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

AMICUS CURIAE BRIEF OF RESTAURANT LAW CENTER IN SUPPORT OF RESPONDENT SUNDANCE, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

AMICUS CURIAE'S REQUEST AND STATEMENT OF INTEREST[1]

Amicus Curiae Restaurant Law Center ("Law Center" or "Amicus") respectfully submits this Amicus Curiae Brief in support of Respondent Sundance, Inc. ("Respondent"). The Law Center is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. The foodservice industry is a labor-intensive industry comprised of over one million restaurants and other foodservice outlets employing approximately 15.3 million people across the nation – approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the nation's second largest private-sector employers. The restaurant industry is also the most diverse industry in the nation, as minorities comprise approximately 47% of the industry's employees, compared to 36% across the rest of the economy. Further, 40% of restaurant businesses are primarily minority owned, compared to 29% of businesses across the rest of the economy. Supporting these businesses is the Law Center's primary purpose.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of amicus briefs.

Many companies in the foodservice industry have arbitration agreements with their employees because arbitration is an efficient means for parties to promptly resolve disputes while avoiding the higher costs of traditional litigation. Many foodservice establishments, particularly those with large workforces, have relied on the Federal Arbitration Act as interpreted by this Court and other courts to structure their employment relationships around agreements that call for individual arbitration. Arbitration provisions are also commonly included in other business agreements.

The Law Center and its members, therefore, have a keen interest in ensuring that artificial rules do not create barriers to enforcing arbitration agreements and that defendants have ample opportunity to invoke their arbitration rights when plaintiffs breach their contractual obligations by commencing litigation in court.

INTRODUCTION AND SUMMARY OF ARGUMENT

When a plaintiff breaches its contractual duty to arbitrate by filing a lawsuit, the defendant's recourse is to move to compel arbitration, and the Federal Arbitration Act ("FAA") ensures that courts do not create artificial barriers to the defendant's right to compel arbitration. Nonetheless, most courts recognize that a defendant may impliedly waive its right to arbitrate by, for example, engaging in substantial litigation activity. Consistent with the

FAA's strong policy favoring arbitration, however, this implied waiver doctrine is applied only in narrow circumstances where the plaintiff (or other non-moving party) was actually prejudiced by the defendant's conduct.

Petitioner Robyn Morgan seeks to wildly expand the concept of implied waiver by eliminating the prejudice requirement and requiring defendants to, on pain of waiver, "seek to compel arbitration of the dispute at the earliest feasible moment—for example, by filing a motion to compel arbitration in response to a complaint or by raising arbitration as an affirmative defense filed with an answer." (Pet'r. Br. 4.) Petitioner's rule is wrong under current law, strikingly inequitable, inefficient, and inconsistent with public policy.

At the outset of litigation, the defendant may not even know whether there is an arbitration agreement governing the parties' dispute. While the plaintiff may spend months or years preparing for litigation, the defendant often has no notice of any dispute until it is served with the complaint. Once service is complete and routed to the responsible person in the defendant's organization, the defendant must hire counsel, investigate the underlying facts, search for any applicable agreement, and analyze the agreement's enforceability under current law. This exercise may be particularly onerous for large organizations with many locations and hundreds or thousands of employees, like many companies in the foodservice industry. It is manifestly inequitable to require

defendants to move to compel at an early stage or strip them of their rights.

As explained in detail below, there are a multitude of perfectly acceptable reasons why defendants may not move to compel arbitration at the earliest possible moment. The lawsuit may suffer from procedural deficiencies that the defendant is obligated to raise in its first response or risk waiving—such as challenges to personal jurisdiction, venue, or service. It may also be beneficial and efficient to first litigate preliminary motions involving standing, subject matter jurisdiction, designation to specialty courts, consolidation with related lawsuits, or application of the first-to-file rule. In some cases, the parties may benefit from limited discovery—discovery that would be available even if the case were compelled to arbitration—particularly when the case hinges on a small number of critical documents.

A strict earliest-feasible-moment rule would even penalize defendants for unavoidable delays outside their control—such as stays or changes in the law, delays due to court congestion, and delays based on reassignment or administrative court functions.

Petitioner's rule would also discourage parties from engaging in early settlement efforts, which can be particularly effective at the early stages in litigation before the parties incur costs litigating a motion to compel arbitration. Encouraging settlement is a universally supported public policy

and it is consistent with the Federal Arbitration Act's mandate to facilitate efficient resolution of disputes.

For the reasons stated in Respondent's Brief and in this Amicus Brief, this Court should affirm and hold that waiver of arbitration rights only occurs when the non-moving party is actually prejudiced. A prejudice requirement allows the trial courts to continue striking the right balance by encouraging efficient case management, preventing unfair waiver of the parties' right to arbitrate, and addressing inappropriate gamesmanship.

ARGUMENT

I. An Earliest-Feasible-Moment Rule Would Be Impractical, as Defendants Often Need Time to Investigate Before Moving to Compel Arbitration

Petitioner asks the Court to impose a rule requiring defendants to "seek to compel arbitration of the dispute at the earliest feasible moment—for example, by filing a motion to compel arbitration in response to a complaint or by raising arbitration as an affirmative defense filed with an answer." (Pet'r. Br. 4.) This proposal ignores the myriad of practical considerations that may make it difficult if not impossible, in many cases, to move to compel arbitration at such an early juncture.

Consider the beginning of a typical civil action. The plaintiff may start preparing for the litigation months or years in advance. This gives the

plaintiff ample opportunity to gather facts, analyze potential claims, determine the most favorable forum, and investigate whether there is an applicable arbitration agreement. Indeed, given this time to investigate, a plaintiff may know she is bound by an arbitration agreement, but willfully breach that agreement by filing litigation, while hoping the defendant will not discover the arbitration agreement, engage in early litigation practice, and unintentionally waive the right to arbitrate.

By contrast, the defendant first learns of the case when it is served with a summons and complaint. Indeed, some defendants may have no idea there is even a dispute with the plaintiff brewing. After valid service, defendants generally have a short period of time – 21 days in federal court and 20-35 days in state court – to respond to the complaint. Fed. R. Civ. P. 12(a)(1)(A); Lexis-Nexis, *How Long Does a Defendant Have to Respond to a Civil Action?* (50-State Survey).

It would be strikingly inequitable to require defendants to move to compel arbitration so quickly after being served with the lawsuit or face losing their contractually bargained-for arbitration rights. As an initial matter, it may take days or weeks for the responsible persons within the defendant's organization to receive the complaint. This can be especially difficult when service is completed at a local outpost of a large business with many locations, when service is completed on a registered agent located in a different state than the defendant's

principal office, or when service is made on a subsidiary, which then has to forward the papers to the responsible person within the parent company. Once the complaint is received by the appropriate persons, they must retain counsel, review the complaint, investigate the facts of the underlying dispute, and determine how to respond to it.

Defendants must also, of course, determine whether any arbitration agreement applies to the dispute. Determining the answer to this question can be difficult. The defendant must first investigate whether any contract exists between the parties and whether that contract contains an arbitration provision. While this seems an easy task, it may be time consuming in many circumstances—such as when there are multiple plaintiffs, large businesses with multiple subsidiaries or divisions, many locations, many employees, changes in ownership. or aged record-keeping systems. For example, corporations that own large restaurant chains may have hundreds of restaurants across the country, multiple offices, thousands of employees, and sometimes numerous franchisees—making it an onerous task to identify particular agreements involving a single plaintiff. Another potential complication is that sometimes the arbitration agreement is between the plaintiff and another defendant or a third party (such as a staffing company), so it is not in the possession of the moving defendant but it may nevertheless cover the underlying claims.

Because of circumstances such as these, in some cases, the parties do not discover there is a binding arbitration agreement until they are well into discovery. *See, e.g.*, *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 89 (Tex. 1996) (defendant did not locate arbitration agreement until it searched a remote warehouse while preparing for depositions); *Citifinancial Mortg. Co. v. Smith*, No. 3:06cv899-MHT (WO), 2007 U.S. Dist. LEXIS 61085, at *14 (M.D. Ala. Aug. 20, 2007) (mortgage company did not discover prior loan by affiliate containing arbitration provision until discovery in related bankruptcy proceedings); *McCants v. Team Elec., Inc.*, No. 19CV9565AJNRWL, 2021 WL 653122, at *10-11 (S.D.N.Y. Feb. 19, 2021) (defendant did not discover arbitration agreement between plaintiff and third-party staffing company until document production from the third party).

Even when the defendant discovers an arbitration agreement, the analysis is not over. The defendant must then determine whether the agreement is binding on the plaintiff and other parties to the litigation (who may be non-signatories to the arbitration agreement), whether the scope of the agreement covers the plaintiff's claims, and whether the agreement is valid and enforceable under the applicable law in the forum where the plaintiff sued. This can be a complex analysis, and one that is subject to frequently changing legal standards, particularly when class allegations are involved.

Only after this factual investigation and legal analysis is complete can the defendant determine whether it is possible and appropriate to move to compel arbitration. The time leading up to a motion to compel arbitration, therefore, can be time-consuming and labor-intensive, even for diligent parties. It would be profoundly unjust to set a strict rule requiring them to move to compel arbitration at an early stage of the case, before most have had a reasonable opportunity to conduct an initial investigation. Yet Petitioner's rule would do just that, even in cases where the parties are not prejudiced at all by the passage of time between the onset of litigation and the motion to compel.

II. An Earliest-Feasible-Moment Rule Would Unfairly Penalize Defendants For Raising Preliminary Issues That May Lead to Early Resolution or Otherwise Assist the Parties

There are many circumstances where it is necessary, beneficial, and expedient to raise preliminary issues before moving to compel arbitration. An earliest-feasible-moment rule would force litigants to either forgo raising important preliminary issues or abandon their bargained-for contractual right to arbitration.

Under the federal rules and most state procedural systems, defendants must raise certain deficiencies in the plaintiffs' case early or risk waiving them. For example, the Federal Rules of Civil Procedure require defendants to raise

deficiencies regarding personal jurisdiction, venue, process, and service of process in their first responsive pleading. Fed. R. Civ. P. 12(h)(1). These kind of motions are important to litigate first because they are fundamental to establish the court's authority to issue any subsequent rulings as to the defendant—whether those later rulings relate to arbitration or any other matter.

There are a number of other motions that may also be beneficial to decide before considering arbitration, depending upon the facts of the case. These include, among others, motions relating to standing, subject matter jurisdiction, failure to join a necessary party, coordination or consolidation, designation to a complex division or specialty court, or the first-to-file rule.

The case at bar is a good example. Petitioner's claims were virtually identical to another employment class action called *Wood v. Sundance, Inc.*, which had been pending against Sundance in another jurisdiction for some time. (*See* Resp't. Br. 8-9.) Sundance moved to stay or dismiss the case based on the first-to-file rule, which allows the court to refuse to hear a case when another lawsuit involving substantially overlapping issues was filed in a different federal court on an earlier date. *See Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 603 (5th Cir. 1999). This rule is based on "principles of comity and sound judicial administration." *Id.* Its purpose is "to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to

avoid piecemeal resolution of issues that call for a uniform result." *Id.* (quoting *West Gulf Maritime Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 729 (5th Cir. 1985)).

While the district court ultimately denied Sundance's motion, it was reasonable for Sundance to seek a stay or dismissal based on the *Wood* case before moving to compel arbitration. Courts encourage efforts to consolidate, coordinate, or stay cases that are closely related because it makes litigation more efficient for the courts and the parties, and it furthers uniform application of the law. *See, e.g.*, *Blair v. Equifax Check Services*, 181 F.3d 832, 839 (7th Cir. 1999). Petitioner's strict earliest-feasible-moment rule would strongly discourage parties from filing coordination motions such as these and would force the parties to waste resources arbitrating issues that are already being litigated in another case.

It may also make sense for the parties to engage in some amount of formal or informal discovery before moving to compel arbitration. This may be particularly useful for cases in which the factual allegations are narrow or there are a few pivotal documents that may prove decisive. Such discovery is rarely inconsistent with the right to arbitrate because most arbitration agreements are governed by rules that allow at least limited discovery. *See, e.g.*, Am. Arbitration Ass'n Emp't Arbitration Rules and Mediation Procedures, Rule 9 (authority for discovery); JAMS Emp't Rules &

Procedures, Rule 17 (allowing document exchange and depositions).

Even limited discovery, however, typically takes months. Petitioner's rule would punish parties for engaging in discovery, even when the inquiry is limited, the burden in responding to discovery is minimal, and the discovery would be available and necessary in arbitration. There is no compelling rationale for requiring a defendant to invoke its arbitration rights before engaging in discovery that would be necessary even if the dispute is sent to arbitration.

The circumstances where a defendant might reasonably delay moving to compel arbitration are highly fact-dependent. What is reasonable, expedient, or not burdensome in one case may be inappropriate and inconsistent with the right to arbitrate in another. Trial courts are best equipped to make these judgments and the current law appropriately allows trial courts to determine whether early motion practice or other procedural wrangling inappropriately prejudices the plaintiff such that the right to arbitration may be considered waived.

III. An Earliest-Feasible-Moment Rule Would Punish Parties for Unavoidable Delays Caused By Changing Law

The law governing enforceability of arbitration agreements is hotly contested and continually changing, and the rapid pace of legal changes may result in delays at the trial court level,

as lower courts grapple with how to apply new appellate rulings. Petitioner's strict earliest-feasible-moment rule would punish defendants whose decision to seek arbitration is delayed due to changes in law.

This precise scenario arose in *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348, 375 (2014) before the California Supreme Court, a court that is comparatively less friendly to arbitration. There, plaintiff Arshavir Iskanian filed a putative class action against his former employer CLS Transportation Los Angeles, LLC ("CLS"), alleging wage and hour violations. *Id.* at 360. CLS filed a petition to compel arbitration, which the trial court granted, and Iskanian appealed. *Id.* at 375. While the appeal was pending, the California Supreme Court decided *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), which limited the enforceability of class waivers. *Id.* The Court of Appeal remanded *Iskanian* to consider *Gentry*'s effect. *Id.* Instead of further litigating the petition to compel, CLS withdrew the petition and the parties litigated the case in the trial court. *Id.* The parties spent the next several years completing discovery and litigating Iskanian's motion to certify a class, which the trial court granted. *Id.*

Approximately a year and a half after the class was certified, the legal landscape changed again. This Court decided *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), which cast doubt on *Gentry*. *Iskanian*, 59 Cal. 4th at 375. The change in law meant the arbitration agreement between CLS

and Iskanian likely was enforceable. *Id.* CLS renewed its petition to compel arbitration based on the new law, which the trial court once again granted. *Id.* When the case worked its way back to the California Supreme Court, Iskanian argued CLS had waived its right to arbitrate by withdrawing its petition to arbitrate and litigating the case for several years, but the Supreme Court disagreed. *Id.* at 375-78. CLS's decision to withdraw and its subsequent litigation activity was reasonable based on then-current law under *Gentry*. *Id.* at 376-77. Iskanian also did not suffer the kind of prejudice that would justify depriving CLS of its contractual right to arbitrate, given that the parties would have conducted discovery in arbitration anyway and litigation costs alone were not sufficient to show prejudice. *Id.* at 376-77.

As the California Supreme Court explained, CLS acted reasonably based on current law and it was entitled to assert its contractual arbitration rights when it became clear those rights were enforceable. Similarly, in this case, Sundance waited a short time for this Court's decision in *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407 (2019) to provide clarification on the enforceability of its arbitration agreement before renewing its motion to compel. *Lamps Plus* surely will not be the last pivotal decision affecting arbitration rights. Yet Petitioner's earliest-feasible-moment rule would eviscerate these contractual rights for defendants like CLS who act reasonably based on current law or defendants like Sundance who wait for issuance of pivotal decisions.

Given the rapidly changing law on arbitration agreements and related doctrines, defendants will certainly continue to encounter conundrums of this kind, where changes in law affect their ability to seek arbitration. The current waiver standard with its prejudice requirement appropriately allows defendants to assert arbitration rights when they act reasonably under current law and only foreclose that option when the plaintiff truly suffers unjustified prejudice.

IV. An Earliest-Feasible-Moment Rule Would Unfairly Penalize Defendants for Unavoidable Delays Due to Court Congestion or Routine Case Administration

The strict rule Petitioners propose would also unfairly penalize litigants for delays entirely outside their control. Court calendars across the nation are congested. It is not uncommon for parties to wait months to get motions heard, and after those motions are heard, the judge may take months to issue a decision.[2]

A case may also be delayed due to reassignment to another judge or courthouse for

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[2] The March 2021 Civil Justice Reform Act report stated that 10,079 motions were currently pending before district courts and magistrate judges for more than six months, an increase of 27 percent since the previous report in September 2020. Administrative Office of the U.S. Courts, *March 2021 Civil Justice Reform Act Report*, https://www.uscourts.gov/statistics-reports/march-2021-civil-justice-reform-act.

numerous reasons—such as retirement or transfer of the judge, to balance out caseloads, to move a case to a complex division or specialty court, to consolidate related cases, to correct venue, or to address judicial conflicts. Reassignment often requires the parties to reschedule pending motions and entails additional time to prepare for and attend status or case management conferences with the newly assigned judge.

A case may also be stayed for reasons outside the control of the party seeking arbitration—such as when another party files for bankruptcy or when the court determines a stay is appropriate due to a pending related case or a pivotal decision anticipated from a higher court. *See* 11 U.S.C. § 362(a)(1) (automatic stay resulting from bankruptcy); *United States v. Michigan National Corp.*, 419 U.S. 1, 4 (1974) (a federal court may "stay proceedings in a case properly before it while awaiting the decision of another tribunal"); *Cigna Healthcare of St. Louis, Inc. v. Kaiser*, 294 F.3d 849, 851 (7th Cir. 2002) ("A federal court is authorized to stay proceedings in a lawsuit before it because parallel proceedings are pending in another court, either federal or state.").

This case is a prime example. After Sundance moved to stay or dismiss based on the first-to-file rule, the trial judge waited nearly four months to decide the motion. This delay accounts for a substantial portion of the time that elapsed between Sundance's deadline to respond to the complaint and its motion to compel arbitration.

Such circumstances may preclude a defendant from moving to compel arbitration at the earliest possible moment. Petitioner's strict rule would unfairly penalize parties for delays entirely outside their control.

V. An Earliest-Feasible-Moment Rule Would Deter Good Faith Settlement Efforts

In certain cases, settlements efforts may be particularly effective early in litigation, before any party moves to compel arbitration and incurs the costs of litigating the motion and initiating the arbitration. This is particularly true when the parties are already aware of the dispute and have a head start on understanding their respective positions, the legal issues, and the potential exposure. Early settlement may also be effective when there are related actions against the same defendant.

Settlement efforts, however, take time. If the parties elect to hire mediators, they may face busy calendars and briefing requirements. But the potential upsides—reaching a mutually agreed resolution, avoiding litigation risks, conserving resources, and achieving certainty—are large. For these reasons and others, the law universally acknowledges the strong public policy encouraging settlement. *See, e.g., Airline Stewards, Etc. v. American Airlines*, 573 F.2d 960, 963 (7th Cir. 1978) ("It is a well-settled principle that the law generally favors the encouragement of settlements."); *Huang v. Equifax Inc. (In re Equifax Inc. Customer Data Sec.*

Breach Litig.), 999 F.3d 1247, 1273 (11th Cir. 2021) ("Settlements resolve differences and bring parties together for a common resolution. Settlements also save the bench and bar time, money, and headaches. As such, there is a strong judicial policy favoring settlement.") (internal citations and quotation marks omitted); *Mansfield v. Bernabei*, 727 S.E.2d 69, 74 (Va. 2012) ("The importance of encouraging compromise and settlement is unquestioned in our jurisprudence."); *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 808 (Tex. 1980) ("We have long recognized that encouraging settlement and compromise is in the public interest.").

Settlement efforts are not inconsistent with the purposes of the FAA, nor do they indicate a waiver of the right to arbitrate. *Walker v. J.C. Bradford Co.*, 938 F.2d 575, 578 (5th Cir. 1991) ("Offers to settle, like arbitration, are to be favored, as they encourage the amicable and quick settlement of suits outside the judicial system."); *Zamora v. Lehman*, 186 Cal. App. 4th 1, 20 (2010) ("attempt to settle the action was not inconsistent with the right to arbitrate and did not result in undue delay"); *Dickinson v. Heinold Sec., Inc.*, 661 F.2d 638, 641 (7th Cir. 1981) (holding that "attempts by the parties to settle" after a dispute has arisen "are not sufficient to waive arbitration"). And forcing the parties to litigate a motion to compel arbitration before engaging in settlement discussions would not only waste judicial resources, but would also waste the parties' resources that could otherwise be used to settle the dispute.

This case is a prime example of the reasonableness of early settlement efforts. When Petitioner initiated her lawsuit, Sundance had already spent months defending the *Wood* case, which raised virtually identical employment claims in a different jurisdiction. Contemplating a possible global settlement, the parties agreed to a voluntary joint mediation with the *Wood* plaintiffs. By mediating jointly, Petitioner received important discovery relevant to her claims, which had already been produced in *Wood*, and she had the opportunity to leverage the prospect of a potential global settlement. The mediation resulted in a settlement with the *Wood* plaintiffs, but not Petitioner. Petitioner, however, still benefitted by receiving the discovery and could not have been prejudiced, given that the mediation was voluntary.

Petitioner's earliest-feasible-moment rule would preclude such valuable settlement efforts and would punish parties for attempting to voluntarily resolve their dispute without wasting time and resources—a result that is antithetical to the FAA and universal judicial policy.

CONCLUSION

For all of the reasons discussed in Sundance, Inc.'s Respondent's Brief and above, Amicus respectfully requests the Court affirm.

Date: February 11, 2022

Respectfully submitted,

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