No. 21-328

IN THE

Supreme Court of the United States

ROBYN MORGAN, on Behalf of Herself and All Similarly Situated Individuals,
Petitioner,

v.

SUNDANCE, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Waiver is the intentional relinquishment of a known right and, in the context of contracts, occurs when one party to a contract either explicitly repudiates its rights under the contract or acts in a manner inconsistent with an intention of exercising them. In the opinion below, the Eighth Circuit joined eight other federal courts of appeals and most state supreme courts in grafting an additional requirement onto the waiver analysis when the contract at issue happens to involve arbitration—requiring the party asserting waiver to show that the waiving party's inconsistent acts caused prejudice. Three other federal courts of appeal, and the supreme courts of at least four states, do not include prejudice as an essential element of proving waiver of the right to arbitrate.

The question presented is: Does the arbitration-specific requirement that the proponent of a contractual waiver defense prove prejudice violate this Court's instruction that lower courts must "place arbitration agreements on an equal footing with other contracts?" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains all parties to the proceeding whose judgment is under review. Petitioner Robyn Morgan is an individual for whom no corporate disclosure statement is required.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

LEGISLATIVE HISTORY

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eighth Circuit (Pet. App. 1-11) is reported at 992 F.3d 711. The opinion of the U.S. District Court for the Southern District of Iowa denying Respondent's motion to compel arbitration (Pet. App. 12-34) is unreported but is available at 2019 WL 5089205.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Petition for Certiorari was filed in this Court on August 27, 2021, and this Court granted certiorari on November 15, 2021.

STATUTORY PROVISIONS

9 U.S.C. § 2: A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3: If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on

application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4: A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of

the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

INTRODUCTION

The Federal Arbitration Act ("FAA") articulated Congress's intent that agreements to arbitrate be as enforceable as other types of agreements. To achieve that objective, the FAA provides streamlined procedures for compelling arbitration and staying courtroom litigation where a party seeks to enforce an agreement to arbitrate.

This statutory scheme was premised on the assumption that parties to arbitration agreements faced with courtroom litigation would promptly assert their rights under those agreements by availing themselves of the new streamlined procedures the Act created. That assumption was well-founded, for Congress was legislating against the backdrop of an established common-law doctrine of waiver under which contractual rights can be waived unilaterally by actions of the waiving party that are inconsistent with an intention of asserting those rights.

Thus, when parties to an arbitration agreement are faced with litigation, both the FAA and general principles of contract law counsel that they should seek to compel arbitration of the dispute at the earliest feasible moment—for example, by filing a motion to compel arbitration in response to a complaint or by raising arbitration as an affirmative defense filed with an answer.

But that's not what Respondent Sundance, Inc., did here. Instead, when Petitioner Robyn Morgan sued it under the Fair Labor Standards Act ("FLSA"), Sundance filed a motion to dismiss without mentioning arbitration, a motion that affirmatively argued that if Ms. Morgan's collective claims were dismissed, she could refile individual claims *in court*. Having lost its attempt at dismissal, Sundance then unsuccessfully sought to settle Ms. Morgan's collective-action claims on a nationwide basis and filed an answer that raised fourteen affirmative defenses, none of which mentioned arbitration. Only after losing its motion to dismiss and failing to settle the collective claims did Sundance seek to compel individual arbitration of Ms. Morgan's claims.

By engaging in courtroom litigation and seeking to settle Ms. Morgan's claims collectively—where in arbitration, her claims would be decided or settled individually—Sundance demonstrated an intent to relinquish its right to insist on arbitration under the terms of its agreement. According to the common law of waiver as most states define it, that would have been the end of the story: Sundance would have lost its chance to enforce the arbitration agreement through its inconsistent actions in court.

But the Eighth Circuit, like the majority of federal and state courts, has grafted an additional requirement onto the test for waiver when an agreement to arbitrate is involved. Inconsistent actions by the waiving party are not enough; the other party must also show those inconsistent actions caused prejudice. And because the court below concluded Ms. Morgan had not been prejudiced by Sundance's behavior, under this arbitration-specific standard, there had been no waiver.

This additional requirement—that the non-waiving party suffer prejudice—is contrary to the FAA's text and purpose. A standard for waiver of contractual rights to compel arbitration different from the standard applied to waiver of other contractual rights is *prohibited* by the FAA's substantive command that arbitration agreements be treated just like other contracts. Further, the prejudice requirement incentivizes parties to substantially engage in litigation before seeking to compel arbitration—undermining the FAA's objective of streamlining the dispute resolution process and spawning the very tactical forum-switching that the FAA was enacted to stop. This Court should clarify that waiving the right to insist on arbitration under an agreement covered by the FAA, like waiving any other contractual right, does not require prejudice.

STATEMENT OF THE CASE

A. The Federal Arbitration Act

The FAA, enacted in 1925, reversed a history of judicial hostility toward arbitration agreements by "allow[ing] parties to avoid 'the costliness and delays of litigation'" and "plac[ing] arbitration agreements 'upon the same footing as other contracts.'" *Scherk v.*

Alberto-Culver Co., 417 U.S. 506, 510-11 (1974) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)). That "overarching purpose" of the FAA is "evident in the text of §§ 2, 3, and 4." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

"Section 2 is the primary substantive provision of the Act, declaring that a written agreement to arbitrate 'in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The primary thrust of § 2 "was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). This Court has referred to § 2's substantive command that agreements to arbitrate be treated the same as other contracts as the FAA's "equal-treatment principle." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) (discussing the equal-treatment principle in the context of federal statutory claims).

This equal-treatment principle is not superseded by the "liberal federal policy favoring arbitration" this Court has distilled from the FAA. *See Moses H. Cone*, 460 U.S. at 24. Rather, the equal-treatment principle is the embodiment of that policy: "Section 2 embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts[.]" *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). *See also Hall*

Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 581 (2008) (describing policy favoring arbitration as placing arbitration contracts on equal footing with "all other contracts").

Sections 3 and 4, in turn, provide for streamlined judicial proceedings to enforce the substantive right evinced in § 2. Section 3 provides that where there is an existing court proceeding, a court, "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration" under a written arbitration agreement, "shall on application of one of the parties stay" the court proceedings until the arbitration is complete, "providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3. In other words, § 3 allows a party to seek a stay of a pending court proceeding for the duration of an arbitration so long as the party can demonstrate that the claims at issue fall within the scope of a written arbitration agreement and that the party seeking the stay is not in default in proceeding with arbitration under that agreement. *See Scherk*, 417 U.S. at 511 (describing § 3). As this Court has pointed out, neither § 2 nor § 3 "purports to alter background principles of state contract law[,]" and § 3 "adds no substantive restriction to § 2's enforceability mandate." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009).

Section 4 directs courts "to order parties to proceed to arbitration if there has been a 'failure, neglect, or refusal' of any party to honor an agreement to arbitrate." *Scherk*, 417 U.S. at 511 (quoting 9 U.S.C. § 4). Section 4 applies regardless of whether there is an existing court proceeding; it allows parties to petition a federal court in the first instance to compel

arbitration. 9 U.S.C. § 4; *see also Moses H. Cone*, 460 U.S. at 22 (explaining that §§ 3 and 4 provide "two parallel devices for enforcing an arbitration agreement").

B. Robyn Morgan's Allegations Against Sundance

Sundance owns more than 150 Taco Bell franchises throughout the United States. J.A. 9.[1] Robyn Morgan worked at one of these franchises in Osceola, Iowa, as an hourly employee from August to October of 2015. J.A. 10.

Sundance did not pay its employees, including Ms. Morgan, for the hours they worked. Sundance had a policy of "shifting" hours that employees worked in one week and recording them for the following week so that the total number of recorded hours in any given week would never exceed 40. J.A. 12. As a result of this shifting, Ms. Morgan and other employees were not paid for all of the hours they worked in a given week and were not paid at overtime rates when they worked more than 40 hours in a single week. J.A. 11-12. Employees who regularly worked more than 40 hours per week and—and whose overtime hours therefore could not be "shifted"—were simply never paid, at any rate, for all the hours they worked. J.A. 12-13 (Sundance capped hours in any two-week period at 80).

Sundance also sometimes instructed Ms. Morgan and other employees to clock out and to continue

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[1] Citations to the Joint Appendix filed in this Court are formatted as "J.A. X." Citations to the appendix filed with Ms. Morgan's Petition for Certiorari are formatted as "Pet. App. X."

working off the clock—additional work for which the employees were never paid. J.A. 13.

In September 2018, Ms. Morgan filed a nationwide collective action against Sundance in Iowa federal court on behalf of all similarly situated hourly employees of Sundance franchises, alleging that these practices constituted willful violations of the FLSA. J.A. 14.

C. The *Wood* Action and Sundance's Motion to Dismiss

Two years before Ms. Morgan filed this action in Iowa, a similar action was filed under the FLSA against Sundance in the Eastern District of Michigan detailing the same practices of "shifting" time to subsequent pay periods. *Wood v. Sundance, Inc.*, No. 2:16-cv-13598 (E.D. Mich. Oct. 7, 2016) (the "*Wood* action"). The *Wood* action was initially filed as a nationwide collective action, but in June 2017, it was conditionally certified to include only hourly employees of Sundance's Taco Bell restaurants in Michigan. J.A. 45-46.

After Ms. Morgan filed her complaint in Iowa, Sundance moved to dismiss or stay the suit pursuant to the "first-to-file" rule, arguing that her action was duplicative of the *Wood* action. J.A. 19-43. Sundance's motion said nothing about Ms. Morgan's claims being subject to a mandatory arbitration provision, and it certainly did not ask the court to enforce that provision. To the contrary, in seeking dismissal of her nationwide collective action as duplicative of *Wood*, Sundance affirmatively argued that Ms. Morgan could "refile her claim on an individual basis before this Court." J.A. 39.

The district court denied Sundance's motion to dismiss, concluding that because members of Ms. Morgan's putative collective action who had worked for Sundance outside of Michigan could not join the *Wood* action, the two cases were not duplicative. J.A. 44-55.

Four days later, Sundance filed its answer, listing fourteen affirmative defenses to the merits of Ms. Morgan's claims. J.A. 56-74. And though the defenses included a statute of limitations defense based on Ms. Morgan's employment agreement, none mentioned arbitration as a defense to the litigation. J.A. 71-73.

D. Information Exchange and Mediation

Plaintiffs in this case and in the *Wood* action met with representatives of Sundance for a joint mediation on April 15, 2019. In preparation for that mediation, Sundance provided Ms. Morgan's counsel with payroll data for nearly 12,000 members of the putative collective, as well as thousands of pages of emails from Sundance management. Pet. App. 17. Ms. Morgan retained an expert to analyze the payroll data. *Id.*

The mediation led to settlement of the *Wood* action, but Ms. Morgan's case did not settle, and counsel for the parties proceeded to correspond regarding scheduling matters. *Id.* Sundance first raised arbitration with Ms. Morgan's counsel on May 1, 2019, and, on May 3, 2019, Sundance moved to compel individual arbitration of Ms. Morgan's claims. J.A. 75-76.

E. Lower Court Opinions

Ms. Morgan opposed Sundance's motion to compel arbitration on the basis that Sundance had waived

any right it may have had to compel arbitration by engaging in litigation. Pet. App. 19. The district court applied the tripartite test established by the Eighth Circuit in *Lewallen v. Green Tree Servicing, LLC*, 487 F.3d 1085 (8th Cir. 2007), to determine whether Sundance had waived its right to arbitration. First, there was no dispute that Sundance knew of an existing right to arbitrate—the agreement was part of a form contract on Sundance's own website. Pet. App. 14, 26. Second, the court held that Sundance acted inconsistently with that right when it waited for eight months before asserting its right to arbitration and failed to mention arbitration in its answer, in its motion to dismiss, or in scheduling discussions with opposing counsel. Pet. App. 27-31. Finally, the court found that Ms. Morgan was prejudiced by having to defend against Sundance's motion to dismiss and by spending time and resources preparing for a classwide mediation instead of individual arbitration. Pet. App. 32-33.[2]

Sundance appealed, and the Eighth Circuit reversed, with Judge Colloton dissenting. The Eighth Circuit majority found the question close as to

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[2] The district court also rejected Sundance's argument that its delay in seeking to compel arbitration was justified because it was supposedly unclear until after this Court's decision in *Lamps Plus v. Varela*, 139 S. Ct. 1407 (2019), that collective arbitration would not be permitted in Ms. Morgan's case. Pet. App. 31-32. As the district court explained, Sundance's arbitration clause is silent as to collective proceedings, and *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), had already held that collective arbitration could not be compelled where an agreement is silent on that subject. Pet. App. 31-32; *see* J.A. 77-78 (requiring arbitration with no mention of class or collective proceedings).

whether Sundance had committed enough actions inconsistent with its right to arbitrate to meet the second element of the *Lewallen* test, but explained that "Sundance's conduct, even if inconsistent with its right to arbitration, did not materially prejudice Morgan," Pet. App. 3. The court ultimately found waiver lacking because of "the absence of a showing of prejudice to Morgan." Pet. App. 6. Specifically, the majority described the "first-to-file" dispute over the *Wood* action as "quasi-jurisdictional" and concluded that Ms. Morgan would not have to duplicate efforts in arbitration because that first-to-file dispute did not go to the merits of her claims.

The dissent noted that Sundance had made a strategic choice to delay invoking its arbitration rights and to instead "express [a] preference for a judicial forum in the Eastern District of Michigan." Pet. App. 7. Judge Colloton next observed that Sundance's participation in mediation was also inconsistent with its arbitration rights because it was seeking to settle claims for the nationwide collective while it sought to arbitrate Ms. Morgan's claims alone, and the settlement dynamics in the two fora would thus be very different. Pet. App. 8-9.

Relatedly, the reason Sundance gave for waiting to compel arbitration—this Court's decision in *Lamps Plus*, 139 S. Ct. 1407—only added to the impression of gamesmanship. Sundance had stated in its memorandum that before *Lamps Plus*, it "risked being compelled to arbitrate this matter as a collective action." Pet. App. 9 (internal quotations omitted). Or as Judge Colloton explained, "Sundance was content with a judicial forum until it believed

that an intervening court decision improved its prospects in arbitration." Pet. App. 9-10.

Turning to the issue of prejudice, which the majority had found dispositive, Judge Colloton deemed it a "debatable prerequisite." Pet. App. 10. He recognized that at least two courts of appeals—the Seventh and D.C. Circuits—do not require a showing of prejudice to establish waiver of arbitration and cited an earlier Eighth Circuit opinion that described the question as "unsettled." Pet. App. 10 (quoting *Erdman Co. v. Phx. Land & Acquisition, LLC*, 650 F.3d 1115, 1119 (8th Cir. 2011)). Moreover, in explaining why the Seventh Circuit does not require a showing of prejudice, he noted that "in ordinary contract law, a waiver normally is effective without proof of consideration or detrimental reliance." Pet. App. 10 (quoting *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995)). However, he concluded, if prejudice is required to prove waiver, then Ms. Morgan had satisfied that requirement. Pet. App. 11.

This Court granted Ms. Morgan's petition for certiorari.

SUMMARY OF ARGUMENT

I. American courts have long defined "waiver" as the intentional relinquishment of a known right and have applied the concept in a wide variety of contexts, including rights afforded by contract. Common-law waiver of contractual rights can be express or implied. Courts assessing whether an implied waiver has occurred focus on whether the words and actions of the waiving party were inconsistent with an intention of exercising the contractual right and demonstrated an intention to abandon it. Thus, assessments of

contractual waiver focus solely on the waiving party's intent, leading courts and commentators alike to describe waiver as unilateral.

This unilateral concept has frequently been contrasted with the related doctrines of estoppel and laches, because the same factual situations can often lead to two or more of these defenses being asserted simultaneously. Estoppel differs from waiver, however, in that it requires another party to have changed its position to its detriment based on what it understood the other party would do—such as making a payment late because the other party had previously accepted late payments. Laches, an equitable defense available when a party unreasonably delayed in bringing a claim, also requires a showing of prejudice to the party asserting the defense. Courts and commentators have distinguished estoppel and laches from waiver in that the first two require a showing of prejudice, while waiver does not.

But most federal and state courts have eschewed these common-law distinctions when a party begins litigating an arbitrable claim in court and then later invokes its contractual right to insist on arbitration under an agreement covered by the FAA. These courts have concocted a separate body of arbitration-specific waiver law that they apply in these situations and that, unlike generally-applicable contractual waiver law, requires prejudice to the non-waiving party as an essential element. These courts point to the FAA as a basis for deviating from common-law waiver standards, but the FAA does not support such a departure.

II. The cornerstone of the FAA is the equal-treatment principle codified at § 2, which requires courts to place agreements to arbitrate "on an equal footing with other contracts." *Concepcion*, 563 U.S. at 339. The equal-treatment principle forbids courts from crafting or applying rules that differ from the rules applied to contracts generally or otherwise "derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* The arbitration-specific waiver standard most courts employ, which includes a prejudice requirement even though those same courts do not require prejudice for waiver of other contractual rights, violates this equal-treatment principle and thus violates the FAA's core substantive command. *See Buckeye Check Cashing*, 546 U.S. at 447.

And nothing else in the text of the FAA supports a prejudice requirement either. Some courts point to § 3 of the Act, which requires courts to stay litigation of arbitrable issues until arbitration has occurred "providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3. But default, like waiver, is a unilateral concept that focuses exclusively on the defaulting party's failure to perform an obligation, and "default" had the same meaning in 1925 when the FAA was enacted. In short, the FAA's text and structure mandate that the same common-law standard for waiver be applied to rights under arbitration agreements made enforceable by the statute as to rights under any other sort of contract.

III. The prejudice requirement also creates perverse incentives antithetical to the FAA's purposes. Congress intended the FAA to reduce

litigation-related delays and provide streamlined procedures so that parties who wished to arbitrate their disputes could benefit from the speed and efficiency of that alternative forum. But the high bar for arbitration-related waiver that most courts now apply instead incentivizes extensive skirmishing in court before arbitration rights are invoked by either party.

The status quo also allows parties to test their case in court first and only retreat to arbitration if they encounter a judicial setback or decide that arbitration has become a more strategically attractive forum. But this sort of tactical gamesmanship is precisely what Congress passed the FAA to prohibit. In 1925 Congress replaced the historical approach treating pre-dispute arbitration agreements as optional second-class contracts that could be abandoned at will with a commitment that those agreements were as binding and enforceable as any other contracts. This Court should honor those intentions, and the equal-treatment principle, by clarifying that arbitration rights are just as waivable as other contract rights when parties act inconsistently with an intent to enforce them.

ARGUMENT

I. CONTRACTUAL RIGHTS MAY BE WAIVED, AND IN MOST CONTRACTUAL CONTEXTS, WAIVER FOCUSES EXCLUSIVELY ON THE ACTIONS OF THE WAIVING PARTY WITHOUT REGARD TO THEIR EFFECTS ON OTHERS.

In both civil and criminal law, waiver has long been defined as the intentional relinquishment of a

known right. *Alsens Am. Portland Cement Works v. Degnon Contracting Co.*, 118 N.E. 210, 210 (N.Y. 1917) (civil); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (criminal). The concept of waiver is ubiquitous in American law. Rights can be waived that derive from the U.S. Constitution, *Id.* at 467-68 (Sixth Amendment right to counsel); from federal statute, 29 U.S.C. § 626(f) (right to bring claim under Age Discrimination in Employment Act); from state property law, *Maroun v. Deutsche Bank Nat'l Trust Co.*, 109 A.3d 203, 209 (N.H. 2014) (homestead rights preventing foreclosure); from the common law of torts, *Boehm v. Cody Country Chamber of Commerce*, 748 P.2d 704, 711 (Wyo. 1987) (right to bring a negligence claim); and from the Federal Rules of Civil Procedure, Fed. R. Civ. P. 12(h) (defenses to suit).

And, as relevant here, rights created by contract can be waived as well. A waiver may either be express or may be implied from conduct through which an intent to abandon the right can be inferred. *See Loan Mountain Prod. Co. v. Nat. Gas Pipeline Co. of Am.*, 984 F.2d 1551, 1557 (10th Cir. 1992) ("Waiver can be express or implied, and exists when one has an intent not to require strict compliance with a contractual duty[.]").

The waiver of contractual rights arises in numerous contexts, from building contracts to insurance contracts to forum selection clauses. Across these contexts, and across the states—where the substantive body of contract law has primarily developed—courts agree that waiver of contractual rights is unilateral in character: Whether a waiver

has occurred depends entirely on the actions and intentions of the waiving party. [3]

While detrimental reliance or prejudice to the non-waiving party is also sometimes present in cases involving contractual waivers, in nearly all the states (at least outside the context of arbitration), such reliance or prejudice is not an element of waiver itself. Rather, prejudice goes to the distinct, related concept of estoppel. And while the same conduct inconsistent with the terms of a contract can constitute both a waiver (when it manifests the waiving party's intention to relinquish the right) and an estoppel (when it causes a change in the behavior of another party), the contract law of most states goes to great pains to explain that waiver may occur without estoppel, and estoppel may occur without waiver.[4] Only in the law of arbitration contracts have the two concepts been fused together such that prejudice to

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[3] Some scholars have posited that the term "waiver" in the contractual context should be limited to conditions on performance, which, when waived, make performance of the contractual obligation unconditional. *See, e.g.*, 8 Corbin on Contracts § 40.1 (2021). But most courts do not confine their discussion of waiver to conditional contracts. *See, e.g.*, *U.S. Pipeline, Inc. v. N. Nat. Gas Co.*, 930 N.W.2d 460, 480-81 (Neb. 2019) (discussing waiver of a breach-remedy provision, not a condition on performance); *Bennett v. Farmers Ins. Co. of Ore.*, 26 P.3d 785, 796-97 (Ore. 2001) (any contractual term, including a material term, may be waived). *See also* 13 R. Lord, Williston on Contracts § 39:14 (4th ed. 2012) ("waiver can also operate in the context of an exchange of promises" and "any satisfactory discussion of [contractual waiver] must consider all of its applications").

[4] If the conduct manifesting the waiver involves an unreasonable delay in asserting a contractual right, it may also support the equitable defense of laches. *See* Part I.B.ii, *infra*.

the non-waiving party is an essential component of proving a waiver.

A. The Contract Law of the Vast Majority of States Treats Waiver as a Unilateral Concept that Does Not Require Prejudice to the Other Contracting Party.

The vast majority of state high courts considering when waiver of a contractual right will be found focus exclusively on actions taken by the waiving party that demonstrate an intent to abandon the right at issue, or that are inconsistent with an intent to exercise that right. *See, e.g.*, *Hughes v. Mitchell Co.*, 49 So.3d 192, 201-02 (Ala. 2010) ("a party's intention to waive a right is to be ascertained from the external acts manifesting the waiver")[5]; *Bennett*, 26 P.3d at 796-97 ("party to a written contract may waive a provision of that contract by conduct" and employer's promulgation of new policy requiring termination for cause unequivocally waived inconsistent at-will provision in plaintiff's employment contract); *McCarthy v. Tobin*, 706 N.E.2d 629, 633 (Mass. 1999) ("[w]ords and conduct attributable to" waiving party were inconsistent with an intention to enforce contractual deadline); *Beck v. Lind*, 235 N.W.2d 239, 251 (N.D. 1975) (landlord waived right to rescind or cancel lease where he knew of tenant's conduct breaching lease and did not object to that breach). Or as the Virginia Supreme Court succinctly put it, "intent is the essence of waiver." *Stanley's Cafeteria, Inc. v. Abramson*, 306 S.E.2d 870, 874 (Va. 1983).

Contractual waivers frequently arise in the insurance context, where an insurer acts

[5] Unless otherwise noted, all internal quotations are omitted.

inconsistently with an intent to enforce a contractual condition of coverage. For example, in *U.S. Fidelity & Guaranty Co. v. Bimco Iron & Metal Corp.*, 464 S.W.2d 353, 354 (Tex. 1971), the owner of a commercial building sought to recover on its insurance policy after a burglar stole electrical wiring from the building. The insurance company refused to pay for any of the damage to the building, arguing that the insured had breached the policy by failing to timely file a formal proof of loss. *Id.* at 356. But the Texas Supreme Court found that when an adjuster inspected the building and stated that the damage to the door would be covered but that the stolen wiring would not, the insurer had waived the proof of loss provision because that suggestion of partial coverage was inconsistent with an intent to insist upon strict compliance with the proof of loss requirement. *Id.* at 356-57. Other courts confronting similar facts have reached the same conclusion.[6]

An ongoing course of conduct can also constitute a waiver of contractual terms and the rights they afford. *Christensen v. Equity Coop. Livestock Sale Ass'n*, 396 N.W.2d 762, 762-63 (Wis. Ct. App. 1986), upheld a jury's conclusion that a purchaser of cattle had waived his security interest in the animals when, over a five-year period, he inspected the herd, had reason to know that it was shrinking and that the farmer was selling cattle outside the terms of the

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[6] *Scheetz v. IMT Ins. Co. (Mut.)*, 324 N.W.2d 302, 304-05 (Iowa 1982) (insurer waived contractual provision that suit must be filed within one year of loss by continuing negotiations beyond that deadline); *Baird v. Fidelity-Phenix Fire Ins. Co.*, 162 S.W.2d 384, 389 (Tenn. 1942) (insurer waived requirement that insured retain sole and unconditional ownership of property, knowing that terms of will put that ownership in doubt).

contract, yet renewed the contract anyway. The New Hampshire Supreme Court reached a similar conclusion in a construction contract case, finding waiver where "the written terms" of the contract, while "clear," had been "disregarded by the parties." *D. M. Holden, Inc. v. Contractor's Crane Serv., Inc.*, 435 A.2d 529, 532 (N.H. 1981). And *U.S. Pipeline*, 930 N.W.2d at 480-81, held that a natural gas company that had contracted with a pipeline construction company waived its right to claim liquidated damages for delay in the project's completion by requesting extra work after the completion date and failing to inform the pipeline company that it intended to enforce the liquidated damages provision.

Even in contractual contexts closer to arbitration, involving provisions about alternative dispute resolution and forum selection, the laser focus remains on the waiving party's acts inconsistent with an intention to enforce the right at issue. *See Windham Land Trust v. Jeffords*, 967 A.2d 690, 697 n.4 (Me. 2009) (landowners had waived right to enforce conservation easement's requirement for pre-suit mediation by failing to participate in mediation before suit and waiting over a year after suit had commenced to invoke the provision as a defense); *Russo v. Barger*, 366 P.3d 577, 580-81 (Ariz. Ct. App. 2016) (defendant waived right to invoke forum selection clause by extensively litigating in the original forum after invoking clause in its answer).[7]

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[7] *Russo* pointed to earlier Arizona cases on waiver of the right to arbitrate in reaching its conclusion, noting that an agreement to arbitrate is "a specialized kind of forum selection clause." 366 P.3d at 580 (quoting *Scherk*, 417 U.S. at 519). Those

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In state after state, court after court has emphasized that waiver of contractual rights is accomplished unilaterally. *E.g.*, *Best Place, Inc. v. Penn Am. Ins. Co.*, 920 P.2d 334, 353 (Haw. 1996) ("Waiver is essentially unilateral in character, focusing only upon the acts and conduct of the [waiving party]."); *Thoroughbred Assocs., L.L.C. v. Kansas City Royalty Co.*, 469 P.3d 666, 678 (Kan. Ct. App. 2020) ("Unlike [contract] modification, which requires mutual assent, waiver can occur unilaterally."); *Old Republic Ins. Co. v. FSR Brokerage, Inc.*, 80 Cal. App. 4th 666, 678 (Cal. Ct. App. 2000) ("*pivotal* issue in a claim of waiver is the intention of the party who allegedly relinquished the known legal right" as waiver "does not require any act or conduct by the other party" (emphasis in original)).

According to the law of most states, waiver of a contractual term need not be supported by consideration[8] or another party's reliance.[9] And once

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earlier Arizona cases did not include prejudice as an element of arbitration waiver. *E.g.*, *Bolo Corp. v. Homes & Son Constr. Co.*, 464 P.2d 788, 792 (Ariz. 1970). But Arizona courts have since adopted the Ninth Circuit test for arbitration waiver, where prejudice is a necessary and in fact the "most significant[]" factor. *Sec. Alarm Fin. Enters., L.P. v. Fuller*, 398 P.3d 578, 583-84 (Ariz. Ct. App. 2017).

[8] *E.g.*, *Bennett*, 26 P.3d at 796; *In re Guardianship of Collins*, 327 N.W.2d 230, 234 (Iowa 1982); *U.S. Fidelity & Guaranty*, 464 S.W.2d at 358; *Alsens American*, 118 N.E. at 210.

[9] *E.g.*, *Lafayette Car Wash, Inc. v. Boes*, 282 N.E.2d 837, 839-40 (Ind. 1972); *Salloum Foods & Liquor, Inc. v. Parliament Ins. Co.*, 388 N.E.2d 23, 28 (Ill. App. Ct. 1979); *Kennedy v. Manry*, 66 S.E. 29, 31 (Ga. Ct. App. 1909), *superseded by statute on other grounds as recognized in Whitehead v. S. Discount Co.*, 135 S.E.2d 496, 498-99 (Ga. Ct. App. 1964); *Horne v. Radiological*

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waived, most contractual rights can't be reinstated through retraction or revocation of the waiver.[10]

Finally, outside the arbitration context, prejudice is rarely mentioned when courts discuss waiver of contractual rights.[11] Where the concept of prejudice does come up, it is usually to distinguish waiver—which does not require a showing of prejudice—from the related doctrines of laches and estoppel—which do. *See* Part I.B, *infra*.

B. Courts Distinguish Contractual Waiver from Other Doctrines Requiring Prejudice, but Collapse the Distinction When Agreements to Arbitrate Are at Issue.

The fact patterns in which the contractual defense of waiver is often asserted—situations where one

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Health Servs., P.C., 371 N.Y.S.2d 948, 960 (N.Y. Sup. Ct. 1975); *Nathan Miller, Inc. v. N. Ins. Co. of N.Y.*, 39 A.2d 23, 25-26 (Del. Super. Ct. 1944).

[10] *E.g.*, *Scheetz*, 324 N.W.2d at 305; *Lafayette Car Wash*, 282 N.E.2d at 839; *State ex rel. Johnson v. Indep. Sch. Dist. No. 810, Wabasha Cnty.*, 109 N.W.2d 596, 602 (Minn. 1961); *Thomas N. Carlton Estate, Inc. v. Keller*, 52 So.2d 131, 133 (Fla. 1951); *Home Fire Ins. Co. v. Kuhlman*, 78 N.W. 936, 936 (Neb. 1899).

[11] A small minority of states do require prejudice in other contractual waiver contexts besides arbitration. *E.g.*, *Magic Valley Foods, Inc. v. Sun Valley Potatoes, Inc.*, 10 P.3d 734, 737 (Idaho 2000); *Maak v. IHC Health Servs., Inc.*, 372 P.3d 64, 73 (Utah Ct. App. 2016). Other states consider prejudice as an element of only certain types of waiver. *E.g.*, *J.R. Hale Contracting Co. v. United N.M. Bank at Albuquerque*, 799 P.2d 581, 585-86 (N.M. 1990) (recognizing "waiver by estoppel" as a species of waiver on which another party relies to its prejudice and distinguishing it from express or implied in fact waiver, where such reliance is not required).

party has acted inconsistently with the written terms of a contract or delayed in seeking enforcement of a contractual provision—also often lend themselves to assertion of the closely related defenses of estoppel and/or laches. Courts ruling on two or more of these defenses in the same case often have occasion to compare and contrast them. And consistently over the decades and across contractual contexts, courts and scholarly treatises distinguish among these doctrines based on the presence or absence of a prejudice requirement.

The sole exception to this general contract-law principle—that estoppel and laches require prejudice while waiver does not—occurs when one party to an arbitration agreement governed by the FAA argues that another party to that agreement has waived the right to enforce it. In this one contractual scenario, most federal and many state courts import a prejudice requirement into a doctrine that they label as waiver but that functions in practice like some sort of waiver-laches-estoppel hybrid. These courts base this conflation not on general contract law principles but on an errant notion that the text of the FAA, and this Court's precedents, mandate an arbitration-specific standard.

i. Waiver Differs from Estoppel in that the Latter, but Not the Former, Requires that Another Party Suffer Prejudice from the Estopped Party's Inconsistent Acts.

In an influential early opinion, the Supreme Judicial Court of Maine described waiver and estoppel as two partially overlapping sets. Many estoppels would also constitute waivers, the court

explained, but not all waivers qualify as estoppels because they lacked the key element of prejudice:

> Sometimes the conduct of a party may show that he not only intended to, and did, waive his rights, but that the adverse party had been misled thereby, when the law raises an absolute bar to the repudiation of conduct that caused the mischief. This is estoppel, although it may contain all the elements of waiver. But the reverse may not be true; for a party may so conduct himself as to show an intention to waive his rights, when the adverse party has not been deceived or misled thereby, and no estoppel would arise, although a waiver may well be found.

Libby v. Haley, 39 A. 1004, 1005 (Me. 1898) (citations omitted).

Although *Libby* involved a contract to sell a horse, many of the first cases in American courts to explore contractual waiver involved insurance companies that initially ignored, and later tried to enforce, a term in their policies. The insured who cried foul when this bait and switch occurred would often argue that the insurer had waived its enforcement rights and should be estopped from changing its position midstream, with the litigants, the lower court, or both using the terms "waiver" and "estoppel" interchangeably. This confusion led numerous appellate courts in the early twentieth century to offer primers like the following:

> Waiver involves the notion of an intention entertained by the holder of some right to abandon or relinquish, instead of insisting on, the right. An estoppel arises when the purpose

> or natural consequence of a person's representations or conduct is such as to induce another person to do or to omit some act, the doing or omission of which would turn out to his detriment and to the inducing party's benefit if the latter were permitted to take such advantage of it, and such an estoppel more often carries with it the implication of fraud than waiver does. . . . Waiver depends upon what one himself intends to do; estoppel depends rather upon what he caused his adversary to do. Estoppel results from an act which may operate to the injury of the other party; waiver may affect the opposite party beneficially.

Nw. Nat'l Life Ins. Co. v. Ward, 155 P. 524, 526-27 (Okla. 1915). *See also Baird*, 162 S.W.2d at 388-89 (distinguishing waiver and estoppel); *Nathan Miller,* 39 A.2d at 24-25 (same).

Federal courts have also identified prejudice as the decisive factor distinguishing waiver from estoppel. *E.g.*, *Slidell, Inc. v. Millennium Inorganic Chems., Inc.*, 460 F.3d 1047, 1056 (8th Cir. 2006) (applying Minnesota law); *Mitchell v. Aetna Cas. & Sur. Co.*, 579 F.2d 342, 347-48 (5th Cir. 1978); *Royal Air Props., Inc. v. Smith*, 333 F.2d 568, 571 (9th Cir. 1964). So have legal treatises. *See* 28 Am. Jur. 2d Estoppel and Waiver § 35 (2011) ("The intent to relinquish a right is a necessary element of waiver but not of estoppel while detrimental reliance is a necessary element of estoppel but not of waiver."); 8 Corbin on Contracts § 40.1 (2021) (focusing on prejudice in its discussion of *Parsons v. Halliburton*

Energy Servs., Inc., 785 S.E.2d 844, 850-52 (W. Va. 2016)).

Since the high courts of Maine and Oklahoma first weighed in with their explanations distinguishing waiver from estoppel, many more states joined their ranks. *E.g.*, *Savre v. Santoyo*, 865 N.W.2d 419, 426 (N.D. 2015); *Edmondson v. Penn. Nat'l Mut. Cas. Ins. Co.*, 781 S.W.2d 753, 755-57 (Ky. 1989); *Continental Ins. Cos. v. Stanley*, 569 S.W.2d 653, 656 (Ark. 1978); *Lafayette Car Wash*, 282 N.E.2d at 839-40; *U.S. Fidelity & Guaranty*, 464 S.W.2d at 358; *Inland Mut. Ins. Co. v. Hightower*, 145 So.2d 422, 425-26 (Ala. 1962).

The prejudice factor that separates waiver from estoppel is a distinction that can make a dispositive difference. In *Best Place*, a nightclub operating at a loss was destroyed by a fire caused by arson and made a claim on its fire insurance policy. 920 P.2d at 337. That policy required a formal "proof of loss" to be filed within 60 days of the property damage, and the nightclub submitted its proof of loss form outside that deadline. *Id.* at 351-52. The insurance company responded to the untimely proof of loss with a letter contesting the specific amounts claimed and asking for more information. *Id.*

The Hawaii Supreme Court found that the insurance company had waived its right to insist on the 60-day time limit by seeking more information rather than denying the claim outright. *Id.* at 353-54. However, the same conduct on the insurer's part did not support a claim of estoppel, because "there is no indication that [the nightclub] reasonably relied on [the insurer's acts or omissions] to its detriment." *Id.* at 355. Without evidence of detrimental reliance by

the insured, there was no estoppel, consistent with the observation the Maine high court had made a century before that a waiver can exist without also satisfying the higher bar of estoppel. *Libby*, 39 A. at 1005 ("when the adverse party has not been deceived or misled thereby, . . . no estoppel would arise, although a waiver may well be found").

ii. Laches Is an Unreasonable Delay in Enforcing a Known Right, Which, Like Estoppel, Requires Prejudice.

Laches has been described as the equitable counterpart to the legal doctrine of waiver, as both require that a party have acted so as to affirmatively repudiate a known right. 31 C.J.S. Estoppel and Waiver § 87 (2021). But laches differs from waiver in that the party asserting laches must show that the other party's delay harmed it. *E.g.*, *Royal Air*, 333 F.2d at 570-71; *Murphy v. Stevens*, 645 P.2d 82, 93 (Wyo. 1982) ("Waiver differs primarily from laches in that laches requires a showing of prejudice to the party claiming it; waiver does not."); *In re Marriage of Kann and Kann*, 488 P.3d 245, 252-53, 254-55 (Colo. Ct. App. 2017) (extensively discussing prejudice in analyzing laches but not discussing prejudice at all in analyzing waiver); *Jervey v. Martint Env't, Inc.*, 721 S.E.2d 469, 473-74 (S.C. Ct. App. 2012) ("waiver does not necessarily imply that the party asserting waiver has been misled to his prejudice" but requiring prejudice for laches), *vacated in part on other grounds*, 750 S.E.2d 90 (S.C. 2013).

While laches has been described as a species of estoppel, 30A C.J.S. Equity § 142 (2021), the two doctrines are not synonymous. Laches is an affirmative defense that turns on a prejudice-causing

delay, while estoppel may be used either affirmatively or defensively based on one party having changed its position in reliance on the actions or inactions of another. *See Feinzig v. Ficksman*, 674 N.E.2d 1329, 1333-34 (Mass. App. Ct. 1997). But what ties the two doctrines together is the obligation to show prejudice, a requirement that the unilateral doctrine of waiver ordinarily lacks.

iii. In the Vast Majority of Jurisdictions, Arbitration Is the Only Contractual Context in Which Courts Require Prejudice to Prove Waiver.

These distinctions completely fall apart in the arbitration context. Courts apply different rules when a contract gives parties the right to require arbitration of disputes but they begin litigating in court instead before one of them seeks to invoke their arbitration rights. Many courts analyze cases like this under a doctrine they call waiver but that is in fact "an amalgam of waiver, estoppel, and laches principles" that requires "a showing of prejudice." *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 345 (Ky. Ct. App. 2001).

This trend towards blurring the lines between waiver and estoppel when a contract for arbitration is involved began in the federal courts, with many early opinions pointing to the liberal federal policy favoring arbitration to explain why a higher waiver standard was necessary. *Carolina Throwing Co. v. S & E Novelty Corp.*, 442 F.2d 329, 331 (4th Cir. 1971) (describing prejudice requirement as "the modern rule based on a liberal national policy favoring arbitration") (modifications in original omitted); *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (2d

Cir. 1968) (similar). Prejudice is now a required element of arbitration waiver in nine of twelve federal courts of appeals.[12]

And the arbitration-specific prejudice requirement for waiver has taken root in more than half the states as well. Indeed, many of the same state courts that wrote opinions explaining why prejudice is not needed to prove waiver (in the course of distinguishing waiver from estoppel or laches) have explicitly required prejudice to prove waiver of the right to arbitrate. *Compare Scheetz*, 324 N.W.2d at 304 (in contractual waiver case involving insurance, facts need not "support a plea of estoppel"), *with Wesley Ret. Servs., Inc. v. Hansen Lind Meyer, Inc.*, 594 N.W.2d 22, 30-31 (Iowa 1999) (requiring prejudice to prove waiver of right to arbitrate); *compare Savre*, 865 N.W.2d at 426-27 (distinguishing waiver from estoppel because waiver doesn't require prejudice), *with David v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 440 N.W.2d 269, 274 (N.D. 1989) ("More is required [for waiver] than action inconsistent with the arbitration provision; prejudice to the party opposing arbitration must also be shown."); *compare Jervey*, 721 S.E.2d at 473-74 (waiver does not require that other party be misled to their prejudice), *with Rich v. Walsh*, 590

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[12] *Joca-Roca Real Estate, LLC v. Brennan*, 772 F.3d 945, 949 (1st Cir. 2014); *Hooper v. Advance Am., Cash Advance Ctrs. of Mo., Inc.*, 589 F.3d 917, 922-24 (8th Cir. 2009); *O.J. Distrib., Inc. v. Hornell Brewing Co.*, 340 F.3d 345, 356 (6th Cir. 2003); *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 926-27 (3d Cir. 1992); *S & H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990); *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 497 (5th Cir. 1986); *ATSA of Cal., Inc. v. Cont'l Ins. Co.*, 702 F.2d 172, 175 (9th Cir. 1983); *Carolina Throwing*, 442 F.2d at 331; *Carcich*, 389 F.2d at 696.

S.E.2d 506, 508-10 (S.C. Ct. App. 2003) (requiring prejudice for arbitration waiver); *compare U.S. Fidelity & Guaranty*, 464 S.W.2d at 357-58 (distinguishing waiver from estoppel based on prejudice), *with Perry Homes v. Cull*, 258 S.W.3d 580, 594-95 (Tex. 2008) (requiring prejudice for waiver by litigation conduct of right to arbitrate).

The courts that have required prejudice in arbitration cases have not done so as part of a modification of their generally applicable law of contract waiver. Rather, they explicitly acknowledge that they are creating a different waiver standard for arbitration than for other contract rights. *E.g.*, *id.* at 594 (acknowledging Texas Supreme Court precedent that "waiver is essentially unilateral in its character").

Often states justify this departure from their ordinary contract law principles by citing the FAA and federal decisions interpreting it. *E.g.*, *LAS, Inc. v. Mini-Tankers, USA*, 796 N.E.2d 633, 637-38 (Ill. App. Ct. 2003) (requiring prejudice for arbitration waiver because most federal courts do); *David*, 440 N.W.2d at 274 (finding prejudice required by "the Federal policy favoring arbitration").[13] But the FAA does not support

[13] Two states have sliced the salami even finer, holding that general state-law contract principles should dictate waiver of the right to arbitrate under state law but not when the contract is governed by the FAA. *See Security Alarm*, 398 P.3d at 582-83 (holding that arbitration waiver is governed by § 3 of the FAA and is not a state-law contract defense analyzed under § 2); *Kinsey v. Bradley*, 765 P.2d 1329, 1331-32 (Wash. App. Ct. 1989) (noting that lower court had not required prejudice as part of waiver inquiry because a Washington Supreme Court arbitration waiver precedent, *Lake Wash. Sch. Dist. 414 v.*

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divergent waiver standards for rights derived from arbitration agreements than for rights derived from other types of contracts. To the contrary, such arbitration exceptionalism is antithetical to the FAA's plain language and abhorrent to the legislative objectives that spurred its enactment.

II. IMPOSING A PREJUDICE REQUIREMENT SPECIFIC TO WAIVER OF THE RIGHT TO ARBITRATE IS CONTRARY TO THE FAA.

The FAA's "primary substantive provision," § 2, reflects "the fundamental principle that arbitration is a matter of contract" and that courts must place agreements to arbitrate future disputes "on an equal footing with" other types of contracts. *Concepcion*, 563 U.S. at 339. This equal-treatment principle applies to federal as well as state courts, *see Epic Systems*, 138 S. Ct. at 1622-23, and requires that arbitration agreements be enforced to the same degree as other contracts. *Prima Paint*, 388 U.S. at 404 n.12.

The imposition of a prejudice requirement for proving waiver of the right to arbitrate, when prejudice is not required to waive other contractual rights, flies in the face of this equal-treatment principle at the core of the FAA. And nothing else in the statute's text countenances an arbitration-specific prejudice requirement either. The word "prejudice" appears nowhere in the statute, nor does any similar concept such as change in position or detrimental reliance.

Mobile Modules Nw., Inc., 621 P.2d 791 (Wash. 1980), did not require prejudice, but remanding because prejudice was required under the FAA and federal law).

Some courts treat the question of whether the right to insist on arbitration has been waived by inconsistent litigation conduct as a question under § 3 of the FAA, which requires courts to stay litigation of arbitrable issues until arbitration has occurred, "providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3. But no support for a prejudice requirement can be found in the term "default" either. For default, like waiver, is a unilateral concept that focuses on the defaulting party's failure to meet contractual obligations and is not concerned with the effect that failure may have on others. And "default" had this same "ordinary meaning" in 1925, when the FAA was enacted. *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2068, 2070 (2018).

A. The FAA's Equal-Treatment Principle Prohibits Engrafting a Prejudice Requirement onto the Waiver Standard Where Arbitration Rights Are at Stake.

Section 2 of the FAA declares written agreements to arbitrate "a controversy thereafter arising out of such contract" to be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This declaration of enforceability, taken together with the reference to "any contract," means that written agreements to arbitrate future disputes arising out of the contract containing the arbitration provision are, as a matter of federal law, as enforceable as any other contract and are also subject to state contract law principles that "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v.*

Thomas, 482 U.S. 483, 492 n.9 (1987); *see also Concepcion*, 563 U.S. at 339 (Section 2 permits arbitration agreements "to be invalidated by generally applicable contract defenses[.]").

In other words, § 2 declares that arbitration agreements are no less and no more enforceable than any other type of contract, and that any attempt to declare such agreements unenforceable must be based on generally-applicable contract law, not "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* This is the equal-treatment principle.

The essence of this equal-treatment principle is that agreements to arbitrate must be treated the same as any other contract. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989) (FAA placed agreements to arbitrate "upon the same footing as other contracts"); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) ("The House Report accompanying the [FAA] makes clear that its purpose was to place an arbitration agreement 'upon the same footing as other contracts, where it belongs[.]'") (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)).

Because in passing the FAA Congress was responding to the courts' historical hostility to arbitration agreements, *see id.* at 219-20 & n.6, implementing the equal-treatment principle in practice has often meant raising arbitration agreements above the esteem in which they had previously been held. This is why the equal-treatment principle has sometimes been expressed as a pro-arbitration federal policy. *Granite Rock Co. v. Int'l*

Bhd. of Teamsters, 561 U.S. 287, 302 (2010) (the "federal policy favoring arbitration . . . is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts").

But the FAA did not raise arbitration agreements above other types of contracts such that a different, more rigorous standard would be required to waive arbitration rights than to waive other contractual rights. Such a result would reflect preferential, not equal, treatment, at odds with the FAA's same-footing principle. *Volt*, 489 U.S. at 478 (FAA "does not mandate the arbitration of all claims" but "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms"); *Prima Paint*, 388 U.S. at 404 n.12 ("the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so").[14]

Over and over again, this Court has explained that the FAA requires courts to apply generally-applicable

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[14] The minority of federal courts that do not require prejudice as an element of arbitration waiver have emphasized this inconsistency with the equal-treatment principle in rejecting a prejudice requirement. *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 590 (7th Cir. 1992) ("we should treat a waiver of the right to arbitrate the same as we would treat the waiver of any other contract right"); *Nat'l Found. for Cancer Rsch. v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987) ("the question of whether there has been waiver in the arbitration agreement context should be analyzed in much the same way as in any other contractual context").

contract law to agreements to arbitrate, and forbids crafting different rules for arbitration agreements than for other types of contracts. *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54-58 (2015) (California court did not follow generally-applicable California contract law principles in interpreting arbitration agreement and so did not place that agreement "on equal footing with all other contracts"); *Doctors Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (Montana law that placed "arbitration agreements in a class apart from 'any contract'" was "inconsonant with" § 2 of the FAA); *Perry*, 482 U.S. at 492 n.9 ("A court may not, . . . in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law.").

This same-footing requirement in the FAA is perhaps best known for its role in preempting state laws that single out arbitration for disfavored treatment. *E.g.*, *Kindred Nursing*, 137 S. Ct. at 1426. But this is not its only application. It has also been described as the underpinning of the severability principle established in *Prima Paint* that arbitration agreements are to be analyzed separately from the contracts containing them. *Buckeye Check Cashing*, 546 U.S. at 447 ("The rule of severability establishes how this equal-footing guarantee . . . is to be implemented."). And this Court recently applied it when assessing a federal-law defense to enforcement of an arbitration agreement in a case involving federal statutory claims. *Epic Systems*, 138 S. Ct. at 1622-23.

The prejudice requirement for arbitration waiver cannot survive its encounter with the FAA's equal-treatment principle. Federal and state courts alike disclaim the need to establish prejudice to prove a waiver of other contractual rights, instead emphasizing waiver's unilateral nature. *E.g.*, *Royal Air*, 333 F.2d at 571; *U.S. Fidelity & Guaranty*, 464 S.W.2d at 357-58. The prejudice requirement is unique to the arbitration context and thus "derive[s its] meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. This is precisely the sort of differential treatment the FAA forbids.

Regardless if a party seeks to invoke the FAA's protections in state or federal court, or utilizes § 3, § 4 or both as their means of procedural enforcement, the equal-treatment principle should yield the same result. If the party seeking the FAA's help in enforcing an agreement to arbitrate has acted in a manner inconsistent with an intent to enforce their rights under that agreement, such that generally-applicable contract law principles would support a finding of waiver, then the FAA requires that the same body of contractual waiver law apply to their rights under the arbitration agreement. If generally-applicable contract law would not require prejudice as part of such a waiver analysis, the FAA forbids prejudice to be imported into the equation just because "an agreement to arbitrate is at issue." *Id.* Thus, the suggestion that the FAA somehow warrants adding a prejudice requirement to the test for waiver has it exactly backwards; the FAA forbids it.

B. There Is No Other Textual Basis in the FAA for a Prejudice Requirement.

Looking beyond § 2, no other provision in the FAA can justify the addition of a prejudice requirement either. Nothing in the FAA's plain language mentions prejudice, detrimental reliance, or harm suffered by the party resisting arbitration. Several of the federal courts to engraft a prejudice requirement onto the standard for waiving the right to arbitrate suggested that they were not applying the law of waiver at all but rather interpreting § 3 of the FAA, which uses the term "default." *E.g.*, *Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley*, 683 F.3d 577, 586 (4th Cir. 2012) (statutory default under § 3 of the FAA "resembles waiver" but is a more demanding standard); *Morewitz v. W. of Eng. Ship Owners Mut. Prot. & Indem. Ass'n (Luxembourg)*, 62 F.3d 1356, 1365 n.16 (11th Cir. 1995) (noting that § 3 of the FAA uses the term "default" which is "analogous in meaning to the common-law term 'waiver'").

Section 3 instructs courts to grant a stay of already-initiated court proceedings so that issues "referrable to arbitration" may be arbitrated, but only if two conditions are met: 1) the court is "satisfied that the issue involved in such suit or proceeding is referable to arbitration"; and 2) "the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3.

But courts relying on § 3 and its reference to "default" as the basis for a prejudice requirement have not explained where, precisely, in § 3 of the FAA such a requirement is to be found. Nor can they, for the term "default" has had a consistent meaning since

before the FAA's enactment, and that meaning does not require prejudice.

i. "Default" Was and Is a Unilateral Term Connoting a Failure to Perform Under a Contract.

Both when the FAA was enacted in 1925 and today, "default" has referred to the unilateral actions of one party to a contract, without regard to the impact of those actions on the other party. Comparing the modern definition of "default" in Black's Legal Dictionary to the definition in the operative version of that dictionary when the FAA was passed reveals a meaning that has remained constant. *Compare* Black's Law Dictionary (11th ed. 2019) ("[t]he omission or failure to perform a legal or contractual duty"), *with* Black's Law Dictionary (2nd ed. 1910) ("The omission or failure to fulfill a duty, observe a promise, discharge an obligation, or perform an agreement.").

That definition is consistent with the way this Court used "default" in the years leading up to the FAA's enactment: "Default" then, as it does now, meant the neglect or failure to perform a contractual or statutory duty, without regard to how that failure to perform affected others. *See, e.g.*, *Aikins v. Kingbury*, 247 U.S. 484, 489 (1918) (holding failure to make contractually required payments put a party "in default" and describing that default as "abandonment of the contract"); *United States v. U.S. Fid. & Guar. Co.*, 236 U.S. 512, 523-24 (1915) (government contractor's "default" was "complete" where he failed to perform contractual duties); *Clews v. Jamieson*, 182 U.S. 461, 465 (1901) (analyzing stock exchange rules that discussed "neglect to fulfil [a] contract" and

describing such neglect as a "default"); *Providence Steam-Engine Co. v. Hubbard*, 101 U.S. 188, 194-95 (1879) (discussing a Connecticut statute that made corporate officers liable if they "neglected or refused" to file stock certificates with the town clerk, and repeatedly referring to failure to comply with the statute as a "default").[15]

Moreover, default on a contract created an "absolute" liability that could not be excused. *Hicks v. Guinness*, 269 U.S. 71, 81 (1925) (declining to excuse defaulting party from paying interest during wartime, explaining that when contractual "liability is incurred by wrong or default it is absolute"); *see Klein v. N.Y. Life Ins. Co.*, 104 U.S. 88, 89, 91 (1881) (enforcing life insurance policy term stating the policy would be revoked if the insured defaulted on any premium payment even though the dying insured was too ill to make the final payment and the beneficiary did not know the insurance policy existed). And as relevant to the situation where one party first chooses to litigate in court and later demands arbitration, specific performance was not available in 1925 as a contractual remedy to parties who were themselves in default. James Webster Eaton, Handbook of Equity Jurisprudence § 279 (2d ed. 1923) ("a vendee, who has

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[15] Other legal dictionaries from that time period are in accord with this Court and with Black's. Bouvier's Law Dictionary and Concise Encyclopedia 814 (Francis Rawle ed., 8th ed. 1914) ("[t]he non-performance of a duty, whether arising under a contract or otherwise"); A Concise Legal Dictionary 145 (Charles E. Chadman ed., 1909) ("Omission of what ought to be done. To allow judgment to be taken because of some neglect or failure to appear or answer."); Dictionary of Terms and Phrases Used in American or English Jurisprudence 356 (Benjamin Vaughan Abbott ed., 1879) ("[t]he neglect or omission of a duty").

once refused to perform his part of the contract by paying an installment of the purchase money, may not subsequently enforce performance against the vendor").

None of the legal definitions of "default" in use during the years leading up to the FAA's enactment, nor the contemporaneous judicial opinions discussing the term, mention anything about prejudice being necessary to establish a default. Thus, those courts that have looked to § 3's "default" language as the source of the prejudice requirement for arbitration waiver were engaging in some very creative statutory construction indeed. If anything, the standard for default in 1925 was more lenient than the standard for waiver, as the former only required a failure to perform a contractual obligation while the latter required an abandonment of a right that was both knowing and intentional. *See Clark v. West*, 193 N.Y. 349, 360 (1908).

The contemporary legal definition of "default" is consistent with the way it was viewed in 1925: "The omission or failure to perform a legal or contractual duty[.]" Black's Law Dictionary (11th ed. 2019). And in other rules and statutes besides the FAA, the term "default" refers to a failure to perform an obligation, without regard to any harm or prejudice caused by that failure.

For example, Federal Rule of Civil Procedure 55 allows a "default" to be entered by a clerk in federal court when "a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend" the action against them. Fed. R. Civ. P. 55(a). No showing of prejudice to the non-defaulting party is required; though the rule

mentions an affidavit, all that affidavit must "show[]" is the defaulting party's "failure." *Id.*

Another common type of default is a failure to honor an obligation of indebtedness by making payments when due. Congress has used the term in this context, *e.g.*, 38 U.S.C. § 3732, and has even defined it in terms of the precise amount of time by which a payment is late. 20 U.S.C. § 1087bb(g)(2) ("a [federal student] loan shall be considered to be in default" if an installment payment is more than 240 or 270 days late, depending on the repayment schedule, or if the borrower "fails . . . to comply with other terms of the promissory note"). This definition contemplates that default will be accomplished unilaterally, based on the borrower's failure and nothing more.

Of course, not every failure to meet the obligations of a contract involves failing to pay money when due, and Congress referred to such nonmonetary "defaults" in a provision of the bankruptcy code concerning the assumption of unexpired leases and executory contracts by the bankruptcy trustee. 11 U.S.C. § 365(b)(2)(D) (referring to "a default arising from any failure by the debtor to perform nonmonetary obligations" under the contract); *In re BankVest Capital Corp.*, 360 F.3d 291, 294-95 (1st Cir. 2004) (analyzing this provision in case involving "non-monetary default" of failing to deliver computer equipment when due under terms of lease).

To be sure, the provisions of the Bankruptcy Code at issue in *BankVest* concerned whether, and how, defaults can be cured, a concept focused on harm that defaults cause to others. *See also* 2 L. Distressed Real Est. § 15:20 (2021) (discussing contractual right to

cure default on mortgage prior to foreclosure). But such discussions of cure take as a given that a default has occurred and concern what can be done in its aftermath; they have nothing to do with what must be shown to establish that a default has occurred in the first place. That antecedent question, now as in 1925, concerned only the actions of the defaulting party.

ii. Other Provisions of the FAA Confirm that There Is No textual Basis for a Prejudice Requirement.

Looking beyond § 3 to the statute as a whole only strengthens the case against an FAA-based prejudice requirement for waiver of the right to arbitrate. For one thing, a treasure trove of clues to what the FAA's enacting Congress meant by "default" can be found in the very next section of the statute, which uses the term five times, twice in the same phrase, "default in proceeding" that appears in § 3. In that latter section the phrase is defined to mean "failure to comply" or "failure, neglect or refusal to perform." 9 U.S.C. § 4. These meanings, which are consistent with the ordinary meaning of "default" in 1925, should be applied to § 3's use of the term as well, for "identical words and phrases within the same statute should normally be given the same meaning[.]" *Arthur Andersen*, 556 U.S. at 630 n.4.

Section 4 allows "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" to petition any federal court to compel that other party to arbitrate. 9 U.S.C. § 4. Before a court will do so, however, it must answer two threshold questions: was a written agreement to arbitrate made, and is there "a default in proceeding thereunder?" *Id.*

Before Congress starts using that five-word phrase, however, it twice uses slightly different formulations, each time combining them with the other threshold question courts must answer before compelling arbitration, about the making of the agreement to arbitrate. *See id.* ("The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue[.]" "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue[.]").

These repeated pairings make clear that "default in proceeding," "failure to comply" with the arbitration agreement, and "failure, neglect, or refusal to perform" the arbitration agreement all mean the same thing under § 4.

In accordance with the presumption that "when Congress uses a term in multiple places within a single statute, the term bears a consistent meaning throughout[,]" *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019), the term "default in proceeding with such arbitration" in § 3 should be understood to mean "failure, neglect or refusal to proceed with the arbitration."[16] Thus, Congress gave courts applying § 3 of the FAA a straightforward question to answer, divorced from any considerations of prejudice or detrimental reliance: Has the applicant for the § 3

[16] Of course, in § 4 the "party alleged to be in default" is not the same party bringing the motion to compel, whereas in § 3 the default inquiry is being asked about "the applicant for the stay." But, as this Court has observed, "it is inconceivable that Congress intended the rule to differ depending upon" whether a stay under § 3 or specific performance under § 4 is being sought. *Prima Paint*, 388 U.S. at 404.

stay failed, neglected or refused to proceed with the arbitration? If the answer is yes, the stay should not be granted.

But even when the waiver question arises in state court, or on a motion to compel arbitration under § 4 where the "default" signposts don't point the way so clearly, the prejudice requirement is just as atextual. That is because nothing in the details of §§ 3 or 4, which are about the procedures used in court when a party exercises their right to enforce an arbitration agreement, purports to alter the substantive contours of that enforcement right. *Arthur Andersen*, 556 U.S. at 630 ("[section] 3 adds no substantive restriction to § 2's enforceability mandate"); *Buckeye Check Cashing*, 546 U.S. at 447 (section 4 implements § 2's "substantive command that arbitration agreements be treated like all other contracts"). Nothing in the text of either of those procedural provisions supersedes the statute's core equal-treatment principle. And as discussed in Part II.A, *supra*, requiring prejudice to prove a waiver of an arbitration agreement, or "default in proceeding" with the arbitration that agreement authorizes, when a showing of prejudice is not required to prove waiver or default in other contractual contexts, is a flagrant violation of that equal-treatment principle.

III. THE HEIGHTENED STANDARD FOR PROVING WAIVER THAT MANY COURTS REQUIRE INTERFERES WITH FUNDAMENTAL ATTRIBUTES OF ARBITRATION WHILE ENCOURAGING GAMESMANSHIP AND DELAY.

The federal and state courts that require prejudice as an element of arbitration waiver are wrong to do so

because neither the plain language nor the structure of the FAA supports such a requirement. What's more, by raising the burden of proof the party asserting waiver must meet, these courts strip arbitration of its key advantages—speed and efficiency—and incentivize the same sort of gamesmanship that Congress enacted the FAA to prevent.

Congress passed the FAA so that courts' historical hostility towards private arbitration would no longer deprive contracting parties of "the promise of quicker, more informal, and often cheaper resolutions" that arbitration "had to offer." *Epic Systems*, 138 S. Ct. at1621. *See also* H.R. Rep. No. 96, 68th Cong., 1st Sess., 2 (1924) ("the costliness and delays of litigation . . . can be largely eliminated by" making arbitration agreements as valid and enforceable as other contracts). Indeed, this Court declared it an "unmistakably clear congressional purpose" of the FAA that "the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint*, 388 U.S. at 404; *see also Concepcion*, 563 U.S. at 344 ("The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."); *Preston v. Ferrer*, 552 U.S. 346, 357-58 (2008) ("A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results,'" an objective that would be "frustrated" by allowing a dispute to be heard by a state agency in the first instance.).

The majority rule requiring proof of prejudice before a waiver of the right to arbitrate will be found undermines both arbitration's general promise of speed and cost savings and the more specific Congressional purpose articulated in *Prima Paint* of streamlining pre-arbitration judicial skirmishes.

First, instead of an inquiry into only the allegedly waiving party's conduct and whether it was inconsistent with an intent to arbitrate, courts requiring a showing of prejudice must wrangle with a host of additional questions. For example, can the party asserting waiver demonstrate that the allegedly waiving party could not have obtained the same discovery in arbitration? If not, a prejudice finding may be impossible. *See Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F.3d 200, 207 (4th Cir. 2004) (no prejudice where party could not prove discovery its adversary obtained in court was not also available in arbitration). Or can the party asserting waiver prove that the allegedly waiving party's discovery requests pertained only to arbitrable claims (making them presumptively prejudicial) and were not also relevant to non-arbitrable claims? *See Rush v. Oppenheimer & Co.*, 779 F.2d 885, 889 (2d Cir. 1985) (no prejudice where party could not "point to any specific discovery" that was not also relevant to arguably non-arbitrable claims).

Second, a high bar for waiver requiring prejudice incentivizes gamesmanship and delay by allowing parties to test the judicial waters before seeking to arbitrate. Congress passed the FAA because when arbitration contracts were revocable at will, parties could proceed with arbitration nearly to the point of a final decision and then change their mind at the last

minute if they worried the arbitrator might not rule in their favor, or if they simply believed further delay would serve their interests. *See* Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the S. Comm. on the Judiciary and the H. Comm. on the Judiciary, 68th Cong. 33, 35 (1924) (written statement of Julius Henry Cohen) (explaining need for the FAA because nothing prevented a party from walking away from arbitration whenever that party "sees an advantage in the delay and trouble to which his opponent will be put to enforce his rights through the courts").

The widespread adoption of a heightened bar for waiving the right to arbitrate under the FAA has created similarly perverse incentives towards gamesmanship and delay. The only difference is that now the courts have become the testing ground where parties who could demand arbitration, but who choose not to, first try out their legal theories and defenses and learn the strengths and weaknesses of their adversary's case—all the while holding a demand for arbitration in reserve like an ace in the hole to be played at what the party with the arbitration ace perceives to be the most opportune time.

Often that time comes when the court rules against that party on a motion or when settlement efforts fall through. Here, for example, Sundance did not seek to arbitrate until after it lost its motion to dismiss and after efforts to settle Ms. Morgan's claims on a nationwide basis were unsuccessful. Perhaps Sundance reasoned that if it could not settle away the collective claims, it would do better by arbitrating Ms. Morgan's claims individually.

Sometimes that time comes months or years into litigation and after the party belatedly demanding arbitration has filed suit in court itself or used the court's procedures to seek discovery. *See MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 246-48 (4th Cir. 2001).

And sometimes courts will find that these substantial litigation activities prejudiced the other party and satisfied the enhanced waiver threshold for arbitration—but not always. *See Rush*, 779 F.2d at 889-90 (finding no prejudice despite defendants having previously filed motion to dismiss and acknowledging that they only sought arbitration when district court vacated its order granting that motion, because until that point they "believed that they were as well off in district court as they would have been in arbitration"). Thus, parties have powerful incentives to follow the strategy of the defendants in *Rush*, pursuing a litigation path unless and until an adverse development there prompts them to activate the arbitral escape hatch, counting on the high standard of waiver to cushion their landing in the backup arbitral forum.

Even courts that decry this gamesmanship have nonetheless declined to find waiver, concluding that the high bar for arbitration waiver leaves them no choice. In *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 577 (5th Cir. 1991), the court spoke in open frustration of "parties who use federal courts to advance their causes and then seek to finish their suits in the alternate fora that they could have proceeded to immediately." Yet the Fifth Circuit held it was "compelled" by circuit precedent, particularly

"its teaching on prejudice[,]" to find there had been no waiver of the right to demand arbitration. *Id.*

The FAA was enacted precisely to stop the behavior that raised the *Walker* court's ire: litigants' attempts to "switch judicial horses in midstream[.]" *Id.* Allowing such forum-shopping out of a misplaced sense of fidelity to the FAA is ironic in the extreme.

Indeed, incentivizing parties to pursue claims in litigation before seeking to arbitrate "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344. That is because nothing about allowing a party to litigate before seeking to compel arbitration fulfills the FAA's "promise of quicker, more informal, and often cheaper resolutions." *Epic Systems*, 138 S. Ct. at 1621. Nor does it work toward the "unmistakably clear Congressional purpose" of the FAA that "the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint*, 388 U.S. at 404. It does exactly the opposite. As this Court explained in the context of whether parties could have their dispute heard in a state administrative proceeding before going to arbitration, such exhaustion would "frustrate[ ]" the objective of arbitration agreements to "achieve 'streamlined proceedings and expeditious results.'" *Concepcion*, 563 U.S. at 346 (quoting *Preston*, 552 U.S. at 357-58).

Thus, at the end of the day, the prejudice requirement for waiver is unsupported by the text of the FAA, inconsistent with the Act's admonition that arbitration agreements be treated like other contracts, and works against the overarching

purposes of the FAA. This Court can and should instruct the courts that require prejudice to prove arbitration waiver that they no longer need to reward "poor judgment" or "poor foresight" based on a misguided view of what the FAA requires. *Walker*, 938 F.2d at 577.

CONCLUSION

The Court should reverse the decision of the United States Court of Appeals for the Eighth Circuit.

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