No. 21-328

In the Supreme Court of the United States

ROBYN MORGAN,

Petitioner,

v.

SUNDANCE, INC.,

Respondent.

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

BRIEF OF MINNESOTA, MARYLAND, ALASKA, COLORADO, THE DISTRICT OF COLUMBIA, DELAWARE, IDAHO, ILLINOIS, IOWA, MAINE, MASSACHUSETTS, NEW JERSEY, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*

Amici States are home to millions of residents subject to agreements containing arbitration provisions. One study found that, as recently as 2018, more than 800 million consumer arbitration agreements were in force nationally, and possibly as many as two-thirds of American households were subject to these largely "nonnegotiable, adhesionary contracts."[1] Another study found that a majority of the Nation's private-sector non-union employees work for employers that impose mandatory arbitration requirements.[2] Given the pervasiveness of arbitration agreements involving state residents, *Amici* States have both a responsibility to ensure the correct and consistent application of arbitration law and a responsibility to protect state residents from the costs and unfairness inflicted by those who invoke arbitration clauses only after first choosing to litigate strategically in court.

These interests have special pertinence where, as here, the question presented implicates state law. As this Court has recognized, under Chapter 1 of the Federal Arbitration Act ("FAA") courts "apply state-law doctrines related to the enforcement of arbitration agreements." *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140

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[1] Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. Davis L. Rev. Online 233, 234, 236 (2019).

[2] Alexander J.S. Colvin, *The growing use of mandatory arbitration*, Economic Policy Institute, at 2, 5 (Apr. 6, 2018), available at https://files.epi.org/pdf/144131.pdf.

S. Ct. 1637, 1643 (2020). "The 'traditional principles of state law' that apply under Chapter 1" include, among others, "'waiver,'" *id.* at 1643-44 (citation omitted), which is the subject now before this Court. Section 2 of Chapter 1 "requires federal courts to place [arbitration] agreements upon the same footing as other contracts. But it does not alter background principles of state contract law. . . ." *Id.* at 1643 (internal quotation marks and citation omitted).

The court of appeals here strayed from these principles. Relying solely on federal court decisions and without acknowledging applicable state law, the panel's majority opinion holds that an employee seeking to establish a corporate employer's waiver of its right to mandatory arbitration must prove prejudice and that the requisite prejudice must be something other than the increased cost and delay suffered due to the employer's choice to strategically pursue court litigation before opting to arbitrate. Contrary to this Court's precedent, the court of appeals' prejudice requirement treats arbitration clauses differently from other contractual terms, which typically can be deemed waived under state law without a showing that the other party has been prejudiced. *See* Pet'r's Br. 19-23. The court of appeals thus disregarded this Court's instruction that it "must place arbitration agreements on an equal footing with other contracts." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citation omitted).

The onerous prejudice requirement imposed by the court of appeals threatens to encourage corporate

litigants "to play 'heads I win, tails you lose,' " Pet. App. 8 (Colloton, J., dissenting) (citation omitted)—that is, " 'to weigh [their] options' " by first proceeding in court "to see how the case was going . . . before deciding whether [they] would be better off there or in arbitration," *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995) (citation omitted). *Amici* States seek to protect their residents from the otherwise unnecessary litigation expenses and delays that result when parties engage in such gamesmanship. Such abuses not only impose increased litigation costs on employees and consumers; they also waste judicial resources and frustrate a "prime objective" of arbitration, which is "to achieve 'streamlined proceedings and expeditious results.' " *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)).

Though pertinent state law may differ in certain respects from one state to another, each *Amici* State has an interest in having its law applied consistently in all cases involving its residents. *Amici* States also share an interest in the swift, efficient, and *fair* resolution of employee and consumer complaints, free from the costly gamesmanship that the Eighth Circuit's ruling rewards.

SUMMARY OF THE ARGUMENT

Arbitration clauses have become widespread for workers and consumers alike in recent decades, largely as a result of this Court's enforcement of the FAA. As Petitioner points out, Pet. 12-19, there is a split among the federal circuits regarding whether the litigant opposing arbitration must show prejudice in order to establish that the other party waived its right to arbitrate. Some companies take advantage of the prejudice requirement and the uncertainty around it to abuse the protection that the FAA provides arbitration agreements, and they do so at the expense of employees and consumers. These companies first try to make strategic motions in court, and only if those motions are unsuccessful do they alert the court to their right to arbitrate. That gamesmanship wastes judicial resources, imposes increased litigation costs on consumers and employees, and undermines the virtues of arbitration that the Court has repeatedly highlighted.

The uncertainty regarding waiver has its root in a misunderstanding of the role of state law in interstate arbitration agreements. The FAA did not displace state contract law; the FAA incorporated it. Yet many federal courts have developed a separate test for waiver of arbitration agreements, instead of simply applying the relevant state law regarding the waiver of any contractual requirement. The Court should help to remove the uncertainty and ensure greater fidelity to the intent of the FAA, by clarifying that generally-applicable state contract law applies in state and federal courts when

a litigant claims that an opponent has waived the right to arbitrate.

But if the Court were to determine that waiver is an issue of *federal* law, the Court should conclude that waiver does not require prejudice. The text of § 3 of the FAA requires courts to stay litigation if the issues are subject to a valid arbitration agreement, unless the party seeking arbitration is "in default." Default referred only to dilatory actions of the party seeking arbitration, not to any impact on that party's opponent. Nevertheless, decades after the FAA was enacted, courts began imposing an extra-textual prejudice requirement and the majority of federal circuits now follow that rule. The prejudice requirement, however, violates this Court's instruction that "courts must place arbitration agreements on an equal footing with other contracts," *Concepcion*, 563 U.S. at 339, because contract provisions typically can be waived without a showing of prejudice. The prejudice requirement also invites abuses, like those highlighted in the procedural history of this case. At the very least, to discourage the tactical use of court litigation as an expensive prelude to arbitration, the Court should recognize that litigation costs incurred due to an adversary's delay in seeking arbitration can constitute prejudice under federal law.

ARGUMENT

I. State Law Should Govern Whether Prejudice Is Required For Waiver of Mandatory Arbitration Clauses.

A. Generally-Applicable State Law Governs the Formation, Interpretation, and Enforcement of Arbitration Agreements, Including Waiver.

The Federal Arbitration Act does not displace generally applicable state contract law but instead incorporates it. Under the FAA, a written agreement to arbitrate is "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. Although the FAA reflects "a liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), that policy "is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate," *Volt Info. Scis., Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989). The FAA does not, however, "alter background principles of state contract law regarding the scope of agreements" and "explicitly retains an external body of law governing revocation (such grounds 'as exist at law or in equity')." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009) (quoting 9 U.S.C. § 2).

Indeed, this Court has recently reiterated that the FAA "permits courts to apply state-law doctrines related to the enforcement of arbitration agreements."

GE Energy, 140 S. Ct. at 1643. Interpreting the FAA to incorporate state law principles that put arbitration clauses "on equal footing" with other contracts "simply does not offend the rule of liberal construction set forth in *Moses H. Cone*, nor does it offend any other policy embodied in the FAA." *Volt Info. Scis.*, 489 U.S. at 476.

State law applies more broadly than simply to the "enforcement" of arbitration agreements; this Court has repeatedly affirmed state contract law's exclusive role in determining key legal questions with respect to the formation, interpretation, and scope of such agreements and their application to nonparties. "[T]he interpretation of a contract is ordinarily a matter of state law to which [the Court] defer[s]" in arbitration cases. *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54 (2015). In addition, "[o]rdinary state-law principles . . . govern the formation of" arbitration agreements. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). State law also governs issues of "validity, revocability, and enforceability." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). In *Arthur Andersen*, for example, the Court held that a litigant who was not a party to the relevant arbitration agreement could enforce an arbitration clause "if the relevant state contract law allows him to enforce the agreement." 556 U.S. at 632. In its most recent arbitration decision, this Court acknowledged that waiver is one of the "'traditional principles of state law'" by which a nonsignatory can enforce arbitration. *See GE Energy*, 140 S. Ct. at 1643-44 (citation omitted).

The same is true for contract defenses. This Court has instructed that a state's "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see Concepcion*, 563 U.S. at 343 (stating that "§ 2's saving clause preserves generally applicable contract defenses"). There is no principled reason to treat a defense of waiver differently from other contract defenses this Court has already indicated should be analyzed under state law, like fraud, duress, and unconscionability.

Indeed, some courts have already concluded that waiver of arbitration should be governed by state contract law. *See*, *e.g.*, *Iraq Middle Mkt. Dev. Found. v. Harmoosh*, 848 F.3d 235, 238-39 (4th Cir. 2017) (applying state law in resolving question of arbitration waiver); *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1121, 1124 (9th Cir. 2008) (same); *Cain v. Midland Funding, LLC*, 452 Md. 141, 154 (2017) (citing *Doctor's Assocs.*, 517 U.S. at 687); *Parsons v. Halliburton Energy Servs., Inc.*, 237 W. Va. 138, 148 (2016) ("[U]nder West Virginia's long-established law of contracts, courts do not require a showing of prejudice to establish a waiver of contract rights."); *Sanderson Farms, Inc. v. Gatlin*, 848 So. 2d 828, 837 (Miss. 2003) (holding that "it is

simple contract law that a party may waive the protections of any provision of a contract.").[3]

B. State Law is not Preempted in This Case.

The only limits to the principle that generally-applicable state law governs the existence and interpretation of arbitration agreements stem from preemption concerns that do not apply to the question of waiver at issue here.

State contract law is preempted if it directly conflicts with the FAA. For example, in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967), the groundbreaking decision that established the "severability" of arbitration clauses, the Court rejected the argument that state law governed whether an arbitration agreement was severable from the rest

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[3] Clarification from this Court that waiver is a question of state contract law would be especially helpful to state court judges. Many state courts that have adopted a prejudice requirement for waiver have done so based on the belief or assumption that the question had been authoritatively determined by federal courts applying federal law. *E.g., Brothers Jurewicz, Inc. v. Atari, Inc.*, 296 N.W.2d 422, 429 n.8 (Minn. 1980) (noting with approval "that some recent decisions in other jurisdictions require a finding of waiver to be based not only upon a finding of intentional relinquishment of a known right but also upon a finding of prejudice to the opposing party") (citing *Weight Watchers of Quebec, Ltd. v. Weight Watchers Int'l, Inc.*, 398 F. Supp. 1057 (E.D.N.Y.1975)); *Kinsey v. Bradley*, 53 Wash. App. 167, 169 (1989) (applying federal law to waiver of arbitration agreement and requiring prejudice despite generally-applicable state contract law not requiring prejudice).

of the contract, because it determined that § 4 of the FAA explicitly required that result.

A second type of preemption occurs when the state law contract principle appears on its face to apply to contracts generally but its application "stand[s] as an obstacle to the accomplishment of the FAA's objectives," such as when "the rule would have a disproportionate impact on arbitration agreements" or otherwise "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 342-44; *see*, *e.g.*, *Lamps Plus v. Varela*, 139 S. Ct. 1407, 1417-18 (2019) (holding that California's *contra proferentem* rule, construing an ambiguous agreement against the drafter "based on public policy considerations" rather than "the intent of the parties," is "flatly inconsistent with 'the foundational FAA principle that arbitration is a matter of consent' ") (citation omitted).

Neither limitation applies here. There is no explicit provision of the FAA requiring that waiver be decided as a matter of federal law. The only provision of the FAA even arguably relevant to waiver—the "default" language in 9 U.S.C. § 3—does not make it impossible to apply state law, as "default" could be understood simply to import state contract law regarding waiver. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995) (finding no preemption when "it is not impossible for petitioners to comply with both federal

and state law because there is simply no federal standard for a private party to comply with").[4]

There is also no suggestion in the record that generally applicable Iowa law on waiver (which would govern this Iowa employment dispute) "stand[s] as an obstacle" to the FAA's objectives.[5] *Concepcion*, 563 U.S. at 343. On the contrary, it is the Eighth Circuit's difficult-to-satisfy prejudice requirement that "interferes with fundamental attributes of arbitration," *id.* at 344, by fostering an environment in which corporate litigants may use court litigation with impunity to generate delays and increase costs for their adversaries before ultimately resorting to arbitration.

Because no doctrine of preemption prevents it, state contract law should govern whether a party waived its contractual right to arbitrate. That result is consistent with the FAA's preservation of "state-law doctrines related to the enforcement of arbitration agreements." *GE Energy*, 140 S. Ct. at 1643. Just as state contract law typically governs other questions about the formation, interpretation, and enforceability of arbitration agreements, subject to exceptions not

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[4] To the contrary, this Court has explained that "§ 3 adds no substantive restriction to § 2's enforceability mandate." *Arthur Andersen*, 556 U.S. at 630. In other words, § 3 does not alter the "background principles of state contract law" for determining the validity, revocability, and enforceability of arbitration agreements. *Id.*

[5] Prejudice is not an essential element of waiver under Iowa contract law. *Matter of Guardianship of Collins*, 327 N.W.2d 230, 233-34 (Iowa 1982).

applicable here, state law should govern whether a party waives its contractual right to arbitrate.

II. If Federal Law Controls, the Gamesmanship Highlighted By This Case Demonstrates Why the FAA Should Not Be Construed to Require Consumers to Show Prejudice to Establish Waiver.

As discussed above, waiver, like other generally applicable contract defenses, is a matter of state law. If, however, this Court determines that federal law governs waiver of arbitration, it should jettison any requirement of prejudice.

The prejudice requirement was bolted onto traditional waiver tests by some federal courts, supposedly to promote arbitration. But the prejudice requirement undermines the core virtues that this Court has long heralded as central to arbitration. Indeed, the requirement is inconsistent with the text and purposes of the FAA, which, as this Court has repeatedly emphasized, seeks to "'encourage[] . . . efficient and speedy dispute resolution.'" *Concepcion*, 563 U.S. at 345 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

As discussed below, the federal case law on waiver of arbitration developed from courts' application of the "default" provision in § 3 of the FAA. In early decisions applying § 3, the meaning of "default" was relatively straightforward and clear, focusing the analysis on whether the party seeking arbitration had abandoned its contractual right to that forum through its actions.

Default was a unilateral affair that did not involve consideration of consequences to the non-moving party. Accordingly, the prevailing understanding of default incentivized swift and decisive action by the party that wished to pursue arbitration. Much of that clarity and incentive to act promptly has been sacrificed by some courts' subsequent introduction of a prejudice requirement.

By shifting focus away from the intention and actions of the party seeking arbitration, the requirement of prejudice creates uncertainty and leads to wasteful, collateral disputes. Parties can test the waters of judicial litigation first and then abruptly change course if things go poorly. Moreover, where the parties are financially unequal—as is often the case in consumer and employment contracts—the prejudice requirement empowers the stronger party to deplete its opponent's resources in court litigation while betting that the prejudice requirement will ultimately permit resort to arbitration. In this way, demanding that the economically-disadvantaged party show prejudice converts a fair process into a rigged game of attrition and undermines "arbitration's essential virtue of resolving disputes straightaway." *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008).

A. The Prejudice Requirement Conflicts With the Text of the FAA.

Section 3 of the FAA requires that federal courts grant stays of pending litigation in favor of arbitration

so long as "the applicant for the stay is not in default proceeding with . . . arbitration." 9 U.S.C. § 3. On its face, this provision spotlights only the actions or inaction of the party seeking to arbitrate. Nothing in § 3—or any other provision of the FAA—instructs a court to consider, let alone make determinative, prejudice that the other side might suffer because of the default.

In fact, dictionaries from around the time of the FAA's passage in 1925 reflect the common understanding that "default" meant "[t]o fail in performing a contract or agreement." Webster's New Unabridged Dictionary of the English Language 310 (Saalfield Publishing Co. 1901); *see also* Black's Law Dictionary 342 (2d Ed., West 1910) (defining "default" as "[t]he omission or failure to fulfill a duty, observe a promise, discharge an obligation, or perform an agreement"). These definitions establish that the concept hinges on the actions of the defaulting party to a contract, not on the consequences of that default for the other side.

Consistent with the plain meaning of the text, courts construing "default" in § 3 shortly after its adoption focused almost exclusively on the behavior of the party seeking to arbitrate. The critical inquiry was whether the party seeking to exercise the contractual right to arbitrate had acted consistently with that right or had abandoned it through word or action. For instance, in *Radiator Specialty Co. v. Cannon Mills*, 97 F.2d 318, 319 (4th Cir. 1938), the Fourth Circuit recognized that:

> [a]rbitration laws are passed to expedite and facilitate the settlement of disputes and avoid the delay caused by litigation. It was never intended that these laws should be used as a means of furthering and extending delays. Under [§ 3 of the FAA], it is clearly the intention of Congress to provide that the party seeking to enforce arbitration can do so only when not guilty of dilatoriness or delay.

The court went on to analyze exclusively the behavior of the defendant that was seeking arbitration, before concluding that "'whatever right the defendant may have had under his contract and the Arbitration Law to enforce arbitration he deliberately waived; he chose and elected to proceed by an action in court for the determination of the respective claims.'" *Id.* (quoting *Zimmerman v. Cohen*, 236 N.Y. 15, 19 (1923)). The court reasoned that this result follows from the FAA's respect for the choices made by the contracting parties: "'the law does not bar the parties to the contract from coming into the courts of the state if they mutually choose to do so.'" *Id.*

The Fourth Circuit was not alone. *See*, *e.g.*, *La Nacional Platanera, S.C.L. v. North Am. Fruit & Steamship Corp.*, 84 F.2d 881, 883 (5th Cir. 1936) (analyzing only actions of the plaintiff to determine if he was "so much in default that he was not entitled to demand arbitration"); *Almacenes Fernandez, S. A. v. Golodetz*, 148 F.2d 625, 628 (2d Cir. 1945) (centering analysis on the party seeking to arbitrate and concluding that its "action did not indicate an intention . . . to

abandon its right to insist on arbitration"). In the few instances where courts considered the other party at all, it was usually to determine if the other party had accepted the waiver. For instance, in *Galion Iron Works & Mfg. Co. v. J.D. Adams Mfg. Co.*, 128 F.2d 411 (7th Cir. 1942), the Seventh Circuit recognized that "[a] right to arbitration arising out of mutual agreement, like any other contractual right, may be waived, amended or altered." *Id.* at 413. It then concluded that the plaintiff, who had brought suit in court, abandoned the right to arbitrate. Although the court noted that the defendant had "acquiesced" in that abandonment by filing an "answer on the merits," the crux of the Seventh Circuit's holding was that "[p]laintiff could have sought arbitration but it exercised its option by bringing suit. By its election, it waived its right to arbitration." *Id.* The reference to the other party's behavior, then, merely recognized that a waiver may generally be retracted until accepted by the other party.

Courts consistently applied the plain text of § 3 of the FAA until the late 1960s, when some courts engrafted a requirement of prejudice. *See* Robert B. Martin, *Waiver of the Right to Compel Arbitration—A Directional Analysis*, 16 Cal. W. L. Rev. 375, 389 n.128 (1980) ("Federal Court decisions discussing prejudice as a determinant for waiver started to appear around 1968."). Perhaps the clearest harbinger of this shift in the federal common law was *Carcich v. Rederi A/B Nordie*, 389 F.2d 692 (2d Cir. 1968). There, the Second Circuit elevated prejudice to make it the key element of

waiver: "It is not 'inconsistency' [with the right to arbitrate], but the presence or absence of prejudice which is determinative." *Id.* at 696.

Significantly, neither *Carcich* nor the other circuit decisions following it purported to find a textual footing in the FAA to ground their logic. No such footing exists. Instead, these cases derive their federal common law rule from an espoused fidelity to the strong federal policy favoring arbitration. *Id.* (reasoning that the requirement of prejudice vindicated the "overriding federal policy favoring arbitration" by ensuring that waiver was not "lightly inferred"); *see also*, *e.g.*, *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 887 (2d Cir. 1985) ("Given this dominant federal policy favoring arbitration, waiver of the right to compel arbitration due to participation in litigation may be found only when prejudice to the other party is demonstrated."); *Fisher v. A.G. Becker Paribas, Inc.*, 791 F.2d 691, 694 (9th Cir. 1986) (stating that "[a]ny examination of whether the right to compel arbitration has been waived must be conducted in light of the strong federal policy favoring enforcement of arbitration agreements," and then finding that waiver requires "prejudice to the party opposing arbitration"). But, as the following sections demonstrate, the prejudice requirement confounds rather than strengthens the federal policy favoring arbitration.

B. The Prejudice Requirement Leads to Uncertainty and Wasteful Procedural Battles, in Direct Contradiction to the Core Values of the FAA.

The prejudice requirement was appended to waiver analysis supposedly to reinforce the strong federal policy favoring arbitration. But the inherently uncertain requirement has had precisely the opposite effect in practice.

1. Due to its Uncertainty and Unpredictability, the Prejudice Requirement Invites Gamesmanship.

The current prejudice requirement is uncertain and unpredictable for several reasons. First, different Circuits apply different prejudice tests. *Compare, e.g.*, *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 12 (1st Cir. 2003) (requiring only a "modicum of prejudice"), *with MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 249 (4th Cir. 2001) (requiring a showing that party objecting to arbitration "'suffered *actual prejudice*'" amounting to more than delay and increased litigation expenses) (emphasis added by court; citations omitted).

Second, and more tellingly, even within the same Circuit, the prejudice standard regularly leads to inconsistent results. *Compare, e.g.*, *Joca-Roca Real Est., LLC v. Brennan*, 772 F.3d 945, 948-49 (1st Cir. 2014) (finding that an eight-month delay justified a finding of waiver), *with Cutler Assocs., Inc. v. Palace Constr., LLC*, 132 F. Supp. 3d 191, 199-200 (D. Mass. 2015)

(finding that an eight-month delay in seeking arbitration did not justify a finding of waiver). For instance, although the Eighth Circuit's finding of no prejudice in this case purports to rely on the Circuit's established analysis, the same court "concluded in a prior decision that nearly identical conduct by a defendant—waiting eight months to mention arbitration while forcing a plaintiff to defend against a motion to transfer venue to another judicial district—supported a finding of prejudice." Pet. App. 11 (Colloton, J., dissenting) (referring to *Messina v. North Cent. Distrib., Inc.*, 821 F.3d 1047, 1051 (8th Cir. 2016)). As if to illustrate the point, a few months after the decision in this case, the Eighth Circuit held that a party's decision to strategically defend a lawsuit for ten months before compelling arbitration constituted a waiver. *Sitzer v. National Ass'n of Realtors*, 12 F.4th 853, 856 (8th Cir. 2021) ("We have little doubt about what HomeServices was trying to do. If there was a possibility that the case would end in federal court, it was uninterested in switching to arbitration.").

The ambiguity of the prejudice requirement invites parties to game the system. Parties, like the Respondent in this case, have little to lose and much to gain by postponing their election to arbitrate and trying their luck in court first. Well-resourced parties can delay adjudication on the merits, cherry-pick for better outcomes, and all the while foist the cost of time-consuming procedural battles onto their opponents and the courts. And they are often allowed to do so without seriously jeopardizing their opportunity to

demand arbitration later, if they ultimately come to believe that arbitration would favor them.

This sort of tactical abuse of the arbitral procedure runs counter to the core goals of the FAA, and by favoring stronger parties, it raises questions about the fairness of arbitration and court processes alike.

2. Parties That Opportunistically Exploit the Uncertainty of the Prejudice Requirement Thwart the Goals of Arbitration.

As this Court has long made clear, the FAA has two intertwined goals: enforcement of agreements to arbitrate according to their terms and "'efficient and speedy dispute resolution.'" *See Concepcion*, 563 U.S. at 345 (quoting *Dean Witter*, 470 U.S. at 221); *see also id.* at 344 ("The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."). The prejudice requirement thwarts both objectives.

Rather than upholding the contractual autonomy of the parties, as the FAA was meant to do, the prejudice requirement erodes commercial predictability. As this Court has repeatedly emphasized, "the FAA requires courts to honor parties' expectations." *Concepcion*, 563 U.S. at 351. When parties opt for arbitration, they do so expecting "lower costs, greater efficiency and speed." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010); *Preston*, 552 U.S. at 357

("A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.' ") (citation omitted). But the prejudice requirement robs parties of the "promise of quicker, more informal, and often cheaper resolutions" that arbitration offers. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018).

Because arbitration's essential virtue of resolving disputes straightaway is so paramount to party expectations, this Court has consistently interpreted the FAA to require minimal court involvement in the face of a valid arbitration agreement. Even in those situations where a court must resolve issues before compelling arbitration, "[b]oth of these sections [3 and 4 of the FAA] call for an expeditious and summary hearing" by the court so as not to "frustrate[ ] the statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone*, 460 U.S. at 22; *see also*, *e.g.*, *Concepcion*, 563 U.S. at 345 (citing *Dean Witter*'s quotation of a 1924 House Report stating that "the costliness and delays of litigation . . . can be largely eliminated by agreements for arbitration").

Similarly, the structure of appeal provisions in § 16 of the FAA supports the expectation that resort to arbitration should be swift and decisive. On the one hand, § 16 "makes an exception to [the] finality requirement" that ordinarily precludes interlocutory appeals, *Arthur Andersen*, 556 U.S. at 627, by providing that an appeal may be taken from a district court's denial of a motion to stay under § 3 or compel arbitration under § 4. On the other hand, § 16 does not authorize

immediate appeal of a *grant* of a motion to stay or compel arbitration. Thus, both the language of the FAA and this Court's precedent make it "unmistakably clear" that, when parties select arbitration, the FAA mandates that the procedure "be speedy and not subject to delay and obstruction in the courts." *Prima Paint*, 388 U.S. at 404.

Accordingly, the twin aims of the FAA—enforcement of arbitration agreements pursuant to their terms and efficient and speedy dispute resolution—are not served by allowing a party to engage in extensive court litigation, which, if unsuccessful, acts merely as a costly prelude to arbitration. *Cf. Hall St. Assocs.*, 552 U.S. at 588 (concluding that arbitration should proceed only after "limited" judicial involvement lest it be rendered "merely a prelude to a more cumbersome and time-consuming judicial review process"). A party who is forced into arbitration after being required to spend months exhausting resources in court—as the Petitioner had to do here—has been denied the fundamental benefits of the process. *See*, *e.g.*, *Rankin*, 336 F.3d at 13 (noting the importance of choosing between arbitration and litigation early in the dispute-resolution process to avoid the needless expenditure of both individual and judicial resources); *Cabinetree of Wis.*, 50 F.3d at 391 ("Selection of a forum in which to resolve a legal dispute should be made at the earliest possible opportunity in order to economize on the resources, both public and private, consumed in dispute resolution.").

The choice between arbitration and litigation lends stability and predictability to the parties' contractual relationship. Parties can anticipate and adequately price their rights and duties in light of the enforcement mechanism that will be used. *See*, *e.g.*, Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 Notre Dame L. Rev. 523, 531-33 (2005). But arbitration's value becomes illusory when a rule like the prejudice requirement incentivizes procedural gamesmanship.

3. The Prejudice Requirement Systematically Favors Stronger Parties and Thus Degrades Both Judicial Processes and Arbitration.

Parties with greater resources are systematically favored by any dispute-resolution rule, like the prejudice requirement, that fosters delay and increases costs. The prejudice requirement allows a stronger party to protract litigation about things other than the merits and thus drain opponents of resources before ever invoking the right to arbitrate. Parties like the Respondent in this case are allowed to play a game of "heads I win, tails you lose." *Cabinetree of Wis.*, 50 F.3d at 391.

Examples of how the prejudice requirement tilts the playing field are easy to find and are particularly prevalent in consumer actions and wage-theft disputes. In many instances, courts allow defendants to

enforce arbitration agreements after they have strategically litigated in court for months. For example, in *Jackson v. Aliera Cos., Inc.*, plaintiffs filed a putative class action in August 2019 alleging defendants sold unauthorized health care plans and violated the Washington Consumer Protection Act. No. 19-cv-01281-BJR, 2020 WL 5909959, at *1 (W.D. Wash. Oct. 6, 2020). Defendants unsuccessfully moved to dismiss based on federal preemption and exhaustion of remedies. Only after ten months of litigation on the merits and the court's denial of their motion to dismiss did defendants move to compel arbitration. *Id.* at *6. Nevertheless, the court concluded that the plaintiffs had not established prejudice, and therefore defendants did not waive arbitration. *Id*. at *7; *see also*, *e.g.*, *Pacheco v. PCM Constr. Servs., L.L.C.*, 602 F. App'x 945, 946-49 (5th Cir. 2015) (finding employer did not waive arbitration clause in wage dispute with former employees despite waiting a year and not mentioning arbitration clause in its answer or in two motions to dismiss); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1074-75 (9th Cir. 2013) (finding employer did not waive arbitration in wage dispute despite "years of litigation prior to the motion to compel" because plaintiff employee did not suffer cognizable prejudice); *In re Lowe's Companies, Inc. Fair Lab. Standards Act & Wage & Hour Litig.*, 517 F. Supp. 3d 484, 504-05 (W.D.N.C. 2021) (relying on the Fourth Circuit's decision in *MicroStrategy, Inc. v. Lauricia* and enforcing arbitration agreement in wage dispute despite unexplained six-month delay in producing arbitration agreement that applied to plaintiff); *Brock Servs., LLC v. Rogillio*, No. CV 18-867-JWD-EWD,

2020 WL 2529396, at *8, *25-*29 (M.D. La. May 18, 2020) (finding defendant did not waive arbitration right, despite more than a year of litigation, including two motions to dismiss, two injunction hearings, discovery, and settlement attempts); *In re Trevino*, No. 10-70594, 2018 WL 5994753, at *4-*7 (Bankr. S.D. Tex. Nov. 14, 2018) (finding no waiver of arbitration right, despite bank filing motion to dismiss and not raising arbitration for more than two years).

Even those cases where courts find the right to arbitrate *was* waived serve to demonstrate the inherent uncertainty in current federal law and the resulting incentive for defendants to engage in strategically belated enforcement of arbitration agreements. For example, one trial court called out defendants' misconduct against plaintiffs who had alleged violations of the Fair Credit Reporting Act:

> Now, after briefing and discovery are complete, and after Plaintiffs have successfully prevailed on several potentially dispositive motions, including their motion for class certification, JRK seeks to exert additional leverage on Plaintiffs by obtaining a redo on the merits, based on information that it has known throughout the litigation, but has not disclosed to the Plaintiffs or to the Court, and without a shadow of justification for the delay in raising the issue.

Milbourne v. JRK Residential Am., LLC, No. 3:12-cv-861, 2016 WL 1071564, at *9 (E.D. Va. March 15, 2016). That defendant's behavior is not unusual. *See*, *e.g.*,

Sitzer, 12 F.4th at 856 (finding waiver of arbitration right after observing, "We have little doubt about what HomeServices was trying to do. If there was a possibility that the case would end in federal court, it was uninterested in switching to arbitration."); *Freeman v. SmartPay Leasing, LLC*, 771 F. App'x 926, 933 (11th Cir. 2019) (finding cell phone company waived its right to arbitrate with the consumer "when it refused to pay the initial filing fee, as expressly required by the arbitration agreement"); *In re Cox Enterprises, Inc. Set-top Cable Television Box Antitrust Litig.*, 790 F.3d 1112, 1118 (10th Cir. 2015) (finding waiver of arbitration clause after company engaged in two years of litigation, including substantial discovery and class-related motions practice); *Qazi v. Stage Stores, Inc.*, No. 4:18-CV-0780, 2020 WL 1321538, *8 (S.D. Tex. March 17, 2020) (unpublished decision finding waiver when defendants waited two years to raise arbitration; sought broad discovery, and briefed class certification multiple times; and waited two months after the decision in *Lamps Plus*, which they claimed prompted the motion to compel arbitration); *Kater v. Churchill Downs Downs Inc.*, No. 3:15-CV-00612-RBL, 2018 WL 5734656, at *6 (W.D. Wash. Nov. 2, 2018) (finding waiver of arbitration right because defendant "doggedly pursued a favorable ruling . . . through three different forums for the past 3+ years" before seeking to arbitrate); *Price v. UBS Fin. Servs.*, Inc., No. CV 2:17-01882, 2018 WL 1203471, at *4 (D.N.J. Mar. 8, 2018) (finding that "the elapsed time of more than eight months leans toward waiver" and that "Defendant's sole explanation for its delay is its apparent litigation

strategy in pursuing dismissal in this Court before presumably pursuing a similar tactic in arbitration—*i.e.*, a second bite at the apple"); *Scott v. Family Dollar Stores, Inc.*, No. 3:08-cv-00540-MOC-DSC, 2017 WL 4084059, at *3 (W.D.N.C. Feb. 9, 2017) (finding waiver of arbitration right when "this case has been pending since 2008, had an interlocutory appeal to the Fourth Circuit, and survived the class certification process," and when "Plaintiffs, and their counsel, have invested substantial time and money into trial preparation"); *cf. Roach v. BM Motoring, LLC*, 228 N.J. 163, 180 (2017) (holding defendants were precluded from compelling arbitration by their earlier "knowing refusal to cooperate with plaintiffs' arbitration demands, filed in reasonable compliance with the parties' agreement"; otherwise "the result would be a 'perverse incentive scheme'") (citation omitted).

The gamesmanship that these cases reflect should not be rewarded, particularly when the corporate parties invoking arbitration are in the best position to limit the inefficiencies and unfairness that delay causes.[6] Rules like the prejudice requirement that

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[6] That consumers and employees often bring their claims in court rather than to arbitration does not suggest that the prejudice requirement even-handedly allows both parties to engage in gamesmanship. Consumers and employees typically sue in court not to gain a strategic advantage, but because they are unaware that their contract contains an arbitration clause that bars them from proceeding to litigation, *see* Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, at 11 (2015), available at https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf, or

systematically favor one party degrade the quality of justice in both courts and arbitration.

The precise conduct of Respondent in this case underlines the problem. As Judge Colloton points out in his dissent, Respondent "was content with a judicial forum until it believed that an intervening court decision improved its prospects in arbitration." Pet. App. 9-10. But nothing in the FAA allows parties to have it both ways, and certainly nothing in the FAA allows a party to tax opposing parties and courts with the cost of hunting for a more favorable forum. Permitting arbitration to be a fallback option, just in case judicial litigation does not play out as well as one would have liked, undermines the integrity of the judicial system, by treating it as, at best, a testing ground and, at worst, an expensive sideshow. Such belated resort to arbitration also diminishes the value of arbitration itself and thus undermines the objectives of the FAA.

CONCLUSION

Whether waiver of the right to arbitration requires prejudice is a matter of state law and the Court should so hold. But if the Court determines that waiver

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because they have non-frivolous claims that the arbitration clause is unenforceable, *see, e.g.*, *Gingras v. Think Fin., Inc.*, 922 F.3d 112 (2d Cir. 2019)); *Herzfeld v. 1416 Chancellor, Inc.*, 666 Fed. Appx. 124, 127, 2016 WL 6574075, at *2 (3d Cir. Nov. 7, 2016).

is controlled by federal law, the prejudice requirement should be rejected because it is inconsistent with the text of the FAA, leads to inefficient dispute resolution, and encourages procedural gamesmanship and forum-shopping.

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