No. 21-____

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

PETITION FOR A WRIT OF CERTIORARI

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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).

RELATED CASES

Morgan v. Sundance, Inc., No. 4:18-cv-316, U.S. District Court for the Southern District of Iowa. Denial of motion to compel arbitration entered June 28, 2019.

Morgan v. Sundance, Inc., No. 19-2435, U.S. Court of Appeals for the Eighth Circuit. Judgment entered March 30, 2021.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eighth Circuit (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 (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).

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.

INTRODUCTION

Unlike the equitable doctrines of laches and estoppel, which require a showing of prejudice, common-law waiver is traditionally a unilateral concept. 31 C.J.S. *Estoppel and Waiver* § 87 (2021). It consists of "the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (using this definition to distinguish waiver from forfeiture). Rights can be waived explicitly, but waiver can also be implied by a course of conduct inconsistent with an intent to enforce the right. 13 R. Lord, *Williston on Contracts* § 39:30 (4th Ed. 2012).

But for one particular contractual right and one particular type of implied waiver, these ordinary contract principles have devolved into a muddled mess. Parties who are contractually bound to resolve future disputes in arbitration but who choose to litigate those disputes in court instead face differing legal standards throughout the country for whether their inconsistent litigation conduct constitutes a waiver of their right to demand arbitration.

Some courts, like the Courts of Appeals for the Seventh and D.C. Circuits and the high courts of Alaska, Florida, Maryland, and West Virginia, follow an equal-treatment approach. They treat waiver of the right to arbitrate like the waiver of any other contractual right by focusing solely on the actions of the allegedly waiving party, without requiring that the other party suffer prejudice from those actions. Other courts, such as the First Circuit, take a weak-prejudice approach: They require only "a modicum" of

prejudice to be shown by the party asserting the waiver. *See In re Tyco Int'l Sec. Litig.*, 422 F.3d 41, 44 (1st Cir. 2005).

And a third, strong-prejudice group of courts consider prejudice the crucial, dispositive facet of the analysis. *E.g.*, *Rota-McLarty v. Santander Consumer USA*, 700 F.3d 690, 702 (4th Cir. 2012) ("The dispositive determination is whether the opposing party has suffered actual prejudice."); *Citibank, N.A. v. Stok & Assocs., P.A.*, 387 F. App'x 921, 924-25 (11th Cir. 2010), cert. granted, 562 U.S. 1215 (2011), cert. dismissed, 563 U.S. 1029 (2011) (finding no waiver despite substantial litigation conduct inconsistent with right to arbitrate, solely because the other party failed to prove prejudice).

In the opinion below, the Eighth Circuit placed itself firmly into the strong-prejudice camp. The majority opinion concluded that Sundance, Inc., knew of its right to insist on arbitration and that it acted inconsistently with that right by filing an answer in federal court that did not mention arbitration and otherwise participating in the litigation process in federal court for eight months. App. 5. But it refused to find this conduct constituted waiver of the right to arbitrate because "Morgan was not prejudiced by Sundance's litigation strategy." App. 6.

This addition of a prejudice requirement to the contractual waiver analysis when the contract at issue involves arbitration is not supported by the text of the Federal Arbitration Act (FAA). To the contrary, it violates what this Court has called "the primary substantive provision" of that statute, 9 U.S.C. § 2, which directs that agreements to arbitrate future disputes be placed on "an equal footing with other

contracts." *Rent-A-Center, W. v. Jackson*, 561 U.S. 63, 67 (2010) (internal citations and quotations omitted). Nor does § 3 of the Act, under which many courts analyze litigation-conduct waiver because it mentions being "in default in proceeding with [the] arbitration," say anything about prejudice to the non-defaulting party.

With different arbitration-specific waiver tests proliferating around the country, contracting parties must navigate a gauntlet of inconsistencies. The federal-court waiver test for arbitration is different in Illinois than in the neighboring state of Missouri. And even within the same state, federal courts applying the FAA reach a different conclusion on the need for prejudice than state courts do. *Compare Martin v. Yasuda*, 829 F.3d 1118, 1126 (9th Cir. 2016) (requiring prejudice), *with Hudson v. Citibank (S.D.) NA*, 387 P.3d 42, 47-49 (Alaska 2016) (rejecting prejudice requirement).

Finally, in most states, the ordinary test for waiving contractual rights differs from the test for waiving the right to arbitrate, contravening this Court's repeated admonition that states treat arbitration agreements the same as other contracts. *Compare Scheetz v. IMT Ins. Co.*, 324 N.W.2d 302, 304-05 (Iowa 1982) (waiver of insurer's contractual rights required only knowledge of those rights and an intent to relinquish them, and it was not necessary "that the facts be such as would 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).

This Court should grant the petition to provide clarification and uniformity to this unsettled area of law. Both are badly needed.

STATEMENT OF THE CASE

A. Robyn Morgan's Allegations

Sundance owns more than 150 Taco Bell franchises throughout the United States. Complaint ¶ 1 (Sept. 25, 2018). Robyn Morgan worked at one of these franchises in Osceola, Iowa, as an hourly employee from August to October of 2015. *Id.* ¶ 3.

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. *Id.* ¶ 17. As a result of this shifting, Ms. Morgan and other crew members were not paid for all of the hours they worked and were not paid overtime when they worked more than 40 hours in a single week. *Id.* ¶ 15.

Ms. Morgan and other crew members were also sometimes instructed to clock out and to continue working off the clock. *Id.* ¶ 24. Ms. Morgan alleged that these practices constituted willful violations of the Fair Labor Standards Act (FLSA) and filed a nationwide FLSA collective action on behalf of all similarly situated hourly employees of Sundance franchises. *Id.* ¶ 26.

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

Two years before 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 of 2017, it was conditionally certified to include only hourly employees of Sundance's Taco Bell restaurants in Michigan. Eighth Circuit Appendix ("8th Cir. App.") 183.

After Morgan filed her complaint in Iowa, Sundance moved to dismiss it pursuant to the "first-to-file" rule, arguing that her action was duplicative of the *Wood* action. 8th Cir. App. 14-30. This motion said nothing about Morgan's claims being subject to a mandatory arbitration provision. To the contrary, in seeking dismissal of her nationwide collective action as duplicative of *Wood*, Sundance argued that Morgan could "refile her claim on an individual basis before this court." 8th Cir. App. 27.

On March 15, 2019, the district court denied Sundance's motion to dismiss, concluding that because members of 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. 8th Cir. App. 186-88. Four days later, Sundance filed its answer, listing fourteen affirmative defenses. Eighth Circuit Appellee Appendix 1-15. None of these defenses mentioned an arbitration agreement.

C. 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 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. App. 17.

The mediation led to settlement of the *Wood* action, but Morgan's case did not settle. Approximately two weeks later, on May 3, 2019, Sundance moved to compel individual arbitration of Morgan's claims. 8th Cir. App. 191.

D. Lower Court Opinions

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. It first concluded that Sundance knew of an existing right to arbitrate because that right was set forth on a form contract on Sundance's own website. App. 26. Second, it 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. App. 27-31. Finally, the court found that Morgan was prejudiced by having to defend against Sundance's motion to dismiss and by spending time preparing for a classwide mediation instead of individual arbitration. App. 32-33.

Sundance appealed, and the Eighth Circuit reversed, with Judge Colloton dissenting. The Eighth Circuit majority found the question close as to whether Sundance had committed enough actions inconsistent with its right to arbitrate to meet the second element of the *Lewallen* test, but ultimately found waiver lacking because of "the absence of a showing of prejudice to Morgan." App. 6. Specifically,

the majority described the "first-to-file" dispute over the *Wood* action as "quasi-jurisdictional" and concluded that 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." 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. App. 8-9.

Relatedly, the reason Sundance gave for waiting to compel arbitration—this Court's decision in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019)—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." 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." App. 9-10.

Turning to the issue of prejudice, which the majority had found dispositive, Judge Colloton deemed it a "debatable prerequisite." 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." 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." App. 10 (quoting *Cabinetree of Wisc., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995)). However, he concluded, if prejudice is required to prove waiver, then Morgan had satisfied that requirement. App. 11.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve a longstanding circuit split on the question whether a party asserting waiver of the right to arbitrate through inconsistent litigation conduct must prove prejudice, and if so, how much. This question not only divides the federal courts of appeals, but divides federal courts from geographically co-located state courts of last resort, so that someone asserting litigation-conduct waiver in Maryland or West Virginia would have to prove prejudice if their case were in federal court and governed by Fourth Circuit precedent but not if it were proceeding in state court.

Because the Eighth Circuit has joined the wrong side of this circuit split, prejudice is explicitly required in that circuit to establish waiver when an arbitration contract is at issue and explicitly not required when analyzing waiver of other contractual rights. *E.g.*, *Slidell, Inc. v. Millennium Inorganic Chems., Inc.*, 460 F.3d 1047, 1056 (8th Cir. 2006) (applying Minnesota law) (waiver of contractual rights based on inconsistent course of conduct does

not require detrimental reliance); *Hosp. Prods., Inc. v. Sterile Design, Inc.*, 734 F. Supp. 896, 904-05 (E.D. Mo. 1990) (distinguishing waiver from estoppel in contract case), *aff'd*, 923 F.2d 859 (8th Cir. 1990). This departure of Eighth Circuit arbitration waiver caselaw from its caselaw regarding waiver of other contractual rights flies in the face of this Court's principle of equal treatment under the FAA, and that equal-treatment principle has just as much force if the question is one of federal-law default under § 3 of that Act or one of state-law contract defenses under § 2.

The courts that have added an arbitration-specific prejudice element to their tests for waiver have explained this addition in terms of the federal policy favoring arbitration embodied in the FAA. *See Stifel, Nicolaus & Co. v. Freeman*, 924 F.2d 157, 158 (8th Cir. 1991) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). But as the courts that have eschewed a prejudice requirement have pointed out, the FAA sought to make private agreements to arbitrate as enforceable as other types of contracts, not to promote arbitration over litigation at all costs. *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 590 (7th Cir. 1992) (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985)); *Nat'l Found. for Cancer Rsch. v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987) (*NFCR*) (same).

Nor does a prejudice requirement in fact appear to promote the federal policy favoring arbitration, for the circuits with some of the strictest prejudice requirements also find themselves enmeshed in the most litigation about whether that requirement has

been met. The Fifth Circuit, for example, which considers prejudice to be "the essence of waiver," *E. C. Ernst, Inc. v. Manhattan Constr. Co. of Texas*, 559 F.2d 268, 269 (5th Cir. 1977), has entertained three appeals on that question in the last year alone.[1]

Moreover, this high, and uncertain, threshold for establishing waiver incentivizes parties with arbitration agreements to test the waters in court first and then retreat to the arbitral forum as a fallback position if court litigation does not go well. Such gamesmanship both wastes court resources and frustrates the FAA's promise of efficient and streamlined dispute resolution.

Finally, this case presents an excellent vehicle for correcting the confusion. No other issues besides litigation-conduct waiver are presented by the appeal, and the lack of a prejudice finding was dispositive to the majority's waiver decision. This Court should grant the petition and put an end to the chaos this area of law has spawned.

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[1] Int'l Energy Ventures Mgmt., LLC v. United Energy Grp., Ltd., 999 F.3d 257 (5th Cir. 2021); Polyflow, L.L.C. v. Specialty RTP, L.L.C., 993 F.3d 295 (5th Cir. 2021); Sabatelli v. Baylor Scott & White Health, 832 F. App'x 843 (5th Cir. 2020).

I. WHETHER PREJUDICE IS REQUIRED TO PROVE WAIVER IN THE ARBITRATION CONTEXT HAS DIVIDED FEDERAL AND STATE APPELLATE COURTS.

A. Nine Federal Courts of Appeals Require a Finding of at Least Some Prejudice to Establish Waiver of the Right to Arbitrate Through Litigation Conduct.

Few of the federal courts that now require prejudice as an element of their arbitration waiver analysis did so in their earliest arbitration waiver cases. For example, the Sixth Circuit in *American Locomotive Co. v. Gyro Process Co.*, 185 F.2d 316, 319-20 (6th Cir. 1950), described an extensive course of litigation conduct in which American Locomotive Co. had engaged before it ever invoked § 3 of the FAA to stay the action in favor of arbitration, and found this conduct "amounted to an intentional relinquishment of its known right to arbitrate." The Sixth Circuit went on to note that such a waiver, "like an election needs no consideration, and cannot be retracted." *Id.* at 320. *See also Burton-Dixie Corp. v. Timothy McCarthy Constr. Co.*, 436 F.2d 405, 408 (5th Cir. 1971) (approving of jury instruction that "any conduct [by the parties] that might be reasonably construed as showing that they did not intend to avail themselves of the arbitration provision may amount to a waiver," without any requirement of prejudice).

The concept of prejudice first began creeping into arbitration waiver opinions in the Second Circuit. In *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (2d Cir. 1968), two consolidated cases involving injuries to longshoremen, the court held that mere participation in litigation was not sufficient to

establish a waiver of the right to arbitrate the same dispute "without resultant prejudice to a party." The sole basis for this new prejudice requirement appeared to be that "there is an overriding federal policy favoring arbitration," and so waiver "is not to be lightly inferred." *Id.*

Three years later, the Fourth Circuit also invoked the federal policy favoring arbitration when it imposed an express prejudice requirement for the first time, following the lead of a South Carolina district court the year before. *Carolina Throwing Co. v. S & E Novelty Corp.*, 442 F.2d 329, 331 (4th Cir. 1971) ("The modern rule based on a liberal national policy favoring arbitration seems to be that waiver or 'default' under [section 3 of the FAA] . . . must find a basis in prejudice to the objecting party." (quoting *Batson Yarn & Fabrics Machinery Grp., Inc. v. Saurer-Allma GmbH-Allgauer Maschinenbau*, 311 F. Supp. 68, 73 (D.S.C. 1970)).

From these beginnings in the Second and Fourth Circuits, and with the federal policy favoring arbitration acting as an accelerant, the strong-prejudice view spread quickly to the Third, Ninth, and Eleventh Circuits. *See Gavlik Constr. Co. v. H. F. Campbell Co.*, 526 F.2d 777, 783-84 (3d Cir. 1975), overruled on other grounds by *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) (following Second Circuit approach in *Carcich* and testing waiver "by the presence or absence of prejudice"); *ATSA of Cal., Inc. v. Cont'l Ins. Co.*, 702 F.2d 172, 175 (9th Cir. 1983) ("[I]nconsistent behavior alone is not sufficient; the party opposing the motion to compel arbitration must have suffered prejudice."); *S & H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d

1507, 1514 (11th Cir. 1990) (waiver occurs where party acts inconsistently with right to arbitrate "and, in so acting, has in some way prejudiced the other party").

As the prejudice requirement wound its way through the federal courts, it ended up taking root in the Fifth and Sixth Circuits as well, where it had previously been absent. *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 497 (5th Cir. 1986) ("Waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party."); *O.J. Distrib., Inc. v. Hornell Brewing Co.*, 340 F.3d 345, 356 (6th Cir. 2003) (waiver occurs when a party delays asserting its right to arbitrate "to such an extent that the opposing party incurs actual prejudice").

But not all federal courts that require prejudice as part of the arbitration waiver analysis require it to be present to the same degree. In the First Circuit, the separate requirement of prejudice is "tame at best": If a lengthy delay in seeking arbitration was accompanied by sufficient litigation activity, prejudice to the opposing party can be inferred. *Joca-Roca Real Estate, LLC v. Brennan*, 772 F.3d 945, 949 (1st Cir. 2014).

At the other end of the spectrum, the Second Circuit has held that "pretrial expense and delay[,] . . . without more, do not constitute prejudice sufficient to support a finding of waiver." *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 26 (2d Cir. 1995). The plaintiff in *Leadertex* was only able to demonstrate prejudice sufficient to establish waiver because its fabric inventory was

being held in a warehouse during the pendency of the litigation, preventing it from filling customer orders, and the defendant's delay in asserting its arbitration rights magnified this economic harm. *Id.* at 27.

The Third Circuit's approach falls somewhere between the First Circuit's light touch and the Second Circuit's heavy hand. Considering prejudice to be the "touchstone" of the waiver analysis, that court created a list of six factors to assess whether the requisite degree of prejudice had been experienced. *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 926-27 (3d Cir. 1992) (including such factors as whether the party charged with waiver has contested the merits of its opponent's claims, whether that party has informed its opponent of its intent to arbitrate, and the extent to which both parties have engaged in discovery).

Several of the circuits that require prejudice give discovery a prominent place in their analyses, but they do so in different ways. The Ninth Circuit considers whether the discovery was directed to arbitrable or non-arbitrable claims, *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 697 (9th Cir. 1986), while the Fourth Circuit is primarily concerned with whether the potentially prejudiced party has divulged something through discovery that it would not have had to disclose in arbitration, giving the other party a strategic advantage. *Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.*, 380 F.3d 200, 207 (4th Cir. 2004) (finding no prejudice where party could not prove that its adversary "availed itself of discovery procedures unavailable in arbitration, or gained a strategic advantage through its discovery requests").

In contrast, the Fifth and Sixth Circuits focus on the sheer volume of discovery that has occurred. *Compare Tenneco Resins, Inc. v. Davy Intern., AG*, 770 F.2d 416, 421 (5th Cir. 1985) (no waiver where discovery was "minimal"), *with Johnson Assocs. Corp. v. HL Operating Corp.*, 680 F.3d 713, 720 (6th Cir. 2012) (distinguishing *Tenneco Resins* because the plaintiff had produced 1,151 pages of responsive documents and a 4.11 gigabyte hard drive).

Motions practice is also relevant to multiple circuits' prejudice inquiries, but again, in differing ways. The Fifth Circuit has found motions practice to be prejudicial based on expense alone. *In re Mirant Corp.*, 613 F.3d 584, 588, 591 (5th Cir. 2010) (plaintiffs experienced prejudice where they incurred $265,559 in attorneys' fees and costs defending multiple motions to dismiss). By contrast, other circuits find prejudice related to motions practice because the party seeking arbitration waited to do so until after obtaining an adverse ruling in court. *E.g.*, *Hooper v. Advance Am., Cash Advance Ctrs. of Mo., Inc.*, 589 F.3d 917, 922-24 (8th Cir. 2009) (defendant sought "second bite at the apple" by attempting to reargue issues in arbitration that it had lost on a motion to dismiss); *Newirth v. Aegis Senior Cmtys., LLC*, 931 F.3d 935, 944 (9th Cir. 2019) (plaintiffs would suffer prejudice if they were "forced to relitigate an issue on the merits on which they have already prevailed in court"). In short, even those circuits that require a showing of prejudice are far from unified about what that showing must entail.

B. The Seventh, Tenth, and D.C. Circuits Consider Prejudice a Relevant Factor in the Waiver Analysis But Do Not Consistently Require Its Presence.

Once the prejudice requirement had begun taking hold throughout the federal courts, parties charged with litigation-conduct waiver would argue that as a matter of federal substantive law, the opposing party must be able to show prejudice before they could be found "in default in proceeding with [the] arbitration" under § 3 of the FAA. But not all circuits went along with this view of the law.

In *NFCR*, the D.C. Circuit declined to include "prejudice as a separate and independent element of the showing necessary to demonstrate waiver of the right to arbitration." 821 F.2d at 777. Instead, that circuit held that "whether there has been waiver in the arbitration agreement context should be analyzed in much the same way as in any other contractual context," namely, "whether, under the totality of the circumstances, the defaulting party has acted inconsistently with the arbitration right." *Id.* at 774. Prejudice is a relevant factor considered under this totality of the circumstances, but "waiver may be found absent a showing of prejudice." *Id.* at 777.

The Tenth Circuit also considers prejudice to be a relevant factor in the waiver analysis, including it in a six-factor test along with such factors as "whether the litigation machinery has been substantially invoked" and whether "important intervening steps" like discovery have occurred. *Peterson v. Shearson/American Exp., Inc.*, 849 F.2d 464, 467-68 (10th Cir. 1988).

In some post-*Peterson* cases, the Tenth Circuit has applied these factors without explicitly making a finding on prejudice. *See Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1490 (10th Cir. 1994) (finding waiver based on "the totality of [the defendant's] conduct"). But in at least one case, that circuit has declined to find waiver because the party asserting it could not show it "suffered substantial prejudice." *Adams v. Merrill Lynch, Pierce, Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989). *See also BOSC, Inc. v. Bd. of Cnty. Comm'rs of Cnty. of Bernalillo*, 853 F.3d 1165, 1174 n.3 (10th Cir. 2017) (recognizing the inconsistency but declining to resolve it because the totality of the *Peterson* factors did not support a finding of waiver).

The Seventh Circuit has offered the most thorough analysis of any federal court in reaching its conclusion that prejudice should not be an essential element of litigation-conduct waiver. Explaining that the Second, Fourth, and Ninth Circuits required a showing of prejudice while the D.C. Circuit did not, the Seventh Circuit sided with the D.C. Circuit's minority view, holding that prejudice may be a relevant factor but is not dispositive. *St. Mary's Med. Ctr.*, 969 F.2d at 590.

The Seventh Circuit went on to explain that a failure to require prejudice was not inconsistent with the strong federal policy favoring arbitration manifested in the FAA. Citing this Court's enunciation of the equal-treatment principle, the Seventh Circuit observed that Congress's goal in enacting the FAA was to ensure that courts enforced private contracts to arbitrate, not to "prefer[] . . . arbitration over litigation." *Id.* (citing *Dean Witter*

Reynolds, 470 U.S. at 219-21). In other contractual contexts, the court noted, such as an insurer's contractual right to insist on prior notice of loss, the insurer is deemed to have waived its right to insist on such notice if it proceeds to defend the claim, regardless of whether the insurer was prejudiced by the lack of notice. *Id.* at 591. Similarly, a party who has a right to insist on arbitration of a dispute but elects to litigate it instead has waived that right through its inconsistent conduct, and "[t]here is no more reason to insist" on prejudice in the arbitration context than the insurance context. *Id.*

Another way to look at the issue, according to the court in *St. Mary's*, was as the creation of a new, superseding agreement. Both parties had previously agreed to arbitrate future disputes, but when both chose to litigate this particular dispute in court instead, they had entered into a new contract equally worthy of the court's respect. *Id. See also Fisher*, 791 F.2d at 699 (Wiggins, J., concurring) (proposing the same contract-modification approach to the waiver analysis, and advocating that prejudice not be required). In subsequent years, as more and more circuits have grafted prejudice requirements onto their litigation-conduct waiver tests, the Seventh Circuit has steadfastly refused to do so. *See, e.g.*, *Smith v. GC Servs. Ltd. P'ship*, 907 F.3d 495, 499 (7th Cir. 2018); *Kawasaki Heavy Indus., Ltd. v. Bombardier Recreational Prods., Inc.*, 660 F.3d 988, 994 (7th Cir. 2011).

C. Parties Are Subject to Disparate Litigation-Conduct Waiver Standards in State and Federal Court.

The courts of last resort in most states also require a showing of prejudice as part of their test for establishing litigation-conduct waiver of the right to arbitrate. Some state high courts reached this conclusion independently as a matter of state law. *E.g.*, *St. Agnes Med. Ctr. v. PacifiCare of Cal.*, 82 P.3d 727, 738 (Cal. 2003). Others have adopted the federal law of their circuit. *E.g.*, *Advest, Inc. v. Wachtel*, 668 A.2d 367, 372 (Conn. 1995) (following Second Circuit precedent).

But at least four state supreme courts share the minority federal view that prejudice should not be required, and all of those states are in circuits that follow the majority view. *Hudson*, 387 P.3d at 47-49 (Alaska court following Seventh Circuit); *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So.2d 707, 711 (Fla. 2005) (following D.C. Circuit); *Cain v. Midland Funding, LLC*, 156 A.3d 807, 819 (Md. 2017) (finding no prejudice required under Maryland law, distinguishing waiver from estoppel); *Parsons v. Halliburton Energy Servs., Inc.*, 785 S.E.2d 844, 850 (W. Va. 2016) (common-law waiver of contract rights under West Virginia law does not require proof of prejudice or detrimental reliance).[2] Conversely, the

[2] The state supreme courts that take the minority federal view are themselves split on whether the waiver question should be analyzed under federal or state law, with Alaska's and Florida's supreme courts treating it as a federal question (though one on which this Court has not yet spoken) while the high courts of Maryland and West Virginia analyzed it exclusively under state contract law.

Illinois Court of Appeals has chosen to follow the majority federal view, rejecting the Seventh Circuit's approach as wrongly decided. *LAS, Inc. v. Mini-Tankers, USA*, 796 N.E.2d 633, 637-38 (Ill. App. Ct. 2003).

Thus, parties litigating under the shadow of an arbitration clause governed by the FAA face inconsistent standards in state and federal court for what would need to be proven to establish waiver of the right to arbitrate based on conduct in that litigation. The resulting uncertainty is most acute for corporations that do business in multiple states or are subject to suit in both state and federal court. But the risk of arbitrary and unfair results is unacceptably high for individual and corporate litigants alike. Only this Court can step into such a chaotic legal landscape and restore order. It should do so.

II. THE EQUAL-TREATMENT PRINCIPLE REQUIRES THAT THE STANDARD FOR WAIVER OF ARBITRATION RIGHTS BE THE SAME AS WAIVER OF OTHER CONTRACTUAL RIGHTS.

The majority rule—that waiver of arbitration by litigation conduct requires a showing of prejudice—is inconsistent with this Court's repeated statements that contracts to arbitrate should be put on equal footing with other contracts. Outside of the arbitration context, waiver of contractual rights rests only on the actions of the waiving party, not whether the other party is prejudiced by those actions. The same standard should apply to waiver in the arbitration context, and prejudice should not be required to demonstrate waiver of arbitration by litigation conduct.

A. Under this Court's Equal-Treatment Principle, Arbitration Contracts Must be Treated the Same as Other Contracts.

This Court has repeatedly and consistently explained that the purpose of the FAA is to place arbitration "agreements upon the same footing as other contracts." *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989) (cleaned up) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). As such, under the FAA, "courts must place arbitration agreements on an equal footing with other contracts." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)). Indeed, as this Court has emphasized, contract "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue" are precluded by the FAA—precisely *because* the FAA demands that arbitration agreements be treated just like any other contract. *See id. See also Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (describing this approach as the "equal-treatment principle").

This equal-treatment principal is not superseded by the "liberal federal policy favoring arbitration." *See Moses H. Cone*, 460 U.S. at 24. Rather, in keeping with the FAA, the policy in favor of honoring arbitration agreements goes hand-in-hand with applying ordinary contract law to contracts to arbitrate. As this Court has explained, the FAA was intended to make "arbitration agreements as enforceable as other contracts, but not more so." *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388

U.S. 395, 404 n.12 (1967). Consistent with the original purpose of the FAA to overcome judicial hostility to arbitration, the federal policy in favor of arbitration has been applied by this Court to ensure that courts and state laws do not single out arbitration agreements as particularly *un*enforceable. *See, e.g.*, *AT&T*, 563 U.S. at 344-46; *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581-82 (2008) (describing policy favoring arbitration as placing arbitration contracts on equal footing). This Court has *not* relied on the *Moses H. Cone* principle to do the opposite: apply entirely different contract-law principles because arbitration is at issue.

B. Outside the Arbitration Context, Prejudice Is Not Required to Demonstrate Waiver of a Contractual Right.

Prejudice is not required to waive contractual rights outside the context of waiver of arbitration rights by litigation conduct. Courts, the Restatement, and treatises are consistent on that point.

Waiver of a contractual right generally requires the voluntary and intentional relinquishment of a known right. That intent can be expressed either through an explicit statement of intent or can be ascertained from the waiving party's conduct. Waiver of contractual rights is not inferred lightly, and courts generally recognize a presumption against waiver. *See, e.g.*, *Olano*, 507 U.S. at 733; *Carr-Gottstein Foods Co. v. Wasilla, LLC*, 182 P.3d 1131, 1136 (Alaska 2008); *In re Gen. Elec. Capital Corp.,* 203 S.W.3d 314, 316 (Tex. 2006); *Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P.*, 850 N.E.2d 653, 658 (N.Y. 2006); *Major League Baseball v. Morsani*, 790

So. 2d 1071, 1077 n.12 (Fla. 2001); *Scheetz*, 324 N.W.2d at 304; 13 *Williston on Contracts* § 39:27 ("Waiver of a contract provision may be made by a party's express declaration, or it may be implied from representations that fall short of an express declaration of waiver."); 28 Am. Jur. 2d Estoppel & Waiver § 35 (2011); Restatement (Second) Contracts § 84 cmt. b (Am. L. Inst. 1981).

Because the analysis focuses on the intent and actions of the *waiving* party, prejudice is not normally required to establish waiver. *See, e.g.*, *Royal Air Props., Inc. v. Smith*, 333 F.2d 568, 571 (9th Cir. 1964) ("[N]o detriment to a third party is required for waiver, it is unilaterally accomplished."); *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]."); *see also Cabinetree*, 50 F.3d at 390 ("[I]n ordinary contract law, a waiver normally is effective without proof of consideration or detrimental reliance.") (citing 2 E. Allan Farnsworth, *Contracts* § 8.5 (2d ed. 1990); 3A Arthur Linton Corbin, *Corbin on Contracts* § 753 (1960)).

Indeed, courts and other authorities expressly distinguish waiver from estoppel on this point: Waiver is focused *only* on the actions of the waiving party whereas estoppel, in contrast, focuses on the detriment to the other party. *See, e.g.*, 28 Am. Jur. 2d Estoppel & Waiver § 35 (2011) ("Prejudice to the other party is one of the essential elements of an equitable estoppel whereas a waiver does not necessarily imply that the party asserting it has been misled to his or her prejudice or into an altered position."); Restatement (Second) Contracts § 84, cmt. b (1981)

("When the waiver is reinforced by reliance, enforcement is often said to rest on 'estoppel.'").[3] Adding a prejudice requirement to the requirements for waiver is not only inconsistent with the core issue in waiver—the intent of the waiving party—but also conflates waiver with the distinct principle of estoppel.

In short, outside of the arbitration context, contractual waiver simply does not require prejudice—only the waiving party's actions are relevant.

C. Because Ordinary Contract Law Does Not Require Prejudice for Waiver, the Equal-Treatment Principle Requires the Same for Arbitration Contracts.

Because the FAA-derived equal-treatment principle requires that arbitration agreements be subject to the same contract law as other contracts,

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[3] *See also, e.g., Pitts v. Am. Sec. Life Ins. Co.*, 931 F.2d 351, 357 (5th Cir. 1991) ("Strictly defined, *waiver* describes the act, or the consequences of the act, of one party only, while *estoppel* exists when the conduct of one party has induced the other party to take a position that would result in harm if the first party's act were repudiated." (emphasis in original)); *City of Glendale v. Coquat*, 52 P.2d 1178, 1180 (Ariz. 1935) ("[W]aiver depends upon what one himself intends to do, regardless of the attitude assumed by the other party, whereas estoppel depends rather upon what the other party has done."); *Nathan Miller, Inc. v. N. Ins. Co. of N.Y.*, 39 A.2d 23, 25 (Del. Super. Ct. 1944) ("[Waiver] depends on what one party intended to do, rather than upon what he induced his adversary to do, as in estoppel."); *Brown v. State Farm Mut. Auto. Ins. Co.*, 776 S.W.2d 384, 386-87 (Mo. 1989) (en banc) ("To state the obvious, waiver and estoppel are different legal doctrines.").

and ordinary contract law does not impose a prejudice requirement for waiver of a contractual right, prejudice should not be required to demonstrate waiver through litigation conduct of the right to arbitrate. Any other rule—and the current majority rule—is a contract rule that derives its meaning precisely from the fact that an arbitration agreement is at issue. This Court has said over and over that the FAA prohibits such arbitration-specific rules. *See*, *supra*, II.A.

The equal-treatment principle applies regardless of whether contract-law principles are being applied under § 2 of the FAA or § 3 of the FAA. As discussed, *supra*, the waiver of a contractual right to arbitrate is sometimes—usually by state courts—analyzed as a state-law contract defense falling under § 2's savings clause, which provides that an agreement to arbitrate "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. § 2.

Federal courts, on the other hand, generally view waiver of arbitration rights through the lens of a party having defaulted on their contractual right to arbitrate under § 3, and therefore consider waiver to be a question of federal law. Section 3 provides that, if a matter is "referable to arbitration," courts shall stay court proceedings "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. § 3. "Default" is "[t]he omission or failure to perform a legal or contractual duty[.]" Black's Law Dictionary (11th ed. 2019). Just like waiver, the key to whether a party has defaulted is the conduct of the

defaulting party, not whether the other party has been prejudiced. *See, e.g.*, *Gen. Dynamics Corp. v. U.S.*, 563 U.S. 478, 481 (2011) (defense contractor defaulted on contract by declaring that it would not complete the contract; contractor argued that the government's conduct excused its default); *Midland Land & Improvement Co. v. U.S.*, 270 U.S. 251, 253 (1926) (contractor defaulted on government contract where it refused to complete the work it agreed to do under the contract).

While this Court has typically discussed the equal-treatment principle as deriving from § 2's savings clause—which requires that arbitration agreements be subject to ordinary state-law contract defenses—there's no indication in the text of § 3 that courts determining whether waiver (or default) occurred are free to make up new principles of contract law untethered from parties' expectations about how waiver law normally works. Nor is there any indication courts are free to invoke a waiver standard unique to arbitration contracts. And there is nothing in the text of § 3 requiring a non-defaulting party to demonstrate prejudice.

In other words, § 3 provides no reason to depart from the FAA's fundamental goal of enforcement of arbitration contracts on equal terms with any other private contract. *See Prima Paint*, 388 U.S. at 404 n.12. And so, if waiver is a question of federal law under § 3 rather than a question of state law under § 2, the only difference is that courts should apply federal common law, rather than state contract law, not that the waiver standard should "derive [its]

meaning from the fact that an agreement to arbitrate is at issue." *AT&T*, 563 U.S. at 339.[4]

Nor does the federal policy favoring arbitration demand the addition of a prejudice requirement to ordinary contract waiver analysis. As explained, *supra*, this Court has taken that policy preference to mean that arbitration contracts should be placed on "equal footing" with other contracts, *not* that special rules apply to arbitration. As the Seventh Circuit explained in declining to require prejudice: "In other words, the federal policy embodied in the Arbitration Act is a policy favoring enforcement of contracts, not a preference for arbitration over litigation. Therefore, we should treat a waiver of the right to arbitrate the same as we would treat the waiver of any other contract right." *St. Mary's*, 969 F.2d at 590 (citations omitted); *see also NFCR*, 821 F.2d at 774 ("The Supreme Court has made clear that the 'strong federal policy in favor of enforcing arbitration agreements' is based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism. Thus, 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." (citation omitted)).

Moreover, requiring a finding of prejudice encourages inefficiency and forum-shopping.

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[4] If the waiver standard is a question of state law, where states have imposed a different standard for waiver in the context of arbitration than outside of that context, those arbitration-specific laws are preempted by the FAA precisely *because* they are directed solely at arbitration. *See AT&T*, 563 U.S. at 339.

Particularly in circuits requiring a high measure of prejudice, there is no incentive to choose arbitration off the bat. Rather, parties can be reasonably confident that they can roll the dice in court first and still be able to seek arbitration if the court litigation is not going smoothly.

In a particularly egregious example, after an employee filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging discrimination, the employer sued the employee and her attorney in federal court seeking a declaratory judgment that it had not violated the FLSA and damages for the employee's alleged theft of confidential information. *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 246-47 (4th Cir. 2001). That case was dismissed for lack of jurisdiction, and the employer appealed; the appeal was also dismissed. Meanwhile, the employer sued the employee in state court, bringing the same claims. *Id.* at 247. As part of the state-court suit, the parties engaged in discovery, including deposition of the employee. After the employee received her EEOC right-to-sue letter and informed the employer she intended to sue, the employer struck first, suing her again in federal court. *Id.* The employee sued the employer the next day, and the suits were consolidated. *Id.* Only then did the employer move to compel arbitration. *Id.* at 248. The Fourth Circuit held that—despite suing the employee three times, appealing, and engaging in substantial discovery—the employer had nevertheless not waived its contractual right to arbitrate through its litigation conduct because the employee had not met the circuit's high bar for demonstrating actual prejudice. *Id.* at 251.

Permitting the type of gamesmanship and forum-shopping illustrated by *MicroStrategy* is antithetical to the reasons courts recognize waiver of arbitration: It allows parties multiple bites at the apple, to play "heads I win, tails you lose." *Cabinetree*, 50 F.3d at 391; *see Khan v. Parsons Glob. Servs., Ltd.*, 521 F.3d 421, 427 (D.C. Cir. 2008) (courts do not tolerate delaying the invocation of arbitration "as a strategy to manipulate the legal process").

Conversely, requiring that parties seek arbitration *before* engaging in significant litigation conduct, regardless of whether the other party suffered prejudice, promotes the efficient enforcement of agreements to arbitrate and keeps arbitrable disputes out of courts, just as the FAA intended.

III. THIS CASE SQUARELY PRESENTS THE QUESTION PRESENTED, AND IS AN IDEAL VEHICLE FOR RESOLVING THE LONGSTANDING CIRCUIT SPLIT.

Whether prejudice is required to demonstrate that a party waived its contractual right to arbitrate is cleanly and squarely presented by this case, and there are no other questions presented. This petition is a straightforward appeal on the question whether Sundance's motion to compel arbitration should be denied because it waived its right to arbitrate; there are no other legal questions at issue on this appeal.

Further, there can be no question that the prejudice requirement was dispositive below. The Eighth Circuit expressly followed existing circuit precedent holding that, to demonstrate that the party seeking arbitration had waived its right to do so, the party resisting arbitration must demonstrate that it was prejudiced. App. 3 (relying on test as articulated

in *Messina v. N. Cent. Distrib., Inc.*, 821 F.3d 1047, 1050 (8th Cir. 2016)). Then, the majority explained that Sundance had not waived its right to compel arbitration because "Sundance's conduct, even if inconsistent with its right to arbitration, did not materially prejudice Morgan." App. 3. The opinion concludes by reiterating that the driving force behind its decision was its no-prejudice finding: "In the absence of a showing of prejudice to Morgan, we conclude Sundance did not waive its contractual right to invoke arbitration." App. 6.

That prejudice was the dispositive question for the majority is confirmed by Judge Colloton's dissent: "The majority does not dispute that Sundance acted inconsistently with arbitration, but reverses the district court's determination of waiver on the ground that Morgan was not prejudiced." App. 10. Judge Colloton went on to note the circuit split on the prejudice requirement and highlight that prejudice is not normally required outside of the arbitration context. App. 10-11.

In short, the prejudice requirement was *the* deciding issue before the Eighth Circuit and is the sole question before this Court on certiorari.

Finally, this Court previously granted certiorari to address the circuit split—further demonstrating the unquestionable certworthiness of this issue—but the parties settled and dismissed the appeal before this Court could decide it. *See Stok.*, 562 U.S. 1215 (granting cert.); 563 U.S. 1029 (dismissing cert.). Given the longstanding division among the federal courts of appeals, as well as the states, on this question, this Court should take this opportunity to

finally decide whether prejudice is required and resolve the chaos.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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August 27, 2021