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**

REPLY BRIEF

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INTRODUCTION

The Eighth Circuit violated the Federal Arbitration Act when it imposed an arbitration-specific prejudice requirement on Robyn Morgan's contractual defense of waiver. Iowa law, like the law of most states, does not require a showing of prejudice for waiver of other contractual rights. So requiring prejudice because the contract at issue involved arbitration flouts the FAA's substantive command, codified at 9 U.S.C. § 2, that arbitration agreements be placed "on equal footing with all other contracts." *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54 (2015).[1]

Sundance suggests this Court should ignore § 2's equal-treatment principle and instead read a prejudice requirement into the word "default" in § 3 of the FAA because such a rule would be "clear" and "uniform." Resp. Br. 14. There are three problems with this suggestion.

First, it is utterly atextual. Sundance admits that § 3 does not define "default." Undaunted, Sundance supplies a definition—either failure to comply with a clear contractual deadline, or conduct causing prejudice. This is not what "default" meant in 1925, and it is not what "default" means today.

Second, accepting Sundance's POSITION would elevate procedure over substance by discounting § 2, the FAA's "primary substantive provision," in favor of

[1] Unless otherwise indicated, all internal quotations are omitted.

(a misapplication of) § 3, one of the "procedures by which federal courts implement § 2's substantive rule." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67-68 (2010).

Third, Sundance's handwringing about the difficulties of applying state-law waiver standards is irrelevant and overblown. It's irrelevant because whether convenient or not, resort to state law is what the FAA requires, given that waiver is a state-law defense that "arose to govern issues concerning the . . . enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). And it's overblown because federal and state courts alike already apply non-uniform state law to many contract-formation and contract-interpretation questions governed by the FAA.

This Court should decline Sundance's invitation to engraft a prejudice requirement onto the FAA, in the name of uniformity and convenience, that appears nowhere in its text. Nor does a prejudice requirement serve either of the FAA's "two goals" of promoting streamlined dispute resolution and ensuring that arbitration agreements are enforced like other contracts. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). To the contrary, allowing parties to sit on their arbitration rights while wasting the courts' time with docket-clogging litigation makes a mockery of contract principles, and slows down the path to the arbitral forum rather than expediting it.

Sundance intentionally relinquished its contractual right to insist on arbitration, and failed to perform its corresponding duty to arbitrate, when it filed a court document stating Morgan could proceed with her claims in court, JA39, and filed an answer that didn't mention arbitration. JA56-74. Whether analyzed as waiver under § 2, default under § 3, or both, Sundance's inconsistent actions should be dispositive on this point. Prejudice is immaterial.

ARGUMENT

I. SUNDANCE'S INTENTIONAL ACTS CONSTITUTED WAIVER OR RESCISSION, CONTRACT DEFENSES WITHIN THE FAA'S SAVING CLAUSE.

Sundance and its amici try desperately to shift this Court's attention from § 2's substantive equal-treatment mandate to § 3's procedural provisions. Perhaps that's because it's difficult to defend, on § 2's own terms, the arbitration-specific requirements courts are placing on generally-applicable contract defenses like waiver. But Sundance cannot avoid state-law principles by focusing on § 3 instead of § 2, for they are embedded into both provisions. And under state-law principles of waiver and rescission, Sundance gave up its right to arbitrate.

Sundance argues that the proper doctrines to apply in cases of inconsistent litigation conduct are laches or estoppel. Resp. Br. 35-37. Yet the relevant

question is not whether Morgan would have prevailed if she had raised a defense of equitable estoppel alongside or instead of the waiver defense she did assert. The question is whether courts are correct to replace the otherwise distinct doctrines of waiver, laches and estoppel with an "amalgam of waiver, estoppel, and laches principles" only when applying these concepts in the arbitration context. *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 345 (Ky. Ct. App. 2001). Because this waiver-laches-estoppel amalgam "derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue," *Concepcion*, 563 U.S. at 339, the use of the hybrid defense, including by the Eighth Circuit here, violates § 2 of the FAA.

Sundance's second state-law argument, also taken up by the Chamber of Commerce, is that in Iowa and elsewhere, courts allow parties to retract their waivers in the absence of detrimental reliance by another party, so long as the contract remains executory. Resp. Br. 37-39; Chamber Br. 17-21. Sundance's assumption that arbitration agreements remain executory while arbitrable issues are litigated in court begs the ultimate question this case presents. Certainly, the obligation to arbitrate a future dispute that has not yet arisen between the parties remains executory. But here, a dispute did arise, and Morgan chose to litigate that dispute by filing a complaint in Iowa federal court. As Sundance observes repeatedly throughout its brief, Morgan defaulted first.

Morgan's default presented Sundance with two alternatives: (1) continue performing, while seeking

damages for the breach or invoking the specific-performance remedies authorized by the FAA, *see Potter v. Oster*, 426 N.W.2d 148, 150-51 (Iowa 1988); or (2) cease performing its own contractual obligations, *see Kelly v. Iowa Mut. Ins. Co.*, 620 N.W.2d 637, 641 (Iowa 2000) ("[O]nce one party to a contract breaches the agreement, the other party is no longer obligated to continue performing his or her own contractual obligations."). Sundance chose the second course.

Alternatively, if Sundance is correct that the obligation to arbitrate under the agreement remained executory even after Morgan filed suit, then her federal lawsuit constituted a repudiation of the arbitration obligation that, like a breach, relieved Sundance of its reciprocal obligations. *Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231, 241 (Iowa 2001). Moreover, "[i]f a contract is wholly executory, and the legal duties of the parties are as yet unfulfilled, it can be discharged by mutual consent, the acquittance of each from the other's claims being the consideration for the promise of each to waive his own." *Contract*, Black's Law Dictionary (11th ed. 2019) (quoting William R. Anson, Principles of the Law of Contract § 140, at 138 (Arthur L. Corbin ed., 3d Am. ed. 1919)). This is rescission by mutual consent.

Rescission, also sometimes called revocation, restores the parties "to the same rights as if no contract had been made." *Blake v. Osmundson*, 159 N.W. 766, 773 (Iowa 1916). No new consideration for the rescission is necessary; "[t]he mutual release from the old contract is adequate consideration." *O'Dell v. O'Dell*, 26

N.W.2d 401, 414 (Iowa 1947). Rescission requires no express statement of release but can be inferred from the parties' course of conduct. *Id.* at 413.[2]

Once such a rescission is accomplished, "it affords a complete defense by either [party] to any assertion by the other of any right based upon the original unperformed contract," whether that defense "be classed as waiver or estoppel or be given any other technical label." *Id.* at 412-13. Thus, while Sundance contends the most "apposite" legal doctrines for analyzing litigation-conduct waiver are laches and estoppel, Resp. Br. 35-37, a more apposite doctrine is rescission by conduct, which, in Iowa, can be pled under the "technical label" of waiver.

Another way to look at the sequence of events that unfolded here, and in many similar cases, is as a contract modification. The parties had an agreement to arbitrate all future disputes. Morgan, through her conduct, offered new, superseding contract terms: to litigate her FLSA claims against Sundance in federal court, and by its conduct, Sundance accepted the new contract. *See St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co., Inc.*, 969 F.2d 585, 591 (7th

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[2] *See also Severson v. Elberon Elevator, Inc.*, 250 N.W.2d 417, 421-22 (Iowa 1977) (rescission can be accomplished through words or conduct); *Siebring Mfg. Co. v. Carlson Hybrid Corn Co.*, 70 N.W.2d 149, 153 (Iowa 1955) ("defendant by its conduct indicated a willingness to accept the provisions of the modified contract"); *Mortensen v. Frederickson Bros.*, 180 N.W. 977, 983 (Iowa 1921) (contract may be rescinded by "the acquiescence of one party in its explicit repudiation by the other").

Cir. 1992) (proposing modification framework as an alternative to waiver when parties both opt to litigate a dispute that falls within their arbitration agreement); *Cordillera Corp. v. Heard*, 592 P.2d 12, 14 (Colo. App. 1978) (plaintiff who filed complaint in court "offer[ed] to waive" arbitration agreement, and by answering without demanding arbitration, defendant "accepted plaintiff's offer").[3]

Sundance fails to grapple with these issues of rescission or modification, because its Iowa cases involve situations of ongoing or periodic performance where the waiver occurred in the past but the proposed retraction is forward-looking. Sundance does not explain why cases about retracting a waiver as to future performance of a recurring obligation should have any bearing on the standard for waiver of the right to compel arbitration of an extant dispute. *See JTH Tax, LLC v. Shahabuddin*, No. 2:20-cv-217, 2021 WL 3704726, at *4 (E.D. Va. Aug. 20, 2021) (waiver retraction cases involving periodic obligations were unpersuasive where party sought "to retract its waiver of a right pursuant to a contractual provision that contemplates a discrete, one-time performance"); *Mun. Auth. of Westmoreland Cnty. v. CNX Gas Co., L.L.C.*, 380 F. Supp. 3d 464, 470 (W.D. Pa. 2019) (finding "maxim [of retracting waiver and insisting on strict compliance going forward]

[3] Iowa law treats contract modifications differently from rescissions in terms of the need for new consideration. *Recker v. Gustafson*, 279 N.W.2d 744, 759 (Iowa 1979).

particularly applicable when the contract in question has a recurring or periodic obligation").

Moving beyond the specifics of waiver, Sundance argues more broadly that because § 2's saving clause uses the word "revocation," it precludes courts from applying doctrines that consider conduct occurring after the contract was formed. Resp. Br. 30. This cramped construction ignores the common use of "revocation" as synonymous with the equitable doctrine of "rescission," which often turns on changed circumstances arising after a contract was formed. 67A Am. Jur. 2d Sales § 1020 (2d ed.). It also defies common sense, for contracts are frequently invalidated, or deemed prospectively unenforceable, based on parties' post-contract-formation conduct. *E.g.*, *Roach v. BM Motoring, LLC*, 155 A.3d 985, 994-95 (N.J. 2017) (failure to pay arbitration fees after other party initiated arbitration constituted material breach of arbitration agreement and "precluded [the breaching party] from enforcing" the agreement); *Keith v. Bowers*, 690 P.2d 1013, 1014-15 (N.M. 1984) (plaintiff was precluded from enforcing contractual obligation when it had become impossible for him to perform his reciprocal obligation).

Finally, in explaining its position that the question presented here can be answered by looking to § 3 alone, Sundance posits that § 3 "provides one, and only one, ground on which a court" can deny a stay: the provision regarding "default in proceeding" with contractually mandated arbitration. Resp. Br. 15. This is incorrect.

Section 3 contains another threshold requirement, that the court be "satisfied" that the "issue" being litigated is "referrable to arbitration" under a written agreement. Determining whether the dispute is "referrable to arbitration" in turn requires courts to consider the state-law contract-interpretation principles and contract-law defenses embodied in § 2's "substantive command" of equal treatment. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006).

Thus, any independent obligation that § 3 stay applicants must meet to prove they are not "in default in proceeding" with arbitration supplements, and does not replace, the state-law question of whether they have waived their contractual rights to insist on arbitration by behaving inconsistently in litigation. Sundance cannot avoid this antecedent contractual waiver question by asking the Court to focus only on § 3, for it resides there too.

And whatever the word "default" in § 3 adds to this picture, it does not add a prejudice requirement.

II. SUNDANCE'S VIEW WOULD IMBUE "DEFAULT" WITH A MEANING IT DID NOT HAVE IN 1925.

Sundance acknowledges, as it must, that the legal definition of "default" was the same in 1925 as it is today. Resp. Br. 19 (listing similar definitions from Black's Law Dictionary cited at Petr. Br. 39 regarding "omission or failure" to "perform" a contractual "duty"). But then Sundance says over and over, perhaps hoping

repetition will breed acceptance, that a party is not "in default," in 1925 or today, unless that party has violated a specific "clear" deadline or "at least" caused prejudice. Resp. Br. 2, 11, 19. Sundance never offers any support—from treatises or caselaw—for the notion that default could not occur without a clear deadline or prejudice in 1925, or that either of these elements is essential to default today.

At most, Sundance's authorities establish two unremarkable propositions: that contracts often contain specific deadlines for performance; and that a common default fact pattern involves a failure to perform by the deadline. This is true as far as it goes, but it doesn't go very far, for pointing out that something occurs frequently in a particular context does not elevate that frequent context to a definitional requirement. An observer can accurately note that roads often become icy in the winter and that traffic crashes are more frequent when roads are icy without constraining the definition of "traffic crashes" to "crashes that occur in the winter on icy roads" or suggesting that traffic crashes can never occur on a clear summer day.

Just as traffic crashes can occur without icy roads, defaults can occur without either clear deadlines or prejudice. This was true when Congress enacted the FAA.[4] And it remains true today. *E.g.*, *Conway Constr.*

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[4] *See*, *e.g.*, *Jones v. Nelson Cnty.*, 120 S.E. 140, 142 (Va. 1923) (referring to person performing road construction as being "in default" under contract "in the manner of his work"); *Van Buren Cnty. v. Am. Sur. Co.*, 115 N.W. 24, 26-27 (Iowa 1908) (discussing

Co. v. City of Puyallup, 490 P.3d 221, 224 (Wash. 2021) (analyzing provision that public entity can terminate contract "for default" if contractor "fail[s] to meet the requirements of the contract," where failures arguably constituting default were safety violations and use of defective concrete panels on road construction project).[5]

Sundance also suggests that courts add an absence-of-prejudice requirement as a gap-filler where a contract lacks clear deadlines. Resp. Br. 20. But at the time of the FAA's enactment, courts analyzing contracts without a set time for performance added a reasonableness term, not an absence-of-prejudice requirement. *See A.B. Murray Co. v. Lidgerwood Mfg. Co.*, 150 N.E. 514, 514 (N.Y. 1926) ("The law supplies the missing term, and the contract is in legal effect an engagement on the part of the plaintiff to deliver within a reasonable time."); *Chicago, R.I. & P. Ry. Co. v. Planters' Gin & Oil Co.*, 113 S.W. 352, 355 (Ark. 1908) (law imposed implied contract on railroad to "promptly forward" goods; if the contract did not specify the time period for delivery, "the law implies the time necessary";

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bridge-builder's substitution of inferior material as contractual "default").

[5] While Morgan cited one statute tying "default" to a specific time period in her opening brief, Resp. Br. 21 n.3, many other statutes use the term without regard to time. *E.g.*, 7 U.S.C. § 1379c(e) (defining "default" as "failure" to "comply fully with the term and conditions" of wheat marketing allocation program); 16 U.S.C. § 831c-1(b) (discussing "default in the performance of" contracts with Tennessee Valley Authority to alter or replace existing bridges).

and railroad's failure to deliver goods within a reasonable time constituted "default").

Sundance offers various arguments for imposing an absence-of-prejudice requirement onto the word "default" that it does not otherwise possess. All are unavailing.

A. Neither the Federal Rules of Civil Procedure nor the American Arbitration Association Rules Alter What "Default" Meant in 1925.

Sundance and amicus Chamber of Commerce propose that because § 3 motions are filed in federal court and involve litigation, the Court should look to the Federal Rules of Civil Procedure for guidance on what "default" means in § 3. Resp. Br. 21-23; Chamber Br. 8-13. But the FAA was enacted thirteen years before the Federal Rules came into existence,[6] and nothing in its text suggests an intent to incorporate an external, later-enacted body of law. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019).[7]

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[6] Section 4 was amended in 1954 to add references to the Federal Rules regarding service of the notice of the petition to compel arbitration and the jury trial for which § 4 provides. Act of Sept. 3, 1954, chap. 1263, § 19, 68 Stat. 1226, 1233. Neither § 3 nor § 6, cited by the Chamber for its language about motions practice being conducted "in the manner provided by law," 9 U.S.C. § 6, were amended in 1954, or anytime thereafter, to reference the Federal Rules.

[7] If this Court does look to the Federal Rules for guidance, the most analogous provisions are Federal Rule 12(b)(3) and

Sundance notes that its contracts with Morgan and its other hourly workers could have included a firm deadline requiring Sundance to compel arbitration within 30 days if sued, Resp. Br. 20, or a provision requiring the absence of prejudice as a prerequisite to compelling arbitration, *id.* at 22-23. It points to no arbitration agreements that actually contain such terms. More to the point, the FAA doesn't contain temporal limitations or qualifications about prejudice either—and while Sundance may rewrite its contracts, it lacks the authority to add words to the FAA that Congress did not put there.

Sundance makes much of the arbitration agreement's incorporation of AAA Rule 42(a), which states 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." Resp. Br. 20. But this rule is not the all-powerful shield against default that Sundance suggests.[8] Such "no waiver"

12(h), which provide that the defense of improper venue is waived if not raised in the first responsive pleading, regardless of prejudice. Nat'l Acad. Arbitrators Br. 4-5, 9. There is nothing "punitive" or "anti-arbitration," Resp. Br. 40, about requiring defendants to promptly invoke their rights under arbitration agreements of which they are aware, just as they have been required to promptly invoke defenses based on improper venue or lack of personal jurisdiction for decades under the Federal Rules.

[8] If it were, it would immunize many parties besides Sundance from waiver (or default) findings, given that the same language appears as Rule 52(a) in AAA's widely used Commercial Arbitration Rules. https://www.adr.org/sites/default/files/Commercial Rules_Web-Final.pdf. Allowing a third-party arbitral association's rules to take precedence over the court's inherent authority to

clauses, as a matter of generally-applicable state contract law, can themselves be waived by subsequent conduct.[9] This was equally true when the FAA was passed.[10] And the very AAA rule Sundance cites here has been held by numerous courts, even in circuits that include Sundance's desired prejudice requirement in their waiver analysis, not to preclude a finding of waiver.[11]

B. The FAA's Other Provisions Counsel Against Reading a Prejudice Requirement into the Word "Default."

Sundance seizes on the presence of the word "aggrieved" in § 4 in close proximity to "default," Resp. Br. 20, 24, but this use of "aggrieved" does not help Sundance. For if, as Sundance elsewhere claims, a

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manage its own docket by finding waiver when parties abuse court resources, *see Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 348 (5th Cir. 2004), would incentivize delay tactics and forum-switching, contrary to Congress's intent when enacting the FAA.

[9] *E.g.*, *Quality Prods. & Concepts Co. v. Nagel Precision, Inc.*, 666 N.W.2d 251, 257-58 (Mich. 2003); *M.J.G. Props., Inc. v. Hurley*, 537 N.E.2d 165, 166-67 (Mass. App. Ct. 1989); *Fritts v. Cloud Oak Flooring Co.*, 478 S.W.2d 8, 14 (Mo. Ct. App. 1972); 13 R. Lord, Williston on Contracts § 39:36 (4th ed.); 3 Corbin on Contracts § 763 (1960).

[10] *E.g.*, *Beauchamp v. Retail Merchants' Ass'n Mut. Fire Ins. Co.*, 165 N.W. 545, 549 (N.D. 1917); *McMillan v. Ins. Co. of N. Am.*, 58 S.E. 1020, 1024 (S.C. 1907).

[11] *Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 452-54 (3d Cir. 2011); *S & R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 85-86 (2d Cir. 1998).

prejudice requirement is already implicit in the word "default," Resp. Br. 19, then Congress would not have needed to use the word "aggrieved" in § 4 to convey that the party petitioning the court must have been harmed by the other party's failure or refusal to arbitrate. The concept of harm or aggrievement would already have been captured by the word "default," which appears five times in § 4. Sundance's grafting of a prejudice requirement onto "default" would render "aggrieved" in § 4 surplusage.

A more natural reading of § 4, which gives meaning to each of its words, is that a default occurs when one party to an arbitration agreement fails, neglects or refuses to arbitrate. Section 4 separately requires that the party seeking specific performance of the arbitration agreement must have been "aggrieved by" the other party's default.

There are two ways to give "default" a "consistent meaning" in these adjacent statutory provisions. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019). Either "default" carries a prejudice requirement in both §§ 3 and 4, as Sundance contends, and "aggrieved" in § 4 has no independent meaning; or "default" refers to the unilateral conduct of the party failing or refusing to arbitrate, and says nothing about its effect on others. Only the second interpretation accords with the "ordinary meaning" of "default" when the FAA was passed. *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2068, 2070 (2018).

C. The FAA Only Instructs Courts to Assess Whether the § 3 Applicant Is "in Default" at the Time of Requesting the Stay and Says Nothing About Curing Default.

Sundance hypothesizes that a party could initially be "in default" for failing to arbitrate but could cure that default by asserting the right before the other party is prejudiced, presumably by filing a § 3 stay motion. Resp. Br. 24. In other words, according to Sundance, a § 3 motion should nullify any previous inconsistent acts of the stay applicant, no matter how loudly those actions signal an intent to relinquish the arbitration right, so long as the counterparty can't prove prejudice. If § 3 did contain such curative properties, they would certainly be convenient for Sundance, given its own earlier actions in litigation—including stating in its motion to dismiss Morgan's collective action that Morgan could "refile her claim on an individual basis before this Court." JA39. This statement was tantamount to a "document [filed] in court explicitly disclaiming any desire to arbitrate." Resp. Br. 32.

But the concept of cure, like the concept of prejudice, is conspicuously absent from § 3. Sundance's approach reads much unspoken content into the words "in default in proceeding," when a far more straightforward interpretation of that phrase is that the court evaluating a § 3 motion must determine if the applicant has "fail[ed], neglect[ed], or refus[ed]" to proceed with arbitration under the terms of the contract. 9 U.S.C. § 4.

Contracts and rules that contemplate the defaulting party being able to cure their default usually provide guidance on how the attempted cure must occur.[12] Without similar language in § 3 regarding cure of preexisting defaults, a complex scheme for when courts should be able to deem them cured, with prejudice at its center, should not be "engraft[ed] . . . onto the statutory text." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) (rejecting court-created "wholly groundless" exception to delegation because the FAA "contains no 'wholly groundless' exception").

Whether analyzed as a "default in proceeding" with arbitration under § 3 or under the generally-applicable state-law contract defense of waiver under § 2, the result is the same: Sundance failed to perform under its arbitration agreement and acted inconsistently with an intent to enforce its rights under that contract. These are unilateral inquiries that do not ask the reviewing court to consider the effect of the failure to perform, or the inconsistent litigation conduct, on others. In short, neither a § 3 default analysis or a § 2 waiver analysis should require prejudice (unless the applicable state waiver law for contracts not involving arbitration requires it).

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[12] *E.g.*, 48 C.F.R. § 52.249-8(a)(2) (government contracts for supplies and services must provide ten-day period after notice of default for contractor to attempt a cure); *Guffey v. Smith*, 237 U.S. 101, 118 (1915) (state statute provided for right to cure default by paying late rent); Fed. R. Civ. Proc. 55(c) (providing that entries of default may be set aside "for good cause").

Sundance objects that many courts do require prejudice in the arbitration context, and have been doing so for years. Resp. Br. 24-25 & n.7. But the fact that many courts are engrafting an atextual prejudice requirement onto the FAA is no reason for allowing them to continue doing so. It was a reason for this Court to grant the petition for certiorari, to correct a widespread misinterpretation of governing law.

III. ADOPTING SUNDANCE'S POSITIONS WOULD YIELD ABSURD, DESTABILIZING RESULTS.

Sundance takes several extreme positions while advocating for a prejudice requirement situated in § 3 and a revamped § 2 with no equal-treatment principle. Three of its more extreme positions warrant further discussion, as they would have implications far beyond this case if accepted.

A. Sundance's Approach to Contractual Waiver Would Elevate Procedure Over Substance.

First, Sundance's view that § 2 has nothing to say about when inconsistent conduct precludes enforcement of a contractual right would collapse the distinction between substance and procedure that this Court has long maintained when applying the FAA. Section 2 has been described as the FAA's "primary substantive provision," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), while § 3, which

creates judicial procedures for implementing § 2, "adds no substantive restriction to § 2's enforceability mandate." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009). Section 4's procedures only apply in federal court, and this Court has suggested that § 3 is subject to the same restriction.[13] Situating the standard for litigation-conduct waiver in § 3, without any reference to the equal-treatment principle, would leave state courts free to apply any sort of arbitration-specific waiver rule, including one that treated arbitration more harshly and required a defendant to invoke its rights within 24 hours of being served. And anyone unhappy with the rule this Court derives from § 3 could simply avoid it by filing a motion to compel arbitration under § 4 instead.

Sundance reassures this Court that it need not worry about using § 3 to alter substantive rights because waiver by litigation conduct "is not the type of primary conduct typically addressed by substantive state law." Resp. Br. 18. But the rights whose waiver is at issue here are not procedural rights conferred by the Federal Rules. They are substantive rights conferred by contract, and the question of how they can be relinquished implicates substantive state law. *See Weyerhaeuser Co. v. Domtar Corp.*, 204 F. Supp. 3d 731, 739-40 (D. Del. 2016) (court sitting in diversity analyzed waiver defense as matter of Delaware contract law).

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[13] *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 n.6 (1989); *Rent-A-Center*, 561 U.S. at 68 ("The Act also establishes procedures by which *federal* courts implement § 2's substantive rule.") (emphasis added).

Even when the conduct constituting the alleged waiver involves litigation-related delays, the state-law nature of the contractual waiver inquiry remains unchanged. *E.g.*, *Holiday Hosp. Franchising, LLC v. N. Riverfront Marina & Hotel, LLLP*, No. 1:21-CV-2584-TWT, 2021 WL 3798561, at *2 n.2, *3 (N.D. Ga. Aug. 26, 2021) (court sitting in diversity applied Georgia contract law to argument that plaintiff's 4-year delay in bringing suit waived its right to sue under contract); *AVL Powertrain Eng'g, Inc. v. Fairbanks Morse Engine*, 178 F. Supp. 3d 765, 776-77 (W.D. Wis. 2016) (court sitting in diversity applied Wisconsin contract law to argument that plaintiff waived rescission right by continuing to test defendant's products and waiting nearly two years after learning of fraud to sue for rescission).

Moreover, as discussed in part I, even an analysis entirely confined to § 3 cannot avoid consideration of state-law principles like waiver. Courts asked to issue stays under § 3 must first satisfy themselves that the case involves an "issue referrable to arbitration," a question that must be answered based on generally-applicable state contract principles. *Perry*, 482 U.S. at 492 n.9.

B. Abolishing the Equal-Treatment Principle Would Deprive Parties Contracting to Arbitrate of Protections Other Contracting Parties Enjoy.

Second, Sundance's suggestion that the FAA "is not offended" by treating arbitration agreements differently

from other contracts, so long as that differential treatment is favorable to arbitration, Resp. Br. 29, is at odds with decades of this Court's precedents and the intentions of the Congress that enacted the FAA. As Morgan explained in her opening brief, Petr. Br. 35-36, because of the backdrop of hostility towards arbitration against which the FAA was enacted, this Court has most often had occasion to raise arbitration agreements to terms of equality with other contracts by removing barriers to their enforceability. But that doesn't change the fact that equality, not preferential treatment, was Congress's goal. H.R. Rep. No. 68-96, at 1 (1924) (FAA's purpose was to place an arbitration agreement "upon the same footing as other contracts, where it belongs").

Congress does have a history of enacting laws that create enhanced opportunities for the victims of past discrimination, as an attempt to remedy the lasting effects of historic disadvantage. *See*, *e.g.*, 15 U.S.C. § 637(a)(1)(B) (creating program to encourage federal government contracts with "socially and economically disadvantaged small business concerns," including by awarding contracts to such businesses on a noncompetitive basis). When Congress privileges certain contracts over others for remedial purposes, it does so explicitly, and with protections in place to ensure fairness. *See* 15 U.S.C. § 637(h) (providing safeguards for noncompetitive contracts).

The FAA does none of this. Instead, its admonition that arbitration clauses may be invalidated on the same grounds as "any contract," 9 U.S.C. § 2, reinforces that its objective "was to make arbitration agreements

as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

Finally, Sundance charges that there can be no waiver when a party delays in asserting its right to arbitration for bad-faith reasons because such a "sandbagging" party never intended to relinquish its rights. Resp. Br. 34-35. But parties' intentions with respect to contract formation and abandonment are judged objectively, not subjectively. *E.g.*, *Hughes v. Mitchell Co.*, 49 So.3d 192, 201-02 (Ala. 2010) (intent to waive must "be ascertained from the external acts manifesting the waiver"). Moreover, courts applying that objective standard judge a contracting party's actions in the context of the implied covenant of good faith and fair dealing that the law adds to every contract. Restatement (Second) of Contracts § 205 (1981). If Sundance's position is that the objective theory of contract and the covenant of good faith and fair dealing should be jettisoned when assessing arbitration agreements because of their supposed most-favored-nation status, this Court should reject Sundance's offer to dismantle the guardrails that have governed contract law for centuries.[14]

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[14] Sundance's more innocent explanation for delay in invoking arbitration rights is equally unavailing when applied to this case. Specifically, Sundance cannot credibly claim it was "caught by surprise" when Morgan filed a wage claim in court despite being subject to an arbitration agreement. Resp. Br. 34. At that time, Sundance had already for years been litigating another case in Michigan involving similar wage claims, brought by employees subject to the same arbitration agreement, without ever moving

Section 2 of the FAA reflects "the fundamental principle that arbitration is a matter of contract." *Concepcion*, 563 U.S. at 339. That fundamental principle comes with certain corollaries—among them that rights under contracts for arbitration can be waived like other contractual rights, under generally-applicable principles of state contract law. Sundance's attempt to erase the FAA's substantive-procedural distinction, and its attempt to replace the equal-treatment principle with a law-free zone surrounding arbitration agreements, are dangerous and ill-considered proposals—but are ultimately irrelevant. They should not distract this Court from following the FAA's text to its logical conclusion: that neither §§ 2 nor 3 requires a finding of prejudice.

IV. COURTS CAN APPLY DISPARATE STATE CONTRACT LAW RULES WITHOUT UNDERMINING THE FAA'S OBJECTIVES.

Sundance's survey of state law comes down to a plea for orderliness: since some state courts require prejudice to establish waiver in certain circumstances, Resp. Br. 33 n.9, and others allow waivers to be retracted, Resp. Br. 37-39, applying state law would simply be too messy, and this Court should instead adopt a uniform prejudice requirement as a matter of federal common law, Resp. Br. 46-47.

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to compel arbitration. *Wood v. Sundance, Inc.*, No. 2:16-cv-13598 (E.D. Mich. Oct. 7, 2016).

This characterization of a federal prejudice requirement as uniform overlooks the fact that most federal courts already require prejudice in assessing litigation-conduct waiver of arbitration rights, and the standards they apply are far from uniform or orderly. Pet. for Cert. 13-16; States Br. 18-20.

More important, any differences in how the states treat waiver do not make the FAA's equal-treatment principle any less applicable. Even if Sundance is correct that some states would find that no waiver occurred here, or would require prejudice as an element of that waiver analysis, this Court should still reverse the Eighth Circuit's opinion. That opinion was based on a misguided notion that the FAA requires proof of prejudice, which it does not.

Courts applying the FAA have long resorted to "ordinary state-law principles that govern the formation of contracts" to answer such crucial questions as whether an agreement to arbitrate exists, what disputes it covers, and who is bound by it. *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995). The fact that there is variability in these contract law doctrines among the states has not caused FAA enforcement to degenerate into chaos. Nor did chaos ensue when this Court instructed lower courts to look to state law to determine when arbitration clauses can be enforced by or against non-parties. *Arthur Andersen*, 556 U.S. at 631.

Courts that require prejudice to establish waiver of the right to compel arbitration but not waiver of other contractual rights are violating the FAA's

"primary substantive provision" that agreements to arbitrate be placed "on an equal footing with other contracts." *Concepcion*, 563 U.S. at 339. The fact that setting that violation right might require courts to delve into complex state contract doctrines, even doctrines lacking uniformity, should not cause this Court to shy away from faithfully and consistently interpreting the FAA's text. This nation's courts can certainly handle the challenge.

CONCLUSION

The Court should reverse the decision of the United States Court of Appeals for the Eighth Circuit and remand for further proceedings under a standard that does not require a showing of prejudice.

Respectfully submitted,

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