No. 21-328

IN THE

Supreme Court of the United States

ROBYN MORGAN, ON BEHALF OF HERSELF AND ALL SIMILARLY SITUATED INDIVIDUALS,

Petitioner,

v.

SUNDANCE, INC.,

Respondent.

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

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and the courts. Public Citizen works on a wide range of issues, including enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has a longstanding interest in issues concerning the enforcement of mandatory predispute arbitration agreements, and it has appeared as amicus curiae in many cases involving such issues in this Court and other federal and state courts.

Public Citizen submits this brief because it has long been concerned that federal appellate decisions addressing waiver of arbitration have generally failed to recognize that, in the context of the Federal Arbitration Act, waiver has both a federal-law and a state-law dimension. Federal law may determine whether a party has waived its rights to invoke the Act's provisions that empower federal courts to enforce arbitration agreements, but state law continues to control whether, as a matter of contract law, a party's entitlement to enforce a provision in an agreement that might otherwise provide for arbitration has been waived. Public Citizen submits this brief to explain this distinction in the expectation that it may be helpful to the Court in addressing the issues posed by this case.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief. Counsel for both parties have consented in writing to its filing.

SUMMARY OF ARGUMENT

The question in this case is whether a party seeking to establish that an opponent has waived its right to compel arbitration of a dispute under the Federal Arbitration Act (FAA) must demonstrate that it was prejudiced by the conduct that it claims amounted to a waiver. Answering that question requires the Court to consider that the entitlement to compel arbitration under the FAA has both federal- and state-law components.

The FAA provides as a matter of federal law that agreements to arbitrate disputes are enforceable to the same extent as other contracts, and that a federal court may compel arbitration and stay litigation pending arbitration to the extent that a dispute is subject to an arbitration agreement. 9 U.S.C. §§ 2–4. In principle, whether a party has waived the right to invoke the procedural entitlements conferred by the FAA could be a question governed by federal law, at least in a case arising in a federal court.

The general contract-law principles that, under the FAA, determine the enforceability of an arbitration agreement are not, however, matters of federal law: Their source is state law. Even if, as a matter of federal law, a party has not waived its right to invoke whatever rights it may have under the FAA, the FAA provides no right to enforce an agreement to arbitrate that may not be enforced under neutral principles of state contract law. Thus, if the application of general state contract-law principles to the facts shows that a party has waived a contractual provision that would otherwise require arbitration, the FAA's mechanisms give a court nothing to enforce. If those state contract-law principles do not require a showing of prejudice to

establish waiver, the FAA does not impose additional requirements that would permit enforcement of a contract that is unenforceable under neutral principles of state contract law.

Because, as the petitioner demonstrates, neutral state contract-law principles typically do not require a showing of prejudice to establish a waiver of contractual rights, in most instances a court will need go no further than consulting state contract law to reject an assertion that such a showing is required. In such cases, whether the party seeking to arbitrate has also waived its right to invoke the FAA as a matter of federal law is a purely theoretical question. Only in cases where neutral state contract-law principles require a showing of prejudice for waiver does it matter whether, as a matter of federal law, a party's right to invoke the FAA's procedures is waived by inconsistent litigation conduct regardless of prejudice.

ARGUMENT

I. Enforcement of arbitration agreements under the FAA involves the interplay of both federal and state law.

The FAA provides, as a matter of federal law, that agreements to arbitrate disputes involving transactions affecting interstate and foreign commerce are enforceable by federal courts, subject to defenses applicable to the enforcement of contracts generally. *See* 9 U.S.C. § 2; *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 629–30 (2009). The statute further provides parties to arbitration agreements with two procedural mechanisms for enforcing them in the federal courts: motions to stay litigation of issues that are arbitrable under such agreements pending arbitration, *see* 9 U.S.C. § 3, and applications to compel arbitration

when a party to an arbitration agreement is in "default" of its obligation to arbitrate as required by the agreement, *see id.* § 4.

This Court has held that the FAA thus creates a federal " 'equal-treatment rule' for arbitration agreements." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018). Under this equal-treatment principle, as the Court has repeatedly stated, enforcement of arbitration agreements is subject to "generally applicable contract defenses." *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996). That is, arbitration agreements are subject to defenses that "govern issues concerning the validity, revocability, and enforceability of contracts generally," *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987), that do not "apply only to arbitration or … derive their meaning from the fact that an agreement to arbitrate is at issue," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340 (2011), and that do not "disfavor[ ] contracts that … have the defining features of arbitration agreements," *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). In these ways, the FAA puts arbitration agreements "on equal footing with all other contracts," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), by making them "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).

Beyond establishing this equal treatment principle, however, the FAA does not create the generally applicable contract-law principles that determine whether a court may deny enforcement of an arbitration agreement on grounds applicable to "any contract," 9 U.S.C. § 2, or whether it may find a party to be in "default" of its contractual obligations and order that party to arbitrate, *id.* § 4. Nor do the controlling

contract-law principles have any other federal-law source in most cases. "As this Court has put it, there is 'no federal general common law.'" *Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020) (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). Rather, state common law generally provides "rules readymade for such tasks" as enforcing contracts. *Id.* at 716.

Accordingly, this Court has consistently recognized that *state* contract law generally supplies the neutral, generally applicable rules governing the formation and revocation of contracts, as well as defenses to their validity and enforcement, that courts must apply under sections 2, 3, and 4 of the FAA. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019); *Kindred*, 137 S. Ct. at 1426; *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54 (2015); *Concepcion*, 563 U.S. at 343; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474–75 (1989); *Doctor's Assocs.*, 517 U.S. at 686–87; *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 281 (1995); *Perry*, 482 U.S. at 492 n.9.

As the Court explained in *Arthur Andersen*, the FAA's operative provisions do not "purport[ ] to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." 556 U.S. at 630. It retains state contract law as "an external body of law" governing both "§ 2's enforceability mandate" and the procedural mechanisms set forth in sections 3 and 4 that implement it. *Id.* " '[S]tate law,' therefore, is applicable to determine which contracts are binding under § 2 and enforceable under § 3 '*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.' " *Id.* at 630–31 (quoting

Perry, 482 U.S. at 493 n.9). Importantly, *Arthur Andersen* makes clear that the role of state contract law under the FAA is grounded not only in section 2's "saving clause," which subjects section 2's enforceability mandate to defenses applicable to "any contract," 9 U.S.C. § 2, but also in the language of sections 3 and 4, which necessarily rely on state contract law for the determination whether a dispute is "referable to arbitration under an agreement," *id.* § 3, and whether a party is in "default" of its obligations under an arbitration agreement, *id.* § 4. Thus, the FAA's "terms are fulfilled" when an arbitration agreement is enforced to the extent provided for by general principles of "state contract law." *Id.*

II. Where generally applicable principles of state contract law provide for waiver of contract rights regardless of prejudice, the FAA does not superimpose a requirement of prejudice.

The nature of the rights conferred by the FAA necessarily affects analysis of whether a party has waived them. Analytically, waiver principles may come into play at two levels. A party may, as a matter of federal law, have waived its right to invoke the FAA's provisions for compelling arbitration and/or staying litigation pending arbitration. But even if the party has not waived its entitlement to invoke its FAA rights, those rights go no further than its rights under general principles of state contract law. Thus, if neutral principles of state contract law provide a defense to enforcement of a contract based on waiver, and the waiver defense does not require a showing of prejudice, a federal court must apply those same state-law contract principles

in determining whether the party seeking arbitration has waived its contractual entitlement to arbitrate.

A. To the extent that the FAA creates federal statutory entitlements to compel arbitration and/or stay litigation pending arbitration, those entitlements—like most others created by federal law—may be waived or forfeited. *See*, *e.g.*, *Stern v. Marshall*, 564 U.S. 462, 478–82 (2011); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939). Whether a federal statutory right has been waived is generally a question of federal law. *See*, *e.g.*, *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 299 (2009); *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987).[2] While the law sometimes imposes heightened protections to protect against unknowing waivers of important substantive or constitutionally protected rights, *see*, *e.g.*, *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998), other rights, and particularly procedural ones, are typically found to be waived or forfeited by a failure to assert them in a timely manner, *see*, *e.g.*, *Commercial Cas. Ins. Co. v. Consol. Stone Co.*, 278 U.S. 177, 179 (1929) (venue); Fed. R. Civ. P. 38(d) (right to jury trial in civil case). *See generally* Br. of National Academy of Arbitrators.

Where the criteria for waiver of a federal statutory right are not themselves set forth in a statute or rule, determining what constitutes a waiver is effectively an exercise of the courts' limited federal common-law

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[2] In some contexts, the issue whether a federal right has been waived in *state* court proceedings may be viewed as a question of state procedural law. *See*, *e.g.*, *Coleman v. Thompson*, 501 U.S. 722 (1991). That principle, by definition, does not apply when the issue is waiver in a *federal* court proceeding where state procedural law does not apply.

authority to fill in the interstices of the statutory scheme—a power that the courts should exercise with due regard to the limits of their authority and with recognition of the policies of the relevant statute and analogous principles of state law. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991). To the extent that it may be necessary here to address the question presented as a matter of waiver of federal statutory rights, the petitioner's brief explains thoroughly why these relevant considerations all point toward adoption of a rule that a party's litigation conduct that is inconsistent with the exercise of its rights under sections 3 and 4 of the FAA constitutes a waiver of those rights, regardless of whether the other party can demonstrate prejudice.

B. In most cases, however, regardless of whether federal law requires a showing of prejudice to establish a waiver of a party's *statutory* rights under the FAA, general principles of state contract law under which prejudice is not an element of a waiver defense will decide the issue of a party's *contractual* entitlement to arbitration. As explained in part I above, a party's federal statutory entitlement to compel arbitration under the FAA extends no further than its right under generally applicable principles of state contract law to enforce an agreement. And doctrines concerning "waiver" are among the " 'traditional principles' of state law" that the FAA commands courts to effectuate in determining whether an agreement to arbitrate is enforceable. *Arthur Andersen*, 556 U.S. at 631.

Thus, to the extent that waiver of contractual rights is a defense to their enforcement under general principles of state contract law, the FAA requires courts to give effect to those state-law principles

unless they discriminate against arbitration or conflict with its fundamental attributes. *See Epic*, 138 S. Ct. at 1622. Generally applicable state contract-law principles that do not require showings of prejudice for findings of waiver do not in any way single out arbitration for disfavored treatment: They neither discriminate on their face against arbitration by applying only to arbitration agreements, nor derive their meaning from the fact that an arbitration agreement is at issue. *See Kindred*, 137 S. Ct. at 1426. And nothing in such a defense disfavors contracts that "have the defining features of arbitration agreements." *Id.* Nothing about arbitration agreements renders them distinctively vulnerable to waiver.

Likewise, enforcement of state contract-law principles that provide for findings of waiver without a showing of prejudice does not endanger "fundamental attributes of arbitration." *Concepcion*, 563 U.S. at 344. The application of state-law waiver principles has no potential impact on how arbitration is conducted if it is ordered. And by encouraging parties to assert claimed contractual rights promptly, waiver defenses that do not require showings of prejudice help ensure that disputes genuinely subject to arbitration under valid agreements are sent to arbitration early on, rather than being partly adjudicated in court contrary to the terms of those agreements. Waiver doctrines thus promote the enforcement of arbitration agreements "according to their terms," *Epic*, 138 S. Ct. at 1619, rather than allowing parties to create hybrid litigation-arbitration proceedings not contemplated in their agreements by invoking arbitration only at the point in a case that suits them. In sum, because generally applicable state-law contractual waiver defenses that do not require a showing of prejudice are not

inconsistent with arbitration as contemplated by the FAA, the FAA does not displace such defenses or require a showing of prejudice that state law does not demand.

As the petitioner's brief demonstrates, generally applicable state contract doctrines overwhelmingly provide that a party's waiver of a contractual provision is a defense to its attempt to enforce that provision regardless of prejudice. Pet. Br. 19–23. Where choice-of-law principles point to the laws of such states as the controlling state laws, the FAA requires a federal court to give effect to the state waiver defense without adding any requirement of prejudice. The FAA provides no right to enforce an arbitration agreement that is unenforceable under generally applicable, arbitration-neutral principles of state contract law. Therefore, a contract right that has been waived under such state-law principles cannot be enforced under the FAA even if, as a matter of federal law, a court would not find that the party had waived its entitlement to invoke whatever rights the FAA gives it.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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