No. 21-328

In the
Supreme Court of the United States

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

Petitioner,

v.

SUNDANCE, INC.

Respondent.

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

BRIEF FOR RESPONDENT

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INTRODUCTION

This case began when Petitioner Robyn Morgan disregarded the parties' agreement to resolve any dispute between them via "binding arbitration, instead of going to court." She now tries to use her disregard of the parties' agreement as a sword, claiming that her federal-court filing triggered an unwritten and extreme use-it-or-lose-it rule that required Respondent Sundance to demand arbitration at "the earliest feasible moment" or lose its right to arbitrate without regard to whether anyone was prejudiced. While one can imagine such a punitive rule being imposed by a hypothetical Federal Anti-Arbitration Act, it has no grounding in the Federal Arbitration Act (FAA) or even the state-law "waiver" principles Morgan seeks to invoke. In fact, the FAA not only favors arbitration, but specifically provides that courts "shall" stay this kind of arbitration-agreement-defying litigation unless the party seeking to arbitrate is "in default." Moreover, nothing else in the FAA or state law causes a party to forever forfeit important contractual rights absent disregard of clear deadlines or prejudice to others. Instead, the manufactured rule Morgan advances is exactly the kind of punitive, made-to-defeat-arbitration rule that the FAA and this Court's cases categorically reject.

Morgan's argument rests on a syllogism: (1) Under state contract law, contractual rights can be "waived" without regard to prejudice; (2) Section 2 of the FAA and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), require courts to apply a strict equal-footing doctrine treating arbitration agreements no more favorably than other contracts; and (3) the FAA

therefore requires courts to find a party who has participated in any meaningful respect in litigation filed in derogation of an arbitration agreement to have waived its contractual right to arbitrate without regard to prejudice. That syllogism is flawed at every turn.

First, Morgan starts on the wrong foot by focusing on Section 2 of the FAA. There is a provision of the FAA that specifically addresses when litigation filed by a party to an arbitration agreement shall be stayed in favor of the agreed-upon arbitration, and it is not Section 2. Rather, Section 3 addresses this precise question and provides that courts "shall" stay the litigation in favor of agreed-upon arbitration unless the party seeking to arbitrate is "in default." In both 1925 and today, a party is not "in default" absent a violation of some clear contractual or court-imposed deadline, or at least prejudice to others. But there is none of that here. If the parties' agreement provided that a right to arbitrate must be asserted within 30 days of the initiation of litigation, then Sundance would be in default if it waited 31 days. But far from imposing any such deadline, the arbitration agreement here incorporates rules that expressly provide that "[n]o judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate." Rule 42(a), American Arbitration Association, *Employment Arbitration Rules and Mediation Procedures* (2017) ("AAA Rules"). There is nothing approaching a default here, so Section 3 and its stay-absent-default direction provide a clear answer and a sufficient basis to affirm.

Morgan fares no better under Section 2. Her first problem is that neither Section 2 nor *Concepcion* imposes the kind of strict equal-treatment principle—equally offended by arbitration-specific rules that favor or disfavor arbitration—on which her argument rests. To the contrary, the text of Section 2, like most of the FAA, is decidedly pro-arbitration. It requires enforcement of arbitration agreements according to their terms absent a generally applicable state-law rule for invalidating contracts. Nothing in Section 2 authorizes the use of contract-law analogies to find that a party waited (or litigated) too long before invoking its rights under a valid arbitration agreement, and its text is not offended if an arbitration agreement is treated more favorably than some other contract not specifically protected by federal law. *Concepcion* is certainly not to the contrary. It invoked the federal policy favoring arbitration and invalidated a state law that improperly disfavored arbitration.

But Morgan's Section 2 problems do not end there. The major premise of her syllogism—that there is a near-uniform state-law practice of finding waiver of contractual rights via litigation conduct or delay without any showing of prejudice—is simply wrong and based on little more than word play. As this Court has recognized, waiver is a word of multiple meanings and is sometimes used when the more accurate concept is forfeiture or estoppel. *See, e.g., Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004). There are certain forms of waiver not present here—like an explicit written relinquishment of a known right or conduct absolutely irreconcilable with later invocation of a right—where prejudice is irrelevant. But when the

argument is that the other side has waited—or litigated—too long before asserting a right in the absence of a clear deadline, the relevant concepts are laches and estoppel, both of which require a showing of prejudice. Worse still for Morgan, even when there is a finding of "waiver," the law in Iowa and almost everywhere else allows a party to retract such a waiver absent detrimental reliance by the other side. In short, all state-law roads lead to a prejudice requirement, and no state finds that important contractual rights can be lost forever absent violation of a clear deadline or prejudice to another party.

In the end, what Morgan seeks is precisely the kind of artificial, made-to-defeat-arbitration rule that the FAA was enacted to countermand and that this Court has repeatedly rejected. She seeks to justify her rule as necessary to counteract gamesmanship, but a prejudice requirement is perfectly tailored to avoiding such misconduct. A party that suffers no prejudice is simply not a victim of gamesmanship, especially when they themselves have initiated litigation after agreeing to resolve their disputes through arbitration instead. Morgan, by contrast, would impose a punitive rule that deprives parties of their agreed-upon right to arbitrate absent any prejudice (or violation of any clear *ex ante* deadline). The choice between those rules is not close. The Court should affirm and vindicate the FAA.

STATEMENT OF THE CASE

A. Statutory Background

Congress enacted the FAA in 1925 to "reverse the longstanding judicial hostility to arbitration." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89

(2000). The FAA counteracted that hostility by establishing a "federal policy favoring arbitration agreements" and displacing "substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Multiple provisions of the FAA promote "the enforcement of arbitration agreements according to their terms," and the FAA preempts state rules that evince hostility to arbitration and frustrate Congress' objective of facilitating arbitration according to the terms the parties themselves embraced. *Concepcion*, 563 U.S. at 344.

For example, Section 2 of the FAA declares that agreements to arbitrate disputes "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. Three things are notable about this provision. First, while Morgan describes Section 2 as embracing a broad "equal-footing" principle, its text does not embrace a pure equal-treatment principle that is equally offended by discrimination against arbitration and by "reverse discrimination" in its favor. Instead, consistent with Congress' aim of counteracting judicial hostility to arbitration, the primary thrust of Section 2 is to require enforcement of arbitration agreements unless the saving clause is satisfied. When a court *enforces* an arbitration agreement, even when some other contract might go unenforced, it does not run afoul of Section 2.

Second, Section 2 addresses arguments that go to the validity, enforceability, and revocability of the arbitration agreement itself. Section 2 does not specifically address the circumstances in which a

court should stay litigation pending arbitration under a valid and applicable arbitration agreement or deny such relief because a party delayed in invoking the agreement. That subject is specifically addressed by Section 3.

Third, Section 2's saving clause is textually narrower than its principal pro-enforcement clause. While the saving clause preserves generally applicable grounds "for the *revocation* of any contract," the principal clause addresses doctrines of contractual enforcement and validity as well and provides the general rule that arbitration agreements "shall be valid, irrevocable, and enforceable." *Id.* (emphasis added).

Other FAA provisions reflect the same federal policy favoring the enforcement of arbitration agreements according to their terms. Section 3 generally requires courts to stay litigation of arbitrable claims "in accordance with the terms of the [arbitration] agreement." 9 U.S.C. §3. Specifically, it provides that if a court in which litigation is brought is "satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement," then it "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." *Id.*

Similarly, even when litigation is not pending, Section 4 emphasizes the court's duty to compel arbitration "in accordance with the terms of the [arbitration] agreement." 9 U.S.C. §4. Under Section

4, "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court" that would have jurisdiction over the underlying dispute "for an order directing that such arbitration proceed in the manner provided for in such agreement." *Id.* As long as the court is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue," it "shall" grant the petition. *Id.* Together, these provisions embody an overarching federal policy "to ensure that private agreements to arbitrate are enforced *according to their terms*." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (emphasis added).

B. Factual Background

Sundance is a Taco Bell franchisee. Pet.App.13. For a few months in 2015, Morgan worked as a crew member at a Taco Bell operated by Sundance in Osceola, Iowa. Pet.App.13. When Morgan applied for the job, she completed and signed an employment application in which she agreed to "use confidential binding arbitration, instead of going to court, for any claims that arise" between her and Sundance. JA77. Morgan further agreed that "the then prevailing employment dispute resolution rules of the American Arbitration Association ["AAA"]" would apply, "except that Taco Bell will pay the arbitrator's fees … [and] that portion of the arbitration filing fee in excess of the similar court filing fee." JA78. As relevant here, the AAA's employment dispute rules expressly provide that "[n]o judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a

waiver of the party's right to arbitrate." AAA Rules R. 42(a).

After her brief employment with Sundance ended, and despite her agreement to "use confidential binding arbitration, *instead of going to court*, for any claims," JA77 (emphasis added), Morgan filed a putative nationwide collective action in federal court alleging that Sundance violated the Fair Labor Standards Act (FLSA). She sought to represent a collective of "herself and all other Crew Members and other hourly employees who have worked for Sundance at any time" over the previous three years. JA14.

Morgan's allegations—indeed, her entire complaint—were nearly identical to the allegations and complaint in a collective action filed two years earlier in the Eastern District of Michigan, *Wood v. Sundance, Inc.*, No. 16-cv-13598. When Morgan filed her complaint, the court in *Wood* had already certified a conditional class, and the *Wood* parties had already conducted substantial discovery. Arguing that Morgan's lawsuit was duplicative of the *Wood* action, Sundance timely moved to stay or dismiss the case without prejudice on procedural grounds under the first-to-file rule. Pet.App.2. Nearly four months later, during which time the only activity involved *pro hac vice* motions, JA3-4, the district court denied Sundance's motion, JA44-55.

Sundance then filed its answer.[1] Before anything else happened, in an effort to resolve the matter

[1] That answer did not include arbitration as a defense, but arbitration is not among the handful of defenses, such as personal jurisdiction, that the Federal Rules specify must be included in an answer. *See* Fed. R. Civ. P. 12(h)(1). As to other defenses, the

without litigation or arbitration, Sundance agreed to include Morgan in a previously scheduled private mediation with the *Wood* plaintiffs. That joint mediation resulted in a settlement of the *Wood* action, but not Morgan's case. Pet.App.2. Just three weeks later, with adversarial proceedings in some forum now seemingly unavoidable, and this Court having foreclosed any possibility that Sundance could be consigned to collective, rather than bilateral, arbitration by issuing its decision in *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407 (2019), Sundance moved under Sections 3 and 4 of the FAA for an order compelling arbitration and either staying or dismissing the litigation. JA75-76. At that point, no proposed scheduling order had been filed, no initial scheduling conference had taken place, no discovery had been conducted, and no merits-related motions had been filed.

Morgan opposed that motion. She did not argue that the arbitration agreement was invalid, revocable, or inapplicable. Nor did she argue that Sundance had missed some contractual or court-imposed deadline for invoking its right to arbitrate. Nor did she argue that, under generally applicable Iowa contract law, Sundance had waived its right to invoke arbitration or was estopped or barred by laches from invoking the right. Instead, she resisted arbitration solely by invoking Eighth Circuit law and arguing that Sundance "waived its right to compel arbitration by its actions of participating in this lawsuit and its delay in raising the issue of arbitration." Pl's.Resp.4 (May 17,

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Federal Rules provide that leave to amend shall be freely given. *See* Fed. R. Civ. P. 15.

2019). While Morgan argued that Sundance forfeited its right to arbitrate even in the absence of prejudice, she also claimed that she was prejudiced by the delay because her counsel spent time reviewing emails that Sundance produced in *Wood* (but not in this case), and because she and the *Wood* plaintiffs jointly hired an expert to analyze a spreadsheet of payroll information that Sundance prepared to facilitate the mediation. *Id.* at 6-7. The district court denied Sundance's motion, ruling that Sundance "acted inconsistently with its right to arbitrate" and that those actions resulted in "a waste of effort that would not have been necessary, or a reasonable choice, had Sundance asserted its right to compel arbitration promptly after the lawsuit was filed." Pet.App.29, 33.

The Eighth Circuit reversed. In a 2-1 decision, the court held that "Sundance did not waive its contractual right to invoke arbitration." Pet.App.6. The court explained that under circuit law "[a] party waives its right to arbitration if it: (1) knew of an existing right to arbitration; (2) acted inconsistently with that right; and (3) prejudiced the other party by these inconsistent acts." Pet.App.3. The first element was undisputed. *Id.* Addressing the second element, the court "question[ed]" the district court's determination that Sundance acted inconsistently with its right to arbitrate, noting that "although there was an eight-month delay, the parties spent very little of this time actively litigating and no time on the merits of the case." Pet.App.4-5.

Turning to prejudice, the court explained that "[p]rejudice may result from lost evidence, duplication of efforts, use of discovery methods unavailable in

arbitration, or litigation of substantial issues going to the merits." Pet.App.5. The court found none of that here. Morgan failed to show prejudice, the court explained, because "[f]our months of the delay entailed the parties waiting for disposition of Sundance's motion to dismiss" on non-merits grounds, "[n]o discovery was conducted," and "the record lacks any evidence that Morgan would have to duplicate her efforts during arbitration" because "most of Morgan's work focused on the quasi jurisdictional issue, not the merits." Pet.App.6. The court accordingly concluded that "Sundance did not waive its contractual right to invoke arbitration" and reversed. *Id.* Judge Colloton dissented, explaining that he would have found Morgan prejudiced and suggesting that the prejudice requirement, while entrenched in Eighth Circuit precedent, was "debatable." Pet.App.10.

Morgan filed a petition for certiorari that did not seek review of the Eighth Circuit's case-specific finding that she failed to prove prejudice, but rather took issue only with the Eighth Circuit's "requirement" that she "prove prejudice." Pet.i.

SUMMARY OF ARGUMENT

Section 3 of the FAA specifically addresses motions to stay litigation in favor of agreed-upon arbitration, and it provides a clear, pro-arbitration direction to courts: Grant the stay unless the party seeking to arbitrate is "in default." While the FAA does not define "in default," in 1925 and today, a party is not "in default" unless it violates a clear legal rule or causes prejudice to another. If the arbitration agreement or the Federal Rules gave Sundance only 30 days after a court filing to invoke arbitration and

Sundance waited 31 days, it would be in default. But here, the agreement and Federal Rules impose no deadline, and the incorporated arbitration rules provide that "judicial proceedings" do not waive the right to arbitrate. There is thus no basis to find default here, and Section 3's clear stay-absent-default direction provides a sufficient basis to affirm.

Morgan fares no better under Section 2 of the FAA. Section 2 is no less "[i]n line with" the "'liberal federal policy favoring arbitration'" than the rest of the Act. *Concepcion*, 563 U.S. at 339 (*quoting Moses H. Cone*, 460 U.S. at 24). Section 2 and *Concepcion* set a floor, not a ceiling; they are unconcerned if arbitration agreements are treated more favorably than other contracts. And Section 2 does not address efforts to avoid compliance with a valid arbitration agreement. But even if the proper test for whether a party has waited (or litigated) too long before invoking its right to arbitrate lay in state-law saved from preemption under Section 2, rather than in a uniform federal rule under Section 3, Morgan still could not justify a rule that requires arbitration rights to be asserted at the earliest feasible juncture without regard to whether anyone is prejudiced by delay. When a party has not expressly and intentionally relinquished a contractual right, but rather has simply waited (or litigated) too long before invoking it, the relevant state-law doctrines are laches and estoppel, both of which require a showing of prejudice. And even when a party has unilaterally waived a contractual right, state law allows the waiver to be retracted in the absence of prejudice. In short, all state-law roads lead to prejudice, and no state embraces the harsh use-it-as-expeditiously-as-

feasible-or-lose-it rule that Morgan advocates. If any state did adopt such a rule, it would be precisely the kind of anti-arbitration rule that the equal-footing doctrine protects against.

A rule that the right to arbitrate is not lost absent a violation of a clear deadline or prejudice to another is supported by the text and policies of the FAA as well as common sense. There are multiple reasons—from pursuing settlement to ascertaining changing appellate doctrine—why a party surprised by litigation filed by someone who agreed to settle disputes by "arbitration, instead of going to court" might make some initial defensive court filings before invoking its contractual right to arbitrate. And there is no reason the defendant should be put on an invisible clock or subjected to unwritten rules just because the plaintiff has disregarded the arbitration agreement. Morgan asserts that her harsh rule is necessary to prevent "gamesmanship" and promote efficiency. But a prejudice requirement is perfectly tailored to weed out gamesmanship, while a requirement to file as expeditiously as possible without regard to prejudice is wildly overinclusive. This Court has already rejected the argument that the FAA values efficiency over enforcing the parties' agreement as written, and there is nothing efficient about green-lighting a nationwide collective action when the parties agreed to bilateral arbitration.

In the end, the choice here is clear. A federal rule that promotes arbitration and enforces the parties' agreement absent prejudice is entirely consistent with the FAA and this Court's precedents. An invented state-law rule that borrows the harshest features of

inapposite doctrines and finds forfeiture of the contractual and statutory right to arbitrate at the drop of a hat has nothing to recommend it. The Court should affirm.

ARGUMENT

I. Section 3 Of The FAA Directly Addresses The Question Here And Requires Affirmance.

Morgan's argument rests on the premise that whether a party is entitled to stay litigation in favor of agreed-upon arbitration is governed by an equal-footing doctrine derived from Section 2 and this Court's decision in *Concepcion*. But she never actually explains why that would be so. In fact, there is a provision in the FAA that specifically addresses the circumstances in which courts should stay litigation in favor of the arbitration the parties agreed to pursue "instead of going to court." That provision is Section 3, not Section 2. Section 3 provides a clear, uniform, federal-law answer to the question whether litigation should be stayed pending arbitration. It provides that courts "shall" stay the litigation and enforce the arbitration agreement, unless the party seeking that relief is "in default." While the FAA does not define "in default," both in 1925 and today, a party is not in default absent a failure to abide by clear rules, or at least prejudice to the other side. That understanding is consistent with the use of default in other provisions of the FAA and with the FAA's "'liberal federal policy favoring arbitration.'" *Concepcion*, 563 U.S. at 339 (*quoting Moses H. Cone*, 460 U.S. at 24). And that rule is sufficient to decide this case and affirm the decision below.

A. Section 3 Directs Courts to Stay Litigation in Favor of Agreed-Upon Arbitration Absent Default.

This case arises out of Sundance's application under Section 3 for a stay of litigation and to compel arbitration under Section 4. Sundance invoked Section 3 for a reason: It specifically addresses the circumstances in which courts should stay litigation in favor of agreed-upon arbitration. And Section 3 provides one, and only one, ground on which a court can withhold that relief: A court "shall" stay litigation at the request of a party to a valid and applicable arbitration agreement "providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. §3. Thus, under the FAA, unless the party seeking to arbitrate is "in default," the court "shall" stay the litigation in favor of the parties' agreed-upon arbitration.

Although the more general—and equally pro-arbitration—text of Section 2 ultimately supplies the same answer, *see infra* Part II, there is no need to look beyond Section 3, which specifically addresses the question and provides clear direction: Enter a stay absent default. "It is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992); *accord* Antonin Scalia & Bryan A. Garner, *Reading Law* 183-88 (2012). That is particularly true where, as here, "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012); *see also Int'l Paper Co. v.*

Ouellette, 479 U.S. 481, 494 (1987) ("[W]e do not believe Congress intended to undermine this carefully drawn statute through a general saving clause."). Congress "deliberately targeted" the specific question of when to stay litigation in favor of a valid arbitration agreement in Section 3, and it provided the "specific solution[]" of directing courts to stay litigation unless the party seeking to arbitrate is "in default."

Section 2, by contrast, deals with the distinct question of whether the arbitration agreement itself is valid, irrevocable, and enforceable. Like Section 3, it provides a broad, pro-arbitration rule, subject only to a limited proviso. Section 2 provides that arbitration agreements are "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. But Section 2 and its saving clause are directed to a different question than Section 3's "in default" direction. An objection to a motion to stay or compel arbitration based on delay or litigation conduct is not a ground for rendering a contract invalid or unenforceable, let alone for revoking it. Such an objection is a case-specific argument that asks the court to disregard a concededly valid and enforceable contract because the other side delayed in invoking it. The objection does not call into question the validity of the underlying arbitration agreement or provide any basis for revoking or disregarding it if a subsequent dispute arises between the parties. Thus, Section 3 provides both the most specific and the most apposite basis on which to decide whether Sundance waited or litigated too long before seeking to stay this litigation in favor of agreed-upon arbitration.

Consistent with that understanding, this Court has previously resolved a litigation-conduct-grounded objection to a Section-3 stay application by reference to Section 3 and its "in default" standard, not by reference to state-law contract defenses saved by Section 2. *See Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.*, 293 U.S. 449, 454 (1935) (affirming for "[t]he reasons … stated in the opinion of the Court of Appeals" decision analyzing issue under Section 3), *aff'ing* 70 F.2d 297 (2d Cir. 1934) (L. Hand, J.). So too has every court of appeals—not just "some" or "several" of them, Pet'r.Br.15, 38. While most modern cases now cite established circuit precedent without referencing any specific FAA provision, every circuit's test can be traced back to an earlier case that recognized Section 3 as controlling. The decision below, for example, does not cite any specific FAA section, but circuit precedent traces back to *N & D Fashions, Inc. v. DHJ Indus., Inc.*, 548 F.2d 722 (8th Cir. 1976), which expressly invoked Section 3. *Id.* at 728. The story is the same in every other circuit.[2]

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[2] *See Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 13 (1st Cir. 2005); *Shanferoke Coal*, 70 F.2d at 299; *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 217-18 (3d Cir. 2007); *Carolina Throwing Co. v. S&E Novelty Corp.*, 442 F.2d 329, 330 (4th Cir. 1971); *Tenneco Resins, Inc. v. Davy Int'l, A.G.*, 770 F.2d 416, 420 (5th Cir. 1985); *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 393-94 (6th Cir. 2008); *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 712 F.2d 270, 272-73 (7th Cir. 1983); *Shinto Shipping Co. v. Fibrex & Shipping Co.,* 572 F.2d 1328, 1330 (9th Cir. 1978); *Legal Servs., Inc. v. Cahill*, 786 F.3d 1287, 1296 (10th Cir. 2015); *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1316 (11th Cir. 2002); *Zuckerman Spaeder, LLP v. Auffenberg*, 646 F.3d 919, 921 (D.C. Cir. 2011).

Morgan identifies no reason to depart from that long-settled consensus at this late date. Not only is it sound as a matter of statutory construction, but treating this litigation-conduct-based defense as governed by Section 3 and its stay-absent-default rule has the considerable virtue of ensuring a uniform federal standard that does not turn on the vagaries of any one state's contract law.

That makes particularly good sense because the conduct that gives rise to the supposed "waiver" is not the type of primary conduct typically addressed by substantive state law. It consists of delay in invoking a legal remedy and/or in-court, litigation conduct of the kind that federal courts assess every day through application of the Federal Rules and their inherent powers—applying principles that do not deprive litigants of statutory or contractual rights absent a violation of clear rules or prejudice to the other side. Moreover, a federal-law default rule allows this Court to develop standards that promote the FAA's pro-arbitration policies, rather than policing state-law doctrines to ensure that they are being applied even-handedly, not manipulated out of judicial hostility to arbitration. Finally, Section 3 and its stay-absent-default rule give primacy to the terms of the parties' agreement. Where the parties provide for clear time limits, a party that violates them will plainly be in default. *See infra* Part I.B. But where, as here, the agreement imposes no deadline and the parties incorporate rules that provide that participation in judicial proceedings does not foreclose a right to arbitrate, Section 3 allows courts to honor the parties' agreement.

B. A Party Is Not "In Default" Under Section 3 Absent a Violation of a Clear Rule or a Showing of Prejudice.

If courts "shall" issue a stay of litigation in favor of agreed-upon arbitration absent default, that leaves only the question of what constitutes default. While the FAA does not define the term "in default," in both 1925 and today, a party is not "in default" absent a violation of a clearly established duty, or at least prejudice to the other parties. *See, e.g.*, *Food Mktg. Inst. v. Argus Leader Media*, 139 S.Ct. 2356, 2362 (2019) (absent a statutory definition, statutory terms should be given their "ordinary, contemporary, common meaning"); *accord Reading Law* 69-77.

When the FAA was enacted, as now, "default" meant the "omission or failure to fulfill a duty, observe a promise, discharge an obligation, or perform an agreement." *Default*, Black's Law Dictionary (3d ed. 1933); *see also Default*, Black's Law Dictionary (11th ed. 2019) (defining "default" as "[t]he omission or failure to perform a legal or contractual duty"); *Default*, Random House Dictionary of the English Language (unabridged ed. 1967) (defining "default" for legal purposes as "failure to perform an act or obligation legally required, esp. to appear in court or to plead at a time assigned"). Moreover, as Morgan acknowledges, a party who initially defaults can generally cure that default absent prejudice to another; a party who has cured is no longer "in default." *See infra* pp.23-24. That the FAA uses the term "default" in its ordinary sense is confirmed by Section 4, which uses the term "default" synonymously with "failure, neglect, or refusal" to comply with a

contractual duty to arbitrate and allows someone "aggrieved" by such a default to compel arbitration. 9 U.S.C. §4.

The concept of default is straightforward when it comes to contractual obligations. A party that disregards a clear contractual time limit or other contractual obligation is plainly "in default." *See, e.g.*, Pet'r.Br.39-42 (citing authorities invoking default in the form of breach of a contractual duty). Thus, if a contract required parties to initiate arbitration within 30 days of receiving notice of litigation, a party who waits 60 days—or even 31 days—to initiate arbitration would be in default. But when the contract is silent on the timeliness of asserting a particular contractual right, simply delaying the assertion of that right without any prejudice to another does not constitute default. And when, as here, the contract incorporates rules that expressly provide that "[n]o judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate," AAA Rules R. 42(a), it would be well-nigh impossible to find a party "in default" just by failing to assert a "right to arbitrate" at the earliest feasible juncture in a "judicial proceeding."

As noted, this interpretation of "default" comports with the use of the term in Section 4 of the FAA. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) ("[I]dentical words used in different parts of the same statute are generally presumed to have the same meaning."); *accord Reading Law* 170-73. It also reinforces the broader policy of the FAA to allow the parties to "'enforce' arbitration agreements according to their

terms." *Italian Colors Rest. v. Becerra*, 570 U.S. 228, 233 (2013); *see also, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1621 (2018). When the parties agree to resolve their disputes via "arbitration, instead of going to court," JA77, and incorporate rules that expressly protect against finding a waiver of a right to arbitrate based on judicial proceedings, JA78, both the plain text of Section 3 and the broader purposes of the FAA counsel against finding a party "in default" based on participation in judicial proceedings, at least absent material prejudice to other parties, *see infra* pp.22-25.

That is not to say that Section 3's concept of default is limited to contractual duties. A party can also find itself in default by virtue of failing to comply with a duty imposed by directly applicable law—a duty that may or may not consider prejudice to others. When a statute or court rule imposes a legal duty to take certain action by a certain time, a party that fails to do so is "in default" of that obligation.[3] When the conduct alleged to put a party "in default" is litigation activity, the most apposite source of legal duties will be court rules. For example, courts enter a default judgment if a defendant "has failed to plead or otherwise defend" in the time required by the federal rules. Fed. R. Civ. P. 55(a). Such rules, much like contractual provisions imposing time limitations, generally provide clear deadlines and, in the absence

[3] For instance, one of Morgan's examples of a statutory reference to default includes just such a specific time deadline. 20 U.S.C. §1087bb(g)(2) (student loan is "in default" after the borrower fails to make installment payments for "(A) 240 days (in the case of a loan repayable monthly), or (B) 270 days (in the case of a loan repayable quarterly)."); *see* Pet'r.Br.42.

of such clarity, typically take into account prejudice to others. For example, Rule 12(a)(1) provides clear deadlines for certain filings, and Rule 12(h)(ii) provides clear instructions that certain defenses must be raised at a particular juncture.[4] Absent such clear deadlines, the Rules typically prescribe a standard—like the permissive standard for amending pleadings—that allows the court to account for prejudice to others. But Sundance is not "in default" of any rule-based deadline or standard.[5]

Morgan complains that if "default" is limited to violations of clear contractual or legal obligations, then courts could not find a party "in default" even if its delay has caused significant prejudice to the other side. Pet'r.Br.40-42. But that argument ignores that contracts can, and court rules often do, build in considerations of prejudice, especially when a party is alleging that the other side forfeited a right in the absence of a clear deadline. Just as nothing stops parties from imposing contractual deadlines for invoking arbitration—or incorporating rules that do likewise—nothing stops parties from agreeing to standards that make the absence of prejudice to the

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[4] That kind of clear rule explains why failure to raise a venue objection in a responsive pleading forfeits that objection "without considering prejudice." Academy.Br.3. The Federal Rules expressly require a venue objection to be raised in a responsive pleading. *See* Fed. R. Civ. P. 12(h)(1)(B)(ii).

[5] Rule 8(c)(1) requires the affirmative defense of "arbitration and award" to be asserted in a responsive pleading, but that defense "is not that the claim should be arbitrated rather than adjudicated in court; it is that the claim *has already* been resolved by an award in arbitration." *Hill v. Ricoh Ams. Corp.*, 603 F.3d 766, 771 (10th Cir. 2010) (emphasis added).

other side a prerequisite to compelling arbitration. Such a provision may seem out of place in most arbitration agreements, but that is only because the thrust of those agreements is to facilitate "arbitration, instead of going to court," JA77, not vice-versa.

Moreover, as noted, consideration of prejudice is hardly out of place in the Federal Rules, where issues of timeliness not resolved via clear deadlines account for prejudice. Most obviously, Rule 15 addresses the circumstances in which parties may amend their pleadings, and it instructs that even when amendment is not allowed as a matter of right, leave to amend should be "freely give[n] … when justice so requires." Fed. R. Civ. P. 15(a)(2). That capacious standard obviously allows for consideration of prejudice to other parties and the court itself. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also, e.g., Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020) ("Of the *Foman* factors, prejudice to the opposing party carries the most weight."); *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001) ("Prejudice is the touchstone of the inquiry under rule 15(a).").[6]

The statutory term "in default" can also allow for consideration of prejudice even when neither the contract nor the applicable rules directly account for it, as evidenced by the fact that the overwhelming

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[6] Morgan seems to think that because a party can unilaterally default on a deadline or other legal duty, the default inquiry can focus only on the defaulting party. But that ignores that many legal duties themselves require prejudice to another before the duty is violated. In that context, one cannot tell whether a party unilaterally defaulted without considering prejudice to others.

majority of circuits, all of which ground their test in Section 3, allow for consideration of prejudice. In this regard, it is telling that Section 3 uses the phrase "in default." Even if a party has defaulted by waiting or litigating too long before invoking its right to arbitrate, it could still "cure" any default if it asserts the right before the other side is materially prejudiced. *See, e.g.*, *Khochinsky v. Republic of Poland*, 1 F.4th 1, 7 (D.C. Cir. 2021) (in deciding whether to set aside default judgment under Rule 55(a), courts must consider "whether … a set-aside would prejudice plaintiff"); *accord* Pet'r.Br.42-43 (acknowledging that concept of "cure" is "focused on harm that defaults cause to others"). And a party that has cured a default is no longer "in default." *E.g.*, *Guffey v. Smith*, 237 U.S. 101, 118 (1915).

The possibility of considering prejudice to others as part of a statutory "in default" inquiry is consistent with Section 4, which treats "neglect" as a form of default and authorizes a motion to compel when default has "aggrieved" the other party to the agreement. Moreover, courts have also found a party "in default" when litigation misconduct does not violate a specific rule but prejudices others in ways that implicate the court's inherent powers. While the circuits may take different paths to the prejudice requirement and state their tests in varying ways, the tests boil down to the same basic proposition: Courts may deny a Section 3 stay application "only when participation in the litigation has been so substantial that compelling arbitration would prejudice the other

party." *Cargill Ferrous Int'l v. Sea Phoenix MV*, 325 F.3d 695, 700 (5th Cir. 2003).[7]

What has nothing to recommend it, and no basis in statutory text, congressional purposes, or anything else, is a construction of Section 3 that would find a party "in default" in the absence of *either* a violation of a contractual/legal duty *or* prejudice to others. The whole thrust of the law, as reflected in the federal rules and the whole body of state law surveyed in Part II, *infra*, is to deal with timeliness issues and litigation conduct in one of two ways: clear deadlines or more flexible standards that require prejudice before

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[7] *See, e.g.*, *Creative Sols. Grp., Inc. v. Pentzer Corp.*, 252 F.3d 28, 32 (1st Cir. 2001) ("[M]ere delay in seeking arbitration without some resultant prejudice to a party cannot carry the day."); *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 105 (2d Cir. 2002) ("Waiver of the right to compel arbitration due to participation in litigation may be found only when prejudice to the other party is demonstrated."); *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 598 (3d Cir. 2004) ("[P]rejudice is the touchstone for determining whether the right to arbitrate has been waived" by litigation conduct.); *Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley, Inc.*, 683 F.3d 577, 587 (4th Cir. 2012) ("[T]he dispositive question is whether the party objecting to arbitration has suffered *actual prejudice*."); *Shy v. Navistar Int'l Corp*, 781 F.3d 820, 827-28 (6th Cir. 2015) ("A party waives arbitration if … opposing party incurred actual prejudice."); *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 793 (8th Cir. 1998) (same); *Shinto Shipping*, 572 F.2d at 1330 (9th Cir. 1978) ("[T]his court must be convinced … that the appellant was prejudiced … before we can find a waiver."); *Hart v. Orion Ins. Co.*, 453 F.2d 1358, 1361 (10th Cir. 1971) ("The question of waiver turns on the presence or absence of prejudice."); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000) (finding waiver if "a party's 'substantial participation in litigation' … results in prejudice").

finding that a party has lost a right. Virtually no one puts parties in the impossible position of losing rights forever without either blowing a clear statutory deadline or prejudicing someone else through delay. That is particularly true when the party is seeking to vindicate a clear, non-time-limited right, like the right to settle disputes through "arbitration, instead of in court." And it is particularly true when the parties' contract incorporates rules that assure a party that it will not lose its right to arbitrate in light of judicial proceedings. To find a "default" in those circumstances, in the absence of prejudice to anyone, including the party who agreed to arbitrate but filed litigation instead, would be the height of unfairness.

Such a concept of "default" would also run counter to the policies underlying the FAA. Despite Morgan's protestations to the contrary, Pet'r.Br.34-35; Professors.Br.5-10, 16-20, the FAA is not studiously neutral on the subject of arbitration. This Court has repeatedly stressed that the FAA was designed to counteract judicial hostility to arbitration. Indeed, the Court's "cases place it beyond dispute that the FAA was designed to promote arbitration." *Concepcion*, 563 U.S. at 345. And time and again, the Court has admonished that the FAA requires courts to resolve "any doubts [about] waiver, delay, or a like defense to arbitrability" "in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25. Thus, even allowing for the possibility that the phrase "in default" appearing in a hypothetical Federal Anti-Arbitration Act could require a party to invoke its right to arbitrate at the earliest feasible juncture or lose it forever, without regard to prejudice to others, positing such an interpretation of the FAA is a non-starter.

Applying these principles here, it is clear that Sundance was not "in default" within the meaning of Section 3, and that the decision below ordering a remand to issue a stay should be affirmed. Morgan does not and cannot claim that there was a default under the parties' arbitration agreement or the arbitration rules that the agreement incorporates by reference. To the contrary, those rules affirmatively reassured Sundance that participating in a judicial proceeding would not waive its right to arbitrate. And no federal statute or rule imposes any deadline for initiating arbitration or seeking a stay of litigation under Section 3. Finally, Morgan did not take issue with the Eighth Circuit's finding of no prejudice in either her petition for certiorari or her opening brief. Rather, the lack of prejudice here is the premise of her question presented. Thus, given the absence of any violation of a clear contractual or legal obligation or any prejudice to Morgan, Section 3 not only is the most apposite statutory provision, but provides a sufficient basis to affirm the decision below.

II. The Same Conclusion Would Follow Under Section 2 And Its Saving Clause.

Morgan fares no better under Section 2 of the FAA. That section neither embraces a stand-alone requirement that arbitration agreements be treated no better than any other contract nor even governs the question whether a right to arbitrate under a valid agreement has been lost due to delay or participation in litigation. Consistent with that reality, Morgan did not resist Sundance's motion to compel arbitration on the ground that doing so would be inconsistent with Iowa's law of contractual waiver; she did so by

invoking Eighth Circuit precedents that are grounded in Section 3 and require a showing of prejudice.

But even if Section 2 and state law governed, they would not help Morgan because neither Iowa nor states more generally treat contractual rights as definitively "waived" whenever they are not invoked at the earliest feasible juncture. Indeed, when the concern is not the intentional relinquishment of a known right, but a delay in asserting a right while engaging in arguably inconsistent conduct, "waiver" is not even the correct concept. The relevant doctrines are laches and estoppel, both of which require consideration of prejudice to others. Moreover, even when a contractual right is waived, one can typically retract the waiver unless doing so would prejudice the counterparty. In short, all state-law roads lead to prejudice; no relevant doctrine treats the failure to assert a contractual right at the earliest feasible juncture as a definitive forfeiture of the right without regard to prejudice. Adopting such a novel concept in the arbitration context alone not only would be fundamentally unfair, but is the one step that actually would run afoul of Section 2 and the FAA's policy against treating the right to arbitrate less favorably than all other contractual rights.

A. Section 2 Prohibits Discrimination Against Arbitration but Does not Impose a Strict Equal-Treatment Principle or Govern the Timeliness of Demanding Arbitration Under a Valid Agreement.

Morgan's argument is premised on the view that Section 2 and this Court's decision in *Concepcion* impose a strict equal-footing requirement that would

prevent a court from imposing an arbitration-specific rule treating arbitration agreements more favorably than other contractual rights. That gets matters very nearly backwards. The FAA is not offended by arbitration-specific rules that single out arbitration agreements for especially favorable treatment. Indeed, that is a fair description of the FAA itself.

While this Court has used terms like "equal-footing" as a shorthand to describe Section 2's saving clause, it is a mistake to think of Section 2 as a kind of strict equal-treatment rule, like the Equal Protection Clause or Title VII, that is equally offended by "reverse discrimination" in favor of arbitration. Instead, like the rest of the FAA, Section 2 is decidedly pro-arbitration and strongly favors the enforcement of arbitration agreements. *See, e.g.*, *Italian Colors*, 570 U.S. at 233; *Moses H. Cone*, 460 U.S. at 24. In that regard, Section 2 and its saving clause are better understood as adopting a most-favored-nations-clause approach to arbitration, rather than a strict regime of equal treatment. As long as arbitration agreements are enforced at least as favorably as other contracts, Section 2 is not offended.

Concepcion is entirely consistent with that understanding. In fact, the Court there specifically tied its equal-footing language to the "'liberal federal policy *favoring* arbitration'" and described the former as "[i]n line with" the latter. *Concepcion*, 563 U.S. at 339 (*quoting Moses H. Cone*, 460 U.S. at 24) (emphasis added). Equally important, the *Concepcion* Court ultimately held that even a state law that purports to be neutral and generally applicable is preempted if it targets arbitration or the characteristics of traditional

bilateral arbitration. *Id.* at 341-42. Such a law frustrates the objectives of the FAA to favor arbitration and the enforcement of arbitration agreements according to their terms. But there is no comparable doctrine that requires the preemption of state laws that favor arbitration. Such a law would not implicate the FAA, its saving clause, or the equal-footing principle at all.

There is a further obstacle to applying Section 2 to require courts to employ state law to deny a motion to stay litigation in favor of a valid arbitration agreement: Section 2 addresses contract-law defenses that go to the validity of the arbitration agreement, not strained contract-law analogies to whether the assertion of a right to arbitrate under a concededly valid agreement is timely. The point here is not just that Sections 3 and 4 address those matters more directly (though they do). *See supra* pp.15-18. In addition, Section 2 and especially its saving clause focus on state-law arguments that go to the validity, enforceability, or revocability of the arbitration agreement itself. In fact, the text of the saving clause addresses only "such grounds as exist at law or in equity for the *revocation* of any contract." 9 U.S.C. §2 (emphasis added). There is no way to understand an arguably untimely assertion of a right to arbitrate as a ground for revoking the underlying contract. *See Concepcion*, 563 U.S. at 354 (Thomas, J., concurring). But even if one assumes that the saving clause is co-extensive with Section 2's principal clause, and saves state-law doctrines implicating the validity and enforceability of an arbitration agreement, it still would not reach an argument that a valid arbitration agreement, which could be timely invoked in a

subsequent dispute, should be ignored because a litigant delayed in invoking it.

Consistent with all that, Morgan did not argue in the courts below that the arbitration agreement was unenforceable under Iowa law or even rely on Iowa principles of contractual waiver as the basis for resisting Sundance's motion to stay the litigation in favor of agreed-upon arbitration. Instead, she invoked Eighth Circuit law that is grounded in Section 3 and requires a showing of prejudice. If she had argued that the reason that Sundance was untimely was because Iowa contractual waiver principles apply directly and satisfy the saving clause, the misfit between that argument and the text of Section 2 would have been evident. Moreover, if she had made the argument in those terms, then it would have been clear that nothing in Iowa law or state law more generally supports her harsh use-it-as-expeditiously-as-feasible-or-lose-it rule, as shown next.[8]

[8] To the extent Morgan's theory is not that Iowa law, saved by Section 2's saving clause, renders Sundance's motion untimely, but that federal common law extrapolated from Section 2 does that work, the argument is even less tenable. Any federal common law based on Section 2 would need to advance the federal policy favoring arbitration embodied in the FAA, but for all the reasons explained, Morgan's proposed use-it-or-lose-it rule does the opposite.

B. When Parties Delay in Enforcing Contractual Rights, Estoppel and Laches, Not "Waiver," Provide the Correct Framework and Require a Showing of Prejudice.

Morgan's argument depends critically on the notion that the applicable state-law doctrine is "waiver," which does not require a showing of prejudice. But waiver, like jurisdiction, "is a word of many, too many, meanings." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 90 (1998). In particular, as this Court has observed, waiver is often used imprecisely when the proper concept is really forfeiture or some other more precisely apposite doctrine. *See, e.g.*, *Kontrick*, 540 U.S. at 458 n.13. And there is really only one form of waiver that gives rise to anything like the kind of harsh, prejudice-is-irrelevant result that Morgan seeks: "the voluntary and intentional relinquishment of a known and existing right." 13 Williston on Contracts §39:14 (4th ed.).

If a party to an arbitration agreement walks into its counterparty's office and expressly disavows any intent to enforce the agreement, it can properly be said to have *waived* its right to invoke the arbitration provision. So too if a party files a document in court explicitly disclaiming any desire to arbitrate. Morgan is correct that this kind of express "waiver of contractual rights is accomplished unilaterally" in most states. Pet'r.Br.22. But *that* doctrine has no role to play in virtually any Section 3 case, as it would be the rare applicant who seeks a stay after having affirmatively and explicitly disavowed its right to

arbitrate. That is certainly not what happened here; Morgan does not and cannot claim that Sundance ever *expressly* waived its right to insist on the arbitration to which the parties agreed.

State courts will sometimes talk about "implied waiver," where in the absence of an express waiver, a party undertakes "a *clear, unequivocal, and decisive* act…, so consistent with an intention to waive that *no other reasonable explanation is possible*." 13 Williston on Contracts §39:28 (emphases added); *MidWestOne Bank v. Heartland Co-op*, 941 N.W.2d 876, 888 (Iowa 2020) ("[T]o establish implied waiver by conduct, there must exist clear, unequivocal, and decisive conduct demonstrating intent to waive."); *In re Sykes*, 497 N.W.2d 829, 833 (Iowa 1993) ("[I]mplied waiver … occur[s] by some clear, unequivocal, and decisive act … inconsistent with any other intention than waiver of the right at issue."). But even that kind of "implied waiver" might be better understood as forfeiture, and in all events is doubly irrelevant. First, at least some jurisdictions will not apply the doctrine of implied waiver without a showing of prejudice to other parties.[9] Second, the standard for that kind of implied waiver is extremely demanding, and it is not remotely satisfied by the kind of actions taken by Sundance here.

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[9] *See, e.g.*, *Eagle Springs Homeowners Ass'n, Inc. v. Rodina*, 454 P.3d 504, 513 (Idaho 2019); *Olsen v. Milner*, 276 P.3d 934, 939 (Mont. 2012); *Anderson v. Coop. Ins. Cos.*, 895 A.2d 155, 159 (Vt. 2006); *Greensburg Deposit Bank v. GGC-Goff Motors*, 851 S.W.2d 476, 478 (Ky. 1993); *Mark v. Hahn*, 177 So.2d 5, 8 (Fla. 1965); *Brown v. City of Pittsburgh*, 186 A.2d 399, 401 (Pa. 1962); *Morgan Cnty. v. Gay*, 834 S.E.2d 576, 587 (Ga. Ct. App. 2019).

Responding to the other side's court filings may be in some tension with a later assertion of a right to arbitrate, but the two courses of action are hardly so irreconcilable that "no other reasonable explanation is possible." In fact, there are numerous reasonable explanations for why a party would participate in litigation without intending to surrender its right to compel arbitration at some future time. For example, a defendant caught by surprise by litigation initiated by an employee who agreed to resolve disputes via "arbitration, instead of going to court" may need to make ministerial or threshold filings in court before initiating arbitration in hopes of persuading the employee to honor the agreement or reach a settlement. Another defendant may await an impending judicial decision clarifying the validity of a state anti-arbitration rule or the prospects of being subjected to class-wide arbitration. Another defendant might wait in reliance on a contractual assurance that judicial proceedings cannot provide a basis for finding a waiver of its right to arbitrate. Another defendant with a strong jurisdictional or procedural defense might seek to obtain a quick dismissal in court without intending to waive its right to resolve the merits in arbitration should that threshold defense not prevail. And so on. There is no shortage of reasonable reasons why a party to an arbitration agreement that is nonetheless subjected to litigation might make some initial defensive filings before invoking its right to arbitrate without clearly and unambiguously relinquishing that right.

To be sure, a defendant might opt to participate in litigation for decidedly less savory reasons, such as the hope of preserving arbitration as an "escape hatch"

in case things start going poorly in a judicial forum that initially seems favorable. Pet'r.Br.49. But that kind of intentional ploy hardly reflects an intentional relinquishment of the right to arbitrate. To the contrary, the very fact that the sandbagging defendant planned for the possibility of belatedly demanding arbitration confirms that it never intended to disavow arbitration. *See* 13 Williston on Contracts §39:28 ("[Implied waiver] is dependent solely on what the party charged with waiver intends to do."). By definition, a defendant who litigates while "holding a demand for arbitration in reserve like an ace in the hole to be played at … the most opportune time," Pet'r.Br.48, never intends to relinquish the right to play the ace or to waive its right to arbitrate.

But while neither delay nor participation in judicial proceedings constitutes an intentional relinquishment of the right to arbitrate, there are state-law doctrines that directly address the concern that a party could wait too long to assert a right (even in the absence of a clear deadline) or engage in conduct that lulls a counterparty into a false sense that the right will never be asserted. Those directly applicable doctrines are laches and estoppel. The problem for Morgan is that both doctrines require a party seeking to invoke the defense to show prejudice, as she correctly concedes. *See* Pet'r.Br.24-29.

To the extent the concern is that one party simply waited too long to assert its right to arbitrate despite the absence of any specific time limit in the contract, the apposite doctrine is laches. Laches bars parties from obtaining judicial relief if they unreasonably delay in asserting their rights. *See SCA Hygiene*

Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S.Ct. 954, 960 (2017). But as Morgan concedes, Pet'r.Br.28-29, laches bars relief only if the party's "unreasonable delay in prosecuting a claim or protecting a right *has worked a prejudice*" to the other party. 1 D. Dobbs, Law of Remedies §2.3(5) (2d ed. 1993) (emphasis added). To the extent the concern is not just the passage of time, but that one party engaged in conduct—here, litigation—that the other party may have perceived as inconsistent with a later invocation of the right to arbitrate, the apposite doctrine is estoppel. But estoppel likewise applies only when one party "was misled *to its prejudice* by the conduct of the other party into the honest and reasonable belief that the latter was not insisting on, and was therefore giving up, some right." 13 Williston on Contracts §39:29 (emphasis added); *see also, e.g.*, *Oklahoma v. Texas*, 268 U.S. 252, 257 (1925).

To be sure, some courts have created potential confusion, which Morgan seeks to exploit, by labeling this defense "waiver by litigation conduct" or even "waiver by estoppel." But whatever the precise label employed, this variant of estoppel generally requires a showing of prejudice or detrimental reliance. *See* 13 Williston on Contracts §§39:28-29 (contrasting "true waiver" with "waiver by estoppel based on detrimental reliance"). Indeed, courts that have been careful with their terminology in the arbitration context have acknowledged that "waiver by litigation conduct" is *not* true waiver in the no-prejudice sense, but rather a variant of estoppel or forfeiture. For example, the Tenth Circuit has taken pains to distinguish between "when a party intentionally relinquishes or abandons its right to arbitration," and "when a party's conduct

in litigation forecloses its right to arbitrate." *BOSC, Inc. v. Bd. of Cnty. Comm'rs*, 853 F.3d 1165, 1170 (10th Cir. 2017). And the First Circuit has noted that "the heading 'waiver' … here mean[s] forfeiture rather than intentional relinquishment." *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 12 (1st Cir. 2003); *see also, e.g.*, *Zuckerman Spaeder, LLP v. Auffenberg*, 646 F.3d 919, 922 (D.C. Cir. 2011) ("forfeiture, not waiver, is the appropriate standard for evaluating a late-filed motion under Section 3").

In sum, while a true intentional waiver does not require a showing of prejudice, an effort to estop a party from asserting its contractual right to arbitrate because it waited or litigated too long before invoking it falls in the heartland of the doctrines of laches and estoppel. Those doctrines, which are specifically designed to assign consequences to delay and inconsistent actions, are a much better fit here than waiver. And both require the showing of prejudice that Morgan desperately seeks to avoid.[10]

C. A Party That Waives a Contractual Right May Retract That Waiver Absent Prejudice to Other Parties.

Morgan's position faces one more fatal hurdle: Even if (contrary to fact) waiver were the relevant

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[10] Morgan herself describes prejudice as "the decisive factor distinguishing waiver from estoppel." Pet'r.Br.26. But she overlooks an equally key distinction that makes clear that this case does not involve waiver: "*The intent to relinquish a right is a necessary element of waiver but not of estoppel* while detrimental reliance is a necessary element of estoppel but not of waiver." 28 Am. Jur. 2d Estoppel & Waiver §35 (emphasis added).

concept, there would still be no avoiding a prejudice requirement. Under generally accepted contract principles in Iowa and elsewhere, a waiver "can be retracted at any time before the other party has materially changed his position in reliance" on the waiver, assuming time remains for performance under the contract. Restatement (First) of Contracts §297 (1932); *accord, e.g.*, Restatement (Second) of Contracts §84(2) (1981); 8 Corbin on Contracts §40.1 (2021); 13 Williston on Contracts §39:20. Precisely because of its unilateral nature, a waiver is a promise that requires reliance or consideration to become irrevocable. *See* Restatement (Second) of Contracts §84 cmt. B.[11]

If waiver were relevant at all in the arbitration context, then, the ability to retract absent prejudice would defeat Morgan's effort to avoid the arbitration she agreed to absent any prejudice to her. Unless parties contract for a particular deadline for demanding arbitration, an arbitration agreement remains executory throughout the course of litigation; either party remains able to perform by invoking the arbitration condition. Absent prejudice, a demand for arbitration during litigation would thus retract any purported waiver while it is still possible to satisfy the arbitration provision. *See First State Bank v. Shirley Ag Serv., Inc.*, 417 N.W.2d 448, 454 (Iowa 1987) ("[N]otice of contractual forfeiture is itself a notice of withdrawal of a previous waiver of a contractual right.").

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[11] Morgan resists the proposition that waiver requires reliance or consideration, Pet'r.Br.22-23 & nn.8-9, but the cases she cites focus on what it takes to *accomplish* a waiver, not what it takes to make a waiver *irrevocable*.

Morgan asserts that "most contractual rights can't be reinstated through retraction or revocation of the waiver." Pet'r.Br.22-23 & n.10.[12] But the few cases she cites do not support that proposition. Her lead (and only Iowa) case reached the unremarkable conclusion that retraction is ineffective *after the time for performance passes*. *See Scheetz v. IMT Ins. Co.*, 324 N.W.2d 302, 304-05 & n.2 (Iowa 1982) (rejecting "withdrawal of a waiver with respect to *past* obligations"). But *Scheetz*, like many other Iowa cases, embraced the principle relevant here—*i.e.*, that "one who has waived a condition in a contract may withdraw the waiver, so long as the other party is afforded a reasonable opportunity to perform the conditions of the contract that had been waived." *FS Credit Corp. v. Troy Elevator, Inc.*, 397 N.W.2d 735, 738 (Iowa 1986); *see Scheetz*, 324 N.W.2d at 304 n.2; *see also, e.g.*, *Peoples Tr. & Sav. Bank v. Sec. Sav. Bank*, 815 N.W.2d 744, 763 (Iowa 2012); *Perkins v. Farmers Tr. & Sav. Bank*, 421 N.W.2d 533, 536 (Iowa 1988); *First State Bank*, 417 N.W.2d at 454; *Janes v. Towne*, 207 N.W. 790, 792 (Iowa 1926). Similar problems confront Morgan in every state she invokes.[13]

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[12] Petitioner does not explain her use of the qualifier "most" or whether, under her view of Section 2, different retraction rules would apply to different contracts in different states.

[13] For example, each state she cites has adopted the Uniform Commercial Code provisions authorizing retraction of waiver in sales and lease contracts. Fla. Stat. §§672.208-09; Ind. Code §§26-1-2-209, 26-1-2.1-208; Iowa Code §§554.13208-554.13209; Minn. Stat. §§336.2-209, 336.2A-208; Neb. Rev. Stat. U.C.C. §2-209.

Thus, there is simply no shaking a prejudice requirement. Every conceivably applicable doctrine either requires a showing of prejudice or allows a waiver to be retracted in the absence of prejudice. That is hardly surprising. Neither common-law doctrines nor typical court rules treat a bargained-for contractual right as forever sacrificed unless a party has expressly relinquished it, violated a clear deadline for asserting the right, or caused prejudice to another party. Simply put, absent at least one of those circumstances, there is no valid basis for refusing to enforce the parties' arbitration agreement according to its terms or to deprive a party of its statutory rights under the FAA.

* * *

In the end, Morgan does not seek to block arbitration based on any generally recognized contract doctrine. In a non-arbitration context, a party with a non-time-limited right could plainly invoke the right despite a delay or some arguably inconsistent conduct, absent prejudice to another party. And if the contract specifically provided that the other conduct did not constitute waiver, the question would not be close.

What Morgan seeks is not some generally applicable contract law principle, but a uniquely punitive anti-arbitration rule of her own manufacture: Parties should be deemed to have forever "waived" their right to arbitrate, without regard to prejudice, unless they "seek to compel arbitration of the dispute at the earliest feasible moment." Pet'r.Br.4. That test has no grounding in any generally applicable doctrine. A failure to assert a contractual right not subject to a time limit "at the earliest feasible moment" is the

antithesis of the *intentional relinquishment* of the right to arbitrate. It is the kind of unforgiving rule that Congress might have embraced if its goal was to entrench, rather than counteract, judicial hostility to arbitration. In fact, it is precisely the kind of anti-arbitration rule that Section 2 and *Concepcion*'s equal-footing doctrine guard *against*.

III. The Prejudice Requirement Best Advances The Aims Of The FAA While Foreclosing Gamesmanship.

For the reasons already explained, *see supra* pp.19-41, requiring a showing of prejudice before depriving a party of its bargained-for right to arbitrate, rather than demanding that parties move to compel arbitration at the earliest feasible juncture, best comports with the text and policies of the FAA. It also makes good common sense, as there is no valid reason to deprive a party of its right to arbitrate absent the kind of clear notice provided by contractual or court-imposed deadlines if no one else suffers prejudice. Moreover, as noted, there are numerous reasonable explanations for why a party to a valid arbitration agreement might not invoke it at the earliest possible moment, chief among them the possibility that the dispute could be resolved without expending material judicial or arbitral resources. Here, for example, much of the so-called delay in invoking the agreement is attributable to Sundance's settlement efforts—efforts that not only were undertaken in good faith but were successful with respect to the *Wood* action. Those good-faith efforts to avoid litigation hardly constitute litigation misconduct. A rule under which a defendant could

lose its right to arbitrate by acquiescing in preliminary litigation not directed to the merits of the dispute, while simultaneously engaging in settlement talks, has nothing to recommend it. *See, e.g.*, *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 578 (5th Cir. 1991) ("Attempts at settlement … are not inconsistent with an inclination to arbitrate and do not preclude the exercise of a right to arbitration.").

Morgan's earliest-feasible-invocation rule would be especially inequitable since the party invoking the arbitration provision is typically (as here) the defendant. Unlike a plaintiff who files a lawsuit on its own schedule after as much forethought as it desires, defendants are haled into court against their will, on someone else's schedule, without prior notice, and all despite the parties' agreement to resolve their disputes via "arbitration, instead of going to court." JA77. Defendants often will not even know that there *was* any dispute until the complaint is served (again, despite provisions in the arbitration agreement requiring such prior notice, JA78), let alone know the optimal way to respond. Requiring prejudice before such a party can be deemed to have lost its right to arbitrate allows defendants to appear in court and submit preliminary filings—appearances, answers, and other filings not seeking resolution of the merits—while they investigate the claims, analyze the relevant law (which can be in flux), and assess whether arbitration will be necessary.[14]

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[14] While Morgan brands Sundance's candid admission that it waited for *Lamps Plus* to clarify that a motion to compel would not compel something other than traditional bilateral arbitration as gamesmanship, there is nothing unreasonable about waiting

A strict use-it-or-lose-it rule, by contrast, would illogically reward plaintiffs who have disregarded their own agreement to arbitrate in lieu of litigation by depriving defendants of the ability to conduct due diligence or attempt to resolve the dispute amicably before deciding on the best path forward. Denying defendants that opportunity in the absence of any contractual deadline (and in the face of incorporated arbitration rules that promise that such litigation will not give rise to waiver) is the antithesis of "rigorously" enforcing "arbitration agreements." *Epic*, 138 S.Ct. at 1621.

Text, statutory context, and common sense thus all support a rule that preserves the right to arbitrate absent a violation of a clear deadline or prejudice to others. Against all that, Morgan and her *amici* contend that their use-it-immediately-or-lose-it-forever rule is necessary to prevent gamesmanship. *E.g.*, Pet'r.Br.45-51; AAJ.24-25. That is a strange claim when an earliest-feasible-juncture rule would be wildly overinclusive vis-à-vis that end—causing countless arbitration rights to be forfeited when no gamesmanship is afoot—while the prejudice inquiry is perfectly tailored to preclude gamesmanship. Indeed, every circuit has incorporated an anti-gamesmanship component into its prejudice inquiry, recognizing that "deliberate gamesmanship," *In re Tyco Int'l*, 422 F.3d

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for clarity from a higher court when doing so does not prejudice others. Even the California Supreme Court in *Iskanian v. CLS Transportation Los Angeles, LLC* allowed a party to belatedly invoke a right to arbitrate non-PAGA claims because it waited for this Court's *Concepcion* decision and there was no material prejudice to the plaintiff. 327 P.3d 129, 145 (Cal. 2014).

41, 46-47 (1st Cir. 2005), and efforts "to manipulate the legal process and … waste scarce judicial resources," *Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 453-54 (3d Cir. 2011), are grounds for finding prejudice. When parties litigate for "years, expending judicial resources while extracting information out of the opposing party," AAJ.Br.2, or "try out their legal theories and defenses and learn the strengths and weaknesses of their adversary's case," Pet'r.Br.48, courts find prejudice. Courts have been doing so for decades, and their robust body of decisions rejecting such gamesmanship via prejudice inquiries refutes Morgan's concerns.

The lower courts' success at policing gamesmanship is evident in Morgan's own brief. Morgan highlights four cases, presumably hand-picked from thousands over the FAA's first century, that she claims are particularly egregious examples of a prejudice requirement failing to weed out gamesmanship. But those cases are not as she describes them, and her felt need to embellish her own examples underscores that the prejudice rule is ideally suited to the task of policing gamesmanship.

For example, Morgan claims that the court in *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244 (4th Cir. 2001), declined to find prejudice when an arbitration demand came "years into litigation" and after the defendant "used the court's procedures to seek discovery." Pet'r.Br.49; *see also* Pet.29 (identifying *MicroStrategy* as a "particularly egregious example"). But the supposed "years" of litigation and discovery occurred not in the case *sub judice*, but in "previous lawsuits [that] involved claims legally and factually

distinct from the later claims for which Micro-Strategy sought arbitration." *Forrester v. Penn Lyon Homes, Inc.*, 553 F.3d 340, 344 (4th Cir. 2009) (distinguishing *MicroStrategy* and finding default).

Morgan's other decisions are equally unavailing. In *Walker v. J.C. Bradford & Co.*, the Fifth Circuit found no prejudice because the defendant was "not entirely responsible for the delay," discovery was "minimal," and the plaintiffs "fail[ed] to bring forth more than generalized protestations about the costs of delay." 938 F.2d at 578. Far from requiring plaintiffs to establish that any "discovery its adversary obtained in court was not also available in arbitration," Pet'r.Br.47, *Patten Grading & Paving, Inv. v. Shanska USA Bldg., Inc.* listed that fact as only one of a litany of reasons why "minimal" discovery did not constitute prejudice. 380 F.3d 200, 207 (4th Cir. 2004). And *Rush v. Oppenheimer & Co.* turned almost entirely on the fact the plaintiff was not prejudiced by conducting discovery or litigating a motion to dismiss *non-arbitrable* claims. 779 F.2d 885, 888-90 (2d Cir. 1985).

Morgan's hair-trigger rule, by contrast, would be vastly overinclusive as a means of combatting gamesmanship, as it would deny a contractual arbitration right to defendants who have done nothing more than submit preliminary and/or responsive filings while they investigate the plaintiff's allegations, attempt to resolve the dispute amicably, and consider whether arbitration is necessary. Moreover, the one type of gamesmanship that her rule conveniently ignores is her own gamesmanship in disregarding her promise to resolve any disputes with Sundance via "arbitration, instead of going to court."

Instead of accounting for that gamesmanship or any resulting prejudice, Morgan tries to leverage it, suggesting that by going to court she put the defendant on an invisible clock that required it to invoke its arbitration rights at the earliest feasible juncture, with feasibility judged not by the parties' arbitration agreement, or the arbitration rules incorporated therein, or even by clear *ex ante* court deadlines, but by *ex post* judgments by courts with a traditional predisposition to favor litigation. As an interpretation of a statute designed to promote arbitration and counteract judicial hostility to it, Morgan's rule has nothing to recommend it.

Straining to find an actual threat to the FAA and its policies, Morgan and her *amici* suggest that the prejudice requirement introduces inefficiencies by raising "a host of additional questions" for courts to address. Pet'r.Br.47; *see* States.Br.20-23. In reality, a prejudice inquiry is a familiar feature of numerous doctrines that courts have long ably and efficiently applied. *See, e.g.*, *Dietz v. Bouldin*, 579 U.S. 40, 49 (2016) (inherent powers); *SCA Hygiene*, 137 S.Ct. at 960 (laches); *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (ineffective assistance); Fed. R. Evid. 403 (admission of evidence). Moreover, Morgan seems to forget that her principal position is not that there is a uniform, federal earliest-feasible-juncture test, but that courts must first ascertain the applicable state law, identify the apposite state contract law of general applicability, and then apply it. As is evident from Morgan's repeated qualifier "most," Pet'r.Br.4, 18, 22, 23, the answers to those questions are not nearly as uniform (or favorable to her position) as she would like this Court to think. In fact, if the state-law inquiry is

properly applied, it will still lead to a prejudice inquiry, governed by state-court precedents. *See supra* Part II.C. Compared to Morgan's state-law-based proposal, a uniform federal standard of default (which could always be adjusted if it proves difficult to apply or leads courts to undervalue the liberal federal policy favoring arbitration) is a paragon of efficiency.

At any rate, this Court has already held that the FAA, like most legal doctrines, does not value efficiency over all else. Rules that lead arbitration agreements to be routinely disregarded and motions to compel arbitration to be summarily denied would be highly efficient (at least judged from the standpoint of the judicial resources expended on such threshold inquiries), but it would resemble the regime the FAA was designed to replace. Not surprisingly, this Court has already thoroughly rejected the notion that the FAA's pro-arbitration goals should take a backseat to amorphous notions of efficiency. *See Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985). *Dean Witter* reversed a lower court that declined to compel the arbitration of arbitrable state-law claims on the ground that certain federal claims were non-arbitrable and duplicative proceedings would be inefficient. While acknowledging "the Act's goal of speedy and efficient decisionmaking," the Court observed that the FAA's "principal objective" is not efficiency but "to ensure judicial enforcement of privately made agreements to arbitrate." *Id.* at 219-20. The Court held that even at the expense of parallel proceedings, it is the duty of a court to "enforce the bargain of the parties to arbitrate, and 'not substitute its own views of economy and efficiency' for those of Congress." *Id.* at 217.

There is no comparable inefficiency here. To the contrary, here, and in the vast majority of cases, Congress' primary goal of promoting arbitration in line with parties' agreement and efficiency (especially as measured by the overall expenditure of judicial resources) are mutually reinforcing. When the parties agree to arbitrate bilaterally, instead of going to court; when the agreement does not specify a deadline for invoking the agreement and incorporates rules protecting against a finding of waiver via litigation; and when no party is prejudiced by invoking the agreement, the efficient and pro-arbitration solution is to enforce the agreement and stay the litigation. In fact, in a comparison between the bilateral arbitration the parties agreed to and the potential nationwide collective action Morgan seeks to pursue in court, the efficiency calculus is not even close.

In the end, the choice the parties offer this Court is stark. Under Sundance's view, there is a uniform federal rule that prevents a party from losing its right to arbitrate absent a violation of a clear deadline, express relinquishment of the right, or prejudice to others. That rule favors arbitration, counteracts lingering judicial hostility to arbitration, and gives primacy to the terms of the parties' agreement. In contrast, Morgan seeks to replace a longstanding and well-functioning consensus in favor of a manufactured anti-arbitration rule that does not track the state-law concepts on which it is purportedly based and that would serve primarily to prevent valid arbitration agreements from being enforced according to their terms. If the choice were close, it would trigger this Court's instruction to resolve "any doubts [about] waiver, delay, or a like defense to arbitrability" "in

favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25. But the question is not close. Text, context, and statutory purposes all point in the same direction here. The Court should not abandon a prejudice inquiry in favor of a use-it-or-lose-it rule that systematically favors litigation over agreed-upon arbitration.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted,

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