purposes of trial, but that would not destroy federal jurisdiction. *Id.* at 242. Because the certification provides mandatory federal jurisdiction, appellate courts likewise have jurisdiction over any remand decision notwithstanding Section 1447(d). Because Congress's specialized removal scheme and the general language of Section 1447(d) were facially at odds, "only one can prevail." *Id*. at 244. The specialized scheme prevailed because it was "tailor-made" for the circumstances and provided a federal forum selection that was "beyond the ken of district courts to revise." *Id.*

The same is true with cases removed under the Convention. As even the Fifth Circuit has recognized, Section 205 is "one of the broadest

removal provisions * * * in the statute books." *Acosta* v. *Master Maint. & Constr., Inc*., 452 F.3d 373, 377 (5th Cir. 2006). It provides specialized removal jurisdiction whenever "the subject matter of an action or proceeding pending in a State court *relates to* an arbitration agreement * * * falling under the Convention." 9 U.S.C. § 205. This very "low bar" for removal jurisdiction under Section 205 means that "whenever an arbitration agreement falling under the Convention could conceivably affect the outcome of the plaintiff's case, the agreement 'relates to' the plaintiff's suit." *Beiser*, 284 F.3d at 669. Thus, the district court "will have jurisdiction under § 205 over just about any suit in which a defendant contends that an arbitration clause falling under the Convention provides a defense," as long as the assertion is not "absurd or impossible." *Id*.

"So generous is the removal provision" that "the general rule of construing removal statutes strictly against removal 'cannot apply to Convention Act cases because in these instances, Congress created special removal rights to channel cases into federal court.'" *Acosta*, 452 F.3d at 377 (citation omitted). By providing for "easy removal" under Section 205, Congress intended for the district courts to make a quick and conclusive assessment of their jurisdiction on the pleadings alone. *Beiser*, 284 F.3d at 674, 670-71.[5] Once it is determined that a case "relates to" an

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[5] To accomplish this goal, Section 205 provides that "[t]he procedure for *removal* of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal." The *Dahiya* decision incorrectly jumped to the conclusion that this incorporates Section 1447(d)'s bar on appealing *remand* orders. *See* 371 F.3d

arbitration agreement covered by the Convention—as the District Court determined here, App. 19a, 22a, statutory removal jurisdiction exists. Once conferred, that jurisdiction cannot be ousted by any merits determination.

As in *Osborn*, Congress's specialized removal jurisdiction is conclusive whenever it is found that a case relates to an arbitration agreement, and the express bestowal of appellate jurisdiction over any decision denying that mandatory federal forum takes precedence over the more general language of Section 1447(d).[6] Like the certification in *Osborn*, a district court's determination that a case relates to an arbitration agreement under Section 205 is conclusive of the jurisdictional inquiry, and that statute calls for no further threshold inquiry. 549 U.S. at 243. Any later remand for lack of subject matter jurisdiction is unauthorized and therefore cannot oust appellate jurisdiction to review the basis for that order.

As explained by the dissenting judge in *Dahiya*—the chief precedent invoked by Pioneer—the Fifth Circuit's law precluding appellate review conflicts with that clear intent of Congress, and "cries out for immediate remedy from the Supreme Court." *Dahiya*, 371 F.3d at 214 n.3 (DeMoss, J., dissenting). In an ordinary case, removal merely changes the

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at 210. Removal is addressed under 28 U.S.C. § 1446, not Section 1447(d), which addresses remands.

[6] *Cf. Powerex Corp.* v. *Reliant Energy Servs.*, 551 U.S. 224, 240 (2007) (Breyer, J., dissenting) (*Osborn* recognizes that "even a statute silent on the subject [of remand] can create an important conflict with § 1447(d)'s 'no appellate review' instruction," which is resolved "by reading a later more specific statute as creating an implicit exception to § 1447(d)").

forum in which the same case will be tried. *Id*. The non-appealability of a remand order under Section 1447(d) is just "a reflection of the congressional policy to prevent delays of the trial on the merits by appeals over validity of the remand order." *Id*. But under Section 205, "the purpose is to allow the removing party to assert in federal court the existence of an agreement to arbitrate under the Convention and compel such arbitration in lieu of the trial that would otherwise occur in the state court." *Id*. Removal under Section 205 "raises the issue of whether there should be a trial on the merits at all; and the immediate appeals process authorized under 9 U.S.C. § 16 reflects the strong congressional policy of giving preference to arbitration over litigation as to agreements covered by the Convention." *Id*. *See also* H.R. Rep. 100-889, at 36-37 (1988).

Here, the District Court expressly determined that the case was properly removed under Section 205, adopting the magistrate judge's analysis of jurisdiction as its own opinion. App. 19a, 22a. Subsequently, the District Court by its own acknowledgement engaged in a merits inquiry, interpreting the contracts to determine whether a valid arbitration agreement existed. App. 36a. The District Court was not then authorized to issue a remand for lack of jurisdiction, because federal removal jurisdiction had been conclusively determined. Indeed, the court could not have interpreted the insurance agreements without jurisdiction to engage in that inquiry. As in *Osborn*, then, the court of appeals' jurisdiction could not be barred by Section 1447(d). Rather, the denial of the motion to compel based on the District Court's ruling

that no valid agreement to arbitrate existed was immediately appealable under Section 16(a)(1)(C).

Accordingly, the decision below conflicts with both *Arthur Andersen*'s interpretation of Section 16(a), and *Osborn*'s holding that a conflict with Section 1447(d) is resolved in favor of a comprehensive statute that conclusively determines federal jurisdiction. The Court should grant certiorari to rectify this departure from this Court's precedents.

B. The Decision Below Conflicts With The Decisions of Other Circuits.

The District Court initially determined that it had removal jurisdiction under the Convention. App. 22a. When it later concluded that there was no valid agreement to arbitrate, it should have simply denied the Underwriters' motion to compel arbitration, thereby allowing the Underwriters to immediately appeal that denial under Section 16(a)(1)(C). This is what would have happened in most circuits. But instead, the court denied the motion to compel arbitration by tacking on an unauthorized remand order, which the Fifth Circuit found to nullify appellate jurisdiction. The Fifth Circuit's decision conflicts with decisions of other circuits.

The Ninth Circuit has held that jurisdiction exists under Section 16(a)(1), notwithstanding Section 1447(d), to review an order denying enforcement of an arbitration agreement under the Convention and simultaneously remanding to state court. In *Reddam* v. *KPMG LLP*, 457 F.3d 1054 (9th Cir. 2006), the district court held that it had removal jurisdiction under the Convention, but later remanded when the arbitration panel's refusal to decide the case led the court to believe federal

jurisdiction was no longer present. *Id*. at 1059. Because the district court had already found that it had jurisdiction under the Convention, the Ninth Circuit held that the later occurring event did not destroy federal jurisdiction and that Section 1447(d) therefore did not preclude an appeal of the order. *Id*. But independent of that holding, the Ninth Circuit also expressly held that it had jurisdiction to review the denial of arbitration under Section 16(a)(1). *See id*. at 1059 n.8 ("Beyond that, we have jurisdiction under 9 U.S.C. § 16(a)(1)(A) & (B) to review the district court's conclusion that it could no longer enforce the arbitration agreement.").

There is thus a basic divergence among the lower courts. *Cf. Restoration Pres. Masonry* v. *Grove Europe*, 325 F.3d 54, 59 (1st Cir. 2003) (noting, but not resolving, circuit split). In the Fifth Circuit, unlike the Ninth, a determination of non-arbitrability in a case removed under the Convention is entirely unreviewable, because a finding that the parties did not agree to arbitrate a dispute divests the trial court of removal jurisdiction. *See Dahiya*, 371 F.3d 207; *Warrantech*, 461 F.3d 568. The Eighth and Fourth circuits have ruled the same way. *See Transit Cas. Co.* v. *Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 625 (8th Cir. 1997); *Severonickel* v. *Reymenants*, 115 F.3d 265, 267 (4th Cir. 1997).

By contrast, the Second Circuit has correctly held that a non-frivolous assertion that a claim "relates to" an arbitration agreement under the Convention confers federal jurisdiction that is not divested by a subsequent merits determination of arbitrability. In *Sarhank Group* v. *Oracle Corp*., 404 F.3d 657, 660 (2d Cir. 2005), the court held that because

defendants' allegations of an arbitration agreement were "not immaterial, frivolous, or made solely to obtain jurisdiction," the district court had subject matter jurisdiction, and questions regarding the validity of the agreements were "merits questions," that did not involve a lack of subject matter jurisdiction, "although cases confusing these issues are frequently found in the reports." *Id*.

Similarly, in *Sandvik AB* v. *Advent Int'l Corp*., 220 F.3d 99, 100 (3d Cir. 2000), the district court denied a motion to compel arbitration, holding that it could not order arbitration without determining the validity of the underlying contract. *Id*. at 102. On appeal, the Third Circuit held that it had jurisdiction under Section 16(a)(1) to review the denial, notwithstanding the absence of a finding of a valid arbitration agreement. *Id*. at 100. As the court held, "[i]t is precisely this sort of appeal that the FAA's interlocutory appeal provisions were designed to address." *Id*. "Refusing [the] appeal could circumvent the FAA's clear purpose of enforcing binding arbitration agreements." *Id*. at 104.[7]

The Fifth Circuit's dismissals in this and similar cases, despite the clear language of Section 16(a)(1), have had precisely this effect of "circumvent[ing] the FAA's clear purpose of enforcing binding arbitration

[7] *See also Koveleskie* v. *SBC Capital Mkts. Inc*., 167 F.3d 361, 363 (7th Cir. 1999) (holding that, despite the district court's declaration of a need for discovery before a decision could be reached on the arbitration issue, there was no doubt that the requested order was denied, and thus appealable); *McLaughlin Gormley King Co.* v. *Terminix Int'l Co., L.P*., 105 F.3d 1192, 1193 (8th Cir. 1997) (reviewing a district court's refusal to order arbitration prior to discovery on issue of arbitrability because "an order that favors litigation over arbitration * * * is immediately appealable under § 16(a)").

agreements." *Id*. Ironically, it was the Fifth Circuit, in *Beiser* v. *Weyler*, *supra*, that most clearly explained the dangers of that approach, before that court's abrupt reverse of course in *Dahiya*, *supra*. As noted above, the court in *Beiser* adopted a "low bar" under which Section 205 removal jurisdiction exists in "just about any suit" in which a defendant invokes an arbitration clause, "[a]s long as the defendant's assertion is not completely absurd or impossible." *Beiser*, 284 F.3d at 669.

As the *Beiser* court explained—consistent with this Court's later holding in *Arthur Andersen*, 129 S. Ct. at 1400—the contrary view of "conflating jurisdiction and the merits" would "deprive defendants of an opportunity to appeal in a significant class of cases in which the district court concludes that the arbitration clause under the Convention does not in fact provide a defense." *Id*. at 672. "[D]enying defendants appellate review over the refusal to enforce an arbitration clause under the Convention would be in tension with the solicitude with which federal law generally treats arbitration" and would have "irrational consequences" by allowing state judges throughout the nation to have the final word on whether a dispute is arbitrable pursuant to an international treaty. *Id*. at 673-674.[8]

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[8] *See Restoration Pres. Masonry*, 325 F.3d at 59 (*Beiser* conflicted with Eighth Circuit by "criticizing conflation of jurisdictional and merits inquiries in remanding arbitration cases 'into a single step,' and arguing that the consequences of such a conflation are 'both irrational and inconsistent with * * * precedents' because of the importance of international comity, the goal of development of a uniform body of law regarding the Convention, the international business community's need for predictability, and the general federal policy of solicitude toward arbitration").

The Fifth Circuit, however, abruptly retreated from these principles in *Dahiya*, 371 F.3d at 211 & n.5, placing it in conflict with this Court's precedents and those of other circuits. As in this case, even where it is determined that removal jurisdiction exists under Section 205 because a claim "relates to" an arbitration agreement covered by the Convention, a district court's merits-based determination of non-arbitrability will divest both district court *and* appellate jurisdiction. These results are exactly the untenable ones recognized in *Beiser*—the absence of any uniform, federal body of law carrying out an international treaty and the nullification of the strong federal policy favoring arbitration.

This precedent also permits courts, and parties, to manipulate appellate jurisdiction, in contravention of this Court's settled law. *Whitmore* v. *Arkansas*, 495 U.S. 149, 155-56 (1990) ("[a] federal court is powerless to create its own jurisdiction"). For example, in *Palmer Ventures LLC* v. *Deutsche Bank AG*, 254 Fed. App'x 426 (5th Cir. 2007), the district court, much like the court in this case, initially denied a motion to remand a case removed under Section 205 "with the caveat that a closer look * * * might ultimately result in a remand for lack of subject matter jurisdiction." *Id*. at 428-29. The court then denied a motion to compel arbitration, finding no subject matter jurisdiction under the Convention. But instead of issuing an immediate remand, the court gave the party 20 days to assert another basis for federal jurisdiction. *Id*. at 429. Rather than do so, the defendant filed an immediate notice of appeal to the Fifth Circuit pursuant to Section 16(a)(1)(C). The Fifth Circuit took jurisdiction over the appeal and stayed further action in the trial court. *Id.*

In this case, however, the District Court remanded the case at the same time it rejected the Underwriters' motion to compel arbitration, and the Fifth Circuit held that this fortuitous timing precluded appellate jurisdiction. Had the court denied the motion to compel *before* issuing a remand, the Underwriters could have ensured appellate jurisdiction merely by immediately appealing the denial of the motion to compel under Section 16(a)(1)(C).

As evidenced by the decisions of other courts recognizing that determinations of non-arbitrability do not divest jurisdiction over cases removed under the Convention, there is no logical or jurisprudential rationale for allowing appeals of such decisions whenever they precede remand orders, but denying appeals of the same rulings when the District Court elects to issue a simultaneous remand. Congress expressly granted a right of appeal in Section 16(a)(1), in light of the important federal policies favoring arbitration under the Convention. The Fifth Circuit's denial of that right conflicts with the precedents of this Court and other circuits. The Court's review is warranted to resolve those conflicts, and ensure that the right to appeal a denial of arbitration is uniform and predictable for foreign parties seeking to enforce commercial arbitration agreements under the Convention in U.S. courts.

II. THIS CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE.

This case also involves a question of national importance because the treaty obligation of the United States to provide predictable and uniform rights to enforce arbitration agreements under the Convention is thwarted when courts deny the appellate review granted by Section 16(a)(1) of the FAA.

In the FAA, Congress intended to reverse judicial enmity to arbitration. *See Gilmer* v. *Interstate/Johnson Lane Corp*., 500 U.S. 20, 24 (1991). "Section 16(a) serves that end by ensuring that district court orders hostile to arbitration agreements can be immediately appealed." *Conrad*, 585 F.3d 1381. Congress could not have made the FAA's appeal right more plain: "[a]n appeal may be taken from an order * * * denying an application under section 206 of this title to compel arbitration." 9 U.S.C. § 16(a)(1)(C). This Court's review is needed to ensure that the lower courts fulfill this nation's treaty obligations under the Convention.

The Court has long recognized the strong federal policy favoring the effective and efficient resolution of disputes through private arbitration. *See Mitsubishi Motors Corp.* v. *Solar Chrysler-Plymouth, Inc.*, 476 U.S. 614, 626 (1985); *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). The Convention further implicates "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes." *Mitsubishi*, 473 U.S. at 629. These requirements persist "even assuming that a contrary result would be forthcoming in a domestic context." *Id*. By enabling the Convention's treaty obligations in Chapter 2 of the FAA, Congress made the Convention the "highest law of the land." *Sedco*, 767 F.2d at 1145. As such, "the Convention must be enforced according to its terms over all prior inconsistent rules of law." *Id.*; *accord Bautista* v. *Star Cruises*, 396 F.3d 1289, 1297 (11th Cir. 2005). That includes Section 1447(d).

Even before Section 16's enactment, this Court and other courts employed judicially-made equitable rules, such as the collateral order doctrine, to ensure the appealability of orders preventing arbitration because non-appealability would frustrate "Congress' clear intent, in the [FAA], to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone*, 460 U.S. at 22. A denial of motion to compel arbitration under the Convention was also held appealable as a mandatory injunction under 28 U.S.C. § 1292(a)(1). *Sedco,* 767 F.2d at 1149. Indeed, in *Sedco*, the Convention was found to abrogate a longstanding rule of nonappealability of stays in admiralty law that otherwise would have barred the appeal of an order refusing to enforce an arbitration clause. *Id*. This bar was overridden "to carry out the important congressional policy of insuring that arbitration contracts are enforced in the courts pursuant to the Convention," as well as "to prevent the United States from violating its Treaty obligations with 65 nations." *Id*.

As an exercise of Congress's treaty power and as federal law, "[t]he Convention must be enforced according to its terms over all prior inconsistent rules of law." *Sedco,* 767 F.2d at 1145. The enactment of Section 16 only reinforces that duty, since Congress has now expressly commanded that appellate courts accept jurisdiction over orders denying arbitration under the Convention.

The Convention's goal was "to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced." *Scherk*, 417 U.S. at 520 n.15. These obligations are reciprocal: to gain rights under the Convention, "Congress had to

guarantee enforcement of arbitral contracts and awards made pursuant to the Convention in United States courts." *McDermott* v *Lloyd's Underwriters of London*, 944 F.2d 1199, 1207 (5th Cir. 1991). *See* Convention, art. XIV, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38; S. Rep. No. 91-702, at 3 (1970). As international trade has expanded in recent decades, "so too has the use of international arbitration to resolve disputes arising in the course of that trade." *Mitsubishi*, 473 U.S. at 638. A contractual provision "specifying in advance the forum in which disputes shall be litigated and the law to be applied is * * * an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction," and "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." *Scherk*, 417 U.S. at 516-517.

Delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced "should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements." *Id.* at 520 n.15 (citation omitted). The FAA, which incorporates the Convention, "demonstrates the firm commitment of the Congress to the elimination of vestiges of judicial reluctance to enforce arbitration agreements, at least in the international commercial context." *McCreary Tire & Rubber Co.* v. *Ceat*, 501 F.2d 1032, 1037 (3d Cir. 1974); *cf. Mitsubishi*, 473

U.S. at 625 n.14 (FAA was "designed to overcome an anachronistic judicial hostility to agreements to arbitrate").

The Fifth Circuit, and other courts that allow the general language of Section 1447(d) to defeat the specific conferral of jurisdiction in Section 16(a)(1), create just the kind of unpredictability and parochialism that the Convention sought to eliminate. As this Court has stated, "[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *Id.* The Fifth Circuit, and other courts following its approach, cede to such parochialism when they fail to abide by Congress's specific intent to provide federal appellate jurisdiction over all decisions declining to recognize rights to arbitration under the Convention.

Uniform federal appellate review ensures that the law of arbitrability furthers the federal policy favoring arbitration over litigation. "[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute," which requires applying "*federal* substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA]." *Mitsubishi*, 476 U.S. at 626 (emphasis added). Under that law, "questions of arbitrability

must be addressed with a healthy regard for the federal policy favoring arbitration." *Id*. at 24-25. [9]

As this case demonstrates, the Fifth Circuit's jurisprudence permits district courts to deny arbitration under the Convention exclusively on *state* contract law grounds with no federal appellate review, thus leaving such cases entirely in the hands of the state courts' interpretations of their own contract law. This result puts the Convention's enforceability into the hands of 50 state supreme courts, rather than the federal circuits. Because "disunity is directly proportional to the number of authorities speaking on any subject * * * federal-district-court Convention decisions are appealable of right to a court of appeals, ensuring uniformity of federal decisions at least on a multi-state basis." *McDermott*, 944 F.2d at 1212. The Fifth Circuit's view destroys this uniformity, undermining the United States' obligations under the Convention.

This result also incentivizes litigation gamesmanship and parochialism. *See Scherk*, 417 U.S. at 516-517 ("parochial refusal by the courts of one country to enforce an international arbitration agreement * * * invite[s] unseemly and mutually destructive jockeying by the parties"). A plaintiff can choose the state forum, the state law that will apply,

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[9] *See Trippe Mfg. Co.* v. *Niles Audio Corp*., 401 F.3d 529, 532 (3rd Cir. 2005) (presumption in favor of arbitration applies "[w]hen determining both the existence and the scope of an arbitration agreement"); *Smith/Enron Cogeneration Ltd. P'ship* v. *Smith Cogeneration Int'l. Inc*., 198 F.3d 88, 96 (2d Cir. 1999) ("When we exercise jurisdiction under Chapter Two of the FAA, we have compelling reasons to apply federal law, which is already well-developed, to the question of whether an agreement to arbitrate is enforceable.").

and even the district court to which removal is anticipated. Here, for example, Pioneer chose the Louisiana forum; the agreements were interpreted under state law; and the case was remanded to a trial court in Baton Rouge, all without *any* federal appellate review of the decision. This favors the party that seeks to litigate and resist arbitration, and encourages forum-shopping to exploit the possibility of evading federal review, exactly the opposite of what Congress and the Convention's signatories intended.

This case exemplifies the gamesmanship inherent in the Fifth Circuit's rules of appealability. The District Court initially determined that it had jurisdiction under the Convention. App. 22a. Suddenly, after months of inaction, it remanded the case based on its construction of the parties' agreements under state contract law, providing no prior opportunity to note an appeal under Section 16(a)(1)(C). App. 38a. If the District Court had denied the Underwriters' motion to compel for the same reason (lack of a valid agreement) *without* remanding (as courts in other circuits would have done), it is indisputable that Section 16 would provide an immediate right to an interlocutory appeal. Nothing in the FAA authorizes district courts to hold the keys to the right to appeal.

To interpret Section 1447(d) to foreclose appeal of Convention cases, despite the FAA's plain provisions, "frustrate[s] the intention of Congress as reflected by the FAA and the [Convention] to give foreign parties the right to choose arbitration as a form of dispute resolution designed to save the parties time, money, and effort by substituting for the litigation process the advantages of speed, simplicity, and economy

associated with arbitration." *Dahiya* v. *Talmidge Int'l Ltd.*, 380 F.3d 218 (5th Cir. 2004) (DeMoss, J., dissenting from denial of rehearing en banc). "If the provisions of § 1447(d) will always trump the provisions of 9 U.S.C. § 16, then the Convention will be unenforceable" in states where Section 1447(d) determines appealability of Convention cases, and Congress's "elaborate efforts in Title 9 to give parties the right to choose arbitration in place of litigation can now be frustrated by the age-old controversy as to whether litigation was going to occur in the state courts or the federal courts." *Id*. The Court should grant review to unify to the law, and to quell the lower courts' subversion of federal treaty obligations.

III. ALTERNATIVELY, THE COURT SHOULD VACATE THE DECISION BELOW, AND REMAND TO THE FIFTH CIRCUIT FOR RECONSIDERATION SUPPORTED BY AN OPINION.

As explained above, certiorari is warranted in this case because the Fifth Circuit's jurisprudence—reflected in its prior decision in *Dahiya*—conflicts with this Court's precedents and the holdings of other circuits. But at a bare minimum, the Court should require the Fifth Circuit to state its reasoning for any decision in this case to deny the appellate right of review mandated in Section 16(a). This is not a case where a court of appeals has summarily affirmed the reasoning of a decision reached by a district court. Rather, the Fifth Circuit was the first—and only—lower court that could have opined on the question of appellate jurisdiction, and that court summarily dismissed the Underwriters' appeal without any opinion or even citation of authority. Accordingly, even if this Court were not inclined to

grant plenary review at this time, it should grant the petition, vacate the Fifth Circuit's judgment, and remand this case ("GVR") for that court to state a rationale for its actions.

In other cases, the Court has addressed the lack of an opinion on a matter of great importance by granting certiorari, vacating the opinion below, and remanding for an opinion from the lower court. For example, in *Taylor* v. *McKeithen*, 407 U.S. 191, 194 (1972), the Court issued a GVR in a civil rights case "[b]ecause this record does not fully inform us of the precise nature of the litigation and because we have not had the benefit of the insight of the Court of Appeals." Similarly, in *Northcross* v. *Memphis Bd. of Ed.*, 412 U.S. 427, 428-29 (1973), the Court issued a GVR where the decision below "was without stated reasons." And more recently, in *Youngblood* v. *West Virginia*, 547 U.S. 867, 870 (2006), where the majority on the state supreme court did not address the constitutionality of a search, the Court issued a GVR, stating that "it would be better to have the benefit of the views of the full Supreme Court of Appeals of West Virginia" on the issue.

A GVR is likewise warranted in this case. Indeed, neither the litigants nor this Court have the benefit of *any* opinion from *any* lower court on the dispositive question of appellate jurisdiction. The District Court ruled on the issue of arbitrability, but it was not asked to, nor could it have, opined on whether 28 U.S.C. § 1447(d) barred appeal of its order. That question was faced for the first time by the Fifth Circuit, in the form of Pioneer's motion to dismiss. That court, however, summarily granted the motion without setting the matter for further briefing or argument, without issuing an opinion,

and without providing even a citation of authority for its decision. App 1a.

As explained above, the Court can and should review the question presented in light of the conflict between the precedents of the Fifth Circuit and those of this Court and other circuits. But at a bare minimum, the Court should require the Fifth Circuit to explain its actions. To be sure, courts of appeals routinely issue summary affirmances of district court decisions where the trial court's reasoning (whether oral or written) is correct, and in those circumstances there is no need for a court of appeals to duplicate the analysis of the trial court. Here, however, there was not—and could not have been—any decision or reasoning by the District Court on the question of appellate jurisdiction. The Fifth Circuit was the sole arbiter on that question and it abdicated any responsibility to explain its actions.

Given the national and international importance of the issue, if the Court is not inclined to grant certiorari in the first instance it should, at a minimum, require the Fifth Circuit to reconsider the case and provide a rationale for its decision. Pioneer should not be able to evade review of the decision granting its motion to dismiss merely because the court of appeals elected not to explain that important decision.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed. In the alternative, the petition should be granted, the judgment below should be vacated, and the case should be remanded to the court of appeals for further consideration supported by an opinion.

Respectfully submitted,

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