No. 21-328

IN THE

Supreme Court of the United States

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

v.

SUNDANCE, INC.,
Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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Nowhere in Sundance's Brief in Opposition does it attempt to explain why the Eighth Circuit was right to include a prejudice requirement in its arbitration waiver analysis when prejudice is not required to establish waiver of other contractual rights. The Petition discusses at length (at 22-29) how a prejudice requirement is at odds with waiver in other contractual contexts, where the entire inquiry focuses on the waiving party's voluntary acts inconsistent with the contractual right. Sundance makes no attempt to reconcile this discrepancy.

In essence, then, Sundance concedes that the majority view followed by the Eighth Circuit here violates the equal-treatment principle articulated by this Court in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011), and *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421, 1426 (2017). Such a violation is far from an "academic distinction with no practical significance." Opp. 14. Rather, it means as a practical matter that Sundance could engage in a sort of gamesmanship—voluntarily relinquishing and then enforcing contractual rights based on changes in its perceived tactical situation—that would not be countenanced if those rights arose from another type of contract. It should not be countenanced here either just because the contract in question happens to involve arbitration.

Moreover, throughout the long tenure of the circuit split and the split among state high courts about whether prejudice is required in the arbitration waiver context (a split that Sundance admits has "existed for decades," Opp. 8, 16), there are certainly

cases in prejudice-requirement courts where the absence of a prejudice finding has been dispositive. The opinion below establishes that this was such a case.

I. SUNDANCE ENGAGED IN VOLUNTARY CONDUCT THAT WOULD HAVE CONSTITUTED WAIVER IN OTHER CONTRACTUAL CONTEXTS.

One need look no further for an illustration of the equal-treatment principle being violated than Sundance's actions in this case. Sundance explains that it participated in the joint mediation of the *Morgan* and *Wood* actions "in an effort to achieve a potential global resolution." Opp. 3. Sundance next explains that before this Court decided *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1419 (2019), it "faced a greater risk of being compelled to arbitrate Morgan's claims on a collective basis," which would have made arbitration less efficient. Opp. 3 n.3.

Sundance made a choice to remain in court, where it could pursue a global settlement, rather than run the risk of an inefficient collective arbitration. Then, when the global settlement did not materialize and the chances of a collective arbitration diminished with this Court's decision in *Lamps Plus*, it sought to switch gears and compel arbitration.

When a party engages in voluntary conduct inconsistent with a contractual right, the contract law of most states, including that of Iowa, holds the resulting waiver to be irrevocable.[1] For example, in

[1] This discussion of Iowa law is intended to illustrate the departure in the opinion below from this Court's FAA equal-

Scheetz v. IMT Insurance Co. (Mutual), 324 N.W.2d 302, 303 (Iowa 1982), an insurance company with a provision in its contract stating that any claim had to be filed within one year of the loss was still negotiating a potential settlement with the homeowner whose home was damaged by fire when that one-year period expired. The Iowa Supreme Court ruled that by extending the negotiations beyond one year, the insurer "could have had no other intent than to relinquish its contractual right" to enforce the limitations period. *Id.* at 304. And once made, this contractual waiver could not be recalled or retracted. *Id.* at 305.

Here, Sundance took several voluntary actions analogous to the insurer in *Scheetz* continuing to negotiate after the one-year limitations period expired. It filed a motion to dismiss under the first-to-file rule in which it suggested Morgan's action could be re-filed in court, 8th Cir. App. 27; it filed an answer that did not mention arbitration as a defense, Eighth Circuit Appellee Appendix 1-15; and it engaged in mediation in an effort to reach a global resolution, Opp. 3. Indeed, Sundance repeatedly invokes the voluntary nature of this mediation, Opp. i, 2, even though the voluntariness of the waiving party's conduct is a prerequisite for finding an implied waiver outside the arbitration context. *See Travelers Indem. Co. v. Fields*, 317 N.W.2d 176, 186-87 (Iowa 1982) (finding dispute over voluntariness made waiver a fact question for jury).

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treatment principle. Petitioner takes no position on whether waiver in cases governed by the FAA should be analyzed under state or federal law.

And Sundance admitted throughout this litigation that, until this Court's decision in *Lamps Plus,* it avoided enforcing its arbitration right because it worried about the prospect of having to arbitrate collectively. App. 9-10, 18. Such admissions would have amounted to waiver as a matter of law in states, like Iowa, that consider only the waiving party's conduct and intentions as relevant, without any requirement of prejudice to the other party. *See, e.g.*, *Gosiger, Inc. v. Elliott Aviation, Inc.*, 823 F.3d 497, 502 (8th Cir. 2016) (applying Iowa law); *In re Estate of Warrington*, 686 N.W.2d 198, 202 (Iowa 2004).

Moreover, as the law professors' amicus brief observed, Congress passed the Federal Arbitration Act (FAA) so that parties to arbitration agreements could no longer walk away from those agreements if things were not going well in the arbitral forum. *See* Amicus Br. 6 n.3. Similarly, the equal-treatment principle requires that the right to arbitrate, once intentionally relinquished as Sundance did here, cannot be revived again when an intervening event, like a decision by this Court, causes the party with the relinquished right to take a more optimistic view of the prospects in arbitration.

The FAA made arbitration agreements as enforceable as other types of contracts. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). It also made the waiver of the right to arbitrate as irrevocable as the waiver of other contractual rights, and this Court should make that corollary clear.

II. THE SPLIT AMONG FEDERAL AND STATE COURTS ON THE PREJUDICE REQUIREMENT HAS ONGOING REAL-WORLD CONSEQUENCES.

Sundance's primary argument against certiorari is that the facts bearing on the waiving party's litigation conduct overlap with the facts bearing on prejudice so that whether prejudice is a separate requirement rarely has "practical import." Opp. 8. This it-all-comes-out-in-the-wash argument ignores several reasons why having a uniform, consistent standard for waiver is important. Moreover, Sundance's conclusion—that case outcomes do not turn on the presence or absence of a prejudice requirement—is empirically false.

First, the continued existence of the arbitration-specific prejudice requirement has consequences beyond its effect on particular cases, undermining this Court's authority and leaving lower courts confused about how to apply its precedents. This Court has lamented on previous occasions that lower courts have not taken its equal-treatment principle seriously enough. *See Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012) (granting petition for certiorari, vacating and remanding decision of West Virginia Supreme Court of Appeals because that court's violation of the equal-treatment principle was "inconsistent with clear instruction in the precedents of this Court"). Allowing the majority of state and federal courts to continue violating that principle with impunity with regard to their rules for waiver could encourage lower courts to test what other exceptions to the principle this Court might tolerate,

leading to more lower court opinions like the one this Court vacated in *Brown*.

Relatedly, many of the courts that impose an arbitration-specific prejudice requirement in their waiver tests added that element based on the "federal policy favoring arbitration" enunciated by this Court. *Sweater Bee by Banff, Ltd. v. Manhattan Indus., Inc.*, 754 F.2d 457, 461 (2d Cir. 1985) (holding waiver of the right to arbitrate could not be found without "resultant prejudice to the other party" because of the "overriding federal policy favoring arbitration" and then quoting at length from *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

This Court has maintained the equal-treatment principle and the federal policy favoring arbitration as two complementary pillars of its FAA jurisprudence. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220-21 (1985); *see also AT&T*, 563 U.S. at 339. The minority-view courts acknowledge the co-existence of these two pillars and properly balance them. *See St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 590 (7th Cir. 1992); *Nat'l Found. for Cancer Rsch. v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987).

But the majority-view courts continue to have difficulty reconciling these two principles, instead using the latter as a reason to impose a prejudice requirement unique to arbitration that violates the former. *See Toddle Inn Franchising, LLC v. KPJ Assocs., LLC*, 8 F.4th 56, 64 (1st Cir. 2021) (tying the presumption against inferring waiver of the right to arbitrate to the "liberal federal policy" favoring

arbitration, and requiring prejudice); *Sabatelli v. Baylor Scott & White Health*, 832 Fed. App'x 843, 848 (5th Cir. 2020) (same).[2] This Court should step in to prevent further misapplication of these two pillars of its FAA jurisprudence in the lower courts, which may spread beyond waiver to other areas of arbitration law.

Finally, Sundance suggests that the differences among the circuits' tests for arbitration waiver are slight and have caused no "disruption or problem." Opp. 8. But the high burdens for waiver that many circuits apply encourage parties with known arbitration rights to test the courts first before asserting them, which is disruptive to the courts whose resources are taken up with those matters, sometimes for years, before one of the parties elects the arbitral off-ramp. *See In re Checking Acct. Overdraft Litig.*, 754 F.3d 1290, 1294-97 (11th Cir. 2014) (discussing multiple defendants in related cases who litigated arbitrability questions and availed themselves of the FAA's automatic right of interlocutory appeal before ever invoking the delegation clauses in their contracts).

And Sundance is simply wrong to conclude that because all circuits consider prejudice as a factor in the waiver analysis, it doesn't matter that for some courts the factor is discretionary while for others it is mandatory. The Petition (at 29-30) discussed the extensive litigation conduct engaged in by the

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[2] Indeed, Sundance even notes that the majority opinion below applied the Eighth Circuit's three-part waiver test, including the prejudice requirement, alongside the presumption that "any doubts concerning the waiver of arbitrability should be resolved in favor of arbitration." Opp. 6 (quoting App. 3).

defendant in *MicroStrategy, Inc. v. Lauricia*, where the Fourth Circuit nonetheless refused to find waiver because the plaintiff could not prove prejudice. 268 F.3d 244, 246-47 (4th Cir. 2001). Nor was *Lauricia* anomalous in finding prejudice dispositive. It is one in a long line of such cases. *See, e.g.*, *Aqualucid Consultants, Inc. v. Zeta Corp.*, 721 Fed. App'x 414, 418 (6th Cir. 2017) ("Absent a showing of prejudice to Plaintiffs, there can be no waiver by Defendants."); *Stifel, Nicolaus & Co. Inc. v. Freeman*, 924 F.2d 157, 158-59 (8th Cir. 1991) (plaintiff acted inconsistently with right to arbitrate by initiating litigation and engaging in discovery before seeking to arbitrate counterclaim brought against it, but court held there was no waiver in absence of finding of prejudice); *Maxum Foundations, Inc. v. Salus Corp.*, 779 F.2d 974, 976-77, 982 (4th Cir. 1985) (finding no waiver despite the fact that party seeking arbitration had taken depositions and propounded written discovery before moving to compel arbitration, and took another deposition afterwards, because the plaintiff could not show it was prejudiced).[3] And the opinion below was yet another case in that line.

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[3] Sundance finds it significant that this Court recently denied a petition for certiorari raising this issue in *Morgenthau Venture Partners, LLC v. Kimmel*, 254 So. 3d 958 (Fla. Dist. Ct. App. 2018), *cert. denied* 139 S. Ct. 2693 (2019). But that case had significant vehicle problems, as it was a summary affirmance by an intermediate appellate court and thus would have required this Court to effectively review a trial court opinion. Moreover, that case originated in state court, where at least one justice on this Court believes the Federal Arbitration act does not apply. *See, e.g.*, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285-97 (1995) (Thomas, J., dissenting).

III. THE PREJUDICE ELEMENT WAS DISPOSITIVE BELOW, AND GIVEN CIRCUIT PRECEDENT, MORGAN HAD NO CHOICE BUT TO ARGUE PREJUDICE.

A. As Petitioner explained in her Petition, the Eighth Circuit's decision that Sundance did not waive its right to compel arbitration rests on its conclusion that Ms. Morgan was not prejudiced by Sundance's conduct inconsistent with arbitration. Pet. 30-31. Indeed, the majority repeatedly stressed this point, saying, "Sundance's conduct, *even if* inconsistent with its right to arbitration, did not materially prejudice Morgan," App. 3 (emphasis added), and concluding its decision with, "*In the absence of a showing of prejudice* to Morgan, we conclude Sundance did not waive its contractual right to invoke arbitration," App. 6 (emphasis added). The dissenting opinion views the majority decision the same way: "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.[4]

Ignoring these express statements from the court about its own analysis, Sundance speculates that the majority would have reached the same conclusion that Sundance did not waive its right to arbitrate even if prejudice were not required. Opp. 11. But that is far from apparent from the text of the decision. While the majority indicates that it would have analyzed the question whether Sundance

[4] Given that the dissent raises the question whether prejudice should be required, one would expect the majority to state that its conclusion would be the same regardless of whether prejudice were required if it thought that was clear. It did not.

substantially invoked the litigation machinery differently than the district court, it never says whether it would have reached a different conclusion. *See* App. 5. Rather, it moves straight from its statements about what the district court should have considered to its prejudice analysis. *Id.*

Nor does the fact that some of the elements of the substantial invocation and prejudice analyses overlap mean that they are identical and that courts will reach the same conclusion regardless of whether prejudice is required. Not only is that the easily disproved gravamen of Sundance's Opposition overall—see, *supra* Part II—but it is also contrary to the text of the Eighth Circuit's decision here. The decision below notes the factors for prejudice may be different than for other prongs of the analysis, App. 5 (quoting *Messina v. N. Cent. Distrib., Inc.*, 821 F.3d 1047, 1051 (8th Cir. 2016)), and its analysis, in fact, considers different factors. In finding that Ms. Morgan was not prejudiced, it concludes that no discovery was conducted and that there would be no duplication of effort were the dispute sent to arbitration—neither of which the court indicates were relevant to its discussion of Sundance's conduct inconsistent with arbitration. *See* App. 6.

This Court should take the Eighth Circuit at its word that its conclusion was based on its prejudice analysis—and not on what Sundance speculates the court below would have done had it applied a different test.

B. Ms. Morgan need not have argued below that prejudice is not required for this Court to review the question presented. This Court may review any issue "pressed or passed upon below." *U.S. v. Williams*, 504

U.S. 36, 41-43 (1992) (explaining the rule and citing examples of cases where this Court reviewed issues that had been decided by the courts below, but not argued by the parties); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (noting that this Court "ordinarily feel[s] free" to review questions decided by the court below). Here, the Eighth Circuit "passed upon" the question whether prejudice is required by reiterating the established Circuit test for waiver—which includes prejudice as one of its prongs—and then, in fact, requiring prejudice for waiver. App. 3 (reiterating *Messina*/*Lewallen* test, including its prejudice prong); App. 5-6 (conducting prejudice analysis). Sundance's apparent position is that the majority must have expressly considered the possibility that the test may be a different one. Opp. 9-10. But, as Sundance admits, prejudice has been required by the Eighth Circuit for decades, Opp. 17, and the panel below was bound by that precedent and could not have declined to require prejudice. If this Court could not review a decision where a lower court followed established Circuit precedent, its ability to grant certiorari would be substantially circumscribed. That is not the rule.

Moreover, given that Eighth Circuit precedent was already clear that prejudice is required for waiver, it is unsurprising Ms. Morgan argued below that she met that test. Indeed, any argument below that prejudice is not required would have been futile, absent en banc review. This Court has not required parties to make arguments below inconsistent with governing Circuit precedent to grant review, and it should not do so here. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (rejecting

waiver argument because making the argument below would have been futile under circuit precedent).

There is a clear and longstanding circuit split on the question whether prejudice to the non-waiving party is required to establish litigation-conduct waiver in the arbitration context. Courts on both sides of the split have explained the rationale for their position; these arguments are not novel. Moreover, if this Court grants review, Sundance will have ample opportunity to argue in favor of a prejudice requirement under de novo review. That the prejudice-requirement debate did not previously occur between the parties here —though it was raised by the dissenting judge, App. 10-11—should not preclude this Court's review of this certworthy issue.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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