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

MOTION FOR LEAVE TO FILE AND BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF GRANTING THE PETITION FOR A WRIT OF CERTIORARI

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Dated: September 29, 2021

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF GRANTING THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rules 33.1 and 37.2(b), proposed *amici curiae* submit this Motion for Leave to File a Brief *Amici Curiae* on Behalf of Law Professors in Support of Granting the Petition for a Writ of Certiorari. In support of the motion, proposed *amici curiae* state as follows:

1. Proposed *amici curiae* wish to file a Brief *Amici Curiae* on Behalf of Law Professors in Support of Granting the Petition for a Writ of Certiorari in the above-captioned matter.

2. Pursuant to Rule 37.2(a), counsel for *amici curiae* notified the counsel of record for all parties of *amici*'s intent to file an *amici curiae* brief in support of granting the petition. With that notice, counsel asked the counsel of record for the parties if they would consent to this filing. Counsel provided this notice on September 16, 2021, fifteen days before the October 1, 2021 deadline for the brief, in accordance with Rule 37.2(a).

3. Rule 37.2(b) states that where a party has withheld consent, counsel must file a motion for leave to file the *amici curiae* brief. In that motion, counsel must "indicate the party or parties who have withheld consent" and also state the nature of the movant's interest.

4. On September 16, 2021, counsel of record for Respondent Sundance, Inc. stated that Respondent

does not consent to the filing of this proposed *amici curiae* brief.

5. The proposed *amici curiae* have an interest in this case. They comprise law professors with expertise in the areas of contract law and arbitration law. They have an interest in ensuring the proper interpretation of contract law and arbitration law principles in federal and state courts. They submit this brief to show how lower courts have failed to properly apply the Federal Arbitration Act's equal-treatment principle, and that they have improperly created a federal common law of arbitration waiver rather than applying state contract law principles to the question of when a party has waived its right to enforce an arbitration contract. This Court should grant the Petition to resolve the split among lower courts regarding whether prejudice is an element of waiver, and to instruct lower courts that determining whether a party waived an arbitration agreement should rest on the same principles for determining whether a party waived any other contractual provision. Because prejudice is not an element of waiver for contracts generally, it should be not be an element of waiver for arbitration clauses either.

6. Pursuant to Rule 37.2(b) this motion for leave to file is being filed "as one document with the brief sought to be filed . . . ."

For the foregoing reasons, proposed *amici curiae* respectfully request that this Court grant this Motion for Leave To File a Brief *Amici Curiae* in Support of

Granting the Petition for a Writ of Certiorari and accept the proposed brief for filing.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

This case involves questions of substantial importance to the fields of both arbitration law and contract law. *Amici* are law professors with expertise in both fields. They have an interest in ensuring the proper interpretation of contract law and arbitration law principles in federal and state courts. They file this brief to give the Court the benefit of their many years of practical experience and scholarly study. Because the circuits are split on the question of whether waiver of an arbitration clause requires a showing of prejudice to the party opposing arbitration, and because the majority view that prejudice is required rests on a misapplication of the Federal Arbitration Act (FAA), *amici* request that this Court grant the Petition in this case.

A full list of *amici curiae* is attached as Appendix A with this brief.

SUMMARY OF ARGUMENT

This Court should grant certiorari to provide guidance in an important and recurring context: when one party argues that another has waived the right to

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a) counsel notified the parties of record of the intent to file an *amici curiae* brief on September 16, 2021. On September 16, 2021, counsel for Respondent stated that Respondent does not consent to the filing of an *amici curiae* brief.

require arbitration. This is a question that courts grapple with hundreds of times every year.[2] The majority of lower courts have crafted a rule requiring that the asserted waiver cause prejudice to the party opposing arbitration. In devising such a rule, those courts have ignored state contract law and misapplied this Court's repeated holdings that arbitration clauses should be placed on equal footing with other contracts.

Granting certiorari will allow this Court to provide necessary guidance on two important principles. The first principle is that the federal policy favoring arbitration is meant to ensure that arbitration clauses are treated no differently than other contracts; what is known as the "equal treatment" principle. *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). Those lower courts that require showing of prejudice as an element of waiver have violated this principle. Here, the Eighth Circuit followed the majority approach, requiring proof that the waiving party "prejudiced the other party by [its] inconsistent acts." *Morgan v. Sundance, Inc.*, 992 F.3d 711, 713-14 (8th Cir. 2021). However, it is hornbook contract law that "[p]rejudice is irrelevant to a claim of waiver." *Johnston Equip. Corp. of Iowa v. Indus. Indem.*, 489 N.W.2d 13, 17 (Iowa 1992). By requiring prejudice, these courts have not afforded "equal treatment" to arbitration provisions vis-à-vis other contracts.

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[2] For example, a Westlaw search for "adv: waive /10 arbitrat! & DA(aft 2019) & DA(bef 2021)" reveals 472 hits, which suggests that courts dealt with an asserted waiver of the right to arbitrate nearly 500 times in 2020 alone.

The second principle is a corollary of the equal treatment principle. When interpreting an arbitration provision or addressing defenses to arbitration, courts must apply ordinary rules of state contract law, just as they would for any other contract. *Arthur Andersen, LLP v. Carlisle*, 556 U.S. 624, 632 (2009) (explaining that the applicability of equitable estoppel to arbitration agreements would depend on what "relevant state contract law" says about equitable estoppel); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

When it comes to waiver of arbitration clauses, however, many lower courts are not applying state contract law at all. Rather, they hold that the federal policy favoring arbitration requires the imposition of a prejudice requirement. Thus, they have invented their own federal common law—law that is not grounded in either the FAA or state contract principles.

This Court previously provided valuable guidance to lower courts on the role of state contract law in evaluating arbitration clauses. Lower federal courts once created their own federal common law regarding when third parties were bound to arbitrate. However, this Court repudiated this approach, explaining that such questions depend on "relevant state contract law." *Arthur Andersen*, 556 U.S. at 632. In response lower courts correctly abandoned federal common law and applied state contract law instead. *See, e.g.*, *AtriCure, Inc. v. Meng*, ---F.4th---, 2021 WL 3823418 at *4-5 (6th Cir. 2021); *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 261-62 (5th Cir. 2014). With waiver, by contrast, the courts continue to ignore state contract law. Just as with *Arthur*

Andersen, this Court's intervention could correct this problem and clarify that waiver of arbitration clauses is governed by the same state contract law principles that govern waiver of any other contractual provision.

ARGUMENT

Certiorari is Warranted Because the Majority of Federal Courts Have Improperly Invented a Federal Common Law of Waiver Rather than Applying State Contract Law.

A. The Federal Policy Favoring Arbitration Requires Courts to Treat Arbitration Clauses Equally with Other Contracts by Incorporating State Contract Law Principles.

This Court has established two basic principles underlying the FAA: (1) that arbitration clauses must be placed on equal footing with other contracts, and (2) to do so, courts must apply state law contract principles to arbitration agreements. Under this framework, waiver should be straightforward. As one court explained, "[b]ecause waiver is a 'generally applicable contract defense,' we analyze whether the arbitration clause was waived, and is therefore unenforceable, under state—not federal—law." *Cain v. Midland Funding, LLC*, 156 A.3d 807, 814 (Md. 2017).

However, waiver has become anything but simple. Lower courts have disregarded this Court's instructions, ignored rather than incorporated state contract law, and distorted the federal policy favoring arbitration to craft a prejudice requirement that exists

nowhere else in general contract law. This case presents a valuable opportunity to clarify the proper scope of the FAA and to reinforce the proper role of state contract law when evaluating agreements to arbitrate.

As Petitioner persuasively explains, a central purpose of the FAA was to treat arbitration agreements no differently than other contracts. Pet. 21-23. The Act was passed to prevent courts from singling out arbitration clauses for unfavorable treatment and to prevent courts from crafting special rules that applied to arbitration agreements, but not other contracts. *See Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989). This Court has repeatedly held that the FAA places arbitration agreements "on an equal footing as 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)), also known as the "equal-treatment principle." *Kindred Nursing Centers, Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017).

The federal policy favoring arbitration embodies this equal-treatment principle. "Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring it and placing arbitration agreements on equal footing with all other contracts.'" *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) (cleaned up) (quoting *Cardegna*, 546 U.S. at 443)). In other words, when applying the federal policy favoring arbitration, "the court is not to place its thumb on the scales" one way

or the other. *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995).

Treating arbitration clauses equally with other contracts means they should be interpreted under the same legal principles that apply to other contracts. Under the FAA, "courts should apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944; *see also Arthur Andersen*, 556 U.S. at 632 (indicating that the defense of equitable estoppel to arbitration agreements would apply based on what "relevant state contract law" says about equitable estoppel).[3]

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[3] There is no claim here that state contract law waiver principles are preempted by the FAA. This Court will not apply state contract law principles if they conflict with fundamental attributes of arbitration and therefore are preempted by the FAA. *See, e.g.*, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418 (2019) (finding that the contract principle of *contra proferentem* could not be used to require parties to submit to class arbitration where the parties did not expressly agree to class arbitration). However, no one has argued that longstanding state waiver principles which focus on intent rather than prejudice somehow undermine arbitration's fundamental attributes. Rather, not requiring prejudice is consistent with the FAA's focus on party intent, on promoting the speedy resolution of disputes, and on prohibiting the kind of gamesmanship that parties used to back out of their contractual agreements prior to the FAA's enactment. *See Arbitration of Interstate Commercial Disputes: Joint Hearing 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) (emphasizing that the FAA was needed because "a party has been at absolute liberty to disregard his engagement to enter into arbitration any time before the award actually is handed down," and that a party will change their mind about arbitrating when that party "sees an

As Petitioner explains, prejudice is not an element of waiver under general state contract principles. Pet. 23-25; *see also Mounteer Enters., Inc. v. Homeowners Ass'n for the Colony at White Pine Canyon*, 422 P.3d 809, 815 (Utah 2018) ("The prejudice requirement is a doctrinal misfit in the law of waiver."). Nevertheless, the majority of federal circuits as well as several state appellate courts have engrafted prejudice as an extra requirement for waiver of arbitration clauses. In doing so, they have abandoned this Court's instructions to provide equal treatment to arbitration clauses and to incorporate state contract law. Rather, they do not even purport to analyze, let alone apply, state contract principles. Instead, as explained below, they have imposed their own prejudice requirement crafted out of whole cloth. As a result, they have singled out arbitration clauses for differential treatment and "placed their thumbs on the scale" in a manner inconsistent with the FAA. *Cabinetree*, 50 F.3d at 390.

B. Those Courts Requiring Prejudice as an Element of Waiver Have Misapplied the Federal Policy Favoring Arbitration.

The prejudice requirement also violates the FAA's rule that courts apply state contract law to arbitration agreements. The prejudice requirement is not grounded in state contract law. Nor is it grounded in the text or structure of the FAA. Rather, it is a judicially created doctrine that lacks legal basis.

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advantage in the delay and trouble to which his opponent will be put to enforce his rights through the courts").

The lower courts' description of the prejudice requirement shows how they are misapplying the federal policy favoring arbitration and treating arbitration clauses differently from other contracts. For example, the Second Circuit directly tied the prejudice requirement to the federal policy favoring arbitration: "Given this dominant federal policy favoring arbitration, waiver of the right to compel arbitration due to participation in litigation may be found only when prejudice is to the other party is demonstrated." *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 887 (2d Cir. 1985). The court never even attempted to apply state contract law. Rather, it cited federal cases and created a special and unequal waiver rule for arbitration clauses vis-à-vis other contracts.

Other circuits have similarly and incorrectly derived this specialized prejudice requirement from their misreading of the federal policy favoring arbitration. *See, e.g.*, *Fisher v. A.G. Becker Paribas, Inc.*, 791 F.2d 691, 694 (9th Cir. 1986) (stating that "[a]any examination of whether the right to compel arbitration has been waived must be conducted in light of the strong federal policy favoring enforcement of arbitration agreements," and then concluding that arbitration waiver requires showing "prejudice to the party opposing arbitration"). In that case, as in *Rush*, the Ninth Circuit never mentioned the contract law of Idaho, the state where the case arose, let alone attempted to apply it.

The Fifth Circuit made explicit what was the Second and Ninth Circuits held implicitly. In holding that arbitration waiver will be found only when the party seeking arbitration acts "to the detriment or

prejudice of the other party," the Fifth Circuit expressly rejected Texas contract law that made waiver turn on party intent rather than prejudice. *Miller Brewing Co. v. Fort Worth Distrib. Co., Inc.*, 781 F.2d 494, 497 (5th Cir. 1986). It held:

> The issue of arbitrability under the United States Arbitration Act is a matter of federal substantive law. We thus dismiss out of hand FWDC's citation to 60 Tex. Jur. 2d. 199 for the proposition that 'waiver is a question of fact based largely on intent. It is defined as 'an intentional release, relinquishment, or surrender of a right that is at the time known to the party making it.'

Id. at 497 n.4.

This improper use of the federal policy favoring arbitration and rejection of state contract law also has affected how state courts have addressed arbitration waiver. For example, the Washington Court of Appeals acknowledged that "prejudice is not required under state law" to show waiver, but nonetheless required prejudice for arbitration waiver based on federal circuit decisions treating arbitration waiver as an issue of federal law. *Kinsey v. Bradley*, 765 P.2d 1329, 1331 (Wash. Ct. App. 1989); *see also MSO, LLC v. DeSimone*, 94 A.3d 1189, 1198 (Conn. 2014) (adopting prejudice as a requirement for arbitration waiver because it "is consistent with the majority of federal circuit courts which similarly require prejudice to the party opposing arbitration on the grounds of waiver" and expressing a desire for a "uniform approach").

To be sure, it is understandable that federal courts may have thought that federal law should determine whether a party waived the right to enforce an arbitration clause and that state contract law did not apply. Many of the early decisions on waiver date back to the 1980s. This was soon after this Court first articulated the federal policy favoring arbitration in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983), but before the Court more explicitly held that the FAA requires applying state contract law principles to arbitration agreements. *See First Options*, 514 U.S. at 944; *see also Arthur Andersen, Inc.*, 556 U.S. at 632. Similarly, while this Court had previously held that the FAA makes "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),[4] this Court's strong reaffirmance of the equal treatment principle did not come until later. *See, e.g.*, *Volt Info. Sciences, Inc.*, 489 U.S. at 478. Nonetheless, the circuits have failed to keep pace with this Court's decisions, and have continued to ignore state contract law and misconstrue the federal policy favoring arbitration when addressing waiver of arbitration provisions. Those errors will continue unless this Court resolves this circuit split and instructs that arbitration waiver should be

[4] *See also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (recognizing that the FAA was intended "to place arbitration agreements 'upon the same footing as other contracts . . . .'" (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)).

determined by the same state law that determines waiver of any other contractual provision.

C. This Court Previously Has Corrected Lower Courts that Have Improperly Created a Federal Common Law for Evaluating Arbitration Agreements Rather than Applying State Contract Law.

This Court should grant certiorari so that it can correct the lower courts' improper use of the federal policy favoring arbitration and their failure to apply state law. This Court has previously acted when the federal circuit courts had created a federal common law for evaluating the application of arbitration agreements to non-signatories. This Court's guidance helped the circuits revise their doctrine and apply state contract law principles going forward. One common issue that can arise regarding arbitration agreements—as with other contracts—is when non-signatories can enforce or be bound by an arbitration agreement. When it came to the question of whether the doctrine of equitable estoppel allowed non-signatories to enforce arbitration agreements, several circuits relied on the federal policy favoring arbitration to treat equitable estoppel in arbitration as a question of federal law. *See, e.g.*, *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000).

In *Arthur Andersen LLP v. Carlisle*, this Court indicated that the applicability of equitable estoppel in arbitration depends on "whether relevant state contract law" would recognize equitable estoppel and

on "what standard" state contract law would apply. 556 U.S. at 632. The circuit courts responded by recognizing that their previous decisions creating a federal common law of equitable estoppel were improper, and by applying state law equitable estoppel principles going forward. *See, e.g.*, *Crawford Praful Drugs, Inc. v.* 748 F.3d at 261-62 ("Consequently, prior decisions allowing non-signatories to compel arbitration based on federal common law rather than state contract law, such as *Grigson*, have been modified to conform with *Arthur Andersen*."); *see also AtriCure, Inc.*, 2021 WL 3823418 at *4-5 ("To the extent that our decision in *Arnold* [*v. Arnold Corp.*, 920 F.3d 1269, 1281 (6th Cir. 1990)] suggested that this issue [of equitable estoppel] rested on federal common law, its analysis did not survive *Arthur Andersen*."); *Lawson v. Life of the South Ins. Co.*, 648 F.3d 1166, 1172 (11th Cir. 2011) (stating that *Arthur Andersen* "clarifies that state law governs that question [of equitable estoppel], and to the extent any of our earlier decisions indicate to the contrary, those indications are overruled or at least undermined to the point of abrogation by *Carlisle*"). In short, by clarifying that state contract law applies to arbitration agreements, this Court caused the circuit courts to reject their prior misguided federal common law approach and to start applying state law. This Court should do the same here to correct the circuits' improper approach to arbitration waiver.

Additionally, lower courts have indicated that they would benefit from guidance from this Court. Current law contains a mishmash of different standards that vary across the circuits and that are difficult for other courts to parse. In the words of one court:

> A Nordic smorgasbord of United States Circuit Court of Appeals decisions greets us on the subject of prejudice for purposes of arbitration waiver. Oodles of federal appeals court decisions analyze the nature and extent of prejudice required and whether the nonmoving party suffered prejudice sufficient to harness waiver. The various circuits take differing views and apply distinct tests.

Shuster v. Prestige Senior Mgmt., L.L.C., 376 P.3d 412, 423 (Wash. Ct. App. 2016). One of the simplest ways to cut through these varied approaches to prejudice is to grant certiorari and determine that prejudice is not an element of waiver, just as it is not an element of waiver for any other contractual provision.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court grant the Petition for a Writ of Certiorari to determine whether prejudice is a required element for waiver of the right to enforce an arbitration clause.

Respectfully submitted,

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APPENDIX A

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